IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated: 05.02.2016

Coram:

The Hon'ble Mr.Justice V.RAMASUBRAMANIAN
and
The Hon'ble Mr.Justice N.KIRUBAKARAN

Civil Miscellaneous Appeal No.2753 of 2015
and
M.P.Nos. 1 & 2 of 2015

M/s. S.L.Lumax Ltd.,
(Formerly, M/s. Lumax Samlip Industries Ltd.)
No.G-15, SIPCOT Industrial Complex,
Irunkatukottai, Sriperumbudur Taluk,
Kanchipuram - 602 105. ...Appellant

Versus

The Commissioner of Central Excise,
Chennai - IV Commissionerate,
MHU Complex, Nandanam,
Chennai - 600 035.
(accepted the cause-title vide order of
Court dated 19.11.2015 made in MP.1/15
made in MP.1/15 in CMA.SR.80515/15) ...Respondent

Civil Miscellaneous Appeal filed under Section 35-G of the Central Excise Act, 1944, against the Final Order No.40340 of 2015, dated 25.03.2015 made in Appeal No.E/306/2005-SM passed by the Customs, Excise and Service Tax Appellate Tribunal, Chennai.

For Appellant : Mr.C.Saravanan

For Respondent: Mr.A.P.Srinivas,
SSC for Central Excise Department

JUDGMENT

V.RAMASUBRAMANIAN, J

This appeal is filed by the Assessee under Section 35G of the Central Excise Act, 1944, challenging the Final Order passed by the Customs, Excise and Service Tax Appellate Tribunal, Chennai.

2. We have heard Mr.C.Saravanan, learned counsel for the appellant/assessee and Mr.A.P.Srinivas, learned Senior Standing Counsel for the Department.

3. The Appellant was incorporated in August, 1997 and has its registered office at New Delhi. Its factory is located in Irunkatukottai, Sriperumbudur Taluk, Kancheepuram District.

4. On 28.9.1998 and 5.10.1998, the appellant filed two Bills of Entry for the goods imported. They also filed a declaration on 26.11.1998 under Rule 57T(1) of the Central Excise Rules, 1944.

5. Commercial production was started in 1999 and a declaration was filed under Rule 57T(2) of the Rules. After the last date for filing of the Return under Rule 57T(10) of the Rules expired, the appellant took Modvat Credit on 30.6.1999 in respect of the import of injection molding machines.

6. Unfortunately, in the Income Tax Returns for the Financial years 1998-1999, 1999-2000 and 2000-2001, the appellant claimed depreciation for the whole of the machinery, including the duty component, on which Modvat Credit has already been availed. This was detected by the Office of the Headquarters Preventive Unit on 5.3.2002.

7. Immediately, the appellant filed application under Section 154 of the Income Tax Act, 1961 for the rectification of mistake. By this time, the Returns filed by the appellant for the Financial years 1998-99 and 1999-2000 had already been accepted.

8. However, the appellant filed Revised Returns for the Financial years 1999-2000 and 2000-2001 along with Revised Computation of Loss. The rectification for filing of Return was also made and an intimation was made under Section 154 of the Act.

9. By an order dated 9.1.2004, the petition for Rectification under Section 154 of the Act in respect of the Assessment Year 1999-2000 was rejected, on the ground that only Revised Return ought to have been filed.

10. As a consequence, the Assessment Order was made on 29.3.2004 for the Assessment Year 2000-2001 and a show cause notice was issued on 28.5.2004.

11. In the meantime, the Commissioner (Appeals) allowed the application for rectification of mistakes, by his order dated 31.5.2004 and set aside the order of refusal dated 9.1.2004

passed by the Assessing Officer. This order of the Commissioner (Appeals) was set aside by the Tribunal which order was confirmed by the High Court and the Supreme Court. As a consequence, the Original Order of the Assessing Officer dated 9.11.2004, refusing to permit the rectification of Return under Section 154 of the Act became final.

12. In other words, the benefit that the appellant can be said to have unlawfully claimed, by way of depreciation even on the component of duty on which Modvat Credit had been taken, was withdrawn by the Assessee in respect of Assessment years other than 1998-99.

13. In the meantime, a show cause notice dated 28.5.2004 was issued by the Additional Commissioner of Central Excise, calling upon the appellant to show cause as to why the Modvat Credit taken by them should not be withdrawn. This show cause notice resulted in an Order in Original dated 28.9.2004, directing the recovery of the Modvat Credit together with interest and penalty for an equivalent amount. However, the Additional Commissioner observed in his Order in Original that the appellant would be eligible for Modvat Credit after 30.5.2004, the date of acceptance of withdrawal of depreciation by the Department. This Order in Original of the Additional Commissioner has been accepted by the Department. However, as against the recovery of the Modvat Credit, the appellant filed an appeal. The appeal was allowed by the Commissioner (Appeals), by an order dated 21.1.2005.

14. As against the said order, the Department filed an appeal before the Customs, Excise and Service Tax Appellate Tribunal. Cross-Objection was necessitated on account of the fact that even while allowing the appellant to take Modvat Credit after 30.4.2005, there was an order for recovery.

15. By an order dated 25.03.2005, the Tribunal allowed the appeal filed by the Department and restored the Order in Original. Unfortunately, even while restoring the Order in Original, the Tribunal did not take note of that portion of the Order in Original which entitles the appellant to take Modvat Credit from 30.4.2005. Therefore, the assessee is on appeal before us.

16. The appeal of the Assessee was admitted by this Court on 11.12.2015 on the following substantial questions of law:-

> "1. Whether the Hon'ble CESTAT was justified in allowing the department's appeal ignoring the admitted fact that the appellant has fully given up the depreciation claimed under the Income Tax Act, 1961, as admitted by the income tax department in

the collateral proceeding before Supreme Court for the Assessment Year 1999-2000 and in the revised returns for the subsequent year?

2. Whether the Hon'ble CESTAT was justified in concluding willful mis-declaration when indeed even on the date of investigation in Feb-March 2002, the depreciation claimed had remained un-utilized which in any event was given up in the subsequent IT Returns?

3. Whether the Hon'ble CESTAT was justified in upholding the demand when indeed the appellant has given up the depreciation which remained unabsorbed in the Income Tax Return in revised Income Tax Return?

4. Whether the Hon'ble CESTAT was justified in upholding the demand when indeed depreciation is claimed at the rate of 10.34% per annum when the entire depreciation has been given up? "

17. From the facts narrated above, it can be seen that the appellant, though entitled to one of the two benefits, availed both the benefits. After detection by the Preventive Unit, the appellant chose to file an application for rectification under Section 154 of the Act as well as revised returns in respect of the Assessment years 1999-2000 and 2000-2001. They were accepted. In so far as the Assessment year 1998-99 is concerned, the time limit for filing a revised return had already expired and the attempt of the appellant to file application for rectification under Section 154 of the Act failed up to the Supreme Court.

18. In simple terms the assessee started up with a claim for two benefits and ended up with losing both the benefits. Therefore, the question is as to whether at least after the appellant realised his mistake and had foregone one of the benefits the appellant should still be penalized? The answer to this question would be an emphatic no. It is true that only after detection by the Preventive Unit, the appellant attempted to withdraw one of the two benefits. But the mistake has been explained by the assessee on the ground that their registered office was located in New Delhi and their factory was located in Tamil Nadu. The calculation of depreciation in so far as it relates to the duty component on which Modvat Credit had already been claimed, is certainly a tedious process. It does not mean that the appellant can have the licence to commit a mistake.

19. But once the mistake is detected and he filed revised returns, deprivation of the benefit of Modvat Credit could only be punitive. This cannot be the object of the grant of Modvat Credit.

20. As we have pointed out earlier, at least in the Order in Original, the Original Authority declared the entitlement of the appellant to Modvat Credit from 30.4.2005. Now while restoring the Order in Original, the CESTAT has modified that portion also, without there being an appeal by the Department to the Appellate Commissioner as against the Order in Original. Therefore, the appellant is entitled to succeed.

21. In view of the above, the appeal is allowed and the substantial questions of law are answered in favour of the appellant. However, we make it clear that the Original Authority shall workout the total amount of depreciation given up by the appellant, despite losing the battle in relation to the Assessment Year 1998-99, for the purpose of finding out the extent to which the appellant is entitled to the benefit. Consequently, M.P.Nos. 1 an 2 of 2015 are closed.

Sd/-
Assistant Registrar(CS II)

//True Copy//

Sub Assistant Registrar

To
1. Customs, Excise and Service Tax Appellate Tribunal,
Chennai.

2. The Commissioner of Central Excise,
Chennai - IV Commissionerate,
MHU Complex, Nandanam,
Chennai - 600 035.

+ 1 cc to Mr.A.P. Srinivas, Advocate Sr.7976

C.M.A. No.2753 of 2015

EV(CO)
EU 04.04.16