THE HON'BLE SRI JUSTICE V. RAMASUBRAMANIAN

AND

THE HON'BLE SMT JUSTICE ANIS

WRIT PETITION No. 7768 of 2016

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ORDER: ***(Per VRS,J)***

The petitioner has come up with the above writ petition, challenging an order passed by the Deputy Commissioner of Central Excise, dated 18.02.2016, refusing to pay the refund as ordered by the Commissioner directly, but to credit the same in the CENVAT Fund.

2. Heard Mr. V. Hari Haran, learned counsel for the petitioner, and Mr. M.V.J.K.Kumar, learned senior standing counsel for the Department.

3. The issue that arises for consideration in this writ petition is of a limited nature. By an order passed in Appeal No.49 of 2014,
dated 04.11.2015, the Commissioner (Appeals) allowed the appeal of the petitioner for refund of a sum of Rs.17,55,947/- That order has attained finality.

4. But, when the petitioner actually sought the amount,

the

2nd respondent passed an order in original, dated 18.02.2016, agreeing to allow the CENVAT credit to the extent of the refund ordered, but refusing to pay the refund by way of cash or credit. Aggrieved by the said order, the petitioner is before us.

5. The grievance of the petitioner is that it has already become a sick Company and a reference to this effect has already been made to the BIFR under the Sick Industrial Companies (Special Provisions) Act, 1985. Therefore, the petitioner claims that there is no point in having CENVAT credit for a sick Company. The petitioner actually wants the amount of refund to be paid to the State Bank of India, which is a secured creditor.

6. However, the claim of the petitioner is resisted by the learned senior standing counsel for the Department, on the ground that under sub-section (2) of Section 11B of the Central Excise Act, 1944,

a refund can only be credited to the Fund and no payment can be made. Merely because the petitioner has become a sick Company,

it is not possible for the respondents to violate the mandate of Section 11B (2).

7. We have carefully considered the above submissions.

8. It is true that under sub-section (2) of Section 11B, the refund ordered, can be credited only to the Fund. But, this general rule is subject to certain exceptions indicated in the proviso to sub-section (2). Sub-section (2) of Section 11B, together with the provisos therein, reads as follows:

> *"If, on receipt of any such application, the Assistant Commissioner of Central Excise or Deputy Commissioner of Central Excise is satisfied that the whole or any part of the duty of excise and interest, if any, paid on such duty paid by the applicant is refundable, he may make an order accordingly and the amount so determined shall be credited to the Fund:*
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> *Provided that the amount of duty of excise and interest, if any, paid on such duty as determined by the Assistant Commissioner of Central Excise or Deputy Commissioner of Central Excise under the foregoing provisions of this sub-section shall, instead of being credited to the Fund, be paid to the applicant, if such amount is relatable to -*
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> *(a) rebate of duty of excise on excisable goods exported out of India or on excisable materials used in the manufacture of goods which are exported out of India;*

(b) unspent advance deposits lying in balance in the applicant's account current maintained with the Principal Commissioner of Central Excise or Commissioner of Central Excise;

(c) refund of credit of duty paid on excisable goods used as inputs in accordance with the rules made, or any notification issued, under this Act;

(d) the duty of excise and interest, if any, paid on such duty paid by the manufacturer, if he had not passed on the incidence of such duty and interest, if any, paid on such duty to any other person;

(e) the duty of excise and interest, if any, paid on such duty borne by the buyer, if he had not passed on the incidence of such duty and interest, if any, paid on such duty to any other person;

(f) the duty of excise and interest, if any, paid on such duty borne by any other such class of applicants as the Central Government may, by notification in the Official Gazette, specify :

Provided further that no notification under clause (f) of the first proviso shall be issued unless in the opinion of the Central Government the incidence of duty and interest, if any, paid on such duty has not been passed on by the persons concerned to any other person."

9. Therefore, we have to examine whether the case of

the petitioner would fall under any one of the six exceptions contained in the proviso.

10. A careful look at the order in appeal passed in favour of the petitioner directing refund, shows that this is a case where the petitioner paid excess duty, but did not pass on the incidence of such duty to any other person. Such a finding is recorded by the Commissioner (Appeals) and the said order has also attained finality. Therefore, this case, in our opinion, falls within Clause (e) under the proviso to sub-section (2) of Section 11B.

11. After all, the petitioner is not asking the money to be paid into his account. He is only asking the money to be paid to the State Bank of India towards discharge of some loan. In such a case, the payment to the Bank would also act, probably as a recovery for the Bank.

12. Therefore, the Writ Petition is allowed, directing the respondents to pay the amount of refund directly to the no lien account bearing No.30286184022 of the petitioner in State Bank of India, Stressed Assets Management Branch, Secunderabad Branch, towards discharge of any part of the liability of the petitioner.

Consequently, miscellaneous petitions if any pending in the writ petition shall stand dismissed. No order as to costs.

V. RAMASUBRAMANIAN, J

ANIS, J.

11th August, 2016
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