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IN THE HIGH COURT OF DELHI AT NEW DELHI

Judgment delivered on: 01.12.2016

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CEAC 11/2005

COMMISSIONER OF CENTRAL EXCISE Petitioner

Through: Mr. Pramod Kr. Rai, Sr. Standing
Counsel with Mr. Deepak Anand, Jr.
Standing Counsel.

versus

M/S U.K.PAINTS (I) P.LTD. Respondent

Through: Mr. Naveen Mullick and Mr. Parth
Mullick, Advs.

CORAM:

HON'BLE MR. JUSTICE S. RAVINDRA BHAT

HON'BLE MR. JUSTICE NAJMI WAZIRI

S. RAVINDRA BHAT, J (Oral)

1. The following questions of law were framed on 27.01.2011 in this appeal preferred by the Commissioner of Central Excise:

“(1) Whether the adjudicating authority is not required to call the DEEC and other related documents for quantification of correct amount of refund?”

“(2) Whether the CESTAT has the jurisdiction to decide the appeal in respect of any order passed by the Commissioner (Appeals) under Section 35A of the Central Excise Act, 1944 read with sub-section 1(b) of Section 35B of the Act ibid and proviso thereto in the cases wherein goods have been exported out of India (except to Nepal and Bhutan)”

without payment of duty?”

2. The facts of the present case are that the respondent – Assessee, which at the relevant time used to manufacture paints, varnishes and detergent powder, received substantial export orders from the USSR. It discharged its obligations, during the course of which it entered into arrangements with sub-contractors/job-workers who manufactured the pre-arranged quantity in their premises and paid duty. Later, they preferred refund claims under Rule 57 F (3) of the Central Excise Rules, 1949 contending that they were not in a position to utilise the credit of duty paid. Benefit was also sought to be availed under Notification No. 85/87 dated 01.03.1987 on the ground that the Assessee had exported detergent powder to USSR under DEEC Scheme. These were rejected by the Assistant Commissioner, Central Excise, MOD-V on various dates in 1993-94. On appeals, the refund claims were directed to be adjudicated *de novo*. In 1996, again the Assistant Commissioner rejected the claims. The appellate Commissioner again remitted matter with specific directions vide order dated 18.03.1998. The third time also the position did not alter and by an order dated 28.11.2001; the Assistant Commissioner rejected six refund claims. It was held that Rule 57 F(3) stipulated that refund of claim was allowed in respect of inputs used in or in relation to the manufacture of final products which are cleared for export under bond subject to safeguard, conditions and limitations spelt out in the said rule and notification and that the conditions were invisible in the present circumstances given *interalia* that the Assessee

had sought benefit under DEEC Scheme. It was contended that the Commissioner, to whom the appeal was preferred against the Order-in-Original, rejected the Assessee's ground and upheld the order of Assistant Commissioner.

3. The Assessee approached the Customs, Excise & Service Tax Appellate Tribunal, New Delhi (CESTAT) which had passed the impugned order on 25.09.2003. The CESTAT accepted its plea and set aside the findings of the authorities below. The CESTAT held in favour of the Assessee on the issue of ineligibility on account of the DEEC Scheme. Although, this was the ground of appeal urged at the time the Revenue approached this Court, substantial arguments on this aspect had not been addressed, and the CESTAT's findings are as below:

"13. As we note from the Order in Original no. 125/01, the first discrepancy/deficiency is that certain duty paying documents were not furnished. The list also includes DEEC books shipping bill etc. We are unable to see the relevance of these documents to the refund claim in question. The credit had been accumulated by the appellant on the basis of duty paying documents, which have been accepted by the Range Office without raising any objection at the point of taking of credit. If the credit itself is to be questioned, then, it is to be done at the stage of RT 12 scrutiny and not when someone seeks refund of accumulated credit under Rule 57F. There is no evidence on record to show that that assessing authorities had any time conveyed any objection in respect of any duty paying document at the point of scrutiny of the duty paying documents. Therefore once the Range officer has certified the fact of accumulation of certain quantum of credit,

the admissibility of credit with reference to an individual duty paying document, cannot be examined again solely because the appellants have sought refund of accumulated credit. We therefore hold that denial of credit on the ground of want of certain duty paying documents is not sustainable.”

4. The main ground which the Revenue urged before the CESTAT was that appeal under Section 35B was not maintainable; at the relevant time, the regime which existed did not permit credit under Rule 57F(3) vis-a-vis clearance from premises of job workers. It is urged that the Assessee without informing the Central Government of the appeal before the CESTAT approached it (CG) under Section 35EE and that in these circumstances the Government rejected its revision application. The learned counsel urges that regardless of the Central Government's position, proviso to Section 35B(1) (d) clearly states that orders which relate to exports without payment of duty are excluded from the ambit of the appellate Tribunal's jurisdiction. On the other issue, i.e., the permissibility of credit, it is urged that existing notifications including Notification No. 214 of 1986 did not expressly provide for MODVAT credit in respect of clearance from premises of job workers or third party's premises. This was permitted by Notification No. 18/99-CE (NT) dated 28.02.1999 which apparently amended Rule 57F(4). In the circumstances, since there was absence of any such provision, the Assessee could not have been granted the benefit.

5. The learned counsel for the Assessee relied upon the permission granted by the concerned jurisdictional Assistant Commissioner on

28.12.1990 for the clearance in respect of the entire quantity of detergent powder manufactured from the premises of the job-workers at Tarn Taran, Distt. Amritsar. It is stated that goods were manufactured by the job-workers in licensed premises and approval was given by the concerned Collectorate and it was communicated to the concerned jurisdictional Collectorate in Amritsar for appropriate action. In these circumstances, the findings of the CESTAT should not be disturbed with respect to the verification of the clearance. It was urged next that as far as the question of permissibility of credit goes, even though the notification so expressly provided for the benefit, the intention of the rule making authority can be gathered from the latter amendment brought into force with effect from 22.02.1999 precisely to tide over such difficulties. Having regard to the circumstances it would not be appropriate for the Court to interfere with the order of the CESTAT. Likewise, it was argued that since the Central Government itself has taken a position in its order dated 24.11.2003 with respect to lack of jurisdiction, it cannot be said that the CESTAT should be again approached for relief as that would only paint the hardship and injustice caused to the Assessee.

6. As far as the question with respect to jurisdiction is concerned, it would be pertinent to extract the following observations and findings of the Central Government rejecting the Assessee's revision on 24.11.2003:

“4. Govt. has carefully gone through the written and oral submissions. Govt. has also gone through the Orders-in-Original and Orders-in-Appeal. The applicant have not claimed rebate of duty on goods

exported under Rule 12 or rebate of duty on excisable materials used in the manufacture of goods which are exported under rule 12 A of the Central Excise Rules, 1944 but they have claimed refund of the credit of the specified duty in respect of inputs used in the final products cleared for export under bond or used in the intermediate products cleared for export in terms of the proviso to Rule 57F (3) of the Central Excise Rules, 1944. Govt. feels that the applicant's refund claims filed in terms of Rule 57 F (3) does fall in the categories of the cases as mentioned in the Proviso (a), (b) and (c) to the section 57 F(3) of the Central Excise Act 1944 and in the circumstances no Revision Application can be filed under section 35 EE of the Act.

5. In view of the above facts and circumstances Govt. is constrained to reject the Revision Application as beyond jurisdiction without going into merit of the case."

7. Thus, the Government itself was of the definite opinion that it lacked jurisdiction at least in the circumstances of the case. Although the learned counsel has urged that the Assessee approached the Central Government without appraising it of the pendency of the appeal, this Court is not persuaded to differ with the submission of the Assessee because what in fact is being urged is that it is speaking in two voices. Having expressed itself with respect to the lack of jurisdiction in the facts, the government cannot be heard to say that it did possess jurisdiction under Section 55EE.

8. For this reason, the question of law framed is answered against the Revenue.

9. As far as the second question is concerned, i.e., the

permissibility of the credit in the facts of the case, undoubtedly, Rule 57F, as existing on the date, did not permit credit in case of clearance made from the third party premises as in the present case. This Court is obvious of the fact that the concerned jurisdictional Commissioner did permit such clearance and that on that basis the exports were made and even the DEEC benefits were given. All that the job workers did was to put together all manufactured products which answered the specifications of the importers' requirements in terms of the order given by the CESTAT in this case. In light of the difficulties faced by such exporters especially those relying upon third party manufacturers, in the absence of their capacity to deal with larger orders this rule enabled the authority to make such clearance order and also enabled claim of credit from 22.02.1999 onwards.

10. Having regard to these facts, the Court is of the opinion that larger interest of justice lies in not disturbing the order of the CESTAT.

11. For the forgoing reasons, the Court is satisfied that there is no merit in the appeal. Accordingly, it is dismissed.

S. RAVINDRA BHAT, J

NAJMI WAZIRI, J

DECEMBER 01, 2016/acm