* IN THE HIGH COURT OF JUDICATURE AT HYDERABAD
FOR THE STATE OF TELANGANA AND THE STATE OF ANDHRA PRADESH

* HON'BLE SRI JUSTICE V.RAMASUBRAMANIAN
AND
* HONOURABLE SRI JUSTICE ABHINAND KUMAR SHAVILI

+C.E.R.C.No.1 of 2004

% Date: 25-10-2017

#Between:

Commissioner of Customs & Central Excise,
Hyderabad-III, Commissionerate,
Hyderabad – 500 004

….. Applicant

And

M/s. Surana Telecom Ltd.,
Plot No.214, 215/A & 215/D,
Phase-II, IDA, Cherlapally,
Hyderabad.

…. Respondent

! Counsel for the appellant : Mr. B. Narasimha Sarma

^ Counsel for Respondent : Mr. Ch. Pushyam Kiran

<GIST:
> HEAD NOTE:
? Cases referred

1) 1997 (94) ELT 445 (SC)

HON'BLE SRI JUSTICE V. RAMASUBRAMANIAN
AND
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JUDGMENT: (Per VRS,J)

On a request made by the Revenue, Customs, Excise and Gold (Control) Appellate Tribunal (CEGAT) has made the above reference to this Court, for its opinion on the following question of law –

> "Whether filing of letter of protest with the Range Superintendent under Rule 233 B read with Notification No.26/95 CE(N.T) dated 06.06.1995 as amended by the Notification No.33/99 CE (N.T) dated 11.05.1999 is not in accordance with law?"

2. Heard Mr. B. Narasimha Sarma, learned Senior Standing Counsel for the department and Mr. Ch. Pushyam Kiran, learned counsel for the respondents.

3. The respondent-assessee is engaged in the manufacture of Cable Jointing Kits. When a demand was made, the respondent-assessee paid the amount under protest and came up with a writ petition. The High Court allowed the writ petition and set aside the demand.

4. Thereafter, the respondent filed a claim for refund. The claim for refund was rejected by the adjudicating authority on the ground that it was time barred. But the appeal filed by the respondent was allowed by the Commissioner (Appeals) and the matter remanded back to the Assistant Commissioner for De novo proceeding.

5. The Assistant Commissioner thereafter passed an order dismissing the claim on the ground that the letter of protest, at the time of payment of duty, was made to the Range Officer instead of the jurisdictional Assistant Commissioner as required by rule. This order of the

adjudicating authority passed afresh after remand, became the subject matter of an appeal before the Commissioner (Appeals), Hyderabad. The Commissioner allowed the appeal, as against which a further appeal was filed by the Revenue before the CEGAT. The CEGAT dismissed the appeal on the basis of the ratio laid down in Executive Engineer, Workshop Division, M.P. Electricity Board v. Collector, Central Excise, Raipur[1]. As against the dismissal of the appeal by CEGAT, the Revenue requested for reference of the question of law and the CEGAT made a reference of the above question of law.

6. Before going into the question of law raised by the CEGAT for our opinion, it is necessary to take note of the fact that the actual claim for refund made by the respondent-assessee was for a sum of Rs.95,56,264/-. After rejection of the entire claim by the Original Authority, the Appellate Authority allowed the appeal and modified the order directing refund only to the extent of Rs.3,45,548/-.

7. As against the disallowance of the claim for refund to the extent of nearly Rs.92 lakhs, the assessee filed a further appeal before CEGAT and succeeded there and the said order was also confirmed by this Court. Therefore, as on date, the claim for refund to the extent of nearly Rs.92 lakhs, has gone in favour of the respondent-assessee on the very same question of law.

8. In other words what now survives for adjudication in the above reference is only the allowing of the refund claim to the extent of Rs.3,45,548/-. In such circumstances, we are of the considered view that the question now referred by the CEGAT cannot be answered differently in respect of one portion of the claim, viz., Rs.3,45,548/- when the same

[1] 1997 (94) ELT 445 (SC)

question has gone in favour of the assessee in respect of a major portion, viz., to the tune of Rs.92 lakhs.

9. Though it is contended by the learned Senior Standing Counsel for the Department that the success of the respondent-assessee in respect of the remaining portion of the claim was on another ground, viz., whether the respondent was entitled to MODVAT credit or not, we do not think that the same would make any difference. The effect of the Tribunal setting aside the order of the Commissioner (Appeals) insofar as MODVAT credit is concerned is that the respondent would be entitled to refund to the tune of Rs.92 lakhs.

10. Additionally, there is no dispute on facts that the petitioner submitted a letter of protest to the Range Officer at the time of making payment. Every invoice, through which payment was made, contain a protest. Therefore, the contention that the protest was not made to the jurisdictional Assistant commissioner, cannot survive. The expression used in Section 233B is "proper officer". Therefore, once it is admitted that the respondent made payment under protest, even while filing the writ petition, he cannot be denied the refund. Therefore, the question referred is answered in favour of the respondent.

11. Accordingly the Revision Case is dismissed. As a sequel, miscellaneous petitions pending, if any, shall stand closed. There shall be no order as to costs.

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V. RAMASUBRAMANIAN, J.

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ABHINAND KUMAR SHAVILI, J.

25th October, 2017
Js.

HON'BLE SRI JUSTICE V. RAMASUBRAMANIAN
AND
HON'BLE SRI JUSTICE ABHINAND KUMAR SHAVILI

C.E.R.C.No.1 of 2004

(judgment of the Bench delivered by VRS,J)

9th October, 2017

Js.