

\$~3

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **CEAC 8/2017 & CM No.15296/2017**

Date of decision: 13th December, 2017

COMMISSIONER OF CENTRAL EXCISE,
DELHI II

..... Petitioner

Through: Mr.Sanjeev Narula, Sr.Standing Counsel
(Customs, CBEC) with Mr.Abhishek Ghai
and Ms.Anumita Chandra, Advocates.

versus

WELSPRING UNIVERSAL

..... Respondent

Through: Dr.Prabhat Kumar and Mr.Arjun Malik,
Advocates.

CORAM:

HON'BLE MR. JUSTICE SANJIV KHANNA

HON'BLE MS. JUSTICE PRATHIBA M. SINGH

SANJIV KHANNA, J. (ORAL):

This appeal by the Commissioner of Central Excise under Section 35G of the Central Excise Act, 1944 impugns the order dated 19th September, 2016 passed by the Customs, Excise and Service Tax Appellate Tribunal in Excise Appeal No.1773/2010 in the case of Wellspring Universal.

2. The respondent-assessee is a 100% Export Oriented Unit (EOU) engaged in the manufacture and exports of hand tools, welding machine and

safety products.

3. Two show cause notices dated 26th September 2008 and 6th January, 2009 were issued, *inter-alia* alleging that the respondent-assessee had wrongly claimed CENVAT credit of Rs.33,70,340/- for the period 2006-07 and up to 30th June, 2008 and Rs.1,35,554/- from 1st July, 2008 to 10th December, 2008 respectively, on goods purchased from their sister unit, namely Wellspring India Pvt. Ltd., Bahadurgarh (Haryana).

4. Vide order in original dated 31st July, 2009, Additional Commissioner, Central Excise (Delhi), rejecting submissions and contention of the respondent-assessee, held that CENVAT credit of Rs.35,05,894/- availed should be disallowed under Rule 14 of the CENVAT Credit Rules, 2004 (Rules for short). Extended period under Section 11A was invoked to direct recovery of the said amount along with applicable interest under Section 11A(b) of the Act. Penalty of Rs.5,00,000/- was imposed under Rule 15 of the Rules.

5. The respondent-assessee filed appeals which were allowed vide order dated 30th March, 2010 by the Commissioner Appeals.

6. Aggrieved, the Revenue preferred further appeal before the Tribunal which, as recorded above, has been dismissed by the impugned order affirming the findings recorded by the Commissioner Appeals and observing that the respondent-assessee had asked for credit of duty actually paid and not duty which was payable and available. This fact was undisputed as the Revenue had not challenged the factum of payment of duty by the respondent-assessee to the supplier. Further, the officer who had issued the show cause notice did not have jurisdiction to re-open the assessment of the supplier.

7. We have heard counsel for the appellant-revenue and the respondent-assessee and do not find any reason to interfere. On being asked, counsel for the Revenue has accepted that the respondent-assessee had paid the aforesaid excise duty of Rs.35,05,894/-. This is not challenged and questioned.

8. Having paid the aforesaid duty, there was nothing wrong and incorrect in the respondent-assessee taking refund. Revenue has not been out of pocket. Refund was of the amount paid.

9. Counsel for the Revenue had drawn our attention to Rule 3(1) and submitted that manufacturer or producer of the final product would be entitled to benefit of CENVAT credit only if duty was leviable under the Act. The submission was that Wellspring India Pvt. Ltd., the supplier, was also a 100% export unit and on the transaction, no duty was required to be paid in terms of paragraph 6.13(a) of the Foreign Trade Policy 2004-09, being a case of Inter Unit Transfer. CBEC Circular No.17/2006-Customs dated 1st June, 2006 was relied upon. Reference was made to Section 5A (1A) of the Act.

10. In order to consider the submission, we would like to refer to Section 5A (1) and (1A) which is reproduced below:-

“5A (1) If the Central Government is satisfied that it is necessary in the public interest so to do, it may, by notification in the Official Gazette exempt generally either absolutely or subject to such conditions (to be fulfilled before or after removal) as may be specified in the notification, excisable goods of any specified description from the whole or any part of the duty of excise leviable thereon:

***Provided** that, unless specifically provided in such notification, no exemption therein shall apply to excisable*

*goods which are produced or manufactured -
(i) in a free trade zone or a special economic zone and
brought to any other place in India; or
(ii) by a hundred per cent export-oriented undertaking and
brought to any place in India.*

Explanation. - *In this proviso, "free trade zone", "special economic zone" and "hundred per cent export-oriented undertaking" shall have the same meanings as in Explanation 2 to sub-section (1) of section 3.*

5A (1A) *For the removal of doubts, it is hereby declared that where an exemption under sub-Section (1) in respect of any excisable goods from the whole of the duty of excise leviable thereon has been granted absolutely, the manufacturer of such excisable goods shall not pay the duty of excise on such goods."*

5A(1) empowers the Central Government to issue a notification in the official gazette and grant exemption generally, either absolutely or subject to conditions to be fulfilled before or after removal, as specified in the notification in respect of excisable goods. The proviso stipulates that unless it is provided in such notification, no exemption shall apply to excisable goods which are produced or manufactured in a free trade zone or special economic zone or by a 100% export oriented undertaking. Sub-Section (1A) of Section 5A is applicable in case of exemption granted under the notification in respect of any excisable goods from whole of the duty of excise leviable thereon absolutely. Sub-Section (1A) of Section 5A will not apply in cases where exemption is not granted absolutely, but is subject to the conditions which have to be fulfilled before or after removal, as specified in the notification.

11. The exemption notification relied upon by the Revenue, i.e., paragraph 6.13 (a) to (c) of the Foreign Trade Policy reads as under:-

“6.13(a) Transfer of manufactured goods from one EOU/EHTP/STP/BTP unit to another EOU/EHTP/STP/BTP unit is allowed with prior intimation to concerned DC and Customs authorities, following procedure of in-bound movement of goods. Transfer of manufactured goods shall also be allowed from EOU/EHTP/STP/BTP unit to a SEZ developer or unit following procedure prescribed in SEZ Rules, 2006.

(b) Capital goods may be transferred or given on loan to other EOU/EHTP/STP/BTP/SEZ units, with prior intimation to concerned DC and Customs authorities.

(c) Goods supplied by one unit of EOU/EHTP/STP/BTP to another unit shall be treated as imported goods for second unit for payment of duty, on DTA sale by second unit.”

Aforesaid paragraphs postulate and state that the exemption granted is not absolute, but is hedged with conditions which have to be satisfied. Prior intimation to the custom authorities and DC has to be made. Procedure for inbound movement of goods has to be followed. In the present case, it is not the case of the Revenue that the said procedure was followed by the supplier or by the respondent-assessee.

12. We were concerned whether the supplier being a sister concern had taken undue advantage of the benefit by charging duty which was paid by the respondent-assessee. The reason being this is not a case of an arm's length transaction as the supplier and the respondent-assessee were related to each other, but counsel for the Revenue has stated that they have not examined the said aspect whatsoever and it is not the pleaded case of the

Revenue. The show cause notice and the order in original do not record that the supplier has taken undue benefit by asking the respondent-assessee to pay the duty. Even otherwise, the impugned order permits the Revenue to proceed in case of any wrongdoing in the case of the supplier.

13. This being the position, we do not think the impugned order requires any interference. Duty has been paid by the respondent-assessee to the supplier, hence they are entitled to benefit and refund on export. Paragraph 6.13(a) imposes conditions and is not absolute. Conditions were not satisfied. The respondent-assessee was liable to pay duty.

14. The appeal is accordingly dismissed without any order as to costs.

SANJIV KHANNA, J.

PRATHIBA M. SINGH, J.

DECEMBER 13, 2017

mamta