Sharayu Khot.

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

CENTRAL EXCISE APPEAL NO. 10 OF 2018

The Commissioner of CGST & Central Excise, Thane ...**Appellant**

Versus

F G P Ltd. ...**Respondent**

Mr. M. Dwivedi, for the Appellant.

Mr. Rajesh Oswal a/w Ms. Divyasha Mathur, a/w Mr. Viraj Bhate, i/by PDS Legal, for the Respondent.

CORAM : M.S. SANKLECHA & RIYAZ I. CHAGLA, JJ.

DATE : 19 September 2018

Sharayu Pandurang Khot
Digitally signed by Sharayu Pandurang Khot
Date: 2018.09.26 17:20:35 +1200

ORDER :

1. This Appeal under Section 35G of the Central Excise Act, 1944 challenges the order dated 18th August 2016 passed

by the Customs, Excise and Service Tax Appellate Tribunal (for short "***the Tribunal***").

2. Shri. Dwivedi, the learned Counsel appearing for the Revenue urges only the following question of law for our consideration:-

> "Whether in the facts and circumstances of the case and in law was the Tribunal correct in holding that payment of duty by the assessee during the period 1988 to 1990 was provisional under Rule 9B of the erstwhile Central Excise Rules, 1944 ("***Rules***") and therefore, no question of unjust enrichment can arise?"

3. The Respondent is engaged in manufacturing of chopped strand mat (final product). At an intermediate stage in the manufacture of final product, the Respondent obtained glass filament. According to the Respondent, glass filament was not

excisable. Therefore, the Respondent filed price list which was provisionally approved by the Assistant Commissioner under Rule 9B of the Rules. Further the Respondent also paid the duty under protest and filed refund claims. It was finally held that for the period 1988 to 1990 the glass filament was not excisable goods and therefore, no duty was payable. This resulted in the Respondent being entitled to refund.

4. The Appellant sought to deny the refund to the Respondent on the ground that the goods were not provisionally assessed and in fact, the duty had been paid under protest. The impugned order of the Tribunal holds that the clearance effected by the Respondent was Provisional under Rule 9B of the Rules. Thus, the excise duty paid by them was to be refunded.

5. Shri. Dwivedi, the learned Counsel for the Revenue submits that there was no provisional assessment as Respondent had paid the duty under protest. Therefore, the refund on finalization of assessment should be credited to the Consumer

Welfare Fund.

6. On the other hand, Shri. Oswal, the learned Counsel for the Respondent invites our attention to the memorandum of Appeal, wherein in paragraph 3.4 the Appellant-Revenue itself states that the price list filed by the Respondent was provisionally approved by the Assistant Commissioner under Rule 9B of the Rules and the Respondent was directed to execute B-13 bond with sufficient surety. A copy of the letter communicating the above fact to the Respondent is also annexed to the memorandum of Appeal at Exh.D being letter dated 29th August 1988.

7. In the above view, no fault can be found with the impugned order of the Tribunal holding that the assessment during the period 1988 to 1990 were provisional under Rule 9B of the Rules. Further, no question of unjust enrichment would arise, as the refund claims were filed in 1991 that is much before the amendment to Rule 9B of the Rules in the year 1999

which requires the officers of the Revenue before granting refund, to be satisfied that there is no unjust enrichment on finalization of the provisional assessment.

8. In the above view, the finding of fact by the Tribunal that the assessment were provisional under Rule 9B of the Rules cannot be found fault with in the absence of the same being shown to be perverse. In the above view, the proposed question does not give rise to the substantial question of law. Thus, not entertained.

9. Accordingly, the Appeal is dismissed, with no order as to costs.

[RIYAZ I. CHAGLA J.] **[M.S. SANKLECHA, J.]**