IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 20.12.2018

CORAM :

The Honourable Mr.Justice T.S.SIVAGNANAM
and
The Honourable Mr.Justice N.SATHISH KUMAR

C.M.A.Nos.1535 of 2007 and 826 of 2017

C.M.A.No.1535 of 2005

M/s.Ashok Leyland Limited,
Rep. by its Asst. General Manager,
(Corporate Tax) Shri K.K.Sekar ...Appellant

Vs

1.Customs, Excise & Service Tax
Appellate Tribunal,
Shastri Bhavan Annex,
No.26, Haddows Road,
Chennai - 600 006.

2.Commissioner of Central Excise (Appeals),
Mahatma Gandhi Road,
Chennai - 600 034.

3.Assistant Commissioner of Central Excise,
Hosur II Division
67A, SIPCOT Industrial Complex,
Hosur - 635126. ...Respondents

APPEAL under Section 35G of the Central Excise Act, 1944 to set aside the final order No.975/2006 dated 26.10.2006 of the first respondent and direct the third respondent herein and allow refund (re-credit) of Rs.5,37,979.80 as claimed by the appellant.

C.M.A.No.826 of 2017

M/s.Ashok Leyland Limited,
Rep. by its Deputy General Manager,
(Corporate Tax) Shri K.K.Sekar
No.175, SIPCOT Industrial Complex,
Hosur - 635 126. ...Appellant

Vs

1.Commissioner of Central Excise,
Chennai I Commissionerate,
Nungambakkam, Chennai - 600 034.

2.Commissioner of Central Excise (Appeals),
Mahatma Gandhi Road,
Chennai - 600 034.

3.Assistant Commissioner of Central Excise,
Hosur II Division
67A, SIPCOT Industrial Complex,
Hosur - 6350126. ...Respondents

APPEAL under Section 35G of the Central Excise Act, 1944 to set aside the final order No.40630/2015 dated 15.06.2015 of the first respondent and direct the third respondent herein and allow refund (re-credit) of Rs.19,50,090/- as claimed by the appellant.

For Appellant
in both the Appeals : Mr.P.R.Renganath

For Respondents
in both the Appeals : Mr.A.P.Srinivas

COMMON JUDGMENT

(Judgment was delivered by T.S.SIVAGNANAM,J)

These appeals filed by the assessee under Section 35G of the Central Excise Act, 1944, are directed against the final orders passed by the Customs, Excise and Service Tax Appellate Tribunal and the Commissioner of Central Excise in final Order No.975/2006 dated 26.10.2006 and final Order No.40630/2015 dated 15.06.2015 respectively.

2.The Civil Miscellaneous Appeal in C.M.A.No.1535 of 2007 was admitted on the following substantial questions of law:

"(a) Whether the differential duty paid after 16.03.1995 for clearances of excisable goods (components) made before 16.03.1995 will be available as credity to the manufacture of final products (Chassis) in terms of Rule 57E of CEA 44 (OR) whether in view of the Rule 57F(4A) the said credit will be barred" and

(b) Whether in the above circumstances the Tribunal was correct in reject claim for Rs.5,37,979.80 which will be available to the appellants if the above question is answered in favour of the appellants."

3.The Civil Miscellaneous Appeal in C.M.A.No.826 of 2017 was admitted on the following substantial questions of law:

> "(a) Whether the differential duty paid after 16.03.1995 for clearances of excisable goods (components) made before 16.03.1995 will be available as credity to the manufacture of final products (Chassis) in terms of Rule 57E of CEA 44 (OR) whether in view of the Rule 57F(4A) the said credit will be barred" and
>
> (b) Whether in the above circumstances the Tribunal was correct in reject claim for Rs.19,50,090/- which will be available to the appellants if the above question is answered in favour of the appellants."

4.Mr.P.R.Renganath, learned counsel for the appellant submitted that Rule 57F(4A) of the Central Excise Rules (hereinafter referred to as "the Rules") provides that credit lying unutilized as on 16.03.1995 shall lapse. So far as the appellant is concerned, the goods, i.e. the inputs, which were imported components, were received prior to 16.03.1995 and the credit of duty (CVD), namely, countervailing duty had been availed prior to 16.03.1995 and there is no dispute regarding this. It is submitted that the dispute is however with regard to the credit relating to the differential duty (CVD) which was availed based on Rule 57E-certificates issued by the Madras Customs dated 18.08.1996. The learned counsel would contend that the adjudicating authority has erroneously held that had the assessee correctly paid CVD at the time of import and availed MODVAT credit, this amount would be lapsed as per Rule 57F(4A) of the Rules. It is his submission that Rule 57F(4A) causes lapse only of the credit lying unutilized as on 16.03.1995, i.e. the credit which has been availed before 16.03.1995 and in the assessee's case, the credit has been availed only much after 16.03.1995 under Madras Customs certificate dated 18.08.1996. Therefore, on its very terms, Rule 57F(4A) of the Rules does not apply to the assessee's case. Thus, it is the contention of the learned counsel that the said Rule cause lapse only of past credit as of a particular date, namely, 16.03.1995 and not of future credit.

5.The assessee was before the Tribunal on three occasions on the same issue. On the first occasion, the assessee was successful. The said decision was reported in 2001 (1385) ELT 544 (Tri.-Chennai). The Single Member Bench of the Tribunal held that in terms of Rule 57F(4A) of the Rules unutilized credit of duty as on 16.03.1995 gets lapsed. The goods had been received prior to that date on which additional duty paid had lapsed. Subsequently, there was a demand for the differential duty at the hands of the supplier on this date and documents were received after 16.03.1995 and the credit had been taken subsequent to that date. The Tribunal held that the duty paid cannot be correlated to the duty payment remaining unutilized prior to 16.03.1995 and accordingly, held that the Commissioner's finding that credit availed subsequent to March 1995 cannot be utilized is not a correct finding in terms of the provisions of Rule 57E of the Rules. However, in the second round of litigation on the same issue when the assessee went before the Tribunal, they were unsuccessful. In fact, the Single Member Bench who had rendered the decision in favour of the assessee reported in 2001 (138) ELT 544 (Tri.-Chennai) was also part of the Two Member Bench of the Tribunal which held against the assessee and this decision is reported in (2002) 148 ELT 453 (Tri.-Chennai). On the third occasion, the matter came up before the Single Member Bench of the Tribunal which after taking note of the decision in (2002) 148 ELT 453 (Tri.-Chennai) rejected the assessee's appeal. This is how the assessee is before us by way of these appeals.

6.We have heard Mr.A.P.Srinivas, learned counsel for the respondents on the above submissions.

7.To arrive at a decision in these appeals and to answer the substantial questions of law, it would be necessary to take note of Rule 57F(4A) which was substituted by notification No.11/95-C.E. (NT) dated 16.03.1995, which reads as follows:

> "Rule 57F(4A) Notwithstanding anything contained in sub-rule (4) or sub-rule (1) of rule 57A and the notifications issued thereunder, any credit of specified duty lying unutilized on the 16th day of March, 1995, with a manufacturer of tractors, falling under hearing No.87.01 or motor vehicles falling under heading No.87.02 and 87.04 of the Schedule to the Central Excise Tariff Act, 1985 (5 of 1986) shall lapse and shall not be allowed to be utilized for payment of duty on any excisable goods, whether cleared for home consumption or for export:
>
> Provided that nothing contained in this sub-rule shall apply to credit of duty, if any, in respect of inputs lying in stock or contained in finished products lying in stock on the 16th day of March, 1995."

8.In terms of the above rule which commence with a non obstante clause, any credit excise duty lying unutilized on 16.03.1995 with the manufacturer of tractors or motor vehicles shall lapse and shall not be allowed to be utilized for payment of duty on any excisable goods. The assessee's contention is that the credit which accrue to them in August 1995 was much after the date fixed in Rule 57F(4A) of the Rules and therefore, the same will not lapse. However, one important factor which the assessee has lost sight is that this credit which was earned by the assessee was on account of the payment of CVD as demanded by the Madras Customs in respect of the imports made by the assessee (inputs) and admittedly these imports were prior to 16.03.1995. Therefore, the Commissioner was fully justified in holding that had the assessee has correctly paid the CVD at the time of import and availed MODVAT credit, this amount would have lapsed as per Rule 57F(4A) of the Rules.

9.Learned counsel for the assessee would submit that Rule 57F(4A) of the Rules used the terms any credit of specified duty lying unutilized and it does not refer to the inputs lying with the assessee. In our considered view the assessee cannot call upon this Court to decide the validity of the above Rule which has already been upheld. Furthermore, the Court cannot substitute the words in the statute and what is required to be seen is the intention of the statute. Therefore, for all purposes what would be relevant is what had occurred prior to 16.03.1995. In the instant case, what occasioned the availment of credit after 16.03.1995 is an import which had occurred prior to 16.03.1995 and the credit certificate was given by the Madras Customs because of higher rate of CVD to be paid on the imports. Therefore, in our considered view, the first respondent rightly rejected the assessee's case and we hold that the decision reported in 2001 (138) ELT 148 (Tri.-Chennai) does not laid down the correct legal principle.

10.In the result, the appeals are dismissed and consequently, the substantial questions are answered against the appellant. No costs.

cse

Sd/-
Assistant Registrar(CS VI)

//True Copy//

Sub Assistant Registrar

To

1.Customs, Excise & Service Tax
Appellate Tribunal,
Shastri Bhavan Annex,
No.26, Haddows Road,
Chennai - 600 006.
Chennai - 600 006.

2.Commissioner of Central Excise,
Chennai I Commissionerate,
Nungambakkam, Chennai - 600 034.

3.Commissioner of Central Excise (Appeals),
Mahatma Gandhi Road,
Chennai - 600 034.

4.Assistant Commissioner of Central Excise,
Hosur II Division
67A, SIPCOT Industrial Complex,
Hosur - 6350126.

+1cc to Mr.A.P.Srinivas, Advocate, S.R.No.89084

CA(CO)
KAK(05/01/2019)