IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 21.08.2018

CORAM:

THE HONOURABLE MR.JUSTICE T.S.SIVAGNANAM
and
THE HONOURABLE MRS.JUSTICE V.BHAVANI SUBBAROYAN

Writ Appeal No.781 of 2011

1. Union of India,
Rep. by the Joint Secretary to the
Government of India,
Ministry of Finance,
Department of Revenue,
L14, Hudco Viahala Bldg., B Wing,
New Delhi - 110066.

2. Commissioner of Customs [Appeals],
Customs House, No.60, Rajaji Salai,
Chennai - 600001.

3. Deputy Commissioner of Customs,
Chennai Airport, Air Cargo Complex,
Meenambakkam, Chennai - 600027.

4. Superintendent of Central Excise,
B4 Range, B-Division,
317, Anna Salai, Teynampet,
Chennai - 600018. ..Appellants/Respondents

vs.

M/s.Tamilnadu Petro Products Ltd.,
Manali Express Highway,
Manali, Chennai - 600068. ..Respondent/Petitioner

Prayer: Writ Appeal filed under Clause 15 of the Letters Patent to set aside the order dated 24.03.2010 passed in Writ Petition No.24085 of 2007 and restore the order of Revisional Authority and further direct the respondent to refund CENVAT Credit.

W.P.24085/2007:
Writ Petition filed under Article 226 of the constitution of India praying for the issuance of a Writ of certiorarified Mandamus to call for the records of the portion of the impugned order No. 93/07 dated 15.2.07 bearing reference no. 380 / 57/DBK/06-RA of he 1st respondent and quash the same and direct the 2nd and 3rd respondent to forbear from enforcing the demand

to pay back the cenvet credit of Rs. 41 81 722 by the petitioner forthwith.

For Appellants : Mr.Rajkumar Jhabukh

For Respondent : Mr.N.Prasad

J U D G M E N T

(Judgement of the Court was made by T.S.SIVAGNANAM,J.)

This Appeal by the Central Government is directed against the order in Writ Petition No.24085 of 2007 dated 24.03.2010. The said Writ Petition was filed by the respondent herein (hereinafter referred to as "the assessee").

2. The Assessee filed the said Writ Petition for the issuance of Writ of Certiorarified Mandamus to quash the order passed by the first appellant dated 15.02.2007 and to forebear the appellants from enforcing the demand to pay back the Cenvat Credit of Rs.41,81,722/-. The order passed by the first appellant, which was challenged in the Writ Petition, was the order passed in a revision application filed by the Department challenging the order passed by the Commissioner of Appeals in Appeal No.451 of 2006 dated 08.06.2006.

3. Though several contentions raised before the Writ Court by the assessee as well as the Department, the Writ Court confined the adjudication as to the correctness of the impugned order, i.e., whether the revisional authority/the first appellant was justified in directing the assessee to pay a sum of Rs.41,81,722/- being the full Cenvat credit availed by the assesee. The Writ Court opined that the ground on which the Department had challenged the order passed by the Commissioner of Appeals before the first appellant was as to the identity of the goods exported to avail the benefit under Section 74 of the Customs Act. When the first appellant had confirmed the findings of the second appellant as to the identity of the goods exported, the further reasoning based on Rule 3(4) of the Cenvat Credit rules is clearly in violation of the principals of natural justice. Further, the Writ Court observed that right through, the contention of the Department was only on the identity of the goods to avail the duty drawback and there was no issue raised as to the applicability of Rule 3(4) of the Cenvat Credit Rules and therefore, held that the first appellant travelled beyond the dispute and quashed the portion of the order dated 15.02.2007. The Department is on appeal against the order raising various contentions.

4. Heard Mr.Rajkumar Jhabukh, learned counsel for the appellant and Mr.N.Prasad, learned counsel for the respondent/assessee.

5. At the first blush, we were also inclined to agree with the opinion expressed by the Writ Court, in particular, in paragraph 8 of the impugned order dated 24.03.2010, but on a closer scrutiny, we deem it appropriate to take a different view. This is so because while the revision petition was pending on the file of the first appellant, a Show Cause Notice dated 23.10.2006 (in short "SCN") was issued by the first appellant invoking the power under Section 129-DD of the Customs Act, 1962. The SCN states that the copy of the review application filed by the Department before the first appellant is attached to the SCN and may be treated as part of the SCN. The proposal contained in the SCN is as to why the said Order-in-Appeal should not be annulled or any other orders as deemed fit be passed on the grounds stipulated in the said Revision Application. The assessee was directed to submit their objection and also their intention to be heard in person. The order passed by the first appellant dated 15.02.2007 shows that in response to the SCN dated 23.10.2006, the assessee had submitted their cross objection vide their letter dated 27.11.2006. Thus, we do not agree with the findings of the Writ Court that the first appellant had travelled beyond the scope of the appeal, which was pending before it, since, the SCN dated 23.10.2006 was issued by the first appellant and the same was also taken up along with the main revision application.

6. The learned counsel appearing for the assessee contended that the first appellant vide the order dated 15.02.2007 had affirmed the order passed by the second appellant and therefore, the question of demanding the payment of the Cenvat credit amounting to Rs.41,81,722/- is wholly without jurisdiction. On a close reading of the order passed by the first appellant dated 15.02.2007, we find that the first appellant has upheld the order passed by the second appellant, with regard to the eligibility of 50% of import duty to be paid as drawback under Notification No.19/65, Ministry of Finance, Department of Revenue, as amended by Notification No.154-Cus., dated 08.11.1969 and No.45 Customs dated 02.05.1970. Therefore, to that extent, by agreeing with the assessee with regard to the identity of the goods, the first appellant had confirmed the order passed by the second appellant and not in any respect.

7. The learned counsel pointed out that in the ground of revision filed by the Department before the first appellant, there is no such specific plea with regard to the drawback claimed in the sum of Rs.34,29,913/- and there is no proposal in the SCN invoking Rule 3(4) of the Cenvat Credit Rules. In our considered view, it would be inappropriate for us to examine such aspect of the matter, since that required to have been done by the first appellant, while disposing of the revision application, which was done vide order dated 15.02.2007, which also dealt with the SCN dated 23.10.2006. The reason assigned by the first appellant in the order dated 15.02.2007 with regard to the Cenvat is contained in paragraphs 7.6 of the order. However, we find that in the discussion portion, there is no reference to the stand taken by the respondent in their cross objection dated 27.11.2006.

8. The revisional authority, though may be entitled to modify, annul or reverse the orders passed by the lower authority, however, if it proposes to take a different stand, which may result in directing the assessee to pay additional duty or to reverse a credit availed by them, then it goes without saying that such proceedings should be adjudicated in a proper manner, after affording due opportunity to the assessee. As pointed out by us earlier, though there is a reference to the cross objection filed by the assessee dated 27.11.2006, there is absolutely no discussion about the same in paragraph 7.6 of the order passed by the first appellant dated 15.02.2007. Therefore, in our considered view, the writ court having held that there is a violation of principles of natural justice ought to have noted that a SCN was also pending adjudication before the first appellant, who has jurisdiction to issue the same.

9. Therefore, the appropriate course that should have been adopted was to affirm the findings rendered by the first appellant in paragraph 7.4. and remand the matter to the first appellant for adjudicating the SCN dated 23.10.2006 along with cross objection dated 27.11.2006. Since this course having been not adopted by the writ court, we are of the considered view that to that extent, the order passed by the writ court calls for interference.

10. Accordingly, the writ appeal is allowed. The operative direction issued by the writ court in paragraph 9 of the order dated 24.03.2010 is set aside and the matter is remanded to the first appellant to adjudicate the SCN dated 23.10.2006 along with the cross objection filed by the assessee dated 27.11.2006, after affording an effective opportunity of personal hearing to the authorised representative of the assessee and pass orders on

merits and in accordance with law.

11. We make it clear that it is well open to the assessee to canvass all grounds, which have been canvassed by the assessee before the writ court as well as before us during the course of arguments and we also make it clear that the findings regarding the identity of the goods shall not be done, as the first appellant as affirmed the order passed by the second appellant, while disposing of the revision dated 15.02.2007. Thus, the order of remand to the first appellant is only on the above said grounds alone.

-s/d-
Assistant Registrar(CS-IX)

True Copy

Sub-Assistant Registrar

hvk/gg

To

1. The Joint Secretary to the
Government of India
Ministry of Finance,
Department of Revenue,
L14, Hudco Viahala Bldg., B Wing,
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Customs House, No.60, Rajaji Salai,
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4. The Superintendent of Central Excise,
B4 Range, B-Division,
317, Anna Salai, Teynampet,
Chennai - 600018.

+1 CC to Mr.N. Inbarajan, Advocate sr 57391.
+1 CC to Mr.Rajkumar Jhabukh , Advocate sr 57171

W.A.No.781 of 2011

SP(12/09/2018)