IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 26.6.2019

CORAM

THE HONOURABLE DR.JUSTICE VINEET KOTHARI
AND
THE HONOURABLE MR.JUSTICE C.V.KARTHIKEYAN

C.M.A.No.1393 of 2010

M/s.Ambika Cotton Mills Limited,
9A, Valluvar Street,
Sivanandha Colony,
Coimbatore 641 012. Appellant/Appellant

Versus

1. The Commissioner of Central
Excise (Appeals),
Lal Bahadur Shashtri Marg,
Central Revenue Buildings,
Madurai 625 002.

2. The Customs, Excise and Service
Tax Appellate Tribunal,
South Zonal Bench,
Shastri Bhavan Annexe, 1st Floor,
No.26, Haddows Road,
Chennai 600 006. Respondents/Respondents

Prayer: Civil Miscellaneous Appeal filed under Section 35G of the Central Excise Act, 1944 against the Final Order No.1583 of 2009 dated 30.10.2009 in Appeal No.E/557/2003 on the file of the Customs, Excise and Service Tax Appellate Tribunal, South Zonal Bench, Chennai.

For appellant : Mr.R.G.Muthukumaran

For R1 : Mr.T.Pramodkumar Chopda

For R2 : Tribunal

JUDGMENT
(Judgment of the court was made by Dr.VINEET KOTHARI, J.)

The Assessee has filed the present Appeal aggrieved by the order of the CESTAT dated 30.10.2009 whereby the learned Tribunal disallowed the MODVAT Credit to the Appellant/Assessee holding that since it was 100% EOU, Rule 57R or 57T or 57Q of CESTAT Rules does not allow any such MODVAT Credit in respect of duty paid by the Appellant on purchase of capital goods.

2. The relevant portion of the order passed by the Tribunal is quoted below for ready reference:-

> "4. After hearing both sides and on perusal of the records, we find that the appellant filed the MODVAT declaration vide letter dated 27.9.1999 under Rule 57T of the erstwhile Rules. Original authority observed that Rule 57R of the erstwhile Rules provides for the eligibility of credit of a manufacturer/supplier, who supplies exempted final products inter alia to a 100% EOU on capital goods. It does not refer to the eligibility of a 100% EOU. Commissioner (Appeals) has observed that EOUs are treated as special class and duty-free procurement is allowed under an exclusive notification with certain procedural requirements. It is seen that sub-rule (2) of Rule 100-H as it stood during the relevant period, provides that the provisions of Rule 57Q would not apply to excisable goods produced or manufactured by a 100% EOU. Rule 57Q of the erstwhile Rules is for eligibility for MODVAT credit and Rule 57T is for filing of declaration. Rule 57R provides that no MODVAT credit shall be allowed on capital goods, which are used exclusively in the manufacture of exempted final products except the final product is removed to a 100% EOU. Thus, there is no provision for availing credit by 100% EOU. In the case of GTN Exports (supra) it was held that restriction of utilisation of credit by a 100% EOU was lifted by Notification No.18/2004-CE(NT) dated 6.9.2004 and CBEC Circular No.799/32/2004-Cx dated 23.9.2004. So the denial of credit to the appellants is justified.
>
> 5. In view of the discussions, we do not find any reason to interfere with the order of the Commissioner (Appeals). Accordingly, the appeal filed by the appellants is dismissed."

3. The learned counsel for the Appellant/Assessee only press one point before us, which requires our consideration. He has submitted that Chapter V-A of the Central Excise Rules, 1944 deals with "Removal from a Free Trade Zone or from a Hundred Per Cent Export-Oriented Undertaking of Excisable Goods for Home Consumption". He has drawn our attention to Rule 100H in Chapter V-A and submitted that based on such provision, the Respondent-Department is contending that the Assessee is not

entitled to MODVAT Credit against the clearance of the final products made by the Assessee. The said provision is also quoted below for ready reference:-

> "Rule 100H. Exemption from certain provisions-- (1)The provisions contained in rules 43, 44, 45, 46, 47, 50, 52, 52A, 53, 53A, 54, 55, 56A, 56AA, 56B, 56C, 57A, 57Q, Chapter VII, Chapter VIII, rules 223A, 223B, 224, 228 and 229 shall not apply to a manufacturer who produces or manufactures excisable goods in a free trade zone.
>
> (2)The provisions contained in rules 43, 44, 45, 46, 47, 50, 52, 52A, 53, 53A, 54, 55, 56A, 56AA, 56B, 56C, 57A, 57Q, Chapter VII, rules 223A, 223B, 224, 228 and 229 shall not apply to excisable goods produced or manufactured by a hundred per cent export-oriented undertaking."

4. The learned counsel for the Appellant further submitted that Chapter V-A itself only applies to the 100% EOU of Excisable Goods that are made for Home Consumption, but, the Assessee in the present case made clearance of the final goods not for consumption in India but, for exporting such final products to the countries other than India. Therefore, the MODVAT Credit in respect of duty paid by him on the purchase of capital goods deserves to be allowed to the Appellant Assessee under Rule 57Q of the Central Excise Rules, 1944 and this aspect of the matter has not been considered by the learned Tribunal.

5. The learned counsel for the Revenue has drawn our attention to the Appellant's letter dated 27.9.1999 addressed to the Deputy Commissioner of Central Excise expressing its objection and the order dated 29.11.1999 passed thereon which was impugned before the learned Commissioner of Excise (Appeals). The relevant portion of the said order is also quoted below for ready reference:-

> "Please refer to your letter dated 27.9.1999 claiming MODVAT Credit on capital goods in terms of clause (1) of Rule 57R and also this office letter of even No. dated 7.9.99 on the above subject matter.
>
> As per the above said Rule 57R, no credit of specified duty shall be allowed on capital goods which are used exclusively in the manufacture of exempted final products except when the final product is either,
>
> i) cleared to a unit in a Free Trade Zone
>
> ii) cleared to a 100% EOU, or

iii) cleared to a Unit in a EHTP on STP.

From a careful reading of the said provisions you will appreciate that it refers to the eligibility of a manufacturer supplier who supplies exempted final products inter alia to 100% EOU, for modvat credit of duty paid on Capital Goods. It does not refer to the eligibility of a 100% EOU.

It is also observed that based on your Application dated 17.6.99 for permission Under 100% EOU Scheme, Development Commissioner has permitted/extended all facilities and privileges admissible as envisaged in Export/import Policy 1997-2002, on 28.7.99 itself, even before obtaining Central Excise L-4 Licence. Apart from the above, in terms of clause (2) of Rule 100-H the provisions contained in Rule 57Q shall not apply to excisable goods produced or manufactured by a 100% EOU. In other words, you are not eligible to apply the provisions of Section AAAA to Chapter V of the Central Excise Rules 1944. Since Rule 57R is covered under the above mentioned section AAAA of Chapter V of Central Excise Rules 1944, you are not eligible to apply the said provision of Rule 57R(1). Therefore it has not been found permissible to accede to your request to allow modvat credit on Capital Goods purchased by you."

6. Having heard the learned counsel for the parties and upon perusal of the order passed by the learned Tribunal, we are of the opinion that the learned Tribunal also failed to address itself to the main contention raised by the Appellant/Assessee before the learned Tribunal as well as this court that Chapter V-A of the Central Excise Rules 1944 itself did not apply the case of the Appellant/Assssee as the clearance of the excisable goods was made by the Appellant/Assessee not for Home Consumption but, for export wheres Chapter V-A apply only if the clearance of excisable goods is made for Home Consumption.

7. The learned counsel for the Appellant/Assessee contended before us that the Appellant/Assessee has a got a separate manufacturing unit from which the goods are cleared for Home Consumption or for sale within India, whereas from the 100% EOU in question, no such clearance is made for Home Consumption and therefore, Rule 57Q does not stand in the way as per Rule 100H under Chapter V-A of the Act Central Excise Rules, 1944.

8. In view of the aforesaid submission and the reasons, we are inclined to remit the matter back to the learned CESTAT for fresh consideration of this aspect. Accordingly, the order of the Tribunal, for this limited purpose, is set aside. The parties are relegated to the CESTAT and the learned Tribunal shall consider the above issue after giving opportunity to the parties and pass fresh orders within six months from today. The Civil Miscellaneous Appeal is disposed of accordingly. No costs.

Sd/-
Assistant Registrar(CO)

//True copy//

Sub Assistant Registrar

ssk.

To:

1. The Commissioner of Central
Excise (Appeals),
Lal Bahadur Shashtri Marg,
Central Revenue Buildings,
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2. The Customs, Excise and Service
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Shastri Bhavan Annexe, 1st Floor,
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Chennai 600 006.

Copy To
The Section Officer,
ER Section,
High Court, Madras

+1cc to Mr.T.Pramodkumar Chopda, Advocate SR.No.52906

+1cc to Mr.N.Muthukumar, Advocate SR.No.53044

C.M.A.No.1393 of 2010

RSI(CO)
GMY(13/08/2019)