IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 21.02.2019

CORAM

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

Civil Miscellaneous Appeal No.75 of 2009
and
Miscellaneous Petition No.1 of 2009

M/s.Lakshmi Automatic Loom Works Ltd.,
Knitting Machinery Division,
Singarampalayam, Kinathukadavu Post,
Pollachi-642 109, Tamilnadu. ... Appellant

-vs-

1.Customs, Excise & Service Tax Appellate Tribunal,
South Zonal Bench, Shastri Bhavan Annexe,
1st Floor, No.26, Haddows Road, Chennai-600 006.

2.Commissioner of Central Excise (Appeals),
No.6/7, ATD Street, Race Course Road,
Coimbatore-18.

3.Commissioner of Central Excise,
No.6/7, ATD Street, Race Course Road,
Coimbatore-18.

4.Assistant Commissioner of Central Excise,
Pollachi Division, D Colony, Jothi Nagar,
Pollachi-642 001. ... Respondents

APPEAL under Section 35G of the Central Excise Act, 1944 to set aside the order dated 10.10.2008 made in Misc.Order No.430 of 2008 on the file of the Customs, Excise and Service Tax Appellate Tribunal (Larger Bench), Chennai.

For Appellant : Mr.Raghavan Ramabadran

For RR2 to 4 : Mr.A.P.Srinivas,
Senior Standing Counsel

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JUDGMENT

(Delivered by T.S.Sivagnanam, J.)

This appeal has been filed by the appellant/assessee under Section 35G of the Central Excise Act, 1944, challenging the order of the Larger Bench of the Customs, Excise and Service Tax Appellate Tribunal (Larger Bench), Chennai (for brevity "the Tribunal") in Misc.Order No.430 of 2008, dated 10.10.2008.

2.The above appeal has been filed raising the following substantial questions of law, which was admitted on 12.01.2009:-

> "(i) Whether the 1st respondent is right in denying the benefit of duty free removal of Modvat credit availed inputs to 100% EOU under Notification No.1/95 CE dated 4.1.1995 solely on the ground that such inputs are not manufactured by them?
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> (ii) Whether the 1st respondent is right in denying the appellants Modvat credit on the inputs supplied to 100% EOU while the Central Excise Rules, 1944 permitted retention of Modvat credit used in the manufacture of final products that are cleared to EOU?
>
> (iii) Whether the 1st respondent is right in denying the duty free clearance of Modvat credit availed inputs to 100% EOU on the only ground that the inputs are not manufactured by the appellants when the Central Excise Rules, 1944 permitted clearance of finished goods without payment of duty to 100% EOU which is a 'deemed export'?
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> (iv) Whether the 1st respondent is right in denying the benefit of procurement of spares by a 100% EOU without payment of duty by interpreting the procedural condition as a substantive condition thereby denying the benefit of Notification No.1/95 CE dated 4.1.95 when the fact of usage of inputs by the appellants and its use as spares by the 100% EOU is not disputed?
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> (v) Whether the 1st respondent is right in interpreting the Notification No.1/95 CE dated 4.1.95 in a manner as done by them when the provisions of Central Excise Rules, 1944, permitted duty free procurement of capital goods/spares by an 100% EOU."

3.We have heard Mr.Raghavan Ramabadran, learned counsel for the appellant; and Mr.A.P.Srinivas, learned Senior Standing Counsel for the respondent.

4.The learned counsel on either side fairly submit that the questions of law raised in this appeal were considered by us in the case of M/s.Lakshmi Machine Works Limited vs. The Customs, Excise and Service Tax Appellate Tribunal, Chennai and Another [C.M.A.Nos.2197 to 2201 of 2005: dated 26.09.2018]. In the case of M/s.Lakshmi Machine Works Limited (supra), there were three substantial questions of law, which were raised for consideration of which, we find substantial question of law nos.1 and 2 would cover the questions raised before us in this appeal.

5.In the said case, we took note of a decision of the Division Bench of the High Court of Karnataka in the case of CCE, Bangalore-II vs. Solectron Centum Electronics Ltd. [(2014) 309 ELT 479 (Kar.)] and allowed the appeals by setting aside the common order passed by the Tribunal and remanded the matter to the Tribunal for fresh consideration in terms of the observations contained in our order. For useful reference, we quote the relevant paragraphs hereunder:-

> "15.However, in our considered view, this may not be very material at the stage of the matter, as we have to decide as to what course of action should be taken in the appeal. Useful reference can be made to the relevant portions of the decision in the case of Solectron Centum Electronics Ltd., rendered by the High Court of Karnataka, which read thus:
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> > "The argument is that the assessee is entitled to the said benefit only if the user industry brings excisable goods directly from the factory of manufacture or warehouse. In the instant case, when it removed goods to EHTP unit, it was not bringing excisable goods directly from the factory of manufacture or warehouse and therefore they are not entitled to the benefit of Notification No.22/2003. This is not a case where the assessee was purchasing those goods for its EHTP unit for the first time. It purchased the capital goods as well as inputs for its DTA unit. Therefore, duty was paid. Thereafter, with the permission of the authorities as reflected in CT-3, the inputs were removed from DTA unit to the EHTP unit. Similarly, the capital goods purchased for DTA unit was used, it was not removed as such and when it was removed to EHTP unit again, they have no liability to pay the credit. This aspect has been completely missed by the authority. They proceeded on the assumption that user industry thereby mean EHTP unit was not bringing excisable goods

directly from the factory of manufacture or warehouse and therefore they are not eligible for exemption. In the light of the aforesaid Notification which granted exemption, it is very clear that EHTP unit is entitled to exemption of payment of duty. Therefore, the assessee rightly availed the CENVAT credit and then reversed it when those goods were moved to EHTP unit and claimed refund. Therefore, the said question of law is answered in favour of the assessee and against the Revenue............

In so far as the inputs are concerned, it is not in dispute that the assessee while purchasing the said goods for its DTA unit has paid duty. It is only when those inputs as such were removed to the EHTP unit, the CENVAT credit availed was reversed. It is because, if the assessee had purchased those inputs for its EHTP unit by virtue of aforesaid Notification, there was no duty payable, as the said inputs were removed with the previous permission of the Department as reflected in CT-3. There was no liability to pay the duty and already CENVAT credit had been taken, it was reversed under protest and therefore, they were entitled to the refund of the said amount. That question is also answered in favour of the assessee and against the Revenue."

16.In the light of the decision in the case of Solectron Centum Electronics Ltd., we are of the considered view that the matters require reconsideration by the Tribunal. Though it may be true that the decision was not available when the Tribunal decided and passed the impugned common order, nevertheless, when the matter travelled upto the Supreme Court in the case of Lakshmi Automatic Loom Works Ltd., and the matter was remanded to the High Court of Karnataka for a fresh consideration, we are of the view that the Tribunal should have a fresh look into the matter taking note of the legal position as laid down in the case of Solectron Centum Electronics Ltd.

17.We are informed that another Division Bench of this Court in the case of Commissioner of GST & Central Excise, Chennai South Commissionerate vs. M/s.Velvette International Pharma Products Ltd., (Herbal Division) Chennai-49 [C.M.A.Nos.1093 and 1046 of 2018 dated 20.06.2018], remanded a similar issue for a fresh consideration before the Tribunal. However, we do not have the benefit of the judgment of the Tribunal. In any event, we do not express any opinion on the merits of the case and it is for the Tribunal to take note of the facts and circumstances of the case, decide the matters on the applicability of the law laid down in the case of Solectron Centum Electronics Ltd. and take a fresh decision in the matters on merits and in accordance with law.

18.For all the above reasons, the above civil miscellaneous appeals are allowed, the impugned common order is set aside and the matters are remanded to the Tribunal for a fresh consideration in terms of the observations made above. Consequently, the substantial questions of law framed for consideration are left open. No costs. Consequently, the connected CMPs are closed."

6.It is pointed out by the learned counsel appearing for the appellant that the only distinction in the instance case is that the impugned order passed by the Tribunal is an order passed by a Bench consisting of three Hon'ble Members whereas, the order which was subject matter of challenge in M/s.Lakshmi Machine Works Limited (supra) was an order passed by the Tribunal wherein, there were two Hon'ble Members.

7.In our considered view, we had entertained the appeals on the substantial questions of law raised by the assessee, and after taking note of the earlier decisions, which were remanded to the Tribunal for fresh consideration after setting aside the order of the Tribunal, we had followed the same, allowed the appeals and remanded the matter for fresh consideration leaving the substantial questions of law open. We are not persuaded to take a different decision in the instant case, as the issue requires to be heard afresh in terms of the order of remand.

8.For the above reasons, this civil miscellaneous appeal is allowed, the order passed by the Tribunal is set aside and the matter is remanded to the Tribunal for fresh consideration in terms of the observations in M/s.Lakshmi Machine Works Limited (supra) and the matter shall be clubbed and heard together with other connected matters. No costs.

Sd/-
Assistant Registrar

//True Copy//

Sub Assistant Registrar

abr

To

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

2. The Commissioner of Central Excise (Appeals),
   No.6/7, ATD Street, Race Course Road,
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4. The Assistant Commissioner of Central Excise,
   Pollachi Division, D Colony, Jothi Nagar,
   Pollachi-642 001.

copy to: The Section Officer,
VR Section,
High Court, Madras.

+1 cc to Mr.A.P.Srinivas, Advocate, S.R.No.16303

C.M.A.No.75 of 2009

GJ-II(CO)
SSM(26/03/2019).