IN THE HIGH COURT OF JUDICATURE AT MADRAS
DATED :: 25-06-2019

CORAM

THE HON'BLE DR.JUSTICE VINEET KOTHARI
AND
THE HON'BLE MR.JUSTICE C.V.KARTHIKEYAN

C.M.A.No.2359 of 2018

M/s.Supreme Petrochem Ltd. .... Appellant

-vs-

The Commissioner of Central Tax & Central Excise
North Commissionerate,
26/1, Mahatma Gandhi Road,
Nungambakkam,
Chennai - 600 034. ...Respondent

Appeal against the order, dated 13.03.2018, passed in Final Order No.40780/2018 in Appeal No.E/150/2011-DB by the Customs, Excise and Service Tax Appellate Tribunal, Chennai.

For Appellant : M/s.M.Karthikeyan for
Mr.S.Jaikumar

For Respondent: Mr.A.P.Srinivas,
Senior Standing Counsel.

JUDGMENT
(By Dr.Vineet Kothari,J.)

The Appellant-Assessee M/s.Supreme Petrochem Ltd., formerly known as M/s.Shin Ho Petrochemicals India Ltd., Chennai, has filed this Appeal under Section 35 G of the Central Excise Act,1944, aggrieved by the order passed by the Customs, Excise and Service Tax Appellate Tribunal, Chennai, dated 13.03.2018, in Final Order No.40780/2018 in Appeal No.E/150/2011-DB, by which the learned Tribunal dismissed the Appeal of the Assessee and denied Cenvat Credit to the Assessee under Rule 9 (1) (b) of the Cenvat Credit Rules,2004.

2. The facts, leading to the filing of this Appeal, in brief, are as under.

3. The Assessee imported ''Product Screen Separator Drive'' (second hand machinery) goods from M/s.SH Chemical Co.Ltd., South Korea, at a declared assessable value of

Rs.13,93,827/- (based on Invoice C&F value of US $ 29463). The Customs Authorities, upon checking, found that the said goods were undervalued and, accordingly, served a Show Cause Notice on 07.02.2007 on the Assessee, demanding additional Customs Duty of Rs.18.00 lakhs along with confiscation of the goods and imposition of penalty under Section 112 of the Customs Act,1962. The Assessee contended before the authorities that the goods in question were second hand and the same were supplied 'free of cost' by their related party in South Korea and only the packing and logistics costs were borne by the importer-assessee, which were reflected in the Invoice produced.

4. The Assessee, at the state of Show Cause Notice itself, straightaway approached the Settlement Commission, constituted under Chapter XIV-A of the Customs Act, 1962, for settlement of the dispute and agreed before the said Settlement Commission that it would be willing to pay additional Customs Duty, subject to the grant of immunity from penalty and prosecution in terms of the provisions under Section 127-A to 127-J of the Customs Act,1962, contained in Chapter XIV-A of the said Act.

5. Accordingly, the Settlement Commission passed an order on 31.05.2007 and imposing the duty liability of Rs.18,01,115/-, granted the aforesaid immunity from confiscation, penalty and prosecution under the Customs Act,1962, and under any other Central Acts. By way of 'disclaimer' in paragraph 4 of the short order passed by the Settlement Commission, it was stated that the 'Settlement' would be void, if it was subsequently found that it was obtained by fraud or misrepresentation of facts. Subject to that, the immunity, as aforesaid, stood granted to the Assessee.

6. The Assessee paid the said sum of Rs.18,01,115/-, but claimed the said amount as Cenvat Credit to the extent of Rs.11,58,012/- under the provisions of the Cenvat Credit Rules,2004, incorporated under the Central Excise Act,1944. The said claim of Cenvat Credit stood denied and refused by the adjudicating authority by an order, dated 31.03.2009, after serving a Show Cause Notice, dated 21.01.2009, on the Assessee. The Assessing Authority held that under Rule 9 (1) (b) of the Cenvat Credit Rules,2004, no credit is allowable where additional amount of duty is recoverable from the manufacturer or importer of inputs or capital goods on account of any non-levy or short-levy by reason of fraud, collusion or any wilful misstatement or suppression of facts or contravention of any provisions of the Central Excise Act,1944, or the Customs Act,1962 or the rules made thereunder.

7. Besides disallowing the said Cenvat Credit of Rs.11,58,012/-, the Joint Commissioner-Adjudicating Authority

also imposed 'Interest' under Rule 14 of the Cenvat Credit Rules,2004, and 'Penalty' of Rs.11,58,012/- under Section 11 AC of the Central Excise Act,1944, read with Rule 15 (2) of the Cenvat Credit Rules,2004. Aggrieved by the same, the Assessee went up on First Appeal before the Commissioner of Central Excise (Appeals), which Appeal too came to be dismissed by the said Appellate Authority on 29.12.2010 and the Second Appeal before the Tribunal also failed vide the impugned order before us, which was passed on 13.03.2018. Hence, the Assessee has preferred this Appeal before this Court.

8. Mr.S.Jaikumar, learned counsel for the Appellant-Assessee, urged before us that the claim of Cenvat Credit under a different enactment, namely, Cenvat Credit Rules,2004, framed under the Central Excise Act,1944, in respect of Customs Duty paid under the Customs Act,1962, was not prohibited by the provisions of the Customs Act,1962, and merely because the Appellant-Assessee approached the Settlement Commission, constituted under the provisions of the Customs Act,1962, it neither amounted to admission of any guilt, fraud or misstatement on the part of the Assessee nor the customs duty paid by the Assessee under the orders of the Settlement Commission could be held to be disentitled to the Cenvat Credit in terms of Cenvat Credit Rules,2004, under the Excise Law.

9. The learned counsel drew our attention particularly to Rule 3 Sub-clause (7), which stipulates that a manufacturer or purchaser of a final product shall be entitled to take credit of the additional duty leviable under Section 3 of the Customs Tariff Act equivalent to the duty of excise specified under the clause specified therein, which is, in short, called 'CVD'. Further, referring to Rule 9 of the same Rules, the learned counsel submitted that Rule 9 of the Cenvat Credit Rules,2004, permits documents and accounts to be produced by the manufacturer to claim Cenvat Credit and, therefore, the production of a Supplementary Invoice or a Challan in proof of payment of such CVD or customs duty is enough proof and since the said levy was not on account of non-levy or short-levy by reason of fraud, collusion or wilful misstatement or suppression of facts, the credit in question under Cenvat Credit Rules,2004, ought to have been allowed by the authorities below. He relied upon the judgments in the cases of Commissioner of Customs & Central Excise, Noida v. Silver Oak Laboratories Pvt. Ltd., 2014 (310) E.L.T. 256 (All.), of Allahabad High Court and Commissioner of Central Excise & Customs v. Philips India Ltd., 2008 (224) E.L.T. 44 (Guj.), of Gujarat High Court, to support his contention.

10. The learned counsel submitted that the Allahabad High Court, in the aforesaid case of Silver Oak Laboratories Pvt. Ltd., held that the Certificate issued by the Directorate

of Revenue Intelligence (DRI) was sufficient proof to claim credit under Rule 57E(4) of the Central Excise Rules,1944, as it then existed, and the Assessee, who was issued with such certificate by DRI in pursuance of the order passed by the Settlement Commission, was entitled to Credit under Rule 57E of the Central Excise Rules. Similarly, he urged that the Gujarat High Court, in the case of Philips India Ltd., cited above, has observed that where the duty has been paid after the order of the Settlement Commission on capital goods imported, the Assessee was entitled to Cenvat Credit in 1994-1995 under Rule 11, which was applicable at that relevant point of time. It was held on the interpretation and applicability of Rule 7 (1) (b) of the Cenvat Credit Rules,2002, and the question arose therein was, whether it would be applicable to the Respondent-Assessee, though it was claimed by the Respondent in the year 2002-2003.

11. On the other hand, Mr.A.P.Srinivas, learned Senior Standing Counsel for the Revenue, has supported the impugned orders passed by the authorities below and submitted that the first Show Cause Notice, which was served on the Assessee in the present case, was based on the allegations of fraud, collusion and misstatement about the undervaluation of the goods imported by the Assessee from its related party in South Korea. According to him, even though second hand machinery was imported, no price against that was shown to have been paid in the Invoice and only freight and packing costs were shown in the Invoice. It was only upon adjudication and verification by the authorities of the Department, the imposition of customs duty on the import of the said machinery was accepted by the Assessee without any contest, by approaching the Settlement Commission under the provision of Section 127 of Chapter XIV-A of the Customs Act,1962. He further submitted that merely because the Assessing Authority, in pursuance of the Show Cause Notice, was not allowed to give any findings with regard to fraud, collusion, misrepresentation or suppression of facts, it does not entitle the Assessee to claim Cenvat Credit under Rule 9 (1) (b) of the Cenvat Credit Rules,2004, later on, of the Duty so paid under the orders of the Settlement Commission. He also submitted that the order of the Settlement Commission at the stage of Show Cause Notice resulted in a Final Order in favour of the Assessee, giving him immunity from penalty and prosecution, subject to the condition of payment of additional Customs Duty determined, which was found to be payable, setting aside the undervaluation or depressed valuation of the imported items shown in the Invoice and, therefore, such Customs Duty paid by the Assessee cannot be said to be without the taint of suppression of facts and misrepresentation and, therefore, it cannot be allowed to be set off under any other law, including Cenvat Credit Rules under the Central Excise Act, in view of Section 127-J of the Customs Act. He, therefore, submitted that the authorities below, in the present case, have rightly denied

the Cenvat Credit to the Assessee and the learned Tribunal was justified in upholding the orders passed by the authorities below.

12. We have heard the learned counsel at length and perused the record, including the provisions of both the Acts and the Case Laws cited at the Bar.

13. We are of the considered opinion that the present Appeal of the Assessee has no merit and deserves to be dismissed. The effort of the Assessee in the present case seems to be taking away what was given by it under the order of the Settlement Commission under another law. In other words, what was paid under the Customs Act resulting in a binding order passed by the Settlement Commission is sought to be scuttled by the proceedings under the Central Excise Act,1944. It is precisely these kinds of loopholes, which were sought to be checked and plugged by the Parliament, by enacting the provision of Section 127-J of the Customs Act,1962, which is quoted below :

> ''127-J. Order of Settlement to be conclusive.-
> Every order of settlement passed under sub-section (5) of Section 127C shall be conclusive as to the matters stated therein and no matter covered by such order shall, save as otherwise provided in this Chapter, be reopened in any proceeding under this Act or under any other law for the time being in force.''

14. What is intended by making the order of the Settlement Commission to be conclusive is that both the parties, namely, the Assessee and the Revenue, are for ever bound and to remain within the four corners of the orders of the Settlement Commission and this is the specific negation of re-opening of any proceedings under the Act (The Customs Act,1962) or under any other law for the time being in force (including the Central Excise Act,1944, or the Cenvat Credit Rules made thereunder).

15. If what the learned counsel for the Assessee contended was to be allowed as claimed, the very purpose of settlement of dispute, in which the Assessee succeeded in not allowing the authorities to arrive at any adverse findings of fact as the Settlement Commission was approached at the initial stage of Show Cause Notice itself and also got immunities from penalty and prosecution and all thus would be defeated, will undo what was achieved for settling the dispute between both the parties, by invoking Chapter XIV of the Customs Act,1962, for settlement of the dispute.

16. The provision of Chapter XIV-A of the Customs Act,1962, providing for settlement of disputes by the Settlement

Commission is an independent Code and while it is provided to enact a remedial forum for putting an end to disputes in a quicker and more peaceful manner, it gives several advantages to the Assessees and the disputing parties mainly in the form of immunity from penalty and prosecution, which rigor of law would have been otherwise applicable to the Assessee besides the determination of disputed amount of duty under the provisions of the Act. The impermissibility of reopening of the order passed by the Settlement Commission in any proceeding under the Customs Act itself or under any other law does not only mean Assessment or other legal proceedings, but the said provision is intended to put an end to any possibility of later on tinkering, modification, adjustment or disturbance of what has been achieved by that order.

17. The novel argument of the learned counsel for the Assessee that the customs duty paid under the orders of the Settlement Commission is nothing but CVD, which, per se, is allowable as Cenvat Credit is oversimplification. What is not provided in law cannot be granted. The initial proceedings initiated against the Assessee in the present case itself proceeded on the basis of the allegation against the Assessee that the Assessee had undervalued the value of the imported goods, which were shown to have been imported as 'free of cost' from a related party in South Korea and, therefore, there was a purported evasion of Customs Duty by the Assessee. Sooner the Show Cause Notice with these allegations was served upon the Assessee, the Assessee took shelter before the Settlement Commission for avoiding the rigmarole of all these assessment and penalty proceedings before the regular authorities of the Act, namely, the Assessment or the Appellate proceedings. Once the Assessee obtained a favourable order from the Settlement Commission and paid the Customs Duty determined to the tune of of Rs.18,01,115/-, there was no scope left for the Assessee to claim such amount in the form of refund or adjustment either under the Customs Act itself or under any other law, including the Central Excise Act and the Cenvat Credit Rules.

18. Giving a finality and conclusiveness to the orders of the Settlement Commission has to be taken to its logical end and the position inter se between the parties flowing from the order of the Settlement Commission cannot be allowed to be disturbed in any manner, much less any indirect gain or duty paid can be allowed to be taken back by the Assessee under the provisions of any other law, including the Central Excise Act and the Cenvat Credit Rules. Therefore, we do not find any merit in the said contention of the Assessee and the same is liable to be rejected, which is, accordingly, rejected.

19. The case of the Revenue that even Rule 9 (1) (b) of the Cenvat Credit Rules,2004, prohibits the credit of excise

duty or customs duty in case the same has been paid and recovered from the Assessee on account of earlier non-levy or short-levy, by reason of fraud, collusion, wilful misstatement or suppression of facts, also has considerable force.

20. The contents of the Show Cause Notice in the present case, would clearly reveal that the case of the Revenue against the Assessee in the said Show Cause Notice was that of misstatement of facts and suppression of facts as well as misrepresentation of the assessable value of the goods to the extent of Rs.49,02,861/-, which was declared only at Rs.13,93,827/-. Merely because the said Show Cause Notice did not result in any Final Order at the instance of the Assessee itself, it does not mean that there was no case of fraud or misrepresentation or wrong declaration on the part of the Assessee. Therefore, even on the applicability of Rule 9 (1) (b) of the Cenvat Credit Rules,2004, we find that the denial of Cenvat Credit to the Assessee in the present case independently was also justified.

21. Viewed from any angle, we do not find any merit in the contention raised by the learned counsel for the Assessee that the Assessee was independently entitled to Cenvat Credit in respect of the CVD paid by it under the orders of the Customs Duty Settlement Commission in the present case under the provisions of Cenvat Credit Rules,2004. Thus, the present Appeal of the Assessee is liable to be dismissed.

22. The judgments relied upon by the learned counsel for the Assessee also are of little help to him. The Allahabad High Court's decision in Silver Oak Laboratories Pvt. Ltd., cited above, merely turned on the basis of Directorate of Revenue Intelligence's Certificate coupled with the Supplementary Invoice, which was produced by the Assessee in terms of Rule 57E of the Central Excise Rules,1944, as it then existed, and the Court held that on the basis of these documents, the Assessee was held entitled to Cenvat Credit. Nothing about the scope of Rule 9 (1) (b) and Section 127-J of the Customs Act,1962, as we have discussed above, even came up for consideration before the Division Bench of the Allahabad High court and, therefore, the said judgment is of no avail to the Assessee in the present case.

23. Similarly, the observation made by the Division Bench of the Gujarat High Court in the case of Philips India Ltd., referred to supra, in a short order about the applicability of Rule 7 (1) (b) of the Cenvat Credit Rules,2002, where such Cenvat Credit was claimed in the year 2002-2003 itself in Paragraph 3 of the order that the duty finally paid after the orders of the Settlement Commission upon capital goods imported was entitled for Cenvat Credit in the year 1994-95

under Rule 11 applicable at that point of time, does not throw light on the case of the Assessee before us as to how that observation is of any help to the present case of the Assessee.

24. Civil Miscellaneous Appeal filed by the Assessee is, accordingly, dismissed. No costs. Consequently, the connected C.M.P.No.17983 of 2018 also stands dismissed.

Sd/-
Assistant Registrar(CS V)

//True Copy//

Sub Assistant Registrar

dixit

To

1.The Commissioner of Central Tax & Central Excise
North Commissionerate,
26/1, Mahatma Gandhi Road,
Nungambakkam,
Chennai - 600 034.

2.The Customs,
Excise and Service Tax Appellate Tribunal,
Chennai.

+1cc to Mr.Jayakumar.S, Advocate, S.R.No.53181
+1cc to Mr.A.P.Srinivas, Advocate, S.R.No.52810

C.M.A.No.2359 OF 2018

RR(CO)

RRS(06/08/2019)