HONOURABLE SRI JUSTICE V. RAMASUBRAMANIAN

AND

HONOURABLE SRI JUSTICE P. KESHAVA RAO

C.E.A. No.17 OF 2019

JUDGMENT: (Per Hon'ble Sri Justice V. Ramasubramanian)

The revenue has come up with the above appeal under Section 35G of the Central Excise Act, 1944, raising the following substantial questions of law:

> "(i) Whether the decision of the Hon'ble CESTAT, in the Final Order No.A/30848/2018 dated.04.07.2018 in Appeal No.E/1219/2010 is correct in allowing the assessee's Appeal simply relying upon the decision of the Hon'ble Supreme Court, in the case of M/s. Mafatlal Industries Ltd., without appreciating that the assessee has received the duty amount from M/s ITC ltd which in turn passed on to the consumer thereby disentitling it to receive the refund?
>
> (ii) Whether the CESTAT is correct in holding that the bar of 'unjust enrichment' would not apply by relying upon the decision of the Hon'ble Apex Court in the case of M/s Mafatlal Industries Ltd., ignoring the fact that the finalization of provisional assessment from which refund arose was after the amendment to Rule 9B(5) applying bar of unjust enrichment and when the same was ratified by the Hon'ble Apex Court in Para 3 of the judgment in the case of Commissioner Vs TVS Suzuki Ltd., 2003 (156) E.L.T. 161 (S.C.) as "In order to get over the situation arising under Mafatlal Industries

> Ltd., (supra) vide notification No.45/99-C.E. (N.T.), dated 25-6-1999, an amendment was made in sub-rule (5) of Rule 9B by adding a proviso thereto. The effect of the proviso is that even after finalization of the provisional assessment under Rule 9B(5), if it is found that an assessee is entitled to refund, such refund shall not be made to him except in accordance with the procedure established under sub-section (2) of Section 11B of the Act."?"

2. The first question turns on facts. Therefore, we do not think that the same deserves any consideration as substantial question of law.

3. The second question is covered by a decision of this Court in **Commissioner of Customs, Central Excise & Service Tax, Hyderabad - III Commissionerate v. M/s. Amrutanjan Health Care Limited**[1]. Paragraph No.12 of the said decision reads as follows:

> "The above narration from the material placed before this Court is made to put on record in the method and manner in which the issue was dealt with from time to time, creating a mass of facts without adverting to the core issue viz., the applicability or otherwise of the amended Rule 9B in 1999 for the transactions prior to 1995 and particularly, in relation to the payments made under protest, on provisional basis, when there is a doubt in respect of levying excise duty. In its order, the Appellate Authority had relied on the judgment of the Supreme Court in *Sahakari Khand Udyog Mandal Limited* v. CCE -

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[1] **2018(15) GSTL 177 (AP)**

2005 (181) E.L.T. 328 (S.C.). In the said judgment and in the judgment rendered in *State of Maharashtra v. Swanstone Multiplex Cinema Pvt. Ltd.* – (2009) 8 SCC 235, there is no reference to the earlier judgments of the Supreme Court in *TVS Suzuki Ltd.* and also *Sinkhai Synthetics & Chemicals v. Collector Of Central Excise* – (2002) 9 SCC 416 = 2002 (143) E.L.T. 17 wherein the applicability of amended Rule 9B, in particular sub-rule (5) was discussed. The specific plea that sub-rule (5) of Rule 9B would be applicable to the refund claims made even prior to the amended provision came into existence, was rejected holding that the operation of sub-rule (5) of Rule 9B was not retrospective. At any rate, as noted supra, the aspect of entitlement of the assessee for refund has become final, by order-in-Appeal dated 30.09.2008, except to the extent of quantification of the refund which order also attained finality on account of the orders of the Tribunal dated 26.03.2009."

4. Therefore, following the same, the appeal is dismissed. No order as to costs.

As a sequel thereto, Miscellaneous Applications, if any pending, in the appeal stand closed.

V. RAMASUBRAMANIAN, J

P. KESHAVA RAO, J

April 18, 2019.
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