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CEXA/11/2021
IA NO: GA/1/2021, GA/2/2021)
IN THE HIGH COURT AT CALCUTTA
SPECIAL JURISDICTION (CENTRAL EXCISE)
ORIGINAL SIDE

COMMISSIONER OF CENTRAL CUSTOMS, BOLPUR
VERSUS
XPRO INDIA LIMITED

BEFORE :

THE HON'BLE JUSTICE T.S. SIVAGNANAM
And
THE HON'BLE JUSTICE HIRANMAY BHATTACHARYYA

Date : 15th November, 2021

Appearance:-

Mr. Somnath Ganguli, Adv.
Mr. Tapan Bhanja, Adv.
Ms. Sabnam Basu, Adv.
Ms. Priyamvada Singh, Adv.
... For Appellant
Mr. Deepro Sen, Adv.
... For Respondent

GA/1/2021

The Court : Heard Mr. Somnath Ganguli, learned Counsel appearing for the appellant/revenue and Mr. Deepro Sen, learned Counsel appearing for the respondent/assessee. There is a delay of 779 days in filing the appeal. The learned Counsel for the respondent/assessee vehemently opposes the delay by stating that there is no cause, much less sufficient cause, shown by the appellant to explain the inordinate delay in filing the appeal, more particularly, the period between 2nd June, 2019 to 14th March, 2020, when there is a delay of 287 days.

Learned Counsel for the appellant/revenue submitted that on account of frequent transfer of the officers of the department and change of person in charge of the file and change of counsel, delay has occurred. In any event, since we are inclined to hear the matter on merits, we exercise discretion and condone the delay in filing the appeal. Accordingly, the application for condonation of delay is allowed.

CEXA/11/2021

This appeal filed by the Revenue under Section 35G(1) of the Central Excise Act, 1944(the Act, for brevity) is directed against the order dated 14.06.2018 passed by the Customs, Excise and Service Tax Appellate Tribunal, Kolkata, Eastern Zonal Bench (the Tribunal) in Excise Appeal No.E/81/2008. The revenue has raised following substantial questions of law for consideration:

1. Whether the Reprocessed Polypropylene Granules (RPG) manufactured by the respondent is a by-product or final product and if it is a final product, whether the respondent is required to reverse the proportionate Modvat Credit in terms of Rule 57C of the Central Excise Rules, 1994 ?

2. Whether the Learned Tribunal is justified in allowing the appeal of the respondent without appreciating that the respondent had not followed the relevant provisions of the Central Excise Rules, 1994 as well as the terms and condition of the Notification No.14/92 dated 01.03.1992 ?
3. Whether the order passed by the Learned Tribunal is perverse and contrary to the findings of the adjudicating authority and a reasonable one ?
4. Whether the decisions relied upon by the Tribunal is applicable in the present facts and circumstances of the case or not ?
5. Whether in the facts and circumstances of the case the Tribunal has erred in observing that the impugned product namely Re-Processed Polypropylene Granule (RPG) has arisen out of waste and scrap of plastics is a by-product ?

We have elaborately heard Mr. Ganguli, learned Counsel appearing for the appellant/revenue and Mr. Sen, learned Counsel appearing for the respondent/assessee. The short question involved in the present appeal is with regard to whether the assessee in terms of Rule 57C of the MODVAT Credit Rules is entitled to claim credit of duty on the ground that the final products are exempted. The assessee is engaged in the manufacture of Biaxially Oriented Polypropylene Films (BOPP) and they had filed MODVAT credit on Polypropylene Granules but had cleared the waste and scrap of plastics arisen from such inputs, and payment of central excise duty. According to the revenue, in terms of Notification No.42/92 dated 1st March, 1992, waste and scrap of plastics falling under Chapter 39.15 are chargeable to Nil rate of duty and if such waste arises from the goods under Chapter 39 of the Central Excise Tariff Act, 1985 of which duty has been paid and if this condition is not fulfilled, such waste is chargeable to Central Excise duty. Further, the revenue relied on Rule 57F (4) (a) of the Central Excise Rules, 1944 to state that any waste material arising from the processing of inputs in respect of which credit has been taken may be removed on payment of duty, as if such waste is manufactured in the factory. The allegation against the respondent/assessee was that they have availed MODVAT credit on Polypropylene and cleared the waste and scrap of plastics arising from processing of such inputs without payment of duty. Further allegation was that the respondent/assessee has manufactured Reprocessed Polypropylene Granules (RPG) out of this waste and scrap of plastics arising from the processing imported and indigenous Polypropylene Granules. Thus, there is an allegation that the assessee has irregularly availed MODVAT credit. This led to the issuance of a show cause notice dated 21.04.1997 which ultimately culminated in an adjudication order dated 25.09.2007 demanding payment of Central Excise duty on the waste and scrap of plastics cleared during the period in question.

Aggrieved by such order, the assessee preferred appeal before the Tribunal. The Tribunal has allowed the appeal filed by the assessee and questioning the correctness of the same the revenue is before us by way of this appeal raising the aforementioned substantial questions of law.

On a perusal of the order impugned before us, we find that the Tribunal after taking note of the statutory provisions took note of the decisions of the Tribunal, CESTAT West Zonal Bench, Mumbai in the case of Commissioner of Central Excise and Customs, Aurangabad –versus- Cosmo Films Ltd. reported in 2014(307) ELT 967 (Tri-Mum) and allowed the assessee's case. We find that the said decision was in respect of another assessee who are engaged in the same process of manufacture namely manufacture of BOPP Films. The Tribunal took note of the decision. The Tribunal followed the case of MRF Ltd. and Supreme Industries, reported in 2002 (148) ELT 484, which was upheld by the Hon'ble Supreme Court in 2003 (153) ELT A 91 (SC) wherein it was held that by taking credit the inputs do not become non-duty paid. The Tribunal also referred to the decision of High Court of Allahabad reported in 2014(300) ELT 372 (All.) wherein it was held that bagasse which arose in the manufacture of sugar, it was waste product and not a final product. Applying these decisions, the Tribunal in Cosmo Films (supra) held that the plastic waste and scrap arising in the course of BOPP films cannot be considered as a final product and it is only a bye-product and, therefore, the provision of

Rule 57D is applicable to the facts of the case and, therefore, the assessee was held to have the rightly taken the credit on the inputs contained in the waste and scrap of plastics which has arisen as bye-product in the course of manufacture of the BOPP films. Furthermore, the Tribunal took note of two other decisions, namely, Collector of Central Excise, Chandigarh –versus- Maxon India Ltd. reported in 1994 (72) ELT 483 (Tribunal) and Commissioner of Central Excise and Customs, Aurangabad –versus- Prime Plastic Pvt. Ltd. reported in 1999(112) ELT 337 (Tribunal) wherein an identical issue was considered and held that waste and scrap of plastic which emerges during the process of manufacture is a bye-product and not a final product. Before us there is nothing on record to indicate that those decisions of the Tribunal have been reversed or modified by the High Court or by the Hon'ble Supreme Court. That apart, we find that the conclusion arrived at by the Tribunal examining the nature of manufacturing activity done by the respondent assessee and the fact that the Polypropylene Granules which were procured being admittedly duty paid items, the bye-product which is generated during the course of manufacture can never be treated as a non-duty paid item. Therefore, we find that the conclusion arrived at by the Tribunal does not call for any interference.

Accordingly, the appeal being CEXA 11 of 2021 is dismissed and the substantial questions of law are answered against the Revenue.

With the dismissal of the appeal, the connected application being GA/2/2021 also stands dismissed.

(T.S. SIVAGNANAM, J.)

(HIRANMAY BHATTACHARYYA, J.)

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