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IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 16.09.2021

CORAM:

The Honourable Mr.Justice T.S.SIVAGNANAM
and
The Honourable Mr.Justice SATHI KUMAR SUKUMARA KURUP

C.M.A.No.2083 of 2010
and M.P.No.1 of 2010

M/s.Sudhan Spinning Mills P. Ltd.,
Thadi Combu,
Dindigul - 624 709. ...Appellant

Vs

The Commissioner of Central Excise,
Office of the Commissioner of Central Excise,
Madurai. ...Respondent

APPEAL under Section 35G of the Central Excise Act against the order dated 10.02.2010 made Final Order No.174 of 2010 in Appeal No.E/729/2007 on the file of the Customs, Excise and Service Tax Appellate Tribunal, South Zonal Bench at Chennai.

For Appellant : No appearance

For Respondent : Mr.T.Pramod Kumar Chopda

JUDGMENT

T.S.Sivagnanam,J

This appeal filed by the assessee under Section 35G of the Central Excise Act, 1944 is directed against the order dated 10.02.2010 passed by the Customs, Excise and Service Tax Appellate Tribunal, South Zonal Bench at Chennai ['the Tribunal' for brevity] in Final Order No.174 of 2010, whereby the appeal filed by the appellant/assessee was dismissed.

2.The facts leading to the filing of the appeal before the Tribunal is as hereunder:

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The assessee is a Private Limited Company engaged in the manufacture of cotton yarn falling under Chapter 52 of the First Schedule to the Central Excise Tariff Act, 1985. The assessee was initially a Domestic Tariff Area Unit [DTA Unit] till 1999. Thereafter, it had obtained a license as a 100% Export Oriented Unit [EOU] for the manufacture and export of cotton yarn during the period from 27.08.1999 to 26.08.2004 and from 27.08.2004 to 29.05.2006. The assessee had imported capital goods and also procured indigenously manufactured goods without payment of central excise duty as per the notification for the use and in the manufacture and export of cotton yarns to fulfill the export obligation as prescribed in the Foreign Trade Policy [FTP]. Subsequently, the assessee exited from their EOU status and addressed a letter to the Development Commissioner and sought for debonding of goods lying in stock which included imported and indigenous capital goods. The appellant proceeded to take steps to discontinue their EOU status by adopting the procedure in the Hand Book of procedures for EOU as made applicable to the Export Promotion Capital Goods Scheme [EPCG Scheme] and by letter dated 15.10.2005 addressed the Development Commissioner to request to issue No Objection Certificate for debonding and accordingly, a letter was issued on 10.11.2005 and based on the said letter, the assessee approached the Assistant Commissioner of Central Excise on 14.12.2005 and informed that the assessee would pay the duties and debonding after their assessments and also wrote to the Development Commissioner of Madras Export Processing Zone [MEPZ] about their desire to opt for EPCG Scheme in terms of para 6.18 of FTP and para 5.4 of Hand Book of Procedure and requested to recommend their case to the Joint Director General of Foreign Trade, Coimbatore for issue of EPCG license. Based on the letter dated 14.12.2005, the Joint Director General of Foreign Trade issued necessary certificate for issue of EPCG license. Accordingly, license dated 02.02.2006 was issued to the assessee with the condition that the license would be utilized under Customs Notification 97/2004. Further, the assessee placed heavy reliance on the letter dated 18.05.2006 written by the Assistant Commissioner of Central Excise, Dindigul I Division to the Development Commissioner stating that no customs and central excise duties are pending from the assessee Unit. Based upon the said letter, the Development Commissioner by letter dated 29.05.2006 granted final exit from 100% EOU status in DTA. While so, the respondent issued show cause notice dated 30.04.2007 stating that the assessee has not paid applicable central excise duties on the depreciated value of the indigenously procured capital goods and demanded a sum of Rs.1,30,50,370/- together with interest. By reply dated 08.06.2007 the assessee denied their liability and also informed that they are in the process of performing their export obligations. The reply was rejected and the proposal made in the show cause notice was confirmed and

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order-in-original was passed dated 24.08.2007. Aggrieved by the same, the assessee preferred appeal before the Tribunal which has been dismissed by the impugned order.

3.The assessee has raised the following substantial questions of law for consideration:

> "1.Whether on the facts and circumstances of the case, the Appellate Tribunal is right in law in confirming the demand of Rs.1,30,50,370/- equal to the central excise duty arrived on the depreciated value of the indigenously procured capital goods under section 11A of the Central Excise Act, 1944?
>
> 2.Whether on the facts and circumstances of the case, the Appellate Tribunal is right in law in brushing aside the case on merits and holding that fulfillment of export obligation to a higher limit is not relevant in view of the fact that the payment of duty is already compensated by fixing export obligation demand of duty again from the appellant is not justifiable?
>
> 3.Whether on the facts and circumstances of the case, the Appellate Tribunal is right in law in not adjudicating upon the issues with regard to the fulfillment of export obligation when the same was raised and pleaded before it?"

4.We have heard Mr.T.Pramod Kumar Chopda, learned counsel appearing for the revenue. None appears for the appellant/assessee. The matter has been on the Board of the Court for final hearing from January 2020 and the order sheet reveals at every stage the Board of this Court, where one of us [TSSJ] was a member from the year 2018 and repeatedly adjournment was sought for and very recently also on four occasions, adjournment was sought for and those requests were accommodated, yet today [16.09.2021], when the matter is taken up, none appears for the appellant.

5.The sheet anchor of the case of the appellant is based upon the letter written by the Assistant Commissioner, Central Excise, Dindigul I, dated 18.05.2006 to the Development Commissioner, wherein it has been stated that the assessee has paid all the customs and central excise duty and nothing is pending from their Unit. We have perused the letter dated 18.05.2006 which has been addressed by the Assistant Commissioner to the Development Commissioner, MEPS, Tambaram. In paragraph 2 of the letter which has been mentioned that the entire excise duty liability of Rs.1,30,50,369/- on indigenous capital goods against the EPCG license has been discharged by

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the assessee. The final exit order was given by the Assistant Development Commissioner by order dated 29.05.2006. The effect of such letter was considered by the Tribunal. In fact the Tribunal in paragraph 4 of its order records the response of the assessee to a query raised by the Tribunal. The Tribunal has called upon the assessee to state as to whether they are contesting the dutiability of the indigenously procured capital goods on merit or they are contesting the amount of duty quantified. The candid response of the assessee has been recorded by the Tribunal in the following terms:

> "............ On a query from the Bench, the learned counsel states that the appellants are not contesting the dutiability of the indigenously procured capital goods on merit nor they are contesting the amount of duty quantified."

6.Thus, it is clear that the assessee did not contest the dutiability of the indigenously procured capital goods on merit or on the quantum. Therefore, their plea was that based on the letter of the Assistant Commissioner dated 18.05.2006 central excise duty liability stood discharged. Unfortunately the assessee who has been registered under the provisions of the Central Excise Act has failed to take note of rudimentary legal principles. If the assessee claims that he has discharged the duty liability, the same should be established in the manner known to law by producing the necessary challan or an order to the said effect passed by the competent Assessing Officer. The Tribunal rightly held that the letter dated 18.05.2006 by the Assistant Commissioner to the Development Commissioner, MEPZ is not an order. Furthermore, the Tribunal rightly took note of the legal position that the assessment order is not required to be appealed against for raising a demand of short levy or non-levy and this power is exercisable in terms of section 11A of the Central Excise Act, 1944 and section 28 of the Customs Act, 1962. In this regard, the decision relied on by the revenue had been taken note of, namely, Venus Enterprises vs. Commissioner of Customs, Chennai [2006 (199) ELT 405 (Mad.)] which had been upheld by the Hon'ble Supreme Court as reported in 2007 (209) ELT A61 (SC). Furthermore, the Tribunal in paragraph 6 has once again recorded that the assessees are not challenging the fact that they are required to pay the excise duty on the amortized value of the indigenously procured capital goods duty-free under the EOU scheme when they converted to EPCG scheme on merit and they are also not challenging the fact that the quantum of duty computed which was payable by them has not been actually paid. The only challenge which was made by the assessee before the Tribunal is that the Assistant Commissioner's letter dated 18.05.2006 has not been appealed against and reversed and hence, no demand of duty can be raised. This contention was rightly

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rejected by the Tribunal by taking note of the fact that the assessee was fully aware of the duty liability which was clear from their letter dated 14.11.2005, which reads as follows:

> "This has reference to our opting out of EOU Scheme and operate under the EPCG Scheme Regarding.
>
> We are glad to inform you that the Development Commissioner, Madras Export Processing Zone, Chennai has given his inprincipal No Objection Certificate to us for Exit from the EOU Scheme to operate under EPCG Scheme. A copy of the letter received from the Development Commissioner is enclosed herein for your reference.
>
> As stipulated in the letter, we are agreeable to pay Customs & Central Excise Duty for the Capital Goods [on the Amortized Value], Raw materials, Consumables and Finished goods in stock at the applicable rate of Duty both for the Imported and Indigenous goods.
>
> After assessing the Duty amount to be paid for the plant & machinery and other materials in stock, we will submit a separate letter shortly for doing the needful."

7.A reading of the above letter will clearly show that the assessee in no uncertain terms agreed to pay Customs & Central Excise Duty for the Capital Goods on the amortized value, Raw materials, Consumables and Finished goods in stock at the applicable rate of Duty both for the imported and indigenous goods. Furthermore, in the letter dated 01.12.2005 when the assessee addressed the Development Commissioner, they have indicated the duty liability in respect of indigenous capital goods and also submitted the invoices in respect of such capital goods.

8.Thus, the Tribunal was right in stating that the intention of the assessee was not as that of an honest tax payer as they failed to come forward to disclose that they have not paid the duty amount. That apart, as observed earlier the letter dated 18.05.2006 cannot be regarded as an assessment order and it is merely an inter-departmental communication. Admittedly, there was no adjudication done prior to the letter dated 18.05.2006 for it to be considered as an adjudication order and at best, it can be taken to be an inadvertent mistake committed by the authority in addressing the Development Commissioner. Precisely, for this reason the Tribunal has granted relief to the assessee by deleting the penalty which also in our considered view is a proper exercise of discretion by the

Tribunal. Before the Tribunal, the assessee having admitted to the fact that they have not discharged the duty liability took an alternate stand that they have been burdened with fulfillment of export obligation to a higher limit and if it is so, they will be entitled to draw back and consequently, the demand would be revenue neutral. This issue was considered by the Tribunal and rightly held to be not relevant dispute before the Tribunal as the appellant had to approach the DGFT authorities for making any adjustment subject to their eligibility. Thus, we find that the Tribunal has rightly re-appreciated the facts and rejected the appeal filed by the appellant/assessee.

9.Thus, we find no question of law much less the substantial question of law arising for consideration in this appeal. Accordingly, the appeal fails and is dismissed. No costs.

Sd/-
Assistant Registrar(CCC)

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Sub Assistant Registrar

cse

To

The Customs, Excise and Service Tax
Appellate Tribunal,
South Zonal Bench at Chennai.

+1cc to Mr.T.Pramod Kumar Chopda, Advocate Sr No.47589

C.M.A.No.2083 of 2010

RLD (CO)
PR (27/10/2021)

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