IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 17.02.2021

CORAM :

The Honourable Mr.Justice T.S.SIVAGNANAM
and
The Honourable Ms.Justice R.N.MANJULA

W.A.No.425 of 2021
and
C.M.P.No.1701 of 2021

M/s.Same Deutz Fahr India (P) Ltd.,
Rep. by its Joint General Manager-Finance,
S.Tamil Selvan,
No.72-M, SIPCOT Industrial Estate,
Ranipet - 632 403. ...Appellant

Vs

The Commissioner of Central Excise,
Chennai-III Commissionerate,
No.26/1, Mahatma Gandhi Road,
Nungambakkam,
Chennai - 600 034. ...Respondent

PRAYER: Writ Appeal filed under Clause 15 of Letters Patent to set aside the order dated 11.12.2020 passed in W.P.No.28045 of 2015.

Prayer in W.P.No.28045 of 2015:

Writ Petition filed under Article 226 of the Constitution of India Praying for issuance of a Writ of Certiorari Calling for the records of the respondent culminating in Order in Original No.09/2015 (CE) dated 28.5.2015 issued from File No.C.No.V/15/87/15/2014-C.Ex.-Adj.III and quash the same.

For Appellant: Mr.S.Murugappan

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

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

This writ appeal, filed by the writ petitioner, is directed against the order dated 11.12.2020 passed in W.P.No.28045 of 2015

2. The writ petition was filed challenging the Order-in-Original dated 28.05.2015 passed by the respondent, the Commissioner of Central Excise, Chennai - III Commissionerate. When the writ petition was entertained in the year 2015, an order of interim stay was granted on 17.9.2015, which continued to remain in force till the writ petition was disposed of.

3. From the materials placed before this Court, we find that no counter affidavit was filed by the Department and when the writ petition was taken up for hearing on 11.12.2020, the Court opined that the appellant should avail alternative remedy. It is no doubt true that when a case arises under the Taxation Statute, the assessee should be relegated to avail the appeal remedy. However, this is a rule of discretion by exercising self restraint by the Constitutional Courts. There have been several decisions of the Hon'ble Supreme Court which have held that when writ petitions are pending for several years and when they are taken up for final hearing, the Court should seldom relegate the party to avail the alternative remedy as it would be very harsh on the party to approach the statutory authority after several years. Precisely, in the instant case, this has happened and after nearly six years, the petitioner has been directed to avail the appeal remedy.

4. Therefore, we are of the view that at this juncture, no useful purpose would be served in directing the appellant to file an appeal before the Tribunal and more particularly when an argument was made before the adjudicating authority. The point, which was canvassed by the assessee would have wider ramification and may be applicable to other export oriented units also. Though, in paragraph 10.5 of the order, the Commissioner recorded the submission made on behalf of the appellant, there is no finding as to whether the said submission merits consideration or not.

5. It is brought to the notice of this Court by the learned counsel for the appellant that the Directorate General of Export Promotion had issued a clarification on 02.04.2008 and the said clarification would enure in favour of the appellant/assessee. The said clarification is as hereunder:

"DIRECTORATE GENERAL OF EXPORT PROMOTION
(CBEC, Department of Revenue, Ministry of Finance,
Govt. of India)
First Floor, Hotel Janpath, New Delhi – 110001
EPABX No.: - 23344616, 23344622, Fax:- 011-23344624/630

F. No. DGEP/EOU/03/2007/879 Date: 02.04.2008

To
The Chief Commissioner of Central Excise,
Mumbai-I zone,
115, New Central Excise Building,
M.K. Road, Church Gate,
Mumbai - 400020

Sir,

Sub: Benefits of exemption notification issued under section 5A of Central Excise Act on the on the goods cleared into DTA by EOUs – Clarification in respect of representation of M/s. A.R. Sulphonates Pvt. Ltd., Thane – reg.

Please refer to F.No. IV/16-Tech-16/MCX/CCO-I/2008 dated 21.02.2008 on the above cited subject.

2. The issue has been examined. EOUs are required to pay duties on their clearance to DTA equating such clearance at par with imports in terms of proviso to Section 3 of the Central Excise Act, 1944. For the purpose of calculating additional duty (CVD) on imported goods under Section 3 of the Custom Tariff Act, 1975, any general excise exemption as well as conditional excise exemption, if conditions are satisfied, would be applicable for determining the CVD liability. Thus, there is no bar in applying an exemption notification issued under section 5A of the Central Excise Act for the purpose of computation of CVD to be paid by EOUs on the goods cleared into DTA. The restriction on EOUs for applying exemptions issued under section 5A of the Central Excise Act is for the purpose that EOUs should not pay excise duty only as in the case of clearances from DTA units, unless so intended. This would render section 3 of the Central Excise Act redundant which require EOUs to pay central excise duty equivalent to the aggregate of customs duties. However, as in the case of import, wherein CVD is paid equal to excise duty as applicable, exemptions of central excise duty shall also be applicable to EOUs for computation of duty on DTA clearances.

It is, thus, viewed that there is no bar under the proviso to Section 5A ibid for considering excise exemption while calculating the additional customs duty component payable by an EOU on DTA clearances. Hence, the unit would be liable to pay duties based on applicable basic custom duty and applicable additional customs (CVD) in terms of the exemption vide Sl. No. 32 of notification No. 4/2006-CE dated 01.03.2006 on Sulphuric Acid subject to the condition 2 of the Annexure to this notification.

4. In the light of the above, a suitable clarification may please be issued to the field formation having jurisdiction over this unit. The unit has been advised to contact your office.

5. This issues with approval of the Member (Cus & EP), CBEC.

Yours faithfully
(M. Vinod Kumar)
Addl. Director General (EP)"

6. Considering the fact that a clarification had been issued on 02.04.2008, it would be necessary for the Adjudicating Authority to examine as to the applicability of the said clarification qua the appellant's case. Therefore, we are inclined to remand the matter to the Adjudicating Authority for de novo adjudication and take a fresh decision on merits and in accordance with law.

7. For the above reasons, the Writ Appeal is allowed. Consequently, the writ petition is also allowed, the Order-in-Original dated 28.05.2015 is set aside and the matter is remanded back to the respondent for a fresh consideration. The respondent shall afford an opportunity of personal hearing to the authorized representative of the appellant, consider their submission and take a fresh decision on merits and in accordance with law. No costs. Consequently, connected miscellaneous petition is closed.

Sd/-
Assistant Registrar(co)

//True Copy//

Sub Assistant Registrar

hvk

To
The Commissioner of Central Excise,
Chennai-III Commissionerate,
No.26/1, Mahatma Gandhi Road,
Nungambakkam, Chennai - 600 034.

+1cc to Mr.S.Murugappan, Advocate SR.No. 9427

W.A.No.425 of 2021
and
C.M.P.No.1701 of 2021

ad (CO)
A.SK(10/03/2021)