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IN THE HIGH COURT AT CALCUTTA
SPECIAL JURISDICTION (CENTRAL EXCISE)
ORIGINAL SIDE

CEXA/6/2022
IA NO.GA/2/2022

COMMISSIONER OF CENTRAL EXCISE & SERVICE TAX, DURGAPUR COMMISSIONERATE
Vs.
SHYAM FERRO ALLOYS LIMITED

BEFORE:
The Hon'ble JUSTICE T.S. SIVAGNANAM
A N D
The Hon'ble JUSTICE PRASENJIT BISWAS
Date : 2nd September, 2022.

Appearance:
Mr. K.K. Maiti, Adv.
Ms. Aishwarya Rajyashree, Adv.
.....for the appellant.

Mr. N.K. Choudhury, Adv.
Mr. Nilotpal Choudhury, Adv.
...for the respondent.

The Court : This appeal filed by the revenue under Section 35G of the Central Excise Act, 1944 (the Act, for brevity) is directed against the order dated 4th October, 2018 passed by the Commissioner of Central Excise & Service Tax Appellate Tribunal, Eastern Zonal Bench, Kolkata (the Tribunal) in Appeal No.E/75693/2015 and E/76697/2016.

The revenue has raised the following substantial questions of law for consideration :-

a) *Whether the Learned Tribunal has committed gross error of law by allowing Cenvat Credit availed by the respondent on the basis of "Transfer Memos", though the said "Transfer Memos" are beyond the documents prescribed under Rule 9 of the Cenvat Credit Rules, 2004 for availing Cenvat Credit?*
b) *Whether the decision relied upon by the Learned Tribunal in the case of Union of India –Vs– Marmagoa Steel Limited reported in 2008(229) ELT 481(SC) is applicable in the present facts of the case?*
c) *Whether the order passed by the Learned Tribunal is perverse, bad in law and liable to be set aside or not?*

We have heard Mr. K.K. Maiti, learned standing counsel appearing for the appellant and Mr. N.K. Choudhury, learned advocate for the respondent.

The short question involved in the instant case is whether the Tribunal was right in allowing the assessee's appeal and holding that the assessee is entitled to avail CENVAT credit on the basis of the bill of entry to show that the goods were imported and utilized in the manufacturing unit. The case of the revenue as submitted by the learned standing counsel is that the credit has been availed based upon a transfer memo which shows only a quantity of Manganese ore was diverted to the Durgapur factory of the respondent/assessee.

It is submitted by the learned standing counsel that Rule 9 of the CENVAT Credit Rules, 2004 (the Rules) documents which can be relied on by the assessee for the purpose of availing CENVAT credit has been clearly enumerated and the transfer memo is not one such document which finds place in Rule 9 and, therefore, the availment of credit was illegal and liable to be reversed.

In support of his contention, the learned standing counsel has placed reliance on the decision in the case of Principal Commissioner of Customs, Central Excise & Service Tax, Meerut –vs- BSNL Limited reported in 2018 (8) G.S.T.L. 253 (Allahabad).

Learned advocate appearing for the respondent/assessee submitted that the bill of entry is one of the documents which is an approved document in terms of Rule 9 which has been produced and which has not been disputed, the department does not dispute the payment of duty and it does not dispute the utilization of the imported goods in the manufacturing process in respect of one of the factories though the goods were diverted in two of the factories and selectively action has been initiated only in respect of Durgapur factory. It is submitted that more or less identical issue was considered by the Hon'ble Supreme Court in Union of India –vs- Marmagoa Steel Limited reported in 2008 (229) E.L.T. 481 (S.C.), which decision was followed by the Tribunal while granting relief to the assessee.

After we have elaborately heard the learned advocates for the parties, what emerges is that the import of Manganese ore and the quantity of import has not been disputed by the department. The bill of entry has been filed along with proof to show duty had been paid. This fact has also not been disputed by the department. According to the respondent/assessee, they have got two units, one in Burdwan and the other at Durgapur and the imported material was transferred to both the units by way of a transfer memo appended with the bill of entry and the department does not dispute that the goods were used in the manufacturing process.

In such circumstances, the question would be whether merely because part of the goods which were imported and duty paid was transferred to one of the units of the assessee pursuant to a transfer memo can be the sole reason for denying credit.

In terms of Rule 3 of the said Rules, a manufacturer/producer of final product or provider or output service shall be allowed to take credit, called the CENVAT credit. Admittedly, eligibility to avail credit has not been questioned by the department based on the document which was produced by the assessee. The only reason to deny credit was on the ground that it is by way of a transfer memo which is not one of the documents listed under Rule 9. It is to be noted that the bill of entry is one of the approved documents in terms of Rule 9 (1)(c) of the Rules. The bill of entry being the basic document, the assessee was entitled to avail credit based upon the duty paid pursuant to the import effected which was established by producing bill of entry.

The decision in the case of BSNL Limited (supra) is clearly distinguishable on facts as in the said case no document was produced and, therefore, the Court thought fit to remand the matter for fresh consideration. On the other hand, the decision in Marmagoa Steel Limited (supra) would come to the aid and assistance of the assessee and the learned Tribunal rightly took note of the said decision and granted relief.

Thus, for the above reasons, we find no grounds to interfere with the order passed by the learned Tribunal. The appeal filed by the revenue is dismissed and the substantial questions are answered against the revenue.

The stay application being IA NO.GA/2/2022 also stands dismissed.

(T.S. SIVAGNANAM, J.)

(PRASENJIT BISWAS, J.)

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