IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 12.08.2024

CORAM :

THE HONOURABLE DR.JUSTICE ANITA SUMANTH
and
THE HONOURABLE MR.JUSTICE G. ARUL MURUGAN

W.A.No.140 of 2012
and
M.P.No.1 of 2012

1.The Commissioner of Customs (Appeals)
Custom House, 60, Rajaji Salai,
Chennai – 1.

2.The Asst.Commissioner of Customs
Gr VII, Custom House,
60, Rajaji Salai,
Chennai – 600 001.

3.The Deputy Commissioner of Customs (Refunds),
Custom House, No.60, Rajaji Salai,
Chennai – 600 001. .. Appellants

vs

1.M/s.Vinoram Limited,
Rep. by its Director C.Suvarna,
13th Floor, Prestige Meridian 1,
No.28, Mahatma Gandhi Road,
Bangalore 560 001.

2.The Joint Director of Foreign Trade (C&E Wing),
VI Floor, Kendriya Sadan,
7th Main, II Block, Koramangala,
Bangalore – 560 034. .. Respondents

Prayer : Appeal filed under Section 15 of Letters Patent against order dated 03.08.2010 passed in W.P.No.17012 of 2001.

For Appellants : Mr.A.P.Srinivas,
Senior Standing Counsel

For Respondents : Mr.Hari Radhakrishnan
for R1
No appearance for R2

JUDGMENT
(Delivered by Dr.ANITA SUMANTH.,J)

The writ petitioner / first respondent in this appeal, is engaged in the manufacture of perfumes. Raw materials had been imported under 23 Bills of Entry spanning the period 21.08.1998 - 17.12.1998. The writ petitioner had sought the benefit of adjustment of Countervailing Duty (CVD) against Duty Entitlement Pass Book (DEPB) scrips that it had held.

2. The entire amount of duty of an amount of Rs.28,42,745/- was paid by way of debit from the DEPB scrips. There was some ambiguity at that point in time as to whether petitioner would be simultaneously eligible for Modified Value Added Tax (MODVAT) credit as well, if the duty liability of the imports had been met by way of debit to the DEPB scrips.

3. Hence by way of abundant action, the sought petitioner remitted the entirety of the duty once again on 19.7.1999, and made an application on 27.08.1999 seeking re-credit of the duty to the account of DEPB scrips. That application has come to be rejected by way of an Order-in-Original dated 16.01.2001.

4. The reasoning for rejection is that Section 27 of the Customs Act which provides for grant of refunds, requires an assessee to make an application within a period of six months from the assessment of duty. In the present case, the application was made on 27.8.1999 as against credits made during the period 21.8.1998 and 17.12.1999. Hence it was dismissed as barred by limitation.

5. The matter was carried in appeal before the first Appellate Authority, who confirmed the order of adjudication as against which the present writ petition has been filed. A tentative argument has been raised as against the procedure followed by the writ petitioner in approaching this Court instead of availing alternate statutory remedy before the Customs, Excise and Service Tax Appellate Tribunal (CESTAT).

6. However, we decline consideration of this issue at this stage particularly as the argument of alternate remedy has not been raised even the counter filed in March 2002. Then again the matter is now at the stage of writ appeal and considering the question of alternative remedy in a matter that is of the year 2001, after the elapse of 23 years, would not, in our view either be appropriate or fair to the parties.

7. The writ court has passed an order on 3.8.2010 directing the Department (appellant before us) to refund the duty paid in cash as the application dated 26.8.99 had been made within the period of limitation qua the remittance of the duty by cash. As far as the request of the writ

petitioner seeking re-credit to the DEPB account was concerned, that argument was rejected on the ground that the tenure of the scrip was itself over and hence re-credit was not possible.

8. The present appeal is filed by the Department assailing the directions of the learned Single Judge to refund the duty paid in cash as, according to Department, such refund is impermissible. They would argue that the availment of MODVAT credit is contrary to law in cases where credit had been remitted by way of adjustment to DEPB scrips.

9. This issue is no longer res integra as it has been considered and decided in favour of the assessee in the case of *Commissioner of Central Excise, Chennai 1 v SPIC Ltd*[1]. The duty on imports in that case had also been paid by way of debit to DEPB scrips and the question of law that was decided was whether such debit was correct in light of Notification 34/97 – Customs dated 07.04.97 and the provisions of Cenvat Credit Rules, 2002.

10. The facts have been set out at paragraph 3 of that decision and the Bench notes that that assessee had not paid additional duty under Section 3 of the Customs Tariff Act in cash but had paid the CVD by way of credit to DEPB scrips. The question that arose was whether in such circumstances, that assessee would be entitled to MODVAT credit.

11. In the interests of completion, Notification 34/97 – Customs dated 07.04.97 is extracted below:-

1 2014 (305) ETL 484

"Duty Entitlement Pass Book-Imports made against
In exercise of the powers conferred by sub-section (1) of Section 25 of the Customs Act, 1962(52 of 1962), the Central Government, being satisfied that is necessary in the public interest so to do, hereby exempt goods imported into India from –
(1) the whole of the duty of Customs leviable thereon which is specified in the First Schedule to the Customs Tariff Act, 1975 (51 of 1975); and
(2) the whole of the additional duty leviable under section 3 of the said Customs Tariff Act where specifically claimed by the importer, subject to the following conditions, namely :-
(i) That the importer has been issued a Duty Entitlement Pass Book by the Licensing Authority in pursuance of paragraphs 7.25 read with paragraph 7.29 of the Export and Import Policy (hereinafter referred to as said Duty Entitlement Pass Book).
(ii) The importer has been permitted credit entries in the said Duty Entitlement Pass Book at the rates notified by the Government of India in the Ministry of Commerce for the products exported or has been allowed a provisional credit in the said Duty Entitlement Pass Book by the Licensing Authority to be set-off by the credits earned on exports to be subsequently effected;"
(iii) The said Duty Entitlement Pass Book is produced before the proper officer of Customs for debit of the duties leviable on the goods but for exemption contained herein.
Provided that exemption from duty shall not be admissible if there is insufficient credit in the said Duty Entitlement Pass Book for debiting the duty leviable on the goods but for this exemption.
(iv) The said Duty Entitlement Pass Book shall be valid for twelve months from the date of issue or such extended period as may be granted by the Licensing Authority for import and export only, at the port of registration which shall be one of the sea ports at Mumbai, Calcutta, Cochin, Kandia, Mangalore, Marmagoa, Chennai, Nhava Sheva, Paradeep, Tuticorin, Visakhapatnam, Kakinada, Magdalla, sikka, Pipavav, Dahej, Mundra and

Nagapattinam or any of the airports at Ahmedabad, Bangalore, Mumbai, Calcutta, Coimbatore, Delhi, Jaipur, Varanasi, Srinagar, Trivandrum, Hyderabad, Chennai, Bhubaneshwar, Nagpur and Cochin or any of the Inland Container Depots at Bangalore, Coimbatore, Delhi, Gauhati, Kanput, Pimpri (Pune), Pitampur (Indore), Moradabad, Ludhiana, Hyderabad, Nagpur, Agra, Faridabad, Jaipur, Guntur, Varanasi, Jodhpur, Salem, Tirupur, Singanalur, Waluj, Malanpur, Surat, Nasik, Rudrapur (Nainital), Kota, Udaipur, Daulatabad, (Wanjarwadi and Maliwada), Dighi (Pune), Vadodra, Ahmedabad, Bhiwadi, Madurai, Jallandhar, Meerut, Bhilwara and Pondicherry or through the Land Customs Station at Ranaghat;

Provided that where the expiry of the Duty Entitlement Pass Book fails before the last day of the month, the Duty Entitlement Pass Book shall be deemed to be valid till the last day of the said month.

Provided further that the Commissioner of Customs may by special order and subject to such conditions as may be specified by him, permit imports and exports from any other sea port, airport, inland container deport or through a land customs station;

(v) The importer claiming exemption from duties against provisional credit permitted under paragraphs 7.35 of 'Export and Import Policy' by the Licensing authorities, executes a bond in such form and for such sum, with such surety or securities as may be prescribed by the Assistant Commissioner of Customs or Deputy Commissioner of Customs, binding himself to pay on demand duty leviable on goods imported but for the exemption contained herein together with interest at the rate of 24% per annum from the date of clearance in this event of his failure to make exports and earn credits thereon to set-off the provisionals credits allowed:

Provided that in the case of import against provisional credits, the exemption shall be permitted only for such goods which are in the nature of inputs required for use in the production of goods in the factory of the Duty Entitlement Pass Book holder or in the factory of supporting

manufacturer as specified in the said Duty Entitlement Pass Book and such inputs are not transferred, loaned, sold, parted with or disposed of in any manner, even after credits on exports to set off provisional credits have been earned.
(vi) Where the Importer does not claim exemption from the additional duty of customs leviable under section 3 of the Customs Tariff Act, 1975 (51 of 1975), he shall be deemed not to have availed the exemption from the duty specified in the First Schedule to the said Customs Tariff Act for the purpose of calculation of the said additional duty of customs.
(vii) Where benefit of exemption from duty is claimed by a person, who is not a Duty Entitlement Pass Book holder, such benefit shall be permissible only against specific amount of credit, not being a provisional credit, transferred by a duty Entitlement Pass Book holder to such person.
Explanation – For the purpose of this notification 'Export and Import Policy' means the Export and Import Policy April, 1997 – March, 2002."

12. The conclusion of the Court is from paragraph 19 onwards, wherein the Bench reiterates that in the background of the DEPB Scheme and the purpose of the MODVAT Scheme, the availing of credit by way of debit to DEPB is in pari materia with, and as good as payment of tax by way of cash in terms of Rule 57(9) of the Central Excise Rules.

13. Their conclusion is thus that the stipulations under Notification dated 03.04.97 cannot under any circumstances be held to be a limitation for the purpose of claim of MODVAT. There does not appear to be anything available to show that this decision has been reversed in appeal. Hence, and applying the ratio of the decision of this Court in the case of SPIC Ltd., with which we concur, we confirm the

direction of the writ court in granting refund of a sum of Rs.28,42,745/- paid in cash by the petitioner on 19.07.1999. The question of re-credit to the DEPB scrips does not arise as the scrip has itself expired.

14. As a footnote, we may clarify this on the aspect of limitation. The petitioner had remitted the duty in cash on 19.07.1999 and the claim for re-credit has been made on 27.8.99 within a period of six months from the day of payment as aforesaid. The application has thus been made within the period of limitation as stipulated under Section 27 of the Act.

15. For the aforesaid reasons, we confirm the order of the writ court dated 03.08.2010 and dismiss this appeal. Refund, if not already given, will be made within a period of four weeks from date of receipt of this order. No costs. Connected miscellaneous petition is closed.

[A.S.M., J] [G.A.M., J]
12.08.2024

Index:Yes
Neutral Citation:Yes
ssm

To

The Joint Director of Foreign Trade (C&E Wing),
VI Floor, Kendriya Sadan,
7th Main, II Block,
Koramangala, Bangalore – 560 034.

DR. ANITA SUMANTH,J.
and
G. ARUL MURUGAN.,J

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