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Court : Chennai

Decided On : Jan-08-2008

Reported in : 2008(125)ECC123; 2008(151)LC123(Madras);
2008(227)ELT361(Mad)

Judge : K. Raviraja Pandian and ;Chitra Venkataraman, JJ.

Acts : [Central Excise Act, 1944](#) - Sections 35H; [Central Excise Tariff Act, 1985](#);
Central Excise Rules, 1944 - Rules 56A and 57G

Appeal No. : R.C.P. No. 23 of 2000

Appellant : Commissioner of Central Excise

Respondent : Customs, Excise and Gold (Control) Appellate Tribunal, South Regional Bench and Elgi Ultra Industrie

Advocate for Def. : Raghul Balaji, Adv. (R2)

Advocate for Pet/Ap. : T.S. Sivagnanam, SCCG

Disposition : Petition dismissed

Judgement :

ORDER

Chitra Venkataraman, J.

1. This is a petition filed by the Revenue under Section 35H of the [Central Excise Act, 1944](#), to direct the first respondent Tribunal to state the case on the following question of law set out in the petition for its opinion:

Whether the Hon'ble Tribunal is correct in ordering for extension of Modvat benefit to the assessee who have not followed a procedure and have not filed any declaration under Rule 57G of the Central Excise Rules, 1944?

2. The assessee engaged in the manufacture of Drip Irrigation System claimed exemption in respect of the HDPE/LDPE pipes cleared during the period 1.10.1995 to 4.3.1996, used in manufacture of Drip Irrigation System. The contention of Revenue is that in the course of inspection of the Departmental officials at the unit of the assessee on 5.3.1996, it was found that the HDPE and LDPE pipes were manufactured and cleared by the assessee in the guise of parts of drip irrigation system. The pipes were classifiable under Chapter Heading 3917 of the [Central Excise Tariff Act, 1985](#). They are parts of general use and not meant for use solely and principally with Drip Irrigation System and hence not exempt from payment of duty as parts of the Drip Irrigation System. Drip Irrigation System and parts fall under Heading 84.24 exempt from duty in terms of NOM No. 56/95 CE dated 16.3.1995. The Revenue's contention is that the said pipes manufactured were not exempt items. The Revenue viewed that since the assessee cleared the HDPE/LDPE Pipes along with other bought out items and used in the assembly of the Drip Irrigation System at the site of the customer, the exemption from duty was not available. However, concessional rate as per Notification 1/93 was applied resulting in a demand of Rs. 39,70,085/- and allowed the assessee to avail the MODVAT credit of duty pass on the inputs used in the manufacture of the said pipes. The assessee preferred appeal before the Customs Excise and Gold (Control) Appellate Tribunal against the duty levied and the Revenue also preferred an appeal on extending the MODVAT credit, on the view that the assessee was not entitled to have the benefit of MODVAT credit in the absence of any declaration filed in accordance with the provisions of the Act. It is stated that the appeal filed by the assessee as against the classification issued

has not reached finality. However, the appeal preferred by the Revenue before the Customs, Excise and Gold (Control) Appellate Tribunal was dismissed by applying the decision of the Supreme Court in the case of Formica India Division v. Collector of Central Excise reported in : 1995(77)ELT511(SC) that the assessee was entitled to have the benefit of MODVAT credit under Rule 57-G. Aggrieved by the same, the Revenue preferred Reference Application before the first respondent Tribunal to refer the matter to the High Court on the following question of law:

Whether the Hon'ble Tribunal is correct in ordering for extension of Modvat benefit to the assessee who have not followed a procedure and have not filed any declaration under Rule 57G of the Central Excise Rules, 1944.

3. The first respondent-Tribunal dismissed the said application in Reference Order No. 112/99 dated 15.10.1999 holding that the order in appeal was passed following the decision of the Supreme Court in Formica India Division v. Collector of Central Excise reported in : 1995(77)ELT511(SC) . Hence, no referable question of law arose. The aggrieved Revenue has filed the Reference Case Petition seeking a direction to the Tribunal to state the case on the question of law referred to above.

4. Learned Senior Counsel for Central Government appearing for the Revenue submitted that the decision of the Supreme Court in the case of Formica India Division v. Collector of Central Excise reported in : 1995(77)ELT511(SC) has no relevance to the facts of the case. He submitted that the items manufactured namely, pipes, cannot be called as parts of Drip Irrigation System, and considering the capability of the general use, the question of exempting the items did not arise. Further, when the assessee had not followed the procedure of filing the declaration under Section 57-G of the Central Excise Rules, 1944, the question of ordering the MODVAT benefit did not arise in this case.

5. Per contra, learned Counsel appearing for the second respondent relied on a decision of this Court in the case of Commissioner of Central Excise, Salem v. Chemplast Sanmar Limited, Mettur Dam reported in : 2009(239)ELT398(Mad) . In the said decision, after referring to the decision of the Apex Court in Formica India

Division v. Collector of Central Excise reported in : 1995(77)ELT511(SC) , the Division Bench of this Court took the view that MODVAT credit could not be denied to the assessee on a mere technical ground that the procedure prescribed for availment of credit had not been followed at the material time. This Court held:

Rule 56-A relating to set off of duty is a pre-cursor to the Modvat Scheme, both of which are schemes intended to obviate cascading effect of duty paid at various intermediate stages.

This Court held that since the assessee was claiming exemption and at that point of time, it was not possible for the assessee to have complied with the procedural requirements for availing MODVAT credit, it was not open to the Department to deny the MODVAT credit on the technical ground that the procedure prescribed for availment of credit had not been followed at the material time.

It may be noted that the only limited question that arose for consideration before the Tribunal was whether the assessee would be entitled to the benefit of MODVAT credit when the assessee had not followed the procedure under Section 54-G. Admittedly, the question of dutiability has been in issue and the consistent case of the assessee is that it is part of the Drip Irrigation System. Whatever be the merit of the contention on this point, when the very liability was denied and when the assessee had paid the duty under protest, the assessee could not ordinarily comply with the requirement of Rule 56-A at the first instance itself. Hence, rightly the Tribunal confirmed the view of the Commissioner, following the decision of the Apex Court. The situation in the present case is no different from the one that prevailed in the decided case of the Supreme Court referred to by the Tribunal. In the circumstances, we do not find any referable question of law to direct the Tribunal to state a case to this Court. Hence, the Reference Case Petition stands dismissed.