(2012) 02 KL CK 0010

In the High Court Of Kerala

Case No : CER No. 1 of 2010

C.C.E., C. and S.T., Cochin — APPELLANT

Vs

Tecil Chemicals and Hydropower Ltd. — RESPONDENT

Date of Decision : 02-02-2012

Acts Referred:
Central Excises and Salt Act, 1944 — Section 35H, 35L

Citation : (2012) 286 ELT 19

Hon'ble Judges : C.N. Ramachandran Nair, J;Babu Mathew P. Joseph, J

Bench : Division Bench

Advocate : John Varghese, SSC, for the Appellant; Joseph Kodianthara, Joy Joseph (Kottayam), V. Abraham Markos, Mathews K. Uthuppachan, Binu Mathew, Terry V. James, B.J. John Prakash and Tom Thomas (Kakkuzhiyil), for the Respondent

Judgement

C.N. Ramachandran Nair, J.—This is an application filed by the Commissioner of Central Excise u/s 35H of the Central Excise Act for a direction to the Customs, Excise and Service Tax Appellate Tribunal to refer the questions of law arising from the orders issued in 2002 (84) ECC 871 issued in favour of the respondent assessee. We have heard Advocate Sri John Varrghese, Standing Counsel appearing for the applicant and the Senior Counsel Sri. Joseph Kodianthara appearing for respondent.

2. Respondent/assessee was engaged in the manufacture of ''Acetylene Black''. ''Calcium Carbide'', is an input manufactured by the respondent and captively consumed in the manufacture of final product. The question arose as to whether duty was payable on the intermediary namely Calcium Carbide which led to respondent paying duty under protest from April 1978 to May 1983. However, later in appeal respondent succeeded in getting exemption from duty on the input captively consumed. Refund application was subsequently filed on 13-4-1999 which was rejected by the assessing officer and confirmed by the first appellate authority. However on a second appeal by the respondent the Tribunal

allowed the claim. It is against this order of the Tribunal, the Commissioner of Central Excise has filed this reference application for referring several questions stated in the reference application.

3. At the outset the learned senior counsel appearing for respondent opposed the maintainability of the reference application u/s 35H for the reason that the question involves valuation of the goods. The contention is that the issue raised is regarding valuation of goods and so much so no reference is maintainable u/s 35H and the remedy for the department is to file an appeal to the Hon''ble Supreme Court u/s 35L. However, the Standing Counsel submitted that valuation of goods is not involved in this case and the issue raised is only whether respondent is entitled to refund of duty paid under protest which they are eligible, only if there is no unjust enrichment. The point specifically canvassed by the respondent''s counsel is that unjust enrichment has to be considered with reference to the value of product sold and so much so valuation is involved. We are unable to accept this contention because the specific bar u/s 35H is only with regard to the question of "value of goods for purposes of assessment" which is not the case here. The issue considered and the finding of the Tribunal is that the final product was sold at market price and the question is only whether the duty paid under protest was loaded on product price. This does not involve any determination of value of the final product, which is admittedly the market value, on which there is no controversy. So much so, we do not find any substance in the objection raised by the respondent''s counsel.

4. The question to be considered is whether the Tribunal''s order gives rise to substantial question of law for decision of this court. In this context also the respondent''s counsel raised objection that the relief is granted based on findings on facts by the Tribunal and so much so no question of law can arise from the findings on facts by the Tribunal. The Standing Counsel submitted that many of the issues decided by the Tribunal stands reversed by the judgment of the Hon''ble Supreme Court reported in Commissioner of Central Excise, Mumbai-II Vs. Allied Photographics India Ltd., which is true because contrary to the findings of the Tribunal payment of duty under protest by itself does not entitle the assessee for refund. Similar is the position with regard to the payment of duty provisionally which cannot by itself entitle for refund if there is unjust enrichment. In this case, the conceded position is that final product is sold at market price which is same for all products manufactured and sold by every manufacturer. In this situation, it is the duty of the assessee to prove that market price at which they sold the product does not include duty on input paid under protest. In this context the correctness of the decision rendered by the Tribunal calls for examination by this Court. We, therefore, feel that the appellate order of the Tribunal gives rise to substantial question of law for our decision. We feel a comprehensive question will cover every issue and therefore we redraft the question as follows. The question to be referred is as follows.

Whether on the facts and in the circumstances of the case was the Tribunal justified in holding that there is no unjust enrichment thereby entitling the assessee for refund of the duty paid under protest on input namely Calcium Carbide? The Tribunal is directed to draw up a Statement of the case and refer the above question for decision by this Court. Registry will forward a copy of this judgment to the Tribunal for compliance by them.

