**(2014) 04 AP CK 0059**

**In the Andhra Pradesh High Court**

**Case No :** Central Excise Appeal No. 54 of 2005

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| Commissioner of Central Excise and Customs | APPELLANT |
| Vs | |
| Vera Laboratories Ltd. | RESPONDENT |

**Date of Decision :** 09-04-2014

**Acts Referred:**

**Citation :** (2014) 309 ELT 677 : (2014) 28 GSTR 397

**Hon'ble Judges :** G. Chandraiah, J;Challa Kodanda Ram, J

**Bench :** Division Bench

## Judgement

Challa Kodanda Ram, J.—The Central Excise Appeal is filed at the instance of the Department against the Final Order No. 1753 of 2004, dated 05.11.2004 passed by the Customs, Excise and Service Tax Appellate Tribunal, Bangalore (for short "CESTAT") by raising the following question of law for adjudication:

Whether the Modvat Credit can be taken on the inputs, which were not suffered duty?

2. The case of the appellant - Commissioner of Central Excise and Customs is that without there being any material on record to the effect that the goods, which have been imported by the respondent-M/s. Vera Laboratories Limited, had suffered duty, they cannot be permitted to avail Modvat Credit.

3. We have perused the order of the Tribunal and also the material which is forming part of the record before the Tribunal. The respondent had also filed a paper book which formed part of the record before the Tribunal. The case involves three Bills of Entries through which the respondent had imported certain raw material on payment of customs duty. The relevant Bills of Entries are Nos. 4165, dated 18.04.1995; 5720, dated 22.05.1995 and 72430, dated 12.12.1995. The amounts of customs duty involved are Rs. 31,86,154/-, Rs. 29,61,614/- and Rs. 9,36,678/- respectively. A show cause notice dated 28.08.2000 was issued to the respondent alleging availment of Modvat Credit wrongfully on the ground that the customs duty with respect to these Bills of Entries was not credited to

the account of the Department. After considering the objections raised by the respondent, an order dated 30.06.2003 came to be passed by the appellant-Commissioner confirming the show cause notice whereby a sum of Rs. 13,23,542/- along with interest thereon was demanded on account of wrongful availment of Modvat Credit. The penalty proceedings were dropped by the Commissioner. Against the order dated 30.06.2003 of the Commissioner, the respondent preferred an appeal, and the Tribunal, after hearing the arguments and on verification of the record gave a finding that Demand Drafts were in the name of the Commissioner of Customs'' account M/s. Vera Laboratories Ltd. and were in fact credited to their account and by relying on its own decision in Hetero Drug Ltd. v. CC Airport, Chennai 2004 (168) ELT 211 (Tri. Bang.) allowed the appeal vide Final Order No. 1753, dated 05.11.2004 setting the order of the Commissioner. Being aggrieved by this order, the present appeal is preferred by the Department.

4. Sri V. Gopala Krishna Gokhaley, learned Standing Counsel for Central Excise appearing for the appellant, submits that there is no finding of the Tribunal to the effect that customs duty has been credited to the account of the Department inasmuch as the Customs House Agent M/s. Far Port International had committed fraud and utilized the amounts from other parties, and thereafter, the material of some other party came to be cleared, as such, with respect to the subject Bills of Entries, there is no credit of the customs duty. He further submits that the Tribunal had wrongly relied on its earlier decision in the case of Hetero Drugs case and CC Jaipur v. Genus Overseas Electronics Ltd. 2003 (155) ELT 541 (Tri. L.B.) He further submits that the case law relied on by the respondent-company has no relevance to the facts of the case on hand.

5. On the other hand, Sri Karan Talwar, Advocate, who is appearing on behalf of M/s. Sri Laxmi Kumaran and Sri Sridharan, learned counsel for the sole respondent, submits that Demand Drafts in relation to the Bills of Entries Nos. 4165 and 72430 were specifically drawn in favour of the Commissioner of Customs'' account M/s. Vera Laboratories Limited and were in fact cleared and credited to the Consolidated Fund of Union of India. By furnishing a letter issued by the Banker, the learned counsel submits that even with respect to the Bill of Entry No. 5720, an amount of Rs. 29,61,614/- has been paid. He has further raised an objection that in the present appeal, no specific question of law is raised alleging perversity of fact, and in that view of the matter, the finding of the Tribunal that the Demand Drafts have been credited in favour of the Department cannot be interfered with and the question raised is not with respect to non-payment of the customs duty, but with respect to wrongful availment of Modvat Credit. He further submits that the Tribunal rightly reversed the order of the Commissioner and the same does not warrant interference.

6. We have considered the rival submissions made by the learned counsel for both the parties with supporting material and find that so far as Bills of Entries Nos. 4165 and 72430 are concerned, the material on record would disclose that

 

specific demand drafts have been drawn in favour of the Commissioner of Customs'' account M/s. Vera Laboratories Limited. In such circumstances, the fraudulent acts of the Customs House Agent (CHA) in trying to account those demand drafts in favour of third party would not arise except with the specific connivance of the department officials. The order in original does not indicate that the subject demand drafts have been credited to any other party''s account. It is not in dispute that the amounts were credited to the Consolidated Fund of Union of India, in which event, it is not permissible for the Department to argue that no such amounts have been credited to the account of the Department. In that view of the matter, the finding of the Tribunal with respect to the payment of customs duty against the Bills of Entries Nos. 4165 and 72430 is unexceptionable. Once the amount of customs duty having been paid is accepted, the entitlement of Modvat Credit cannot be denied. Hence, so far as the Bills of Entries Nos. 4165 and 72430 are concerned, the order of the Tribunal does not call for interference by this Court.

7. So far as the Bill of Entry No. 5720 is concerned, though the respondent had raised specific grounds with supporting material before the Tribunal stating that an amount of Rs. 29,61,614/- has been credited to the account of the Department vide Demand Draft No. 589033, dated 20.05.1995 drawn on State Bank of India, Hyderabad, there is no specific finding to that effect and the same was not adverted to. In that view of the matter, we deem it appropriate to remit the case back to the Tribunal to consider the submissions of the respondent in respect of Bill of Entry No. 5720, dated 22/23.05.1995 to pass appropriate orders. The learned counsel for the respondent has also raised a ground with respect to the very proceedings having been initiated as barred by limitation which aspect was not adverted to. We make it clear that it would be open for the respondent to urge both legal and factual grounds including the ground of limitation before the Tribunal to fortify their case.

8. Hence, the appeal is partly allowed to the extent indicated above. No order as to costs.

 