(2009) 10 MAD CK 0123

In the Madras High Court

Case No : C.M.A. No. 2572 of 2009

Commissioner of Central Excise, Pondicherry APPELLANT

Vs

Cestat, Chennai RESPONDENT

Date of Decision : 05-10-2009

Acts Referred:
Central Excise Rules, 1944 — Rule 173Q
Central Excises and Salt Act, 1944 — Section 11AB, 35, 4(4)

Citation : (2012) 275 ELT 41

Hon'ble Judges : T. Raja, J;K. Raviraja Pandian, J

Bench : Division Bench

Advocate : S. Udayakumar, SCGSC, for the Appellant;

Final Decision : Dismissed

Judgement

K. Raviraja Pandian, J.—This Civil Miscellaneous Appeal has been filed at the instance of the Department against the order of the CESTAT

dated 3-7-2007 made in Final Order No. 811 of 2007 [2007 (215) E.L.T. 190 (Tribunal)] by formulating the following questions of law :

(i) Whether the Tribunal is right in holding that the second respondent is entitled to abatement in terms of Section 4(4)(d)(ii) of Central Excise Act,

1944 when the Hon''ble Apex Court has held that one cannot go by general implication that wholesale price would always mean cum duty price

particularly when the assessee had cleared the goods on the basis of exemption notification?

(ii) Whether remanding of the case by the CESTAT to the adjudicating authority for the consideration of modvat benefit is correct when a clear

finding has been given in the Order-in-Original No. 5/2001 dated 27-6-2001 in this regard and Modvat credit has already been allowed in Para. 1

of the Order-in-Original by the adjudicating authority on the basis of available records, after verification?

2. Learned Senior Central Government Standing Counsel for the Department had submitted that the second question of law had only arisen for

consideration of this Court.

3. The facts of the case proceeded as follows :

The offence has been registered against the assessee M/s. Microstretch Elastomers (P) Ltd., by the Divisional Preventive Group, Pondicherry for

manufacturing and clearing excisable goods without payment of a Central Excise Duty by misdeclaring their product. The assessee were

manufacturing cotton core yarn with the aid of power and that the said cotton core yarn was classifiable under sub-heading No. 5205.11 or

5206.11, but the assessee had classified the said goods under sub-heading No. 5205.90 in their declarations filed with the department. The

assessee submitted a letter dated 12-3-1998 in which they furnished the details of clearances of cotton core yam and rubber manufactured and

cleared by them, the details of machinery and copy of their letter dated 26-6-1995 addressed to the Superintendent of C.Ex. Range I,

Pondicherry. A scrutiny of the documents revealed that initially they had obtained Registration Certification No. 2/95 dated 7-4-1995 for the

manufacture of (i) Cotton spun yarn classified under heading 56.04 and (ii) cotton yarn classified under heading 52.05 and within three months they

had surrendered their registration certificates stating that their product was eligible for SSI exemption and they proposed to avail full exemption

upto value of Rs. 30 lakhs. Hence, the assessee filed a declaration under Notification No. 13/92 (N.T.), dated 14-5-1992 as amended classifying

their product (1) Core spun yarn under 5604.90 (ii) cotton yarn under 5604.10 and (iii) Rubber thread under 5604.10. The assessee had declared

to the department that they were manufacturing three products namely cotton core yarn, cotton yarn and rubber yarn. Under what heading the

cotton yarn manufactured by the assessee is to be classified was the dispute. The Original authority, after taking samples, classified the goods

manufactured by the assessee under subheading 5205.11, rubber thread under 4007.00 and demanded duty of Rs. 1,26,88,422/-with a penalty of

Rs. 75,00,000/- under Rule 173Q and interest u/s 11AB with effect from

28-9-1996. Aggrieved by the order, the assessee went on appeal

before the first respondent who by its order dated 1-6-2000 set aside the said order in original and remanding for de novo adjudication for

reconsidering all the technical opinion and on remand, the Commissioner of Central Excise vide Order-in-Original No. 5/2001, dated 27-6-2001

classified the sub-section 5205.1 chargeable duty at the rate of 20% ad valorem at 18% during the relevant period, As such, the duty liability for

cotton core yarn was reworked out to Rs. 9,90,124/- and imposed the penalty of Rs. 2,00,000/- u/s 173Q of the Central Excise Rules, 1944.

4. Aggrieved by the above order, the assessee filed an appeal before CESTAT, which by the impugned order has upheld the classification of the

cotton core yarn and under Chapter Sub-Heading 5205.11. The penalty imposed under Rule 173Q was vacated, as the dispute relates to the

classification of the goods. In addition to that, the Tribunal has held that the assessee are eligible to avail the benefit of Modvat credit and

abatements in terms of Section 4(4)(d)(ii) of Central Excise Act. On the opinion so framed, the Tribunal remitted back the matter to the original

authority to consider the benefit u/s 4(4)(d)(ii) of the Central Excise Act on the basis of materials. That particular portion of the order remitting

back for reconsideration of the benefit u/s 4(4)(d)(ii) of the Central Excise Duty was put in issue.

5. Heard the learned counsel for the appellants.

6. Admittedly, in this case, in respect of classification, no appeal can be filed before this Court, as per the provisions of the Act. The Tribunal, after

considering the entire set of facts and available materials and also the expert opinion, has come to the conclusion that the modvat credit would

come under the heading 5205. In view of the fact that the dispute is a bona fide dispute, the Tribunal deleted the penalty imposed by the lower

authorities. The Tribunal has held that the assessee is entitled to the benefit of Section 4(4)(d)(ii) of the Act which was obtained during the relevant

period. As regards the Modvat benefit, the Tribunal was of the opinion that it will be open to establish their claim with documents showing payment

of duty on the related inputs. For these reasons, the Tribunal remitted the matter back to the original authority for the Limited purpose. This remittal

order is put in issue on the ground that it has been already considered and denied when the entire entitlement of the modvat benefit (sic) finally

considered. The only issue for which the matter had been refer to the original authority is whether the assessee is entitled to mod(sic) even that

order of remittal has been granted by imposing a condition that the assessee should establish the claim by producing the documents showing

payment of duty on the related inputs. We find that the remittal order is not in any way prejudicial to the interest or the Revenue to adjudicate the

matter on appeal u/s 35(q) of Central Excise Act which requires question of law much less substantial question of law for entertaining the above

appeal. We do not find any question of law in this appeal.

7. The Civil Miscellaneous Appeal is dismissed. No costs.

