(1996) 04 MP CK 0078

In the Madhya Pradesh High Court

Case No : Miscellaneous Civil Case No. 605 of 1995

Commissioner of Customs and C. Ex. — APPELLANT

Vs

Kesari Steels — RESPONDENT

Date of Decision : 23-04-1996

Acts Referred:
Central Excise Rules, 1944 — Rule 57A
Central Excises and Salt Act, 1944 — Section 35G(3)

Citation : (1997) 57 ECC 91 : (1996) 87 ELT 34

Hon'ble Judges : N.K. Jain, J;A.R. Tiwari, J

Bench : Division Bench

Advocate : B.G. Neema, for the Appellant; Kohli, for the Respondent

Final Decision : Dismissed

Judgement

A.R. Tiwari, J.—The applicant (Commissioner of Customs and Central Excise, Indore) has filed this application u/s 35G(3) of the Central Excises and Salt Act, 1944 seeking direction to the Tribunal to state the case and refer the question, labelled as substantial question of law as extracted below :-

"Whether Modvat credit is admissible on the ramming mass and Oxygen/ Acytelene gas and packing of ramming mass which are basically used as part of furnace, Cutting Tool respectively, keeping in view the scope of Rules 57A which allows Modvat credit on goods used in or in relation to the manufacture of final products."

* * *

2. Briefly stated, the facts of the case are that the non-applicant is the manufacturer of continuous cast Billets falling under Chapter Heading No. 72.06 of Schedule to the Central Excise Tariff Act, 1985. The non-applicant has been availing itself of the Modvat credits provided under Rule 57A of the Central Excise Rules, 1944. During 1986-87 the non-applicant had received Modvat credits amounting to Rs. 3,19,630.80 Ps. on ramming mass and Rs. 1,500/- on packing

material used for packing of such ramming mass. The Assistant Collector, Ujjain disallowed the said credits on the ground that the ramming mass was not an input. The non-applicant then, filed the appeal before the Collector (Appeal). The order went against the applicant as passed in No. A/808/1994-NRB, dated 8-9-1994. The applicant then filed the application Registered as E/Ref/126/94-NRB. This reference application was dismissed on 20-1-1995.

3. The Tribunal dismissed the application as under :-

"We have taken note of the submissions. We find that the reference application covers not only ramming mass but also oxygen gas and Acytelene gas which had been held to be eligible inputs for availment of Modvat credit. This issue is not related to the judgment of the Hon''ble High Court and stands covered by various Tribunal decisions viz., (1) 1990 (30) ECR 67 , (2) CCE v. Heavy Engineering Corporation and Ors. The Central Board of Excise and Customs also had subsequently fallen in line with the Tribunal decision and issued instructions that Modvat credit is in fact available for the said items. The reference application has been filed including such items also in the reference application. As far as the question relates to ramming mass and packaging materials therefor, the matter stands squarely covered by the High Court judgment in the Singh Alloys & Steel Ltd. Case. The mere fact that an appeal has been filed by the department against the said judgment before the Division Bench without obtaining a stay of the said judgment, does not alter the legal position. The order has not given rise to any question of law. Accordingly, we dismiss the reference application."

* * *

4. On 17-10-1995, this Court had directed issuance of show-cause notice against admission. The non-applicant has filed the reply opposing admission.

5. We have heard Shri B.G. Neema, learned Counsel for the applicant and Shri Kohli, learned Counsel for the non-applicant.

6. Shri Neema submitted that the order of the Tribunal is based on the decision rendered by the Single Bench of Calcutta High Court, but that decision is under challenge before the Division Bench in a L.P.A. On this ground, he seeks direction for reference. Shri Kohli, on the other hand submitted that once the matter is decided by the Court, no referable question thereafter, survives. He also pointed out that the Full Bench of the Tribunal has also taken the same view as is taken by the High Court of Calcutta and as such, there is no referable question of law.

7. In Commissioner of Wealth-tax Vs. Smt. Usha Devi (Lrs. of H.H. Maharaja Yeshwant Rao Holkar), , it was held that pendency of same issue before the Supreme court is no ground for directing the reference. This Court took the same view in MCC No.125/88 and also in MCC No. 48/85 (Ganga Cut-Piece Centre, Dewas v. Commissioner of Income Tax, Bhopal), decided on 19-12-1995. It is settled law that the point having been concluded by the decision ceases to precipitate any referable question of law. In view of the settled position of law,

mere pendency of the same issue before the Division Bench, in our view, does not give rise to a referable question of law as proposed in this application.

8. Nothing substantial is urged to take a different view in the matter.

9. In the result, we find the aforesaid application meritless and decline admission. The application is, thus, dismissed, but with no orders as to costs. Counsel fee for each side is, however, fixed at Rs. 750/-, if certified.