(2015) 09 MAD CK 0165

In the Madras High Court

Case No : C.M.A. No. 2939 of 2008

Commr. of C. Ex. & S.T., LTU — APPELLANT

Vs

Tamilnadu Petroproducts Ltd. — RESPONDENT

Date of Decision : 04-09-2015

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

Citation : (2015) 40 STR 878

Hon'ble Judges : V. Ramasubramanian and T. Mathivanan, JJ.

Bench : Division Bench

Advocate : A.P. Srinivas, Senior Panel Counsel, for the Appellant; N. Prasad, for the Respondent

Judgement

V. Ramasubramanian, J.—This appeal is by the Revenue under Section 35G of the Central Excise Act, 1944. Heard Mr. A.P. Srinivas, learned Senior Panel Counsel for the appellant and Mr. N. Prasad, learned counsel for the first respondent.

2. The first respondent is a Government of Tamil Nadu Undertaking incorporated as a Public Limited Company. They are the manufacturers of various organic and inorganic chemicals. They are registered as a manufacturer and they are also registered with the Department of Central Excise, for the service of "transport of goods by road". The assessee has been availing Cenvat credit on various inputs and capital goods under the Cenvat Credit Rules and they are utilising the same for payment of duty on their finished goods. They are also paying service tax on the freight charges for the inward transfer of inputs and capital goods to their factory and outward transport of finished goods.

3. Upon gathering intelligence, a surprise inspection was conducted in January 2006 and it was found that the first respondent/assessee had used Cenvat credit as against the service tax paid by them prior to 1-1-2005. There was no liability for payment of service tax on inward transportation and outward transportation upto the stock point prior to 1-1-2005.

4. Therefore, the show cause notice was issued on 1-5-2006, proposing to recover the amount representing the Cenvat credit wrongly availed and also for imposing a penalty and interest.

5. The first respondent/assessee filed a reply after which an order-in-original was passed on 31-7-2006 making a demand for a sum of Rs. 6,89,543/- representing the quantum of Cenvat credit wrongly availed. It must be pointed out here that before the order-in-original was passed, the first respondent also paid the amount by way of a debit entry. However, the original authority directed the charge of interest under Section 11AB and also imposed penalty of Rs. 5,000/-.

6. The first respondent filed an appeal, but, the same was dismissed insofar as the demand and the portion of interest is concerned. The imposition of penalty alone was set aside by the first appellate authority.

7. But, the further appeal filed by the first respondent was allowed by CESTAT by an order dated 4-3-2008 [, 2008 (10) S.T.R. 621 (Tribunal)]. Aggrieved by the said order, the Commissioner of Excise has come up with the above appeal. It is an admitted fact that the first respondent/assessee was not liable to pay service tax on the transportation of goods both inward and outward upto 31-12-2004. The liability was imposed only with effect from 1-1-2005. But, unfortunately, the first respondent/assessee paid service tax, even at a time when there was no liability on them. Since they made payment of tax under the impression that they were due to pay, they claimed Cenvat credit to that extent. It is not the case of the Department that the first respondent claimed Cenvat credit in respect of an amount that they had not paid or in excess of the amount that they have paid. The only grievance of the Department is that if the assessee had paid tax which they were due to pay or if they had paid duty in excess of what they are liable to pay, the only course open to them is to claim refund and not to make use of Cenvat credit. But, we do not think so. If, upon a misconception of the legal position, the assessee had paid the tax that he was not liable to pay and such assessee also happens to be an assessee entitled to certain credits such as Cenvat credit, the availing of the said benefit cannot be termed as illegal. Therefore, we find no infirmity in the order of the Tribunal. The question of law is answered against the Revenue and the appeal is dismissed. No costs.

