(1993) 11 MAD CK 0027

In the Madras High Court

Case No : Writ Petition No''s. 16111 and 16112 of 1993

Eltex Rudy Ltd. APPELLANT

Vs

Superintendent of C. Ex., Coimbatore RESPONDENT

Date of Decision : 19-11-1993

Acts Referred:

Central Excise Rules, 1944 — Rule 57A, 57E
Central Excises and Salt Act, 1944 — Section 11B
Customs Act, 1962 — Section 129, 27

Citation : (1994) 70 ELT 208

Hon'ble Judges : Kanakaraj, J

Bench : Single Bench

Advocate : Mr. C. Natarajan, for the Appellant; Mr. K. Ramakrishna Reddy, Addl. Central Govt. Standing Counsel, for the Respondent

Judgement

1. By consent of both parties, the Writ Petitions are taken up for final disposal, at the time of hearing the miscellaneous petitions.

2. The petitioner-company is engaged in the manufacture of aluminium rough castings. They had been availing exemption on these goods under

Notification No. 180/88 read with Chapter Heading 7616.90 of the Central Excise Tariff Act. Later the Revenue re-classified the goods as

machinery parts falling under Chapter 87 of the Central Excise Tariff, thus denying the benefit of the said notification. The stand of the petitioner-

company is that whatever be the classification of the goods, the duty if any, payable by the petitioners, as and when paid becomes a credit of duty

for the buyers who use castings in the manufacture of finished goods. Therefore, the contention is that the duty, if paid, becomes a credit for the

buyers in term of Rule 57A of the Central Excise Rules, 1944. The second respondent made two demands for Rs. 78,78,292.85 and Rs.

13,65,730.15 respectively. Against those demands the petitioner-company has preferred appeals before the Collector of Central Excise (Appeals)

and those appeals were dismissed on 7-4-1992. Thereupon the petitioner-company filed further appeals before the third respondent. Those

appeals are still pending disposal on the file of the third respondent. Pending disposal of the appeals, the petitioner-company sought for stay of

recovery and waiver of pre-deposit of the disputed Excise Duty. Taking up both the cases, the third respondent passed a common order directing

the petitioner to deposit an amount of Rs. 10,00,000 within 12 weeks from 29-3-1993. With a view to comply with the order of the third

respondent, the petitioner-company approached its principal customer who had purchased the goods without duty. The said principal customer by

its letter dated 29-4-1993 were willing to reimburse the duty amount provided the petitioner-company furnished T.R. 6 forms certifying the

payment of duty by the first respondent. The intention of the said principal customer was that on the basis of the chalan they could take credit

under Rule 57-A and utilise the amount as a credit in respect of their finished goods. In respect of one such payment, the petitioner-company

approached the first respondent for the issue of a certificate of payment. The first respondent by his letter dated 27-7-1993 refused to issue a

certificate on the ground that the payment made in pursuance of the third respondent''s order as part of the deposit, cannot be construed as

payment of differential duty relating to a particular customer. Therefore, he refused to issue the certificate in order enable the customer to avail

MODVAT credit of the amount so deposited. Thereafter, the petitioner approached the third respondent for extending the time for complying with

its order and the third respondent accordingly extended the time up to 15-9-1993. It is under these circumstances that the petitioner-company has

filed these two writ petitions in respect of the said two demands for the issue of a writ of mandamus to direct the first and second respondents to

give certificate of duty payment in respect of the amounts paid and payable by the petitioners pursuant to the orders of the third respondent made

on the said application.

3. There is a certain amount of vagueness in the plea of the petitioners. While they categorically state in the affidavit filed in support of the writ

petition that the demand for the certificate under Form T.R. 6 is for the specific purpose of the buyer claiming relief under rule 57A of the Rules, in

another portion of affidavit they express their grievance in the following words :-

Now in view of the refusal of the 1st and 2nd respondents even to acknowledge the amount paid as duty, the petitioners have no alternative

except to approach this Hon''ble High Court under Article 226 of the Constitution of India, on the following amongst other grounds.

The above passage seems to suggest that the petitioners only require respondents 1 and 2 to acknowledge the ""amount paid as duty"".

4. Counter-affidavits have been filed by the respondents in both the writ petitions. The clear and categorical stand of the respondents is that any

payment as advance deposited in pursuance of the third respondents'' order cannot be construed as a payment of differential duty relating to a

particular customer. Therefore they make it clear that the request of the petitioners to issue a certificate under rule 57-E of the rules cannot be

conceded. According to them, the payment of duty is different from a deposit made under the order of the third respondent as a pre-deposit for

obtaining stay. It is also pointed out that in case the petitioner succeeds in the appeals filed before the third respondent, they will be eligible for the

refund of the pre-deposit so made to the department. Therefor, the issue of a certificate was likely to create complications for the department in the

case of the petitioners ultimately succeeding in the appeals before the third respondent.

5. The entire argument of the learned counsel for the petitioner is that merely because the payment is made in pursuance of an order of the third

respondent in granting conditional stay, the payment will not lose its character as duty. Therefore according to him, even though the payment is

made in pursuance of the conditional order of stay pending certain appeals, it is only ""duty that is paid"" and therefore, they are entitled to the issue

of a certificate which will enable its buyers to claim MODVAT credit. He has taken me through the relevant Rules 57-A, 57-B and also 57-E.

Emphasis is made on Rule 57-E to suggest that there is an in-built machinery to make recoveries or make adjustments against the petitioners. In the

event of the duty or any input, being varied subsequently. Therefore, even if the appeals before the third respondent ultimately are allowed, adjustments can be made and there is no impediment in the issue of a certificate as demanded by the petitioners. He also relies on the order of the

Tribunal in one another case, wherein similar relief was given. A reference to the said order shows that the facts of the case before the Tribunal is

distinguishable from the facts of the present case. In the case before the Tribunal it was argued that in respect of a portion of an amount being the

duty on the goods supplied to M/s. Maruti Udyog Limited, the assessee in that case was entitled to MODVAT credit in respect of the duty paid

on the goods supplied to M/s. Maruti Udyog Limited. It was made clear that there was ""no objection on the part of the applicants to deposit at

least, the amounts of duty of Rs. 4,66,067.73 and Rs. 2,40,896.79 which represents the goods supplied to M/s. Maruti Udyog Ltd. direct. ""In

other words, as rightly pointed out by the respondents, the amount was paid without any objection as duty and a specific direction was sought for

in respect of those payments under Rule 57-E, so that M/s. Maruti Udyog Ltd. could avail the MODVAT credit. In the case before me the

petitioners do not contend that they are willing to make the payment without any objections, as duty, but on the other hand they make it clear that

they are only depositing the amount in pursuance of the orders of the third respondent. Reliance is next placed upon the circular issued by the

respondent as to the manner in which a deposit should be treated in the accounts. The department has clarified that the correct procedure is

classified such deposits made pending disposal of appeals under the final revenue head of account from the initial state itself. I am of the opinion

that this is a matter of convenience of the department regarding the procedural aspects and this cannot be taken advantage by the petitioners for

claiming that the deposit itself tantamounts to payment of duty. Reliance is next placed on the judgment of the apex court in Union of India and

others Vs. Jain Spinners Ltd. and another, . That case relates to the refund of certain amounts paid pending disposal of a writ petition and the

applicability of the Amendment Act, 1991, amending the provisions of Section 11-B of the Central Excises and Salt Act. The decision of the apex

court was based on the fact that the amounts deposited by the assessee, were permitted to be withdrawn by the department on the condition that

the amount would be refunded to the assessee provided the assessee ultimately succeeded. It is in that context that the apex court held that what was deposited in court was in fact, duty and the assessees were entitled to get the refund of the same either directly or from the court or it if had

been withdrawn by the department, from the departmental authorities. The following sentence is relied on by the learned counsel for the petitioners

:-

The contention of the learned counsel based on the said circular has therefore, to be rejected and the deposit made by the respondents in the

Court has to be held as one towards duty.

The sentence above quoted in my opinion, does not support the case of the petitioners. The apex court has only held that the deposit made by the

assessees has to be held as one towards the duty.

6. On the other hand reliance is placed by the revenue on the judgment of the Calcutta High Court in Super Cassettes Industries Ltd. Vs. Collector

of Customs, . That case also arose out of a demand for refund of certain amounts deposited pending disposal of the appeal u/s 129 of the Customs

Act, 1962. In holding that Section 27 of the Customs Act would not stand in the way of ordering the refund of the deposit made by the assessee

pending disposal of an appeal, Calcutta High Court categorically states ""such deposits should not be treated as payment of duty"". The amount so

deposited, according to the Calcutta High Court, remained merely as a deposit till the disposal of the appeal by the Tribunal. Once the assessee

succeeded before the Tribunal the amounts should be refunded.

7. While concluding his argument learned counsel for the respondents states that respondents have no objection to issue a certificate

acknowledging the payments made as deposits made in pursuance of the third respondent''s order. They have only an objection to issue a

certificate under Rule 57-E and enabled the petitioners'' customer to avail of MODVAT credit. Having analysed the rival submissions, based on

the respective authorities, I am inclined to hold that the word ''deposit'' has certainly, a totally different meaning than the word ''payment''. Even

according to the petitioners, only if money is paid as duty, it can be treated as a credit of duty for the buyers under Rule 57-E. In this case I have

already pointed out that the money is not paid, but it is only deposited in pursuance of a conditional stay order. It is interesting to see the Dictionary

meaning of the word ''deposit''. The following meanings are given :-

(i) Something entrusted for safekeeping such as a sum of money in a bank.

(ii) The condition of being entrusted for safekeeping.

(iii) A sum of money given as security for an item acquired for temporary use.

The petitioners in this case are only depositing the amount in pursuance of the conditional order of stay made by the third respondent. They are not

paying the amount of duty de hors his appeal before the Tribunal. Under such circumstances, I am clearly of the opinion that the petitioners cannot

claim even at this stage MODVAT credit for the deposits made in pursuance of the order of the third respondent. As rightly pointed out by the

learned counsel for the respondents, the respondents could acknowledge payments as ""deposit towards duty"" made in pursuance of the third

respondent''s order. The respondents are certainly not obliged to give a certificate under Rule 57-E of the Rules and thus enabling the customer of

the petitioner to avail of MODVAT credit even at this stage. The writ petitions are therefore, dismissed with the above observation, recording the

statement of the learned counsel for the respondents. There will however, be no order as to costs.