316-338

IN THE HIGH COURT OF KARNATAKA AT BANGALORE

Dated this the 17th day of February, 1998

B e f o r e

THE HON'BLE MR. JUSTICE V.P. MOHAN KUMAR

Writ Petition Nos. 34159 and 34160 of 1997

Between:

M/s S.K. "lectronics
79/2-B, Lakshmi Buildings
Magadi Road Cross, Behind Tiles
Factory Compound,
Bangalore 560 023
represented by
Sri Deepak Shah Authorised
Signatory. .. Petitioner in W.P.34159/97

(By Sri Sridhar, Adv. for
Sri G.Sampath, Adv.)

M/s S.S. Enterprises,
79/2-A, Lakshmi Building,
Magadi Road Cross, Behind
Tiles Factory Compound,
Bangalore- 560 023
Represented by Sri Deepad Shah
Authorised Signatory. ..Petitioner in W.P.34160/97

(By Sri Sridhar, Adv. for
Sri G.Sampath, Adv.)

A n d:

1. The Commissioner of Central
Excise, C.R.Buildings,
Queens Road,
Bangalore- 560 001.

2. Customs, Excise Gold(Control)
Appellate Tribunal,
No.26, Haddows Road, 1st Floor,
"Shastri Bhavan Annexe Building",
Madras 600 006. ..Respondents(Common)

(By Smt.Shireen Zaifrulla,CGSC)

These writ petition filed under Articles 226 and 227 of the Constitutionof India praying to set aside the Annexure-C orders bearing No.2343/96 dated 29-11-1996 and 2797/97 dated 20-10-1997 respectively and to hold that the petitioners are entitled to the benefit of Modvat Credit on the three invoices in question in both the petitions.

These petitions coming on for Preliminary hearing in B Group, this day, the Court made the following:

O__R__D__E__R

W.P.34159/97:

Petitioner herein challenges Annexure-C order passed by the 2nd respondent. A show cause notice was issued by the Department to show cause why modvat credit of Rs.72,097.30 should not be disallowed and equivalent amount should not be recovered on the ground that the invoice was endorsed more than once. The petitioner replied to the show cause notice. Inspite of his reply, the Department on 10-11-1994 disallowed the credit of Rs.72,097.30 and ordered for recovery of the equivalent amount on the ground that the invoice produced by the petitioner has been endorsed more than once and as such credit cannot be given. It held that the documents produced is

not

not valid under Rule 57 G of the Rules. Therefore the petitioner preferred an appeal before the first Appellate Authority the 1st respondent herein. By order dated 12.9.1996 the said appeal was also rejected. Thereafter the petitioner moved an application to frame the question of law arising and refer the same to the High Court for adjudication. Without awaiting its, disposal he has moved this Court challenging the said Annexure-C order passed by the second respondent.

2. W.P. 34160/97:

Similar question as the one raised in W.P. No.34159/97 arises for consideration in this petition as well. The petitioner is a manufacturer of goods falling under Chapter 83 and 85 of the Central Excise Tariff Act, 1985. The petitioner was availing modvat credit facility in respect of goods, which however were proposed to be denied as regards Annexure-A-1 to A-4 invoice mainly on the ground that it has been endorsed more than once. A show cause notice was issued to the petitioner to which he replied. The Assistant Commissioner rejected the plea by

order

order dated 8-1-1994. The petitioner preferred statutory appeal under Section 35-A of the Act. The Appellate Authority by order dated 13-2-1996 confirmed the order impugned. The petitioner challenged the order in further appeal Annexure-B and the appeal was rejected by Annexure-C order. The said order is challenged in this proceeding.

3. At the outset, Mrs. Shireen Zafrullah, the learned Counsel appearing for the respondents has raised a preliminary objection in that these writ petitioners are not maintainable in the light of availability of an effective alternative remedy under Sec.35-G of the Act. The question, then urged for consideration is whether the remedy under Sec.35-G of the Central Excise Act provides an effective alternate remedy to an assessee under the statute to resolve the dispute. After hearing the respective sides, I am of the view that this cannot be declared as an effective alternate remedy available to the assessee in the fact and circumstances of the case. Section 35-G states thus:

"Statement

"Statement of case to High Court

(1) The Collector of Central Excise or the other party may, within sixty days of the date upon which he is served with notice of an order under Section 35C(not being an order relating, among other things, to the determination of any question having a relation to the rate of duty excise or to the value of goods for purposes of assessment), by application in the prescribed form, accompanied, where the application is made by the other party, by a fee of two hundred rupees, require the Appellate Tribunal to refer to the High Court any question of law arising out of such order and, subject to the other provisions contained in this section, the Appellate Tribunal shall, within one hundred and twenty days of the receipt of such application, draw up a statement of the case and refer it to the High Court:

Provided that the Appellate Tribunal may, if it is satisfied that the applicant was prevented by sufficient cause from presenting the application within the period hereinbefore specified, allow it to be presented within a further period not exceeding thirty days."

The essence of Section 35-G would be the power of the Tribunal to draw up a case and refer to the High Court "any question of law arising out of the order". After the question raised is thus answered a further decision has to be taken by the Tribunal on the basis of the answer given by the High Court. As noticed by the Supreme Court in the decision reported in (1951) 19 ITR 108 while considering pari materia jurisdiction of the High Court under the Income Tax Act, the jurisdiction of the High Court was interpreted only as consultative and it was neither original nor appellate. In the said judgment the Supreme Court stated thus:

> "In order to attract the provisions of this clause, it is necessary to show, firstly, that the order under appeal is a final order; and secondly, that it was passed inthe exercise of the original or appellate jurisdiction of the High Court. The second requirement clearly follows from the concluding part of the clause. It seems to us that the order appealed against in this case, cannot be regarded as a final order, because it does not of its own force bind or affect the rights of the parties. All that the

High

High Court is required to do under Section 21 of the Bihar Sales Tax Act is to decide the questionof law raised and send a copy of its judgment to the Board of Revenue. The Board of Revenue then has to dispose of the case in the light of the judgment of the High Court. It is true that the Board's order is based on what is stated by the High Court to be the correct legal position, but the fact remains that the order of the High Court standing by itself does not affect the rights of the parties, and the final order in the matter is the order which is passed ultimately by the Board of Revenue. This question has been fully dealt with in TATA IRON AND STEEL COMPANY v. CHIEF REVENUE AUTHORITY, BOMBAY, where Lord Atkinson pointed out that the order made by the High Court was merely advisory and quoted the following observations of Lord Esher in IN RE KNIGHT AND THE TABERNACLE PERMANENT BUILDING SOCIETY:-

"In the caseof Ex parte County Council of Kent, where a statute provided that a case might be stated for the decision of the Court it was held that though the language might prima facie import that there has to be the equivalent of a judgment or order, yet when the context was looked at it appeared that the jurisdiction of the Court appealed to was only consultative, and that there was nothing which

amounted

amounted to a judgment or order."

It cannot also be held that the order was passed by the High Court in this case in the exercise of either original or appellate jurisdiction. It is not contended that the matter arose in the exercise of the appellate jurisdiction of the High Court, because there was no appeal before it. Nor can the matter, properly speaking, be said to have arisen in the exercise of the original jurisdiction of the High Court, as was held by the Judges of the Lahore High Court in the case to which reference was made, because the proceedings did not commence in the High Court as all original suits and proceedings should commence. But the High Court acquired jurisidction to dealwith the case by virtue of an express provision of the Bihar Sales Tax Act. The crux of the matter therefore is that the jurisdiction of the High Court was only consultative and was neither original nor appellate."

Thus, a judgment has to be rendered by the Tribunal after analysing the factual situation after receipt of the answer to the question referred to the High Court.

4. Similar view has been taken by the Supreme Court in the decision reported in AIR 1986 SC 421 wherein their Lordships held as follows:

> "When a question of law arises, the Tribunal can and in certain circumstances must seek at the instance of the assessee or in its own motion or at the instance of the revenue the opinon of the High Court on such a question. The jurisdiction exercised by the High Court is purely advisory, it is neither of a Civil Court exercising original, nor of any appellate or revisional jurisdiction. Therefore, the powers and jurisdiction of the High Courts and in certain cases of the Supreme Court, are those which are expressed and conferred upon them and also those which inhere in the exercise of that jurisdiction or are ancillary or those which subserve the exercise of the function and jurisdiction of giving advice. The appeal is kept pending before the Appellate Tribunal."

The said decision was rendered relying on its earlier decision reported in 19 ITR 108. In effect the answer provided by the High Court in a reference under similar provision under the Income Tax Act was only an advisory in nature and is not final. As stated the reference jurisdiction under the present Act is also

also similar. In these circumstances I overrule the contention of the respondents that there exists an effective alternate remedy under Sec.35-G of the Act.

6. The whole case of the petitioner depends on the admissibility under Rule 57 G of the Rules, as a valid document, an invoice which is endorsed more than once. The admissibility of such document was considered by the West Regional Bench of the Tribunal in S.B.S. Organics Pvt. Ltd vs Collector of C.Ex.& Customs 1990(45) E.L.T. 701 (Tribunal) and noticing the respective contentions it held thus:

> " We have carefully considered the arguments from both sides. The main issue to be decided in this appeal is whether the denial of modvat credit in respect of inputs received under gate passes endorsed in favour off the appellants are passing through more than two hands, is sustainable. xxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx As seen from the Trade Notice cited by the learned Advocate, it is evident that the Government is keen to extend the modvat credit so long as the goods in factory packed condition as are covered by the gate passes are received by the parties intending to avail modvat credit, Going by this spirit of the relaxation, we are unable to

to appreciate the routine and mechanical approach of the authorities below in rejecting the claim of the modvat credit only on the ground that morethan one endorsement have been made, When the Board themselves have taken a decision to relax the procedural requirement by way of administrative instruction it should be the endeavour of the authorities to extend modvat credit wherever, the duty paid nature of the goods is evident from the gate passes produced and quantum of duty paid on the inputs could be ascertained from them. A positive approach is called for in this regard. We also take note of the argument of Shri Arya that permitting a number of endorsements would involve in considerable administrative burden and the gate passes are likely to be abused. In this case, it is contended by the other side that the previous endorsements have been made not by any other manufacturer who could utilise this inputs but only by intermediaries in the trade channel. In any case, the department is entitled to make verification or investigation with regard to the genuineness of the gate pass and also on the question whether gate pass has been utilised for availment of modvat credit at the earliest stages. In this case, no such enquiry appears to have been conducted and the modvat credit has been denied only on the

the ground that more than that of permitted endorsements have been made in the gate passes. Such an order cannot be sustainable in the context of the scheme of modvat credit read along with the relaxation made by the Board."

6. This question again came up for consideration in DAVANGERE COTTON MILLS vs CENTRAL EXCISE,BELGAUM, Appeal No.E/1487/97. The South Zonal Bench, Madras presided over by the President, Justice U.L.Bhat, observed in this behalf as hereunder:

" An endorsed invoice does not cease to be an invoice. It continues to be an invoice as contemplated by law though the name of the ultimate consignee is not seen in the invoice as such, but seen only in the endorsement. We see no reason to hold that such a transfered invoice cannot hold good for the purpose of Rule-57G. Our attention is invited to the two decisions of the Tribunal namely:

(i) the decision in Kay Poly Plast Limited 1996(83) ELT 681(T) holding that an endorsed Bill of Entry would be sufficient and the case of

(ii) Krishna Cold Rolled Section Limited 1996(88) ELT 98(T) holding that the endorsed invoice

after

after 1-4-94 would be a document sufficient for the purposes of Rule 57 G. We agree with the view taken by the decisions of the Tribunal and hold that the document produced on the strength of which the Appellant availed the modvat credit is sufficient for the purpose of the Modvat Scheme."

5. This is the view expressed in S.B.S. Organics Pvt. Ltd's case as well. Doubting the correctness of S.B.S. Organic's case reference application under Section 35-G was made by the Department before the Benches of Tribunal at Mumbai and New Delhi. The Mumbai Bench in COMMISSIONER OF CEN.EXCISE,MUMBAI-I vs. HEGAL CAPSULE INDS.P.LTD, 1997(21) RLT 468 stated as hereunder.

"4. It is further found that a similar application seeking to raise the same point of law for reference to High Court has been rejected by the Tribunal: case of COLLECTOR vs. BANSAL INDUSTRIES 1995 (78) ELT 149. The Tribunal observed-

"In questioning this decision, the Collector has referred to the provisions of Rule 57G(2) of Central Excise Rules 1944 and contended that a thrice endorsed Gate Pass is not valid duty paying document

document for the purpose of the said provision. We do not agree.. A Gate Pass mentioning the details relating to the manufactured goods, tariffitem, quantity, duty paid and consignee is the duty paying document. It does not cease to be such duty paying document if it is endorsed more than twice....What was decided was to reject the contention of the department that a thrice endorsed gate pass ceases to be evidence of duty paid nature of the goods. A gate pass with two endorsements has been permitted to be acceptable as valid document. The additional third endorsement cannot take it out of that category. If the bona-fide nature of the endorsements could be gone into by the authorities to satisfy themselves about the validity of the claim within the terms of the Tribunal order. No question of law has arisen in the matter."

5. It is also noted that in the case of **Collector Vs. Modern Malleables-15(18) R.L.T. 247.** East Zonal Bench of the Tribunal had held that -

the case of SBS Organics is a direct decision onthe issue whether thrice endorsed gate pass is valid for the purpose of giving modvat credit or not and the Tribunal

further

further observed that the reliance is therefore, better placed on that decision rather than on the decision of the Southern Zonal Bench of the Tribunal in the case of Gopalkrishna Polly Industries. The Tribunal further noted that the essence of the Bombay High Court judgment in the case of **Bombay Goods Transport Association Vs. UOI - 1995(77) ELT** 521 relied upon in the Southern Zonal Bench decision is that modvat credit would be available if duty paid character of the input is proved and that in fact the gate pass itself, according to the Tribunal, is a guarantee of the duty paid because the gate pass signifieses the duty paid character of the goods and the same original gate pass was endorsed thrice.

This will further strengthen the view that no point of law for reference to the High Court arises out of the impugned order of the Tribunal in this case.

6. In this view of the matter, no question of law requiring reference to the High Court will arise. The application is rejected."

Likewise the New Delhi Bench in C.C.E., CHANDIGARH vs. SHUBH TIMB STEELS, 1997(22)RLT 712 stated as follows:

"3.Both

"3. Both sides fairly conceded that issue involved in this case is no longer res-integra in view of the fact that the Tribunal has been consistently taking the view that modvat credit is permissible on such challans issued by Steel Authority of India. Shri K.K.Angd submitted that issue in this case has been decided by the Tribunal in the judgment reported in 1990(26) ECR-412. Further, he submitted that reference application filed by the department has also been dismissed by the Tribunal on the similar issue as per **Reference Order No. R/47-48/95-NB** dated **1.11.1995.**

4. On going through the facts and circumstances and case law, I find that it is settled position now that challans issued by the Canalising Agencies allowed by the Government of India as duty paying documents in terms of Rule 57G(2) of the Central Excise Rules, 1944, for availment of Modvat credit can be allowed on endorsement. Accordingly, I accept the contentions of the respondent and in the result, the appeal filed by the department is hereby dismissed."

Thus S.B.S. Organis' case has been treated as the binding authority on the Tribunal. The same is the view expressed in 1995(79) E.L.T. 523 by the

the Delhi Bench, wherein they stated as follows:

"6. These applications seek to challenge the jurisdiction of this Tribunal in deciding these issues. The thrust of the applicants is that this Tribunal is bound by the directions of the Board issued in exercise of the statutory powers prescribing the duty paying documents. As a matter of fact, this Tribunal has not questioned the prescription of the Board with regard to the documents. The documents prescribed as one 'evidencing' payment of duty is the sale challan and the gate pass. The significance of these quoted words reproduced from the proviso(2) sub-rule 2 of 56G has to be appreciated. The proviso says, in essence that credit can only be taken on inputs covered by a gate pass R-1, a bill of entry or any other document has been prescribed by the Board evidencing the payment of duty on the inputs. Since the gate passes were already prescribed in the proviso, the questionof the Board prescribing it would not arise. The sale challan has been prescribed by the Board as a document evidencing the payment of duty. Now, if the challan and the gate pass continue to be document showing payment of duty even after one or two endorsements, they do not cease to be such duty paying document

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> if further endorsements are put on them. The proviso or the rules elsewhere relating to modvat do not confer upon the Board powers to limit the number of endorsements. Therefore directions issued by the Board with regard to the number of endorsement being duty paying document, either specified in the rule or prescribed under it cannot have been issued in exercise of its statutory powers. They would therefore be in the nature of administrative instructions. Therefore orders passed by this Tribunal have only impugned upon the orders issued by the Board in its administrative capacity. It was therefore to be held that the question framed in the applications for reference to the High Court itself does not arise from the orders of this Tribunal."

But, if we pursue the impugned order we notice, a contrary view having been taken by the South Zonal Bench, in the decision referred to in the impugned order. In such a situation what could be the question that can be formulated by the Tribunal for reference to the High Court? The different benches of the Tribunal has spoken in different manner and as such the question to be referred may be to reconcile

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the disputed decision; it may not be an answer to the point raised in the appeal. Hence one cannot say that invoking the advisory jurisdiction under Section 35G of the Act would be an effective alternate remedy. The answer to reference under Section 35-G may not decide the issue urged by the petitioner completely. It, therefore cannot be an alternate remedy.

8. The further question, would, therefore be what should be the relief to be granted to the petitioner in the instant case. The essential question raised by the petitioner is whether an invoice endorsed more than once is a valid document under Rule-57 G of the Rules.

9. As noticed earlier, various benches of the Tribunal has spoken in confliting manner on the issue. It is desirable in such cases, that the President of the Tribunal refers the question in dispute to

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a larger bench and sets at rest the dispute and the discordant note.

9. When conflict between the benches of the same Tribunal arises, the course open has been indicated by the Supreme Court in UNION OF INDIA vs PARAS LAMINATES (P) LTD reported in 1990(49) E L T 322(SC). Speaking for the Bench Justice Kochuthommen stated as under:

> " It is true that a Bench of two members must not lightly disregard the decision of another Bench of the same Tribunal on an identical question. This is particularly true when the earlier decision is rendered by a larger Bench. The rationale of this rule is the need for continuity, certainly and predictability in the administration of justice. Persons affected by decisions of Tribunals or Courts have a right to expect that those exercising judicial functions will follow the reason or ground of the judicial decision in the earlier cases on identical matters. Classification of particular goods adopted in earlier decisions must not be lightly

lightly disregarded in subsequent decisions, lest such judicial inconsistency should shake public confidence in the administration of justice. It is, however, equally true that it is vital to the administration of justice that those exercising judicial power must have the necessary freedom to doubt the correctness of an earlier decision if and when subsequent proceedings bring to light what is perceived by them as an erroneous decision in the earlier case. In such circumstances, it is but natural and reasonable and indeed efficatious that the case is referred to a larger Bench. This is what was done by the Bench of two members who in their reasoned order pointed out what they perceived to be an error of law in the earlier decision and stated the points for the President to make a reference to a larger Bench.

10. That the President has ample power to refer a case to larger Bench is not in doubt in view of sub-section (5) of Section 129-C, which we have set out above. That provision clearly says that in the event of the members of a Bench differing in opinion on any point, and the members are equally divided, the case shall be referred to the President for hearing on any such point by one or more of the members of the Tribunal, and such point shall be decided according to the opinion of

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the majority of the members.

11. It is true that sub-section(5) refers to difference of opinion arising amongst members of a Bench in a particular case, and not specifically where the members of a Bench doubt the correctness of an earlier decision. However, Section 129-C confers power of reference upon the President. That power should be construed to be wide enough to enable the President to make a reference where members of Bench find themselves unable to decide a case according to what they perceive to be the correct law and fact because of an impediment arising from an earlier decision with which they cannot honestly agree. In such cases, it is necessary for the healthy functioning of the Tribunal that the President shouldhave the requisite authority to refer the case to a larger Bench. That is a power which is implied in the express grant authorising the President to constitute Benches of the Tribunal for effective and expeditious discharge of its functions."

Therefore the proper course would be, to direct the President to constitute a larger Bench of the Tribunal and resolve the disputed question dealt within the case referred to above, and hold whether

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the dictum in S B S Organics' case referred to supra is correctly decided and answer whether an invoice/gate pass endorsed more thanonce is valid document within Rule57-G of the Central Excise and Customs Rules. I therefore quash the impugned order Annexure-C passed by the 2nd respondent in the appeals filed by the petitioners. The appeals filed by the petitioner Annexure-B in the respective writ petitions shall stand restored to the file of the 2nd respondent. I would further direct the Presidnt of the 2nd respondent Tribunal to constitute a larger Bench as indicated in the decision referred to above namely UNION OF INDIA vs. PARAS LAMINATES (P)LTD reported in 1990(49) E L T 322 (SC) and adjudicate the question referred to in the preceding paragraphs. The writ petitions stand disposed of as above./

Sd/-
JUDGE

Vb/-