A M/S. SHREE HARI CHEMICALS EXPORT LTD.

v.

UNION OF INDIA AND ANR.

DECEMBER 16, 2005

B [S.B. SINHA AND P.K. BALASUBRAMANYAN, JJ.]

Central Excise Rules, 1944—Rules 56A and 57A—Modvat Credit Scheme—Availability of credit facility—Wrong claim of credit of duty on input of Naphthalene under Rule 57A—Subsequently claim made to return C *the credit taken and claim raised under Rule 56A—Entitlement of claim under Rule 56A—Held: Assessee cannot be denied relief on mentioning wrong provision of law, if he is otherwise entitled to—Credit available under Rule 57A having been returned, assessee can claim exemption under another Rule—However, matter remitted back to the concerned Authority to determine* D *whether assessee was entitled to take credit under Rule 56A(8).*

In terms of the Notification of 1962, credit facility was available under Rule 56A of the Central Excise Rules, 1944. However, by Notification of 1986 issued under Rule 57A credit facility was not available on inputs classifiable under Chapter Heading 27 of the Central Excise Tariff Act. Appellant-assessee E **availed the credit of duty on Naphthalene falling under Chapter 27 in terms of Rule 57A as an input for manufacturing of hydrochloric acid. Assistant Collector issued notice for disallowing the credit as it was claimed wrongly. Appellant claimed credit under Rule 56A and intended to return the credit taken under Rule 57A. Assistant Commissioner disallowed the claim but the Commissioner allowed the claim. Aggrieved respondent No. 2-Revenue filed** F **an appeal. Tribunal allowed the same. High Court upheld the order. Hence the present appeal.**

Allowing the appeal and remitting the matter to the Assistant Commissioner, the Court

G **HELD: 1.1. A wrong mentioning of a Section cannot be a ground to refuse relief to an assessee if he is otherwise entitled thereto. [904-F]**

1.2. Sub-rule (9) of Rule 56A of the Central Excise Rules, 1944 debars an assessee from taking benefit of one or the other sub-rules of Rules 56A if credit of duty paid on such material, component parts or finished product

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has been taken under Rule 57A. Thus, the said provision merely debars taking of credit both under Rules 56A and 57A. Appellant although had taken credit as regard input of Naphthalene in terms of Rule 57A, the same was not applicable in his case, as such he had no other option but to return the same. Therefore, the word 'taken' must be understood in its proper perspective. A person cannot take the benefit unless final order of assessment is passed. Only because in his books of accounts entries are made for taking of the credit in terms of one provision of the Rules, the same if ultimately found to be inapplicable and return of the credit is taken effect, there cannot be any legal bar in claiming the exemption under another Rule. However, since it is not clear as to whether the appellant had complied with the provisions for taking credit in terms of Sub-rule (8) of Rule 56A of the Rules or not if it was not otherwise entitled thereto, matter is remitted back to the Assistant Commissioner to determine the same. [905-C-F]

Commissioner of Income-Tax, Madras **v.** *Mahalakshmi Textile Mills Ltd.*, **66 ITR 710 and** *Anchor Pressings (P) Ltd.* **v.** *Commissioner of Income Tax, U.P. and Ors.*, **[1986] 3 SCC 439, referred to.**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 7534 of 2005.

From the Judgment and Order dated 14.9.2004 of the Bombay High Court in W.P. No. 8363 of 2003.

Prakash Shah, Jay Savla and Ms. Reena Bagga for the Appellant.

K. Swami and P. Parmeswaran for the Respondents.

The Judgment of the Court was delivered by

S.B. SINHA, J. Leave granted.

The Appellant herein *inter alia* is engaged in manufacture of Hydrochloric Acid. It falls under Chapter Heading 29 of the First Schedule of the Central Excise Tariff Act, 1985. It uses Naphthalene for the manufacture of Hydrochloric Acid.

Chapter AA of the Central Excise Rules, 1944 (for short "the Rules") provides for credit of duty paid on excisable goods used as inputs. (hereinafter referred to as "the Modvat Credit Scheme"). Sub-rule (1) of Rule 57A which was applicable at the relevant time reads as under:

"The provisions of this section shall apply to such finished excisable

A goods (hereinafter referred to as the "final products"), as the Central Government may, by a notification in the Official Gazette, specify in this behalf, for the purpose of allowing credit of any duty of excise or the additional duty under Section 3 of the Customs Tariff Act, 1975 (51 of 1975) as may be specified in the said notification (hereinafter referred to as the "specified duty") paid on the goods used in or in B relation to the manufacture of the said final products. (hereinafter referred to as the "inputs") and for utilizing the credit so allowed towards payments of duty of excise leviable on the final products, whether under the Act or under any other Act, as may be specified in the said notification, subject to the provisions of this section and C the conditions and restrictions that may be specified in the notification."

Rule 56A of the Rules, however, provides for the special procedure for movement of duty paid materials or component for use in the manufacture of finished excisable goods. (hereinafter referred to as "the Proforma Credit D Scheme") Sub-rules (8) and (9) of Rule 56A of the Rules, which are material for the purpose of this case, read as under:

"(8) Notwithstanding anything contained elsewhere in this rule or any change in the nomenclature or classification of any goods consequent to the commencement of the Central Excise Tariff Act, 1985 (5 of 1986), E the credit of duty paid on any material, component parts or finished product shall be allowed if the credit of duty was allowed in respect of such material, component parts or finished product under this rule immediately before the commencement of the Central Excise Tariff Act, 1985 (5 of 1986).

F Provided that no such credit shall apply in respect of any material, component parts or finished product, if such credit was not allowable under this rule immediately before the commencement of the Central Excise Tariff Act, 1985 (5 of 1986).

(9) No credit of duty paid on any material, component parts or finished G product shall be allowed under this Rule if credit of duty paid on such material, component parts or finished product has been taken under rule 57A."

Credit under Rule 56A was said to be available on Naphthalene in terms of a notification dated 29.12.1962. However, on or about 1st March, 1986, a H notification bearing No. 177 of 1986 was issued under Rule 57A of the Rules

stating that the credit on inputs classifiable under Chapter Heading 27 of the Tariff Act would not be available. The Appellant herein during the period September, 1991 to January, 1992 availed the credit of duty amounting to Rs. 2,46,109/- on 1,04,119 kgs. of Naphthalene falling under Chapter 27 of the Tariff Act in terms of Rule 57A. As the said credit facility in terms of the Modvat Credit Scheme was not available in relation to Naphthalene as an input for manufacturing of Hydrochloric acid, a show-cause notice was issued by the Assistant Collector, Central Excise in terms whereof not only the wrong claim made on the part of the Appellant herein as regard credit of input was pointed out, it was also proposed to disallow credit of Rs. 2,46,109/- and a penalty under Rule 173Q of the Rules was proposed to be levied. The Appellant herein did not deny or dispute in view of the aforementioned notification No. 177 of 1986 that it has wrongly claimed credit in terms of Rule 57A but submitted that it should not be denied credit of duty on the input which was available prior to 1.3.1986 under Rule 56A. The said contention of the Appellant was rejected by the Additional Commissioner of Central Excise by an order dated 12.12.1997 whereagainst an appeal was preferred before the Commissioner of Central Excise. By an order dated 24.2.1998, the Commissioner allowed the appeal recording that indisputably the input was received in the factory and was used in the manufacture of final product and although initially the Appellant claimed credit under Rule 57A, they found the same as inconvenient and wanted to avail credit under Rule 56A(8) of the Rules.

The Respondent No. 2 herein aggrieved by and dissatisfied therewith preferred an appeal before the Tribunal which having been allowed; the Appellant herein filed a writ petition before the High Court. By reason of the impugned judgment the same was dismissed.

Mr. Prakash Shah, learned counsel appearing on behalf of the Appellant would submit that wrong mentioning of a provision of law cannot be a bar in claiming relief to which the Appellant was otherwise entitled to and, thus, the Tribunal as well as the High Court committed an error in disallowing the same.

The learned counsel appearing on behalf of the Respondent, on the other hand, would submit that the Appellant having claimed credit in terms of Rule 57A, must be held to have availed the same and in that view of the matter, Sub-rule (9) of Rule 56A would be applicable in the instant case. It was further submitted that the procedure for claiming relief under Rules 56A and 57A being different, nothing has been produced before the authorities to

A show that the Appellant was otherwise entitled thereto.

Before adverting to the rival contentions raised at the Bar, we would place on record that upon receipt of the show-cause notice, the Appellant herein categorically made a claim before the Assistant Commissioner that it intended to return the credit taken in terms of Rule 57A of the Rules and avail
B the benefits in terms of Sub-rule (8) of Rule 56A thereof. In its order dated 12.12.1997, the Assistant Commissioner noticed that the assessee had taken credit wrongly and, thus, it is not eligible for credit under Rule 56A of the Rules. The Commissioner, on the other hand, opined that the Appellant would be so entitled. The Tribunal did not discuss the question in great details but
C considered the question from the point of view of applicability of its earlier in *CCE* v. *Crest Chemicals Pvt. Ltd.,* and having found the same to be not applicable allowed the appeal of the Revenue. The High Court affirmed the said order of the Tribunal stating:

> "The fact of the matter is, as noticed by us above, that the petitioner
> D claimed modvat credit only under Rule 57A. As a matter of fact, not only that no claim was made by the petitioner under Rule 56A(8) but also there was no entries made by the petitioner in RG 23A (sic 23) register. The petitioner claimed modvat credit under Rule 57A but strangely the Commissioner of Appeals allowed the credit to the petitioner under Rule 56A(8). When the petitioner had claimed benefit
> E under Rule 57A, in our considered view, the petitioner could not have claimed the benefit of modvat credit under Rule 56A(6) particularly when the conditions precedent under Rule 56A were also not satisfied. The judgments relied upon by the learned counsel for the petitioner have no application."

F It is now a well-settled principle of law that wrong mentioning of a section would not be a ground to refuse relief to an assessee if he is otherwise entitled thereto.

In *Commissioner of Income-Tax, Madras* v. *Mahalakshmi Textile Mills Ltd.,* [66 ITR 710], a 3-Judge Bench of this Court opined:

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> "...If for reasons recorded by the departmental authorities in rejecting a contention raised by the assessee, grant of relief to him on another ground is justified, it would be open to the departmental authorities and the Tribunal, and indeed they would be under a duty to grant that relief. The right of the assessee to relief is not restricted to the plea

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raised by him." A

Yet again in *Anchor Pressings (P) Ltd.* v. *Commissioner of Income Tax, U.P. and Ors.*, [1986] 3 SCC 439, it was observed:

> "...It is contended that an obligation was imposed on the Income Tax Officer by the statute to grant such relief and it could not be refused merely because the appellant had omitted to claim the relief. While we believe the appellant is right in his contention, we do not think that the mere existence of such an obligation on the Income Tax Officer is sufficient....." B

Sub-rule (9) of Rule 56A of the Rules debars an assessee from taking benefit of one or the other sub-rules of Rule 56A if credit of duty paid on such material, component parts or finished product has been taken under Rule 57A. Thus, the said provision merely debars taking of credit both under Rules 56A and 57A. The Appellant herein although had taken credit as regard input of Naphthalene in terms of Rule 57A, evidently, the same was not applicable in his case. He had, therefore, no other option but to return the same. In that view of the matter, we are of the opinion, that the word 'taken' must be understood in its proper perspective. A person cannot take the benefit unless final order of assessment is passed. Only because in his books of accounts entries are made for taking of the credit in terms of one provision of the Rules, the same if ultimately found to be inapplicable and return of the credit is taken effect, we are of the opinion that there cannot be any legal bar in claiming the exemption under another rule. However, we are not sure as to whether the Appellant had complied with the provisions for taking credit in terms of Sub-rule (8) of Rule 56A of the Rules or not if it was not otherwise entitled thereto. For the aforementioned purpose, thus, it is necessary that the claim of the Appellant be considered afresh by the Assistant Commissioner of Excise. C D E F

We, therefore, while setting aside the order of all the authorities as well as the Tribunal, remit the matter back to the Assistant Commissioner for his determination as to whether the Appellant herein was entitled to take the credit in terms of Sub-Rule (8) of Rule 56A of the Rules or not. It would be open to the Appellant herein to show that it was so entitled. G

The Appeal is allowed and the impugned judgments are set aside with the aforementioned directions. However, in the facts and circumstances of this case, there shall be no order as to costs.

N.J. Appeal allowed. H