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M/S. SARVESH REFRACTORIES (P) LTD.

v.

COMMISSIONER OF CENTRAL EXCISE & CUSTOMS

NOVEMBER 22, 2007

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[ASHOK BHAN AND V.S. SIRPURKAR, JJ.]

C *Central Excise Rules, 1944—r. 570 and 1730 (bb)—Purchase of 'Loadall' by assessee from manufacturer/supplier—Manufacturer paying the duty under heading 84.29—Claim of MODVAT credit by assessee classifying the item under heading 84.27—Revenue denying the credit and imposing penalty—Held: Assessee not entitled to MODVAT credit—He, as a consumer, could not get the classification of the item changed to heading 84.27 from 84.29 as declared by the manufacturer—Central Excise Tariff Act, 1985—Tariff heading 84.27.*

D **Appellant-assessee purchased 'Loadall' from its manufacturer/supplier. The cost element of the good included excise duty. Assessee claimed MODVAT credit in respect of the said item under Rule 570 of the Central Excise Rules, 1944. The authority disallowed the same on the ground that the manufacturer had paid duty on the item, classifying the same under Heading 84.29 and Rule 570 was not applicable to that Heading. The authority also imposed penalty under Rule 1730 (bb). In appeal, appellant-assessee was held to be entitled to the MODVAT credit. Tribunal denied the same, holding that the item having been classified by the manufacturer under Heading 84.29, the assessee, as a consumer could not get the classification changed to 84.27. Hence the present appeal.**

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Disposing of the appeal, the Court

HELD: Appellant could not get the classification of 'Loadall' changed to Heading 84.27 from 84.29 as declared by the manufacturer. Insofar as the penalty imposed by the authority-in-original is concerned,

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a case for imposition of penalty is not made out and accordingly the same is set aside and deleted. [Para 6] [446-C, D]

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 1824 of 2002.

From the Judgment and final Order No. A-860-KOL/2001 dated 10.9.2001 of the Customs Excise & Gold (Control) Appellate Tribunal Eastern Bench, Kolkata in Appeal No. E/294/2001.

Rajesh Kumar, Rajiv Roy, A.C. Pradhan and S.K. Patri (for Pranab Kumar Mullick) for the Appellant.

V. Shekhar, P. Narsimhan, Pradeep K. Dubey and Abhigya (for B.V. Balaram Das) for the Respondent.

The Judgment of the Court was delivered by

ASHOK BHAN, J. 1. Being aggrieved by the order dated 10 th September 2001 passed by the Customs, Excise & Gold (Control) Appellate Tribunal (Now known as Customs, Excise & Service Tax Appellate Tribunal) [for short 'the Tribunal] in Appeal No.E-294/2001, the assessee-appellant has filed the present appeal.

2. The appellant purchased 'Loadall' from M/s. Escorts JCB Ltd. The cost element of the 'Loadall' included excise duty to the tune of Rs.1,79,328/-. The appellant claimed MODVAT credit in respect of the said item under Rule 57Q of the Central Excise Rules, 1944 (for short, 'the Rules').

3. Since the said item had been classified by M/s. Escorts JCB Ltd., the manufacturer and supplier, under Heading 84.29 and had paid duty under the said heading, the authority-in-original, viz., Dy. Commissioner disallowed the MODVAT credit to the appellant by observing that the said Heading 84.29 has been specifically ousted from the definition of "capital goods" under Rule 57Q of the Rules. The Dy. Commissioner also imposed a penalty of Rs.50,000/- under Rule 173Q(bb) of the Rules.

4. On appeal filed by the appellant, the Commissioner (Appeals) observed that 'Loadall' being an improvised version of material handling

A equipment would properly fall under Heading 84.27 and not under Heading 84.29. It was further observed that forklift truck or crane or similar material handling equipments have been held to be eligible capital goods. On this finding, the Commissioner (Appeals) held that the appellant would be entitled to claim MODVAT credit.

B 5. Revenue, being aggrieved, filed an appeal before the Tribunal which was accepted by setting aside the order of the Commissioner (Appeals) and restoring that of the authority-in-original. It was held that the 'Loadall' having been classified by the Central Excise Officer having jurisdiction over the manufacturer's factory as falling under Heading 84.29, the appellant, who is the consumer of those goods, could not get the classification of the manufacturer changed from 84.29 to 84.27.

C 6. The finding recorded by the Tribunal is unexceptionable. We agree with the view taken by the Tribunal that the appellant could not get the classification of 'Loadall' changed to Heading 84.27 from 84.29, as declared by the manufacturer. Insofar as the penalty imposed by the authority-in-original is concerned, we are of the view that a case for imposition of penalty is not made out and accordingly the same is set aside and deleted. Rest of the order of the Tribunal restoring the order of the authority-in-original is confirmed.

D 7. Counsel for the appellant has raised an alternate argument on the interpretation of Rule 57Q of the Rules which had not been raised either in reply to the show cause notice or before any of the authorities below. Under the circumstances, we do not permit the appellant to raise this alternate submission.

E 8. The appeal is disposed of accordingly with no order as to costs.

K.K.T.

Appeal disposed of.