

GAHC010139562018



THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)

Case No. : C.Ex.App./2/2019

COMMISSIONER, CENTRAL GOODS AND SERVICE TAX AND CENTRAL
EXCISE

HAVING HIS OFFICE AT SETHI TRUST BUILDING, G.S. ROAD,
BHANGAGARH, GUWAHATI, 781005

VERSUS

M/S RAJDHANI TELE PRODUCTS
AT LOKHRA, NH-37, NEAR TIRUPATI ROLLING MILL, GUWAHATI 781034

Advocate for the Petitioner : MR. S C KEYAL, SC, CUSTOMS

Advocate for the Respondent : MR H DAS, FOR CAVEATOR

BEFORE
HONOURABLE THE CHIEF JUSTICE
HONOURABLE MR. JUSTICE ARUN DEV CHOUDHURY

JUDGMENT

Date : 02.06.2023

(Arun Dev Choudhury, J)

1. Heard Mr. S.C Keyal, learned counsel appearing for the appellant.
Also heard Dr. A. Saraf, learned senior counsel for the respondent.

2. The present appeal under section 35G of the Central Excise Act,

1944 is preferred assailing the order No.FO/78328/2017 dated 30.11.2017 passed by the Customs, Excise & Service Tax Appellate Tribunal (CESTAT), Eastern Zonal Bench, Kolkata in Appeal No.E/446/2008-DC.

3. The present appeal was admitted by this Court under its order dated 20.02.2019 for hearing by formulating the following substantial questions of law:

I. Whether the CESTAT was justified in concluding that the exemption as granted to the respondent was justified and in that light whether the conclusion as reached is perverse for non-consideration of the evidence said to have been produced by the appellant herein?

II. Whether the order is perverse and in that regard as to whether the CESTAT has taken into consideration the materials available on record?

4. The facts:

Before endeavouring into determining the substantial questions of law, the facts giving rise to the present appeal may be summed up as under:

I. A show cause notice dated 29.10.2007 was issued to the respondent alleging that respondent misused benefit of exemption notification No.32/99CE dated 08.07.1999 and availed undue benefit of excise duty exemption by way of erroneous refund amounting to Rs.66,89,962.00 (Rupees sixty six lakhs eighty nine thousand nine hundred and sixty two) during the period from December 2002 to August, 2005.

II. The basic allegations levelled in the aforesaid show cause notice dated 29.10.2007 were to the extent that acting on intelligence input, an enquiry was conducted by visiting the industrial unit of the assessee on 18.10.2005 and it was found that an industrial unit by the name and style of "*M/s Polyplast Products*" was functioning on the same plot of land where the respondent units were said to be operating till 31.03.2002. The said Polyplast products had surrendered its registration to the Central Excise Authority on 09.04.2002, though the assessee unit had applied for benefit of exemption and was granted such exemption on 10.12.2002. It was also alleged that during the investigation it was found that the invoice/bills in respect of the machines shown to have been purchased by the assessee unit were forged and fabricated, except two invoice/bills pertaining to the year 2003 for new products. It was also alleged that in terms of the exemption notification, the commercial production of such exempted units should have commenced on or after 24.12.1997 and there was no physical existence of the assessee unit till 31.01.2002 over the plot of land in question and the proprietor of the unit has also admitted in his statement that production started on 28.11.2005 after the respondent unit obtained central excise registration. Accordingly, it was alleged that the proprietor of M/s Polyplast products with an intention to have exemption benefit renamed the earlier unit as "*M/s Rajdhani Tele Products*" and obtained a new central excise registration. It was further alleged that the respondent unit was in existence only on paper and that during investigation, it came to light that the vendor from whom the

machineries were shown to have been purchased had denied selling any such products to the respondent unit.

III. After considering the matter including the statements recorded by the Investigating Authority, the Commissioner of Central Excise, Shillong under its order dated 29.07.2008 confirmed the demand of the duty to the tune of Rs.66,89,962.00 holding that the respondent unit was ineligible for the benefit of exemption notification in question and accordingly, ordered recovery of the said amount along with interest and penalty.

IV. Being aggrieved, the respondent unit preferred an appeal before the Customs Excise and Service Tax Appellate Tribunal (CESTAT), Kolkata.

5. Findings of the Commissioner of Excise:

The Commissioner of Excise, while deciding the issue before it, came to the following conclusions:

I. There was a change of status of the unit from M/s Polyplast Products to M/s Rajdhani Tele Products and registration of the new unit was obtained on 21.03.2002 and earlier registration was surrendered on 09.04.2002. Thus illegality was committed.

II. Relying on the purchase voucher dated 17.05.2003 and 10.05.2003, it was concluded that no new plant/machinery were purchased and/or installed for establishing a new industrial unit. It was also concluded that machines were purchased in the year 2003, whereas production has been shown to be commenced on 25.05.2000. The assessee has availed the benefit of exemption by

means of false declaration by producing forged documents and suppression of material facts.

6. The findings of the Appellate Tribunal:

The Appellate Tribunal set aside the order of the Commissioner on basis of the following considerations:

I. The Authority concerned after verification of the application of the appellant unit by order dated 10.12.2002 allowed the exemption benefit to the unit and it is reflected and recorded in the order of exemption dated 10.12.2002 that the factory was visited and it was found that the plants and machineries are in existence and in operation as declared by the assessee. It was verified and confirmed that the commercial production of the unit started on 25.05.2000.

II. The investigation leading to withdrawal of such benefits commenced in the year 2005. The Department sought for list of the machineries, which were procured and installed before grant of exemption. The investigation was focused on establishing that the invoices of machineries were forged and fabricated and concluded to be so only on the basis of statements of third parties, without any supporting documents.

III. If the department had any doubt about the procurement, the verification should have been carried out either before grant of exemption or soon thereafter.

IV. The investigation proceeded not on the basis of the list of machinery originally declared by the assessee but on the basis of the list of machinery obtained subsequently.

V. Neither in the show cause notice nor in the impugned order, it was indicated that any verification of the machines actually installed and working in the unit had been undertaken.

VI. The entire case has been built up on the basis of statements of the alleged suppliers of plant and machineries, without any documentary corroboration of such statements.

7. Arguments advanced on behalf of the Appellants

Mr. S.C. Kayal learned Counsel for the Appellate assailing the impugned decision argues the following:

I. The decision of the CESAT is perverse in concluding that the exemption granted to the respondent was justified as it was done after due verification and that the investigation ought to have been done either prior to grant of exemption or immediately thereafter inasmuch as the learned appellate Tribunal has ignored the material that Rajdhani Tele Products commenced production by using the machines of M/s Polyplast in the same premises and thus the divisional authority who conducted the verification was misled by the assessee.

II. The learned appellate authority also failed to appreciate the fact that the divisional authority who granted exemption and the Anti Evasion Unit are two independent authorities and investigation was launched on the basis of intelligence inputs gathered. Therefore, the judgment of the appellate authority is perverse.

8. Arguments Advanced on behalf of the Respondent:

Per contra, Dr. Saraf, learned senior counsel raised the following contentions:

I. The appellate Tribunal is the highest authority empowered to determine the question of fact and the learned tribunal after appreciation of the materials placed before it, including the statements of different individuals and the documents such as invoices, allowed the appeal by concluding that the exemption was withdrawn on wrong interpretation of facts. Therefore, this Court in exercise of its power under section 35G may not like to upset such findings of facts. The first substantial question of law framed is general in nature and cannot be treated to be a substantial question of law at all.

II. The appreciation of the facts by the tribunal, the examination of the documentary evidences and interpretation of such contents cannot be held to be giving rise to the substantial questions of law as framed, inasmuch as the fact remains that exemption was granted after due verifications by the competent authority and finding of the Commissioner of Excise is based only on the statements of the so called vendors without any supporting documents. Therefore, the findings of the appellate tribunal cannot be said to be perverse. In support of such contention Dr. Saraf places reliance on the judgment of the Hon'ble Apex Court in the case of ***Veerayee Ammal Vs. Seeni Ammal*** reported in ***(2002) 1 SCC 134***, ***Sri T.Ashok Pai Vs. Commissioner Of Income Tax*** reported in ***(2007) 7 SCC 162***, ***Commissioner of Income Tax Vs. P. Mohanakala*** reported in

(2007) 6 SCC 21.

9. Determination of this Court:

I. This court has given anxious consideration to the arguments advanced by the learned counsel for the parties and also perused the materials available on record.

II. It is well settled that the power of the High Court under section 35G of Act, 1944 to interfere with an order passed by an Appellate Tribunal is very limited and the same can be done, only when the Court is satisfied that the case involves substantial questions of law.

III. Finding of facts reached by an Appellate Tribunal cannot be interfered or reversed in an appeal under section 35G of the Act'1944 without coming to a conclusion that the said finding of fact is either perverse or not based on materials on record. The word "Perverse" in the legal parlance is defined to mean "against the weight of evidence".

IV. It is equally well settled that even when from the evidence two inferences are possible, then the one drawn by the Tribunal below should be opted. Such finding of facts and decision can only be interfered in an appeal under section 35G of the Act'1944, when such decision is based on inadmissible evidence or arrived at without evidence or recorded based on misreading of materials on record and documents.

V. In the case in hand, from the show cause notice as well as

from the order of the Commissioner dated 29.07.2008, it is clear that the order of exemption granted to the respondent on 10.12.2002 is not disputed.

VI. From the order of exemption, it is clearly established that the exemption was granted on the basis of policy of area based exemption. It is clearly discernible from the said order that before grant of such exemption the competent authority concluded that the unit is entitled for exemption as it is located in notified area/industrial area and the assessee is engaged in manufacturing and started commercial production on 25.05.2000. It was also recorded in the order of exemption that on the visit of the factory by the Deputy Commissioner, who issued the order of exemption, the plant and machineries declared by assessee were found to be in operation and also the employees as declared by assessee were mostly found present. Therefore, the conclusion of the Appellate Tribunal in discarding the Investigation report on ground that the investigation was done in the year 2005 and not immediately after the exemption was granted, cannot be faulted with. Therefore, the course of action adopted by the appellate authority in placing reliance on the recorded facts in the order dated 10.12.2002 granting exemption cannot be said to be perverse.

VII. The allegations levelled in the show cause notice dated 29.10.2007 and confirmed in Commissioners order dated 30.11.2007 are based on the foundation that no purchase of plants and machinery was made as claimed by the assessee and such allegations has been established through the statement of the vendors from

whom the machineries were purchased and also from the statement of the alleged transporters. However, these statements were recorded in the year 2005 whereas the exemption order was issued on 10.12.2002 and further such statements are also not supported by any tangible material including documents which would show the transactions done by the vendors during the aforesaid period of supply. The fact also remains that there is no whisper by the authority/department that the findings recorded by the competent authority in order dated 10.12.2002, while granting exemption are incorrect or that no verification was made by the authority before granting such exemption. That being the position, the conclusion of the learned Appellate Tribunal as discussed and summarised herein above, cannot be said to be perverse.

VIII. Accordingly, the substantial questions of law formulated are answered against the appellant and in favour of the assessee.

10. In view of the determination made herein above, the present appeal fails and is accordingly dismissed. Parties to bear their own cost.

JUDGE CHIEF JUSTICE

Comparing Assistant