

GAHC010179492023



**THE GAUHATI HIGH COURT AT GUWAHATI**  
**(The High Court of Assam, Nagaland, Mizoram and Arunachal Pradesh)**

**PRINCIPAL SEAT AT GUWAHATI**

**C.Ex. Appeal No. 2/2023**

M/s NET METALLICS,

A partnership concern represented by one of its Partner

Shri Jugal Kishore Mahanta and having its Office and

Place of business at Industrial Growth Centre, College Road,

P.O. Duliajan, PIN- 786602, in the District of Dibrugarh, Assam.

.....Appellant

-Versus-

1. The Union of India,  
Represented by the Secretary to the  
Government of India, Ministry of Finance,  
Department of Revenue, North Block,  
Central Secretariat, New Delhi- 110001.
- 2 The Commissioner,  
Central Excise & Service Tax, Dibrugarh,

having his office at Milan Nagar, Lane-F,  
P.O.: C.R. Building, Dibrugarh – 786003.

3. The Additional Commissioner,  
Central Excise & Service Tax, Dibrugarh,  
having his office at Milan Nagar, Lane-F,  
P.O.: C.R. Building, Dibrugarh – 786003.

.....Respondents.

Advocate for the appellant : Mr S Chetia,

Advocate for the respondent : Mr S C Keyal, Sr. SC, CBIC.

**BEFORE**  
**HON'BLE THE CHIEF JUSTICE**  
**HON'BLE MRS. JUSTICE SUSMITA PHUKAN KHAUND**

Date of hearing : 11.09.2023

Date of judgment : 11.09.2023

**JUDGEMENT AND ORDER (ORAL)**

**(Susmita Phukan Khaund, J.)**

1. This appeal under Section 35(G) of the Central Excise Act, 1944, (CEA, for short), is preferred against the order of the CESTAT dated 14.07.2023.
2. The appellant is a partnership concern represented by Sri Jugal Kishore Mahanta. The Union of India, The Commissioner of Central Excise and Service Tax, Dibrugarh and the Additional Commissioner of Central Excise and Service Tax are arrayed as respondent Nos. 1,

2 and 3 respectively.

3. Brief facts of this appeal are that during its usual course of business, the appellant/assessee filed Central Excise returns before the appropriate authority and claimed refund of duty paid in terms of Notification No. 20/2007-CE dated 25.04.2007, paid through PLA Account, after availing CENVAT Credit, to which the appellant (also referred to as the assessee) was entitled. The respondent No. 3, however issued a demand-cum- show cause notice dated 30.07.2013, with allegations that the appellant had wrongly availed CENVAT Credit of CENVAT duty including Education cess and Secondary and Higher Secondary Cess to the tune of Rs. 35,34,992/- (Rupees Thirty Five Lacs Thirty Four Thousand Nine Hundred and Ninety-Two Only) during the period from July, 2012 to May, 2013, in contravention to the provisions of Rule 9 of the CENVAT Credit Rules, 2004, and therefore, the said amount of CENVAT Credit procured by the appellant is to be disallowed. The appellant was directed to submit reply within 30 days from the date of receipt of the notice and to appear before the respondent No. 3 for personal hearing, failing which, the respondent No. 3 would decide the case on basis of available records. The appellant submitted a detailed reply, justifying his stance, relating to the demand-cum-show cause notice dated 30.07.2013 and *inter alia*, submitted that Rule 9 of CENVAT Credit Rules, 2004, is specific and unequivocal to the effect that an invoice issued by a manufacturer is sufficient to claim CENVAT Credit. The appellant made a prayer before the respondent No. 3 to drop the proceedings, sought to be initiated against him. The appellant also appeared before the respondent No. 3 on the date fixed for personal hearing.

4. After hearing the appellant, the jurisdictional authority, i.e., the respondent No. 3, vide

its Order No. 03/Addl. Commr./ADJ/BT/CE/COMMR./DIB/13-14 dated 29.01.2014, was pleased to drop the proceedings, sought to be initiated against the appellant, observing that "since no other issue was involved in the instant case, the case is liable to be dropped in accordance with the various judgments, cited by the appellant". The respondent No. 3 then, preferred an appeal against his own Order-in-Original (OIO, for short) dated 29.1.2014, before the Commissioner of Customs and Central Excise (Appeals) at Guwahati. The Commissioner (Appeals), Guwahati, vide an Order-In-Appeal No. 119/DIB/CE(A)/GHY/14 dated 24.11.2014, set aside the OIO dated 29.01.2014, and, thereafter, a Corrigendum was issued on 29.12.2014 by the Commissioner (Appeals), rectifying the order dated 29.01.2014.

5. It is contended by the appellant that appeal against the OIO was filed, but without hearing the appellant, the orders dated 24.11.2014 and 29.12.2014 were passed. This impelled the appellant to file a writ petition under Article 226 of the Constitution of India, challenging the orders dated 24.11.2014 and 29.12.2014, passed by the Commissioner (Appeals). Vide order dated 17.07.2017, in WP(C) No. 3527/2017, the impugned order dated 24.11.2014 (Annexure VI of the petition) and the corrigendum dated 29.12.2014 (Annexure-VII of the petition) were set aside and quashed, with a direction to the Commissioner (Appeals) to afford opportunity of hearing to the assessee and to pass a fresh speaking order in the concerned appeal. Thereafter, the appellant appeared before the Commissioner (Appeals), Guwahati, and produced all the relevant records and made submissions in support of his case, but the appellate authority did not consider the submissions and vide Order-In-Appeal No. 57/DIB/CE(A)/GHY/17 dated 14.09.2017, allowed the appeal filed by the respondent No. 3 by setting aside and quashing the OIO dated 29.01.2014, passed by the respondent No. 3. Being aggrieved of the order dated 14.09.2017, the writ petition, being

WP(C) No. 1308 of 2018 was preferred and came up for hearing on 19.03.2018. The respondents raised an objection on the ground of alternative remedy whereupon, the appellant sought withdrawal of the writ petition with a liberty to file an appeal before the appropriate authority and vide order dated 19.03.2018, in WP(C) No. 1308/2018, the appellant was granted liberty to approach the appellate authority.

6. Thereupon, the appellant filed the appeal before the Customs, Excise and Service Tax Appellate Tribunal, Kolkata (CESTAT, for short) laying challenge to the impugned Order-In-Appeal, dated 14.09.2017, passed by the Commissioner (Appeals). The appeal was registered as Excise Appeal No. 75905/2018. When the matter came up for hearing on 02.01.2023, the respondents again came up with objections that the appellant had not made pre-deposits, mandatorily required in an appeal to the CESTAT, against the order of the first appellate authority.

7. The Revenue has agitated that against the order dated 14.09.2017, passed by the learned Commissioner (Appeals) the appellant filed a writ petition before the Gauhati High Court and vide order dated 19.03.2018, the learned Single Bench passed an order considering the objection raised by the Revenue that against the appellate order dated 14.09.2017, a revision is maintainable under Section 35 EE of the CEA, before the Government of India in the Ministry of Finance. The assessee was then afforded liberty to file a revision before the appropriate authority. It has been contended by the respondents that instead of filing a revision, the appellant had filed an appeal before the CESTAT, Kolkata Bench, which was not even maintainable.

8. Heard Mr S Chetia, learned counsel for the appellant and Mr S C Keyal, learned Senior

Standing Counsel, CBIC.

**Submissions of the Appellant-**

9. It is submitted on behalf of the assessee that vide the impugned Order-In-Appeal (OIA) dated 14.09.2017, the Commissioner (Appeals) has set aside the Order-In-Original (OIO) dated 29.01.2014, passed by the learned Additional Commissioner. Vide OIO dated 29.01.2014, the proceeding sought to be initiated against the appellant through demand-cum- show cause notice was dropped. The Commissioner (Appeals) has only set aside the OIO, without confirming the demand or passing any affirmative order based on the demand-cum- show cause notice dated 30.07.2013. As such, the impugned order dated 14.09.2017 only revives the demand-cum- show cause notice without any subsequent order confirming the demand as proposed to be levied under the demand-cum-notice dated 30.07.2013. This demand-cum-show cause notice has not attained finality in law in absence of any subsequent order confirming the demand, as proposed to be levied under the demand-cum- show cause notice dated 30.07.2013. Therefore, no liability rests upon the appellant even after the impugned order dated 14.09.2017 was passed by the Commissioner (Appeals). The Revenue also did not prefer any appeal for confirmation of the demand after the OIO was set aside.

10. In the present case, there is dispute regarding duty and the only dispute was with respect to relevant documents based on which, CENVAT Credit can be utilized. It was argued that under Rule 3 of Section 35 F of the CEA, unless the appellant has deposited 10% of the duty, in case where duty and penalty are in dispute, no appeal shall be entertained. This case whirls around a dispute regarding the applicable documents under Rule 9 of the CENVAT

Credit Rules, 2004, and not in respect of any demand of duty and as such, no pre-deposit is required to be made under Section 35 of the CEA, 1944 Act, as a pre-condition for admission of appeal. On these grounds, the appellant has implored this Court to set aside the impugned order dated 14.07.2023, passed by the learned CESTAT in Excise Appeal No. 7905/2018, directing the appellant to deposit the amount of Rs. 3,50,000/- (Rupees Three Lacs Fifty Thousand Only), as pre-deposit for admission of appeal.

### **Submissions of the Respondents-**

11. It is submitted on behalf of the respondents that the order passed by the learned Single Judge in WP(C) No. 1308/2013, reflects that a revision is maintainable under Section 35 EE of the CEA against the appellate order dated 14.09.2017, before the Government of India in the Ministry of Finance. The appellant, thereafter, preferred to withdraw the writ petition and was given liberty to file a revision before the appropriate authority as provided under the statute.

The appellant, however, did not prefer any revision as per Section 35 EE of the CEA. It is submitted by the learned counsel for the respondents that the order dated 14.07.2023 in Excise Appeal No. 75905/2018, has been rightly passed by the CESTAT. It has been correctly held by the CESTAT that the Order-In-Original, dropping the proceedings under the SCN dated 30.07.2013 has been set aside by the Commissioner (Appeals). Therefore, the demand proposed under the show cause notice stands confirmed as on date. It is the mandatory requirement that the appellant has to make pre-deposit @ 10% of Rs. 35,34,992/- (Rupees Thirty Five Lacs Thirty Four Thousand Nine Hundred and Ninety-Two Only), if the appellant is desirous to challenge the demand made under the SCN. The respondent has raised objection to the submission of the appellant that Rule 9 of the CENVAT Credit Rules, 2004, is specific

and univocal to the effect that an invoice issued by a manufacturer is sufficient to claim CENVAT Credit. It is contended that the very objective of issuance of invoice for clearance of input or capital goods would stand defeated, if endorsed invoices are considered as valid documents for availing CENVAT Credit. The appellant who is engaged in manufacturing excisable commodity of Mild Steel Ingots had availed the benefit of exemption in terms of Notification No. 20/2007-CE dated 25.04.2007. The appellant obtained major raw materials from M/S NE Thermion (Private) Limited, Duliajan, by way of diversion of items with endorsement in the invoices issued by the manufacturer and availed CENVAT Credit of Rs. 35,34,992/, on the basis of those endorsed copies of invoices.

#### **Consideration of Submissions-**

12. We have considered the submissions at the Bar with circumspection. Vide order dated 17.07.2017, in WP(C) No. 3527/2017, the orders dated 24.11.2014 (Annexure-VI) and the Corrigendum dated 25.11.2014 (Annexure-VII) were set aside and quashed with a direction to the Commissioner (Appeals) to afford hearing to the appellant and to pass a fresh order in the concerned appeal.

13. The Commissioner (Appeals) vide order dated 14.09.2017, set aside the impugned order dated 29.01.2014 and allowed the appeal filed by the Revenue. A close scrutiny of the order dated 14.09.2017 clearly reveals that the OIO dated 29.01.2014 was set aside by the Commissioner (Appeals). Although the appeal was allowed, the order dated 17.07.2017 in WP(C) No. 3527 of 2017 still prevails. Through the order dated 17.07.2017, the order in appeal dated 24.11.2014 and the corrigendum dated 25.11.2014 are not in force any more, as both the order and the corrigendum have been set aside. Though the OIO dated

29.01.2014 was set aside, no order was passed confirming the demand made vide show cause notice dated 30.07.2013. The submission of the respondent that as soon as the OIO dated 29.01.2014 was set aside by the first appellate authority, the show cause notice automatically fructifies into a demand, does not hold good. At the inception, the proceedings were initiated under a specific show cause notice, which was dropped by the Assessing Authority. The first Appellate Authority subsequently set aside the OIO, without confirming any demand.

14. Thus, it is manifest that the demand-cum-show cause notice dated 30.07.2013 has not attained finality in law in absence of any subsequent order confirming the demand as proposed to be levied under the show cause notice. As there is no demand, the question of pre-deposit does not arise at all. Therefore, the impugned order dated 14.07.2023, passed by the CESTAT, Kolkata Bench, in so far as the direction of making payment of pre-deposit of Rs. 3,50,000/-(Rupees Three Lacs Fifty Thousand Only), being 10% of the contested amount of Rs. 35,34,992/-(Rupees Thirty Five Lacs Thirty Four Thousand Nine Hundred and Ninety-Two Only), does not stand to scrutiny and is set aside. The appeal filed by the appellant against the order dated 14.07.2023, shall be registered and decided as per law after providing opportunity of hearing to both parties.

15. In terms of the above observations, the appeal is allowed.

**JUDGE**

**CHIEF JUSTICE**

**Comparing Assistant**