

GAHC010257322023



AS:10467-DB

2024:GAU-

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

Case No. : C.Ex.App./4/2023

COMMISSIONER, CENTRAL GOODS AND SERVICE TAX AND CENTRAL
EXCISE
DIBRUGARH, MILAN NAGAR, LANE-F, P.O.- C.R. BUILDING,
DIBRUGARH- 786003.

VERSUS

M/S DUROPLY INDUSTRIES LIMITED
(FORMERLY M/S SARDA PLYWOOD INDUSTRIES LIMITED),
P.O.- JEYPORE- 786614, DIST.- DIBRUGARH, ASSAM.

For the Appellant(s)	: Mr. S. C. Keyal, SC, CGST.
For the respondent(s)	: Mr. A. Kanodia, Advocate, Mr. P. Das, Advocate.

Date of hearing and judgment : 25.10.2024.

– BEFORE –
HON'BLE THE CHIEF JUSTICE MR. VIJAY BISHNOI
HON'BLE MR. JUSTICE N. UNNI KRISHNAN NAIR

JUDGMENT & ORDER (ORAL)

(Vijay Bishnoi, CJ)

1. Heard Mr. S.C. Keyal, learned Standing counsel, CGST, appearing for the

appellant. Also heard Mr. A. Kanodia, learned counsel appearing for the respondent.

2. This Appeal under Section 35G of the Central Excise Act, 1944 is preferred by the Department of Revenue being aggrieved with the final order dated 15th June, 2023 passed by the Customs, Excise & Service Tax Appellate Tribunal (CESTAT), Kolkata, in Excise Appeal No. 670/2012.

3. With the consent of the parties, the matter has been heard finally at the admission stage.

4. After hearing the learned counsel for the Revenue, this Court, vide order dated 08.12.2023, framed the following substantial questions of law:

“A. Whether Hon’ble CESTAT has erred in law in holding that obtaining fresh license by the respondent after ban was lifted by the Hon’ble Supreme Court on the basis of the report of the High Power Committee amounts to establishment of new industry and entitled to benefit of Notification dated 25.04.2007.

B. Whether the findings of the LD Tribunal is perverse in holding the newly established industry, whereas admittedly ‘M/s Sarda Plywood Industries Ltd, Jeypore is an old wood-based plywood industry, functioning at Jeypore prior to the ban imposed by the Apex Court.”

5. On a subsequent date, the learned counsel appearing for the sole respondent put in appearance and submitted that this Court vide order dated 08.12.2023 had framed substantial questions of law without providing any opportunity of hearing to the respondent and even without issuing notice to the respondent. It was argued on behalf of the respondent that whether the respondent industrial unit is a new industry or an old one is purely a question of fact and since as many as three statutory authorities have already decided the issue against the Revenue while recording a specific finding of fact that the respondent unit is a new industry, it is clear that no substantial question of law is involved in this appeal.

6. The brief facts of the case are that on 29.12.2009, the respondent, which is an

industrial unit, moved an application before the authority concerned for availing the benefit of tax exemption under the Notification No. 20/2007-CE dated 25.04.2010, as amended. The Assistant Commissioner of Central Excise and Service Tax, Dibrugarh, decided the said application vide order dated 21.04.2010 while holding that the respondent unit is eligible to avail the benefit of exemption under the said notification, but refused to grant the benefit of exemption to the respondent on the ground that sufficient CENVAT credit was available to the respondent unit on the first day of the month under consideration for payment of duty on goods. While passing the order dated 21.04.2010, the Assistant Commissioner recorded a finding to the effect that the respondent unit is a new industrial unit. The relevant observations made by the Assistant Commissioner and the reasons cited for not allowing the benefit of exemption to the respondent unit under the Notification dated 25.04.2007, are reproduced hereunder:

“2. All the documents have been forwarded to the Superintendent, Central Excise Naharkatia-I Range (hereinafter called the Range Officer) for verification report. The Range Officer vide his letter dated 12/03/2010 submitted his verification report whereunder he stated, inter alia that he visited the factory of the assessee and verified the documents with the original copies provided by the assessee and found in order. The Range Officer also stated that he verified the Ground Plan with the original copy duly approved by the Chief Inspector of Factories and found in order. He further stated that the unit of the assessee started their first commercial production from 14/10/2009 as recorded in the DSA Register and their first clearance was effected on 09/11/2009 vide Central Excise Invoice No.001 dated 09/11/2009. The Range Officer has stated that he conducted the physical check of the plants and machineries installed in the factory and found to be in existence.

3. I have also visited the factory and caused verification of the documents submitted by the assessee against their claim for eligibility for exemption from payment of duty and consequential refund in terms of notification No.20/2007 CE dated 25.04.2007, as amended. On examination of the documents viz. the certificate issued by the Directorate of Industries & Commerce, Dibrugarh, Assam, D.S.A. Register and from Central Excise Invoice No.001 dated 09/11/2009, I find that the assessee's unit is a new industrial unit which commenced commercial production after the 1st day of April 2007. I have verified and found that the unit has commenced commercial production on 14/10/2009 and they have effected first clearance on 09/11/2009 which are evident from the DSA Register and from Central Excise Invoice No.001 dated

09/11/2009 respectively. I, therefore, find that the unit of the assessee is eligible for exemption under clause 5(a) of the notification No.20/2007-CE dated 25.04.2007, as amended.

12. In view of aforementioned facts, circumstances & amendment made in the notification No.20/2007-CE dated 25.04.2007 by the notification No.20/2008-CE dated 27.03.2008 and notification No.38/2008-CE dated 10.06.2008, I find that the assessee M/s Sarda Plywood Industries Ltd. having its factory at Jeypore, Naharkatia, Dist- Dibrugarh, is eligible for refund of duty under Notification No.20/2007-CE dated 25.04.2007 but as the assessee has sufficient Cenvat Credit available to them unutilized at the end of the month under consideration, therefore, there refund for the month of Nov. 2009 is NIL in terms of principal notification No.20/2008-CE dated 25.04.2007.”

7. The operative portion of the order dated 21.04.2010 is also reproduced hereunder:

“ORDER

I find that M/s Sarda Plywood Industries Ltd; Jeypore, Naharkatia, Dist- Dibrugarh is eligible to avail the exemption benefit under Notification No.20/2007-CE dated 25.04.2007, but as the assessee has sufficient CENVAT credit available to him on the last day of the month under consideration for payment of duty of goods, therefore, the refund sanctioned for the month of Nov 2009 is NIL as laid down in terms of the notification No.20/2007-CE dated 25.04.2007, as amended, inter alia, by notification No.20/2008-CE dated 27.03.2007 and notification No.38/2008-CE dated 10.06.2008.”

8. Being aggrieved with the order dated 21.04.2010, thus, the Revenue preferred an appeal before the Commissioner (Appeals). The Commissioner (Appeals) dismissed the said appeal vide order dated 02.08.2012 while observing as under:

“5. I have gone through the case records including those filed after the hearing and observe that the facts of the case are as straight as they could be. The facts of the case prove that the unit is undoubtedly a new business and entitled to the benefit of Notification No.20/2007-CE dated 25/04/2007 as it fulfills all conditions, but the benefit of it was not granted by the adjudicating authority as the respondent did not fulfill the condition that the manufacturer first utilizes whole of the CENVAT credit available to him on the last day of the month under consideration for payment of duty of goods cleared during the month and pays only the balance amount in cash.

6. As the Divisional Forest Officer’s letter relied upon by the

Department in their appeal, notwithstanding the veracity of its contents, is not a sufficient ground to claim that the unit is only a renovated one. Renovation is generally understood to be the refurbishing of the premises and not the fresh establishment of industry with fresh clearances from all the concerned Departments including the fresh Central Excise registration after commissioning new machinery after a long gap of closing the old unit by all means as discussed in the brief facts.

7. *In these circumstances, it is not apprehensible as to how the Department has interpreted that the present unit in the same premises is the old, the discontinued & the closed business reintroduced 'Renovation' & 'refunctioning' words used by the Department in the appeal are misleading and the appeal is the product of misconception of the facts.*

8. *Irrespective of the above findings on general eligibility of the notification to the respondent, I do not feel it necessary to interfere with the impugned order not granting the benefit of Notification No.20/2007-CE dated 25/04/2007 to the respondent for the reason that the condition of first utilizing the Cenvat credit to the full extent of duty chargeability has not been fulfilled (Para-12 of the Order-in-Original).*

Accordingly the Department's appeal is rejected upholding the impugned order."

9. Being aggrieved with the order passed by the Commissioner (Appeals), the Revenue preferred an appeal before the CESTAT, Kolkata. However, the said appeal also came to be dismissed by the CESTAT, Kolkata, vide order dated 15.06.2023, while affirming the order dated 02.08.2012 passed by the Commissioner (Appeals). While dismissing the appeal, the CESTAT, Kolkata has observed as under:

"6. On perusal of the records placed before us we find that it is a fact on record that the unit of the respondent was functional prior to 12.12.1996, when the ban was imposed on the industry of the appellant. Thereafter the appellant surrendered their factory licence on 10.01.2002 and also surrendered their Central Excise registration on 10.04.2003. Moreover, machinery was also transferred to the Rajkit (Gujarat) factory and list of the machinery was also produced before us. Some plant and machinery was sold by the appellant, that details thereof was also placed on record. Director, Shri M.P. Pariwal also resigned on 20.03.2004 from Board of Directors. Thereafter, the appellant has obtained licence from office of the Divisional Forest Officer, Dibrugarh, Assam vide letter dated 06.08.2008, wherein it has been mentioned that in pursuant of the above, a fresh licence is being issued to your industry bearing No.Sl.No.DIB/PLY/JEIPORE/IE/21 dated 05.08.2008. The Ld. Counsel produced registration and licence to work a factory from

Government of Assam dated 16.09.2008 and sanctioning of loan from North Eastern Development Finance Corporation Ltd. vide letter of sanction dated 09.04.2009. They have also produced certificate issued by District Industry and Commercial Centre, Dibrugarh, Assam. The certificate of registration w.e.f. 21.05.2009. All these documents have been verified by the Ld. Commissioner (Appeals) in the impugned order and thereafter observed as under:-

‘5. I have gone through the case records including those filed after the hearing and observe that the facts of the case are as straight as they could be. The facts of the case prove that the unit is undoubtedly a new business and entitled to the benefit of Notification No.20/2007-CE dated 25/04/2007 as it fulfills all conditions, but the benefit of it was not granted by the adjudicating authority as the respondent did not fulfill the condition that the manufacturer first utilizes whole of the CENVAT credit available to him on the last day of the month under consideration for payment of duty of goods cleared during the month and pays only the balance amount in cash.

6. As the Divisional Forest Officer’s letter relied upon by the Department in their appeal, notwithstanding the veracity of its contents, is not a sufficient ground to claim that the unit is only a renovated one. Renovation is generally understood to be the refurbishing of the premises and not the fresh establishment of industry with fresh clearances from all the concerned Departments including the fresh Central Excise registration after commissioning new machinery after a long gap of closing the old unit by all means as discussed in the brief facts.

7. In these circumstances, it is not apprehensible as to how the Department has interpreted that the present unit in the same premises is the old, the discontinued & the closed business reintroduced ‘Renovation’ & ‘refunctioning’ words used by the Department in the appeal is the product of misconception of the facts.’

7. We have gone through the finding of the Ld. Commissioner (Appeals) in the impugned order and the documents placed before us, which are evident that the respondent has established a new unit although at the same site.

8. In that circumstances, we do not find any infirmity in the impugned order and we hold that the respondent is entitled for benefit of exemption Notification No.20/ 2007-CE dated 25.04.2007. In that circumstances, the impugned order is upheld and the appeal filed by the Revenue is dismissed.”

The order dated 15.06.2023, passed by the CESTAT, Kolkata, is impugned in the present appeal.

10. Learned counsel appearing for the Revenue has argued that M/s Sarada Plywood Industries Limited (now M/s Duroply Industries Limited) was an old wood

based industry functioning at Jeypore, Naharkatia, prior to the ban imposed by the Hon'ble Supreme Court vide order dated 12.12.1996, passed in WP(C) No. 202/95-TN. However, subsequently the said industry was inventoried and cleared by the High Power Committee constituted by the Hon'ble Supreme Court and was made eligible to re-operate with certain conditions. Though the industry did surrender its factory licence (registration) in the year 2002, but applied for fresh registration, as required and, accordingly, it was issued a fresh registration by the competent authority on 28.04.2009. It is contended that the respondent had simply surrendered its licence and applied for a fresh factory licence to operate as per the order of the Hon'ble Supreme Court. It is argued that just because the industry had obtained a fresh licence, it cannot be said that it had set up a new industry. It is further contended that this aspect has completely been overlooked by the Assistant Commissioner and the Commissioner (Appeals) as well as by the CESTAT, Kolkata, while passing the impugned order.

11. On the strength of the above arguments, the learned counsel for the appellant has argued that in view of the above facts, the Excise Appeal is liable to be allowed and the substantial questions of law framed by this Court are liable to be answered in favour of the appellant.

12. Per contra, learned counsel for the respondent has vehemently opposed the prayer of the learned counsel for the Revenue and has argued that it is purely a question of fact whether the respondent has set up a new factory or has simply revived its old factory. It is contended that since all the concerned statutory authorities have held that the respondent has established a new industrial unit, although on the same site, therefore, the stand of the Revenue that the respondent has not set up a new industry is without any basis. It is therefore argued that, as a matter of fact, no substantial question of law arises for consideration in this appeal and, therefore, the appeal is liable to be dismissed.

13. We have considered the submissions made by the learned counsel appearing on behalf of the parties and have perused the material available on record.

14. First of all, it is to be clarified that this Court has framed substantial question of law No. (A) to the effect as to whether the CESTAT has erred in law in holding that obtaining fresh licence by the respondent after ban was lifted by the Hon'ble Supreme Court on the basis of the report of the High Power Committee amounts to establishment of new industry and entitled to benefit of the Notification dated 25.04.2007. However, from a bare perusal of the order of the CESTAT it is more than clear that the CESTAT has not held that the respondent has obtained a fresh licence after the ban had been lifted by the Hon'ble Supreme Court on the basis of the report of the High Power Committee and, therefore, is entitled to benefit of the Notification dated 25.04.2007. In such circumstances, the substantial question of Law No. (A), as framed by this Court is factually incorrect.

15. So far as the substantial question No. (B) is concerned, in the facts and circumstances of the case it cannot be held that the finding recorded by the CESTAT to the effect that the respondent has established a new industrial unit is perverse. The Assistant Commissioner and the Commissioner (Appeals) as well as the CESTAT have recorded their findings after taking into consideration the materials, which suggest that the respondent has established a new industrial unit, although on the same site. The Revenue has failed to produce any evidence contrary to the findings arrived at by the Assistant Commissioner and the Commissioner (Appeals) as well as the CESTAT, or in support of its stand that the respondent has not set up a new factory but has only renovated its old factory.

16. The materials available on record reveal that the Assistant Commissioner, after visiting the respondent factory and after inspecting the documents, recorded a specific finding that the respondent unit is a new industrial unit which commenced commercial production after 01.04.2007. Apparently, the said finding of fact is based on the

material and has rightly not been interfered with by the Commissioner (Appeals) as well as by the CESTAT.

17. In view of the above discussion, we are of the view that no substantial question of law arises in the present appeal. Hence, the appeal is dismissed.

However, there shall be no order as to costs.

JUDGE

CHIEF JUSTICE

Comparing Assistant