

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 10-12-2015

CORAM

THE HONOURABLE MR.JUSTICE M.JAICHANDREN
AND
THE HONOURABLE MRS.JUSTICE S.VIMALA

C.M.A.Nos.1616 and 1617 of 2007

Hinduja Foundries Limited
Kottivakkam High Road,
Ennore, Madras-600 057.
(Appellant CT Amended vide order
of court dated 27.11.2015
made in M.P.1/15 in
C.M.A.1616, 1617/07

.. Appellant/ Applicant

Versus

The Commissioner of Central Excise
Chennai-1, Commissionerate,
Nungambakkam, Chennai-600 034.

.. Respondent/ Respondent

Prayer in C.M.A.No.1616 of 2007: Appeal filed under Section 35-G
of the Central Excise Act, 1944, against the Final Order No.1261
of 2006, dated 11.12.2006, passed by the Customs, Excise and
Service Tax Appellate Tribunal, Chennai,

Prayer in C.M.A.No.1617 of 2007: Appeal filed under Section 35-G
of the Central Excise Act, 1944, against the Final Order No.1262
of 2006, dated 11.12.2006, passed by the Customs, Excise and
Service Tax Appellate Tribunal, Chennai,

For Appellant : Mr.C.Natarajan for
Mr.N.Inbarajan

For Respondent : Mr.Rajnish Pathiyil

COMMON JUDGMENT

(Judgment of the Court was made by M.Jaichandren,J)

The above appeals had been filed against the final order of
the Customs, Excise and Service Tax Appellate Tribunal, South
Zonal Bench, Chennai, made in Final Order No.1261 and 1262 of
2006, dated 11.12.2006, under Section 35-G of the Central Excise
Act, 1944.

2. The facts in brief are as follows:

2.1) The appellant is a company registered under the Companies Act, 1956. It is engaged, inter alia, in the manufacture of Iron and Aluminium Castings, which are foundry products. It is also holding Central Excise Registration Certificate.

2.2) As per the statutory requirements and standards of Accountancy, annual stock taking is done of all castings, whether finished or cast and in the process (work-in-progress), for the purpose of ascertaining the handling shortages or the excesses, during the operations of the year. The corrected stocks, as per the actuals, are carried forward in the books and financial statements for the preparation of the final accounts and the balance sheet. When the officers of the Special Audit Department of the Central Excise had conducted the audit, for the period between December, 1997 and February, 1998, it had been found that the production quantities were not entered regularly. The quantity cleared on a particular day was shown as production, for that day, and the closing balance had been shown as "NIL", every day.

2.3.) On a perusal of the private records of the company, under the head 'Shortage Summary', for the years 1993 to 1997, it had been found that there was a physical shortage of finished products, when compared to the company's own book stock and other documents maintained by it. Such physical shortage of stock had also been noticed in the internal audit of the company. Further investigations had been conducted at the company's actual working area, based on the information gathered from its records. During the physical verification, the appellant company had not put forth any valid reason for the shortages. Hence, it had been observed that the appellant company had cleared their final products without payment of duty, by contravening the provisions of Rule 9 (1), read with Rules 173F, 52A, 53, 173G and 226 of the Central Excise Rules, 1944. In such circumstances, a notice, dated 30.6.1998, had been issued by the respondent asking the appellant to show cause as to why the amount of Rs.58,09,503.64 should not be demanded, in respect of the iron and aluminium castings found short, during the years 1993, 1994-1995, 1995-1996 and 1996-1997. The company had also been asked to show cause as to why an amount of Rs.12,82,825/- should not be demanded from it, in respect of the iron and aluminium castings found in excess during the said years, as the same had not been shown in the records and it had not been cleared on payment of duty and as to why penalty should not be imposed on the company for the violations committed by it, under Section 11AC of the Central Excise Act, 1944, and under Rules 173Q and 226 of the Central Excise Rules, 1944.

2.4) The appellant had submitted a reply, dated 7.2.1999, explaining the manufacturing process and the stock taking procedure followed by the company. It had been stated that there

was no shortage, but only a process loss. Assuming that there were shortages in the work-in-progress, the reasons for such shortages had been explained adequately. The use of the word "shortages" is an internal usage to denote the difference between the theoretical and actual production. It had also been stated that no finished goods had been removed from the factory premises without the payment of excise duty. As such, there was no scope for the demand of duty on the alleged shortages and therefore, a request had been made to the department to drop the proceedings.

2.5) The Commissioner of Central Excise had passed an Order-in-Original, dated 29.7.1999, imposing an amount of Rs.45,26,680/-, in respect of the goods found short, under the proviso to Section 11A(1) of the Central Excise Act, 1944, after adjusting the excess castings found in the shortage notices. A penalty of Rs.8,80,756/- had been imposed on the appellant, under Section 11AC of the Act, for the period of demand, after 28.9.1996, and a penalty of Rs.1 lakh had been imposed on the appellant, for the period prior to 28.9.1996.

2.6) An appeal had been filed by the appellant before the Central Excise and Service Tax Appellate Tribunal, against the Order-in-Original No.4/99, under Section 35B of the Central Excise Act, 1944, in Appeal No.E/1726/2000. The department had filed an appeal against the Order-in-Original No.4/99, under Section 35E(1) of the Central Excise Act, 1944, in Appeal No.E/1055/2000.

2.7) The Central Excise and Service Tax Appellate Tribunal had passed a common order, in Final Order No.1261 and 1262 of 2006, holding that the Commissioner of Central Excise, was not right demanding a lesser duty of Rs.45,26,680/-, instead of Rs.58,09,503.64, as proposed in the show cause notice. With regard to the duty demand on excess goods found, as the Commissioner of Central Excise had not given a definite finding as to whether they had been cleared on payment of duty, the matter had been remanded to decide on the said issue. The Tribunal had dismissed the appellant's appeal and had allowed the department's appeal. Hence, the appellant had preferred the above appeals, on 10.4.2007, under Section 35G of the Act. The appeals had been admitted, on 19.7.2007, on the following substantial questions of law:

"1. Whether in the facts and circumstances of the case, the Tribunal was correct in upholding Central Excise duty demand on the shortage/excess recorded by the Annual Stock-taking of the Appellants' Internal Audit Department in accordance with accounting standards when there was no evidence of clearance of goods from the foundry of the appellants?

2. Has the Tribunal committed serious error in reversing the order of the learned Commissioner of Central Excise in so far as the learned Commissioner of Central Excise itself had noticed that the excess found

by the assessee during annual stock-taking had been corrected and taken into account and hence no short levy can be presumed?

3. Whether the order of the Tribunal suffers from material irregularity in so far as confirming the penalty imposed under Section 11AC without dealing with the issue especially when the proceedings are quasi-criminal in character and the original authority had not even set up a case of clandestine removal in relation to shortages ascertained and recorded by the appellants themselves during the annual stock taking?"

However, the learned counsel appearing on behalf of the appellant had submitted that he is not pressing the following substantial question of law raised by him at the time of admission and he has also made an endorsement to that effect:

"Has the Tribunal committed serious error in reversing the order of the learned Commissioner of Central Excise in so far as the learned Commissioner of Central Excise itself had noticed that the excess found by the assessee during annual stock-taking had been corrected and taken into account and hence no short levy can be presumed?"

3. Mr.C.Natarajan, the learned Senior Counsel appearing on behalf of the appellant had submitted that the order of the Tribunal is vitiated on the principles laid down by the Supreme Court, in paragraphs 25 and 33 of its decision, in Omar Salay Mohamed Sait Vs. Commissioner of Income Tax, Madras), AIR 1959 SC 1238. He had further submitted that, based on the principles enshrined in Paragraphs 11 and 12 of the decision of the Supreme Court, in Ishwar Dass Jain (dead) through Lrs., Vs. Sohan Lal (Dead) by L.R.s), the order passed by the Tribunal ought to be interfered with.

4. It had been further submitted that the matter adjudicated by the Commissioner of Central Excise, in the Order-in-Original, dated 29.7.1999, was to the effect that there were shortages of Iron and Aluminium castings, as noted from the stock taking done, as per the internal audit of the appellant company. The shortages of the goods in the stock taking of the internal audit of the appellant company had been relied on to raise excise duty demands, by the department.

5. The Tribunal, in its Final Order No.1261 and 1262 of 2006, dated 11.12.2006, had observed, in Paragraph No.14 of its order, that there was no convincing explanation for the shortage of castings ascertained by their internal audit branch. All the responsible personnel have refused to attribute the discrepancy to clerical error. It had also been observed that the explanation offered in reply to the show cause notice is an afterthought and cannot reflect the correct state of affairs. Such observations

made by the Tribunal are erroneous in nature, as the appellants have consistently maintained and pleaded that the stock inventory taken by the internal audit pertain to 'Work-in-Progress' and not finished castings required to be entered in RG1 Register, as the 'Work-in-Progress' had not reached the RG1 stage.

6. It had been further submitted that the case of the appellant was that the internal audit had compared the stock, as per the Daily Production Report, with the physical stock of the foundry, to arrive at the excess and shortage, which are negligible in nature. The Daily Production Report pertains to the data of production at the initial stage, when molten metal is poured and the cast is produced, excluding the "run out" and "short run". The pouring chart relates to the first stage in the sequence of operations. Therefore, the production account, as well as the stocks inventory, relates to the 'Work-in-Progress'. Even though the Tribunal had accepted the said position, it had arrived at a wrong conclusion.

7. It had been further submitted that the case of the appellant is corroborated by the statements made by R.Giridhar Gopalan and V.Jayakumar, which had been relied on by the Tribunal. However, the Tribunal had not considered the annual audited balance sheet of the appellant and that data contained therein, more particularly, those which had been shown in the Annexure to the letter, dated 19.2.1999, which was available, before the Commissioner of Central Excise. The data contained therein indicates that the finished castings constitute less than 1%, as against the 'Work-in-Progress', as per the annual accounts and the published balance sheets prepared, as per the statutory requirements. If the Tribunal had considered such data arrived by the appellant, the Tribunal ought to have arrived at a different conclusion, favourable to the appellant.

8. It had been further submitted that the Tribunal had misread the case of the appellant, as if the appellant had pleaded and failed to establish that the discrepancy was due to clerical errors. The Tribunal had neglected to note that the Commissioner of Central Excise, vide his adjudication, has stated in Paragraph-19, that, in the show cause notice, there was no allegation of clandestine removal of the goods. Thus, without any evidence of removal of the goods, the Tribunal could not have upheld the duty demand, as it is clear that there should have been actual or constructive removal for sustaining the demand.

9. The learned counsel had further submitted that the Tribunal had neglected to consider Section 11AC, with regard to the penalty imposed on the appellant. No finding has been recorded as to whether the matter had called for the imposition of penalty on the appellant, under Section 11AC of the Act. There is only a peremptory conclusion stating that the appeal of the assessee is devoid of merits. None of the ingredients of Section 11AC had been set out or applied to the case. The mere fact of affirmation of

duty demand need not necessarily result in the affirmation of penalty, under Section 11AC of the Act, as the penalty proceedings in the said Section are quasi criminal in nature, as per the decision of the Supreme Court, in The Commissioner of Income-Tax, West Bengal Vs. Anwar Ali, 1970(2) SCC 185.

10. The learned counsel appearing on behalf of the department had submitted that there is no error in the findings of the Tribunal to sustain the demand made against the appellant and the imposition of penalty, under Section 11AC of the Act. It had been found, in the records of the appellant, including the internal audit statement of the appellant that there were shortages and excesses, and as there were no particulars maintained in the relevant registers relating to the removal of the finished goods from the appellant company, it had been found that the appellant company was guilty of suppression of the relevant particulars. Hence, the duty amount of Rs.45,26,680/- had been made and a penalty had been imposed, under Section 11AC of the Act, by the Commissioner of Central Excise. The department had filed an appeal against the Order-in-Original No.4/99, under Section 35E(1) of the Central Excise Act, 1944, in Appeal No.E/1055/2000, challenging the reduction of duty amount. The appellant had filed an the appeal before the Central Excise and Service Tax Appellate Tribunal against the Order-in-Original No.4/99, under Section 35B of the Central Excise Act, 1944, in Appeal No.E/1726/2000, challenging the demand and the penalty imposed on it, raising various grounds. There were certain discrepancies found in the records maintained by the appellant, including the internal audit report. Statements of certain officers of the appellant had been recorded. However, the officers had not stated that the discrepancy had occurred due to clerical errors. Therefore, the Commissioner of Central Excise had rendered his decision arriving at his conclusions which are against the appellant. Further, the department has been aggrieved by the findings of the Tribunal, reducing the amount demanded, from Rs.58,09,503.64 to Rs.45,26,680/-. As such, the Tribunal had arrived at its conclusions based on the relevant facts and the provisions of law applicable to the case. Therefore, the present appeals, filed by the appellant, are devoid of merits and therefore, they are liable to be dismissed.

11. In view of the submissions made by the learned counsels appearing on behalf of the appellant, as well as the respondent, we are of the considered view that the Tribunal had arrived at its conclusions, without properly appreciating the evidence available on record relating to the shortages and excesses found in the records of the appellant, including the internal audit. The actual audit practice of the appellant had not been considered by the appellant. The explanation submitted by the appellant, with regard to the manufacturing process and the stock taking procedure had

not been appreciated by the Tribunal in its proper perspective, as there are no clear findings on the said issue. Further, there is no finding by the Tribunal, with regard to the removal of the goods, from the premises of the appellant, for the imposition of the excise duty, as per the provisions of the Act. The conclusion arrived at by the Tribunal, relying on the statements made by the officers of the appellant company, cannot be sustained. The Tribunal had concluded that there was no proper explanation for the shortages and excesses, stating that there was no clear statement from the officers of the appellant company that the discrepancies in its records were due to clerical errors. Further, there are no cogent reasons given by the Tribunal for the imposition of the penalty, under Section 11AC of the Act, without a finding that there was fraudulent or clandestine removal of the goods from the premises of the appellant company. In such circumstances, based on the request made by the learned counsel appearing on behalf of the appellant, we find it appropriate to set aside the order passed by the Tribunal and remand the matter back to the Tribunal to give its finding, based on the records available before it and by giving an opportunity of hearing to the appellant company, as well as the respondent department, with regard to the demand of excise duty to be made against the appellant and with regard to the penalty to be imposed against the appellant, if any, as per the relevant provisions of Central Excise Act, as expeditiously as possible. The above Tax Case Appeals are allowed. Accordingly, the Tax Case Appeals are disposed of, with the above directions.

Sd/-
Asst.Registrar (CO)

/true copy/

Sub Asst. Registrar

csh

To

1. The Commissioner of Central Excise
Chennai-1, Commissionerate,
Nungambakkam, Chennai-600 034.

2. The Registrar

The Customs Excise and Service Tax Tribunal
South Zonal Bench, Shastri Bhavan Annexe
I Floor, Chennai-6

1 cc to Mr.N. Inbarajan, Advocate, Sr. 67293

C.M.A.Nos.1616 and 1617 of 2007

PUR (CO)
kk 2/2