IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATE : 03.07.2015

CORAM

THE HONOURABLE MR. JUSTICE R.SUDHAKAR
AND
THE HONOURABLE MS. JUSTICE K.B.K.VASUKI

C.M.A. NOS. 1698 & 1699 OF 2009

M/s.Goyal Ispat Ltd.
No.24, Padalam Sugar Mills Road
Palayanur
Madurantakam Taluk
Kancheepuram District. .. Appellant in both the appeals

- Vs -

1. Customs, Excise & Service Tax Appellate Tribunal South Zonal Bench Chennai.

2. Commissioner of Central Excise Puducherry Commissionerate Puducherry. .. Respondents in both the appeals

C.M.A. No.1698/09 filed under Section 35-G of the Central Excise Act against the order dated 15.01.2009 passed by the Customs, Excise & Service Tax Appellate Tribunal, South Zonal Bench, Chennai, made in E/Appeal No.E320/02 Final Order No.77/2009.

C.M.A. No.1699/09 filed under Section 35-G of the Central Excise Act against the order dated 13.04.2009 passed by the Customs, Excise & Service Tax Appellate Tribunal, South Zonal Bench, Chennai, made in Misc. Order No.146/09 in E/ROM Application No.09/09 in E/Appeal No.E320/02.

For Appellant : Mr. K.Jayachandran

For Respondents: Mr. E.Vijay Anand for R-2

COMMON JUDGMENT
(DELIVERED BY R.SUDHAKAR, J.)

Aggrieved by the orders of the Tribunal in dismissing the appeal and the subsequent miscellaneous application filed by it, the assessee is before this Court by filing the present appeals. This Court, vide order dated 07.07.2009, while admitting the appeals, framed the following substantial questions of law for consideration :-

"1) Whether the plea of the mistake pointed out in ROM application, raised in the grounds of appeal and agitated before the authorities, can be rejected by the Tribunal stating that such point was not argued before it?

2) Whether the Assistant Commissioner of Central Excise is competent to initiate proceedings for the recovery of any amount payable under compounded levy scheme when compounded levy scheme itself a separate code by itself and no machinery provided for recovery under the scheme?"

2. Though the appeals have been admitted on the above two substantial questions of law, however, at the time of final hearing of the appeals, learned counsel appearing for the appellant/assessee submitted that he is not pressing the second substantial question of law. Accordingly, this Court, in the present appeals is dealing only with the first question of law.

3. The facts, in a nutshell, are as hereunder :-

The appellant is engaged in the manufacture of re-rolled products falling under Chapter sub-heading 7211.11, 7214.90 and 7216.10 of the Central Excise Tariff Act. The appellant is in possession of valid Central Excise Registration Certificate. From 1.9.97 to 31.3.2000, the clearance of the goods insofar as compounded levy scheme is governed by the provisions of Section 3A of the Central Excise Act and the Rules made thereunder.

4. The Assistant Commissioner of Central Excise, vide proceedings dated 29.8.97, informed the assessee that the annual capacity production (for short 'ACP') has been provisionally fixed at 14091 MT. Subsequently, by another proceedings dated 12.9.97, it was informed that the ACP of the appellant unit has been provisionally fixed at 14187.978 MT and the Department was directed to verify the declaration filed by the appellant with the help of Technical Experts/Chartered Engineers and submit detailed report. However, no report has been submitted and the same is not disputed. On 2.3.00, the appellant requested the Department to refix the ACP stating that the declaration already filed by the assessee contains two errors/mistakes, viz., mentioning of wrong type of furnace and mistake in the formula. The plea of the appellant is that the type of furnace is only batch type furnace, for which the factor 'W' is 1.2 Kg./Mtr. as against 2.47 Kg./Mtr. as stated earlier. This request of the appellant was acknowledged by the Department on 6.3.00, however, no action was taken. This letter was followed by subsequent letter dated 29.3.00. This request was made by the appellant on the premise that for the period in dispute, Notification No.32/97 CE-NT dated 1.8.97 in which the ACP is fixed on the parameters of 'd' - Diameter 300 to below 350 and 'W' at 2.47 Kg./Mtr., whereas the correct notification No.45/97 CE-NT dated 30.8.97, provides for fixing the ACP on the basis of 'd' - Diameter between 261 to 310 and the value of 'W' is taken as 1.200 Kg./Mtr.

Therefore, it was urged that due to the change in the formula, the ACP should be revised on the basis of the appropriate notification. Despite the above, show cause notice was issued demanding duty and after adjudication, the same was confirmed against which the assessee preferred appeal before the Commissioner (Appeals).

5. The Commissioner (Appeals) confirmed the demand as made by the adjudicating authority against which the assessee moved the Tribunal with a specific plea with regard to change in the parameters, which finds place as ground No.5, which, for better clarity is extracted hereinbelow :-

> "5. No finding regarding the issue of Batch Type Furnace and change in parameters.
>
> In the reply dated 2.6.2000 and also in the request letter dated 2.3.2000, the appellant submitted that the type of furnace is only Batch Type and the factor "W" is 1.2 as against 2.466 declared on 6.9.97. If any Technical expert verifies the same, the liability will be reduced considerably.
>
> These aspects have not been considered by the adjudicating authority and the Appellate Authority. Not even a word was mentioned about this plea in the order.
>
> Thus, the order is one without properly considering the relevant issues."

6. However, the Tribunal decided the issue primarily on the question that ACP was fixed finally and not provisionally, as contended by the assessee/appellant and held against the assessee.

7. Since the Tribunal did not consider the issue of the effect of Notification No.45/97 CE-NT dated 30.8.97, which deals with the change in parameters, rectification application was filed, which was dismissed by the Tribunal holding that except the plea of provisional ACP fixation, no other plea was taken. Aggrieved by the said orders, the assessee is before this Court by filing the present appeals.

8. Learned counsel appearing for the appellant submitted that the invocation of Section 11A to recover the amount due under the Compounded Levy Scheme is not permissible, since the compounded levy scheme, by itself, is a separate order. It is further submitted that the Tribunal failed to consider the non-filing of the expert opinion with regard to the furnace and has erroneously got carried away, inspite of the facts having not been disputed. It is further submitted that the applicability of Notification No.45/97 CE-NT dated 30.8.97 having been raised, the Tribunal ought to have considered the same, which has not been done in the case on hand and, therefore, the order of the Tribunal is perverse. It is therefore prayed that the order of the Tribunal is liable to be set aside.

9. Per contra, learned standing counsel appearing for the Department reiterated the submissions as made before the authorities below and prayed that no interference is called for with the order passed by the Tribunal.

10. Heard the learned counsel appearing for the appellant and the learned standing counsel appearing for the Department and perused the materials available on record as also the notifications on which reliance was placed by the parties.

11. From a reading of the order of the Tribunal, it is evident that the issue, which was considered by the Tribunal was “whether the Annual Capacity of Production (ACP) of the assessee mill was fixed provisionally vide communication dated 3.4.1998 so as to accept the assessee's contention that the duty demand was not validly raised or the ACP was fixed finally by the above letter of April, 1998 so as to hold that the duty demand was not premature and was validly raised”. The Tribunal, considering the submissions and perusing the communication dated 3.4.1998 went on to hold that the ACP was fixed provisionally with effect from 1.9.97 vide letter dated 12.9.97 and subsequently fixed finally by letter dated April, 1998. For better clarity, the relevant portion of the order is quoted hereinbelow :-

> "2. We have carefully considered the submissions of both sides and perused the communication dated 3.4.1998. The communication reads as under :-
>
> > "Please refer to this office letter of even No. dated 12.9.97 filing the Annual Capacity of Production as 14,187.978 MT., provisionally with effect from 1.9.97.
> >
> > I am directed to inform that the final Annual Capacity of Pfoduction has been finally fixed by the Commissioner as 14,187.978 MT, with effect from 1.9.1997 and duty has to be paid at the applicable rates for the period from 1.9.97 to 31.3.98. Delayed payment after 31.3.98 will attract an interest at the rate of 18% per annum, and apart from that you are liable to pay penalty equal to the outstanding amount of duty or five thousand rupees, whichever is greater in terms of this Office Trade Notice No.13/98 dated 20.3.98 and Trade Notice No.15/98 dated 2.4.98."
>
> 3. From the above it is very clear that the ACP was fixed provisionally with effect from 1.9.1997 vide office letter dated 12.9.97 and subsequently fixed finally by the above mentioned letter of April, 1998. Therefore, there is no merit in this appeal. We accordingly uphold the impugned order and reject the appeal."

12. Against the abovesaid order, a miscellaneous application was filed by the assessee to correct the error apparent on record, insofar as the the Notification No.45/97 CE-NT dated 30.8.97, which

prescribes the formula for computation of ACP in the case of the assessee-mill, has not been pressed into service. However, the Tribunal dismissed the same holding that the only point argued before it relates to premature demand, stating that the ACP had only been fixed provisionally and that no plea was raised with regard to change in parameters. The relevant portion of the order is extracted hereinbelow for better clarity :-

> "2. We have carefully considered the rival submissions. The only point argued before the Bench during the hearing of the appeal was that the demand was premature as the ACP had been fixed provisionally. No plea was raised before the Bench regarding the change in parameters. Therefore, no error let alone an error apparent arise from the record in the Tribunal's final order. The ROM application is accordingly dismissed."

13. However, this Court finds that the above finding of the Tribunal in the original order as also in the ROM application is on the wrong premise that no plea has been raised by the assessee with regard to change of parameters and the applicability of notification dated 30.8.97. From a perusal of the grounds of appeal filed before the Tribunal, more particularly, para-5, which we have extracted above, it is evident that a substantial ground has been raised before the Tribunal with regard to the change of parameters and the applicability of notification dated 30.8.97. However, the said plea has not been considered by the Tribunal and answered in its order. The said notification has a considerable bearing on the duty demand in the instant case. The Tribunal has not answered a substantial ground raised by the assessee, which would have much impact on the duty demand in the present case.

14. In such view of the matter, this Court holds that the Tribunal was not justified in rejecting the ROM application on the wrong premise that no such ground was raised in the appeal. Accordingly, this Court holds that the said ground, raised by the assessee, merits consideration by the Tribunal and the Tribunal ought not have rejected the appeal without answering the said plea. Accordingly, the first substantial question of law is answered in favour of the assessee and against the Revenue.

15. For the reasons aforesaid, both the appeals are allowed and the orders passed by the Tribunal in the main appeal as well as in the ROM application are set aside and the matter is remanded to the Tribunal for fresh consideration in accordance with law. However, in the circumstances of the case, there shall be no order as to costs.

Sd/-
Assistant Registrar(CS IV)

//True Copy//

Sub Assistant Registrar

GLN

To

1. Customs, Excise & Service
    Tax Appellate Tribunal
    South Zonal Bench
    Chennai.

2. Commissioner of Central Excise
    Puducherry Commissionerate
    Puducherry.

+ 1 cc to Mr.E. Vijaya Anand, Advocate Sr.33527

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SVI(CO)
EU 28.09.15