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. NO. 1863 OF 2007
AND
M.P. NO. 1 OF 2007

M/s.Tulsyan NEC Ltd.
rep. by its Managing Director
Sanjay Tulsyan
39, Hari Krishna Naidu Street
Ambattur, Chennai 600 058. .. Appellant

- Vs -

The Commissioner of Central Excise
Chennai II Commissionerate
473, MHU Complex
Anna Salai, Nandanam
Chennai 600 035. .. Respondent

Appeal filed under Section 35-G of the Central Excise Act against the order dated 14.3.2007 passed by the Customs, Excise and Service Tax Appellate Tribunal, South Zonal Bench, Chennai, made in Final Order No.242-243/2007.

For Appellant : Mr. Hari Radhakrishnan

For Respondents : Mr. E.Vijay Anand

JUDGMENT

(DELIVERED BY R.SUDHAKAR, J.)

Aggrieved by the order of the Tribunal in upholding the duty demand, the appellant/assessee is before this Court by filing the present appeal. Though this Court, vide order dated 23.08.07, admitted the appeal, however, no question of law has been framed. However, at the time of final hearing, this Court is of the opinion that in the facts of the case there appears to be no question of law that requires to be considered and, hence, this Court is proceeding to dispose of the matter without framing any question of law.

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

The appellant is a manufacturer of hot re-rolled products of non-alloy steel during the period in question, viz., September, 1997 to March, 2000. In terms of Section 3A of the Central Excise Act, 1944 (for short 'the Act'), excise duty is chargeable on the basis of capacity of production in respect of notified goods. In exercise of powers conferred under sub-section (2) of Section 3A of the Central Excise Act , the Hot Re-rolling Steel Mills Annual Capacity Determination Rules, 1997, was framed, which came into force from 1.9.97 vide Notification No.32/97-CE (NT) dated 1.8.97 as amended by Notification No.45/97-CE (NT) dated 30.8.97.

3. The jurisdiction officer determined the annual capacity production in respect of the assessee's manufacturing unit and demanded duty in terms of the ACP order. On failure by the assessee to pay the duty, show cause notices were issued on 17.2.98, 3.3.98 and 25.8.98, and various other dates. To all those show cause notices, replies were submitted by the assessee and the matter was contested resulting in orders being passed by the Commissioner demanding duty and imposition of penalty. The said orders came to be challenged before the Tribunal by the assessee.

4. The Tribunal, on consideration of the entire factual matrix, primarily upheld the order of the adjudicating authority on the ground that the assessee failed to challenge the ACP order, determined by the competent authority and, therefore, not entitled to take the plea that the demand is not sustainable.

5. The order of the Tribunal on the issue relating to the non-challenge to the ACP order passed by the competent authority, for better appreciation, is extracted hereinbelow :-

> "3. After examining the records and hearing both sides, we find that the ACP of the assessee’s mill had been determined by the Commissioner under Rule 5 of the relevant rules at 29,206 MTs. This determination was never challenged by the assessee. Later on, the Commissioner maintained the same ACP with the changed parameter “(d)” at 156 mm w.e.f. 1.1.99 under Rule 4(2) and Rule 5 of the Annual Capacity Determination Rules, 1999. This decision of the Commissioner was communicated to the party by the Asst. Commissioner in a letter dt. 5-3-99, but the same was also not challenged.
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> 4. It further appears from the records that the writ petition challenging the constitutional validity of Rule 5 of the ACP Determination Rules, 1997 was ultimately dismissed. Thus the ACP determined by the Commissioner for the period from 1-9-97 with the

"(d)" factor at 300 mm and as maintained by him w.e.f. 1-1-99 with the changed "(d)" factor at 156 mm under the provisions of Rule 5 ibid became final and binding on the assessee.

5. In order to examine the challenge against the Commissioner's order relating to demand of duty, we think, it will be convenient to split the total period of dispute into two viz. September 1997 to December 1998 (covered by five SCNs) and January 1999 to March 2000 (covered by the remaining three SCNs). The period covered by the first SCN was also covered by the second and, therefore, the demand raised in the first was rightly vacated by the Commissioner. Thus the first period is covered by four SCNs. After hearing both sides and considering their submissions, we have not found any valid challenge against the demand of duty raised for this period inasmuch as, during this period, admittedly, there was no change of any of the parameters relevant to ACP determination. The ACP was determined under Rule 5. The constitutional validity of this Rule was upheld. The ACP was not challenged. On these facts, we sustain the demand of duty of Rs.10,92,400/- raised on the assessee by the Commissioner for the period September '97 to December '98."

6. The Tribunal also considered the other legal issue raised by the assessee that the determination of ACP was based on a wrong factor and rejected the same holding that the Commissioner has correctly worked out the amount of duty to be paid by the assessee in terms of proviso to Rule 96ZP (3) on the basis of the changed factor.

7. On the next issue, relating to challenge made by the assessee on the determination of ACP on pro-rata basis, the Tribunal answered the same in para-6 of its order in the following manner :-

"6. For the subsequent period, it is submitted by learned counsel that the ACP should have been determined pro rata with the "(d)" factor at 156 mm. On this basis, the ACP for the period from January '99 would be 29206x156/300 = 15187 MTs and, accordingly, the monthly duty liability would be 15187x150/12 = Rs. 1,89,838/-. This claim is based on the third proviso to sub-rule (3) of Rule 96ZP, which reads thus :-

"Provided also that if a manufacturer makes a change in the capacity of re-rolling installed in his factory, or there is any change in the total re-rolling capacity installed, he shall pay the amount calculated pro rata".

After examining the provisions, we find that the above claim is misconceived. The Commissioner worked out an amount of Rs. 28,94,805/- for the period January 1999 to March 2000 in terms of the first proviso to Rule 96ZP(3). That computation took into account the changed "(d)" factor (156mm). Over and above the reduction of duty liability allowed by the Commissioner under the first proviso, no further reduction was warranted. The third proviso to Rule 96ZP (3), relied on by learned counsel, is relatable to Rule 4(1) of the ACP Determination Rules, 1997. Under this provision, capacity of production for any part of the year could be calculated pro rata based on the ACP determined for the whole year under Rule 3 of the said Rules. Correspondingly, the monthly duty liability could be worked out, which could be related to the third proviso to Rule 96ZP(3). In other words, pro rata calculation of duty is consequential to pro rata determination of capacity of production. The Commissioner has correctly worked out the amount of duty to be paid by the assessee in terms of the first proviso to Rule 96ZP(3) on the basis of the changed, "(d)" factor. There was no further change in their installed capacity of the mill during the course of the year so as to attract the third proviso to Rule 96ZP(3). In this connection, it is also pertinent to note that, as early as in July 1999, the assessee had received the Asst. Commissioner's communication of the Commissioner's decision to reject the pro rata calculation of ACP at 13,767 MTs and that the Commissioner's decision was not challenged."

8. On facts, the Tribunal categorically held that the assessee having not challenged the communication issued by the Assistant Commissioner with regard to the ACP order at that point of time, and not having challenged the decision of the Commissioner in fixing the ACP on pro-rata basis, cannot, at a belated stage, raise a plea that the ACP has been wrongly fixed/calculated. As a result, the demand of duty made by the Revenue was confirmed as quoted hereinbelow :-

"7. In the result, the demand of duty of Rs. 28,94,805/- raised by the Commissioner for the period January 1999 to March 2000 also will be sustained. Appeal No. 438/2001 stands dismissed."

9. However, insofar as the penalty imposed on the assessee is concerned, the Tribunal, on facts and on consideration of the entire

materials on record, held that it would be incorrect to hold that the assessee was conducting themselves with mala fide intent to evade payment of duty and, therefore, held that imposition of penalty is not warranted and, accordingly set aside the penalty imposed on the assessee. However, the interest on the amount of duty paid belatedly for the period of delay under Rule 96ZP (3) was sustained. The relevant portion of the order is extracted hereinbelow :-

> "8. In the subsequent order, learned Commissioner imposed a penalty equal to duty on the assessee under Rule 96ZP(3). The Tribunal has consistently held that it is open to the departmental authorities, under the above provision of law, to impose a lesser penalty on a manufacturer of re-rolled products depending on the facts and circumstances of the case. It appears from the impugned order that learned Commissioner has termed the penalty under Rule 96ZP (3) as “mandatory”. Ld. Commissioner has not even attempted exercise of discretion in the matter. The relevant observation in the impugned order reads thus :
>
> > “......like Section 11AC/AB of the Central Excise Act, 1944, penalty and interest contemplated under Rule 96ZP(3) of the Central Excise Rules, 1944 are mandatory”.
>
> We would take the cue from this observation of the learned Commissioner, who has drawn an analogy between the provisions of Section 11AC and Rule 96ZP(3). The Hon’ble Supreme Court has held to the effect that penalty equal to duty is not mandatory under Section 11AC and that a lesser penalty is imposable depending on the facts and circumstances of the case. On the analogy drawn by the Commissioner himself, we would hold that a penalty equal to duty under Rule 96ZP(3) is not mandatory and a lesser penalty can be imposed. Ld. Commissioner ought to have examined the facts and circumstances of the case and determined a reasonable amount of penalty to be imposed on the assessee. It appears to us that, all throughout, the litigation between the department and the assessee was contentious, wherein both sides locked horns with rival interpretations of the provisions of Rule 96ZP (3) as also of the provisions of Annual Capacity Determination Rules, 1997. In this scenario, it would be incorrect to hold that the assessee was conducting themselves with mala fide intent to evade payment of duty. In our considered view, NIL penalty would be reasonable in the aforesaid facts and circumstances. However, the assessee is required to pay interest on

the amounts of duty belatedly paid, for the period of delay, under Rule 96ZP(3). The Commissioner's order impugned in appeal No. 508/2002 will stand modified to this effect. The appeal is, accordingly, disposed of."

Aggrieved by the said order of the Tribunal, the assessee/appellant is before this Court by filing the present appeal.

10. Learned counsel appearing for the assessee assailed the order of the Tribunal by submitting that wrong factor has been adopted by the Commissioner which has been confirmed by the Tribunal and, therefore, the ACP arrived at is wrong. It is further submitted that the though the Commissioner had approved the change in parameter (d), vide communication C.No.IV/16/1/97 dated 5.3.99, however while calculating the ACP has not taken into consideration the said changed parameter and, therefore, the ACP calculation is wrong, which fact has been lost sight of by the Tribunal, while confirming the order. Learned counsel for the assessee further reiterated the submissions advanced before the Tribunal and submitted that the order of the Tribunal is perverse and is liable to be set aside.

11. Per contra, learned standing counsel appearing for the respondent/Department reiterated the submissions as advanced before the Tribunal and submitted that the finding of the Tribunal is a well considered one and warrants no interference at the hands of this Court.

12. Heard the learned counsel appearing for the appellant/assessee and the learned standing counsel appearing for the respondent/Department and perused the materials available on record.

13. On a careful analysis of the order passed by the Tribunal, this Court finds that on the first issue, the Tribunal has held that the assessee/appellant has not challenged the ACP order at the threshold and, therefore, at a belated stage, cannot maintain the plea that the ACP order is wrong. The said reasoning of the Tribunal, in the considered opinion of this Court, is well justified. The Tribunal has dismissed the appeals primarily on the ground that the ACP orders have not been challenged at the initial stage and, therefore, there is no basis for the appellant to sustain the plea at this point of time. This Court is in agreement with the finding recorded by the Tribunal, which warrants no interference.

14. As regards the second issue relating to demand of duty based on ACP fixed on pro-rata basis, the Tribunal has held that the said order has also not been challenged by the assessee as a matter of fact and, therefore, held that the assessee cannot challenge the same at a belated stage. This finding of the Tribunal, on facts, is also sustainable, as this Court finds that the appellant/assessee had not challenged the said pro-rata ACP order and, therefore, cannot now

challenge the said finding of the Tribunal before this Court.

15. For the reasons stated above, this Court finds no justification to interfere with the well considered and well reasoned order passed by the Tribunal. Accordingly, finding no merits warranting interference with the order passed by the Tribunal, this appeal is dismissed. Consequently, connected miscellaneous petition is closed. However, in the circumstances of the case, there shall be no order as to costs.

Sd/-
Assistant Registrar

True Copy

Sub Assistant Registrar

GLN

To
1. The Commissioner of Central Excise
Chennai II Commissionerate
473, MHU Complex
Anna Salai, Nandanam
Chennai 600 035.

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

1 cc to Mr. E.Vijay Anand , Advocate Sr.No.33529
1 cc to Mr. S.S.Rahakrishnan, Advocate Sr.No.33444

C.M.A. NO. 1863 OF 2007

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pmk.22.9.2015