IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

CENTRAL EXCISE APPEAL NO. 177 OF 2016

Wellknown Polyester Ltd. (Unit-III) .. Appellant
v/s.
The Commissioner of Central Excise
Customs & Service Tax, Daman .. Respondent
Commissionerate

WITH
CENTRAL EXCISE APPEAL NO. 178 OF 2016

Wellknown Polyester Ltd. (Unit-II) .. Appellant
v/s.
The Commissioner of Central Excise
Customs & Service Tax, Daman .. Respondent
Commissionerate

Mr. Prakash Shah a/w Mr. Jas Sanghavi i/b PDS Legal for the appellant
Ms. P. S. Cardozo for the respondent

CORAM : M.S. SANKLECHA &
RIYAZ I. CHAGLA J.J.

DATED : 21st DECEMBER, 2017.

P.C.

1. These two appeals under Section 35G of the Central Excise Act, 1940 (the Act) challenge a common order dated 28th October, 2015 passed by the Customs Excise and Service Tax Appellate Authority (the Tribunal). By the common impugned order dated 28th October, 2015, the Tribunal set aside the two orders dated 19th February, 2015 of the Commissioner in respect of Appellant's two units viz. Unit II and Unit III

and restored to him for fresh adjudication.

2. Mr. Shah, learned Counsel appearing for the appellant urges the following re-framed question of law for our consideration :-

> *"Whether in the facts and circumstances of the case, the Tribunal was right in remanding the case back to the adjudicating Authority to decide the case afresh without having dealt with the appellant's contention that the issue was covered in the appellant's own case by the earlier order of the Tribunal dated 24th August, 2015?*

3. We took up these two appeals for admission on the basis of the statement of Mr. Shah on instructions that after remand, no adjudication order has yet been passed.

4. The appeal is admitted on the above substantial question of law. As the controversy involved in the present appeals is within a narrow compass, at the request of the parties, both the appeals are taken up for final disposal.

5. These two appeals emanate from proceedings initiated against the appellants Unit II and III located at Daman. In both the units, it is

engaged in manufacturing of Polyester Oriented Yarn (POY) and Polyester Chips and Fully Drawn Yarn (FDY) (the said goods). Both the Units II and III are clearing its goods to the independent buyers and also captively consuming it by transferring to its sister units. The value of goods captively consumed was taken as the transaction value of sale to independent buyers in terms of Rule 4 of the Central Excise Valuation Rules, 2000 (Valuation Rules 2000). According to the Revenue, the appropriate Rule to be applied was Rule 8 of the Valuation Rules i.e. 110% of the cost of production. Thus, on the above basis, the Revenue issued show cause notices demanding duty to Unit no. II was from April, 2011 to March, 2014 and for Unit no.III the period was from August, 2009 to November, 2013.

6. Both the notices issued to Unit No.II and III were confirmed by two identically worded orders dated 13th February, 2015 of the Commissioner of Central Excise. Thus, holding that the Unit No.II and III of the appellant is liable to pay duty on goods captively consumed and / or transferred to its sister units under Rule 8 of the Valuation Rules, 2000 i.e. 110% of the cost of production.

7. Being aggrieved by the two orders dated 13th February, 2015 in

respect of Unit No.II and III, the appellant filed two appeals to the Tribunal. Along with the two appeals, the appellant filed an early hearing application as the issue was covered by an earlier order dated 24th August, 2015 of the Tribunal in respect of Unit No.II for the earlier period holding that the goods cleared to sister units are to be assessed to tax under Rule 4 of the Valuation Rules, 2000 and not under Rule 8 of the Valuation Rules, 2000 as held by order dated 28th November, 2014. This by the Tribunal holding that the issue is no more *res integra as* on an identical issue in case of ***Steel Complex Ltd. Vs. Commissioner of Central Excise, 171 ELT 255*** (upheld by the Apex Court as reported in 321 ELT A131) and the larger bench of the Tribunal in ***Ispat Industries Ltd. Vs. Commissioner of Central Excise, 309 ELT 185*** held that the goods which are captively consumed have to be valued in terms of Rule 4 of the Valuation Rules, 2000 as contended by the assessee for the period prior to 22nd November, 2013 when Rule 8 of Valuation Rules, 2000 under went a change.

8. When the two appeals of the appellant from the two orders dated 19th February, 2015 came up before the Tribunal, the appellant placed reliance upon the earlier order of the Tribunal dated 24th August, 2015 on identical fact situation and law in respect of its Unit No.II for the

earlier period to contend that the issue stood covered in its favour. However, the common impugned order dated 28th October, 2015 of the Tribunal has after making a reference to the above submission and making reference to the larger bench decision in Ispat Industries Ltd. (surpa) and setting aside the two orders dated 10th February, 2015 of the Commissioner in the two appeals, restored the issue to him for fresh adjudication. This after holding that the adjudication order dated 10th February, 2015 has not given any findings on facts and law. This without mentioning what finding on fact has not been recorded which handicaps disposal of the appeal in terms of the earlier order of the Tribunal.

9. During the hearing before us, Mr. Shah, took us through the earlier order dated 14th October, 2014 passed by the Commissioner in respect of Unit No.II (leading to the Tribunal order dated 24th August, 2015) and the subsequent two orders both dated 19th February, 2015 of the Commissioner (leading to the impugned order of the Tribunal) to contend that all are identically worded to reach the same conclusion on similar facts. *Prima facie*, it appears so. Yet the Tribunal in the impugned order has completely ignored its earlier order in respect of Unit no.II rendered on 24th August, 2015 even when it appears to have

been passed on identical adjudication orders (except difference in period and amount).

10. Ms. Cardozo, learned Counsel appearing for the Revenue submits that no substantial question of law arises as the Tribunal has merely restored the issue to the Commissioner for fresh adjudication. This particularly as the Tribunal has found that the adjudicating authority has not given any findings on the facts and law of the case.

11. We find that impugned order merely records the appellant's contention that the issue is covered by the earlier order of the Tribunal but thereafter, it is not dealt with the earlier order dated 24th August, 2015 to show in what manner the same would not apply to the two appeals, which were before the Tribunal leading to the impugned order dated 28th October, 2015. Thus, a non speaking order. In fact, this Court in ***Commissioner of Central Excise, Pune-I Vs. Syntel International Pvt. Ltd., 2015 (39) STR 27*** has taken a view that though the appellate Authority has power of remand, the same should not be exercised routinely and as a matter of course. It is only where proper opportunity has not been given to the parties or there is some lacuna in the case, which warrants a fresh consideration that the

remand should be made. Therefore, an order remanding the issue for fresh consideration has to be supported by reasons i.e. why the remand and the purpose of it. The impugned order does not set out what facts are necessary to be investigated and not done by the adjudicating authority before granting a remand. Thus, the impugned order is a non-speaking order and prima facie seems to have ignored its earlier order on identical fact situation i.e. orders of the adjudication.

12. In the above view, the substantial question of law is answered in the negative i.e. in favour of the appellant and against the Revenue. The impugned order is set aside and restored to the Tribunal for fresh consideration. It is made clear that it would be open to the Tribunal on examination of the facts in the two appeals before it with the facts in the appeal filed by Unit No.II which led to the Tribunal order dated 24th August, 2015 and come to a finding that the earlier decision rendered on 24th August, 2015 would not apply in the present two appeals before the Tribunal. However, all that is expected by the Tribunal is to justify its conclusion, even if it is of the view that remand is the proper course of action.

13. Further, Mr. Shah very fairly on instructions states that

differential duty payable after 22nd November, 2013 in respect of Appeal No.178 of 2016 relating to Unit No.II, along with interest if any, would be paid to the Revenue within a period of four weeks from today.

14. Both the appeals are disposed of in the above terms. No order as to costs.

(RIYAZ I. CHAGLA, J.) **(M.S. SANKLECHA, J.)**