IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
CENTRAL EXCISE APPEAL NO.98 OF 2015

Vithal SSK Ltd. .. Appellant
Vs
The Commissioner of Central Excise,
Pune-III Commissionerate. .. Respondent
–
Shri Rohit Pawaskar i/b Shri Sandeep Waghmare for the Appellant.
Shri M.Dwivedi for the Respondent.
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CORAM : A.S. OKA & RIYAZ I. CHAGLA, JJ

DATED : 7TH AUGUST 2017

ORAL JUDGMENT (PER A.S. OKA, J)

1. Heard learned counsel appearing for the Appellant and the learned counsel appearing for the Respondent.

2. The learned counsel appearing for the Appellant submits that the following substantial questions of law arise in this Appeal.

> “(a) Whether in the facts and circumstances of the case and in law, the scrap generated during the manufacture of exempted goods, is liable to payment of central excise duty, even when the CENVAT Credit was not availed on the said goods ?
>
> (b) Whether in the facts and circumstances of the case and in law, the the Showcause Notice

invoking the proviso to Sec.11A(1) of the Central Excise Act, is within limitation ?

(d) Whether in the facts and circumstances of the case and in law, the invocation of proviso to Sec.11A was justified, when the Department has knowledge of the clearances made by the Appellant and issued Showcause Notice in the year 1998 and which was ultimately dropped by Commissioner (Appeals) at that time in the earlier proceedings ?

(e) Whether in the facts and circumstances of the case and in law, the authorities below are justified in confirming the duty on the basis of the statement of the employee of the Appellant ?

(f) Whether in the facts and circumstances of the case and in law, the scrap and waste generated during the course of manufacture, amounts to scrap and waste manufactured by the Appellant and whether such scrap and waste, which was cleared prior to 12.7.2004 before the insertion of Rules 3, 5(A) of CENVAT Credit Rules, 2004 ?

3. He invited our attention to the impugned Judgment and Order of the Customs, Excise & Service Tax Appellate Tribunal West Zonal Bench at Mumbai dated 26th November 2009. He submitted that a specific submission was made before the Appellate Tribunal that a penalty was enhanced by the Adjudicating Authority by issuing a corrigendum which is not permissible under the law. He also pointed out that a specific submission was made that the penalty is imposed under Rule 25 of the Central Excise Rules, 2002 (for short “the said Rules”) without invoking a specific clause of the said Rules. He would, therefore, submit that the Appellate Tribunal has committed a gross

error by not considering the submissions which go to the root of the matter. The learned counsel appearing for the Respondent supported the impugned order. He submitted that in Paragraph 5 of the impugned order, the Appellate Tribunal has dealt with the said issues.

4. According to us, the following substantial question of law arises in this Appeal.

QUESTION:

(a) Whether the judgment and order of the Appellate Tribunal is perverse inasmuch as though a specific submission was made on the issue of Rule 25 of the Central Excise Rules, 2002 and on the issue of increase of penalty by the Adjudicating Authority by issuing a Corrigendum before the Appellate Tribunal, the same has not been dealt with by the Appellate Tribunal?

5. Considering the narrow controversy involved, we have taken up this Appeal for final disposal.

6. The Appellant which is a Co-operative Society is the manufacturer of sugar and molasses, etc. According to the case of the Appellant, it has a workshop where it is manufacturing excisable goods

for the maintenance of machines installed in its factory. According to it, the said excisable goods are exempted under the Notification No.65 of 1995 dated 16th March 1995 subject to the condition that the goods are used within the factory for repairs or maintenance of machinery installed therein. While manufacturing the excisable goods, scrap was generated which was cleared outside the factory. It is alleged that the Appellant has cleared the scrap under commercial bills without payment of duty and that proper accounts of the goods manufactured in the workshop were not maintained. The view of the Department was that the scrap resulting from dismantling of the machine is dutiable. A sum of Rs.15,648/- was paid by the Appellant on the scrap generated in the workshop with interest thereon. A show cause notice was issued demanding duty of Rs.3,16,271/- with interest and imposition of penalty under Rule 25 of the said Rules read with Section 11AC of the Central Excise Act, 1944 (for short “the said Act”). Though the Adjudicating Authority dropped a portion of demand relating to waste and scrap of old machinery, it confirmed the demand of Rs.75,674/- which concerns the waste and scrap generated in the workshop along with interest. Even a penalty of Rs.7,000/- was imposed. Later on, the penalty was enhanced to Rs.60,026/-. The order of Adjudicating Authority was challenged by the Appellant before the Commissioner (Appeals) and the Revenue also challenged the same seeking enhancement of penalty equal to the duty amount. The Commissioner

(Appeals) confirmed the demand together with interest and allowed the Appeal of the Department by enhancing the penalty to an amount equal to the amount of duty.

7. The Appellate Tribunal was careful enough to note the specific submissions made by the Consultant appointed by the Appellant in Paragraph 3 of the impugned judgment. The first submission was that the waste and scrap generated in the factory premises was of old used obsolete machinery and a part of the quantity was generated during the course of repair and maintenance of the machinery. It was contended that the waste and scrap was not a manufactured product under Clause (f) of Section 2 of the said Act. The second contention was based on the demand issued on the basis of the audit objection after the limitation period. The third submission was that the penalty was imposed under Rule 25 of the said Rules without invoking the specific clause of the said Rules. Further, the penalty was increased by Adjudicating Authority by issue of a Corrigendum which is not permissible under the law. Five decisions were relied upon by the Consultant appointed by the Appellant.

8. As far as the first submission which is based on the factual statements is concerned, the Appellate Tribunal has relied upon the statement of one Shri M.C. Atkare recorded in the investigation. On the

basis of the said statement, a finding of fact was recorded that the demand has been raised against the Appellant only on the basis of the waste and scrap arising out of the capital goods on which no Modvat credit was availed by the Appellant. We find no reason to interfere with the said finding of fact. Paragraph 5 of the impugned judgment deals with the second issue canvassed regarding demand being made after limitation period was over. Even this aspect has been considered by the Appellate Tribunal by holding that the Appellant informed the Department through its monthly return/RG-23A register and, therefore, the extended period was invoked. The finding of fact is that the act of the Appellant of not supplying the information to the Department and clearing the waste and scrap generated through its private challan amounts to suppression of facts with intention to evade the payment of duty. That is how the Appellate Tribunal justified the invocation of Section 11AC of the said Act. We find it difficult to interfere with the said finding of fact.

9. However, we find that the other two contentions raised by the Appellant were not dealt with by the Appellate Tribunal. In the Appeal before this Court, we do not have benefit of the reasons recorded on the said two contentions as the Appellate Tribunal has not dealt with the same. As observed earlier, this omission on the part of the Appellate Tribunal raises substantial questions of law. Due to non-

consideration of the aforesaid two contentions, the impugned judgment and order of the Appellate Tribunal is vitiated, and therefore, there is no option but to pass an order of remand confined to the aforesaid two contentions of law regarding penalty imposed without invoking specific clause under Rule 25 of the said Rules and the penalty being increased by the Adjudicating Authority by issuing a Corrigendum.

10. Accordingly, we pass the following order:

ORDER :

(a) The impugned judgment and order dated 26th November 2009 is hereby set aside and the Appeal No.E/992 of 2008 is remanded to the Appellate Tribunal;

(b) Fresh adjudication shall be made by the Appellate Tribunal confined to the aforesaid two issues noted in Paragraph 9 above;

(c) Considering the fact that the Appeal before the Appellate Tribunal is of the year 2008, we are sure that the Appellate Tribunal will give necessary priority to the disposal of the said Appeal;

(d) The Appeal is partly allowed on above terms;

(e) All concerned to act upon an authenticated copy of this order.

(RIYAZ I. CHAGLA, J) (A.S. OKA, J)