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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
CENTRAL EXCISE APPEAL NO 15 OF 2007

M/s. National Torch and Tubes … Appellant

vs.
Commissioner of Central Excise, Mumbai-V Commissionerate … Respondent

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Mr. M. H. Patil for the Appellant.
Mr. Swapnil Bangur i/b. Mr. Sham Walve for the Respondent.
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CORAM : A.S. OKA & A.K. MENON, JJ.
DATE : 12th OCTOBER, 2017

ORAL JUDGMENT (Per A. S. Oka, J.)

1. Called out for final hearing. Heard learned Counsel appearing for the Appellant-assessee and learned counsel appearing for the Respondent-Revenue. The present appeal takes an exception to the judgment and order dated 8th July, 2005 passed by the Customs, Excise and Service Tax Appellate Tribunal, Mumbai (for short "the Appellate Tribunal").

2. By the impugned judgment and order, the Appellate Tribunal decided Appeal Nos. E/1709, 1714, 1790 and 1791 of 1999. Out of the four appeals, the Appeal No. E/1790 of 1999 was preferred by the present appellant.

3. The issue involved in this appeal is as regards alleged wrong availment of Modvat credit on inputs used in manufacture of Aluminum Slugs and

Containers falling under Chapter 76 of the Central Excise Tariff Act, 1985. A Show Cause Notice was issued on 3rd September, 1993 by the Collector of Central Excise, Bombay to the appellant calling upon the appellant to Show Cause as to why credit of Modvat taken during the period 1st August, 1988 to 31st January, 1990 on the basis of Subsidiary Gate passes / Certificates (SGPs), should not be denied. The notice was based on the allegations that it were only paper transactions and that the appellants willfully suppressed the facts. By the order dated 26th November, 1997 proceedings of the Show Cause Notice were dropped by the Additional Commissioner of Central Excise.

4. Thereafter, another Show Cause Notice was issued on 24th March, 1994 by the Collector of Central Excise to the appellant calling upon appellant to show cause as to why credit of Modvat should not be denied which was taken based on endorsed Gate passes and SGPs/ Certificates during the period from 1st March, 1989 to 31st October, 1992. After contest by the appellant, the Commissioner of Central Excise confirmed the demand covered under the Show Cause Notice dated 24th March, 1994 and imposed specified penalties on the appellants, their Power of Attorney holder and the dealers. An appeal was preferred against said order. By the impugned judgment and order, penalty imposed on the appellant was reduced to Rs.2,00,000/-. Even the penalty imposed on the constituted attorney of the appellant was reduced to Rs.50,000/-.

5. The Appeal was admitted by order dated 23rd July, 2008 by a Division Bench of this Court by framing three substantial questions of law. The learned Counsel appearing for the appellant invited our attention to application for rectification of the judgment and order dated 8th July, 2005 which was filed by the appellant by invoking sub-section(2) of Section 35C(2) of the Central Excise Act, 1944 (for short the said Act). He pointed out the averments made in the application and in particular paragraph 2 thereof in which submissions made by the appellant before the Appellate Tribunal were reproduced and it was contended that the said submissions have not been dealt with.

6. Learned Counsel appearing for the appellant invited our attention to the order passed on the rectification application on 17th April, 2006 by which the same was dismissed. He submitted that the rectification application is not decided on merits as the contentions raised therein have not been considered. He submitted that there is no finding recorded by which the submissions which were specifically pointed out in the rectification application were not made before the Tribunal. He submitted that the impugned judgment and order is vitiated as material submissions made on factual aspects have not been adverted to by the Appellate Tribunal. He submitted that either appellant will have to be permitted to argue this appeal by urging the contentions which are set out in the application for rectification or the appeal before the Appellate Tribunal will have to be remanded to the Appellate Tribunal for fresh hearing.

7. The learned Counsel appearing for the respondent-revenue invited our attention to findings recorded in the order dated 17th April, 2006. He submitted that the submissions which were canvassed before the Appellate Tribunal at the time of hearing of the appeal have been referred in paragraph 7 of the impugned judgment dated 8th July, 2005. He, would, therefore submit that there was absolutely no merit in the rectification application. He urged that no interference is called for in this appeal.

8. We have given careful consideration to the submissions. Firstly, we may note that in the impugned judgment and order passed by the Tribunal on 8th July, 2005, the submissions made by the learned Counsel appearing for the parties have not been reproduced. First four paragraphs incorporate facts. Immediately next paragraph (wrongly numbered 4) merely records that "heard both sides". Paragraph 7 shows that a submission regarding bar of limitation was made.

9. In the application for rectification, in clause (a) to (e) of paragraph 2, submissions which were allegedly made before the Appellate Tribunal have been reproduced. There is a specific averment that the submissions recorded in the application were made by the applicant and there is an error apparent on the face of the record.

10. We have carefully perused the order dated 17th April, 2006 passed on the rectification application. The issue whether submissions set out in paragraph 2 of the rectification application were made before the Tribunal is not at all considered in the said order dated 17th April, 2006.

11. Law is well settled. When a Court or a Tribunal records that a particular submission was made across the bar, the correctness of the recording as to what transpired before the Court or Tribunal cannot be gone into by a higher forum in Appeal or Revision. If it is recorded that a particular submission was canvassed, it is a recording of what transpired before the concerned Court or Tribunal. Unless what is recorded is corrected by the same Court or Tribunal, the Higher forum which deals with an appeal or a revision will have to proceed on the footing that the factual statements recorded in the impugned judgment are correct. Sub Section (2) of Section 35C gives a specific remedy to a party to appeal to apply for rectifying mistakes apparent from the record.

12. As stated earlier, the appellant came out with specific averments in rectification application that points (a) to (f) of paragraph 2 of the said application were specifically agitated before the Appellate Tribunal but have not been dealt with. In view of the contention, it was the duty of the Appellate Tribunal to record a finding in the order passed on the rectification application on the question whether the submissions set out in paragraph 2 of the rectification application were made at the time of hearing of the Appeal.

13. As in the order passed in the rectification application, the main issue canvassed in the rectification application has not been gone into, it is not open for us to adopt inferential process and decide whether the said points set out in the rectification application were urged before the Appellate Tribunal.

14. In our view, the Tribunal has committed an error by not considering the specific case made out in the rectification application as especially when in the impugned judgment in the appeal, the gist of the submissions made by the parties have not been specifically incorporated.

15. At this stage, we must observe here that as a remedy of an appeal is available before this Court against judgment and Order of the Appellate Tribunal, it will be ideal if the judgment of the Tribunal incorporates brief summary of the submissions made across the bar.

16. In normal course, we would have remitted the Application for rectification for fresh hearing before the Appellate Tribunal. But now, we are informed that both the learned members of the Appellate Tribunal are no more the members. As per the Central Excise and Service Tax Appellate Tribunal (Procedure) Rules and in particular Rule 31A, an application for rectification is required to be heard by the same members. Now it cannot be done with the passage of time. Therefore, to avoid possibility of any prejudice

to the appellant, it will be appropriate if by setting aside the impugned judgment and order, the Appellate Tribunal is directed to hear the appeal afresh. Looking to the averments in paragraph 2 of the rectification application, we have no option but to adopt the aforesaid course.

17. Hence, we pass the following order :

(i) The Order dated 17th April, 2006 in Miscellaneous Application No. E/MA/ROM/732/06 in Appeal No. E/1790/99 is hereby set aside;

(ii) The impugned Judgment and order dated 8th July, 2005 in so far as it relates to Appeal No. E/1790 of 1999 is quashed and set aside;

(iii) We clarify that the clause (3) of the operative part of of the impugned Judgment and order dated 8th July, 2005 is not disturbed;

(iv) Appeal No. E/1790 of 1999 is remanded for fresh hearing to the Customs, Excise and Service Tax Appellate Tribunal, West Zonal Bench at Mumbai;

(v) We are sure that considering the fact that the appeal is of the year 1999, necessary priority will be given by the Appellate Tribunal to the disposal of the Appeal;

(vi) In view of the aforesaid direction, the application for rectification made by the appellant will not survive, as at the time of fresh hearing, the appellant will be entitled to urge the points which are incorporated therein;

(vii) All contentions on merits of the remanded appeal are kept open.

(viii) Appeal is partly allowed in the above terms.

(A.K. MENON, J.) **(A.S. OKA, J.)**