THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 10.04.2017

Coram

The Honourable Mr. JUSTICE RAJIV SHAKDHER,
and
The Honourable Mr.JUSTICE S.SURESH KUMAR

C.M.A.No.1149 of 2017
and
C.M.P.No.5692 of 2017

M/s.Cassel Research Laboratories Pvt Ltd.
No.54, SIDCO Industrial Estate,
Thirumudivakkam,
Chennai - 600 044. ... Appellant

-Vs-

1. Customs, Excise & Service Tax Appellate Tribunal,
1st Floor, Shashtri Bhavan Annexe,
Haddows Road,
Nungambakkam,
Chennai - 600 006.

2. The Commissioner of Central Excise
IV Commissionerate
MHU Complex, 692 Anna Salai
Nandanam,
Chennai - 600 035. ... Respondents

Prayer: Civil Miscellaneous Appeal filed Under Section 35 of the Centra Excise Act, 1944 to answer the above substantial question of law in favour of the appellant and set aside the Final Order No.41819/2016 dated 07.10.2016 passed by the first respondent Tribunal or pass such further orders.

For Appellant : Mr.G.Nataraj

For Respondents : Ms.Hemalatha,
Standing Counsel for R2

R1 - Tribunal

JUDGMENT

(Judgment of the Court was made by Rajiv Shakdher, J.)

1. On the previous date, i.e., 05.04.2017, we had, after hearing the counsel for the parties, passed the following order :

> "1. A perusal of the record would show that the Customs, Excise and Service Tax Appellate Tribunal (in short 'the Tribunal'), has been arrayed as respondent No.1, to the present proceedings.
>
> 1.1. In our opinion, the Tribunal/respondent No.1, is neither a necessary nor a proper party, to the present proceedings.
>
> 1.2. Accordingly, the Tribunal/respondent No.1, is deleted from the array of parties.
>
> 1.3. The appellant will file an amended memo of parties.
>
> 2. Issue notice. Ms.Hemalatha, learned counsel for the Revenue, accepts notice on behalf of respondent No.2 (now, the sole respondent).
>
> 3. By virtue of this appeal, challenge is laid to the order dated 07.10.2016. Since, the order is cryptic, the same is extracted hereafter :
>
> "Appellant has failed to submit the income tax assessment order to substantiate that the depreciation claimed on the capital goods was reversed. In absence of evidence, the matter not being possible to conclude, appeal is rejected accordingly."
>
> 4. The grievance of the appellant qua the impugned order of the Tribunal emanates in the background of the following facts and circumstances :
>
> 4.1. The appellant had, inter alia, received capital goods in the year 2005-2006, on which, CENVAT credit was availed of under the CENVAT Credit Rules, 2004 (in short the 2004 Rules). In accordance with Rule 4(2) of the 2004 Rules, CENVAT Credit equivalent to 50% of the duty paid was taken in the year, when the goods were received, i.e. in April, 2005, while credit qua the balance 50% was taken in the subsequent year, i.e., April 2006. The total credit, which, the appellant had, thus, apparently, taken was a sum of Rs.30,09,266/-.

4.2. It is the appellant's case that contrary to the provisions of Rule 4(4) of the 2004 Rules, the duty paid was capitalised, albeit, inadvertently, and depreciation under Section 32 of the Income Tax Act, 1961 (in short '1961 Act') was also availed of qua the amount of duty, which was capitalised. This aspect got reflected in the returns filed by the appellant qua Assessment Years (AYs) 2006-2007 and 2007-2008 [Previous Year (PY) 2005-2006 and 2006-2007].

4.3. It is, in this background that a Show Cause Notice dated 15.09.2009 (in short 'SCN'), was served on the appellant, whereby, it was proposed to disallow the CENVAT Credit, availed of to the tune of Rs.30,09,266/-.

5. The appellant avers that, upon discovery of the error committed by it, in the return filed for AY 2009-2010 (PY 2008-2009), the element of duty was reduced from the value of the subject capital goods. According to the appellant, this methodology was evolved, as, at that point in time revised returns could not have been filed for AY 2006-2007 and AY 2007-2008.

5.1. Furthermore, the appellant avers that in the reply filed to the SCN, it was indicated that it had, as a matter of fact, added a sum of Rs.42,82,653/- to the value of the subject capital goods, as against an amount of Rs.30,09,266/-.

5.2. In sum, the stand of the appellant was that the error committed was corrected and the benefit taken twice over, albeit, inadvertently, was neutralized in the return filed for AY 2009-2010 (PY 2008-2009).

6. Evidently, this explanation was accepted by the adjudicating authority vide order dated 28.07.2010.

6.1. However, in appeal preferred by the Department, the Commissioner of Central Excise (Appeals), vide order dated 29.10.2010, reversed the Order-in-Original, and consequently, not only confirmed the demand for disallowance of CENVAT credit in the sum of Rs.30,09,266/- along with interest, but also imposed penalty of the like amount.

6.2. Being aggrieved, the appellant preferred an appeal to the Tribunal.

6.3. The Tribunal, via the impugned order, as indicated above, rejected the appeal only on the ground that there was no evidence placed on record to show that the claim for depreciation made earlier on capital goods had been reversed.

6.4. The appellant is aggrieved by this conclusion of the Tribunal, as it is the appellant's stand that, since, the return for AY 2009-2010 (PY 2008-2009) was accepted under Section 143(1) of the 1961 Act, it could do nothing more than place on record of the Tribunal, a copy of the return with the requisite receipt.

7. To our minds, the appellant has a prima facie case and the balance of convenience is also in its favour. Furthermore, prejudice would be caused to the appellant, if, interim protection is not granted.

7.1. Therefore, till the next date of hearing, the operation of the impugned order dated 07.10.2016, is stayed.

7.2. The respondent, will file their reply, before the next date of hearing.

8. Re-notify the matter on 10.04.2017, for final disposal."

2. The issue, which arises for consideration was, broadly, articulated, as is evident from the extract above, in the proceeding held on 05.04.2017.

3. The impugned order would show that the Tribunal rejected the appeal on the sole ground that no evidence had been placed before it by the appellant/assessee to substantiate its stand that depreciation claimed on capital goods contrary to Rule 4 (4) of the CENVAT Credit Rules 2004, had been reversed.

4.Both the counsels are agreed that, since, the assessment was made under section 143(1) of the Income Tax Act, 1961, in so far as this aspect of the matter is concerned, the only evidence in a situation such as this, which, could have been adduced, was, a copy of the return accompanied by the requisite receipt.

5. It is not disputed by Ms.Hemalatha, who appears for the Revenue, that such evidence was placed before the Tribunal. Therefore, both the counsels are agreed that the impugned Judgment and order of the Tribunal needs to be set aside so a decision on merits can be rendered in the matter.

6. Accordingly, the impugned Judgment and order is set aside, with a direction to the Tribunal to decide the appeal of the appellant/assesse on merits.

7. The captioned appeal is, accordingly, allowed. Resultantly, pending miscellaneous petition shall stand closed. There shall, however, be no order as to costs.

-s/d-
Assistant Registrar(CSVIII)

True Copy

Sub-Assistant Registrar

gg/sli

To

1. Customs, Excise & Service Tax Appellate Tribunal,
   1st Floor, Shashtri Bhavan Annexe,
   Haddows Road,
   Nungambakkam,
   Chennai - 600 006.

2. The Commissioner of Central Excise
   IV Commissionerate
   MHU Complex, 692 Anna Salai
   Nandanam,
   Chennai - 600 035.

+1 cc to M/s.R.Hemalatha Advocate sr 21946
+1 cc to M/s.S.jaikumar Advocate sr 21352

C.M.A.No.1149 of 2017
and
C.M.P.No.5692 of 2017

sj(co)
aa20/4/2017