

IN THE HIGH COURT OF JUDICATURE AT MADRAS
DATED : 05.06.2017
CORAM

THE HONOURABLE MR.JUSTICE RAJIV SHAKDHER
And
THE HONOURABLE MR.JUSTICE R.SURESH KUMAR

C.M.A.No.901 of 2012
And
M.P.No.1 of 2012

M/s.Shree Ambika Sugars Ltd. ... Appellant

Vs.

The Commissioner of Central Excise
No.1, Williams Road, Cantonment,
Tiruchirapalli. ... Respondent

Prayer:

Appeal filed under Section 35G of the Central Excise Act, 1994, against the Misc. Order No.492 of 2011 dated 07.10.2011 on the file of the Customs, Excise and Service Tax Appellate Tribunal, Chennai.

For Appellant : Ms.Cyndiya Crishnan
for M/s.Md Shaffiq
For Respondent : Mr.A.P.Srinivas
Standing Counsel

J U D G M E N T

(Judgment of the Court was delivered by RAJIV SHAKDHER,J.)

1.This is a statutory appeal preferred by the Assessee against the order dated 07.10.2011 passed by the Customs, Excise and Service Tax Appellate Tribunal (in short, the Tribunal).

2.The appeal was admitted by this Court on 04.06.2012, when the following question of law was framed for consideration by this Court:

"Whether the order of the learned Tribunal holding penalty imposable on placing reliance on the decision of the Apex Court in the case of M/s.Ind-Swift Laboratories P. Ltd. reported in 2011 (265) E.L.T.3 (S.C.) is sustainable when the Tribunal has passed the impugned order overlooking the fact the

Hon'ble Apex Court has not dealt with the issue of imposition of penalty?"

3. In order to adjudicate upon the appeal, the following brief facts are required to be noticed:

3.1. The Assessee i.e., Shree Ambika Sugars Limited was in the business, at the relevant time, of manufacturing sugar and molasses. It appears that an audit was conducted by the Revenue, which resulted in revelation of the fact that the Assessee had taken excess credit on capital goods to the extent of Rs.8,01,826/-, for the period spanning between April, 2007 to June, 2008.

3.2. Accordingly, a show cause notice dated 06.05.2008, was issued, to which, a reply dated 03.06.2008 was filed by the Assessee.

3.3. Evidently, the Adjudicating Authority was not impressed, by the stand taken by the Assessee and therefore, proceeded to confirm the demand raised vide its order dated 07.08.2008, whereby, it, issued the following operative directions:

"i. I confirm the demand of Rs.8,01,826/- (Rupees Eight lakhs one thousand eight hundred twenty six only) being excess credit taken on capital goods

ii. I appropriate and adjust the reversal of Rs.8,01,826/- (Rupees Eight lakhs one thousand eight hundred twenty six only) towards the demand determined at (i) above

iii. I demand interest under Section 11AB of the Central Excise Act, 1944, read with Rule 14 of the Cenvat Credit Rules, 2004, for the delayed reversal of excess credit amount as confirmed under sl.no.(i) above.

iv. I appropriate and adjust the interest amount of Rs.61,220/- (Rupees Sixty one thousand two hundred and twenty only) towards the demand at (iii) above.

v. I impose a penalty of Rs.8,01,826/- (Rupees Eight lakhs one thousand eight hundred twenty six only) under Section 11AC of the Central Excise Act, 1944."

4.The Assessee, being aggrieved by the aforementioned order, preferred an appeal with the Commissioner of Customs and Central Excise (Appeals) [in short, Commissioner (Appeals)]. The appeal preferred by the Assessee was dismissed and the order passed by the Adjudicating Authority was confirmed.

5.This led to the Assessee preferring a second appeal, this time, to the Tribunal. The Tribunal, in the first instance, vide order dated 21.02.2011, allowed the appeal of the Assessee. The order of the Tribunal is rather cryptic and was pivoted, essentially on the decision rendered by the Punjab and Haryana High Court in the matter of: CCE Delhi Vs. Maruti Udyog Limited, 2007 (214) ELT 173 (P & H). The Tribunal came to the conclusion that since the Assessee was not liable to pay interest, it could not be held liable to pay penalty. Based on this reasoning, the Tribunal also set aside the penalty imposed on the Assessee.

5.1.It is, important, to note that the Tribunal came to the conclusion, based on the aforementioned judgement of the Punjab and Haryana High Court that the Assessee was not liable to pay interest on the ground that it had "not utilized" excess cenvat credit.

6.The record shows that the Revenue had moved a rectification application, under Section 35 C (2) of the Central Excise Act, 1942, (in short, the CE Act), qua, the order dated 21.02.2011, passed by the Tribunal.

6.1.The Tribunal, based on the said application, reversed its earlier order dated 21.02.2011, by noting the ratio of the decision rendered by the Supreme Court in: Union of India and others Vs. Ind-Swift Laboratories Limited, (2011) 4 Supreme Court Cases 635.

6.2. This time around, the Assessee was aggrieved and therefore, as indicated above, preferred the instant appeal.

7.Ms.Cyndiya Crishnan, who appears for the Assessee, at the very outset, has indicated to us, that in so far as the appropriation of excess cenvat credit and imposition of interest is concerned, the Assessee is not aggrieved.

7.1.The learned counsel says that the appeal in the instant case is limited to the imposition of penalty.

7.2.Learned counsel further submits that the Tribunal has not gone into the aspect, as to whether or not, penalty ought to have been imposed on the Assessee, given the facts and circumstances, which have arisen in the present case.

7.3.It is the learned counsel's submission that the Tribunal

had to examine in the facts and circumstances of the case, as to whether the excess cenvat credit was taken by the Assessee, on account of mistake or as alleged was an act of deliberate deception.

7.4.Learned counsel submits that the Commissioner (Appeals) has noted that the excess credit was taken by the Assessee, on account of mistake.

7.5.For this purpose, learned counsel relies upon paragraph no.4.1 of the order passed by the Commissioner (Appeals). Therefore, learned counsel's submission, is that, the Tribunal, inter alia, had to examine not only the provisions of Rule 15(2) of the Cenvat Rules, 2004, as it obtained at the relevant point of time, but also the provisions of Section 11AC of the Central Excise Act, 1944.

7.6.It is also the submission of the learned counsel that the Tribunal may also have to examine the ratio of the decision rendered by the Supreme Court in Union of India Vs. Rajasthan Spinning and Weaving Mills, 2009 (238) E.L.T. 3 (S.C.).

8.Mr.Srinivas, who appears on behalf of the Revenue, resists the appeal and for this purpose, largely relies upon the impugned judgment and order of the Tribunal.

8.1.On being queried, Mr.Srinivas says, that he cannot, but submit that the Tribunal has not returned findings on the issue pertaining to imposition of penalty.

8.2.It is also Mr.Srinivas's submission that the facts obtaining in the present case, will have to be examined, in the background of the ratio of the judgment of the Supreme Court, rendered in Union of India Vs. Rajasthan Spinning and Weaving Mills.

9.We have heard the learned counsels for the parties and perused the records.

10.Apart from anything else, we may, note that we have grave doubts, as to whether, the Tribunal could have reversed its view, based on an application for rectification, moved by the Revenue, under Section 35 C (2) of the CE Act.

10.1.The Supreme Court, in the case of: Commissioner of Central Excise, Belapur, Mumbai Vs. RDC Concrete (India) P. Ltd., 2011 (270) E.L.T. 625 (S.C.), has laid down the following yardstick, for entertaining an application under Section 35 C (2) of the CE Act. For the sake of convenience, the observations made in that behalf, as set out in paragraph 21, are set out hereafter:

"21.This Court has decided in several cases that a mistake apparent on record must be an obvious and patent mistake and the mistake should not be such which can be established by a long drawn process of reasoning. In the case of T.S.Balram v. M/s.Volkart Brothers (supra), this Court has already decided that power to rectify a mistake should be exercised when the mistake is a patent one and should be quite obvious. As stated hereinabove, the mistake cannot be such which can be ascertained by a long drawn process of reasoning. Similarly, this Court has decided in ITO v. Ashok Textiles, 41 ITR 732 that while rectifying a mistake, an erroneous view of law or a debatable point cannot be decided. Moreover, incorrect application of law can also not be corrected."

11.However, we may note that at the time, when the matter was admitted, no question of law was framed, on this aspect of the matter.

11.1.Therefore, for the moment, we are not called upon to rule on this issue. That being said, what is plainly evident upon a perusal of the impugned judgment and order of the Tribunal, is that, there is clearly no discussion on the issue of penalty.

11.2.Both the counsels cannot but submit that the Tribunal being the final fact finding Authority, it should have ruled on, whether or not, penalty ought to have been imposed, in the facts and circumstances of the case.

11.3.The Assessee, as indicated by us herein above, has attempted to make out a case that the Commissioner (Appeals), has, in fact, observed that the excess credit was taken by the Assessee, on account of mistake.

12.We have also looked into the details qua the subject invoices as set out in the paper book.

12.1.It does appear that in case of the first four invoices, the Assessee appears to have taken 50% credit of the eligible cenvat credit, available to the dealer, from whom, the Assessee had bought the goods. This position obtains, vis-a-vis invoice nos.311, 003, 825/26920, 826/26930 dated 23.01.2007, 05.04.2007, 06.06.2007, 06.06.2007, respectively. In so far as the fifth (5th) invoice is concerned, i.e., invoice no.827/26921, dated 06.06.2007, the logic and/or, rationale, which has been put

forth on behalf of the Assessee to explain the mistake does appear to work. This is because, if, 50% of the credit available to the selling dealer was mistakenly recorded by its Clerk, then, the Assessee should have taken credit for a sum of Rs.3,541/- (50% of Rs.7082) and not for a sum of Rs.35,411/-.

12.2.Be that as it may. These are aspects, which the Tribunal will have to rule on and as indicated above, to come to a definitive conclusion, whether or not, the case falls in the realm of a mistake, as contended by the Assessee or is it a case of deliberate and conscious act of deception and/or wrong doing.

12.3.The Tribunal, will also have to examine the facts in the light of the ratio of the judgment of the Supreme Court rendered in: Union of India Vs. Rajasthan Spinning and Weaving Mills.

13.Therefore, for the foregoing reasons, we are inclined to set aside the impugned judgment and order of the Tribunal. The matter, shall stand remanded to the Tribunal for a de novo hearing of the appeal preferred by the Assessee.

13.1.The Tribunal, will bear in mind, the observations made herein above. Consequently, the question of law, as framed is answered in favour of the Assessee and against the Revenue.

14.The appeal is disposed of in the aforementioned terms. However, there shall be no order as to costs. Consequently, the connected miscellaneous petition is also closed.

Sd/-

Assistant Registrar(CS VIII)

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Sub Assistant Registrar

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To

1.The Customs, Excise and Service Tax Appellate Tribunal,
Chennai.

2.The Commissioner of Central Excise
No.1, Williams Road, Cantonment,
Tiruchirapalli.

+1 cc to Mr.Mohammed Shafiq Advocate sr 40420

+1 cc to Mr.A.P.Srinivas Advocate sr 40197

C.M.A.No.901 of 2012

And

M.P.No.1 of 2012

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