

HIGH COURT OF CHHATTISGARH, BILASPUR

Division Bench : Hon'ble Mr. Justice Manindra Mohan Shrivastava
Hon'ble Mrs. Justice Rajani Dubey

TAXC No. 8 of 2018

M/s Steel Authority Of India, Bhilai Steel Plant, Bhilai, Represented Through
Sr. Manager (Finance-Excise), District : Durg, Chhattisgarh

---- Appellant

Versus

Commissioner Of Central Excise Central Excise Bhawan, Dhamtari Road,
Tikrapara, Raipur 492001 (Chhattisgarh), District : Raipur, Chhattisgarh

---- Respondent

TAXC No. 9 of 2018

M/s Steel Authority Of India, Bhilai Steel Plant, Bhilai, Represented Through
Sr. Manager (Finance-Excise), District : Durg, Chhattisgarh

---- Appellant

Versus

Commissioner Of Central Excise, Central Excise Bhawan, Dhamtari Road,
Tikrapara, Raipur 492001 (Chhattisgarh), District : Raipur, Chhattisgarh

---- Respondent

TAXC No. 11 of 2018

M/s Steel Authority Of India, Bhilai Steel Plant, Bhilai, Represented Through
Sr. Manager (Finance Excise), District : Durg, Chhattisgarh

---- Appellant

Versus

Commissioner Of Central Excise, Central Excise Bhawan, Dhamtari Road,
Tikrapara, Raipur 492001 Chhattisgarh, District : Raipur, Chhattisgarh

---- Respondent

For Appellant-SAIL-BSP : Shri Sandeep Dubey, Shri Ravi Raghavan
and Shri Alok Rishi, Advocates

For Respondent-Revenue : Shri Maneesh Sharma, Advocate

C A V Order

[26/10/2018](#)

Per Manindra Mohan Shrivastava, J.

1. These three appeals are being disposed off by this common order as they all have been admitted on an identical question of law arising out of common order passed in three different proceedings in the matter of levy of excise duty along with interest and penalty, denying benefit of cenvat credit to the appellants in respect of three different assessment periods.
2. Appellant-SAIL-BSP, a Government of India Enterprises engaged in manufacturing of iron & steel products, availed credit of the duty paid on input and capital goods used for manufacture of final product. The Revenue, however, initiated recovery proceedings by issuing demand under show-cause notice against the appellant which eventually led to passing of original orders by the jurisdictional Commissioner. Three different appeals were, therefore, filed by the appellant. However, as clearance from the Committee on Disputes (in short "*COD* ") as required during the relevant time in terms of guidelines issued by the Supreme Court on 11.10.1991 in the case of **Oil & Natural Gas Commission Vs. Collector of Central Excise** 1992 (61) ELT 3 (SC), was not obtained, the appeals were dismissed by the Customs, Excise & Service Tax Appellate Tribunal (hereinafter referred to as "*the Tribunal*") though with liberty to apply for restoration of the three appeals on production of necessary clearance from COD. Later on, the constitution Bench of the Supreme Court in the case of **Electronics Corporation of India Ltd. Vs. Union of India** 2011 (265) ELT 11 (SC) recalled its earlier direction issued from time to time in the matter of seeking clearance from COD, with the result that after the judgment of the Supreme Court in the said decision, it was no longer necessary for any aggrieved party to obtain COD before availing statutory remedy of appeal against the orders passed by the jurisdictional Commissioner in the matter of demand of excise duty, penalty, interest etc. The appellant herein filed three restoration applications in three appeals which were earlier dismissed by the Tribunal for want of COD clearance. By the impugned common order, the restoration applications in three different cases filed by

the appellant were rejected, giving rise to aforesaid three appeals.

3. While admitting the appeals, following substantial question of law for determination has been framed in each of the appeals:-

“Whether in view of the judgment passed by Hon'ble the Supreme Court in the matter of *Electronics Corporation of India Ltd. Vs. Union of India*, 2011 (265) ELT 11 (SC), the Tribunal has wrongly refused to restore the appeals preferred by the appellant on the ground of limitation ?”

4. Learned counsel for the appellant argued in extenso to submit that firstly, even assuming that earlier requirement of obtaining clearance from COD in terms of guidelines issued by the Supreme Court vide its order dated 11.10.1991 in the case of **Oil & Natural Gas Commission** (supra) was in operation at the time when three appeals were filed, later on, those directions and all subsequent similar directions in the matter of obtaining clearance from COD were recalled by the constitution Bench of the Supreme Court vide its judgment and order dated 17.2.2011 passed in **Electronics Corporation of India Ltd** (supra). Therefore, it was the duty of the Tribunal to restore all the appeals to its original number and decide the same on merits. Learned counsel for the appellant would also contend that the Tribunal adopted an approach which was completely erroneous in law in holding that there was delay in filing restoration application, ignoring that after the judgment in the case of **Electronics Corporation of India Ltd** (supra), all the appeals were liable to be restored because the dismissal of the appeals was not for want of prosecution or for want of mandatory pre-deposit, but only for want of COD clearance which requirement no longer exists. In support of his submissions, learned counsel for the appellant placed reliance upon **Kirtikumar Jawaharlal Shah Vs. Union of India and Anr.** 2014 (304) ELT 641 (SC), **Punalur Paper Mills Ltd. Vs. Commissioner of C. Ex. & Cus., Cochin** 2014 (310) ELT 279 (Ker.), Order dated 27.3.2017 passed by this Court in the case of **M/s. Steel Authority of India, Bhilai Steel Plant, Bhilai Vs. Commissioner of Central Excise & Service Tax, Raipur** (Tax Case No.140 of 2016), **Kerala State Road Transport Corporation Vs. C.C.E., C. & S.T., Thiruvananthapuram** 2017

(358) ELT 207 (Ker.) and **Commissioner of C. Ex. & Customs Vs. Krishak Bharti Co-operative Ltd.** 2016 (344) ELT 818 (Guj.)

5. On the other hand, learned counsel for the respondent-Revenue argued that the Supreme Court in the case of **Oil and Natural Gas Commission** (supra) had clearly laid down the procedure to be followed before an appeal at the instance of one Public Sector Undertaking could be entertained. As no appeal could be proceeded with without there being a clearance given by the COD, the appeals filed by the appellants were rightly dismissed by the Tribunal way back in the year 2006. He would submit that in fact, out of three appeals, in respect of two appeals COD clearance was declined on 2.11.2006 and 19.10.2006 much before the final order on 30th November 2006 and 4th December 2006 respectively of the Tribunal dismissing appeals for want of COD clearance. Had the denial of COD clearance been brought to the notice of the Tribunal at the time of passing of final order, the result would have been the same and even opportunity would not have been granted for production of necessary clearance. He further submitted that as far as third case is concerned, COD clearance was actually given on 18.12.2007, but even then the appellant did not take any steps to get the appeal restored in time and filed restoration application after almost 10 years without any explanation. He would submit that at the time when the order was passed by the Tribunal, it was completely within its jurisdiction and permissible under the law to dismiss the appeal for want of clearance from COD, though, with liberty to seek restoration as and when clearance is granted. For this purpose, learned counsel for the respondent placed reliance upon **Mahanagar Telephone Nigam Ltd. Vs. Chairman Central Board, Direct Taxes and Anr.** (2004) 6 SCC 431.
6. We have heard learned counsel for the parties and perused the records of the case.
7. In the matter of disputes between **Oil and Natural Gas Commission** and **Collector of Central Excise**, the Supreme Court noticed that disputes between the Government department and the Public Sector Undertaking of the Union of India were being brought before the Court without there being any mechanism to first seek resolution of such dispute through a

high level committee and an order was therefore passed on September 11, 1991 requiring the Government to take proper initiative. The Government, thereafter, submitted a report regarding initiative taken by it and then an order was passed in the aforesaid case by the Supreme Court on 11.10.1991 requiring Government to set up a Committee consisting of high functionaries to monitor disputes between the Government of India and Public Sector Undertakings so as to ensure that no litigation comes to the Court or to a Tribunal without the matter having been first resolved by the Committee and its clearance for litigation. The direction given by the Supreme Court was as below:

“3. We direct that the Government of India shall set up a Committee consisting representatives from the Ministry of Industry, the Bureau of Public Enterprises and the Ministry of Law, to monitor disputes between Ministry and Ministry of Government of India, Ministry and Public Sector Undertaking of the Government of India and Public Sector Undertakings in between themselves, to ensure that no litigation comes to Court or to a Tribunal without the matter having been first examined by the Committee and its clearance for litigation. Government may include a representative of the Ministry concerned in a specific case and one from the Ministry of Finance in the Committee. Senior Officers only should be nominated so that the Committee would function with status, control and discipline.

4. It shall be the obligation of every court and every Tribunal where such a dispute is raised hereafter to demand a clearance from the Committee in case it has not been so pleaded and in the absence of the clearance, the proceedings would not be proceeded with.

5. The Committee shall function under the ultimate control of the Cabinet Secretary but his delegate may

look after the matters. This Court would expect a quarterly report about the functioning of this system to be furnished to the Registry beginning from 1st January, 1992. “

8. A perusal of the aforesaid direction would show that an obligation was placed on every Court and Tribunal where such a dispute is raised, to demand a clearance from the COD and in case it has not been so pleaded and in the absence of the clearance, not to proceed with the case. Later on, a clarification was also issued on 7.1.1994 in the aforesaid case (*ONGC Vs. Collector of Central Excise*) to the following effect:-

“5. Accordingly, there, should be no bar to the lodgment of an appeal or petition either by the Union of India or the Public Sector Undertakings before any court or tribunal so as to save limitation. But, before such filing every endeavor should be made to have the clearance of the High Power Committee.

However, as to what the court or tribunal should do if such judicial remedies are sought before such a court or tribunal, the order of 11th October 1991 clarifies :

“It shall be the obligation of every Court and every Tribunal where such a dispute is raised hereafter to demand a clearance from the Committee in case it has not been so pleaded and in the absence of the clearance, the proceedings would not be proceeded with.”

6. Wherever appeals, petitions etc. are filed without the clearance of the High Power Committee, so as to save limitation, the appellant or the petitioner as the case may be, shall within a month from such filing, refer the matter to the High Power Committee with

prior notice to the Designated Authority in Cabinet Secretariat of Government of India authorised to receive notices in that behalf. Shi. K.T.S. Tulsi, learned Additional Solicitor General, stated that in order to coordinate these references of the High Power Committee the Government proposes to nominate the Under Secretary (Coordination) in the Cabinet Secretariat as the nodal authority to coordinate these references. The reference shall be deemed to have been made and become effective only after a notice of the reference is lodged with the said nodal authority. The reference shall be deemed to be valid if made in the case of the Union of India by its Secretary, Ministry of Finance Department of Revenue, and in the case of Public Sector Undertakings by its Chairman, Managing Director or chief Executive, as the case may be. It is only after such reference to the High Power Committee is made in the manner indicated that the operation of the order or proceedings under challenge shall be suspended till the High Power Committee resolves the dispute or gives clearance to the litigation. If the High Power Committee is unable to resolve the matter for reasons to be recorded by it. It shall grant clearance for the litigation."

9. The aforesaid clarification made it abundantly clear that requirement of obtaining clearance from COD was not treated as bar to the lodgment of an appeal or petition either by the Union of India or Public Sector Undertakings before any Court or Tribunal so as to save limitation. The only consequence of not obtaining clearance from COD was that the proceedings were not to be proceeded with. That means a proceeding was required to be kept as it is without progress till the clearance was given. There was nothing in the aforesaid two directions to empower the Tribunal to dismiss the appeal for want of COD clearance.

10. In yet another order passed in the case of **Oil & Natural Gas Commission Vs. Collector of Central Excise** (2004) 6 SCC 437, the Supreme Court, while reiterating its earlier direction, clarified as below:

“4. There are some doubts and problems that have arisen in the working out of these arrangements which require to be clarified and some crease ironed out. Some doubts persist as to the precise import and implications of the words and recourse to litigation should be avoided”. It is clear that order of this court is not to effect that -- nor can that be done---so far as Union of India and its statutory corporations are concerned, the statutory remedies are effaced. In deed, the purpose of the Constitution of the High Power Committee was not to take away those remedies.”.....

11. In **Canara Bank Vs. Power Grid Corporation of India Ltd.** 1997 (96) ELT 37 (Del.), the Delhi High Court examined the legal position in the light of the direction issued by the Supreme Court in ONGC's case. It was held that for want of clearance, the petition could not be dismissed but it was to be kept pending awaiting reconciliation of dispute or clearance. It was also held that in view of subsequent order of the Supreme Court in ONGC's case, it was not within the jurisdiction of high power committee to refuse clearance as it had only two options – either to resolve the dispute or to grant clearance for litigation.

12. The aforesaid legal position has been clearly settled by the Supreme Court in its recent decision in the case of **Northern Coalfield Ltd. Vs. Heavy Engineering Corp. Ltd and Ors.** (2016) 8 SCC 685, wherein the Supreme Court summarized the effect of various orders passed in **ONGC's** case and **Electronics Corporation of India Ltd** (supra), as below:

“23. The net effect of the above can be summarized as under:

23.1. The Permanent Machinery of Arbitration was put

in place as early as in March, 1989, even before ONGC II was decided on 11th October, 1991.

23.2. The Permanent Machinery of Arbitration was outside the statutory provision then regulating arbitrations in this country namely Arbitration Act, 1940 (10 of 1940).

23.3. The award made in terms of the Permanent Machinery of Arbitration being outside the provisions of the Arbitration Act, 1940 would not constitute an award under the said legislation and would therefore neither be amenable to be set aside under the said statute nor be made a rule of the court to be enforceable as a decree lawfully passed against the judgment debtor.

23.4. The Committee on disputes set up under the orders of this Court in the series of orders passed in ONGC cases did not prevent filing of a suit or proceedings by one PSE/PSU against another or by one Government department against another. The only restriction was that even when such suit or proceedings was instituted the same shall not be proceeded with till such time the Committee on Disputes granted permission to the party approaching the Court.

23.5. The time limit fixed for obtaining such permission was also only directory and did not render the suit and/ or proceedings illegal if permission was not produced within the stipulated period.

23.6. The Committee on Disputes was required to grant permission for instituting or pursuing the proceedings. If the High Power Committee (COD) was unable to resolve the dispute for reasons to be recorded by it, it was required to grant clearance for litigation.

23.7. The Committee on Disputes experience was

found to be unsatisfactory and the directives issued by the Court regarding its constitution and matters incidental thereto were recalled by the Constitution Bench of this Court thereby removing the impediment which was placed upon the Court's/Tribunal's powers to proceed with the suit/ legal proceedings. The Department of Public Enterprises has subsequent to the recall of the orders in the ONGC line of cases modified its guidelines deleting the requirements for a COD clearance for resorting to the Permanent Machinery of Arbitration and;

23.8. The Permanent Machinery of Arbitration was and continues to be outside the purview of Arbitration Act, 1940 now replaced by Arbitration and Conciliation Act, 1996."

13. From the aforesaid consideration, we are of the firm view that it was not at all permissible by the Tribunal to dismiss appellant's appeal filed in year 2006 against the order passed by the jurisdictional Commissioner only for want of clearance from COD. Direction of the Supreme Court in ONGC's case never empowered the Tribunal or for that matter, any other Court to dismiss the appeal only on the ground that COD clearance was not obtained. As has been examined herein-above, the only course open for the Tribunal was to keep those appeals pending till clearance was obtained. The Committee had only two courses open to it. Firstly, to resolve the dispute and if ultimately resolution of dispute between the Government of India and Public Sector Undertaking fails, to grant clearance. Irrespective of the two situations, under no circumstance, it was open for the Tribunal to dismiss the appeals as the right to appeal was not taken away.

14. Learned counsel for the respondent-Revenue has placed heavy reliance on the order passed by the Supreme Court in the case of **Mahanagar Telephone Nigam Ltd. (supra)**. In that decision, the Supreme Court had taken note of its earlier order dated 7.1.1994 passed in *Oil & Natural Gas Commission Vs. Collector of Central Excise* (2004) 6 SCC 437. It was observed as below:-

“8. Undoubtedly, the right to enforce a right in a Court of law cannot be effaced. However, it must be remembered that Courts are overburdened with a large number of cases. The majority of such cases pertain to Government Departments and/or Public Sector Undertakings. As is stated in Chief Conservator of Forests' case (supra) it was not contemplated by the framers of the Constitution or C.P.C. that two departments of a State or Union of India and/or a department of the Government and a Public Sector Undertaking fight a litigation in a Court of law. Such a course is detrimental to public interest as it entails avoidable wastage of public money and time. These are all limbs of the Government and must act in co-ordination and not confrontation. The mechanism set up by this Court is not as suggested by Mr. Andhyarujina only to conciliate between the Government Departments. It is also set up for purposes of ensuring that frivolous disputes do not come before Courts without clearance from the High Powered Committee. If it can, the High Powered Committee will resolve the dispute. If the dispute is not resolved the Committee would undoubtedly give clearance. However there could also be frivolous litigation proposed by a department of the Government or a Public Sector Undertaking. This could be prevented by the High Powered Committee. In such cases there is no question of resolving the dispute. The Committee only has to refuse permission to litigate. No right of the Department/Public Sector Undertaking is affected in such a case. The litigation being of a frivolous nature must not be brought to Court. To be remembered that in almost all cases one or the other party will not be happy with the decision of the High

Powered Committee. The dissatisfied party will always claim that its rights are affected, when in fact, no right is affected. The Committee is constituted of highly placed officers of the Government, who do not have an interest in the dispute, it is thus expected that their decision will be fair and honest. Even if the Department/Public Sector Undertaking finds the decision unpalatable, discipline requires that they abide by it. Otherwise the whole purpose of this exercise will be lost and every party against whom the decision is given will claim that they have been wronged and that their rights are affected. This should not be allowed to be done. “

It was clearly held that the High Powered Committee (COD), if it can, will resolve the dispute and if the dispute is not resolved, the Committee shall undoubtedly give clearance. A pertinent observation was made to deal with cases of exceptional nature that there could also be frivolous litigation proposed by a department of the Government or a public sector undertaking which could be prevented by the High Powered Committee and that in such cases, there is no question of resolving the dispute. On facts, present appeals are not such cases where the Committee of Dispute had opined that the appellant seeks to raise frivolous dispute. Therefore, the settled legal position as adumbrated in series of decisions of the Supreme Court, referred to herein-above, would hold the field in the present case.

15. Our conclusion, therefore, is that even when there was no COD clearance granted, the Tribunal had no jurisdiction and authority under the law to dismiss the appeal for want of COD and then to require the parties to apply restoration upon obtaining clearance. The only permissible course of action was to keep the appeals pending without further proceedings, awaiting submission of COD clearance which was required to be granted once the attempts to resolve the dispute failed.

16. The learned Tribunal has dismissed the applications for restoration on the

ground that the applications for restoration were filed after a long delay. In our considered opinion, the Tribunal was not correct in doing so. Present is not a case where the appeals were dismissed for want of prosecution or for want of mandatory pre-deposit. It is also not a case where the appellant did not file any appeal and the appeal itself was filed after a long delay. These are the cases of exceptional nature where the Tribunal completely misconstruing direction issued by the Supreme Court dismissed the appeals on the ground that COD clearance was not granted which was completely outside the scope of its jurisdiction and authority under the law. If we may say so, order of the Tribunal is *non-est* as it sought to deny the right to invoke remedy of appeal conferred under the statute in favour of the appellant. Though learned counsel for the appellant has cited before us, number of decisions of the different High Courts where delay has been condoned, in view of our conclusion which we have reached, we have no hesitation to hold that dismissal of application for restoration on the ground that such applications were moved belatedly, in the peculiar scenario of the present case, resulted in miscarriage of justice. Once it is held that the Tribunal had no jurisdiction to dismiss the appeal on the ground of want of clearance from COD, it was the duty of the Tribunal to restore the appeals to undo the injustice caused to the appellant who is entitled to hearing of appeal on its own merits, having suffered demand of crores of rupees as excise duty in denial of its claim of cenvat credit.

17. We accordingly answer the question of law framed in these three appeals.

18. In the result, all the appeals are allowed. Impugned order passed by the Tribunal is set aside. The appeals filed by the appellant before the Tribunal shall stand restored to its original number for being heard on its merits and in accordance with law.

Sd/-
(Manindra Mohan Shrivastava)
Judge

Sd/-
(Rajani Dubey)
Judge