IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 24.01.2018

CORAM:

THE HON'BLE MR.JUSTICE S.MANIKUMAR
AND
THE HON'BLE MRS.JUSTICE V.BHAVANI SUBBAROYAN

CMA No.100 of 2018

The Commissioner of Central Excise,
O/o. the Commissioner of Central Excise,
Customs & Service Tax,
6/7, A.T.D.Street, Race Course Road,
Coimbatore - 641 018. ... Appellant

vs.

M/s.United Bleachers Ltd.,
Nellithurai Road,
Mettupalayam - 641 301. ... Respondent

Civil Miscellaneous Appeal filed under Section 35G(2) of the Central Excise Act, 1944) praying to set aside the Final Order No.40263 of 2015 dated 24.02.2015 passed by the Hon'ble Customs, Excise & Service Tax Appellate Tribunal, South Zonal Bench, Chennai.

For Appellant : Mr.A.P.Srinivas

JUDGMENT
(Order of the Court was delivered by S.MANIKUMAR, J)

Instant Civil Miscellaneous Appeal is filed against the final order made in No.40263 of 2015 dated 24.02.2015, on the file of CESTAT, Madras by which the tribunal, dismissed the appeal filed by the revenue and remanded the matter for reconsideration, by the adjudicating authority.

2. Facts relating to the appeal are that M/s.United Bleachers, Nellithurai Road, Mettupalayam, respondent company, is an independent processor of textile fabrics. According to the company, duty liability has been discharged under the compounded levy scheme, prescribed under Section 3A of Central Excise Act, 1944, read with Rule 96 ZQ of Central Excise Rules, 1944. As per Rule 96 ZQ[3] of Central Excise Rules, an independent processor of textile fabrics shall discharge "50% of

the amount of duty payable for a calendar month under Sub-Rule [1] of Rule 96 ZQ of Central Excise Rules, 1944 by the 15th of the calendar month and the remaining amount by the end of the calendar month. Further Rule 96 ZQ[5] of Central Excise Rules stipulates that "if an independent processor fails to pay the amount of duty or any part thereof by the date specified in rule [3] he shall be liable to;

i. Pay the outstanding amount of duty along with interest at the rate of 24% per annum calculated for the out-standing period on the outstanding amount and

ii. A penalty equal to an amount of duty outstanding from him at the end of such month or rupees five thousand whichever is greater

3. The Commissioner of Central Excise, Coimbatore determined the duty liability of the respondent provisionally, under the determination of Annual Capacity of Production scheme [ACP], vide order No.IV/16/460/98 Cex.Pol. Dt.19.04.1999. In terms of Rule 96 ZQ[3], upto 31.03.2000, finally determined as Rs.12,50,000/- per month, vide order in C.No.IV/16/460/98 Cex.Pol. dt.19.01.2001.

4. For the period from 01.04.2000 the Asst. Commissioner, Conoor Division, vide C.No.IV/16/425/98 CE.Pol. Vol.II dt.10.04.2000 [finally determined vide order C.No.IV/16/425/98 CE Pol. Vol.II dt.05.05.2000] determined the same duty, as payable by the respondent, which means that they had to discharge an amount of Rs.6,25,000/- [50% of duty liability as per Rule 96ZQ[3] by 15th of calendar month], and balance amount of Rs.6,25,000/- by the end of the month.

5. Meanwhile the respondent filed an appeal before CESTAT against the ACP order, and after conducting personal hearing a fresh ACP was fixed by the Commissioner of Central Excise, Salem, for the said period vide order, C.No.IV/16/47/2004 Cex.Pol. Dt.21.04.2004.

[i] Claiming that the respondent failed to discharge the duty liability, as determined, under Annual Capacity of Production Scheme, the Commissioner of Central Excise, Coimbatore has issued 4 Show Cause Notices to the respondent, as detailed below:

SCN No. and date	Period	Duty Demanded [Rs.]
C.No.V/52-54/15/95/99-Cx. Adj dated 29.06.1999	16.12.1998 to 31.05.1999	56,99,722/-
C.No.V/16/489/99 UCD dated 15.12.1999	01.06.1999 to 31.10.1999	26,02,850/-

SCN No. and date	Period	Duty Demanded [Rs.]
C.No.V/16/120/2000-UCD dated 02.05.2000	01.11.1999 to 29.02.2000	13,85,080/-
C.No.V/52/15/118/2000-Cx. Adj dated 18.11.2000	01.03.2000 to 31.05.2000	18,00,000/-

6. [i]After due process of law, based on the original ACP fixed, the Commissioner of Central Excise, vide O-I-O Sl.No.35/2001 dated 19.09.2001 confirmed the demand of duty of Rs.1,14,87,652/-, for the period from 16.12.1998 to 31.05.2000, under Rule 96ZQ[3], along with appropriate interest, under rule 96ZQ[5][i] and imposed penalty, under rule 96ZQ[5][ii]. Aggrieved by the order the respondent filed an appeal with CESTAT, Madras, [Appeal No.E/1213/01/MAS]

[ii] ACP was revised by the Commissioner vide C.No.VI/16/47/2004-Cx.Pol. dt.21.04.2004, for the financial years 1998-99 and 1999-2000 [upto Feb, 2000]. Aggrieved by the same, the respondent has filed an appeal before CESTAT, Madras, on 13.10.2004 [No.E/986/2004]

[iii] Contending inter alia that the respondent has failed to discharge the duty liability, as determined under ACP scheme, two SCNs dated 19.06.2001 and 27.07.2001, respectively, have been issued and after, due process of law, the Commissioner of Central Excise, Salem, vide O-I-O N.07/2005 dt.11.02.2005 [C.No.V/52/15/17/2004Cs.Adj], confirmed the demand of interest amounting to Rs.60,432/- [under Rule 96ZQ[5][i] and Penalty amounting to Rs.10,36,38,868/- under Rule 96ZQ[5][i], and penalty amounting to Rs.10,36,38,868/- under Rule 96ZQ[5][ii] [Appeal No.E/308/2005]

7. CESTAT, Chennai, has passed a common order, in the appeals filed by the respondent, vide final order No.499 to 501/2006 dt. 12.06.2006, wherein, demand of duty raised by the Commissioner, in proceedings dated 21.04.2004 (ACP Order) and dated 11.02.2005 (demand of interest), respectively have been upheld. CESTAT, Madras further ordered, de nova adjudication to quantify the penalty to be imposed on the respondent, in terms of Rule 96 ZQ (5) (ii) of Central Excise Rules, 1944. CESTAT, Madras, has directed that the assessee should be given a reasonable opportunity before confirming the penalty. On this aspect, the Tribunal, has observed that since the company was declared sick, imposition of equal penalty, was harsh. CESTAT, Madras, further ordered that while imposing penalty, the extent of default for each month must be ascertained and penalty to be determined, on the facts and circumstances of the case.

8. As directed by the tribunal, the Commissioner of Central Excise, after giving opportunity to the respondent, passed a detailed order-in-original, imposing equal penalty amounting to Rs.73,12,645/- after calculating month wise duty liability for the period from Dec, 98 to Feb, 2001. Aggrieved by the O-I-O the respondent filed an appeal to CESTAT, Madras. The Tribunal, in its final order No.40241 to 40263 of 2015 dated 24.02.2015 remanded the said appeal, along with other 22 appeals, for re-determination of duty, by observing that if they are eligible for any abatement, it should be given to them and that they should be heard.

9. According to the appellant herein, the above decision of the CESTAT, Chennai, without going into the merits of this case, and without discussing the finding of the order-in-original, which has detailed the month wise quantification of duty liability and duty outstanding, worked out, to arrive at the penalty liability, is not legal and proper, and hence, instant appeal is filed under Section 35G of the Central Excise Act, 1944, on the following substantial questions of law.

> "1. Whether the impugned order of the Hon'ble Tribunal was legally correct in remanding the Order-In-Original no.02/2007 dated 26.02.2007 for redetermination of duty liability when such determination of duty liability has already become final and conclusive vide Hon'ble Tribunal's final order no.499 to 501/2006 dt. 12.06.2006.
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> 2. Whether the impugned order of the Hon'ble Tribunal is legally correct when the issue to be decided was penalty of Rs.73,12,645/- under Rule 96 ZQ (5)(ii) of the Central Excise Rules, 1944 and not determination of duty liability."

10. To substantiate the above substantial questions of law, Mr.A.P.Srinivas, learned senior standing counsel for Customs, Central Excise and Service Tax submitted that CESTAT, Madras, has passed the impugned order, disposing of a set of appeals by remanding the matter to the respective adjudicating authorities, giving directions as detailed below,

> (i) That the assessee should be given fair opportunity to argue on the facts and evidence borne by record.
>
> (ii) That the authority shall also follow the ratio laid down in Triveni Alloys Ltd., Vs. CESTAT, Chennai (2014 (206) ELT 617 (Mad.) and CCE Chandigarh Vs. DOABA Steel Rolling Mills (2011(269) ELT 298 (SC) and provide proper opportunity of hearing,
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> (iii) Wherever abatement is permissible, that shall be allowed by the authority concerned, in accordance with law.

(iv) Since the appellants/assessees, have grievance of violation of natural justice, the authority shall do justice to afford reasonable opportunity of hearing to prevent repetitive litigation.

11. Earlier, the Tribunal, in its final order NO.499 to 501/2006 dated 12.06.06, ordered de-nova adjudication, when the respondent appealed against the O-I-O Nos.35/2001 dt. 19.09.2001, 16/2004 dt. 21.04.2004 and 7/2005 dt. 11.02.2005. De-nova Adjudication order (No.2/2007 dt.26.02.2007) was passed by the Commissioner of Central Excise, as per the directions of the Tribunal.

12. Vide final order Nos.499 to 501 of 2006 dated 12.06.2006, while ordering, De-Nova Adjudication, the Tribunal has upheld the demand of duty raised by the Commissioner (para 5 of the order). Hence, duty liability of the respondent has become final and conclusive. The tribunal, vide para 5 of the order dated 12.06.2006, while directing de-nova adjudication had only directed to quantify the penalty to be imposed on the respondent in terms of Rule 96 ZQ(5)(ii) of the Central Excise Rules, 1944. Rule 96 ZQ (5)(ii) of the Central Excise Rules, 1944 mandates equal penalty on the duty liability. Therefore, penalty liability alone be calculated, when the duty liability has already been arrived at.

13. Prior to issuing the O-I-O, dated 26.02.2007, as directed by Tribunal, the respondent was given reasonable opportunity. Personal hearings were fixed on 13.09.06, 26.09.06, 10.10.06, 07.11.06 and 28.11.06, but the respondent requested for postponement. Finally, the respondent appeared on 18.12.2006 and furnished detailed written submissions. Commissioner of Central Excise, Salem, the Adjudicating Authority vide O-I-O in S.No.2/2007 dated 26.02.2007, has reassessed the duty liability, in detail by working out the same, month wise (para 6.3 of the Order) for the period from 16.12.98 to 28.02.2011 and held that an amount of Rs.73,12,645/- as the outstanding amount due, from the respondent. Directions of the Tribunal's, vide de-nova order dated 12.06.2006, has been followed, in letter and spirit. Therefore, the impugned order of the Tribunal, once again, remanding the matter for another, de-nova adjudication, is not proper.

14. He further submitted that Sub-rule (5) of Rule 96 ZQ of the said rules, make it obligatory to pay interest, in case of delayed payment of duty, as well as to pay the penalty. The two sub-clauses of the said Rule 5 of Rule 96-ZQ would clearly disclose that, liability under the both the clauses, to pay penalty, were neither, alternative nor optional, nor it leaves any discretion, either to the authority or to the assessee. As

regards penalty is concerned, prior to 28th February, 1999, it was restricted to equal to an amount of duty, outstanding at the end of the month. However, w.e.f. 28.02.1999, the expression, at the end of such month, has been deleted and that the same, has been quantified as equal to an amount of duty outstanding. According to the learned counsel for the appellant, the legislative intent, therefore, is very clear from the amendment to the said Rules is that, it is the discretion left to the authority to alter the amount of penalty. Amount of penalty has been specified, to be equal to the amount of duty, outstanding. He further submitted that in the case in hand, the penalty levied is equal to the amount of duty, outstanding or paid beyond the due date. Thus, considering the provisions of law, there is no case for interference with the O-I-O.

15. Learned counsel further submitted that since the Order-In-Original No.02/2007 dt. 26.02.2007 imposing the interest and penalty under -rule (5) of Rule 96 ZQ was passed, after following earlier directions in Tribunal's final order No.499 to 501/2006 dated 12.06.06, CESTAT, Madras, should have straight away gone into the merits of imposing interest and penalty. CESTAT, Madras has erred in the impugned final order, by not doing so, and instead remanded the matter back to the Adjudicating Authority.

16. Heard Mr.A.P.Srinivas, learned senior standing counsel for Customs, Central Excise & Service Tax.

17. Though, Mr.A.P.Srinivas, learned counsel submitted that duty liability has already been upheld and that therefore, there is no need for redetermination of duty liability and further contended that in the case of the respondent, there was no consent for redetermination of duty, this Court, is not inclined to accept the said contentions, for the reason that final order Nos.40241 to 40263 of 2015 dated 24.02.2015 shows that in view of the judgment of the Hon'ble Apex Court in CCE, Chandigarh Vs. Doaba Steel Rolling Mills reported in 2011(269) ELT 298 and Triveni Alloys Limited Vs. CESTAT, Chennai, reported in 2014 (306) ELT 617 (Madras), holding that liability under Section 3A of the Central Excise Act, 1944 is determinable, both the learned counsel for the appellants/assessee and the revenue seemed to have suggested to CESTAT, Madras that the batch of appeals be disposed of with suitable directions to the lower authority to redetermine the liability in accordance with law. Having regard to the consensus and submission, CESTAT, Madras in Appeal Nos. 40241 to 40263 of 2015, has passed final orders dated 24.02.2015, as hereunder

> "2. Ld. Counsels suggested that wherever there was violation of natural justice, no proper determination of Annual Capacity Production (ACP) was made, abatement

not allowed and procedure prescribed by Rule 5 of Hot Re-rolling Steel Mills Annual Capacity Determination Rules, 1997 was not followed, such issues be relooked by concerned adjudicating authority, as a result of which both sides shall get reasonable opportunity to resolve their dispute at the gross root level. Added to this, ld. counsels appearing in different cases agreed that there shall be no challenge to leviability of duty under Section 3A of the Central Excise Act, 1944 in view of Apex Court judgment and decision of Madras High Court. But they prayed that appellants deserve full length of hearing before the learned adjudicating authority to argue on different aspects in addition to proper determination of liability wherever such issues are involved. It is also stated in the Bar that Rule 5 of the Hot Re-rolling Steel Mills Annual Capacity Determination Rules, 1997 being under challenge before the Hon'ble High Court of Madras in W.A.No.1620/2003 by M/s.Madras Steel Re-Rollers Vs. UOI, the outcome of that judgment be also applied by learned adjudicating authority while they complete readjudication following principles of natural justice the discretion of the Tribunal made by this order.

3. Revenue agreed to aforesaid prepositions.

4. In view of law laid down in aforesaid judgments and agreement of both sides to reduce the dispute expeditiously before concerned adjudicating authority, all the appeals listed in Sl.No.17 to 39 of the cause list (mention) are remanded to adjudicating authority concerned with the following directions:-

(i) Ld. authority shall grant fair opportunity of hearing to appellants to argue on the facts and evidence borne by record and no fresh evidence shall be entertained.

(ii) The authority shall also follow the ratio laid down in the following judgments and the appellant shall have proper opportunity of hearing on the basis of the ratio laid down in these cases:-

(a) Triveni Alloys Ltd. Vs. CESTAT, Chennai
2014 (206) ELT 61 (Mad.)

(b) CCE, Chandigarh Vs. DOABA Steel Rolling Mills
2011 (269) ELT 298 (SC)

(iii) wherever abatement is permissible, that shall be allowed by the authority concerned in accordance with law.

(iv) Since appellants have grievance of violation of natural justice, the authority shall do justice to afford reasonable opportunity of hearing to prevent repetitive litigation.

(v) Wherever determination of ACP arises, the authority with due regard to Rule 3 of Hot Re-rolling Steel Mills Annual Capacity Determination Rules, 1997 shall determine the same on the basis of materials on record and the appellants shall get proper opportunity of hearing to lead their defence in that regard.

(vi) Since it is mentioned in the Bar that Rule 5 of Hot Re-rolling Steel Mills Annual Capacity Determination Rules, 1997 is under challenge before Hon'ble High Court of Madras in the writ application as aforesaid, th authority shall be guided by judgment of the Hon'ble High Court if judgment therein comes while doing readjudication. Otherwise, his decision shall be subject to outcome thereof. In such event, the authority shall mention in his order that the readjudication order is subject to outcome of the writ application above."

18. While doing so, taking note of the submission of the learned counsel for the revenue, CESTAT, Madras, at paragraph No.7 of the common order has further ordered, as hereunder.

"Ld. A.R. for the Revenue submits that the issue arising out of Rule 3 has already been decided by the Apex Court in CCE Chandigarh Vs. Doaba Steel Rolling Mills - 2011 (269) ELT 298 (SC) but constitutional validity of Rule 5 was not before the Apex Court. At this stage, Members of the Bar submit that Revenue has filed memo before the Hon'ble High Court of Madras stating that writ application may be transmitted to the Apex Court. We are unable to express any opinion on such proposition in absence of any such memo before us."

19. On this day, attention of this Court was also invited to the order made in W.A.Nos.1620 & 1675 of 2003, dated 17.06.2015, by which a Hon'ble Division Bench of this Court in M/s.Madras Steel Re-Rollers Association, Chennai and another Vs. Union of India and another, dismissed the writ appeals. Order of the Hon'ble Division Bench is extracted hereunder.

"Learned counsel for the respondents states that there is no transfer petition pending before the Honurable Supreme Court. On the other hand, a Division Bench of the Karnataka High Court in W.A.No.331 of 2006 and connected matters decided on 27.09.2013 has repelled the challenge to Rule 5 of Hot Rerolling Steel Mills Annual Capacity Determination (Amendment) Rules, 1997, has not made ultra vires and contrary to Section 3-A of the Central Excise Act, 1944, and thus learned counsel for the appellant states that the same deals with no scope to press the present appeals.

2. In view of the aforesaid submission, the writ appeals are dismissed in view of the judgment referred

to aforesaid."

20. Inasmuch as, before CESTAT, Madras, both the learned counsel for the parties have agreed for remand to the adjudicating authority for redetermination of duty liability, we are not inclined to accept the contention of Mr.A.P.Srinivas, learned senior standing counsel for Customs, Central Excise and Service Tax and accordingly, substantial question No.1 is answered in the negative as against the revenue.

21. Taking note of the decision of the Hon'ble Division Bench of this Court in W.A.Nos.1620 & 1675 of 2015 dated 17.06.2015, the adjudicating authority is directed to proceed further.

22. In Shree Bhagwati Steel Rolling Mills Vs. Commissioner of Central Excise, reported in 2015 (326) ELT 209 (SC), the Hon'ble Supreme Court has declared Rule 96 ZQ(5)(ii) of the Central Excise Rules, 1944, as ultra vires of the Act and therefore, the second substantial question of law, is also answered against the revenue.

23. Going through the material on record, we are of the view that the appellant has not made out a case for interference. Hence, the instant Civil Miscellaneous Appeal is dismissed. No Costs.

Sd/-
Assistant Registrar(CS II)

//True copy//

Sub Assistant Registrar

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TO

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

2. The Section Officer,
VR Section, High Court,
Madras. (2 Copies)

+1cc to Mr.A.P.Srinivas, Advocate SR.No.6036

CMA No.100 of 2018

BR(CO)
GN(27/02/2018)