IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 15.11.2018

CORAM :

THE HONOURABLE MR.JUSTICE T.S.SIVAGNANAM
and
THE HONOURABLE MR.JUSTICE N.SATHISH KUMAR

Writ Appeal No.1804 of 2013
and
M.P.No.1 of 2013

Faurecia Emissions Control
Technologies India Pvt.Ltd.,
(Formerly known as Emcon Technologies
India Pvt.Limited & earlier known as
Arvin Exhaust India Pvt.)
rep.by its Finance Controller
D.Jayaraj
.... Appellant

Cause title accepted vide order
of Court dated 02.08.2013 made
in M.P.No.1 of 2013 in WA SR.46018
of 2012.

-vs-

1.The Additional Commissioner of Central Excise,
Chennai Commissionerate III,
121, Nungambakkam High Road,
Chennai-600 034

2.The Asst.Commissioner of Central Excise,
Chennai II Division, Chennai Commissionerate II,
R-40, A-1, Hundred Feet Road,
Mogappair East,
Chennai-600 037 ... Respondents

Writ Appeal filed under Clause 15 of Letters Patent against the order dated 15.02.2012, made in W.P.No.3409 of 2008.

WP.NO.3409/2008:

Petition filed under Article 226 of the Constitution of India praying for a Writ of Certiorari calling for the records on the file of the Ist Respondent in Order in Original No. 21/2007 dated 30th November 2007 and to quash the said order.

For Appellant : Mr.Joseph Prabakar

For Respondents: Mr.A.P.Srinivas

JUDGMENT

[Judgement of the Court was delivered by T.S.Sivagnanam, J.]

This appeal, filed by the appellant/assessee, is directed against the order passed in W.P.No.3409 of 2008, dated 15.02.2012. The assessee filed the said writ petition challenging the Order-in-Original No.21 of 2007, passed by the first respondent, dated 30.11.2007. The said order passed by the first respondent was an order passed after the matter was remanded by the Commissioner of Central Excise (Appeals), vide order dated 31.01.2007, in Order-in-Appeal No.26/2007 (M-II).

2.The appellant had approached the writ Court on the ground that the show cause notice, which was issued by the adjudicating authority, on the issue of amortisation of tooling advance, was identical to that of the show cause notice, which was issued by the Joint Commissioner of Central Excise, NASIK and in the Order-in-Original, dated 17.12.2004, the said adjudicating authority dropped the proposal in the show cause notice agreeing with the submission made by the assessee.

3.It is submitted that for the tooling advance received by the assessee, supply was effected from two Units one at Chennai and the other at NASIK and therefore, the assessee contended that if the adjudicating authority at NASIK, while examining the identical transaction, had dropped the proceedings and the Committee of Commissioners thought fit not to prefer an appeal against the said order, it would bind the first respondent and the first respondent ought to have dropped the proposal in the show cause notice.

4.The respondent Department filed a counter affidavit, in which, among other things, contended that the order passed by the adjudicating authority is in another part of the country and not necessarily binding on the respondents and the Order-in-Original passed by the first respondent was justified.

5.The writ Court, by the impugned order, though noted the submission of the assessee, more particularly in paragraph No.7 of the order opined that on account of the availability of alternate remedy, by way of appeal, the assessee should pursue the same and accordingly dismissed the writ petition, giving liberty to the assessee to file an appeal before the Commissioner of Central Excise (Appeals), raising all grounds and also fixed a time frame within which such exercise shall be completed. Against the said order, the present appeal has been preferred.

6.In this appeal, no interim order was passed. However, the respondent/Department had recovered an amount of Rs.10 lakhs, being the excise duty and penalty by adjusting the caution deposit. With regard to the sum of Rs.5,22,560/-, an attachment notice under Section 11 of the Central Excise Act was issued, against which, the appellant/Petitioner has filed W.P.No.15818 of 2007 and an order of interim stay was granted on 27.04.2007 and it is stated that the said writ petition is pending.

7.The learned counsel for the appellant/petitioner reiterated the submissions made in the writ petition and contended that the judicial discipline requires that the authority should follow the decision of the adjudicating authority at NASIK. In this regard reliance was placed on the decision of the Hon'ble Supreme Court in Boving Fouress Ltd., vs. Commissioner of Central Excise, Chennai [(2006) 202 ELT 389].

8.The learned counsel appearing for the Revenue strenuously contended that the order passed by the writ Court is perfectly valid and the appellant/assessee has to file an appeal; the appellant has an efficacious remedy; there are complicated factual issues involved and therefore, this appeal may not be entertained. Further it is submitted that the order passed by the adjudicating authority in NASIK will not bind the first respondent and if such proposition is permitted to be canvassed, it will unsettle very many settled issues.

9.After elaborately hearing the learned counsels for the parties and carefully perusing the materials placed on record, we partially agree with the submission of the learned counsel for the appellant/assessee for the reason that the tooling advance received by the assessee was for supply of certain tooling equipments and the assessee estimated the life of the tools to be used to produce up to 2,00,000 units, the cost of tooling had been amortised by the assessee over 2,00,000 pieces for the purpose of calculation of excise duty on tooling cost and the said advance received by the assessee is to be repaid by way of adjustment against sales realisation over 2,00,000 units.

10.It is not in dispute that M/s.Mahindra Fort India Ltd., had stopped production of a particular model of car, for which, parts and components had to be produced from the tools supplied by the assessee. Thus, there was an unadjusted tooling advance of Rs.47,41,578/-. This was reflected in the balance-sheet of the asessee in their Chennai Unit and Nasik Unit proportionate to the amounts payable to the respective Units for the supplies effected and out of the total amount of Rs.47,41,578/-, being the unadjusted tooling advance, Rs.31,72,000/- relates to Chennai Unit and the balance of Rs.15,69,578/- relates to NASIK Unit. The adjudicating authority opined that the said amount is only additional consideration flowing directly from the buyer to the assessee in respect of the sale of goods already cleared. Therefore they are liable to duty as well as penalty. This proposal made in the show cause notice was confirmed by Order-in-Original, dated 24.02.2006, against which, the assessee filed an appeal before the Commissioner of Central Excise (Appeals) reiterating the same stand and also relying upon a decision of the Tribunal in the case of Commissioner of Central Excise, Madras vs. Shardlow India Ltd., [1999(110) ELT 772]. The Commissioner of Central Excise (Appeals) passed final order dated 31.01.2007. We have gone through the order. Unfortunately, the Commissioner of Central Excise (Appeals) did not give any finding, but merely extracted the decision of the Tribunal in Shardlow India Ltd., and remanded the case back to the lower authority for deciding the matter afresh. On remand, the assessee reiterated the stand taken by them, including the fact that the adjudicating authority at NASIK had dropped the proceedings. However, we find that the adjudicating authority, on de novo consideration, while passing Order-in-Original, dated 30.11.2007, did not advert to this issue. The decision relied on by the assessee, in the case of Shardlow India Ltd., was also held to be inapplicable to the facts.

11.As observed by us earlier, we would partially agree with the learned counsel for the assessee since it is a single transaction, out of which, an unadjusted advance amount has arisen and the question is as to how it has to be treated in the hands of the assessee. In the balance-sheet, for the year 2000-01, the assessee has shown this amount as miscellaneous income. On going through the balance-sheet, the adjudicating authority called for information, which was furnished by the assessee. The question would be, if it is so, whether penalty was leviable under Section 11AC of the Act. However, we do not want to embark upon such exercise at this juncture, as we find that there is serious error in the decision making process, which would entitle this Court to exercise writ jurisdiction under Article 226 of the Constitution of India, despite availability of an alternate remedy.

12.The learned counsel for the Revenue is right in contending that the appeal remedy available under the Act is not only effective but efficacious. However, there are exceptions to the Rules relating to maintainability of Writ Petition and one such exception being if there is an error in the decision making process and if there is a violation of principles of natural justice and/or the order is passed without jurisdiction, the Writ Court would definitely have power to interfere with such proposal. Thus, considering all the above referred facts we are of the clear view that the adjudicating authority should take a fresh look into the matter uninfluenced and unbiased by any of the findings rendered early and the effect of the order passed by the adjudicating authority in NASIK also has to be considered, since the tooling advance arises out of a single and same transaction.

13.The learned counsel for the assessee would submit that the decision taken by the adjudicating authority at NASIK had attained finality and it is presumed that the Committee of Commissioners took a conscious decision not to challenge the said order. The Hon'ble Supreme Court in BOVING FOURESS LTD., vs. COMMISSIONER OF CENTRAL EXCISE, CHENNAI [2006(202) E.L.T.389] held that where the Department accepts the principle laid down by the Tribunal in one case and let it become final, then the Department is not entitled to raise the same point in other cases, as the Department cannot pick and choose. We are conscious of the fact that there is no decision of the Tribunal in the instant case, nevertheless, the decision of the adjudicating authority is in respect of a single and same transaction. Therefore, the decision though may not have a binding effect, should definitely have persuasive effect.

14.Thus, for all the above reasons, we are of the view that the Writ Petition is maintainable, as the appellant/petitioner has made out a case falling within exceptional circumstances, under which the Court can exercise jurisdiction under Article 226 of the Constitution of India, despite availability of an alternate remedy.

15.For the above reasons, the Writ Appeal is allowed, the order passed in the writ petition is set aside. Consequently, the Order-in-Original, dated 30.11.2007, is set aside and the matter is remanded to the first respondent for fresh adjudication. The first respondent shall afford an opportunity of personal hearing to the authorised representative of the appellant and consider the matter afresh uninfluenced and unbiased by any of the earlier decisions taken by it and in that process decide the effect of the Order-in-Original passed by the Joint Commissioner of Chennai, NASIK, in Order-in-Original No.31/CEX/2004, dated 17.12.2004. If need be, the first respondent shall call for a remand report from the Joint Commissioner of Central Excise, NASIK, as to why the Excise Department took a decision not to pursue the matter further. No costs. Connected miscellaneous petition is closed.

Sd/-
Assistant Registrar(CCC)

//True Copy//

Sub Assistant Registrar

To

1.The Income Tax Appellate Tribunal Madras 'D' Bench.

Copy to:

1.The Additional Commissioner of Central Excise,
Chennai Commissionerate III,
121, Nungambakkam High Road,
Chennai-600 034

2.The Asst.Commissioner of Central Excise,
Chennai II Division, Chennai Commissionerate II,
R-40, A-1, Hundred Feet Road,
Mogappair East,
Chennai-600 037

+1cc to Mr.Joseph Prabakar, Advocate sr.no.78526
+1cc to Mr.A.P.Srinivas, Advocate sr.no.77944

W.A.No.1804 of 2013

mg(co)
nr 10/12/2018