

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATE: 23.01.2018

CORAM

THE HONOURABLE MR.JUSTICE S.MANIKUMAR
and
THE HONOURABLE MRS.JUSTICE V.BHAVANI SUBBAROYAN

C.M.A.No.1407 of 2017
and
CMP.No.7527 of 2017

M/s. Indian Additives Limited
Express Highway
Manali, Chennai 600 068. .. Petitioner/Appellants

Versus

The Commissioner of Central Excise,
Chennai I Commissionerate
Chennai. .. Respondent/Respondents

Prayer:

Civil Miscellaneous Appeal has been filed under Section 35-G of the Central Excise Act, 1944 against the Miscellaneous Order No.40476 of 2016 (Final order No.41689-41690/2015 dated 29.10.2015) dated 21.10.2016 passed by the Customs, Excise and Service Tax Appellate Tribunal, Chennai, (Order in Appeal Nos.06 & 07/2014(M-1) dated 06.01.14 on the file of the Commissioner of Central Excise(Appeals), Chennai-34, against the order in Original No.06 & 07/2011 dated 28/03/2011, on the file of the Deputy Commissioner of Central Excise, Chennai-37)

For Petitioner : Mr.V.S.Manoj
for
Mr.K.Vaitheeswaran

For Respondent : Mrs.R.Hemalatha

ORDER

(Order of the Court was delivered by V.BHAVANI SUBBAROYAN,J.)

The Appeal is filed under Section 35-G of the Central Excise Act, 1944 against the Miscellaneous Order No.40476 of 2016 dated 21.10.2016 passed by the Customs, Excise and Service Tax Appellate Tribunal, Chennai.

2. The brief facts of the case of the appellant are as follows:-

The appellant is engaged in the manufacture of additives for lubricating oil classifiable under Chapter 38 of the Central Excise Tariff Act, 1985. The appellant discharged duties of excise at the time of clearance of final products from their factory. The appellant availed CENVAT credit in respect of excise duty paid on inputs and capital goods and service tax paid on input service. Show Cause Notices dated 06.11.2007 and 04.06.2010 were issued by the Assistant Commissioner of Central Excise, Chennai, and Deputy Commissioner of Central Excise, Chennai, respectively demanding a sum of Rs.4,14,259/-and Rs.1,02,423/- being the CENVAT credit taken on inputs, which were not used in the manufacture of final products nor the said inputs were accounted for satisfactorily, as per Rule 9(5) of the Cenvat Credit Rules, during the periods from January 2007 to September 2007 and during the course of physical inventory undertaken on 31.03.2010. The appellant sent replies to the said Show Cause Notices stating that the shortage is due to heat, evaporation, handling loss and differences in measurement methodologies. After considering the replies of the appellant, the Deputy Commissioner of Central Excise, passed separate orders dated 28.03.2011 in order-in-original Nos.07/2011 and 06/2011 confirming the demand made in the Show Cause Notices with applicable rate of interest and also imposing penalty.

3. Aggrieved over the said orders, the appellant preferred appeals before the Commissioner (Appeals) in Appeal Nos.06 and 07 of 2014. The Commissioner (Appeals), vide common order dated 06.01.2014, rejected the above appeals and upheld the orders-in-original. Against which, the appellant preferred appeals before the Customs, Excise and Service Tax Appellate Tribunal, Chennai. Vide final Order Nos.41689 and 41690 of 2015, the Appellate Tribunal dismissed the appeals on 29.10.2015 on a wrong premise that the appellant had sought for parallel remedy, on the very same issued before the High Court and before the Tribunal.

4. The appellant filed Rectification Petition seeking rectification of the error. The Appellate Tribunal vide Misc. Order No.40476 of 2016 dated 21.10.2016, dismissed the appeals. Aggrieved against the same, the appellant is before this Court with the present Appeal.

5. Heard the learned counsel for the appellant and the learned counsel for the respondent. Perused the materials available on record.

6. Perusal of material on records would show that the appellant is engaged in the manufacture of additives for lubricating oil classifiable under Chapter 38 of the Central Excise Tariff Act, 1985. The appellant availed CENVAT credit in respect of excise duty paid on inputs and capital goods and

service tax paid on input service. Show Cause Notices were issued by the Commissioner of Central Excise, Chennai on the ground that during the course of verification of CENVAT credit accounts and connected records, it was noticed that the appellant was conducting physical stock taking of inputs stored in the factory on quarterly basis and while conducting stock taking of inputs, inputs physically available were found short of book balance. Shortage is recorded in the books of accounts by subtracting the same from the closing balance for the previous month and the resultant balance quantity is taken as the opening balance for the current month. The quantity found short does not appear to have been used in the manufacture of final product as envisaged in the CENVAT Credit Rules, but the appellant has not reversed proportionate credit on such shortage. Therefore, Show Cause Notices dated 06.11.2007 and 04.06.2010 were issued demanding a sum of Rs.4,14,259/- and Rs.1,02,423/- respectively, being the CENVAT Credit of shortage on quantity of inputs available as per stock under Rule 14 of CENVAT Credit Rules 2004, read with Provisions 11A and 11B of Central Excise Act 1944. For the above two show cause notices, the appellant sent replies dated 04.12.2007 and 06.07.2010 respectively.

7. Perusal of materials on record would further show that with regard to show cause notice dated 06.11.2007, Order-in-Original No.07/2011 came to be passed on 28.03.2011 by the Deputy Commissioner of Central Excise, confirming the demand of Rs.4,14,259/- and with regard to another show cause notice dated 04.06.2010, Order-in-Original No.06/2011 came to be passed on the same day i.e., on 28.03.2011 by the Deputy Commissioner of Central Excise, confirming the demand of Rs.1,02,423/-, being the CENVAT Credit which has been taken by the appellant herein and an order of recovery of same under Rule 14 of CENVAT Credit Rules, 2004 read with Section 11 A(1) of the Central Excise Act, 1944 along with appropriate interest under Rule 14 of Cenvat Credit Rules, 2004 read with Section 11AB of Central Excise Act, 1944, came to be passed, apart from imposing a penalty of Rs.50,000/- for show cause notice dated 04.06.2010 and imposing a penalty of Rs.1,00,000/- for notice dated 06.11.2010.

8. In the aforesaid Orders-in-Original, the Deputy Commissioner of Central Excise has given a finding that the assessee had claimed that raw material is subject to evaporation due to the high viscosity; and they have a heating mechanism inside the storage tanks and the raw materials stored are subsequently heated for free flow of the same into production process; from the list of raw materials furnished by the assessee, it could be seen that some of them, like alcohols and light petroleum oils, may be affected by evaporation to a limited extent during shortage and the raw materials, like acidic acid and heavy petroleum oils, are not affected by evaporation; the claim of the assessee at uniform rate of 3% on

all raw materials as evaporation loss is not reasonable; the records indicate that there was no documentary evidence to prove the claim by the assessee in respect of the loss and they have not also explained the heavy loss claimed on materials like Acidic Acid (24.37%), Formic Acid (14.26%) and Calcium Chloride (9.5%); there was no indication as to the permissible limit prescribed by the Standards of Weights and Measurement Act and the Oil Industry Development Act; and in the absence of these details, he was unable to conclude as to the correctness or otherwise of the orders of the authorities below.

9. The Deputy Commissioner of Central Excise also given a finding that the appellant has not stated before CESTAT or before him, which provisions of the Acts are applicable to their case and the details furnished by the assessee were also not in conformity with the directions of the Tribunal, with reference to the materials received and materials stored.

10. The Deputy Commissioner of Central Excise also held that the shortages in input stock occurring due to handling and transportation within the manufacturing facility, due to natural causes like evaporation, dryage, differences in calibration of weighbridges, short accountal due to clerical error, wastage by job workers, due to high volatile and very meagre shortage over a long period of time etc., only have been held to be admissible and thus came to a conclusion that the loss to the extent claimed by the assessee cannot be upheld and that the assessee is liable to pay the amount demanded, in the show cause notices along with interest and penalty, as stated above.

11. It also seen from the material on record that challenging the above two Orders-in-Original dated 28.03.2001, Orders-in-Appeal Nos.06 and 07/2014 (M-1) came to be filed by the appellant before the Commissioner of Central Excise (Appeals). The appellate authority by common order dated 06.01.2014 rejected the appeals filed against the Orders-in-Original Nos.06/2011 and 07/2011 dated 28.03.2011.

12. Challenging the common order dated 06.01.2014 passed by the Commissioner of Central Excise (Appeals), the appellant filed two appeals before the Customs, Excise & Service Tax Appellate Tribunal. Based on the submissions made by the appellant that the appellant is also before the High Court in filing CMA, initially the Appellate Tribunal passed an order on 29.10.2015 in Final Order Nos.41689 and 41690 of 2015 and dismissing the appeals filed by the appellant against the Orders-in-Appeal Nos.06 and 07/2014 dated 06.01.2014 holding that "parallel remedy cannot be invoked by the appellants for the same cause of action." Therefore, the appellant filed Miscellaneous Petition on 29.10.2015 seeking rectification of the order passed by the Appellate Tribunal. In the said

Miscellaneous Petition, it was stated by the learned counsel for the appellant before the Tribunal that there had been misconception of fact of seeking parallel remedy on the same issue before the High Court, but, it was not on the same issue for the current year, but they have filed appeals against the orders passed on the same issue, for the previous period, and the result of the appeal disposed by the order dated 29.10.2015 may be same, but not for seeking parallel remedy. Learned counsel for the appellant would submit that without appreciating the contentions made by the appellants before the Tribunal in challenging the previous order dated 29.10.2015, the Tribunal has passed an order in the Rectification Petition in Miscellaneous Order No.40476 of 2016 on 21.10.2016 modifying the previous order dated 29.10.2015.

13. To decide the instant case, it is appropriate to extract the above two orders of the Appellate Tribunal.

(i) The order passed by the Appellate Tribunal in Final Order Nos.41689 and 41690 of 2015 dated 29.10.2015, reads as follows:-

"Appellant explains that against the appellate order appellant is also before Hon'ble High Court of Madras in CMA. Law being well settled that parallel remedy cannot be sought against same cause of action, both the appeals are dismissed."

(ii) The order passed by the Appellate Tribunal in Misc.Order Nos.40476 of 2016 dated 21.10.2016, reads as follows:-

"Learned counsel says that the order passed on 29.10.2015 was on the misconception of the fact of seeking of parallel remedy on the same issue before the Hon'ble High court of Madras. That is not the fact. The fact is that because the appellant is before Hon'ble High Court on the same issue for the previous period, the result of the appeal disposed by the order dated 29.10.2015 may be same, but not for seeking parallel remedy.

2. Revenue agrees to the proposition above.

3. In view of the above, first sentence may be modified to read as under:-

"Appellant explains that against the appellate order for the previous period, appellant is before Hon'ble High Court of Madras in CMA."

4. In view of the above amendment order, the second sentence of the order shall read as:-

"Following judicial discipline, present appeals also stand dismissed for the reasons stated in the Final Order No.40149 to 40152 of 2015 dated 13.02.2015."

5. The above two amendments to the order dated 29.10.2015 satisfies the requirement of the present miscellaneous application. Accordingly, MA is allowed with the direction that the order shall read as under:-

"Appellant explains that against the appellate order for the previous period, appellant is before Hon'ble High Court of Madras in CMA. Following judicial discipline, present appeals also stand dismissed for the reasons stated in the Final Order No.40149 to 40152 of 2015 dated 13.02.2015."

14. From the reading of the facts, this Court is of the view that the order passed by the Tribunal cannot be sustained and has to be set aside for the reason that the Tribunal has not applied its mind and decided the appeals, but mistakenly passed a cryptic and non-speaking order in the appeals, which arose from the order dated 06.01.2004 made in Orders-in-Appeal Nos.06 and 07/2014 (M-1).

15. For the reasons stated supra, Civil Miscellaneous Appeal No.1407 of 2017 stands allowed, thereby setting aside the order dated 21.10.2016 passed in Miscellaneous Order No.40476 of 2016 by the Customs, Excise and Service Tax Appellate Tribunal, Chennai, in entirety and the matter is remitted to the Tribunal for fresh consideration and the Tribunal shall hear the appeals afresh arising out of the Orders-in-Appeal Nos.06 and 07/2014 (M-1) dated 06.01.2014, within a period of three months from the date of receipt of a copy of this order. No costs. Consequently, connected Miscellaneous Petition is closed.

Sd/-
Asst.Registrar (CO)

/true copy/

Sub Asst. Registrar

mra

To

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

2.The Commissioner of Central Excise (Appeals)
Chennai-34

3.The Deputy Commissioner of Central Excise (Appeals)
Chennai-37

4.The Commissioner of Central Excise,
Chennai I Commissionerate
Chennai.

+ 1 cc to Mr.K.Vaitheeswaran Advocate, SR.5260

+ 1 cc to Mrs.R.Hemalatha, Advocate, SR.5426

C.M.A.No.1407 of 2017

mr(co)
nr 27/02/2018



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