IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 05.09.2018

CORAM:

THE HON'BLE MR. JUSTICE T.S.SIVAGNANAM
and
THE HON'BLE MRS. JUSTICE BHAVANI SUBBAROYAN

C.M.A.No.731 of 2011

Bimetal Bearings Limited,
Huzur Gardens,
Sembiam,
Chennai - 11. .. Appellant/Appellant

Vs

1.Commissioner of Central Excise,
Chennai II Commissionerate,
MHU Complex,
692, Anna Salai, Nandanam,
Chennai - 35.

2.Customs, Excise and Service Tax
Appellate Tribunal,
South Zonal Bench,
Shastri Bhawan Annexe, 1st floor,
26, Haddows Road,
Chennai - 6. .. Respondents

Prayer : Civil Miscellaneous Appeal is filed under Section 35G of the Central Excise Act, 1944, seeking to set aside the impugned Final Order No.1174/2010, dated 11.11.2010, on the file of Customs, Excise and Service Tax Appellate Tribunal, South Zonal Bench, Chennai, Order-in-Appeal No.30/2009 (M-II), dated 22.05.2009, and Order-in-Original No.63/2007, dated 25.09.2007.

For Appellant : Mr.V.Balasubramanian
For R1 : Mr.A.P.Srinivas

JUDGMENT

(Judgment of the Court was delivered by
T.S.SIVAGNANAM, J.)

This appeal filed by the assessee is directed against the final order passed by the Customs, Excise and Service Tax Appellate Tribunal, South Zonal Bench, Chennai, in Final Order No.1174/2010, dated 11.11.2010. This appeal has been admitted vide order dated 01.04.2011 on the following substantial question of law:-

> "Whether or not Appellate Tribunal was in error in not following the binding precedent of the coordinate Bench cited before it in the case of Commissioner of C.Ex. Mumbai-III Vs. CEAT Ltd. In 2010 (254) ELT 349 (Tri.Mumbai)?"

2. The short issue which falls for consideration now is whether the assessee was entitled to suo-motu avail credit of central excise duty which they have reversed?

3. The asssessee are manufactures of Bimetallic Strips and also copper-based powder which is used within their factory in the manufacture of steel strips. The assessee avail Cenvat Credit on the inputs procured by them and utilize the same for payment of Central Excise Duty on their finished products. In the course of verification of input invoices, it was found that they had procured "Superior Kerosene Oil" (hereafter referred to as "SKO") from M/s.Indian Oil Corporation Limited, Tondiarpet Terminal, Chennai (hereinafter referred to as "IOCL"). The genuineness of the duty payment was verified and a reported was called for from IOCL. On the report being submitted, the department found that IOCL was not a registered dealer for SKO and therefore, not entitled to pass Cenvat Credit for SKO and that IOCL had received the SKO from M/s.Chennai Petroleum Corporation Limited (hereinafter referred to as "CPCL") at nil rate of duty by availing the benefit of Notification No.04/2005-CE, dated 01.03.2005, under which the consignments have to be cleared only under the Public Distribution Scheme (hereinafter referred to as "PDS"). However, in the instant case, the supplies were made to an Industrial consumer by adopting higher value than the value at which SKO was received from CPCL.

4. Further, the department reported that the CPCL had raised supplementary invoices on IOCL and on the basis of which the Cenvat invoices were issued by IOCL to the appellant/assessee. Thus, the department came to the prima-facie conclusion that the consignments cleared from CPCL to IOCL were not accompanied by any invoices and the invoices raised by CPCL subsequent to clearances are not valid documents to pass on Cenvat Credit to the buyers. Further, the assessee had filed availed Cenvat Credit on SKO on the basis of the invoices issued by IOCL who were not a registered dealer to pass on the CENVAT Credit as per

Rule 7 of the CENVAT Credit Rules, 2002. Therefore, a letter was addressed by the Range Officer to reverse the amount of CENVAT credit irregularly taken. The assessee vide letter dated 04.02.2006 had stated that the invoices issued by IOCL contained the particulars of invoice number and date of CPCL and based on this information, they have taken credit . Further, they have informed the department that IOCL have registered themselves as dealers of SKO from 26.10.2005 . Further, the assessee reversed the amount of Rs.5,69,237/- towards CENVAT Credit taken on invoices issued by IOCL for the period from 01.02.2005 to 31.10.2005 and the corresponding amount of cess and they sent another letter dated 01.08.2006 stating that they were taking back the credit of the amount reversed on 04.02.2006 on the ground that IOCL had obtained registration on 28.06.2000 from the Director General of Inspector, Customs and Central Excise, New Delhi, and the assessee also enclosed the revised invoices issued by CPCL.

5. The department opined that once the assessee pays back the duty of excise and that in the instant CENVAT credit availed on SKO, the proper course is to seek refund claim under Section 11B of the Central Excise Act and therefore, taking suo-motu recredit of the duty reversed appears to be incorrect. Accordingly, a show cause notice dated 20.06.2007 was issued calling upon the assessee to show cause as to why the duty amount of Rs.5,80,618/- taken in recredit suo-motu by them should not be demanded under Rule 14 of the CENVAT Credit Rules, 2004, and why the penalty should not be imposed on them under Rule 15 of the CENVAT Credit Rules, 2004, since the assessee had taken suo-motu credit irregularly and utilized the same. The assessee filed their reply dated 18.07.2007 largely reiterating what they have stated in their letters dated 04.02.2006 and 01.08.2006. The Assessing Officer held that suo-motu recredit of reversed credit without the permission of the Assistant Commissioner / Deputy Commissioner is not permissible and relied upon the decisions in the case of Medicamen Biotech Limited Vs. CCE [2003 (156) ELT 765] and Oudh Sugar Mills Limited Vs. CCE [2006 (199) ELT 628]. Accordingly, the proposal in the show cause notice was confirmed.

6. The assessee preferred an appeal before the Commissioner of Central Excise (Appeals) (hereinafter referred to as “the Commissioner (Appeals)”), who, by order dated 22.05.2009, dismissed the appeal and confirmed the Order-in-Original. As against which, the assessee preferred an appeal before the Tribunal and the Tribunal, vide the impugned order, dismissed the appeal.

7. Learned counsel for the appellant/assessee would submit that the issue regarding the suo-motu credit came up for consideration before the Division Bench of this Court in M/s.ICMC Corporation Limited, Chennai, Vs. CESTAT, South Zonal Bench, Chennai and others [2014-TIOL-121-HC-MAD-CX] and the Division Bench held that the contention of the Revenue that even in reversal of the entry there is bound to be an unjust enrichment has no substance or based on any legal principle. Therefore, it is submitted that the issue raised in this appeal is covered by the said decision.

8. Learned counsel for the Revenue pointed out that the decision in M/s.ICMC Corporation Limited (cited supra) will not apply to the facts of the instant case, as the crucial question is whether the assessee was entitled to credit at the first instance. Learned counsel explaining the nature of transaction stated that at the relevant time, the IOCL was not a registered dealer of SKO and could not have taken the credit and therefore, the question of assessee availing credit does not arise and therefore, at the first instance, if the assessee is not entitled for availing credit, the question of reversal and once again suo-motu taking recredit does not arise.

9. In reply to the said submission, learned counsel for the appellant/assessee referred to the order passed by the Commissioner (Appeals) stating that the assessee's eligibility to avail the credit was never in dispute and and as Appellate Authority has rendered such a specific finding.

10. We have perused the said order of the Commissioner (Appeals) dated 22.05.2009 and we find that the Commissioner (Appeals) has misread the finding given by the Original Authority to mean as if the assessee's entitlement to credit is not disputed. On a reading of the Order-in-Original clearly shows that the department disputed the very right of the assessee to avail the credit. Therefore, to that extent, the finding rendered by the Commissioner (Appeals) is factually incorrect.

11. At this juncture, it would be relevant to note the following finding given by the Adjudicating Authority in the Order-in-Original dated 25.09.2007, which is quoted below:-

> "11......................
> Further, the said registration No. was changed to a new registration as allotted by SACER and so the department's objection that IOCL are not eligible to pass on

Cenvat Credit was also refuted by them. But, it is seen that M/s.IOCL have registered themselves to deal with SKO only from 08.12.2005 onwards. Apart from the fact that IOCL were not registered for SKO for the period 01.02.2005 to 30.10.2005, the allegation in the SCN is that (1) M/s.IOCL received SKO from CPCL at nil rate of duty by availing benefit of Notification No.04/05, dated 01.03.2005 under which the consignments have to be cleared only under public distribution system, (2) IOCL have passed on higher credit than what is eligible.........”

12. Thus, the Commissioner (Appeals) misinterpreted the order passed by the Original Authority by stating that the assessee's eligibility to credit was never disputed. In fact, that is the very core of the dispute. Hence, the order passed by the Commissioner (Appeals) to that extent has to be necessarily held to be erroneous, though not the ultimate conclusion arrived at by the Commissioner (Appeals) in upholding the order of the Adjudicating Authority.

13. Unfortunately, before the Tribunal, the parties appears to have not made any endeavour to put-forth their factual contentions. Thus, unless and until the factual contention is properly considered, the question of applying the decision in the case of M/s.ICMC Corporation Limited (cited supra) does not arise. Furthermore, the question as to whether to what extent supplementary invoices would aid the stand of the assessee is also required to be gone into, since admittedly IOCL was a registered dealer of SKO only on 26.10.2005, much after the purchases effected by the assessee which was during the period from 01.02.2005 to 30.10.2005.

14. Thus, for the reasons stated above, we are of the considered view that the entire proceedings required to be redone and the factual matrix has to be considered. Hence, we are not inclined to accept the finding of the Tribunal as well as the finding of the Appellate Authority insofar as it relates to the finding that the assessee's entitlement was never in dispute and consequently we hold that the matter has to be remitted back to the Adjudicating Authority for denova consideration.

15. Accordingly, the Civil Miscellaneous Appeal is allowed and the impugned order is set aside.

Consequently, the matter is remitted back to the Adjudicating Authority for fresh consideration on the factual position as indicated above, leaving it open to the assessee and the department to raise all the contentions before the Adjudicating Authority. As a consequence of the above directions, the substantial question of law framed for consideration is left open. No Costs.

Sd/-
Assistant Registrar(CS vii)

//True Copy//

Sub Assistant Registrar

rkm
To

1.The Commissioner of Central Excise,
Chennai II Commissionerate,
MHU Complex,
692, Anna Salai, Nandanam,
Chennai - 35.

2.The Registrar Customs,
Excise and Service Tax
Appellate Tribunal,
South Zonal Bench,
Shastri Bhawan Annexe, 1st floor,
26, Haddows Road,
Chennai - 6.

+1cc to Mr.V.Balasubramanian, Advocate SR.No. 61165
+1cc to Mr.A.P.Srinivas , Advocate SR.No. 61712

C.M.A.No.731 of 2011

ASK(10/10/2018)