In the High Court of Judicature at Madras

Dated : 30.11.2018

Coram :

The Honourable Mr.Justice T.S.SIVAGNANAM

and

The Honourable Mr.Justice N.SATHISH KUMAR

Civil Miscellaneous Appeal Nos.2799 & 2800 of 2018
and CMP.No.21320 of 2018

The Commissioner of GST & Central Excise, formerly known as the Commissioner of Customs & Central Excise, office of the Commissioner of GST & Central Excise, No.1, Foulks Compound, Anaimedu, Salem-1. ...Appellant in both CMAs

Vs

M/s.Visaka Industries Ltd., Namakkal District-637207. ...Respondent in CMA.2799/2018

M/s.Natesan Engineers & Contractors, Salem-636452. ...Respondent in CMA.2800/2018

APPEALS under Section 35G of the Central Excise Act, 1944 against common final order Nos.40339 and 40340/2018 dated 06.2.2018 passed by the Customs, Excise and Service Tax Appellate Tribunal, South Zonal Bench, Chennai respectively in Appeal Nos.E/423/2009-DB and E/422/2009-DB.

For Appellant : Mr.Rajnish Pathiyil, SSC
For Respondents : Mr.Raghavan Ramabadran

COMMON JUDGMENT

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

These appeals filed by the Revenue under Section 35G of the Central Excise Act, 1944 (hereinafter called the Act) are directed against the common final order in Final Order Nos.40339 and 40340/2018 dated 06.2.2018 passed by the Customs, Excise and Service Tax Appellate Tribunal, South Zonal Bench, Chennai (for brevity, the Tribunal).

2. The above appeals are filed raising the following substantial questions of law :

> "i. Has not the Tribunal fallen in error in ignoring the settled positions of law with regard to admission of additional evidence in the appellate stage ?
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> ii. Has not the Tribunal fallen in error in allowing the miscellaneous application in the absence of sufficient reason for not producing these documents at the stage of adjudication ?
>
> iii.Has not the Tribunal fallen in error in allowing the additional documents to be considered, when there was no mention of such documents by the respondent at any point of adjudication ? And
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> iv. Has not the Tribunal fallen in error in ignoring the settled position of law that it is the assessee, who has to strictly prove that it has satisfied the conditions to avail the benefit of exemption ?"

3. We have heard Mr.Rajnish Pathiyil, learned Senior Standing Counsel appearing for the appellant/Revenue and Mr.Raghavan Ramabadran, learned counsel appearing for M/s.Lakshmi Kumaran & Sridharan Associates, learned counsel on record for the respondents.

4. The Commissioner of Customs and Central Excise, Salem issued a show cause notice dated 07.4.2008 to the respondent in CMA.No.2799 of 2018 namely the assessee - M/s.Visaka Industries Limited calling upon them to show cause as to why

(i) the Proviso to Section 11A of the Act should not be invoked to demand central excise duty by invoking the extended time limit;

(ii) the central excise duty amounting to Rs.15,24,01,940/- and education cess of Rs.13,55,237/-, totaling to Rs.15,37,57,177/- should not be demanded from them under Section 11A of the Act;

(iii) interest at the appropriate rate under Section 11AB of the Act should not be demanded; and

(iv) penalty should not be demanded under Section 11AC of the Act.

5. In the same show cause notice, the respondent in CMA.No.2800 of 2018 namely M/s.Natesan Engineers and Contractors was directed to show cause to the Commissioner of Central Excise, Salem-1 as to why a personal penalty under Rule 26 of the Central Excise Rules, 2002 should not be imposed on them for their active involvement and participation in as much as they abetted the assessee in the wrong availment of Notification No.6/ 2002/CE by way of bogus/excess accounting of fly ash resulting in evasion/ non payment of central excise duty of Rs.15,37,57,177/-.

6. The respondents herein filed their respective reply dated 02.5.2008 and 21.7.2008 to the said show cause notice and the matter was taken up for adjudication by the Commissioner of Central Excise. By an Order-in-Original dated 06.5.2009, the proposals in the said show cause notice were confirmed after rejecting the contentions of the respondents herein.

7. The issue, which was to be decided by the Adjudicating Authority, was as to whether the veracity of the receipt of fly ash from outside sources to the extent claimed by the assessee was correct or not.

8. The assessee made their submissions, which were considered by the Adjudicating Authority and primarily, the Adjudicating Authority came to the conclusion that the assessee had not produced any documents to establish that they procured fly ash from other sources other than the quantity delivered to them as per the records of the Mettur Thermal Power Station (MTPS).

9. At this juncture, it may not be necessary for this Court to go into the other aspects of the matter.

10. Aggrieved by order passed by the Adjudicating Authority, the respondents herein filed appeals before the Tribunal. During the pendency of the appeals before the Tribunal, a miscellaneous application was filed by the assessee stating that they have documents to prove that they procured fly ash from open market during the periods 2003-04 and 2004-05. They also filed a paper book containing several documents and in addition to them, the assessee filed a Memorandum of Understanding (MOU) between the MTPS and four cement companies; a sample MOU between the MTPS and the assessee; sample documents pertaining to alleged incorrect lorry numbers; and a letter dated 17.2.2004 from the assessee to the MTPS. The assessee further submitted that those documents were required to substantiate their claim that they received the requisite quantity of 25% fly ash during the relevant periods namely 2003-04 and 2004-05 and that a perusal of those documents was essential to the Tribunal to enable to

pass appropriate orders.

11. The assessee further stated that some of the documents were already produced before the Adjudicating Authority and in this regard, the assessee referred to paragraph 21.08 of the Order-in-Original, which had referred to such documents. The assessee's further case was that the Adjudicating Authority did not properly consider those documents. Hence, the assessee requested the Tribunal to exercise its powers under Rule 23 of the Customs, Excise and Service Tax Appellate Tribunal (Procedure) Rules, 1982 (hereinafter called the CESTAT Rules) and take on record the additional evidence.

12. By the impugned order, the Tribunal, after considering the case of the assessee and that of the Revenue, opined that the documents were required to be considered, but for such a purpose, the Tribunal remanded the matter to the Adjudicating Authority to reconsider the whole issue after giving sufficient opportunity to the assessee to furnish documents and a reasonable opportunity of hearing.

13. The question would be as to whether the Tribunal could have done so.

14. The Revenue is before us contending that there is a clear infraction of Rule 23 of the CESTAT Rules, that the Tribunal could not have remanded the matter for a fresh consideration, as the Adjudicating Authority specifically recorded a finding that no documents were produced despite the allegations being serious and that the Tribunal erred in remanding the matter to the Adjudicating Authority for a fresh consideration.

15. Furthermore, it is submitted by the Revenue that the Tribunal did not record any reasons as to why it was satisfied that those documents were required. According to the learned Senior Standing Counsel for the Revenue, the assessee miserably failed to state or produce sufficient reasons as to why they could not produce the documents at the stage of adjudication. Thus, the Tribunal fell into error in allowing the additional documents to be considered when there was no mention of documents at any point of time.

16. The learned Senior Standing Counsel for the Revenue has relied upon the decision of the Hon'ble Supreme Court in the case of Union of India Vs. Ibrahim Uddin [reported in 2012 (8) SCC 148] to support his contention that the Appellate Tribunal should not allow new evidence to be adduced in order to enable parties to raise a new point in the appeal and where a party, on whom the onus of proving a certain point lies, fails to discharge the onus, he is not entitled to a fresh opportunity to

produce evidence, as the Court can, in such a case, pronounce judgment against him and does not require any additional evidence to enable it to pronounce judgment. It is further submitted by the learned Senior Standing Counsel for the Revenue that this exercise of discretion by the Tribunal should have been done judiciously and not as done in the impugned order.

17. Per contra, the learned counsel for the respondents has reiterated the submissions made before the Tribunal and has drawn the attention of this Court to paragraph 3.1 of the order of the Tribunal wherein the Tribunal recorded that most of the documents were third party documents and that the assessee could not obtain them during the adjudication proceedings. He further submits that the Adjudicating Authority himself referred to whatever documents were given and this regard, has referred to paragraphs 23.01 and 23.02 of the Order-in-Original dated 06.5.2009.

18. We have carefully considered the contentions of the learned counsel on either side.

19. Rule 23 of the CESTAT Rules speaks of production of additional evidence, which reads as follows :

> "Rule 23-Production of additional evidence:-
>
> (1) The parties to the appeal shall not be entitled to produce any additional evidence, either oral or documentary, before the Tribunal, but if the Tribunal is of opinion that any documents should be produced or any witness should be examined or any affidavit should be filed to enable it to pass orders or for any sufficient cause, or if adjudicating authority or the appellate or revisional authority has decided the case without giving sufficient opportunity to any party to adduce evidence on the points specified by them or not specified by them, the Tribunal may, for reasons to be recorded, allow such documents to be produced or witnesses to be examined or affidavits to be filed or such evidence to be adduced.
>
> (2) The production of any document or the examination of any witness or the adducing of any evidence under Sub-Rule (1) may be done either before the Tribunal or before such departmental authority as the Tribunal may direct.
>
> (3) Where any direction has been made

by the Tribunal to produce any documents or to examine any witnesses or to adduce any evidence before any departmental authority, the authority shall comply with the directions of the Tribunal and after such compliance, send the documents, the record of the deposition of the witnesses or the record of evidence adduced, to the Tribunal.

(4) The Tribunal may, of its own motion, call for any documents or summon any witnesses on points at issue, if it considers necessary to meet the ends of justice."

20. Sub-Rule (1) of Rule 23 of the CESTAT Rules states that the parties to the appeal shall not be entitled to produce any additional evidence either oral or documentary. But, if the Tribunal is of the opinion that any documents should be produced or any witness should be examined or any affidavit should be filed to enable it to pass orders or for any sufficient cause or if the Adjudicating Authority or Appellate or Revisional Authority has decided the case without giving sufficient opportunity to a party to adduce evidence, the Tribunal may, for reasons to be recorded, allow such documents to be produced or witnesses to be examined or affidavit to be filed. Sub-Rule (2) empowers production of any documents may be done either before the Tribunal or before such Departmental Authority as the Tribunal may direct. Sub-Rule (3) mandates that when such a direction is issued by the Tribunal, the Authority shall comply with the direction. Sub-Rule (4) directs the Tribunal to exercise power on its own to call for any documents or summon any witness on points at issue if it considers it necessary to meet the ends of justice.

21.The learned Senior Standing Counsel for the Revenue submits that Rule 23 of the CESTAT Rules is akin to Order XLI Rule 27 of the Civil Procedure Code (CPC) and in the instant case, the assessee sought to produce additional evidence without any specific pleadings as to why they did not produce the same before the Adjudicating Authority.

22.

22. We are not fully convinced with the said submission of the learned counsel for the Revenue on account of the difference in the language employed in Order XLI Rule 27 of the CPC and Rule 23 of the CESTAT Rules. Rule 23 of the CESTAT Rules does not contain the conditions as contained in Order XLI Rule 27(a) and (aa) of the CPC.

23. In terms of the provisions and more particularly Order XLI Rule 27 of the CPC, the party seeking to produce additional evidence should establish that notwithstanding exercise of due diligence, he was unable to produce documents or the documents were not within his knowledge or after exercise of due diligence, they have been produced by him at the time when the decree appealed against was passed.

24. In Rule 23 of the CESTAT Rules, there appears to be a bar for the parties to the appeal to be entitled to produce additional documents. However, the Tribunal is empowered to direct the documents to be produced and the circumstances, under which, the Tribunal can exercise powers, have been enumerated in Sub-Rule (1) of Rule 23 of the CESTAT Rules. Apart from that, the Tribunal is suo motu empowered to call for documents or summon any witness on points at issue, if it considers necessary to meet the ends of justice in exercise of its powers under Rule 23(4) of the CESTAT Rules. Therefore, the phraseology and language of Order XLI Rule 27 of the CPC and Rule 23 of the CESTAT Rules is differently worded.

25. In the instant case, the Adjudicating Authority has recorded in paragraph 23.01 of the Order-in-Original that the quantity delivered to the assessee as per the MTPS records was found to be reflected in the private register of M/s.Natesan Engineers and Contractors and that there was no dispute over this. The dispute, therefore, appears to be with regard to the quantity received from outside allottees by M/s.Natesan Engineers and Contractors. Mr.Santhoshkumar, Managing Director deposed in his cross examination held on 19.11.2008 that he had evidence to show the procurement of fly ash from other sources. The explanation given by the assessee was that those were third party documents and therefore, they took some time to get those documents.

26. In paragraph 3.1 of the order passed by the Tribunal, this submission of the assessee was placed on record. That apart, with regard to the discrepancy in the vehicle numbers, the assessee produced certain records to show that an error had occurred. Similarly, we find that in paragraphs 23.01, 23.02(i), 23.02(x), 23.02(xvii), 23.02(xxiii), 23.02(xxv) and 23.02(xxvi), there were references to the stand taken by the assessee.

Therefore, in our considered view, the Tribunal was justified in remanding the matter to the Adjudicating Authority to consider the evidence, which may be produced by the assessee.

27. It goes without saying that if the Department doubts the authenticity of the documents, that aspect can also be gone into by the Adjudicating Authority, as there can be no bar in doing so. In our considered view, the Tribunal, which has decided the matter, is the best judge to take a decision as to which of the documents are required to enable it to pass orders. We find that there is no error in the exercise of such discretion. Furthermore, the assessee's case is that they were not given sufficient opportunity.

28. The learned Senior Standing Counsel for the Revenue has relied upon the decision of the Hon'ble Supreme Court in the case of Ibrahim Uddin. The said decision arose out of a civil litigation and the Court found that there were absolutely no pleadings and that there was no evidence with regard to a Will. Interpreting Order XLI Rule 27 of the CPC, the decision was rendered. In the preceding paragraphs, we have pointed out the difference in the phraseology and language in Order XLI Rule 27 of the CPC and Rule 23 of the CESTAT Rules. Therefore, we are of the considered view that the decision in the case of Ibrahim Uddin would not render any assistance to the case of the Revenue. For the above reasons, we find that there is no error in the order passed by the Tribunal.

29.Accordingly, the civil miscellaneous appeals filed by the Revenue are dismissed. The substantial questions of law are answered against the Revenue and in favour of the assessee. No costs. Consequently, the connected CMP is also dismissed.

Sd/-
Assistant Registrar(CS III)

//True Copy//

Sub Assistant Registrar

To

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

2.The Commissioner of GST & Central Excise, formerly known as the Commissioner of Customs & Central Excise, office of the Commissioner of GST & Central Excise, No.1, Foulks Compound, Anaimedu, Salem-1.

+1cc to Mr.Rajnish Pathiyil, Advocate, S.R.No.82162

+2cc to Mr.Lakshmi Kumaran, Advocate, S.R.No.82359

MG(CO)
GSP(03/01/2019)