BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

RESERVED ON : 22.02.2018

DELIVERED ON : 06.07.2018

CORAM

THE HONOURABLE MR.JUSTICE G.R.SWAMINATHAN

W.P.(MD).No.800 of 2018 and
W.M.P.(MD)No.868 of 2018

M/s.TANSI Fabrication Works,
31, P.S.K.Road,
Alagai Nagar,
Rajapalayam - 626 117,
Virudhunagar District.
Rep. by its General Manager. ... Petitioner

Vs.

The Joint Commissioner of Central G.S.T. & Central Excise,
Tirunelveli Sub-Commissionerate,
Central Revenue Building, Tractor Road,
N.G.O. 'A'Colony,
Tirunelveli - 627 007. ... Respondent

PRAYER : Writ Petition is filed under Article 226 of Constitution of India, to issue a Writ of Certiorari, to call for the entire records relating to Order-in-Original No.10/JC/CE/2017 [DE NOVO] dated 21.08.2017 passed by the respondent and quash the same.

For Petitioner : Mr.J.Sankarraman
For Respondent : Mr.B.Vijay Karthikeyan,
Senior Standing counsel
for Customs and Central Excise.

O R D E R

The Writ petitioner herein is a Government of Tamil Nadu undertaking. It is engaged in the manufacture of Drums, Cash Chest and Iron Safe, File Tray, Steel Tank, Bench, Stool, Hospital Furniture etc. It had registered itself under the Central Excise Act 1944. Considering the peculiar nature of the petitioner, it had been granted exemption meant for small scale industries on an unit basis. This Court is now concerned with the activities of the unit of TANSI located at Alagai Nagar, Rajapalayam, Virudhunagar District.

2. In view of the exemption granted to the S.S.I., units, the

petitioner could start with a clean slate as on 1st day of April every year. The petitioner will have to pay Excise duty in once the exemption limit stood crossed. The petitioner did not experience any difficulty till the issuance of the show cause notice dated 29.03.2006.

3. The Commissioner of Central Excise, Tirunelveli, placing reliance on the Rule 57H(7) of the Central Excise Rules, 1944, Rule 9(2) of the Cenvat Credit Rules, 2002 and Rule 11(2) of the Cenvat Credit Rules, 2004, took the view that the assessee ought to have reversed the inputs lying in stock, work in progress and inputs contained in semi-finished goods/final products on that day, when they went into the exemption regime on the 1st day of April.

4. The show cause notice dated 29.03.2006 called upon the petitioner to show cause as to why the amount of Rs.20,01,120/- being the amount equivalent to the Cenvat credit ought not to be levied on the petitioner. The proposal to levy interest and penalty was also set out in the said notice. The petitioner inexplicably did not respond to the said notice. Therefore, the order-in-original dated 27.03.2007 came to be passed. The Authority confirmed the demand for an amount of Rs.20,01,120/- and also confirmed the interest liability. Penalty of Rs.50,000/- was also imposed. Aggrieved by the same, the petitioner filed an appeal before the Commissioner of Central Excise(Appeals). By order dated 16.12.2008, the appeal was allowed and the matter was remitted to the file of the original authority.

5. After remand, the order impugned in this Writ petition came to be passed. The Authority not only confirmed the demand for an amount of Rs.20,01,120/- together with recovery of interest, but also imposed penalty equivalent to the amount demanded. This order is questioned in this Writ petition.

6. Heard, Mr.J.Sankarraman, learned counsel appearing for the petitioner and Mr.B.Vijay Karthikeyan, learned Senior Standing counsel appearing for Customs and Central Excise.

7. It is true that as against the order impugned in this Writ petition, an appeal remedy is very much available to the Writ petitioner. In fact in the earlier round, the petitioner did successfully avail the appeal remedy. The learned counsel for the petitioner submitted that the impugned order is virtually non-speaking. He drew the attention of this Court to paragraph No.23 of the impugned order in which all the decisions cited by him have been casually brushed aside by holding that they are not applicable to the instant case. This Court is therefore of the view that when the order of the Authority does not consider the contentions of the assessee, the appeal remedy can certainly be bypassed and this Court would be justified in directly entertaining the challenge to the impugned order.

8. The core argument of the learned counsel appearing for the petitioner is based on the decision of Hon'ble Supreme Court reported in 1999 (122) ELT 353 (S.C.) (Collector of Central Excise, Pune Vs. Dai Ichi Karkaria Ltd.,). This decision is relied upon for the proposition that a credit once validly availed is indefeasible. Paragraph No.17 of the said decision reads as under:-

> "17. It is clear from these Rules, as we read them, that a manufacturer obtains credit for the excise duty paid on raw material to be used by him in the production of an excisable product immediately it makes the requisite declaration and obtains an acknowledgement thereof. It is entitled to use the credit at any time thereafter when making payment of excise duty on the excisable product. There is no provision in the Rules which provides for a reversal of the credit by the excise authorities except where it has been illegally or irregularly taken, in which event it stands cancelled or, if utilised, has to be paid for. We are here really concerned with credit that has been validly taken, and its benefit is available to the manufacturer without any limitation in time or otherwise unless the manufacturer itself chooses not to use the raw material in its excisable produce. The credit is, therefore, indefeasible. It should also be noted that there is no co-relation of the raw material and the final product; that is to say, it is not as if credit can be taken only on a final product that is manufactured out of the particular raw material to which the credit is related. The credit may be taken against the excise duty on a final product manufactured on the very day that it becomes available."

9. This decision of the Hon'ble Supreme Court was followed by the Hon'ble Division Bench of Punjab and Haryana High Court in the decision reported in 2008 (224) E.L.T. 239(P.&H.) (Commissioner of Central Excise, Chandigarh Vs. C.N.C.Comercial Ltd.,). The said case is more or less similar to the facts obtaining on hand. In that case also, the assessee was a small scale unit that was entitled to exemption under the very same notification.

10. The Hon'ble Division Bench of Himachal Pradesh High Court had also taken a similar view in favour of the assessee and the said Judgment is reported in 2010 (250) E.L.T. 338(H.P.) (Commissioner of Central Excise Chandigarh V. Tyre Tops). The Himachal Pradesh High Court had followed the decisions of the Kerala High Court and

Rajasthan High Court which also run on the same lines. The learned counsel for the petitioner brought to the notice of this Court, the recent decision rendered by the Hon'ble Division Bench of Madras High Court reported in 2015 (320) E.L.T. 357(MAD) (Tractor and Farm Equipment Ltd., Vs. The Commissioner of Central Excise, Madurai and one other). After surveying all the earlier case laws including the one, that are apparently in favour of the Revenue, the Hon'ble Division Bench held as follows:-

> "Once it is held that no co-relation between the raw material and the final product is required, the appellant's plea stands answered. If credit can be taken against excise duty on a final product manufactured on the very day, it makes it abundantly clear that there need not be co-relation between the input and the goods cleared and as a result, validly taken credit need not be reversed. The Central Excise Rules would come into play in the following manner, that is to say, on the date when the final goods become exempt from payment of duty, for the inputs received on and after the said date, no credit can be taken. This would be the correct method of understanding of the position of law."

11. Therefore, this Court has to necessarily sustain the contention of the petitioner's counsel that the Writ petitioner having rightly availed the Cenvat input credit originally, cannot be called upon to reverse the same, merely because it was stepping into exemption regime.

12. There is yet another point in favour of the Writ petitioner, as rightly pointed out by the learned counsel for the petitioner, namely, the point of limitation. The petitioner is a Government undertaking. It is not in dispute that as and when the petitioner crossed the exemption limit in a given year, it began to pay excise duties. All these transactions have been periodically cleared and are well known to the Authorities. It can be nobody's case that the petitioner had suppressed any material transaction. Therefore, in the very nature of things, the Commissioner of Central Excise, Tirunelveli, could not have sought recovery of duties beyond the period of one year from the relevant date. In this case, show cause notice was issued only on 29.03.2006. Therefore, what transpired beyond 29.03.2005 cannot be touched. Since this Court agrees with the contention of the learned counsel for the petitioner that the demand was unsustainable, there is no need to go into the correctness of imposing penalty equivalent to the amount demanded. But still it would be in order to make a remark or two. Admittedly, the Authority originally levied only a penalty of

Rs.50,000/-. The matter was taken on appeal. The Department did not prefer any cross appeal contending that the penalty amount was inadequately levied. The appeal Authority allowed the Writ petitioner's appeal and remanded the matter. But after remand, the penalty was enhanced from Rs.50,000/- to a sum equivalent to the amount demanded. As rightly pointed out by the petitioner's counsel, the petitioner cannot be put in a worse position, merely, for having filed an appeal. In this regard, he drew the attention of this Court to the decision reported in 2016 (340) E.L.T.6 (Mad.) (Servo Packaging Ltd., V. Cestat, Chennai). In paragraph No.25 of the said Judgment, the Hon'ble Division Bench has observed as under:-

> "25. In the absence of any appeal filed by the department on the finding, relating to alleged clandestine removal of raw materials, the appellant cannot be put in a worse position, in their own appeal, and in such circumstances, the principle of "no reformatio in peius" would come into play, which means that a person should not be placed in a worse position, as a result of filing an appeal. It is a latin phrase, expressing the principle of procedure, according to which, using the remedy at law, should not aggravate the situation of the one who exercises it."

13. Therefore, this Court would fully concur with the contention of the petitioner's counsel that the Authority erred in levying the penalty equivalent to the amount demanded. Looked at from any angle, the impugned order is unsustainable.

14. Therefore, the impugned proceedings passed by the respondent in Order-in-Original No.10/JC/CE/2017 [DE NOVO] dated 21.08.2017 stand quashed. The Writ petition stands allowed, accordingly. No costs. Consequently, connected Miscellaneous petition is closed.

Sd/-
Assistant Registrar (CS-I)

/True Copy/

Sub Assistant Registrar(CS-I)

To

The Joint Commissioner of Central G.S.T. & Central Excise,
Tirunelveli Sub-Commissionerate,
Central Revenue Building, Tractor Road,
N.G.O. 'A' Colony,
Tirunelveli - 627 007.

+1CC to Mr.M.Ramasamy Advocate in SR.No.71728.
+1CC to Mr.B.Vijay Karthikeyan Advocate in SR.No.71778.

PMU
DS/SKN/SAR-1 :25.07.2018: 6P/4C

ORDER MADE IN
W.P.(MD).No.800 of 2018 and
W.M.P.(MD)No.868 of 2018
06.07.2018