IN THE HIGH COURT OF BOMBAY AT GOA

EXCISE APPEAL NO. 28 OF 2008

Commissioner of Central Excise
ICE House, Patto, Panaji,
Goa – 403 001. … Appellant.

Vs.

Patil Steel Wires,
205, 206, Iind Floor,
Amarchand Sharma Complex,
S.P.Road, Secunderabad – 500 003. … Respondent

Ms. Priyanka Kamat, Standing Government Counsel for the Appellant.
Mr. R. Srivastava, Advocate for Respondent.

WITH
EXCISE APPEAL NO. 2/2010.

M/s Patil Steel Wires,
205, 206, IInd Floor,
Amarchand Sharma Complex,
S.P. Road, Secunderabad 500 003. … Appellant.

Vs.

Commissioner of Central Excise
Goa – 403 001. … Respondent

Mr. R. Srivastava, Advocate for the Appellant.
Ms.Priyanka Kamat, Standing Government Counsel for the Respondent.

Coram : M. S. Sonak &
Nutan D. Sardessai, JJ.

Date : 22nd August, 2019.

Oral Judgment (Per M.S. Sonak, J.)

Heard Ms. Priyanka Kamat, learned Standing Government Counsel for the Excise Department and Mr. R. Srivastava, learned Counsel for the Patil Steel Wires (assessee) in both these appeals.

2. In both these appeals the challenge is to the judgment and order dated 06.12.2007 made by the Custom Excise and Service Tax Appellate Tribunal (CESTAT) disposing of appeal Nos. E/1015/2000 and E/1016/2000. The Excise Department is aggrieved by the reduction of penalty amount from Rs.5,00,000/- to Rs.1,00,000/- by the CESTAT. The assessee is aggrieved by the confirmation of demand and imposition of penalty of Rs.1,00,000/-. Hence, we find that in a sense, there are cross appeals, and therefore, it would be appropriate if they are disposed of by common judgment and order.

3. Excise Appeal No. 28/2008 was admitted on 02.02.2009 on the following substantial questions of law:-

> "*(1) Whether the penalty leviable under Rule 57 1 (1)(iv) of Central Excise Rules 1944 is mandatorily to be imposed and whether there is discretion to the appellate*

authority/CESTAT to impose penalty lesser than the prescribed therein?"

4. Excise Appeal No. 2/2010 was admitted on 28.07.2010 on the following substantial questions of law:-

"*a) Whether the correct duty having been paid and there being no case of evasion of payment of duty, the impugned order dated 06/12/2007 of the Appellate Authority confirming the order of the Commissioner dated 29/03/2000, denying credit to the assessee under Modvat Scheme, to the tune of Rs. 20,74,861/- and imposing penalty of equal amount, is in excess of jurisdiction?*

b) Whether, for the same reasons, the availing of extended period of limitation of 5 years under proviso to Section 11-A of the Central Excise Act, on the purported ground of suppression and fraud, was not at all called for?

c) Whether, even the exercise of power under Section 11-A of Central Excise Act, being beyond the period of limitation of 6 months was barred by limitation, since inspection was held on 01/12/1998 and show cause notice was issued on 01/11/1999 and, therefore the institution of *proceedings were hit by limitation.*

d) Whether both the authorities, Appellate and Original as well acted arbitrarily in breach of principles of natural justice in proceeding ex-parte, as there was ample evidence on record not to act in absentia?"

5. Mr. Srivastava, learned Counsel for the assessee submits that the issue of assessments being barred by the provisions of limitation provided under Section 11A of the Central Excise Act, was specifically raised by and on behalf of the assessee. He submits that it is the case of the assessee that there was no evasion in the sense that the credit which was availed, was never in fact utilized by the assessee.

6. Mr. Srivastava, learned Counsel submits that though there may have been some deviations, from the prescribed procedure, there was absolutely no case of fraud or suppression with any intent to evade Central Excise duty. He points out that, in fact, necessary intimations were sent to the department informing the department very clearly of the procedure which was being adopted by the assessee. For all these reasons, he submits that the assessment which commenced beyond the prescribed period of limitation under Section 11 A of the Central Excise Act was in excess of jurisdiction. He submits that though this

issue was expressly raised, the same is not even been considered by the CESTAT.

7. Ms. Kamat, the learned Standing Government Counsel for Excise Department, refers to para 3 of the impugned judgment and order dated 06.12.2007, so to point out that, this aspect has been considered by the CESTAT in as much as the CESTAT has referred to the order of the commissioner in which, it is clearly stated that the assessee permanently availed inadmissible credit by willfully suppressing the facts from the department. She therefore, submits that this is not a case where the CESTAT has failed to adjudicate an important and jurisdictional issue, so as to warrant any interference.

8. Mr. Srivastava did attempt to argue certain other issues in these appeals. However, since the crucial issue which arises, relates to the non consideration of the jurisdictional issue of limitation, we did not hear Mr. Srivastava, in great detail on these other issues.

9. Ms. Kamat the learned Standing Government Counsel for the department pointed out that the CESTAT after concluding that there was fraudulent availment of inadmissible credit by willful suppression of relevant facts, was not at all justified in reducing amount of penalty

from Rs.5,00,000/- to Rs.1,00,000/- in the facts and circumstances of the present case. She therefore submits that the appeal instituted by the Department be allowed and the penalty of Rs. 5,00,000/- restored.

10. The rival contentions are fall for our determination.

11. According to us, there is substantial material on record to suggest that the issue of limitation as prescribed under Section 11A of the Central Excise Act was not only raised but was also argued by the assessee before the CESTAT. However, from the perusal of the impugned judgment and order, we find that there is no consideration, much less, any sufficient consideration of this crucial issue which is undoubtedly a jurisdictional issue in a matter of this nature.

12. The records indicate that even after the impugned judgment and order was filed, the assessee immediately applied for rectification pointing out that the issue of limitation was not even adverted to by CESTAT. This rectification application was dismissed by observing that if there was no consideration of issue of jurisdiction, then the same may amount to an error apparent on the face of record and it will be open for the assessee to institute a review petition or a petition for recall of the CESTAT order.

13. The assessee, did institute a petition for recall which was again dismissed on the ground that the scope of a recall application is very limited. In fact the record bears out that the jurisdictional issue of limitation in terms of Section 11 A was not considered by the CESTAT at all.

14. Such consideration would require the CESTAT to reconcile the observations made in para 3 of the impugned judgment and order, where at one place, the CESTAT has held that the assessee fraudulently availed inadmissible credit and in another place the CESTAT held that this was not a case where the assessee utilized the credit. The CESTAT will also have to advert to the correspondences if any, in which the assessee claims to have posted the Excise Department of the procedure which it was following. This is relevant because the proviso to Section 11 A will apply in case of willful suppression of relevant facts by assessee. According to us, all these matters had to be considered by CESTAT while disposing of the two appeals instituted by assessee.

15. Since the crucial jurisdictional issue has not been considered, the impugned judgment and order of the CESTAT will have to be set

aside and the matter restored before the CESTAT for fresh adjudication in accordance with law and its own merits.

16. In so far as the appeal instituted by the Excise Department is concerned, the same, will also have to be technically allowed, in the sense that the impugned judgment and order will have to be set aside even on the ground of reduction of penalty amount. The issue of penalty will also be have to be considered by the CESTAT depending upon its findings on the grounds raised by assessee on the question of limitation and merits of the adjudication order.

17. Accordingly, both the appeals are hereby allowed and the impugned judgment and order of the CESTAT is set aside.

18. The matter is remanded to the CESTAT for fresh adjudication in accordance with law and on merits. All contentions of the parties are left open for evaluation by CESTAT.

19. The parties to appear before the CESTAT on 23.09.2019 and file an authenticated copy of this order.

20. We request the CESTAT to dispose of the two appeals as

expeditiously as possible and in any case within a period of six months from the date, the parties file authenticated copy of this judgment and order.

21. In the peculiar facts and circumstances of the present case, we leave the parties to bear their own costs.

NUTAN D. SARDESSAI, J. **M. S. SONAK, J.**

MF/-