

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

WRIT PETITION NO. 7878 OF 2019

ISMT Limited

.. Petitioner

v/s.

Union of India & Ors.

.. Respondents

Mr. Jitendra Motwani a/w Mr. Chirag Shetty I/b Economic Laws
Practice for the petitioner

Mr. Pradeep S. Jetly a/w Mr. J.B. Mishra for the respondents

**CORAM : M.S. SANKLECHA &
NTIN JAMDAR, J.J.**

DATED : 22nd AUGUST, 2019

P.C.

1. At the request of the parties, the petition is being disposed of finally at the stage of admission.

2. This petition under Article 226 of the Constitution of India challenges the order dated 16th May, 2017 passed by the Customs, Excise and Service Tax Appellate Tribunal (Tribunal). The impugned order dated 16th May, 2017 dismissed the petitioner's appeal from the order in original dated 18th January, 2006 of the Commissioner of Central Excise under the Central Excise Act, 1944 (Act).

3. At the very outset, we noticed that the impugned order is dated 16th May, 2017 and the petition is filed in this Court only on 6th December, 2018. Thus, we were *prima facie* of the view that the petition deserves to be dismissed on the ground of delay alone. In response, the petitioner states there is no delay as the petitioner was prosecuting its challenge to the impugned order dated 16th May, 2017 ever since its receipt. This by filing an appeal under Section 35G of the Act before the Court. However, it was withdrawn on 9th October, 2018 with liberty to take such proceedings as available in law to challenge the impugned order dated 16th May, 2017. Consequent to the withdrawal of the appeal, this petition has been filed on 6th December, 2018. Our attention is drawn to the above averments in the petition. We find that the delay has been satisfactorily explained, thus we take up the petition for consideration on merits with the consent of both parties.

4. The grievance of the petitioner is that the impugned order dated 16th May, 2017 is a non-speaking order and, therefore, in breach of natural justice. It is urged that the impugned order has

given contradictory findings, as on one hand it holds that the petitioner disputes the due liability on merits while on the other it states that the petitioner is not contesting the duty liability.

5. Further, after holding the above, it proceeds to dispose of the appeal on the basis that the petitioner is not disputing its duty liability.

6. For ease of reference we produce the relevant paragraphs, which according to the parties are *ex facie* contradictory. :-

“1. While Revenue sought to add the amount of Rs.2.50 crores exhibited by Debit Note No.6 dated 31/4/2005 (page 28 of the appeal folder) and Debit Note No.56 dated 29/09/2003 (at page 31 of appeal folder) for an appeal of Rs.1,30,34,638/- relating to product development cost incurred by the appellant manufacturer to the assemble value of goods manufactured and cleared having nexus of the product development cost to the goods manufactured, appellant denies the same.

1.2 Appellants submit that duty has already been paid on these debit notes amounts without any dispute that duty is

not payable (page No.31) thereon. Therefore, there is no more necessity to determine the assessability and duty liability on these amounts for inclusion in the assessable value. In view such admitted position and the expenses of product development having been made by appellant which has direct nexus to manufacture, Revenue's contention that duty is leviable on the above amounts is correct and to this extent, we dismiss the appeal against the manufacturer appellant, M/s. ISMT Ltd. on this count."

7. Normally facts of what transpired in Court such as submissions made as recorded in the impugned order are accepted as final so far as we are concerned. In case, according to the party / parties the facts are not properly recorded in the impugned order, then challenge to it cannot be before us that the impugned order has incorrectly recorded the petitioner's submissions on facts. The remedy, if any, against the order of the Tribunal would be rectification application. However, in this case, we note that it is not a case of incorrect recording of submissions but recording of contradictory submissions and then dealing with appeal on the basis of only one submission. In fact, the Tribunal records the appellant's submission that the appellant denies its liability to duty on merits and immediately thereafter it records that as the duty has been paid, it does not

dispute it. Thus, the order itself is unclear as to what exactly is the finding of the Tribunal on this fact. It is only thereafter that the issues can be framed and determined.

8. Mr. Jetly, learned Counsel appearing for the Revenue contests the submission of the petitioner and submits that on the reading of the entire order, it must follow that the Tribunal has come to a finding on merits that the petitioner is liable to pay duty on merits.

9. We do not find any discussion in the impugned order on merits as to why the development cost incurred by the petitioner has nexus with the final product. In fact, the impugned order seems to proceed on the basis that as the petitioner has paid the duty without any dispute, it follows that duty liability is admitted. This is contrary to the view of this very bench of the Tribunal in its order dated 17th April, 2017 in respect of the same petitioner wherein it had categorically held that “Mere payment of duty by litigant does not prevent it from contesting the said duty paid against arise of liability. There should not be a misconception that when the duty liability was discharged, liability was admitted by the assessee.” Thus, it could not have taken a contrary view on a principle without explaining the

context which would justify a different view in the present facts.

10. In the above view, we set aside the impugned order dated 16th May, 2017 to the extent it relates to the petitioner and restore it to the Tribunal for fresh disposal in accordance with law.

11. Petition allowed in above terms.

(NITIN JAMDAR, J.)

(M.S. SANKLECHA, J.)