

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

CENTRAL EXCISE APPEAL NO. 142 OF 2005

The Commissioner of Central Excise, Thane-II .. Appellant.
v/s.
M/s. Milton Polyplas (I) Pvt. Ltd.,
& Others .. Respondents.

Ms. P. C. Cardozo, for the Appellant.
Mr. V. Sridharan, Sr. Advocate with Mr. Jas Sanghvi and Ms. Divyasha
Mathur i/b. PDS Legal, for the Respondent.

CORAM: A.S.OKA &
M.S.SANKLECHA, JJ.

RESERVED ON : 22nd MARCH, 2019.
PRONOUNCED ON : 1st APRIL, 2019.

JUDGMENT (Per M.S. Sanklecha,J.):

This Appeal under Section 35G of the Central Excise Act, 1944 (the Act), challenges the order dated 27th May, 2005 passed by the Customs, Excise and Service Tax Appellate Tribunal (the CESTAT).

2 On 2nd August, 2006, this appeal was admitted on the following substantial questions of law:-

“(a) Whether the demand issued under erstwhile Rule 57(l)(ii) is legally valid after those Rules were substituted with new CENVAT Rules 2002 and whether the proceedings could continue under Section 38A of Central Excise Act, 1944 in view of Sections 131 and 132 of the Finance Act, 2001 which have introduced saving and validating provisions?

(b) Whether on the facts and in the circumstances of the case the observation of the CESTAT that the principles of natural

justice were violated on the grounds mentioned in para 5(e) (CESTAT order page 13) when it is on records that the Respondents herein themselves were responsible for not availing the opportunity offered from time to time of inspection of all documents and following decisions in the case of M/s. Sunrise Structural & Engg. Ltd. as reported in A/771 to 722/WZB/04-CII when the said decision is also under challenge and Appeal against it is pending in Nagpur Bench of Bombay High Court?

(c) Whether the CESTAT was right in law in setting aside recovery of irregular modvat credit amounting to Rs.1,67,39,432/- under Rule 571 having been fraudulently availed in respect of inputs during the period 31.03.1995 to 06.09.1999 and setting aside equal penalty of Rs.1,67,39,432/- imposed under Rule 571(4) read with Rule 173Q, and recovery of interest at the appropriate rate on the amount of modvat credit determined to be disallowable and recoverable with effect from 23.07.1996 under Rule 571(5)?

(d) Whether in the facts and circumstances of the case the CESTAT was correct in law in rejecting all the evidences collected or/and statements recorded in an enquiry conducted under Section 14 of the Central Excise Act, 1944 which is deemed to be 'Judicial Proceedings' under sub Section (3) of Section 14 *ibid*, within the meaning of Section 193 and Section 228 of the Indian Penal Code, 1860?

(e) Whether the CESTAT was justified in allowing the Appeals of the Respondents ignoring the ratio of law laid down in the Apex Court's decision in the case of Collector of Customs, Madras & Ors. v/s. D. Bhoormull 1983 (13) ELT, 1546 (SC) in which it was held that 'department is not required to prove its case with mathematical precision to a demonstrable degree, for in all human efforts absolute certainty is a myth'?

(f) Whether the CESTAT was right in law in setting aside penalty of 85,00,000/- imposed on Shri C.I. Vaghani, Director of M/s. Milton Polyplas (I) Pvt. Ltd. and Managing Director of M/s. Milton Plastics Ltd. and Rs.45,00,000/- on Shri Satish Kulkarni, Chief of Operation of Milton Polyplas (I) Pvt. Ltd., under Rule 209A of Central Excise Rules 1944?"

3 The brief facts leading this appeal are as under:-

- (i) The Respondent No.1 is engaged in manufacturing insulated wares of plastics such as insulated casseroles and tiffin (said goods) on job work basis for M/s. Milton Plastics Ltd., The said good fall under Chapter 39 of the First Schedule to the Central Excise Tariff Act, 1985 (the Tariff Act).
- (ii) In the process of executing job work for M/s. Milton Plastics Ltd., the Respondent No.1 receive inputs under the cover of appropriate duty paying documents from M/s. Milton Plastics Ltd., The Respondent No.1 avail MODVAT credit on the basis of the duty paying documents received along with inputs. This on satisfying all the conditions for taking MODVAT Credit as provided in the Central Excise Rules 1944 (Rules)
- (iii) However, consequent to an investigation, a show cause notice dated 17th January, 2000 was issued to the Respondent. The above notice demanded from Respondent No.1 Rs.1.66 Crores under Rule 57-I of the said Rules being the credit irregularly availed on the inputs during the period 31st March, 1995 to 6th September, 1999. The basis of the above demand notice was that the Respondent No.1 had received during period 1995-96 to 1999-2000 inputs of high quality steel (of 8% nickel) bearing more duty and thus availed the higher MODVAT Credit but only consumed some part of it in the manufacture of its said goods. The shortfall of the higher quality steel was substituted by use of inferior quality steel. This resulted in the Respondents availing excess MODVAT Credit to the extent of Rs.1.67 Crores. Besides, seeking to impose penalties upon the Respondent No.1 and also upon its Director (Respondent No.3) and the Chief Officer (Respondent No.2).

- (iv) The Respondents contested the show cause notice and sought cross examination of the various persons on whose statement department was placing reliance as well as inspection of various documents relied upon by the Revenue. The Respondents in particular submitted that the show cause notice is not sustainable in view of the MODVAT Rules being Rules 57A to 57U of the said Rules being substituted with CENVAT Rules being 57AA to 57AK of the said Rules with effect from 1st April, 2000. There being no saving clause and General Clauses Act being inapplicable to Rules, thus, the show cause notice aborts.
- (v) However, the Commissioner of Central Excise by his order dated 10th May, 2004 did not accept the Respondent's submission in view of insertion of Section 38A of the Act in 2001 w.e.f. 1944. Further, he held the persons whose cross examination was sought need not be granted as they had made the statements under Section 14 of the Act. Besides, the documents as sought for were not required to be furnished. Therefore, he confirmed the show cause notice and imposed penalties upon the Respondent No.1 its Chief Operating Officer and Director i.e. Respondent Nos.2 and 3.
- (vi) Being aggrieved with the order dated 10th May, 2004, the Respondents filed an appeal to the CESTAT. By the impugned order dated 27th May, 2005, the CESTAT allowed the appeal of the Respondents. This by, *inter alia*, holding that the provisions of Rule 57I of the said Rules under which the notice was issued, ceased to have the effect consequent to its omission w.e.f. 1st April, 2000. In the above view, the impugned order of the CESTAT after upholding the grievance of Respondents that the order of the Commissioner of

Central Excise was in breach of natural justice,, did not deem it necessary to restore the notice to the Commissioner for fresh adjudication. This as it found the notice could not be sustained on jurisdictional issue. However, independent of the above, the penalties imposed upon the Chief Operating Officer and Director or of the Respondent No.1 i.e. Respondent Nos. 2 and 3 were also deleted.

4 On the aforesaid facts, this appeal has been filed by the Revenue. We shall now deal with the above admitted substantial questions of law in serial:-

5 **Re. Question (a):-**

- (i) The subject show cause notice was issued on 17th January, 2000. It demanded an amount of Rs.1.67 Crores being the MODVAT Credit fraudulently availed of during period 1995 to 1999. The above notice-cum-demand was made under Rule 57I (part of MODVAT Rules) of the said Rules. However, as the MODVAT Rules were omitted and/or substituted by CENVAT Rules w.e.f. 1st April, 2000, the Respondents contended the notice issued under erstwhile MODVAT Rules abates. In support, reliance was place upon the decision of the Supreme Court in the case of *Kolhapur Canesugar Mills Pvt. Ltd., v/s. Union of India 119 ELT 257* and *M/s. Rayala Corporation (P) Ltd., v/s. Director of Enforcement [1969] 2 SCC 412*.
- (ii) However, the Commissioner of Central Excise by order dated 10th May, 2004 negated the aforesaid contention. It held that in view of Section 38A of the Act, which was introduced in 2001 with retrospective effect from 28th February, 1944 would save the

notice issued under the MODVAT Rules. This was also so as held by the Larger Bench of the Tribunal in the case of ***Kisan Sahakari Chini Mills Ltd. v/s. Commissioner of Central Excise 131 ELT 370***. Thus, confirming the notice of demand dated 17th January, 2000.

- (ii) On appeal, the CESTAT allowed Respondents' appeal on this issue by holding that the notice issued under the erstwhile MODVAT Rules will not be saved, as '*substitution*' will not be covered by the words '*amended, repealed, superseded or rescinded*' as provided under Section 38-A of the Act. For this purpose, it placed reliance upon its earlier decision in the case of ***Sunrise Structural & Engineering Pvt. Ltd., v/s. Commissioner of Central Excise [2004] 177 ECR 307***.
- (iii) We have perused the decision of the Co-ordinate Bench of the CESTAT in the case of Sunrise Structural and Engineer Ltd. (supra). We find that the aforesaid decision of the CESTAT is based upon the Apex Court's decision in the case of Kolhapur Cansugar Mills Pvt. Ltd., (supra) and M/s. Rayala Corporation (P) Ltd., (supra) wherein after holding that the provisions of Section 6 of the General Clauses Act, will not apply to Rules, went on to hold that section 6 of the General Clause Act, 1897 would only apply to repeal and not to omission of any Central Act or Regulation. This to conclude that Section 38-A of the Act though introduced with retrospective effect, will not save the show cause notice dated 17th January, 2000 issued under Rule 57I of the MODVAT Rules from abating consequent to its substitution w.e.f. 1st April, 2000 with CENVAT Rules.

- (iv) Mr. Sridharan, learned Senior Counsel for the Assessee very fairly concedes that this issue, is no longer res integra. In fact, it stands concluded in favour of the Appellant-Revenue and against Respondent-Assessee by the decision of the Supreme Court in ***Fibre Boards Pvt. Ltd., v/s. CIT 10 SCC 333*** and ***Shree Bhagawati Steel Rolling Mills v/s. CCE 326 ELT 209***. In both the aforesaid decisions, the Apex Court held that omission/ substitution would fall within the ken of a repeal of a provision. It further held that the earlier decision of the Apex Court in this aspect by M/s. Rayala Corporation (P) Ltd. (supra) and Kolhapur Canesugar Mills Pvt. Ltd., (supra) were in the nature of obiter dicta and therefore, not binding. In particular, it was noted in *Fibre Boards Pvt.Ltd., (supra)*, that the earlier decisions in case of M/s. Rayala Corporation (P) Ltd., and Kolhapur Canesugar Mills Pvt. Ltd., (supra) had not made reference to Section 6A of the General Clauses Act, 1897 and the earlier decision of the Constitution Bench in case of ***State of Orissa v/s. M. A. Tulloch & Co., 1964 (SC) 1284***. It thus held that omission would be included in the meaning of repeal. In the light of the above, Section 38A of the Act (inserted in 2001 with retrospective effect from 1944) will make the notice dated 17th January, 2000 valid even post 1st April, 2000. This is in view of Section 38A (c) of the Act which states that any amendment, repeal, supersession or rescinding shall not affect any right, privilege, obligation or liability acquired, accrued or incurred under any rule so amended, repealed, superseded or rescinded. This is further qualified by providing that any investigation, legal proceedings may be continued, as if the Rule had not been

amended, rescinded, repealed or superseded. In fact, the above provision is an amalgamation of Section 6 & 6A of the General Clauses Act, 1897 which applies to Acts, while Section 38A of the Act is specifically in relation to Rules under the Act. Thus, the view of the CESTAT cannot be upheld.

- (v) In the above view, this substantial question of law is answered in the affirmative i.e. in favour of the Appellant-Revenue and against the Respondent-Assessee.

6 Re. Question (b):-

- (i) We note that the impugned order of the CESTAT has reached a finding of fact that the order dated 10th May, 2004 of the Commissioner of Central Excise has been passed in breach of principle of natural justice. This in view of the fact that cross examination of persons whose statements were relied upon by the Revenue were not given to the Respondent. Further, non-supply of documents relied upon by the Revenue would vitiate the order passed by the Commissioner of Central Excise. Thus, the CESTAT holds that the above facts would warrant a remand for re-adjudication. However, same was not done by CESTAT as it would be academic in view of the fact that the proceedings commenced by show cause notice dated 17th January, 2000 could not be continued, post the omission of Rule 57I of the said Rules w.e.f. 31st March, 2000.
- (ii) Ms. Cardozo, learned Counsel in support of the Appeal submits that the statement being relied upon were given under Section 14 of the Act. Therefore, such statements would not be required to go through the rigours of cross examination, before being accepted.

- (iii) This submission cannot be accepted as the entire basis of the Revenue's case against the Respondents is circumstantial to conclude that superior grade steel was diverted elsewhere after taking MODVAT Credit thereon and substituted with a lower grade steel to manufacture said goods. The correctness of these statements made by the person can only be tested, if the same is processed through cross examination of the party affected by it. In the absence of cross examination, the order suffers from breach of natural justice. So also, non-supply of documents relied upon by the Revenue would make the order bad, being in breach of natural justice. Therefore, the finding of the CESTAT that there has been a breach of principles of natural justice in the order passed by the Commissioner of Central Excise is upheld.
- (iv) Therefore, the impugned order of the CESTAT is set aside and the notice is restored to the file of the Commissioner of Central Excise for fresh disposal after following the principles of natural justice.
- (v) In the above view, the question (b) is answered in the affirmative i.e. in favour of the Respondent-Assessee and against the Appellant-Revenue.

7 **Re. Questions (c), (d) and (e):-**

- (a) In view of our answer to question (b), no occasion to answer these questions presently arises. The show cause notice dated 17th January, 2000 has been restored to the Commissioner for fresh disposal after following the principle of natural justice. Thus, these questions need not be presently answered as it would be academic.
- (b) Thus, these questions are not being arrived as it is evident.

8 **Re. Question (f):-**

- (i) The impugned order of the CESTAT deleted the penalty imposed under Rule 209-A of the said Rules upon the Director (Respondent No.3) and the Chief Operations Officer (Respondent No.2) of the Respondent No.1. The penalty was imposed upon both of them for aiding and abetting the availment of incorrect MODVAT Credit taken by the Respondent No.1.
- (ii) Respondent Nos.2 and 3 support the impugned order on the basis of the decision of this Court in Commissioner of **Central Excise v/s. M/s. Bansal Steel Corporation & Others (CEXA No.108 of 2007)** decided on 12th September, 2017 and **Commissioner of Central Excise v/s. M/s. Ramesh Kumar Rajendra Kumar & Co., (CEXA No.18 of 2006)** rendered on 14th September, 2010.
- (iii) We are not examining this issue as the entire show cause notice has now been restored to the Commissioner of Central Excise for fresh disposal after following the principles of natural justice. Needless to state that at the time of adjudication, the Commissioner of Central Excise would consider the Respondents' contention that the aforesaid two decisions in M/s. Bansal Steel Corporation (supra) and M/s. Ramesh Kumar Rajendra Kumar & Co., (supra) apply to the present fact and if so, grant the necessary benefit.
- (iv) Thus, effectively this issue is also remanded for reconsideration. It is made clear that our restoring this issue to the Commissioner of Central Excise for fresh adjudication should not be construed as our accepting the Revenue's case. This remand has only arisen on account of our answer to question (b) above.

9 Therefore, the substantial questions of law are answered as under:-

- (A) Question (a)- in the affirmative i.e. in favour of the Revenue and against the Respondent;
- (B) Question (b)- in the affirmative i.e. in favour of the Respondent and against the Revenue;
- (C) Questions (c)(d) and (e) are not answered in view of being academic; and
- (D) Question (f)- is not specifically answered at this stage, as in view of our answer to question (b) the entire impugned order is set aside and the notice is restored to the Commissioner for final adjudication. This question would be a subject of fresh adjudication by the Commissioner of Central Excise, where the decisions being relied upon by the parties in support of their contentions would be considered on the facts found during adjudication.

10 The impugned order of the CESTAT is set aside. The show cause notice dated 17th January, 2000 is restored to the Commissioner of Central Excise for fresh disposal in accordance with law after following the principle of natural justice.

11 Accordingly, **Appeal disposed of** in the above terms.

(M.S.SANKLECHA,J.)

(A.S.OKA,J.)