

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED :06.06.2019

CORAM

THE HON'BLE MR.JUSTICE M.SUNDAR

W.P.No.2139 of 2018
and
W.M.P.No.2664 of 2018

M/s.Herrenknecht(I) Private Limited,
Allinjivakkam Village, Ponneri Taluk,
Tiruvallur District, Chennai - 600 067
By its Director N.Venkatasubramanian

..Petitioner

vs

1. The Deputy Commissioner of Central Excise,
E Division, Chennai, I Commissionerate
Anna Nagar, Chennai - 600 040
2. The Commissioner(Appeals-II)
Office of the Commissioner of Central tax(Appeals-II)
CGST & Central Excise, Newry Towers,
2nd Floor, Plot No.2054, I Block, II Avenue
Anna Nagar, Chennai - 600 040.

..Respondents

Prayer: Writ Petition filed under Article 226 of the Constitution of India praying to issue a Writ of Certiorari, to call for the records pertaining to the Order in Appeal No.314/2017(CTA-II) dated 31.10.2017 passed by the 2nd respondent herein and to quash the same in so far, as the said order had been passed in total violation to the principles of natural justice, without jurisdiction and in excess of the authority conferred on the said respondent.

For Petitioner : Mr.N.Viswanathan
For Respondents : Mr.A.P.Srinivas
Senior Panel counsel

O R D E R

Mr.N.Viswanathan, learned counsel on record for the sole writ petitioner and Mr.A.P.Srinivas, learned Senior Panel counsel on behalf of both the respondents are before this Court. To be noted, there are two respondents in the instant writ

petition and both respondents are official respondents.

2. From the earlier proceedings made by predecessor Hon'ble Judges, which form part of the case file placed before me, it comes to light that instant writ petition has not been admitted, and Revenue counsel has accepted notice on behalf of respondents at the admission stage. As of today, Revenue counsel has also filed a counter affidavit dated 29.10.2018. Therefore, pleadings are complete.

3. With consent of both the aforesaid counsel before this Court today, main writ petition itself is taken up, heard out and disposed of.

4. The scope of the instant writ petition is limited and the entire matter turns on a very narrow compass.

5. Subject matter is 'Tunnel Boring Machines' ['TBM' for the sake of brevity] used in Metro Rail. The activity in question is after a TBM has completed its function which it was designed for, it is bought back for salvage value and not functional capability. In other words, the process of salvaging parts from a used TBM, remanufacturing scrapped parts and components for reassembling the same into a different and unique machine designed for a project specific function amounts to manufacture. Whether this amounts to manufacturing activity within the meaning of Section 2(f) of 'Central Excise Act, 1944' ['CE Act' for the sake of brevity] is the central theme that constitutes the crux and gravamen of the instant writ petition.

6. In this regard, Deputy Commissioner of Central Excise Department, issued a 'Show Cause Notice' No.11/2016 ['SCN' for the sake of brevity] dated 07.09.2016 bearing reference 'C.No.IV/10/90/2016-Rebate' to the writ petitioner. In this SCN, the Central Excise Deputy Commissioner, proceeded on the basis that the aforesaid activity of the writ petitioner is not a manufacturing activity and therefore, notwithstanding excise duty having been paid on the same, the writ petitioner is ineligible for Cenvat credit. Be that as it may, writ petitioner sent a reply to the aforesaid SCN. This reply is dated 10.04.2016. In the reply, the writ petitioner inter alia took the stand that the aforesaid activity, will certainly qualify as a manufacturing activity within the meaning of Section 2(f) of CE ACT.

7. Pursuant to the aforesaid SCN and reply to the same, matter was adjudicated upon and the Deputy Commissioner of Central Excise being the original authority, passed an order dated 10.10.2016 being ORDER-IN-ORIGINAL No:177/2016(R).

8. Vide this order, the original authority rejected the rebate claimed by the writ petitioner. Suffice to state that the original authority passed the order on the basis that the aforesaid activity of the writ petitioner is not a manufacturing activity within the meaning of Section 2(f) of CE Act.

9. Writ petitioner carried this in appeal to the statutory Appellate Authority namely, Commissioner Appeals-II, Chennai, who is respondent No.2 in the instant writ petition before this Court. In the interregnum, on 11.05.2017, in proceedings bearing ORDER-IN-ORIGINAL No.52/2017, the original authority, in identical facts and circumstances held that the aforesaid activity amounts to manufacture within the meaning of Section 2 (f) of CE Act and dropped the proceedings pursuant to the SCN therein. Most relevant part of that order is contained in paragraphs 4.11 and 5 and the same read as follows:

'4.11 In conclusion I find that:

- Every TBM is uniquely designed for a project-specific function.
- Once a TBM has completed the function it had been designed for, it is bought back for salvage value and not functional capability.
- The fact that the imported machine is classified as a TBM does not support the inference that the machine is a fully or even partly functional TBM.
- The situation is not revenue neutral but in fact results in realisation of additional duty to the exchequer.
- The process of salvaging parts from the used machine, remanufacturing scrapped parts and components and reassembly to a different and unique machine designed for a project-specific function amounts to manufacture in terms of Section 2(f) of the Central Excise Act, 1944.

5. In view of the foregoing findings I hereby pass the following.

ORDER

I hereby drop further proceedings initiated in Show Cause Notice No.02/2016 dated 02-02-2016 issued by the Principal Commissioner of Central Excise, Chennai I Commissionerate.'

10. Aforesaid order dated 11.05.2017, was accepted by a committee of Chief Commissioners. Proceedings of the committee of Chief Commissioners has been placed before this Court and the most relevant portion of the same reads as follows:

'The Adjudicating Authority had held that each of the Tunnel Boring Machine (TBM) used in Metro Rail is a unique one and that the imported machine was sought for salvage value and not the technical capability. Thus

had dropped the demand for denial of cenvat credit availed on the duty paid at the time of import and the duty paid on certain other parts/services for refurbishing the TBM for a given function.

Further, this being a periodical notice, the earlier notice was studied, wherein, also the demand was dropped on "revenue neutrality" and without going into the fact of whether a new manufactured product emerged, that O-I-O is under departmental appeal on the ground that the case law quoted for revenue neutrality is under appeal; whereas in this case, the adjudicating authority, on facts, had given a categorical finding that the process amounts to manufacture, as which no ground for appeal appear to be available. Hence, acceptance of this O-I-O will not, it appears, jeopardise the earlier departmental appeal, since "manufacture" as a concept has to be determined in respected of each of the machine.

Thus, the committee of Chief Commissioners may consider accepting this O-I-O 52/2017 dated 11.05.2017, being legal and proper, without prejudice to the earlier appeal of the department in the similar issue which is on appeal on the ground of "revenue neutrality".

11. Reverting to the appeal preferred by the writ petitioner, in the aforesaid order dated 11.05.2017, it was held that the aforesaid activity of the writ petitioner amounts to manufacturing activity within the meaning of Section 2(f) of CE Act and the acceptance of the same by the committee of Chief Commissioners was brought to the notice of the 2nd respondent, who is the Appellate Authority.

12. Notwithstanding the same being brought to the notice of the Appellate Authority, the 2nd respondent Appellate Authority has passed an order dated 31.10.2017 being ORDER-IN-APPEAL No.314/2017(CTA-II), completely ignoring and sidestepping the aforesaid position. In other words, the aforesaid order dated 11.05.2017 and acceptance of the same by the committee of Chief Commissioners has not been adverted to or addressed, though it was placed before the Appellate Authority.

13. It is on the aforesaid basis / in the aforesaid backdrop that instant writ petition has been filed by the writ petitioner.

14. At the time of admission, learned Revenue counsel took a preliminary objection with regard to maintainability of the

writ petition, citing alternate remedy inter alia by pointing out that a further appeal is available to the writ petitioner against the impugned order. It was pointed out that the further appeal is available under Section 86 of the Finance Act to 'Customs, Excise and Service Tax Appellate Tribunal' ['CESTAT' for the sake of brevity].

15. Hon'ble predecessor Judge, who heard the matter at the time of admission, vide order dated 01.02.2018, negated this preliminary objection regarding maintainability of the writ petition on the ground of alternate remedy. As this is articulated in the proceedings dated 01.02.2018, this Court deems it appropriate to extract the entire order / proceedings made by Hon'ble predecessor Judge dated 01.02.2018, which reads as follows:

'Heard the learned counsel for the petitioner and Mr.A.P.Srinivas, learned Senior Standing Counsel accepting notice for the respondents.

2. The learned Senior Standing Counsel has raised a preliminary objection regarding maintainability of the writ petition stating that the petitioner has an effective alternate remedy of appeal before the Customs, Excise and Service Tax Appellate Tribunal.

3. However, prima facie, this Court is of the view that the writ petition can be entertained on account of the following contentions raised by the petitioner :

The issue is as to whether the activity undertaken by the petitioner amounts to manufacture in terms of Section 2(f) of the Central Excise Act, 1944. This issue was considered in the assessee's own case by the Commissioner of Central Excise, Chennai I Commissionerate in Order-in-Original No.52/2017 dated 11.5.2017. This order has been accepted by the Committee of Commissioners, which includes the Chief Commissioner of Central Excise. The assessee would state that during the course of hearing, their counsel appeared before the Commissioner (Appeals) and brought to his notice about the Order-in-Original dated 11.5.2017 wherein it was concluded that the activity done by the petitioner amounts to manufacture in terms of Section 2(f) of the said Act and further proceedings pursuant to the show cause notice dated 02.2.2016 were dropped.

4. The grievance of the petitioner is that in spite of specifically bringing to the notice of the Commissioner (Appeals) about the order dated 11.5.2017 and the fact that the same has been accepted by the Committee of Commissioners headed by the Chief Commissioner, the Commissioner (Appeals) did not even refer to the order dated 11.5.2017 and passed the

impugned Order-in-Appeal.

5. In the light of the above, this Court is, prima facie, satisfied that the writ petition can be entertained. Accordingly, there will be an order of interim stay. The learned Senior Standing Counsel for the Revenue is directed to get instructions. List on 15.2.2018.'

16. A perusal of the aforesaid proceedings reveals that the preliminary objection of the Revenue counsel regarding maintainability of the writ petition on the ground of alternate remedy has been negatived by this Court. It is not in dispute that preliminary objection being negatived, has not been assailed in any manner and the same has been given legal quietus.

17. Preliminary objection of alternate remedy and maintainability of the writ petition is now not available to the respondents is the common stated position of both sides.

18. In this backdrop, further perusal of the earlier proceedings would reveal that the matter was adjourned from time to time for the Revenue counsel to get instructions as to whether the aforesaid order dated 11.05.2017 and acceptance of the same by the committee of Chief Commissioners was placed before the Commissioner appeals(2nd respondent) at the time of hearing which culminated in the impugned order.

19. Learned Revenue counsel, on instructions, after perusal of the records, fairly submitted that the aforesaid proceedings have in fact been placed and pressed into service by the Appellant [i.e., writ petitioner herein] before the 2nd respondent, but the same has not been adverted to in the impugned order. Therefore, it follows as a natural and indisputable sequitur that the 2nd respondent has passed the impugned order, dated 31.10.2017, without adverting to the aforesaid proceedings, wherein it has been held that the aforementioned activity of the writ petitioner is in fact a manufacturing activity within the meaning of Section 2(f) of CE Act.

20. In the light of the aforesaid trajectory which the hearing has taken today, the scope of the writ petition has become extremely narrow.

21. All that remains is, the Commissioner (Appeals-II) (2nd respondent) has to necessarily be directed to have a relook of the entire matter in the light of the aforesaid order-in-original dated 11.05.2017, holding that the aforementioned activity of the writ petitioner qualifies as a manufacturing activity within the meaning of 2(f) of CE Act and acceptance of

the same by the committee of Chief Commissioners.

22. This takes us to what should follow in the instant writ petition.

23. In the light of the narrative supra, the impugned order in the instant writ petition being order dated 31.10.2017 in Appeal No.314/2017(CTA-II) made by the 2nd respondent is set aside and a direction is given to the 2nd respondent to hear the appeal afresh in accordance with law, after giving opportunity of personal hearing to the writ petitioner and pass orders afresh, adverting to the aforesaid order-in-original dated 11.05.2017 made in proceedings bearing 52/2017 as also the acceptance of same by the committee of Chief Commissioners.

24. The aforesaid exercise of hearing the appeal afresh and disposal of the same shall be completed by the 2nd respondent within a period of three months from the date of receipt of a copy of this order.

25. Writ petition is disposed of on the above terms. No costs. Consequently, connected miscellaneous petition is closed.

Sd/-

Assistant Registrar

//True Copy//

Sub Assistant Registrar

kak

To

1. The Deputy Commissioner of Central Excise,
E Division, Chennai, I Commissionerate
Anna Nagar, Chennai - 600 040

2. The Commissioner(Appeals-II)
Office of the Commissioner of Central tax(Appeals-II)
CGST & Central Excise, Newry Towers,
2nd Floor, Plot No.2054, I Block, II Avenue
Anna Nagar, Chennai - 600 040.

+lcc to Mr.A.P.Srinivasan, Senior Standing counsel customs,
central excise & service tax, High Court, Madras. SR. No. 45502
+lcc to Mr.N.Viswanathan, Advocate, SR. No. 45515

W.P.No.2139 of 2018

PPA(CO)

RMP(04/07/2019)