IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 03-06-2019

CORAM

THE HON'BLE MR.JUSTICE M.SUNDAR

W.P.No.13836 of 2019

M/s.Dellner India Private Limited,
Represented by its Manager-Finance
Mr.Sanjay Sahoo, Aged 39 years,
Survey No.59/1, Padur Road,
Mevalurkuppam,
Sriperumbudur Taluk,
Kanchipuram District-602 105. ... Petitioner

..Vs..

1.The Assistant Commissioner of GST and
Central Excise,
Irungattukottai Division,
Chennai Outer Commissionerate,
C-48, TNHB Building,
II Avenue,
Anna Nagar,
Chennai-40.

2.The Commissioner of Central Tax (Appeals-II),
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 Certiorarified Mandamus, calling for the records of the second respondent namely the Commissioner of Central Tax (Appeals-II), Chennai culminating in the order-in-Appeal No.582 & 583/2018 (CTA-II) dated 17.12.2018 passed from File Nos.A.No.476 & 477/2018 (CTA-II/CO) dated 1.11.2018 and quashing the same direct the first respondent herein to grant the refund of Rs.54,28,351/- claimed by the petitioner herein.

For Petitioner: Mr.S.Murugappan

For Respondents : Ms.Hemalatha,
Standing Counsel.

O R D E R

Mr.S.Murugappan, learned counsel on record for the sole writ petitioner is before this Court. Ms.Hemalatha, learned Standing Counsel, accepts notice on behalf of both respondents, who are official respondents.

2. Though this writ petition is listed in the motion list under the caption 'For Admission', by consent of learned counsel appearing on both sides, the main writ petition itself is taken up, heard out and is being disposed of.

3. Considering the narrow compass on which the entire writ petition turns, it will suffice to give short facts without going into details and attendant particulars.

4. The writ petitioner is holding Central Excise Registration and is engaged in the manufacture of Railway products-Gangway falling under Chapter Heading 86 of Central Excise Tariff Act, 1985. Writ petitioner filed two refund claims and both refund claims are under Rule 5 of 'Cenvat Credit Rules, 2004' ('CCR Rules' for the sake of brevity). These two refunds were sought for by the writ petitioner under Rule 5 of CCR Rules read with relevant Notifications made under Section 11-B of 'The Central Excise Act, 1944' ('CE Act' for the sake of brevity).

5. Details of refund claims made by the writ petitioner as can be culled out from the case file placed before me, are as follows:

Sl.No.	Appeal No. & Dated	Order & Original and Dated	Period Involved	Refund Claimed	Refund Rejected
(1)	(2)	(3)	(4)	(5)	(6)
1.	476/2018 dt.1/11/2018	81/2018 dated 23.7.2018	January to March 2017	13,78,743/-	13,78,743/-
2.	477/2018 dt.1/11/2018	82/2018 dated 23/7/2018	April to June 2017	40,49,608/-	40,49,608/-

6. Post filing of refund claims, it came to light that the writ petitioner had filed aforesaid refund claims without debiting the refund amounts as provided in the relevant Notification made under Section 11-B of the CE Act. However, in the light of the nature of the order, which this Court is now passing, all questions pertaining to making refund claims in such a manner are left open.

7. Be that as it may, writ petitioner had carried forward the entire Cenvat credit available with them as on 30.6.2017 consequent to implementation of 'Goods and Services Tax' regime ('GST' for the sake of brevity) on and from 01.07.2017, in their Electronic Credit Ledger by filing what is referred to as TRAN-1.

8. Aforesaid refund claims made by the writ petitioner were negatived and the writ petitioner carried the same in appeal. The appeal was heard out by the jurisdictional Statutory Appellate Authority, i.e., Commissioner (Appeals-II).

9. The Appellate Authority, after hearing both sides, rejected the appeals vide order dated 17.12.2018 and this order was made in Appeal Nos.582 & 583/2018 (CTA-II) (hereinafter 'impugned order' for brevity).

10. Aggrieved by the impugned order made by the Appellate Authority, the instant writ petition has been filed assailing the impugned order.

11. The sheet anchor submission of learned counsel for writ petitioner is that there is no Notification governing the transition period i.e., period leading to GST regime and the Appellate Authority has completely lost sight of the final order.

12. Be that as it may, there is no dispute or disagreement before me that a Statutory Appeal remedy is available against the impugned order. This Statutory Appeal is under Section 35-B of the CE Act and the same, as it stands in the Statute Book today, reads as follows:

> '35B. Appeals to the Appellate Tribunal.—
>
> (1) Any person aggrieved by any of the following orders may appeal to the Appellate Tribunal against such order—
>
> (a) a decision or order passed by the [Principal Commissioner of Central Excise or Commissioner of Central Excise] as an adjudicating authority;
>
> (b) an order passed by the [Commissioner (Appeals)] under section 35A;

(c) an order passed by the Central Board of Excise and Customs constituted under the Central Boards of Revenue Act, 1963 (54 of 1963) (hereinafter in this Chapter referred to as the Board) or the Appellate [Principal Commissioner of Central Excise] under section 35, as it stood immediately before the appointed day;

(d) an order passed by the Board or the [Principal Commissioner of Central Excise or Commissioner of Central Excise], either before or after the appointed day, under section 35A, as it stood immediately before that day:

PROVIDED that no appeal shall lie to the Appellate Tribunal and the Appellate Tribunal shall not have jurisdiction to decide any appeal in respect of any order referred to in clause (b) if such order relates to,—

(a) a case of loss of goods, where the loss occurs in transit from a factory to a warehouse or to another factory, or from one warehouse to another, or during the course of processing of the goods in a warehouse or in storage, whether in a factory or in a warehouse;

(b) a rebate of duty of excise on goods, exported to any country or territory outside India or on excisable materials used in the manufacture of goods which are exported to any country or territory outside India;

(c) goods exported outside India (except to Nepal or Bhutan) without payment of duty;

[(d) credit of any duty allowed to be utilised towards payment of excise duty on final products under the provisions of this Act or the rules made thereunder and such order is passed by the Commissioner (Appeals) on or after the date appointed under section 109 of the Finance (No.2) Act, 1998:]

PROVIDED FURTHER that the Appellate Tribunal may, in its discretion, refuse to admit an appeal in respect of an order referred to in clause (b) or clause (c) or clause (d) where—

(i) in any disputed case, other than a case where the determination of any question having a relation to the rate of duty of excise or to the value of goods for purposes of assessment is in issue or is one of the points in issue, the difference in duty involved or the duty involved; or

(ii) the amount of fine or penalty determined by such order, does not exceed [two lakh rupees].

[(1A) Every appeal against any order of the nature referred to in the first proviso to sub-section (1), which is pending immediately before the commencement of section 47 of the Finance Act, 1984, before the Appellate Tribunal and any matter arising out of, or connected with, such appeal and which is so pending shall stand transferred on such commencement to the Central Government, and the Central Government shall deal with such appeal or matter under section 35EE as if such appeal or matter were an application or a matter arising out of an application made to it under that section.]

[(1B) (i) The Central Board of Excise and Customs constituted under the Central Boards of Revenue Act, 1963 may, by order, constitute such Committees as may be necessary for the purposes of this Act.]

(ii) Every Committee constituted under clause (i) shall consist of two Chief Commissioners of Central Excise or two Commissioners of Central Excise, as the case may be.]

(2) [The Committee of Commissioners of Central Excise may, if it is] of opinion that an order passed by the Appellate [Commissioner of Central Excise] under section 35, as it stood immediately before the appointed day, or the [Commissioner (Appeals)] under section 35A, is not legal or proper, direct any Central Excise Officer authorised by him in this behalf (hereafter in this Chapter referred to as the authorised officer) to appeal [on its behalf] to the Appellate Tribunal against such order.

PROVIDED that where the Committee of Commissioners of Central Excise differs in its opinion regarding the appeal against the order of the Commissioner (Appeals), it shall state the point or points on which it differs and make a reference to the jurisdictional [[Principal Chief Commissioner of Central

Excise or Chief Commissioner of Central Excise] who shall, after considering the facts of the order, if is of the opinion that the order passed by the Commissioner (Appeals) is not legal or proper, direct any Central Excise Officer to appeal to the Appellate Tribunal against such order.

Explanation : For the purpose of this sub-section, "jurisdictional Chief Commissioner" means the [Principal Chief Commissioner of Central Excise or Chief Commissioner of Central Excise] having jurisdiction over the adjudicating authority in the matter.]

(3) Every appeal under this section shall be filed within three months from the date on which the order sought to be appealed against is communicated to the [Principal Commissioner of Central Excise or Commissioner of Central Excise], or, as the case may be, the other party preferring the appeal.

(4) On receipt of notice that an appeal has been preferred under this section, the party against whom the appeal has been preferred may, notwithstanding that he may not have appealed against such order or any part thereof, file, within forty-five days of the receipt of the notice, a memorandum of cross-objections verified in the prescribed manner against any part of the order appealed against and such memorandum shall be disposed of by the Appellate Tribunal as if it were an appeal presented within the time specified in sub-section (3).

(5) The Appellate Tribunal may admit an appeal or permit the filing of a memorandum of cross-objections after the expiry of the relevant period referred to in sub-section (3) or sub-section (4), if it is satisfied that there was sufficient cause for not presenting it within that period.

[(6) An appeal to the Appellate Tribunal shall be in the prescribed form and shall be verified in the prescribed manner and shall, irrespective of the date of demand of duty and interest or of levy of penalty in relation to which the appeal is made, be accompanied by a fee of,—

(a) where the amount of duty and

interest demanded and penalty levied by any Central Excise Officer in the case to which the appeal relates is five lakh rupees or less, one thousand rupees;

(b) where the amount of duty and interest demanded and penalty levied by any Central Excise Officer in the case to which the appeal relates is more than five lakh rupees but not exceeding fifty lakh rupees, five thousand rupees;

(c) where the amount of duty and interest demanded and penalty levied by any Central Excise Officer in the case to which the appeal relates is more than fifty lakh rupees, ten thousand rupees:

PROVIDED that no such fee shall be payable in the case of an appeal referred to in sub-section (2) or a memorandum of cross-objections referred to in sub-section (4).

(7) Every application made before the Appellate Tribunal,—

(a) in an appeal for grant of stay or for rectification of mistake or for any other purpose; or

(b) for restoration of an appeal or an application, shall be accompanied by a fee of five hundred rupees:

PROVIDED that no such fee shall be payable in the case of an application filed by or on behalf of the [Principal Commissioner of Central Excise or Commissioner of Central Excise] under this sub-section.]'

13. Reverting to the submissions on the aforesaid sheet anchor ground on which the writ petition is predicated, learned counsel for the writ petitioner submitted that the Tribunal, namely, 'Customs, Excise and Service Tax Appellate Tribunal' ('CESTAT' for the sake of brevity), to which the Statutory Appeal lies will not be able to go into the aspect of no Notification governing the aforesaid transition period.

14. A careful perusal of Section 35-B of CE Act, which has been extracted and reproduced supra, reveals that the powers of the Tribunal have not been circumscribed in any manner qua testing no notification plea and there is nothing before this Court to demonstrate that the Tribunal i.e., CESTAT cannot go into the aforesaid aspect of the matter. Therefore, it is clear that an alternate remedy qua impugned order is available for the writ petitioner.

15. With regard to the alternate remedy, it is no doubt, not an absolute Rule. In other words, alternate remedy is a rule of discretion and not a rule of compulsion. Though alternate remedy is a Rule of discretion, in a long line of authorities, the Hon'ble Supreme Court has repeatedly held that exercise of writ jurisdiction on the teeth of alternate remedy, will be when the matter falls under certain specified exceptions. With regard to the long line of authorities, in the considered opinion of this Court one of the important case laws is United Bank of India vs. Satyawati Tondon [(2010) 8 SCC 110].

16. In Satyawati Tondon case, Hon'ble Supreme Court inter alia held that this Rule of alternate remedy, has to be construed very strictly with regard to the tax, cess and other fiscal statute matters.

17. Be that as it may, in a recent judgment rendered by Hon'ble Supreme Court in Authorized Officer, State Bank of Travancore Vs. Mathew K.C. [(2018) 3 SCC 85], Hon'ble Supreme Court has also made an adumbration of exceptions and held that exceptions are as in Whirlpool Corporation case [Whirlpool Corporation vs. Registrar of Trade Marks, Mumbai reported in (1998) 8 SCC 1], Antarim Zila Parishad case [Baburam Prakash Chandra Maheshwari vs. Antarim Zila Parishad reported in AIR 1969 SC 556] and Harbanslal Sahnia case [Harbanslal Sahnia and another vs. Indian Oil Corporation Ltd. and others reported in (2003) 2 SCC 107].

18. What emerges from the aforesaid line of authorities, is that the writ jurisdiction in cases of this nature can be exercised when it falls under the exceptions, which have been adumbrated by Hon'ble Supreme Court. In the considered view of this Court, exceptions supra can broadly be set out as follows:

(a) Lack of jurisdiction on the part of the authority, who has passed the impugned order;

(b) Violation of principles of natural justice;

(c) Reopening of a matter, which has already been settled;

(d) Alternative remedy being ineffective or not efficacious.

19. To be noted, the abovesaid adumbration of exceptions made by this Court are not to be construed as exhaustive. In other words, it is only a broad list of heads of exceptions set out for the purpose of disposal of instant case on hand.

20. In the instant case, after hearing both the aforesaid learned counsel, this Court is unable to persuade itself to believe that the petitioner is able to demonstrate that it's case falls under any of the aforesaid exceptions. In other words, the facts and circumstances of this case, cannot be brought within the contours and four corners of the exceptions, adumbration of which have been made supra by this Court by following a catena of judgments of Hon'ble Supreme Court in this regard.

21. Therefore, this Court is of the considered view that owing to the factual matrix this is an appropriate case to leave it open to the writ petitioner to avail the alternate remedy by filing a Statutory Appeal to CESTAT under Section 35-B of the CE Act.

22. In this regard, it is pointed out that there is a delay with regard to the filing of the Statutory Appeal to CESTAT. If the writ petitioner chooses to avail the alternate remedy, it is open to the writ petitioner to take out an application for condonation of delay in filing appeal and if such delay condonation application is taken out, CESTAT, i.e., the Tribunal shall deal with the same on its own merits and thereafter deal with the appeal subject of course to the outcome of delay condonation application.

23. It is made clear that the disposal of this writ petition will not impede the rights of the writ petitioner in any manner with regard to raising all available grounds in the alternate remedy and any further remedies available in law. Though obvious, it is also made clear that all issues including no notification governing transition period are left open for CESTAT to decide the same on its own merits, subject of course to the outcome of the delay condonation application.

24. With the aforesaid observations, the writ petition is disposed of. However, there shall be no order as to costs.

Sd/-
Assistant Registrar(CS IV)

//True Copy//

Sub Assistant Registrar

To

1.The Assistant Commissioner of GST and
Central Excise,
Irungattukottai Division,
Chennai Outer Commissionerate,
C-48, TNHB Building,
II Avenue,
Anna Nagar,
Chennai-40.

2.The Commissioner of Central Tax (Appeals-II),
Newry Towers, 2nd Floor,
Plot No.2054, I Block, II Avenue,
Anna Nagar,
Chennai-600 040.

+1cc to Mr.S.Murugappan, Advocate Sr.44590

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srg 27/06/2019