IN THE HIGH COURT OF JUDICATURE AT BOMBAY NAGPUR BENCH, NAGPUR

CENTRAL EXCISE APPEAL NO. 15/2019

(THE COMMISSIONER OF GST & CENTRAL EXCISE COMMISSIONERATE NAGPUR-II, NAGPUR **VERSUS** M/S WESTERN COALFIELDS LTD.)

Office Notes, Office Memoranda of Coram, appearances, Court's orders of directions and Registrar's orders.	*Court's or Judge's order*

Shri S.N. Bhattad, counsel for appellant.
Shri H.G. Dharmadhikari with Ms Lalita Phadke, counsel for the respondent.

CORAM : A. S. CHANDURKAR AND N. B. SURYAWANSHI, JJ.
DATED : 18th DECEMBER, 2020.

By this appeal filed under Section 35G of the Central Excise Act, 1944, the appellant seeks to challenge the order dated 12.3.2019 passed by the Customs, Excise and Service Tax Appellate Tribunal Nagpur by which the appeal preferred by the respondent herein challenging the order dated 30.12.2016 passed by the Commissioner of Central Excise has been allowed and that order has been set aside.

According to the respondent, while paying Clean Energy Cess the assessee code mentioned was incorrectly given as that which was applicable for the Central Excise registration. Those payments were made on 06.05.2015. After realizing the mistake committed a request was made to the Commissioner of Service Tax on 07.11.2015 seeking permission to rectify the same. However, a show cause notice dated 04.10.2016 was issued alleging that the respondent had cleared goods on the basis of wrong payment and hence the respondent was liable to pay duty as well as penalty. The Commissioner however confirmed the demand and thereafter imposed penalty. The respondent challenged the order of the Commissioner by preferring an appeal. The Tribunal after holding that there was a mistake in wrongly mentioning the assessee code held that the same was curable in nature. It therefore allowed the appeal. Being aggrieved the Commissioner has filed the present appeal.

Shri S.N. Bhattad, learned counsel for the appellant submitted that Clean Energy Cess was introduced since the year 2010 and a separate assessee code was assigned to the respondent for making payment of the cess. By making such payment of the cess under the assessee code assigned for Central Excise Duty it was not permissible for the respondent to seek rectification for the same. The Commissioner having rightly refused the permission to do so, the Tribunal erred in setting aside the order passed by the Commissioner. Placing reliance on the decisions in *Installment Supply Versus Union of India* [**AIR 1962 SC 53**] and *M/s Radhasoami Satsang Saomi Bagh, Agra Versus Commissioner of Income Tax* [**AIR 1992 SC 377**], it was submitted that merely because an earlier occasion the Commissioner had permitted rectification of the assessee code the same would not preclude the Commissioner from taking appropriate action and the earlier order would not act as as *res-judicata*. It was necessary for the respondent to separately pay Clean Energy Cess and this could be done by claiming refund after clearing the dues. He therefore submitted that the payment of Clean Energy Cess having been made under a wrong assessee code could not be permitted to be rectified and this aspect gave rise to a substantial question of law.

Shri H.G. Dharmadhikari, learned counsel for the respondent on the other hand supported the impugned order. According to him, the Tribunal rightly found that Clean Energy Cess having been duly paid and credited to the account of the Government of India there was no basis for again demanding such amount. It was only a case of wrongful mention of the assessee code. The account code mentioned by the respondent was correct. Inviting attention to the order passed by the Commissioner pursuant to proceedings initiated under an earlier show cause notice dated 22.04.2014 against the respondent itself he submitted that on said occasion the very same Commissioner had held that deposit of duty in the Government account by mentioning the wrong assessee code would not amount to non-payment of duty. This order was accepted by the Department and hence it was not permissible to take a different stand subsequently. He sought to place reliance on the decision in *C.C.E. Navi Mumbai Versus Amar Bitumen & Allied Products Pvt. Ltd.* [**2006(202)E.L.T. 213 (S.C.)**] and submitted that the appeal had been rightly allowed by the Tribunal. The impugned adjudication did not give rise to any substantial question of law.

After hearing learned counsel for the parties and after giving the due consideration to their contentions, we find that the impugned order does not give rise to any substantial question of law. It is not in dispute that Clean Energy Cess was duly paid by the respondent but by mentioning a wrong assessee code which had even otherwise been assigned to the respondent. The Tribunal in the impugned order has held that payment under a wrong code would not make the same null and void. It was merely a procedural infraction that was curable in nature. The respondent is justified in referring to an earlier order passed by the Commissioner on 22.04.2014 in the proceedings initiated by the Department by issuing a show cause notice to the respondent in somewhat similar circumstances. There the Commissioner held that the dispute was only with regard to mentioning incorrect assessee code number and it was not a case of non-payment of duty.

We find that in the light of the observations of the Hon'ble Supreme Court in *Amar Bitumen and Allied Products Pvt. Ltd.* (supra) the appellant having accepted the earlier order passed by the Commissioner against the respondent itself in somewhat circumstances it was not justified in raising an objection to the procedural infraction in present case. It is not a question of the principle of *res-judicata* being made applicable as urged by the appellant but is a question of pick and choose approach by the appellant as observed in *Amar Bitumen and Allied Products Pvt. Ltd.* (supra).

In that view of the matter and as the entire liability had been discharged by the appellant we did not find any reason whatsoever to interfere with the impugned adjudication. The appeal does not give rise to any substantial question of law. It is accordingly dismissed with no order as to costs.

(N. B. SURYAWANSHI, J.) **(A. S. CHANDURKAR, J.)**

APTE

Rohit Apte

Digitally signed by Rohit Apte
Date: 2020.12.21 17:46:08 +0530