28. 01. 2021
Item No. 08
Ct. No.4
PG

W.P.A. 311 of 2012
M/s. Pulsar Rubber Manufacturing Co. (P) Ltd. & Anr.
Vs.
Commissioner of Central Excise, Kolkata-III Commissionerate & Anr.

Mr. Nirmal Kr. Chowdhury
Mr. Arijit Chakrabarti
Mr. Nilotpal Chowdhury
Mr. Prabir Bera............for petitioners

Mr. K.K. Maiti
Ms. Aishawrya Rajyashree.....for respondents

In this writ petition petitioners are a manufacturer. They had applied for CENVAT credit on capital goods. On same goods they had then claimed depreciation under section 32 of Income Tax Act, 1961. Mr. Chowdhury, learned advocate appears on behalf of petitioners and submits, Revenue made a demand on his clients for having obtained CENVAT credit in contravention of CENVAT Credit Rules, 2004. His clients immediately filed revised return on income tax.

Mr. Maiti, learned advocate appears on behalf of Revenue. He submits, rectification was applied for by petitioners. The income tax authorities allowed the rectification, subsequent to assessment earlier made wherein claim of depreciation on the capital goods stood allowed for relevant years. He draws attention to adjudication order dated 6th February, 2009. The operative part is set out below:

> *" (i)The Cenvat credit of Rs. 83,95,428 [Rs. Eighty-three Lakh Ninety-five thousand Four hundred & twenty-eight only- being the total credit of CE duty of Rs. 82,93,502+ Education Cess of Rs. 77,560/- and S&H. Education Cess of Rs. 24,366/-] on the capital goods having been illegally availed and utilized by the Noticee, M/s. Pulsar Rubber Manufacturing Co. (P) Ltd., the same is disallowed and stands recoverable as a confirmed demand from them in terms of rule 14 of the Cenvat Credit Rules, 2004 read with proviso to Section 11A(1) of the Central Excise Act, 1944.*
>
> *(ii) The Noticee is to pay the appropriate interest on the due amount above u/s 11AB of the Central Excise Act, 1944.*
>
> *(iii) Penalty of Rs. 83,95,428/- which is equivalent amount of the demand above, is hereby imposed upon the Noticee in terms of rule 15 of the Cenvat Credit Rules, 2004 read with section 11AC of the said Act."*

Order dated 9th April, 2010 made by Assistant Commissioner of Income Tax, Circle-7, Kolkata, under section 154 of Income Tax Act, 1961 says, *inter alia* as follows:

> *"In this case, regular assessment u/s. 143(3) was completed on 11-12-2006 computing total income for Rs. 1,06,12,802/-.*
>
> *A Rectification petition u/s. 154 was received from the assessee M/s. Pulser Rubber Manufacturing Co. Pvt. Ltd. on 05-04-2010 submitting that for the A.Y. 2004-05, depreciation amounting to Rs. 69,19,540/- had been claimed in the return of income. However, the assessee has also submitted that it availed CENVAT credit on Capital Goods amounting to Rs. 20,78,891/- during the Financial Year relevant to A.Y. 2003-04 but inadvertently the said credit was not deducted from the value of the Capital Goods purchased, as required by the Explanation-9 to Section 43, and thus claimed excess deduction on account of*

> *Depreciation. The assesee has also submitted a revised depreciation chart. The mistake being apparent from record, the total income originally assessed as per order u/s. 143(3) dated 11.12.2006 is revised and rectified as under".*

Pursuant to the order, demand for recovery of the amount allowed as depreciation was directed.

Rule 15 in said Rules provide for confiscation and penalty if any person, *inter alia,* utilises CENVAT credit in respect of capital goods in contravention of any of the provisions of said Rules. In the facts and circumstances this was found and demand of wrongly availed CENVAT credit along with equal amount of penalty, made thereby. Petitioners went before the Tribunal also with application for waiver of pre-deposit. A reduced amount was required, by the Tribunal, to be deposited. Petitioners applied for modification of the order of reduction of pre-deposit stating before the Tribunal that they had obtained rectification of their income tax return. The Tribunal said by impugned order that it has no power to review.

There is no dispute that the Tribunal does not have power to review. Mr. Chowdhury submits, nevertheless, the Tribunal has power to modify on invoking rule 41 in Customs, Excise and Service Tax Appellate Tribunal (Procedure) Rules, 1982. Rule 41 is quoted below:

> ***"RULE 41. Orders and directions in certain cases.—*** *The Tribunal may make such orders or give such directions as may be necessary or expedient to give effect or in relation to its orders or to prevent abuse of its process or to secure the ends of justice."*

Rule 1 in order 47 of Code of Civil Procedure, 1908 provides, *inter alia,* for review on discovery of new or important matter or evidence not within knowledge of applicant or as could not be produced at the time of order or on account of some mistake or error apparent on the face of the record or for any other sufficient reason. Above quoted rule 41 provides for procedure to be adopted by the Tribunal to make directions in relation to its order so as to give effect to it or prevent abuse of the process or to secure ends of justice. The rectification made by the income tax authorities, if a fact subsequently discovered and to be considered, then it is a matter of review, which the Tribunal is not empowered to do. There was no error apparent on the face of the record. The contravention was that petitioners had claimed depreciation as well. No case has been made out that the direction sought by way of modification application, is necessary or expedient to give effect to the order(s) of the Tribunal or to prevent abuse of its process.

So far as ends of justice are concerned, it appears that petitioners upon having obtained CENVAT credit for relevant years had also claimed and obtained deduction, on depreciation in respect of the goods, in the assessment under section 143(3). The Tribunal appears to have passed impugned order, in dealing with petitioners' case as one for review and not for directions being made for the ends of justice. There does not appear to be any breach of procedure or perversity. As such, it does not appear that petitioners' case in the writ petition is against inaction on the part of the Tribunal in not making directions under rule 41. Case of petitioners, of mistake made and on being made aware by the demand, rectification, will be for them to urge before the Tribunal, in the hearing of the appeal.

For reasons aforesaid, there is no cause for interference. The writ petition is dismissed.

(Arindam Sinha, J.)