IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 17.03.2021

CORAM :

The Honourable Mr.Justice T.S.SIVAGNANAM
and
The Honourable Ms.Justice R.N.MANJULA

W.A.No.775 of 2021
and
C.M.P.No.4107 of 2021

Bonfiglioli Transmissions Private Limited,
Represented by its Head Commercial
Mr.T K Ravi, Plot No.AC7-AC11,
Sidco Industrial Estate,
Chennai - 600 044. ...Appellant

Vs

1. Commissioner of Central Excise
(Appeals-II),
26/1, Nungambakkam High Road,
Chennai - 600 034.

2. Additional Commissioner of
Central Excise,
Chennai - VI Commissionerate,
MHU Complex, 692, Anna Salai,
Nandanam, Chennai - 600 035.

3. Commissioner of Central Excise,
Chennai - VI Commissionerate,
MHU Complex, 692, Anna Salai,
Nandanam, Chennai - 600 035. ...Respondents

PRAYER: Writ Appeal filed under Clause 15 of Letters Patent to set aside the order dated 30.11.2020 passed by the learned Judge in W.P.No.5454 of 2017.

Prayer in WP.No.5454 of 2017:
Writ Petition filed under Article 226 of the Constitution of India praying to issue a Writ of Certiorari, calling for the records in Order in Appeal No.19/2014 (M-IV) dated 10.11.2014 passed by the first Respondent in Appeal No.89/2013 (M-IV) dated 19.12.2013 and quash the same as arbitrary and illegal.

For Appellant : Mr.Joseph Prabakar

For Respondents: Mrs.R.Hemalatha, SSC

JUDGMENT
(Delivered by T.S.Sivagnanam,J)

We have heard Mr.Joseph Prabakar, learned counsel for the appellant and Mrs.R.Hemalatha, learned Senior Standing Counsel appearing for the respondents.

2. This writ appeal by the writ petitioner has been filed challenging the order dated 30.11.2020 made in W.P.No.5454 of 2017. The prayer in the writ petition was to quash the order passed by the first appellate authority, namely the Commissioner of Central Excise, (Appeals-II), Chennai in Appeal No.19 of 2014 dated 10.11.2014, confirming the order passed by the adjudicating authority, namely the second respondent, dated 14.10.2013. The learned Single Bench has dismissed the writ petition on the ground of alternate remedy.

3. When we heard the appeal on 10.03.2021, it was pointed by the learned counsel for the appellant that the earlier directions issued by this Court on the very same issue in W.P.No.40100 of 2016 was yet to be complied with. Therefore, we were constrained to pass the following the order:

> *"We have heard Mr.Joseph Prabhakar, learned counsel for the appellant and Mrs.R.Hemalatha, learned Senior Standing Counsel accepting notice for the respondents.*
>
> *2. The above writ appeal is directed against the order dated 30.11.2020 passed by the learned Single Judge in W.P.No.5454 of 2017, which was dismissed on the ground that there is an alternate remedy available to the appellant by placing reliance on the decision of the Hon'ble Supreme Court in the case of Assistant Collector of Central Excise Vs. Dunlop India Ltd. [reported in 1985 (1) SCC 260].*
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> *3. It is not out of place to mention here that in the decision rendered by us in the case of Mahindra & Mahindra Ltd. Vs. Joint Commissioner (CT) [W.A.No.493 of 2021 dated 18.2.2021], we have considered the issue as to whether there is an absolute bar in entertaining a writ petition and held that there are certain exceptions, which have been carved out on the self imposed restriction of entertaining a writ petition when there is availability of alternate remedy. Hence, we do not agree with the finding*

rendered by the learned Single Judge holding that the writ petition was not maintainable.

4. Therefore, we admit the writ appeal after holding that the writ petition is maintainable and a decision could be taken on merits.

5. The issue involved in this appeal is as to whether the supplies effected by the appellant - dealer from the Domestic Tariff Area to Special Economic Zone were exempted from excise duty under Rule 19 of the Central Excise Rules, 2002. The same issue has arisen in the dealer's case for earlier and subsequent periods and from the tabulation given below, it is seen that on those occasions, the dealer succeeded before the Tribunal :

S.No		*Period*	*Case status/remarks*
1	*OIO No. 24/10 dt. 23.11.2010*	*April 2006 to March 2009*	*Appeal allowed by CESTAT, Chennai, in Final Order No.40150/2018 dated 19.1.2018*
2	*OIO No. 25/10 dt.23.11.2010*	*April 2009 to February 2010*	*Appeal allowed by CESTAT, Chennai, in Final Order No.40150 /2018 dated dated 19.1.2018*
3	*OIO No.02/2011 dt. 18.5.2011*	*March 2010-February 2011*	*Appeal allowed by CESTAT, Chennai, in Final Order No.40863 - 40865/2018 dated 09.3.2018.*
4	*OIO No.36/2013 dt.14.10.2013 / OIA No.19/2014 dt.10.11.2014*	*June 2011 to March 2012*	*Subject matter of WP No.5454 of 2017.*
5	*OIO.No.07/2013 dt. 30.10.2013*	*01.04.2012 to 31.10.2012*	*Appeal allowed by CESTAT, Chennai, in Final Order Nos.40863 - 40865/2018 dated 09.3.2018.*
6	*OIO.No.04/2014 dt. 28.3.2014*	*01.11.2012 to 30.9.2013*	*Appeal allowed by CESTAT, Chennai, in Final Order Nos.40863 - 40865/2018 dated 09.3.2018.*

S.No		Period	Case status/remarks
7	OIO.No.22/2016 dt. 18.7.2016	April 2014 to December 2014	Order in Original was challenged in WP No. 40100 of 2016 and the impugned Order was quashed vide Judgement of this Hon'ble High Court dated 01.12.2016. Matter was remanded to Original Authority for passing fresh order. PH attended twice but Order has not been passed as yet.
8	OIO.No.23/2016 dt. 18.7.2016	May 2015 to October 2015	Same as above. (Common WP filed challenging common order)

6. In the above tabular column, S.No.4 pertains to subject of this writ appeal. We also note that in respect of S.No.7, the dealer, on the very same issue approached this Court by filing W.P.No.40100 of 2016 which was heard and decided by one of us (TSSJ) on 01.12.2016 while sitting singly in the decision reported in (2017) 346 ELT 531. In that writ petition, the challenge was to the order in original directing recovery of central excise duty under Section 11A(i) of the Central Excise Act, 1944 along with interest.

7. In the instant case, the dealer relied upon the earlier Notification in Notification No.67/1995 dated 16.3.1995, the circular issued by the Commissioner of Central Excise dated 11.2.2016 and Notification No.25/ 2016-C.E. Dated 14.6.2016, by which, there was an amendment substituting the words 'free trade zone' into 'special economic zone'.

8. Even before the Writ Court, in the earlier writ petition namely W.P.No.40100 of 2016 filed by the appellant herein, the objection of the Department was that there is an alternate remedy available and that the writ petition should not be entertained. This objection was not

sustained and the writ petition in W.P.No.40100 of 2016 was disposed of on 01.12.2016 in the following lines :

> *"5. After hearing the learned counsel for the parties and perusing the materials available on record, it is seen that though the respondent has extracted the objections given by the petitioner in the impugned order, wherein, the petitioner has referred to the notification as well as the Circular of the Commissioner. However, there is no reference to the same and the impugned order has been passed totally on a different ground and by observing that the clearances to Special Economic Zone are not mentioned in the ExCus Notification No.25/2016, dated 14.06.2016. However, what the respondent should have seen is, as to the effect of the notification dated 14.06.2016, apart from the circular, dated 11.02.2010, wherein, it has been stated that though the SEZ are not listed in the proviso (i) to (vi) of Notification No.67/95 as per CBEC Circular 29/06, dated 27.12.2006, supplies from DTA to SEZ are exempted from excise duty under Rule 19 and such supplies shall also be eligible for rebate under Rule 19. Therefore, it is stated that clearances to SEZ are to be treated as exports and whether the unit clears the goods under Rule 18 or 19, no duty accrues to the Government. Thus, the respondent having not taken into consideration the submissions made by the petitioner which are very relevant to the facts of the case, this Court is justified in interfering with the impugned order. Apart from that it was pointed out that in respect of an identical issue in the assesse's own case, the CESTAT had granted an order of stay, dated 25.07.2012.*
>
> *6. In the light of the above, the impugned order calls for interference with a further direction to redo the entire matter, after taking into consideration the contentions raised by the petitioner, some of which, have been noted above.*

7. In view of the above, the Writ Petition is allowed, the impugned order is set-aside and the matter is remanded to the respondent for fresh consideration, who shall take note of the observations made by this Court and after affording an opportunity of personal hearing to the petitioner, pass a fresh order on merits and in accordance with law."

9. We are now informed by Mr.Joseph Prabhakar, learned counsel appearing for the appellant that the said order and directions have not been complied with by the respondent therein, who is the second respondent in this writ appeal. We are surprised to hear as to why the order and directions issued in the earlier writ petition namely W.P.No.40100 of 2016 have not been complied with and if it is in a revenue matter, obviously the appellant ought to have filed a contempt petition before this Court. We are further informed that on two earlier occasions, the representative of the dealer appeared for personal hearing and in spite of that, the directions issued earlier have not been complied with. Therefore, we can safely presume that the Department is not willing to comply with the order and directions issued in W.P.No.40100 of 2016 though they did not file any writ appeal against that order.

10. Mrs.R.Hemalatha, learned Senior Standing Counsel appearing for the respondents may be right in stating that the order was passed by a Single Judge.

11. However, the order dated 01.12.2016 in W.P.No.40100 of 2016 is pressed into service by the appellant herein, which was the writ petitioner therein and it is the same second respondent herein, who was the sole respondent in W.P.No.40100 of 2016. Therefore, this Court can take judicial notice of the fact that the order dated 01.12.2016 passed in W.P. No.40100 of 2016 was not complied with, which would give rise to an action under the Contempt of Courts Act. But, before doing anything further on those lines, one opportunity is granted to the second respondent *herein to explain before this Court as to why the prayer sought for before us should not be allowed and more so when the Department, in the dealer's own case, accepted the orders passed by the Tribunal as set out in the above tabulation. Further, an affidavit shall be filed by the second respondent.*

12. From the counter, which was filed in W.P.No.5454 of 2017, we find that the Assistant Commissioner, who had signed the counter, made a vague averment in paragraph 11 as regards the earlier orders passed by the Tribunal, which was wholly in favour of the appellant without specifically stating as to whether the Department filed any appeal. Therefore, we do not want any such affidavit from the second respondent. But, there should be a fair statement of facts as well as on law before this Court.

13. Let a counter be filed not later than 16.3.2021 with advance copies served on the learned counsel for the appellant. List on 17.3.2021 under the same caption. Until further orders, no coercive action shall be initiated against the appellant."

4. In terms of the directions issued in the above order, the Additional Commissioner of GST & Central Excise, Chennai Outer, has filed an affidavit dated 16.03.2021. The affidavit reads as follows:

"AFFIDAVIT OF MRS.JAYABALASUNDARI

I,JAYABALASUNDARI daughter of Shri D.Balakrishnan, Hindu, aged about 46 years working as Additional commissioner of GST AND CENTRAL EXCISE, Chennai Outer Commissionerate in the office of the Commissioner of GST AND CENTRAL EXCISE, Chennai Outer Commissionerate do hereby solemnly affirm and sincerely state as follows:

[1] I am the Additional Commissioner and as such I am well acquainted with the facts and circumstances of the case from the records available in the office of the Respondents. I further submit that the present affidavit is being filed on behalf of myself and the other Respondents also.

1. I respectfully submit that on 10.03.2021 when the present Writ Appeal came up for admission this Hon'ble court had directed filing of an affidavit with specific status on the proceedings as set forth in the tabulation as found in para 5 of the order therein. It was further directed that a specific averment may be stated in so for as compliance of directions issued by this Hon'ble Court in W.P.No. 40100 of 2016 dated 01.12.2016.

2. I state that in compliance with the direction of this Hon'ble Court we wish to bring forth the following for kind consideration in a tabulation form:

SI		Period	Case Status/ Remarks as submitted by the Petitioner	Present Status as submitted by the respondent
1	OIO No.24/10 dt.23.11.2010	April 2006 to March 2009	Appeal allowed by CESTAT,Chennai ,in Final Order No.40150/2018 dated 19.1.2018	On Review, the Final Order dated 19.1.2018 of Hon'ble CESTAT was accepted by the Commissioner on Merits
2	OIO No.25/10 dt. 23.11.2010	April 2009 to February 2010	Appeal allowed by CESTAT,Chennai ,in Final Order No.40150/2018 dated 19.1.2018	On Review, the Final Order dated 19.1.2018 of Hon'ble CESTAT was accepted by the Commissioner on Merits
3	OIO No.02/2011 dt. 18.5.2011	March 2010-February 2011	Appeal allowed by CESTAT, Chennai,in Final Order No.40863-40865/2018 dated 09.03.2018	On Review, the Final Orders dated 09.3.2018 of Hon'ble CESTAT was accepted by the Commissioner on Merits
4	OIO No.36/2013 dt.14.10.2013 OIA No.19/2014 dt.10.11.2014	June 2011 to March 2012	Subject Matter of WP No.5454 of 2017	This is the subject matter of W.A.No. 775 of 2021 It is pertain to note that though in the present case Writ Petition was filed challenging the Order in appeal and not an order in original as found in all other cases.

5	OIONo.07/2013 dt.30.10.2013	01.04.2012 to 31.10.2012	Appeal allowed by CESTAT,Chennai ,in Final OrderNo.40863-40865/2018 dated 09.03.2018	On Review, the Final Orders dated 09.3.2018 of Hon'ble CESTAT was accepted by the Commissioner on Merits
6	OIO No.04/2014 dt.28.03.2014	01.11.2012 to 30.09.2013	Appeal allowed by CESTAT,Chennai ,in Final OrderNo.40863-40865/2018 dated 09.03.2018	On Review, the Final Orders dated 09.3.2018 of Hon'ble CESTAT was accepted by the Commissioner on Merits
7	OIO No.22.2016 dt.18.07.2016	April 2014 to December 2014	Order in Original was challenged in WP No.40100 of 2016 and the impugned order was quashed vide Judgmentof this Hon'ble High Court dated 01.12.2016. Matter was remanded to Original Authority for passingfreshO rder. PH attended twice but order has not been passed asyet.	In Accordance with Remand directions of The Hon'ble High Court of Madras vide order dated 01.12.2016, after due process of Law, The Additional Commissioner of GST &Central Excise,Chennai Outer vide Orders-In-Original Nos-1&2/2019(ADC) dated 29.11.2019 dropped the proceedings initiated in the SCNs dated 01.03.2015 and 19.03.2016. On Review, the Orders-In-Original passed by ADC were accepted by the Commissioner on Merits.
8	OIO No.23/2016 dt.18.07.2016	May 2015 to October 2015	Same as above. (Common WP Filed challeng ing common order)	

3. I respectfully submit that the above tabulation would depict the current state of affairs as regards all the proceedings issued to the Writ Petitioner.

4. I respectfully submit that the petitioner was not justified in taking a stand that orders passed by the Hon'ble court in W.P.No. 40100 of 2016 dated 01.12.2016 was not complied which is belied of facts. In pursuance to the direction of this Hon'ble court as indicated in serial No. 7 and 8 of the above tabulation order in Originals Nos. 1 and 2/ 2019 (ADC) dated 29.11.2019 and dropped the proceeding initiated in the SCNs dated 01.03.2015 and 19.03.2016.The said proceedings has stated herein were dispatched to the petitioner vide speedpost Track No. ET353889431IN dated 05.12.2019. Therefore the averments of the petitioner that No further action has been taken incompliance with this Hon'ble Courts Order is unwarranted.

5.I therefore submit that in the above background of facts this Hon'ble Court may consider the present Writ Appeal and pass appropriate orders.

Hence it is respectfully prayed that this Hon'ble Court may pass appropriate orders as deemed fit in the circumstance of the cases and thus render justice."

5. In terms of the averments set out by the Additional Commissioner, we find that the submission made by the appellant, stating that no orders have been passed in terms of the directions issued in the earlier writ petition, is a false statement.

6. The learned counsel for the appellant would plead that there is no mistake on the part of the counsel in making such a statement as the receipt of the order accepting the directions issued, was not informed by the client to the counsel and the counsel also genuinely believed the statement, because the affidavit, which was drafted in the writ petition, contained an averment that no orders were passed and this was signed by Mr.T.K.Ravi, son of K.Omana Marar, who is the Head-Commercial of the appellant company. Furthermore, the learned counsel would submit that he was also of the bonafide belief that no orders were passed because in the counter affidavit filed in the writ petition by the Assistant Commissioner, there is no such averment.

7. Be that as it may, it is the duty of the appellant to have brought to the notice of their counsel about the orders passed by the Department that the appellant's case has been

accepted and they have received the copy of the order. Thus, there is a clear failure on the part of the appellant to give full and sufficient instructions to their counsel.

8. We are not inclined to accept it to be an inadvertent mistake, but a sheer case of irresponsibility on the part of the appellant in not placing the full facts before the Court. Under normal circumstances, we would have come down very harshly on the appellant, but we do not propose to do so because the appellant has now realized the mistake as mentioned by the learned counsel for the appellant and that they would pursue the appellate remedy available to them as directed by the Writ Court.

9. In the light of the above, while admonishing the appellant for their conduct and directing them to be extremely careful while dealing with Court matters and not to come to any adverse notice of this Court on any future occasion, we refrain from imposing costs or making any other strong observation against the appellant.

10. Accordingly, the writ appeal is dismissed and the order passed by the learned Single Bench is confirmed and it is open to the appellant to file an appeal before the Tribunal and if the same is done, then the Tribunal, while computing the period of limitation, shall exclude the period from the date of filing the writ petition, i.e. 24.02.2017, till 15 days from the date on which the certified copy of this judgment is received by the appellant. No costs. Consequently, connected miscellaneous petition is closed.

Sd/-
Assistant Registrar(CS VII)

//True Copy//

Sub Assistant Registrar

hvk

To

1. Commissioner of Central Excise
(Appeals-II),
26/1, Nungambakkam High Road,
Chennai - 600 034.

2. Additional Commissioner of
 Central Excise,
 Chennai - VI Commissionerate,
 MHU Complex, 692, Anna Salai,
 Nandanam, Chennai - 600 035.

3. Commissioner of Central Excise,
 Chennai - VI Commissionerate,
 MHU Complex, 692, Anna Salai,
 Nandanam, Chennai - 600 035.

+1cc to M/s.R.Hemalatha, Advocate, S.R.No.17191

W.A.No.775 of 2021
and
C.M.P.No.4107 of 2021

KV(CO)
KM(19/04/2021)