OD-3 & 4

IN THE HIGH COURT AT CALCUTTA
CIVIL APPELLATE JURISDICTION
ORIGINAL SIDE

IA No. GA 4 of 2021
APO 414 of 2017
THE COMMISSIONER OF CENTRAL EXCISE, KOLKATA
Vs
KUSUM PRODUCTS LTD. & ORS.

AND

IA No. GA 5 of 2021
APO 414 of 2017
THE COMMISSIONER OF CENTRAL EXCISE, KOLKATA
Vs
KUSUM PRODUCTS LTD. & ORS.

BEFORE :

THE HON'BLE JUSTICE T.S. SIVAGNANAM
And
THE HON'BLE JUSTICE HIRANMAY BHATTACHARYYA
Date : 14th March, 2022

<u>*Appearance:*</u>
Mr. Uday Sankar Bhattacharyya, Adv.
Ms. Aishwarya Rajyashree, Adv.
Ms. Banani Bhattacharya, Adv.
...for the appellant.

Mr. Nirmal Kumar Chakraborty, Adv.
Mr. Arijit Chakrabarti, Adv.
...for the respondents.

The Court : This application has been filed to restore the application which was dismissed for non-prosecution on 11.02.2020. Since there is a delay of 604 days in filing the application for restoration of the restoration application, an application under Section 5 of the Limitation Act has been filed by the appellant/department. The delay is sought to be explained by contending that the learned standing counsel who was engaged in the matter was arguing the case in the Centenary

Building and by the time he could reach the Court on 25.10.2017, the appeal and connected applications were dismissed for default. It is further submitted that the department had filed an application for restoration within time in the year 2017 itself which is GA No.3631 of 2017. However, the said application was not listed and when the case was listed on 11.02.2020, it was dismissed for default. Thereafter, the present applications have been filed and since there is delay of 604 days, the department seeks for condonation of delay.

The learned standing counsel for the appellant/department contended that the total lockdown was announced in the State as well as the in the country since 22.03.2020 and by virtue of the order passed by the Hon'ble Supreme Court, the period of limitation for filing the appeals under various statutes was extended with effect from 15.03.2020. It is submitted that the present applications were filed on 08.10.2021 and if the period during which the Courts were not functioning and applying the decision of the Hon'ble Supreme Court to the fact of the case, it is submitted that the delay will be only for 10 days, that is between 13.03.2020 and 23.03.2020. Therefore, it is submitted that since the department has raised the substantial questions of law in the intra-court appeal, the Court may exercise its discretion and condone the delay.

The learned counsel appearing for the respondent vehemently opposed the application for condonation of delay and submits that the conduct of the department has to be taken into consideration. It is submitted that even at the time when the appeal was filed, there is a 164 days delay in filing the appeal and the delay was not condoned and when the application for condonation of delay being GA No.98 of 2017 was listed on 25.10.2017, the Court noted that even on the second call since none appeared for the department/appellant and the department/appellant was also not represented on the earlier occasions, the Court dismissed the condonation of delay application, consequently, the appeal being APO NO.414 of 2017 also stood rejected. Further, it is submitted that the present application has been filed with an inordinate delay of 604 days and if the conduct of the department is taken into consideration, the Court may not exercise its discretion in condoning the delay.

We have elaborately heard the learned counsel for the parties and we have perused the materials placed on record. The above-mentioned facts are not in dispute. Admittedly, the appeal which was initially filed there was a delay of 164 days in filing the appeal. However, the application was dismissed on the ground of non-appearance of the counsel who had been engaged to appear in the matter for the department. The department, on coming to know of the dismissal of the application as well as the rejection of the appeal, within the period of limitation, had filed GA No.3631 of 2017 to set aside the order of dismissal of the appeal and restore the application and the appeal and decide them on merits. This application which was filed in the year 2017 was not listed before the Court till 11.02.2020. It is a settled legal principle that no party should suffer for the fault of the Court. In all probabilities if the application was listed soon after it was filed, the appeal would have been restored. Nevertheless, the application came up only on 11.02.2020 and on the said date there was no representation leading to its dismissal. Thereafter, the present applications have been filed to restore the said application along with the delay of 604 days. Admittedly, this Court could not function on account of pandemic situation from 16.03.2020. The Hon'ble Supreme Court has extended the period of limitation for filing of appeals and all categories of cases with effect from 15.03.2020. If the above facts are taken into consideration and if the decision of the Hon'ble Court is to be applied then we find that the delay in filing the application is very marginal. In any event, the appeal is of the year 2017 and from 2017 to 2020, the application for restoration was not listed before the Court for no fault committed by the department. Thus, considering the overall facts and circumstances of the case, we are of the view that ends of justice would be made if the appeal and the applications for condonation are restored and the applications for restorations and other connected applications are allowed. That apart, we also find that the parties are before us by way of this intra-court appeal wherein the legal issue is whether a benefit granted in favour of the respondent/manufacturer under a notification issued by the Government of India, though rescinded subsequently, would the benefit which accrued in favour of the respondent/manufacturer, would lapse. Since this question of law is involved, we are of the view that the appeal should be heard and decided on merits. In the result, the applications being GA No.4 of 2021 and GA No.5 of 2021 are allowed.

The application being GA No.3631 of 2017 is restored to its original file and number. With the consent of the appearing parties, the said application is taken up for hearing by treating the same as on day’s list. For the reasons as stated above the application for restoration being GA No.3631 of 2017 is thus, allowed thereby recalling the order dated February 11, 2020 and by restoring the application being GA No.98 of 2017, GA No.99 of 2017 and the appeal being APO No.414 of 2017 (APOT No.9 of 2017) to the original file and number. With the consent of the parties the application being GA No.98 of 2017 is treated as on day’s list and the same is also allowed for the reasons as stated hereinbefore. Consequently, the delay in filing the appeal is condoned. The appeal APO No.414 of 2017 is directed to be heard on merits.

Re: APO No.414 of 2017

Though the appeal is not appearing in the day’s list, by consent of the parties, the appeal is heard treating the same as on the day’s list.

This appeal filed by the revenue is directed against the order passed by the learned single Bench in WP No.2144 of 2005 dated 15.06.2016. In the said writ petition, the respondent/manufacturer had challenged a show cause notice dated 22.06.2005 and the order passed by the appellant dated 13.09.2005. By the said order the appellant had confirmed the demand of Rs.1,01,05,814/- in terms of Section 11A of Central Excise Act, 1944 ordered for payment of interest under Section 11AB of the Act and imposed equal penalty under Section 11AC of the Act read with Rule 25 of the Central Excise Rules, 2002. The respondent/manufacturer, though was required to prefer an appeal against the said order before the Customs Excise and Service Tax Appellate Tribunal (Tribunal), had approached this Court and filed the writ petition on the ground that the show cause notice as well as the order of adjudication dated 13.09.2005 is without jurisdiction more particularly in the light of the decision of this Court in the case *of Rasoi Limited –vs- Union of India* reported in *2004 (176) ELT 101 (Cal.)* and the Special Leave Petition filed by the appellant/department against the said judgment was dismissed by the Hon'ble Supreme Court in Special Leave to Appeal (Civil) CC : 2314-2315/2005 dated 07.03.2005, hence the demand is illegal. The learned single Bench by the impugned order had allowed the writ petition. On a reading of the order, we find that the department had not disputed that the decision in Rasoi Limited (supra) would be applicable to the respondent's case. We note the submissions of the learned standing counsel for the appellant/department stating that the department never issued any instruction to record any concession and, therefore, the department has filed the present appeal. In the light of the stand taken by the department before us, we have taken up the appeal for consideration.

We have heard Mr. Uday Sankar Bhattacharya, learned standing counsel for the appellant/department and Mr. Nirmal Kumar Chakraborty, learned counsel for the respondent.

The respondent is a manufacturer of Vanaspati. At the relevant point of time, there was notification in force which pertained to set off duty of use of specified mineral oil in the manufacture of vegetable products. The Central Government in exercise of power conferred under Rule 57K of the rules issued Notification No.27/87-CE dated 01.03.1987 as amended by Notification No.99/87-CE dated 20.03.1987; No.17/88-CE dated 1.3.1988 and No.295/88-C.E. dated 16.12.1988.

The relevant condition in the notification qua the present appeal is in clause 3(i) of the notification which states that the amount of credit utilised for payment of duty on any individual clearance of the said final product shall not exceed ₹1000 per metric tonne of vegetable product and the excess credit, if any, available in the credit account shall not be refunded to the manufacturer or adjusted against or utilised for payment of duty on any other excisable goods under any circumstances. The said notification subsequently stood rescinded during August, 1989 and subsequently restored in October 1989 with a reduced amount of money credit and completely rescinded on 23rd June, 1996. The respondent manufacturer had availed the benefit of the notification when it was in vogue owing to which certain credit had accumulated to their account. After the notification stood rescinded, the respondent manufacturer sought to utilise such credit in terms of the notification, which was lying in their account. Thus, the respondent manufacturer sought to utilise the credit lying in their account which was denied, resulting in issuance of show cause notice which ultimately culminated in the order of adjudication dated 13th September, 2005.

Mr. Bhattcharyya, learned standing counsel objected to the maintainability of the writ petition. It is no doubt true that the respondent manufacturer had an effective alternative remedy of appeal before the tribunal. However, in our considered view, at this juncture relegating the respondent to an alternative remedy will not be proper, since the writ petition was filed in the year 2005 and allowed on 15th June, 2016 by the impugned order and this appeal has been pending before this Court ever since 2017. Therefore, we leave open the objection raised by the learned standing counsel for the appellant to be raised in an appropriate case. In the given facts and circumstances, the only issue which would fall for consideration is what would happen to the credit lying in the account of the respondent manufacturer which accrued to them when the notification issued by the Central Government was in vogue. This issue is no longer *res integra* and has been considered and answered by the Hon'ble Supreme Court in *Tungabhadra Industries Limited Vs. Union of India,* reported in 2000 (118) E.L.T. 545(S.C.). The relevant portion of the judgement is quoted herein below :

> *The question whether the benefits of both the notifications can be availed of simultaneously was not a subject matter of consideration before the Gujarat High Court*

and in fact the credit accumulated under the subsequent notification of 11th October, 1989 was not a matter for consideration at all. That apart, Clause(iii) of both the notifications, clearly provides that the amount of credit utilised for payment of duty shall not exceed rupees one thousand per tonne of vegetable products on any individual clearance. When the credits get accumulated in accordance with the rates indicated in the notification itself then the same can be utilised also in accordance with the terms and conditions contained in that notification and, therefore, it is not permissible to construe the judgement of Gujarat High Court that it has been held therein that the manufacturer could avail of the credits accumulated under both the notifications simultaneously. To the said effect also is the judgement of the Andhra Pradesh High Occur on which Mr. Dave placed reliance. The only thing what both the High Courts have held is that the rights acquired or money credit accumulated, is not taken away by rescinding of the notification in question. In fact the decision of the Karnataka High Court in the case of Union of India V. Modern Mills Ltd., 1994 (72) E.L.T. 246 (Kar.) considers and approves the aforesaid decision of the Gujarat High Court and Andhra Pradesh High Court and holds that the accumulated credit would not be ceased with the rescinding of the notification and on the other hand, could be utilised by the assessee towards excise duty payable on its final products thereafter. But it has been further held that the said accumulated credit could be utilised only subject to the conditions to the notification and consequently, it is not open to the manufacturer to insist on clearing his finished products, without paying any amount of excise duty by merely effecting two debit entries of the accumulated credits. In other words, what has been held by the Karnataka High Court in the aforesaid decision is that though the manufacturer would be entitled to utilise the accumulated credits under the rescinded notification and can also accumulate further credits on the basis of the fresh notification of the year 1989, but is not entitled to claim adjustment on the basis of both the accumulated credits simultaneously. We approve the views taken by the Karnataka

> *High Court and we further hold that neither in the decision of the Gujarat High Court nor in the decision of the Andhra pradesh High Court, anything contrary has been said, so far as the question of utilisation of the credit for payment of duty on the manufactured goods are concerned. In this view of the matter, the Excise Authorities have rightly dealt with the matter of utilisation of the accumulated credit in favour of the appellant-manufacturer and we see no infirmity in the same.*

In terms of the above decision, when the credit gets accumulated in accordance with the rates indicated in the notification itself then the same can be utilised also in accordance with the terms and conditions contained in that notification and the accumulated credit would not cease with the rescinding of the notification but could be utilised by the respondent towards excise duty payment on its final products however such accumulated credit could be utilised only subject to the conditions contained in the notification and it is not open to the manufacturer to insists on clearing its finished products without paying any amount of excise duty by merely effecting debit entries of the accumulated credits. That apart, the notification does not provide for any refund being granted. Noting the above decision, this Court in the case of *Rasoi Limited* had granted relief to the manufacturer therein. While doing so the Court took into consideration Section 38A of the Act to interpret the effect of rescinding a notification. In terms of Clause (c) of Section 38A where any rule, notification or order made or issued under the Act or any notification or order issued under such rule is amended, repealed, superseded or rescinded, then unless a different intention appears such amendments, repeal, supersession or rescinding shall not affect any right, privilege, obligation or liability acquired, accrued or incurred under any rule, notification or order so amended, repelled, superseded or rescinded. The Court after noting the above statutory provision, took into consideration the decision in *Tungabhadra Industries Limited* as well as the case of *Samtel India Limited Vs. Commissioner* reported in 2003(155) E.L.T. 14 (S.C.) and *Eicher Motors Limited Vs. Union of India* reported in 1999 (106) E.L.T. 3 (S.C.) and held as follows :

> *"**12.** In view of the aforesaid provisions contained in Section 38A of the Act, I find substance in the contention of Mr. Bajoria that by reason of the omission of the Rule, the right of the petitioner No.1 to have money-credit in terms of the notification under the rule cannot lapse. As pointed out by the Supreme court in the case of Tungabhadra Industries Ltd. (supra), Central Excise Act, does not permit divestment of any accrued right of a person acquired by virtue of any of the provisions contained in the Act, rules, notification, order etc. moreover it is rightly pointed out by Mr. Bajoria that even in cases whereby specific enactment a vested right is taken away in violation of the provisions contained in Section 38A of the Act, the Apex Court has unhesitatingly preserved such accrued right. [see the cases of Samtel India Ltd. and Eicher Motors Ltd. (supra)"*

The department had filed special leave petition before the Hon'ble Supreme Court and the Hob'ble Supreme Court by order dated 7th March, 2005 dismissed the same holding that they find no reason to interfere with the judgement of this Court. Thus the order attained finality. That apart we find that various tribunals and more particularly the tribunal at New Delhi had followed the said decision in the case of *M/s. Suraj Vanaspati Limited Vs. CCE, Noida* reported in 2015 (4) TMI 959 (CESTAT NEW DELHI). The High Court of Gujarat in the case of *Madhusudan Industries Ltd. vs. Union of India* reported in 2014 (309) E.L.T. (Guj.) had taken a similar view after noting the decision in *Rasoi Ltd.*

The learned standing counsel appearing for the revenue would contend that the decision of the Hon'ble Supreme Court rejecting the Special Leave Petition *in limine* will not amount to merger and, therefore, the decision of the learned Single Bench impugned before us has to be independently considered. In fact, our reasoning in the preceding paragraphs proceeds on the basis to test the legal issue and not the correctness of the impugned order based on any alleged concession recorded or merely on the ground that the Special Leave Petition filed in *Rasoi Ltd.* has been dismissed. However, we need to note that the Hon'ble Supreme Court has recorded "we see no reason to interfere" would it amount to dismissal of Special Leave Petition *in limine* or otherwise. We need not go into the said issue as we are proceeding to consider the effect of the notification and the legal principle to be culled out based on the decision of the Hon'ble Supreme Court more particularly in *Tungabhadra Industries Ltd.* In the light of Section 38A of the Act, as also the legal principle that the credit accumulated will not lapse or cannot be taken away by rescinding of a notification, the benefit of such credit to be utilised in accordance with the conditions with the notification should be extended to the respondent manufacturer. In fact, in *Tungabhadra Industries Ltd.,* in the counter-affidavit filed by the Union of India though contended that the accumulated credit under the old notification would lapse, however, learned Senior standing counsel who appeared for the Union of India accepted the legal position that the credits already accrued could be utilised notwithstanding rescinding of the relevant notification. Thus, there can be no quarrel about the legal principle.

Learned counsel appearing for the appellant has expressed apprehension that the attempt of the respondent manufacturer is to wipe out the entire liability of the Central Excise Duty by utilising the credit. In our view, this cannot be done because the utilization of the accumulated credit shall be only in accordance with the stipulation under the notification which clearly specifies the quantum of credit to be utilized for payment of duty on any individual clearance of the said final product which shall not exceed rupees one thousand per tonne on vegetable products and excess credit, if any, available in the credit account shall not be refunded to the manufacturer. Therefore, the respondent manufacturer cannot avail any double benefit under the notification. Thus, the legal position having been settled in the aforementioned decision, we hold that the respondent manufacturer is entitled to utilise the accumulated credit strictly in accordance with the notification which was in vogue at the relevant point of time.

Thus, for the above reasons, we find that the ultimate relief granted by the learned Court does not call for any interference.

Mr. Bhattacharyya, learned counsel for the appellant pointed out that the entire clearance on vegetable products from June, 2004 to February, 2005 were made by the respondent manufacturer without payment of excise duty and evaded payment of excise duty totalling to an amount of Rs.1,01,05,814/-. In our considered view, this finding of the adjudicating authority cannot be read in isolation, as we have already held that the respondent manufacturer will be entitled to the benefit of the notification and adjust the accumulated credit at the rate of rupees one thousand per metric tonne for clearance and this should be borne in mind by the Department while taking a decision.

With the above observation, the appeal being APO/414/2017 stands dismissed.

(T.S. SIVAGNANAM, J.)

(HIRANMAY BHATTACHARYYA, J.)

S.Das/S.PalAs/S.De.