

OD-16

CEXA/13/2021
IA No.GA/2/2021

IN THE HIGH COURT AT CALCUTTA
Special Jurisdiction
ORIGINAL SIDE

COMMISSIONER OF CENTRAL EXCISE,
BOLPUR

-Versus-

M/S. JAI BALAJI INDUSTRIES LIMITED

Appearance:

Mr. Somnath Ganguli, Adv.
Mr. Tapan Bhanja, Adv.
...for the appellant.

Mr. Agnibesh Sengupta, Adv.
Ms. Swapna Das, Adv.
...for the respondents.

BEFORE:

The Hon'ble JUSTICE T.S. SIVAGNANAM

-And-

The Hon'ble JUSTICE HIRANMAY BHATTACHARYYA

Date : 23rd February, 2022.

The Court : This appeal filed by the revenue under Section 35G of the Central Excise Act, 1944 (the 'Act' in brevity) is directed against the final order No.75111/2020 dated 15th January, 2020 passed by the Customs, Excise and Service Tax Appellate Tribunal, Kolkata (in short the 'Tribunal') in Excise Appeal No.2224 of 2010.

The revenue has raised the following substantial questions of law for consideration :

- "I) *Whether the Learned Tribunal is right and justified in allowing the appeal of the assessee by relying upon the order No.77032/2019 dated 25.10.2019 and overlooking the fact that Cenvat Credit availed under Rule 4(2)(a) of the Cenvat Credit Rules, 2004 is not available to the respondent company as M/s. AESPL issued only invoices without supply of any excisable goods, since the said M/s. AESPL did not have any manufacturing capacity?*
- II) *Whether the Learned Tribunal acted in breach of natural justice by not considering the report of the Registered Chartered Engineer and also failed to provide proper reasoning and/or independent findings while disagreeing with the findings of the adjudicating authority?*
- III) *Whether the assessee is entitled to avail Cenvat Credit under Rule 4(2)(a) of the Cenvat Credit Rules, 2004 on the strength of invoices issued by M/s. AESPL, when M/s. AESPL is not authorised to issue Central Excise Invoices under Rule 11 of the Central Excise Rules, 2002?*
- IV) *Whether the Learned Tribunal is justified in allowing the appeal of the assessee without considering the provisions of Rule 3, 4 and 7 of the Cenvat Credit Rules, 2002/Rules 3, 4 and 9 of the Cenvat Credit Rules, 2004?*
- V) *Whether the order passed by the Learned Tribunal is perverse and contrary to the findings of the adjudicating authority and a reasonable one?"*

The respondent/assessee was issued a show cause notice dated 4th December, 2008 alleging that the respondents have

wilfully and deliberately indulged in suppression of material facts from the department of non-receipt of capital goods namely, machine & mechanical appliances from the so called manufacturer-supplier, M/s. Ashok Electrical Stampings (P) Ltd. (M/s. AES) who had actually never manufactured or supplied the same which, according to the department, was evident from the investigation carried out by the concerned jurisdictional unit. Further, the show cause referred to a statement given by the Project Manager of the assessee on 28th November, 2008 recorded under Section 14 of the Act with regard to the entries made for the period 2003-04, 2005-06, 2006-07 and 2008-09 confirming that they have wrongly availed Cenvat Credit on the strength of the invoices issued by M/s. AES through which capital goods were shown to have purchased/procured by the assessee. Further reference has also been made to other statements given by the Project Manager. Further, the show cause notice stated that the Central Excise registration of M/s. AES was suspended by order dated 10th August, 2007 and the fact of procurement of 30 bogus invoices by the assessee during the period includes the period during which the registration of M/s. AES was suspended. Therefore, the assessee was called upon to show cause as to why the Cenvat Credit of Rs.3,07,48,020/- wrongly availed shall not be denied and recovered in terms of Rule 12 of the Cenvat Credit Rules, 2002/Rule 14 of Cenvat Credit Rules, 2004; why penalty shall not be imposed upon them in terms of Rule 13/Rule 15 read with Section 11AC of the Act

and why interest at appropriate rate should not be charged under Rule 12/Rule 14 of the Rules read with Section 11AB on the amount demanded.

The assessee had submitted their reply firstly contending that the case is barred by time under Section 11A of the Act and in the absence of suppression/misstatement having not been established, extended period of limitation cannot be invoked. Further it was stated that the items which have been procured from M/s. AES were received under duly authorized document and used in the assessee's factor for production and manufacture of final products and collateral evidence including the payment particulars through cheques were reflected in the Party-Ledger have been produced at the time when summons was issued to the assessee. Further, it was stated that before the assessee placed supply of purchase orders with M/s. AES, a thorough due diligence was done and only after verification orders were placed. Further, what is required to be seen is whether the assessee had produced documents as specified in Rule 9 of the Rules irrespective of whether the supplier had committed some error or mistake and for which the assessee should not be penalised. Several other accounts and factual details were placed in the reply to the show cause notice and decisions were also referred to in support of their stand. The reply given by the assessee was not accepted by the adjudicating authority and by order dated 31st December, 2009 confirmed the proposal in the show cause notice. Challenging the

said order, the assessee filed appeal before the tribunal. The appeal has been allowed by following another decision of the tribunal in respect of the assessee's another unit in final order no.77032/2019 dated 25th October, 2019. Aggrieved by such order, the revenue is before us.

We have heard Mr. Somnath Ganguli, learned Counsel assisted by Mr. Tapan Bhanja, learned Advocate for the appellant/revenue and Mr. Agnibesh Sengupta, learned Counsel assisted by Ms. Swapna Das, learned Advocates for the respondent/assessee.

On a reading of the impugned order we find that the tribunal has not specifically recorded as to how and in what circumstances the decision of the tribunal dated 25th October, 2019 in respect of another unit of the assessee covers the issue on hand. To be noted that the appeal was filed by the respondent/assessee on 6th April, 2010 and, obviously, on the said date the assessee could not have referred to the decision of the tribunal in respect of the assessee's another unit because the said decision was rendered by the tribunal almost nine years after the appeal was presented i.e., on 25th October, 2019. Thus, it is evidently clear that for the first time when the matter was heard before the tribunal, submission of the assessee was that the issue is covered by the order of the tribunal dated 25th October, 2019. If such was the factual position, in our considered view, the duty cast upon the Court is to examine as to in what manner the

decision covers the case before the concerned Court. The Court will be justified in following the earlier decision if the contesting respondent agrees to the same. However, in the impugned order we find that the revenue has not acceded or accepted that the decision dated 25th October, 2019 of the tribunal covers the present case. In such circumstances, it goes without saying that the tribunal has to record reasons as to how the decision would cover the case before it. Having failed to do so we would be well justified in setting aside the order. That apart, we find that the memorandum of appeal presented by the assessee before the tribunal is a very elaborate memorandum running to nearly 25 pages. The assessee prima facie focussed on factual issues as to how they have bona fide effected the purchase and utilised those products for manufacture of finished goods. Several documents, records, particulars regarding payments made through banking channel etc. were produced. The assessee also relied upon various decisions of the Court, some of which, according to the assessee, would apply to the facts of the case and other decisions on how and when the extended period of limitation under Section 11AC could be invoked. However, the tribunal has not discussed any of those grounds and as observed earlier, the tribunal was required to examine the grounds more particularly when the revenue seeks to sustain the order in original and the department representative is shown to have reiterated the findings rendered by the adjudicating authority in

the order in original. Therefore, we hold that the order impugned to be devoid of reasons and consequently calls for interference.

The learned counsel appearing for the appellant submitted that the decision of the tribunal dated 25th October, 2019 in respect of another unit of the respondent would not apply on facts, but however, the department did not prefer any appeal before this Court under Section 35G on account of low tax effect. If such is the situation, the duty of the Court, while examining the appeal under Section 35G has to be looked into.

We are required to examine as to whether any substantial question of law arises for consideration. The tribunal has not given any reasons as to why the decision dated 25th October, 2019 would apply to the case on hand. Therefore, if we are called upon to adjudicate the correctness of the order, we would have to examine as to whether the Commissioner of Central Excise has rendered a proper finding in the order in original. This is not the scope of the appeal under Section 35G of the Act. This is one more reason as to why the order impugned has to be set aside and the matter to be remanded for fresh consideration.

Learned counsel for the respondent/assessee expresses apprehension that when the matter is sent back to the tribunal, this judgment should not have an impact on the fresh decision that the tribunal is required to take. It is elementary legal principle that in case of open remand, all issues are left open and if any observations are made touching the merits of the

matter, they have to be regarded as observation for setting aside the order of the tribunal and justifying as to why the case should be remanded. Therefore, the respondent/assessee need not have any apprehension in this regard and they will be free to raise all factual and legal issues before the tribunal.

For all the above reasons, the appeal is allowed and the impugned order is set aside and the matter is remanded to the tribunal for fresh consideration on merits and in accordance with law. Consequently, the substantial questions of law are left open.

With the disposal of the appeal, the connected application for stay stands closed.

(T.S. SIVAGNANAM, J.)

(HIRANMAY BHATTACHARYYA, J.)