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IN THE HIGH COURT AT CALCUTTA
SPECIAL JURISDICTION (CENTRAL EXCISE)
ORIGINAL SIDE

CEXA/27/2021
IA NO. GA/2/2021
COMMISSIONER OF CENTRAL EXCISE, BOLPUR
VS.
M/S. SARVA MANGALAM GAJANAN STEEL PVT. LTD.

CEXA/58/2019
IA NO. GA/2/2019 (OLD NO. GA/2496/2019)
THE COMMISSIONER OF CENTRAL EXCISE, BOLPUR COMMISSIONERATE
VS.
M/S. SARVA MANGALAM GAJANAN STEEL PVT. LTD.

BEFORE :
THE HON'BLE JUSTICE T.S. SIVAGNANAM
And
THE HON'BLE JUSTICE HIRANMAY BHATTACHARYYA
Date : AUGUST 08, 2022.

Appearance :
Mr. Kaushik Dey, Adv
Mr. Tapan Bhanja, Adv.
...for appellant
Mr. Anil Kumar Dugar, Adv.
Mr. Rajarshi Chatterjee, Adv.
...for respondent

The Court :- These appeals have been filed by the revenue under 35G of the Central Excise Act, 1944(the Act) against the order passed by the Customs, Excise and Service Tax Appellate Tribunal dated 22nd March, 2018 in Appeal no. E/75532/2015 and Appeal No. 75898/2017 respectively.

Since common questions of law have been raised by the revenue in both the appeals and the order impugned in CEXA/58/2019 passed by the Tribunal having

been followed by the Tribunal in its order which is impugned in CEXA/27/2021 we have heard the appeals together and they are disposed of by this common order.

Mr. Dugar, learned Advocate appearing for the respondent/assessee raised a preliminary objection as regards the maintainability of the appeal in CEXA/58/2019. It is submitted that duty involved in the case is Rs.92,75,862/- and therefore, it being less than Rs.1 crore the appeal is not maintainable before this Court in the light of the circular issued by the CBEC. The learned standing Counsel appearing for the revenue submitted that penalty also had to be reckoned along with duty component and if it is done so the amount exceeds far beyond Rs. 1 crore and the appeal is maintainable. To substantiate his contention reliance was placed on the decision of the High Court at Allahabad in *Commissioner of Customs, Lucknow Vs. J K Export Import House 2017 354 Elt 345 (Allahabad)*. To consider this issue it would be relevant to take note of paragraph 2 of the instruction dated 17.8.2011 issued by the CBEC, which reads as follows:-

“Similarly, no appeal shall be filed in the High Courts if the duty involved does not exceed Rs.10 lakhs with or without penalty and interest.”

On a careful reading of the above we find that to take a decision as to whether the monetary limit stipulated in the circular would be applicable, we have to take note of the illustration given in the instruction issued by the CBEC. It states that no appeal shall be filed in the high Court if the duty involved does not exceed Rs.10 lakh with or without penalty and interest. In our prima facie reading, the decision whether an appeal should be filed or not shall depend upon the quantum of duty involved and if it does not exceed the threshold limit no

appeal should be filed. The learned Standing Counsel has pressed into service decision in the case of *J.K.Export & Import House (supra)*.

The Hon'ble Division Bench, also held that the disputed tax amount and penalty has to be taken into consideration and if it is done so, the appeal is above the monetary limit. In our considered view, the correct interpretation to the circular would be as to whether the duty component exceeds the threshold limit or not, regardless of the fact it is with or without penalty. However, we need not go into the said controversy since there is no bar for this Court to consider an appeal when a substantial question of law arises for consideration. In this regard, the learned Standing Counsel has placed reliance on the decision in the case of Commissioner of Central Excise, Chennai-IV vs. Sundaram Fasteners Limited, 2014(304) E.L.T 7 (Mad.). In the said decision the Court held that quantum of demand should not be a going factor, more so, even when a substantial question of law is involved. Thus, we are required to consider as to whether any substantial question of law is involved in this appeal. The revenue has raised the following substantial questions of law for consideration :-

1. Whether the Learned Tribunal without going into the merits of the case and without even seeing the documents was right in simply passing the order on the basis of the ratio laid down in the decision of the Tribunal in Jai Raj Ispat Limited -Vs- Commissioner of Central Excise, Hyderabad-IV ?

2. Whether the Learned Tribunal failed to appreciate that the judgment relied upon while passing the said order is on the classification of 'Mis-rolls' which is not identical in the respondent case ?”
3. Why credit of CENVAT duty amounting to Rs. 90,05,802/- only Education Cess Amount to Rs. 1,79,937/- only and Secondary & Higher Secondary Cess amounting to Rs. 90,128/- only should not be disallowed and recovered from them under Rule 14 of the CENVAT Credit Rules 2004 read with erstwhile proviso to Section 11A and/or present Section 11A(5) of the Central Excise Act, 1944 ?
4. Why interest at the appropriate rate should not be charged and paid by them under Rule 14 of the CENVAT Credit Rules, 2004 read with erstwhile Section 11AB and/or present Section 11AA of the Central Excise Act, 1944 ?
5. Why a penalty should not be imposed upon them under Rule 15(2) of the CENVAT Credit Rules, 2004 read with Section 11AC of the Central Excise Act, 1944 ?
6. Whether the Learned Tribunal is justified in heavily relying upon the decisions being F.O. No. 75683/2018 dated 22.03.2018 passed in the case of M/s. Sarva Mangalam Gajanan Steel Pvt. Ltd. – Versus – Commissioner of Central Excise, Bolpur While coming to its conclusion without any

independent reasons and without appreciating that in the facts and circumstances of the instant case, the aforesaid decision is not applicable ?

As noted above, the Tribunal in its order dated 22nd March, 2018 impugned in CEXA No.27 of 2021 followed its earlier order dated 22nd March, 2018 which is impugned in CEXA 58 of 2019. The Tribunal has recorded that it has heard the rival submissions and it is of the view that when a final product duty was paid and accepted by the department then the appellant is entitled for CENVAT credit on input as per the decision of the Hon'ble Supreme Court in Jai Raj Ispat Ltd. vs. Commissioner of C. Ex., Hyderabad-IV, 2006 (200) E.L.T. 518 (S.C.). It has extracted paragraph 5 of the said decision and the Tribunal has held that without going into the issue of classification it holds that the assessee is entitled to avail CENVAT credit in accordance with the CENVAT rules. Accordingly, the order of adjudication is set aside.

The case of the revenue before us is that the said decision is wholly inapplicable to the facts of the case on hand. They have contended that the judgment in the case of Jai Raj Ispat Ltd. was with regard to classification of 'mis-rolls' which is not identical to that of the product dealt with by the respondent assessee. Further, it is the case of the revenue that at least brief reasons ought to have been recorded by the learned Tribunal as to how the decision would apply to the case on hand.

After considering the said submission we need to point out that the issue which fell for consideration before the Hon'ble Supreme Court was whether mis-rolls arising during the process of manufacture of CTD bars would fall under tariff

entry 72.04 or 72.07. The Tribunal in the impugned orders has left open the classification issue. If such be the circumstances, the learned Tribunal ought to have made an endeavour to consider the facts of the case, specially when the allegation in the show cause notice issued by the adjudicating authority was that the assessee does not process furnace for melting such waste and scrap and it is practically impossible for the assessee to manufacture MS Flat/Bar, MS Angle, MS Channel, MS Round etc. from the said items which are various types of scraps. Further, the allegation is that it is not financially viable to manufacture MS Flat/Bars etc. from such type of raw material and therefore it was stated that the assessee has taken credit of duty on the said scrap which do not appear to be their inputs, appear to have wilfully and intentionally availed irregular CENVAT credit in contravention of the provisions of Rule 3 read with Rule 9 of the CENVAT Rules, 2004. The assessee had submitted a reply to the show cause notice contending that their rolling mill had been installed to roll such items and the goods so purchased from SAIL and others have been subjected to heating, straightening to make suitable for rolling and sometimes cut to sizes and then re-rolled to manufacture their final products. Apart from that they have stated that re-rolled products so manufactured are being cleared on payment of Central Excise duty. However, the assessee stated that the goods have been purchased from SAIL and other parties have been used in manufacture of dutiable final products and hence the CENVAT credit cannot be denied. Further, the demand notice has been issued without any enquiry and investigation in the factory of the assessee and the burden of proof is on the department to show that the goods purchased from SAIL and others have been disposed off without use in their factory. Further, it was

contended that the department does not dispute payment of duty on goods purchased from SAIL and others, payment of duty on the final products manufactured by them, there was no revenue loss and therefore, proceedings could not have been initiated against the assessee. Several decisions were relied on by the assessee. The adjudicating authority has dealt with the submissions and passed an order on 13th February, 2017 pointing out that several inputs would be used for the manufacture of final product and unless the assessee discloses the description and use of the said items, it will not be possible to ascertain whether the same are eligible inputs or not and that the assessee has never disclosed the description and uses of the items against which they have availed the CENVAT credit treating those as inputs until they were asked for on 9th March, 2015 by the concerned Range Officer. In paragraph 6.12 of the order of adjudication dated 13th February, 2017, the authority has held as follows :-

“6.12 Now I come to the main allegation raised in the impugned show cause notice. I find that the allegation of the department is that the said Noticee had availed Cenvat credit on TMT Cutting. Square Cobble, MRM Rolls Spoils, Misrolls & End cutting, Scrap & Melting Scrap treating those as inputs used in the manufacture MS Flat / Bar, MS Channel, MS Round, MS Angle, MS Ribbed Bar etc. On going through the records I find that the Noticee has used the above scraps as inputs which are classified under Tariff Item No. 72044100 in their purchase invoices. I also find that items classified under Tariff Item No. 72044100 are “Turnings, shavings, chips, milling waste, saw dust, fillings, trimmings and stampings, whether or not in bundles” as per definition. I further observe that for manufacture of MS Flat / Bar, MS Channel, MS Round, MS Angle, MS Ribbed Bar etc. there is a requirement of Ingots or Billets. Therefore, these types of scraps require full melting in liquid form for further use in the manufacture of Ingots or Billets. But as the

Noticee does not possess any furnace to melt them completely, it cannot be held that the said scraps were used by them in their factory and hence these materials were rightly alleged not to be their inputs. Thus the Noticee are found to have willfully and intentionally availed of irregular CENVAT credit on the said Scraps, in contravention of the provisions of Rule 3 read with Rule 9 of the CENVAT Credit Rules 2004.”

There are other factual finding rendered by the adjudicating authority and ultimately the proposal in the show cause notice was affirmed. Thus, when the order is put to challenge before the learned Tribunal, it is required that the learned Tribunal examines the facts and then come to a conclusion as to whether the order passed by the adjudicating authority was just and proper. It is thereafter the decisions can be applied and while applying the decision it has to be applied to the facts and circumstances of the case.

On reading of the impugned order, we find there is no such factual finding recorded by the learned Tribunal, which is the last fact finding authority in the hierarchy of authorities. Further, the Tribunal has not gone into the classification issue which appears to be the sole issue arising in the facts of Jai Raj Ispat Ltd.

In so far as the order impugned in CEXA 27 of 2021, the Tribunal has merely followed the other order and therefore, whatever reasons we have given above will equally apply to the said appeal.

Thus, for the above reasons, we are of the view that the substantial questions of law does arise for consideration in these appeals, more particularly, the question whether the Tribunal without going into the merits of the case and without noting the documents was right in simply passing the order on the basis of the decision in the case of Jai Raj Ispat Ltd. and whether the learned Tribunal

failed to note that the judgment in the case of Jai Raj Ispat Ltd. was pertaining to a classification issue.

With regard to the other substantial question of law, we have to necessarily leave it open because we are inclined to remand the matter to the Tribunal for fresh adjudication.

In the result, the appeals are allowed and the substantial questions of law nos.1 and 2 are answered in favour of the revenue and other question nos.3 to 6 are left open.

The matters are remanded to the Tribunal to consider the cases afresh and after taking note of the factual position, as well as the legal and various decisions that may be relied upon. The learned Tribunal shall pass a speaking order on merits and in accordance with law.

The stay applications stand closed.

(T.S. SIVAGNANAM, J.)

(HIRANMAY BHATTACHARYYA, J.)