Calcutta High Court

Commissioner Of Central Excise vs M/S. Steel Authority Of India ... on 3 February, 2022

Form No. (J2)

IN THE HIGH COURT AT CALCUTTA
SPECIAL JURISDICTION
ORIGINAL SIDE

P R E S E N T:

THE HON'BLE JUSTICE T.S. SIVAGNANAM
AND
THE HON'BLE JUSTICE HIRANMAY BHATTACHARYYA

CEXA/28/2021
IA NO.GA/2/2021

COMMISSIONER OF CENTRAL EXCISE, BOLPUR
VS.
M/S. STEEL AUTHORITY OF INDIA LIMITED

CEXA/28/2021
IA NO.GA/1/2021

COMMISSIONER OF CENTRAL EXCISE, BOLPUR
VS.
M/S. STEEL AUTHORITY OF INDIA LIMITED

Appearance :
Mr. Kaushik Dey, Adv.
Mr. Tapan Bhanja, Adv.
... for the appellant

Heard on : 03.02.2022

Judgment on : 03.02.2022

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T.S. SIVAGNANAM, J. :- Leave is granted to the learned advocate for the appellant to file affidavit-of-service in course of this

day.

We have heard Mr. Kaushik Dey, learned standing counsel duly assisted by Mr. Tapan Bhanja, learned counsel for the appellant.

There is a delay of 1031 days in filing the appeal. We have perused the affidavit filed in support of the condone delay application and we do not appreciate the manner in which the affidavit has been drafted, which seeks to shift the blame on the erstwhile panel counsel. Be that as it may, the affidavit is bereft of any particulars and it appears that a decision has been taken to file an appeal much after the expiry of period of limitation for filing the appeal.

Learned Counsel for the appellant submitted that the merits of the matter may also be taken into consideration.

It is seen that the notice was sent to the respondent along with annexures and the same has returned with the postal endorsement dated 08.01.2020 "refused by dispatch, SAIL, Bolpur Works". Since notice has been refused to be received by the respondent it is deemed to have been served on the respondent, and therefore, we proceed to hear the application and take a decision on merits. As observed earlier, since the appeal has been filed by the revenue under Section 35(G) of the Central Excise Act, 1944, we are to consider as to whether any question of law arises for consideration in this appeal. Therefore, for such reason alone, we exercise discretion and condone the delay. We do not appreciate the manner the affidavit in support of the condone delay petition has been drafted, however, we refrain from taking any action and sincerely hope that such mistakes shall not be repeated in future and a copy of this order be communicated to the concerned Commissioner of Central Excise, Bolpur, presently known as Commissioner of CGST and Central Excise, Bolpur Commissionerate as well as Principal Commissioner, CGST & Central Excise.

In the result the petition is allowed. The delay in filing the appeal is condoned.

CEXA/28/2021 Present appeal by the revenue filed under Section 35(G)(1) of the Central Excise Act, 1944 ('the Act' for brevity) is directed against the order dated 17th May, 2018 passed by the Customs, Excise and Service Tax Appellate Tribunal, East Regional Bench (Tribunal) in Excise Appeal no. 345 of 2010 arising out of an order in original No. 17/Commr./Bol dated 11.03.2010.

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

1. Whether in the facts and circumstances of the case, the Learned Tribunal is right and justified in allowing the appeal of the assessee without appreciating that based on Annual Dispatch Summary being an authorized Official record prepared by the respondent company for the purpose of management information and accounting purpose, the demand of central excise duty along with interest and penalty in terms of section 11A(2) read with 11AB and 11AC of the Central Excise Act, 1944 can be made against the respondent?

2. Whether the Learned Tribunal has committed gross error in not appreciating that when in terms of section 4 read with Section 212 of the Companies Act, 1956 the respondent failed to produce any document that M/s. ACC, DCSL is a subsidiary to the respondent Company then inclusion of clearance figures of an independent central Excise assessee i.e. M/s. ACC, DCSL, in the official Annual Dispatch summary maintained by the respondent company/assessee cannot be accepted?

3. Whether the Learned Tribunal is justified in allowing the appeal of the assessee without considering the provisions of Rules 4, 6 and 8 of the Central Excise Rules, 2002?

4. Whether the decisions in the case of (i) Oudh Sugar Mills Ltd. -vs- UOI [1978(2) ELT (J) 172 (SC)] and (ii) Centurian Laboratories Vs. CCE [2013 (293) ELT 689 (Tri-Ahmd)] relied upon by the Learned Tribunal are applicable in the present facts and circumstances of the case?

We have heard Mr. Kaushik Dey, learned standing counsel duly assisted by Mr. Tapan Bhanja, learned counsel for the appellant.

The appellant/department had issued show cause notice dated 13.07.2009 calling upon the respondent to show cause as to why duty of central excise amounting to Rs.3,95,75,201.00 including education cess shall not be demanded and recovered from the respondent under Proviso to Section 11A (1) of the Act; why interest on the same amount of duty at appropriate rate shall not be demanded under the provisions of Section 11AB of the Act and why penalty should not be imposed on the respondent under Section 11AC of the Act read with Rule 25(1)(a) of the Central Excise Rules, 2002.

The allegation against the respondent was that M/s. ACC DCSL was a separate entity registered under the Act and they purchased molten slag from the respondent for manufacture of granulated slag which is cleared by the said ACC, DCSL Works on payment of excise duty. It is further alleged that the respondent has nothing to do with the matter regarding the quantity of clearance of granulated slag made by M/s. ACC DCSL. Thus, it was stated that the respondent has attempted to mislead the department by taking the plea that clearance of granulated slag made from the 'new plant' pertains to DCSL. This in the opinion of the Commissioner was a misstatement made by the respondent with an intent to evade payment of excise duty and that the respondent has suppressed the actual quantum of clearance of the said goods in the statutory ER-1 returns and, therefore, proposed to invoke the extended period under the Proviso to Section 11(A)(1) of the Act.

The respondent submitted the reply stating that they being a bona fide assessee as well as a Central Government Enterprise was surprised to note that the appellant department had issued a show

cause notice ignoring the facts mentioned in their letter dated 28.01.2009. On the allegations made against the respondent that excisable goods which were produced or manufactured at the place of the respondent's premises and as per the show cause notice, the department's demand for granulated slag cleared under the heading "new plant", it was stated that the department was required to first consider and conclusively prove that the 'new plant' belongs to the respondent, and they were the manufacturer of granulated slag in the 'new plant'. The appellant, the adjudicating authority was not convinced with the reply and the reason given by the appellant for rejecting the reply vide order dated 11th March, 2010 is contained in paragraph 4.7 of the order. The conclusion arrived at by the appellant was that the respondent did not declare the quantity cleared from the new plant in the statutory returns and what they have done it to mislead the department with concocted facts.

Aggrieved by such findings the respondent preferred appeal before the Tribunal which was allowed by order dated 17th May, 2018 which is impugned in this appeal. After we have elaborately heard the learned Counsel for the appellant/revenue and carefully perused the materials on record, we are of the considered view that Tribunal rightly granted relief to the respondent. We support such conclusion with the following reasons:-

At the outset it needs to be pointed out that the order passed by the appellant dated 11th March, 2010, impugned before the Tribunal is a non-speaking order. Substantial portion of the order has been devoted by the appellant to reject the contention of the respondent that they are bona fide assessee and Government of India Enterprise. The reply given by the assessee that there is nothing to indicate to establish the allegation that the ' new plant' belongs to the respondent and they were the manufacturer of the granulated slag and without rendering any finding on the same, the proposal in show cause notice has been confirmed. Before the Tribunal, the respondent had placed the following facts:-

> "Such molten slag, in terms of a log term agreement, sold to M/s. Damodar Cement & Slag Ltd. (in short DCSL), who, after taking land on lease from the appellant, had set up a slag granulation plant on the said lease hold land. It is on record that the said DCSL got itself registered with the Central Excise for the manufacture of granulated slag. Copyof the agreement, as entered into, is annexed hereto and marked 'B'.
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> Since there was/is no facility for weighing Molten Slag, the quantity of such molten slag sold to DCSL was being determined by back calculation from the weight of granulated slag dispatched by the said DCSL in the ratio of 1:1. To ascertain the quantum of granulated slag sold per year to DCSL, the appellant prepared a statement showing the quantity of granulated slag dispatched by the appellant and the quantity dispatched by the said DCSL. The quantity dispatched by the appellant was shown in the table to the 'annual dispatch summery' under the heading 'old plant' and the quantity dispatched by the said DCSL under the head 'new plant'. The said annual statement is prepared for the management information and accounting purpose. The quantity mentioned under 'old plant' was fully in agreement with the quantity produced and cleared during the relevant as mentioned in the statutory

record and in the monthly return ER-1. A specimen copy of Page No. 163 of the annual dispatch summary for the financial year 2007-08 is annexed hereto and marked 'C'.

In or around November, 2008, while auditing the books of account, the CERA raised an objection for showing dispatch of granulated slag under two headings in the said Report, i.e. 'old plant' and 'new plant'. The appellant by its letter dated 28.01.2009 clarified that in the Operational Statistics Report, the dispatch figure of granulated slag generated in the plants of the appellant and in the plant of DCSL was shown under the headings 'old plant' and 'new plant'. It was stated that the said Annual Report was not a statutory document. The said DCSL purchased molten slag from the appellant for manufacture of granulated slag, which was/is being cleared by them on payment of duty. The said DCSL is a separate entity and duly registered under the Central Excise."

The above factual submission was tested for its correctness by the Tribunal and the Tribunal noted that the Central Excise Duty has been demanded by the appellant on the sole ground of difference between the quantity of the granulated slag shown in the Annual Operational Statistical Report and the quantity shown in the monthly ER-1 return filed for the period July 2004 to March, 2008. Apart from that there is no evidence of removal of goods from the factory. Thus the Tribunal noted that the show cause notice came to be issued solely based upon the difference in the two statements. The respondent referred to the agreement between them and M/s. ACC, DCSL under which they were required to sell 70% of the molten slag generated in their factory to the said company. Further it was not disputed that M/s. ACC, DCSL is situated in the same factory premises of the respondent and it is also not disputed that M/s. ACC DCSL cleared the granulated slag on payment of duty. The Tribunal after noting the facts has held that the entire demand has been confirmed by the appellant without ascertaining respondent's manufacturing capacity for the additional quantity of 6,91,315 M.T. based on which the demand was raised. Further the Tribunal noted molten slag cleared by the appellant to M/s. ACC, DCSL is exempted vide Notification 4 of 2006 and C-E dated 01.03.2006. The Tribunal further proceeded to consider as to what would be the significance of the entry " new plant" and noted that the annual dispatch summary is not a statutory record or an authorized document. The respondent explained that during the relevant period, respondent had one granulation plant which was called old plant, one plant was set up by M/s. ACC, DCSL which is in the factory premises of the respondent which was shown as 'new plant' in certain records and that the granulated slag emerging from this plant were cleared on payment of duty. Thus noting these facts, the Tribunal was satisfied with the explanation offered and also took note of an important fact that duty has been paid by M/s. ACC, DCSL with granulated slag, which has been recorded in the order passed by the Commissioner and there is no dispute with the said fact. Thus, we are of the view that the Tribunal rightly granted relief to the respondent considering the factual position and we find that no question of law arises for consideration in this appeal. Accordingly, the appeal fails and dismissed.

Consequently, stay application stands dismissed.

(T. S. SIVAGNANAM, J.) I agree.

(HIRANMAY BHATTACHARYYA, J.) GH/RS