(2015) 02 BOM CK 0352

In the Bombay High Court

Case No : Central Excise Appeal No. 27 of 2014

Agarwal Metals & Alloys Unit-II — APPELLANT

Vs

Commissioner of C. Ex. & S.T., Vapi — RESPONDENT

Date of Decision : 24-02-2015

Acts Referred:

Citation : (2015) 325 ELT 276

Hon'ble Judges : S.C. Dharmadhikari and S.P. Deshmukh, JJ.

Bench : Division Bench

Advocate : Vikram Nankani, Senior Counsel, Sushant Murthy and Nandagopal, Advocates i/b. Economic Laws Practice, for the Appellant; Pradeep S. Jetly, Advocate, for the Respondent

Judgement

1. This appeal by the assessee challenges the order passed by the Customs, Excise and Services Tax Appellate Tribunal dated 18th April, 2013. The learned senior counsel appearing on behalf of the appellant submits that this appeal raises substantial questions of law. The Tribunal was in error in confirming the Order-in-Original. There were several discrepancies and contradictions which were pointed out in the Order-in-Original. As a fact finding authority, the Tribunal was obliged to apply its mind to all the aspects of the controversy and render its findings. It could not have mechanically and causally approved the findings in the Order-in-Original. There has to be independent application of mind. That is completely lacking. The Tribunal''s order can be safely termed as perverse. It is vitiated by errors apparent on the face of the record. Each of the findings of the Tribunal being palpably erroneous result in miscarriage of justice. Mr. Nankani, would submit that the Tribunal rendered its judgment after a good five months of the conclusion of the hearing of the appeal. Such a long gap therefore, is bound to result in inconsistencies, errors and omission to refer to vital materials placed on record. In such circumstances, the questions as formulated for determination and consideration of this Court are substantial questions of law. The appeal deserves to be admitted on the same.

2. Mr. Nankani has taken us through the allegations in the show cause notice, the annexures to the show cause notice and the findings of the Tribunal on two major points. Mr. Nankani would submit that there is an allegation of availment of Cenvat credit on inputs which were not received in the factory of the assessee. The second charge or allegation is of clandestine removal of finished goods. There is a confusion in the finding of the Tribunal because the transporters who are supposed to bring in the material and styled as inputs have given their version, but they were not made available for cross-examination by the assessee. There are no admissions on the part of the assessee. Further, the Tribunal was in error in co-relating the receipt of inputs with the quantum of manufacture of finished products and their clearance. In that regard also the norms known as Standard Input Output Norms (SION) have been referred to but they are totally irrelevant for the matter and particularly in computation of the excise duty. In the circumstances, the findings of fact cannot be said to be in consonance with all the materials placed on record. Therefore, they are clearly perverse.

3. On the other hand, Mr. Jetly appearing for the Revenue submits that this appeal is nothing but an attempt seeking re-appreciation and reappraisal of the factual findings. The findings of fact which are consistent with the materials placed on record bind this Court. There is no perversity and if one is able to identify the two major issues and with materials placed on record in relation to both, then, the Tribunal''s findings and observations which concur with the Order-in-Original do not raise any substantial questions of law. The appeal deserves to be dismissed.

4. With the assistance of Mr. Nankani and Mr. Jetly, we have perused the appeal paper book including some of the documents to which are our attention was invited.

5. At page No. 71 of the paper book is a copy of the show cause notice which has been issued to the assessee. The assessee is stated to be engaged in manufacture of aluminium alloy ingots classifiable under Section 76 of the Schedule to the Central Excise Tariff Act, 1985. Its factory is at Silvassa. It is also availing the benefit of Cenvat credit under the provisions of the Cenvat Credit Rules and applicable at the relevant time.

6. There was specific intelligence received that the assessee availed of Cenvat credit on inputs not physically received/used in the factory and that is how it evaded the Central Excise duty. There was a visit paid by the officers of the Intelligence Unit of the Central Excise and Customs, Vapi. They verified the stocks. They held preventive checks and in the presence of two independent panchas, drew a panchanama. The authorized signatory of the assessee was present. The preliminary scrutiny of this stock revealed that Cenvat credit has been availed of wrongly and erroneously. The details thereof are set out in paragraph 2 onwards of the show cause notice. There are references made extensively to the authorized signatory of the assessee, spectro incharge of the

unit Shri Vivek Kumar Jha, Shri Sameer Agarwal, partner of the assessee and the contents of these statements together with that of one Vipul Vinod Kumar Agarwal partner have been set out in the show cause notice itself. The norms which have been referred to in the show cause notice are only for the purpose of inviting the attention of all concerned to the fact that there is a shortage of the inputs and which are stated to have been received in the factory and for production and manufacture of finished products, then, the extent of such shortage has to be determined. That is determined with the help of the norms and devised for that purpose.

7. Thereafter, on this point the show cause notice refers to inquiries conducted with the owners/brokers of vehicles shown to be used for transportation of certain inputs. The statements of the owners of M/s. Chauhan Road Lines are extensively referred in the show cause notice. The statements are recorded also of the drivers or connected persons. The statement of Satvantsingh Telsingh Saini Proprietor of M/s. Saini Road Carrier, Navi Mumbai, is referred to in paragraph 6.4.15. He says that he is proprietor of this carrier. He owns four trucks. That is how the bookings have been made and the details thereof are set out in their statements. The bills raised on M/s. Agarwal Metals or M/s. Agarwal Metals & Alloys, Silvassa, were placed before him and he stated that he knew the partners of the assessee personally. He received payment from them in cheques and apart from these two companies, the bills also contain the work of transport undertaken for M/s. Kolkatta Iron and Steel Company, which is connected with the assessee. When confronted with invoices this gentleman deposed that the aluminium ash have never been transported in trucks for the assessee. The trucks are utilised for transportation of goods of some other units and that is how reference is then made to the contents of this statement and of M/s. Saini Transport. The allegations have been summarized in the show cause notice and details in the annexures are relatable to the shortages, the discrepancies and the errors. Thus, the materials which were relied upon by the Revenue to support the charge of wrongful availment of Cenvat credit includes the statements of persons associated and connected with the assessee themselves.

8. We are not in agreement with Mr. Nankani that the Tribunal, while affirming a finding of fact as recorded in the Order-in-Original, has omitted from consideration anything which is relevant or germane to this issue. Further, its findings cannot be termed as vitiated by non-application of mind. They are not palpably, erroneous, as contended, as well. In that regard, there is merit in the contention of Mr. Jetly, that this appeal is nothing but an attempt at re-appreciation and reappraisal of the factual findings.

9. We find that the Tribunal was fully aware of the demand raised in the show cause notice and particularly of wrongly availment of Cenvat credit. It has in relation to the first charge or allegation exclusively referred to the investigation carried out, the allegations in the show cause notice, the relevant period and the statements. If it has found that there is enough material to indicate that the

credit which has been availed of is relatable to inputs not received or not used in the factory of the assessee, then, we do not think that its overall agreement with the findings of the Commissioner calls for interference by us. Once the findings of the Tribunal have to be read in their entirety, then, it is not for us to enter into the factual arena. Paragraph 2.2. of the Tribunal''s order has been referred by Mr. Nankani. He is critical of the fact that the Tribunal was unaware as to who could be the persons whose statements were relevant for the purpose of establishing and proving the allegation of the wrongful availment of Cenvat credit. There is some force in the complaint of Mr. Nankani that enormous delay in rendering the decisions invariably results in errors creeping in the order and decision of a last fact finding authority like a Tribunal. We are of the view that the Tribunal should avoid such a delay. If it is possible to pronounce orders and decisions at the earliest and expeditiously, then, the Tribunal must endeavour to do so. That it is burdened or overburdened is no excuse. However, we do not find any reason to interfere with the orders of both the Commissioner and the Tribunal because of want of absolute co-relation or some discrepancies. Once the Tribunal has found that the transportation as claimed and of the goods has not taken place at all, then, coupled with other materials, the Tribunal rightly arrived at the conclusion that there has been a wrongful availment of Cenvat credit. In the circumstances, we do not think that the Tribunal''s order can be termed as perverse. Mr. Nankani criticized the Tribunal for relying too much on the statement of the owner of M/s. Saini Transport. He submits that the appellants came on the scene later than the supplies effected by this agency. However, it is apparent that there were other materials on record including statements of transporters, staff and technical persons. The Tribunal''s conclusion on mismatch of the inputs and the final product is thus correct.

10. The complaint that the Tribunal has while dealing with the second aspect or second allegation with regard to clandestine removal of dutiable goods extensively and wholly relied upon SION norms but we do not find that such is the case. One of the relevant test and norms could be the SION. They would establish the importation of the raw materials and the co-relation with the obligation of the importers for export. These norms were devised after widespread consultation. In the circumstances, apart from the statements recorded, the contents of the panchanama and the details as referred to in various annexures to the show cause notice additionally SION norms have been taken into account and referred beyond that we do not find anything and which could be said to be objectionable.

11. There are elaborate findings with regard to clearance of the aluminium alloy ingots (final product), without payment of duty. The Tribunal has found once again that parties such as M/s. Saini Road Carriers have confirmed that some of the materials which are stated to have been transported as such were not billed. We have already found and with reference to the allegations in the show cause notice that the road carrier, the records, the documents in their custody and possession have been referred to and independent scrutiny of the contents of the

statements of persons connected with the assessee and its business. It is a cumulative reliance and on these materials which led the Tribunal to conclude that the discrepancies and errors in the documents of the carriers would reveal that some of the materials were never transported. Those were transported, but to distinct parties. In the circumstances, we do not find that any prejudices caused to the assessee by not making available persons for cross-examination by them.

12. There is no miscarriage of justice. Eventually, prejudice has to be demonstrated in all such cases and if the complaint is of breach of principles of natural justice. Some of the principles are basic and fundamental and their breach or violation is not pardonable. However, in relation to some of the principles or ingredients thereof, the parties complain that there is a breach or violation thereof. However, there must be independent proof of the prejudice caused. We do not find any prejudice being caused.

13. The written submissions before the Tribunal have been relied upon. The findings of the Tribunal are termed to be ex facie, erroneous and contradictory. We have found that these written submissions may not have been reproduced or all the details thereof are not incorporated in the findings and conclusions of the Tribunal, but the gist of the same has been extensively referred to by the Tribunal. In the circumstances, the allegations made in the show cause notice on both the counts have been held to be established and proved. The concurrent findings arrived at by the above process, cannot be termed as perverse or vitiated by any error of law apparent on the face of the record. Resultantly, this appeal does not raise any substantial question of law. It is dismissed.

14. Mr. Nankani, submits that we may make reference to one of his complaints and which has been made with some vehemence. He submits that there is a reference to 663 Metric Tons of the inputs which are supposed to have been not received or used in the factory of the assessee. However, the assessee has accounted for receipt of 579 Metric Tons. The statements of transporters and others would relate to only 84 Metric Tons. Therefore, the shortage or deficit is only of this much amount. The Cenvat credit could not have been disallowed and in its entirety claims Mr. Nankani. In that regard he refers to the written submissions tendered and the contents of the show cause notice.

15. In the circumstances, he submits that there is a necessity of reworking the credit and the extent to which it could have been disallowed.

16. In that regard, we have perused the written submissions, a copy of which is page 454 of the paper book. The set of written submissions and the details which are stated to be forming part of the record go to show that 579 Metric Tons of aluminium ingots were received as claimed of the 663 Metric Tons alleged to have not been received. Therefore, it is an approximation in relation to 84 Metric Ton and that the transporters have deposed as having not been transported to the appellant''s factory. In relation to that we do not find any reason for either

direction being issued to rework the quantum of wrongful credit or admit this appeal on that count as urged. There were three inputs which the appellant-assessee failed to receive. These were aluminium ingots, aluminium scrap and copper scrap (DREAL) which go in the manufacturing of their final product. We do not think that we can undertake an exercise and at this further appellate stage to find out as to how many metric tons of each of these inputs were transported and received or were stated to be not transported and received. If the total quantity is stated to be as above, then which of the cenvatable goods or inputs have been transported and received and which have not been received, is an exercise which has been carried out by the Order-in-Original and confirmation thereof by the Tribunal. We find from the reading of the Order-in-Original particularly paragraphs 38.2.1 to paragraphs 38.2.6 that on each of these cenvatable credits, the cenvatable inputs have been referred and the computation has been made by the Commissioner by referring to aluminium ingots, aluminium scraps and copper scraps. This is by establishing the co-relation of their transport and receipt. In such circumstances, now on the basis of some general complaint or vague statement, we cannot direct any reworking or proceed to admit the appeal. The findings in the Order-in-Original in their entirety have been confirmed by the Tribunal. In the circumstances, we do not find that any reason for interference is made out on this count. As a result of the above discussion, the appeal is dismissed. No costs.

