

(2010) 12 OHC CK 0016
In the Orissa High Court
Case No : Writ Petition (C) No. 18267 of 2010

Birla Tyres

APPELLANT

Vs

Commissioner (Appeals), Central Excise, Customs and
Service Tax and Others

RESPONDENT

Date of Decision : 23-12-2010

Acts Referred:

Central Excise Rules, 1944 — Rule 49
Central Excise Rules, 2002 — Rule 21
Central Excises and Salt Act, 1944 — Section 11A(1), 11A(2), 11AC, 15, 33A
CENVAT (Credit) Rules, 2004 — Rule 14
Constitution of India, 1950 — Article 226, 227
Customs Act, 1962 — Section 129E

Citation : (2010) 12 OHC CK 0016

Hon'ble Judges : V. Gopala Gowda, C.J.;B.N. Mahapatra, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

V. Gopala Gowda, C.J.—The petitioner has approached this Court questioning correctness of the stay order dated 07.10.2010 (Annexure-1) passed by the Commissioner (Appeals), Central Excise, Customs and Service Tax (O.P. No.1) [for short, "Commissioner (Appeals)"] in file No.V(2)XAP/67/B-1/2010 directing the petitioner to deposit a sum of Rs. 35,00,000/- by 25.10.2010 towards duty as against a total demand confirmed amounting to Rs. 36,35,722/- payable along with interest and penalty of the aforesaid amount imposed in the case. On deposit of this amount, the requirement of pre-deposit of the balance amount of duty with interest and penalty imposed on the petitioner/appellant shall be dispensed with and the appeal will be taken up for final hearing on due communication of compliance of stay order by 25.10.2010.

2. Urging various facts and Jegal contentions, petition was filed before the appellate authority, i.e., Commissioner (Appeals) on 6th April, 2010 raising various grounds, inter alias, contending that the Addl. Commissioner has not

taken into consideration the grounds on which the appeal filed by the petitioner challenging the validity and legality of the said order dated 29.12.2009 (Annexure-2) of the Addl. Commissioner, and the grounds of appeal urged before the Commissioner (Appeals) in appeal would make it clear and apparent that the order under Annexure-2 passed by the Addl. Commissioner is erroneous and unsustainable on the face of it, and the petitioner has got a strong prima facie case in its favor, and further requiring the petitioner to deposit a part of the duty demanded and penalty imposed as pre-deposit to maintain the appeal before the appellate authority would be inequitable, unjustified and unfair which will result in undue hardship to the petitioner and balance of convenience shall be entirely in favor of the order as prayed, viz., stay operation of any further action on the basis of the order in original No.06/STAY/CE/BBSR-I/2010 challenged in the appeal. The said application has been examined and in support of its contention Dr. Samir Chakraborty, learned counsel for the petitioner placed reliance upon the judgments of the Hon''ble Supreme Court in *Indu Nissan Oxo Chemicals Ind. Ltd. Vs. Union of India (UOI) and Others*, and *Ravi Gupta Vs. Commissioner Sales Tax, Delhi and Another*, wherein the apex Court held that for dispensation of pre-deposit, two requirements, i.e., consideration of undue hardship and imposition of conditions to safeguard the interest of Revenue have the relevant consideration. Therefore, while dealing with an application for dispensation of pre-deposit in an appeal prima facie two conditions, viz., undue hardship to such person and safeguarding the interest of Revenue are to be kept in mind. The said order is passed after examining Section 129E of Customs Act, 1962.

3. In *Ravi Gupta (supra)*, the apex Court with reference to Section 43(5) of Delhi Sales Tax Act, 1975 held that stay petition should not be disposed of in a routine manner unmindful of the consequences. The apex Court further observed that there can be no rule of universal application in such matter and the order has to be passed keeping the factual scenario in view.

4. Reliance was also placed on another decision of the Hon''ble Supreme Court in *Collector of Central Excise Vs. H.M.M. Limited*, wherein it is held that show cause notice must contain an averment to that effect pointing out specifically as to which of the various commissions or omissions stated in the proviso to Section 11A(1) of Central Excises & Salt Act, 1944 had been committed by assessee and adjudicating authority must specifically deal with assessee's contention in rebuttal thereof. Penalty not imposable unless Department is able to sustain its demand show cause notice which was under challenge on the ground of limitation.

5. Reliance was also placed upon the larger Bench decision of the Principal Bench of CESTAT, New Delhi in *Grasim Industries Vs. Commissioner of Central Excise, Indore*, 2007 (208) E.L.T. 336 that no condition regarding reversal of credit should taken in respect of inputs used in such destroyed goods provided under Rule 49 of erstwhile Central Excise Rules, 1944 and Rule 21 of Central Excise Rules, 2002. Another decision of the Tribunal of CESTAT, West Zonal Bench,

Mumbai in Ghanshyam Dyeing & Printing P. Ltd. Vs. C.C.E. & C., Belarpur, 2010 (249) E.L.T. 366 in support of the proposition reversal of credit on inputs and packing materials used in final products destroyed in fire Notification No.33/07-C.E. (NT.) has only prospective operation in the said case. In view of the larger Bench decision in Grasim Industries referred to (supra) where remission was allowed of duty paid on finished goods, destroyed in fire, it was held that there was no provision for reversal credit taken on inputs. The High Court of Karnataka in Commr. of LTU Vs. Toyota Kirloskar Motors Pvt. Ltd., after examining and considering Section 11A(2) of Central Excise Act, 1944 on the question of demand held that the same is barred by limitation. In such regard, the said Court relied upon judgment of Hon'ble Supreme Court in Kaur & Singh Vs. Collector of Central Excise, New Delhi, 1997 (94) E.L.T. 289 (S.C.) and Pratibha Processors and others Vs. Union of India and others, .

6. Learned counsel for the petitioner further invited our attention to the reasons assigned in the order impugned contending that Commissioner (Appeals) has not considered the valid grounds urged in the appeal against the order of Addl. Commissioner reversing the Cenvat credit availed by the appellant/petitioner to the extent of Rs. 36,35,772/-towards excise duty under Rule 14 of the Cenvat Credit Rules, 2004 read with proviso to Section 11A(1) of Central Excise Act, 1944 for recovery of interest from the petitioner with effect from the date of taking credit till the date of payment /reversal in terms of Rules, 2004 and Act, 1944 and penalty of Rs. 36,35,772/- under Rule 15 of the said Rules read with Section 11 AC of the said Act, 1944 prima facie bad in law as the assessing authority has failed to take into consideration the reply to the show cause notice submitted by the petitioner on 28.07.2009 along with particulars furnished giving details of machineries, stores and spares burnt or destroyed in fire broke out on 25.10.2005 in the chemical floor of the factory. Therefore, imposing interest and penalty in the order impugned in the appeal is erroneous finding and non-consideration of the show cause notice is a good ground for setting aside the impugned order in the appeal and therefore made out a prima facie case to dispense with the pre-deposit as required under the statute. Non-consideration of this important aspect of the matter has rendered the order failure of exercise of discretionary power properly by the appellate authority and reasons assigned in paragraphs 8 and 9 of the impugned order with reference to their letter dated 19.04.2007 is erroneous in law. Therefore, the same is subject to judicial review of this Court under Articles 226 and 227 of the Constitution and justified for grant of the prayer otherwise it would cause huge financial hardship and injustice to the petitioner if not deposits the pre-deposit amount along with interest and penalty imposed on it within the date specified. Therefore, it is contented by the learned counsel that the impugned order is a non-speaking one and hence the same is liable to be quashed.

7. Mr. Pattnaik, learned Jr. Standing Counsel on behalf of the O.P.-Department sought to justify the impugned order placing strong reliance upon the findings/ reasons recorded at paragraphs 8 to 12 of the impugned order contending that

the appellate authority with reference to the grounds urged in the application filed by the petitioner seeking dispensing with the pre-deposit and also the finding and reasons recorded by the assessing authority, namely, the Addl. Commissioner (Adjudication). He contends that the same is passed on the materials available before him and after considering all the records and written submissions made by the assessee. The plea taken in the reply to the show cause notice that the machineries or the stores or the spares involved which were damaged in the fire are whether goods under Cenvat credit / Modvat credit has not been availed by them does not disclose from the materials in support of such assertion and those materials were goods and procured/purchased prior to March, 1994 and further he placed reliance on the assessee-petitioner having offered opportunity of being heard in person on four different dates but he did not appear for personal hearing. Hence, the assessing authority had no option but to adjudicate the case basing on the evidence available on record after giving sufficient opportunity to the petitioner u/s 33A of the Central Excise Act. Therefore, he submits that the grounds urged in the appeal showing that the finding and reasons recorded, which are contrary to the particulars furnished by the petitioner in the reply to show cause notice, are not considered; Therefore, the finding and reasons recorded are erroneous and therefore a prima facie case made out in the appeal for non-deposit of the pre-deposit amount, as required under law, and the same is not tenable in law. Therefore, he has prays for dismissal of the writ petition.

8. With reference to the above said rival legal contentions we have carefully examined the impugned order and also the order impugned in the appeal filed by the petitioner before the Commissioner (Appeals) with a view to find out as to whether the interim order passed by the appellate authority warrants interference when the same has been passed in proper exercise of discretionary power and what order?

9. Our answer to the aforesaid first point is in the negative for the following reasons. Before the assessing authority, the petitioner has not appeared and produced the records in support of his claim as contented in the reply to the show cause notice. This fact is recorded in paragraphs 5.2 and 5.3 of the order impugned in the Appeal and thereafter in the finding recorded it is held that there is no material disclosed in support of this assumption or in support of the purported conclusion that alleged credit was availed on the machineries, stores and spares at the rate of 16.32% that those were damaged in fire and destroyed and the goods which were damaged in fire, were the goods whereon no Cenvat credit or Modvat credit had been availed by them. Further, with reference to claim of the assessee that no excise duty element in claiming compensation from the Insurance Company has been included in respect of the machinery, stores and spares and the said claim has not been ratified by any authentic material particulars. Therefore, it is held that the contention of the assessee under reply is neither corroborated nor produced any valid documents in support of its claim. The finding and reasons recorded in the order impugned in the appeal is based

on records and written submissions made by the assessee. With reference to the said finding and reasons the stay application for waiver of pre-deposit was examined by the appellate authority. In paragraph 8 of the impugned order, the appellate authority held that the petitioner has not furnished any documents to prove that no credit has been availed against such capital goods and further he is of the view that as the case involves huge revenue, the same cannot be decided without going through the documents, on which the claim relies but it did not furnish before the original authority and the appellate authority as well. The claim made by the petitioner that it was intimated by the Audit Officers vide their letter dated 19.04.2007(Annexure-C to the appeal memorandum) that there was no duty involvement on machineries, stores and spares and duty involvement of Rs. 33,20,536/- on raw materials was reversed by them. It is urged by the petitioner that overlooking the said letter, the Addl. Commissioner had issued the show cause notice and then confirmed the said letter. The said letter has been examined by the appellate authority who made an observation that it does not carry any supporting evidence that the goods destroyed were capital goods purchased much before introduction of the Modvat Scheme. Neither the same contains the list of such goods nor the date of purchase. The detailed statement attached to the said letter only had one column "Insurance claimed for Rs. 5,91,37,738/- on account of fire at chemical floor". Therefore, the claim made by the petitioner that it had given all documents in support of its assertion is erroneous in law and the legal ground urged by the counsel for the petitioner that the appellate authority did not examine the same with reference to the citations cited before the authority is also tenable in law. We have examined the decisions of the Supreme Court, the decisions of CESTATS and the High Court of Karnataka. In fact, those decisions did not support the case of the petitioner having regard to the finding and reasons recorded in the order of determination passed by the determining authority. Therefore, reliance placed upon the decisions of the Supreme Court, CESTAT as well as the High Court are misplaced and attributions are also not applicable to the facts situation either on record or the waiver of the imposed duty, interest and penalty was examined on merits with reference to legal contentions urged herein with regard to the reversal of input credit and imposition of duty, interest and penalty in the backdrop of the contentions urged by the assessee in some of the cases on the question of limitation and merits of the case. Therefore, the reliance placed upon the decisions of the CESTATs, Mumbai and New Delhi and High Court of Karnataka referred to supra have no application to the fact situation; hence the reliance placed upon those decisions are not applicable.

10. For the reasons stated supra we are of the view that the order impugned in the writ petition does not call for interference both on merits and the legal grounds urged in the writ petition are not tenable in law. Apart from the said reasons, having regard to the categorical finding recorded in the order by the determining authority and the reasons recorded by the appellate authority are cogent reasons on the basis of which the records perused by the determining

authority the same were required to be considered by the appellate authority. Therefore, the appellate authority has rightly rejected the stay application seeking for waiver of pre-deposit amount imposed upon the petitioner. Hence, the writ petition fails being devoid of merit.

The writ petition is accordingly dismissed.