

(2015) 03 BOM CK 0118

In the Bombay High Court

Case No : Central Excise Appeal No. 261 of 2014

CEAT Limited

APPELLANT

Vs

The Commissioner of Central Excise

RESPONDENT

Date of Decision : 04-03-2015

Acts Referred:

Additional Duties of Excise (Goods of Special Importance) Act, 1957 — Section 3
Civil Procedure Code, 1908 (CPC) — Order 39 Rule 1, Order 39 Rule 2, Order 39 Rule 39
Constitution of India, 1950 — Article 141
Finance Act, 2005 — Section 124

Citation : (2015) 321 ELT 122

Hon'ble Judges : S.P. Deshmukh, J.; S.C. Dharmadhikari, J.

Bench : Division Bench

Advocate : V. Sridharan, Senior Advocate, Prakash Shah, Prasad Paranjpe, Ashish Philips, Anjali Hirawat, Jas Sanghavi and Niyati Hakani, Advocates i/b. PDS Legal, for the Appellant; A.S. Rao and Suchitra Kamble, Advocates for the Respondent

Judgement

1. This Appeal by the assessee challenges the order passed on 12th June, 2014, by which the Customs, Excise and Service Tax Appellate Tribunal (West) Zonal Customs Branch at Mumbai dealt with an application seeking dispensation of the condition of pre-deposit and stay of recovery pending disposal of the Appeal.
2. The Appellant assessee before us filed an Appeal aggrieved and dissatisfied with the order passed on 1st November, 2013, by the Commissioner of Central Excise Mumbai-III Commissionerate (Adjudication order). The Adjudicating Authority confirmed a duty demand of Rs. 6,59,36,795/- against the appellant assessee along with interest thereon being the ineligible cenvat credit availed by the appellate assessee during April/May 2007. A penalty of Rs. 50,00,000/- had also been imposed under Rule 15 of the Cenvat Credit Rule, 2004.
3. Upon perusal of the order passed by the Tribunal, we are of the view that this Appeal raises substantial question of law. It is, therefore, admitted on the

following substantial questions of law:

(i) Whether in the facts and circumstances of the present case and in law was the Tribunal justified in passing a detailed order at the stage of considering a stay application filed by the assessee and virtually concluding the issue?

(ii) Whether the Tribunal in the present facts and circumstances and in law erred in applying the test that prima facie an arguable case something which merits attention of the Tribunal and not a case which will ultimately succeed.

(iii) Whether under the facts and circumstances, the Hon'ble Tribunal was right in holding that the Appellants are not entitled to utilize the credit of AED (GSI) of Rs. 6,59,36,795/- for payment of BED on tyres, on the ground that Explanation to Rule 3(7)(b) of Cenvat Credit Rules, 2004 would be applicable only in respect of AED (GSI) levied after 1.4.2000, apart from such AED (GSI) being paid after 1.4.2000?

(iv) Whether under the facts and circumstances, the Hon'ble Tribunal is correct in holding that the credit of AED (GSI) in dispute cannot be utilized for payment of BED on the final products on the ground that the said AED (GSI) pertained to the period 16.3.1995 to 2.6.1998, even though the AED (GSI) was paid after 1.4.2000?

4. Mr. Sridharan, the learned senior counsel appearing on behalf of the assessee submits that the Tribunal has seriously erred in holding that the Appellant has no prima facie or arguable case. In the process of finding out whether there is any such case, the Tribunal has rendered elaborate findings and concluded the questions and issues in the pending Appeal. Mr. Sridharan submits that the attempt of the Tribunal in finding out a prima facie case or an arguable point should not result in the point or the issue being concluded. It is only a cursory reference to the submissions and the relevant material at the interlocutory stage which should result in the Tribunal either concluding that the Appellant raises no arguable or prima facie case or has such a case. In the event, the Appeal is found to be completely without merit and raising points and issues concluded by earlier adjudication, right up to the highest Court, or raises such issues which on the face of it would not be legally tenable, then alone the conditions, as are being imposed in the present Appeal can be imposed. Else, a balance will have to be struck by the Tribunal so that the right of the parties like the Appellant is not rendered illusory or totally meaningless. By imposition of the condition of deposit of entire duty amount at the interlocutory stage itself, so also by rendering elaborate findings and conclusions, the right of Appeal is completely lost to the appellant. The binding and sweeping conclusions which have been recorded will now stare in the face of the assessee even at the final hearing of the Appeal. In such circumstances, the Tribunal's order is totally illegal and erroneous. The discretion has not been exercised judiciously and in a sound manner, but with some predetermined notions particularly about the conduct of the appellant assessee. He would, therefore, submit that the Appeal be allowed and this Court

must intervene even at this interlocutory stage to balance the right and equity.

5. On the other hand, Mr. A.S. Rao appearing on behalf of the Revenue would support this order and submit that the Tribunal has found as to how the assessee is delaying the matter. If the assessee is tried to avail of the cenvat credit on the goods, by erroneously terming them as an inputs, that credit was not available at all. Once it was found to be wrongfully availed of and the demand of the Revenue has been confirmed, then, the Tribunal was justified in insisting on deposit of the entire sum. In the circumstances, this Appeal does not raise any substantial questions of law. It deserves to be dismissed.

6. With the assistance of the learned counsel appearing for both sides, we have perused the Memo of Appeal and the annexures including the impugned order.

7. Before we proceed, we wish to invite the attention of the Tribunal to some pertinent observations of the Hon"ble Supreme Court in the case of United Commercial Bank Vs. Bank of India and Others, . The Hon"ble Supreme Court while considering as to whether an injunction can be granted to restrain encashment of Bank guarantee by resorting to the powers conferred in a trial court/civil court under order 39 of the Code of Civil Procedure held as under:

"50. No injunction could be granted under Order 39, Rules 1 and 2 of the Code unless the plaintiffs establish that they had a prima facie case meaning thereby that there was a bona fide contention between the parties or a serious question to be tried. The question that must necessarily arise is whether in the facts and circumstances of the case, there is a prima facie case and, if so, as between whom? In view of the legal principles applicable, it is difficult for us to say on the material on record that the plaintiffs have a prima facie case. It cannot be disputed that if the suit were to be brought by the Bank of India, the High Court would not have granted any injunction as it was bound by the terms of the contract. What could not be done directly cannot be achieved indirectly in a suit brought by the plaintiffs.

51. Even if there was a serious question to be tried, the High Court had to consider the balance of convenience. We have no doubt that there is no reason to prevent the appellant from recalling the amount of Rupees 85,84,456/-. The fact remains that the payment of Rs. 36,52,960/- against the first lot of 20 document made by the appellant to the Bank of India was a payment under reserve while that of reserve as well as against the letter of guarantee or indemnity executed by it. A payment "under reserve" is understood in banking transactions to mean that the recipient of money may not deem it as his own but must be prepared to return it on demand. The balance of convenience clearly lies in allowing the normal banking transactions to go forward. Furthermore, the plaintiffs have failed to establish that they would be put to an irreparable loss unless an interim injunction was granted."

8. Thus, the test is whether there was a bonafide contention between the parties or a serious question to be tried. That one of the party or applicant establishes

that it had a prima facie case means there was a bonafide contention between the parties or a serious question to be tried. Then, comes the other question which the Supreme Court dealt with and applicable at a interlocutory stage, namely, even if there was a serious question to be considered, the High Court had to consider the balance of convenience.

9. In the present case, the Tribunal was aware of this settled test namely whether there is a prima facie point or arguable case and whether the appellant assessee or party before the Tribunal had established that there was a financial hardship. However, the Tribunal lost sight of the fact that the tests, as are evolved by the Hon"ble Supreme Court, cannot be taken to such ridiculous extreme or viewed with such rigor that would make it impossible for anybody to obtain an interim stay or a waiver, partial or full, in his favour of the condition of pre-deposit.

10. In that regard, another principle that this Court has evolved in the decision reported in the case of Inayat Hussain Fakhruddin and Anr. Vs. Union of India and Anr. 1979 Mh. L.J. Page 515, ought to be borne in mind.

"19. Mr. Potey, however, lastly urged an argument based upon sub-rule (2) of rule 16 and the circumstances that a different view has been taken as to the operation of Section 281 and rule 16 by another High Court, thereby indicating that a triable issue arises between the parties. The first contention indicating that a triable issue arises between the parties. The first contention which Mr. Potey raised based upon sub-rule (2) of rule 16 was, that the words used in sub-rule (2) are "where an attachment has been made". Mr. Potey contended that this would defer to the physical date of attachment and not the deemed date. According to Mr. Potey under rule 51 a fiction of relation back is created. There is in Mr. Potey's opinion a conflict between rule 16 sub-rule(2) and rule 51 and if there is a conflict, it was Mr. Potey's submission that it should be resolved in favour of the assessee. The enactment being a fiscal enactment it should be so construed that the benefit should go to the assessee. I do not wish to express any opinion though I am not prepared to be taken in with the argument advanced by Mr. Potey. However, there is some substance in what he says that in view of the possibility of an interpretation of sub-rule (2) as to the fact of attachment and the different interpretation than the one which has been placed by Kerala High Court by me on section 281, a triable issue between the parties arises. It is true that when a Court has to consider whether an injunction should be granted or otherwise it has to consider only a prima facie case. A prima facie case, it is well laid down, does not mean a case which will succeed, but a case which is not such as is apparently barred by any provisions of law, and in respect of which something can be said in favour of the plaintiff. In view of what I have said so far, there seems to be some substance in Mr. Potey's contention that the minimum to which he is entitled is to show that he has some sort of prima facie case, which requires further investigation. It is not without some reluctance that I am inclined to think in the manner in which Mr. Potey wants me to do. But that

can only be on terms. A litigation of this kind should not be used for purpose of defeating the provisions of tax laws. They have an impact on the public and involve rights and interest of other persons who are not before the Court apart from having a general effect upon the assesseees and defaulters and tax dodgers. Taking, therefore, an overall view of the matter, though with some reluctance, I am inclined to grant an interim injunction in favour of the plaintiffs, provided the plaintiffs deposit a sum of Rs. 10,000 each in both the suits within three weeks from the date of this order. Upon failure of the plaintiff to deposit the amount, the injunction as prayed will stand vacated. Mr. Shelat says that in respect of the property which is the subject matter of A.O. No. 31 of 1977 confirmation has already taken place and a sale certificate issued. That the department thereafter is not responsible to do anything with reference to the auction purchaser of the property. If that is so, then it would be obvious that the injunction would be infructuous so far as that property is concerned. Interim injunction be issued on the above terms restraining the defendant from confirming the sale."

11. As this Court has succinctly summarized to a prima facie case, then the law laid down is that a case which is not apparently barred by any provisions of law and in respect of which something can be said in favour of the plaintiff.

12. Equally as held by the Hon"ble Supreme Court in the case of Shri Kihota Hollohon Vs. Mr. Zachilhu and others, , the purpose of interlocutory orders is to preserve in status-quo the rights of the parties, so that, the proceedings do not become infructuous by any unilateral overt acts by one side or the other during its pendency. If we apply these tests to the facts and circumstances of the present case what we note is that the Tribunal had before it an Appeal of the assessee challenging the order of the commissioner who is manufacturer of tyre. It also manufactured the dipped nylon tyre cord fabrics during 16th March, 1995 to 2nd June, 1998. The dipped nylon tyre cord fabrics was subject to Additional Duty of Excise (in lieu of sales tax) under the Additional Duty of Excise (Goods for Special Importance) Act, 1957 (hereinafter referred to as "AED (GSI)", for short). This duty liability was not discharged, but disputed by the appellant assessee. The issue of classification of the goods was raised and which took the matter right up to the Hon"ble Supreme Court of India. The Revenue succeeded before the Hon"ble Supreme Court. In the meanwhile, 23 show cause notices were issued to the assessee for recovery of AED(GSI) on dipped nylon tyre cord fabrics and vide order dated 28th February, 2006, the duty demand was confirmed.

13. The appellant assessee paid this duty demand of AED (GSI), but took credit of the same in their cenvat credit account under AD(GSI). They utilized the credit of AD(GSI) towards payment of Central Excise Duty (basic excise duty) on tyres cleared in April 2007. Prior to 1st April, 2000, the credit of AD(GSI), all inputs could have been utilized only for payment of AD(GSI) on the finished products. However, with effect from 1st March, 2003, the Cenvat Credit Rules were amended, so as to provide for utilization of AD(GSI), towards payment of basic

and special excise duty on finished products. By Section 88 of the Finance Act, 2004, the cenvat credit rates were retrospectively amended so as to restrict the utilization of AD(GSI) credit only when such duty was paid on or after 1st April, 2000. Further, by Section 124 of the Finance Act, 2005, the law was amended providing for cenvat credit of AD(GSI) leviable and paid prior to 1st April, 2000, which had been utilized for payment of basic and special excise duty which was not permissible in view of the retrospective amendment made in the Finance Act, 2004. Since in the present case the duty payment towards AD (GSI) pertained to the period 16th March, 1995 to 7th June, 1998, the Revenue took the view that the assessee is not eligible to pay and utilize the credit for payment of excise duties other than AD(GSI). Accordingly, a show cause notice dated 29th July, 2007, was issued for recovery of the wrongly utilized credit. That was confirmed by the order of the Commissioner dated 1st November, 2013. It is the correctness of that order which is put in issue in the Appeal before the Tribunal.

14. The argument of the assessee's counsel has been noted and from paragraph 3.1 to 3.5. The Revenue's counsel argued to the contrary and the said arguments are noted from paragraph 4.1 to 4.3. One of the arguments, inter-alia, was that the assessee's reliance on the decision of the High Court of Punjab and Haryana in the case of Goodyear India Limited Vs. CCE 2006(199) ELT 842ENDLAWFINDER was misplaced. The decision in Goodyear (supra) was challenged by the Revenue in the Hon'ble Supreme Court by filing a Special Leave Petition 6312 of 2008. Though the High Court of Punjab and Haryana decision's in the case of Goodyear (Supra) was not interfered with and the Revenue's Special Leave Petition was dismissed, the question of law was kept open. Thus, there is no finality attached to this judgment of Punjab and Haryana High Court and it will not bind the Revenue.

15. In dealing with these contentions, what the Tribunal has noted from paragraph 5.2 onwards is that the credit of duties specified in Clauses (I) to (XI) of Rule 3 of the Cenvat Credit Rules, would indicate that the credit of duties paid on inputs or capital goods could be taken if such input goods are received in the factory of the manufacturer only on or after 10th September, 2004, thus, there is merit in the contention of the Revenue that in the present case credit was taken in June 2006. The applicable Rules would be Cenvat Credit Rules of 2004, as per which the credit could not have been taken since the inputs were received/captively consumed in the factor of manufacturer prior to 1st April, 2000.

16. Thereafter, in paragraph 5.3, the contentions of the assessee with regard to amendment to the Cenvat Credit Rules have been dealt with.

17. These arguments are sought to be met by relying on a decision of this Court in the case of N.B. Sanjana, Assistant Collector of Central Excise, Bombay and Others Vs. The Elphinstone Spinning and Weaving Mills Company Ltd., We note that the Tribunal was required to labour this much and at this prima facie stage only because it was not in agreement with the assessee's advocate that there being a decision of the High Court of Punjab and Haryana in favour of the

assessee and in the field, there is an arguable case in assessee's favour. Therefore, this is a fit case for complete waiver of the condition of pre-deposit. In that regard, the Tribunal found that it could justifiably place reliance on some of its larger bench decisions. The Tribunal should have indicated as to how and in what manner these decisions including that of its larger bench have a bearing on the controversy and how they would assist it in construing and interpreting the explanation which it finds below sub-rule (6) of Rule 3 of the Cenvat Credit Rules, 2002. It is with some pain and anguish that we note that from paragraph 5.6 onwards the Tribunal finds some reasons not to give effect to the judgment and decision of the High Court of Punjab and Haryana or not to follow the decision of the Punjab and Haryana High Court. That it is a decision of a High Court, therefore, it deserves due regard and respect, is not disputed before us. When there is an attempt by the assessee and to demonstrate as to how an arguable case exists and in that process the assessee places reliance on a decision of a High Court and having a bearing on the issue, then, the attempt to not only distinguish but disregard it cannot be sustained particularly when the Appeal is yet to be heard finally. In that regard, we find that the Tribunal's following observations are ex-facie contrary to the settled canons and principles of law. Paragraph 5.7 to 5.8 of the Tribunal's order as read as under:

"5.7. If we apply the ratio of the above decision to the facts of the present case, it can be seen that the expressions "leviable under section 3 of the Additional Duties of Excise (Goods of Special Importance) Act, 1957 and paid on or after the 1st day of April, 2000" used in the Explanation to sub-rule (6) of Rule 3 of the Cenvat Credit Rules, 2002, should be construed and interpreted as duty ought to be leviable under section 3 of the AED (GSI) Act and ought to have been paid on or after the 1st day of April, 2000. In the present case the duty payment pertained to the period from 16.09.1995 to 02/06/1998 and therefore, the appellant cannot utilize the said credit for payment of basic excise duty for the period after 01/04/2000 and we hold accordingly.

5.8. The reliance placed by the appellant in the Goodyear India Ltd. case does not help for the following reasons. The ratio laid down in those decisions are not final as in the SLP filed by the department in the said case before the Apex Court, it was held that "question of law is kept open". Secondly, the said decisions did not take into consideration the meaning ascribed to the expression "paid" by the Hon'ble Apex Court in the Elphinstone Spinning Mills case and of the Hon'ble High Court of Gujarat in the Tata Chemicals case. Thirdly, the Tribunal overlooked the decision of the Special Bench decision in the Tata Iron and Steel Company Ltd. case. Fourthly, a larger Bench of the Tribunal in the Lucas TVS Ltd. case held that the expression "paid" should be construed as "ought to have been paid" or "contracted to be paid". Since these two decisions failed to consider the decisions of the Hon'ble Apex Court and of the Hon'ble Gujarat and Patna High Courts, they have to be considered as "per incuriam" or Stare decisis". Further, it is noted that the Goodyear case dealt with a situation where AED (GSI) was paid on 24/01/2004 and credit was taken immediately

thereafter, that is, before the Cenvat Credit Rules, 2004 came into existence. As per the Rules 2004, credit could be taken only in respect of AED (GSI) paid on inputs received on or after 10/09/2004. Thus factual matrix of the present case differs from that involved in the Goodyear case. For all the aforesaid reasons, we are of the considered view of that no reliance can be placed on the Goodyear India Ltd. case in the appeal before us. Thus the appellant has not made out any prima facie case in respect of their claim that they are entitled to use the credit of AED (GSI) taken in June, 2006 as the said credit pertained to payment of duty on dipped nylon tyres cord fabrics captively consumed prior to 01/04/2000."

18. We are of the view that the Tribunal's understanding of the principle of per incuriam or stare decisis leaves a lot to be desired. This understanding is completely and totally inaccurate and erroneous. A decision can be said to be per incuriam only when it is rendered disregarding a statutory provision or a binding precedent. Such is not a case which is found. If the Tribunal was of the view that the High Court of Punjab and Haryana's decision was appealed against by the Revenue to the Hon'ble Supreme Court, but though the decision was not interfered with, that Judgment will not bind it because the question of law is kept open by the Hon'ble Supreme Court, then, that is plainly and simply not per incuriam. If its larger Bench decision or in the decision in the case of Good Year India Limited (Supra), does not take into consideration the meaning ascribed to the expression "Paid", by the Hon'ble Supreme Court of India in some other case, then, as well, there decisions are not per incuriam. A decision can be said to be per incuriam only in the above circumstances. As to what this term means has been amply clarified by the Hon'ble Supreme Court in a decision of its constitution Bench in the case of Central Board of Dawoodi Bohra Community and Another Vs. State of Maharashtra and Another, . The Hon'ble Supreme Court in this context has observed as under:

"7....Per incuriam means of decision rendered by ignorance of a provisions binding decision such as a decision of its own or of a Court of co-ordinate or higher jurisdiction or in ignorance of the terms of a statute or of a rule having the force of law. A ruling making a specific reference to an earlier binding precedent may or may not be correct but cannot be said to be per incuriam."

In a decision reported in Sunita Devi Vs. State of Bihar and Another, , Sunita Devi Vs. State of Bihar and Another, , the Hon'ble Supreme Court explained the term in legal parlance. It held as under:-

"20. "Incuria" literally means "carelessness". In practice per incuriam is taken to mean per ignoratum. English Courts have developed this principle in relaxation of the rule of stare decisis. The "quotable in law", as held in Young V. Bristol Aeroplane Co. Ltd. (1994) 2 All ER 293, is avoided and ignored if it is rendered, "in ignoraium of a statute or other binding authority". Same has been accepted, approved and adopted by this Court while interpreting Article 141 of the Constitution of India, 1950 (in short the "Constitution") which embodies the doctrine of precedents as a matter of law. The above position was highlighted in

State of U.P. and Another Vs. Synthetics and Chemicals Ltd. and Another, . To perpetuate an error is no heroism. To rectify it is the compulsion of the judicial conscience."

Therefore, this is not a principle which could have been prima facie invoked and to deal with the arguments of the assessee's counsel. Further, the said argument could not have been also dealt with on the principle applied and which is to be found in paragraph 5.9 of the order passed by the Tribunal, that an assessee cannot take advantage of violation of a provision of law. It would apply after it is held that the assessee had indeed taken such advantage. We do not see as to how at this prima facie stage such conclusive and final opinions can be reached. Thus, paragraph 5.9 of the order of the Tribunal would indicate further erroneous application of a principle of law.

19. Thus, we find that the Tribunal in reaching the conclusion that the Appellant has not made out any prima facie case extensively dealt with the arguments as if it is called upon to decide the Appeal finally. That it was not called upon by the parties to do so nor was it expected of the Tribunal at the interlocutory or interim stage. All these observations and the entire attempt, is unsustainable in law. As we have held above in order to find out whether there is an arguable or prima facie case all that the Tribunal was called upon to consider is whether there is any point or issue which is bonafide raised and which requires an answer. If, the provisions of the Act, Cenvat Credit Rules, and the principles laid down by the Hon'ble Supreme Court and this Court were pressed into service, by the Tribunal at an interlocutory stage, then, definitely there was something arguable and in favour of the assessee. We do not then see how a very unreasonable and arbitrary condition of pre-deposit of the entire duty demand could have been imposed on the Appellant. That has completely taken away the right of the Appeal guaranteed to the Appellant assessee. If that right is to be meaningful or purposeful and must be preserved and saved unless there are compelling circumstances, then, imposition of such conditions would vitiate the exercise of the discretionary power by the Tribunal. It lost sight of the fact that the power to grant a stay or waiver of the condition of pre-deposit is discretionary. The discretion must be exercised judiciously and not arbitrarily or capriciously. The Tribunal should not act as per its whims and fancies, but apply settled principles of law even at the interlocutory stage. The Tribunal has completely lost sight of all this, which is evident from the impugned order. It cannot be sustained. It accordingly is quashed and set aside. The Appeal succeeds. There will be a waiver of the condition of pre-deposit of the duty amount and interest pending the Appeal. There will also be a stay against recovery of the sum demanded under the Order-in-Original.

20. While we allow the Appeal, we take due note of the arguments of Mr. Rao that this was not a case of complete waiver but a partial one. Considering that the duty demanded was for the period 16th March, 1995 to 2nd June, 1998, and it is being confirmed, after all attempts to evade payment that we should not

allow the assessee to get away, but direct him to deposit at least a substantial sum. In the given facts and circumstances it is not the assessee who should be blamed. If a show cause notice dated 27th September, 2007 was adjudicated by a final order passed on 1st November, 2013, then, the period spent in such adjudication, or the delay which has occasioned or occurred, is not solely attributable to the assessee. That the assessee has a right to challenge the order of adjudication, cannot be held against it. In the circumstances, we find no merit in the contention of Mr. Rao.