

(2016) 08 MAD CK 0007

In the Madras High Court

Case No : C.M.A. Nos. 2855-2856 of 2005

Commissioner of C. Ex.

APPELLANT

Vs

Arun Vyapar Udyog Ltd.

RESPONDENT

Date of Decision : 19-08-2016

Acts Referred:

Citation : (2017) 345 ELT 331

Hon'ble Judges : S. Manikumar and D. Krishna Kumar, JJ.

Bench : Division Bench

Advocate : Shri A.P. Srinivas, SSC, for the Appellant; Shri K. Jayachandran, Advocate, for the Respondent

Final Decision : Dismissed

Judgement

S. Manikumar, J.—Civil Miscellaneous Appeals are directed against the order of the Customs, Excise and Service Tax Appellate Tribunal, Chennai, dated 9-3-2005 in Final Order Nos. 362 and 363 of 2005 [2005 (191) E.L.T. 599 (Tri.-Chen.)], by which, the Tribunal has remanded the matter to the Adjudicating Authority, with certain observations and directions.

2. Facts deduced from the material on record are that M/s. Arun Vyapar Udyog Ltd., respondent herein, are the manufacturers of CTD bars, falling under Chapter 72 of the Central Excise Tariff Act, 1985. They had opted for payment of duty, under Compounded Levy Scheme, in terms of Section 3A of the Central Excise Act, 1944, r/w. Rule 96ZP(3) of the Central Excise Rules, 1944, in terms of Hot Re-rolled Mills Annual Capacity Determination Rules, 1997 (HRMACD Rules, 1997). On the basis of the assessee's letter and upon the visit of the factory by the Central Excise Officials for verification and also based on the technical opinion of Dr. L. Vijayaraghavan, Professor in IIT, the Commissioner of Central Excise, Chennai-II, fixed the ACP of the assessee as 34,693.43 MTs., as per the HRMACD Rules, 1997, for discharging duty, under Rule 96ZP(3) of the Central Excise Rules, 1944. The same was communicated to the assessee, through letter in C. No. IV/16/95/97, dated 30-9-1997, by the Assistant

Commissioner of Central Excise, Chennai V Division.

3. As the assessee had not discharged the appropriate duty liability, show cause notices have been issued to the assessee, demanding differential duty, to the tune of Rs. 1.82 Crores, from September, 1997 to March, 2000. Against which, the assessee preferred Appeal No. E/COD/568 99 & E/1788/99, before the CESTAT, Chennai. The said appeal came to be disposed of, in Final Order No. 655 of 2000, dated 16-5-2000 [2000 (121) E.L.T. 420 (Tribunal)], remanding the matter to the Commissioner of Central Excise, for de novo consideration, with a direction to re-fix the ACP, through a speaking order.

4. Subsequently, the Commissioner, after following due course of law, passed Order-in-Original No. 16 of 2001 in C. No. V/72/30/38/2000 CLS - Tech, dated 30-8-2001, fixing the ACP of the assessee as 34,693.43 MTs., and also adjudicated the show cause notices, issued from September, 1997 to March, 2000 and demanded the differential duty payable to the tune of Rs. 1.82 crores. Further, the Commissioner in Order-in-Original No. 5 of 2002 in C. No. V/72/30/38/2000 CLS - Tech, dated 12-3-2002, imposed a penalty equivalent to the differential duty, demanded to the tune of Rs. 1.82 crores, under Rule 96ZP(3) of the Central Excise Rules, 1944.

5. Being aggrieved by the Order-in-Original No. 16 of 2001 and 5 of 2002, the assessee preferred an appeal, before the CESTAT and the Tribunal, vide Final Order Nos. 362 and 363 of 2005, dated 9-3-2005, ordered as follows :

"7. After carefully examining the submissions, we find that the appellants have a valid challenge against the demand of duty. Admittedly, the demand is squarely based on the ACP as communicated by the Assistant Commissioner to the assessee. That ACP was set aside by this Tribunal and hence, could not have been valid basis for a demand of duty on the assessee. The ACP determined by the Commissioner under Rule 5 of the ACD Rules, 1997 is the one which has been determined by the competent authority. All the show cause notices in question were issued prior to the date on which the Commissioner determined the ACP. It is noticed that the ACP determined by the Commissioner is not at variance with the ACP communicated by the Assistant Commissioner. This, however, does not appear to support the demand based on the ACP order set aside by this Tribunal inasmuch as that order was treated as non est and set aside by this Tribunal. we have, therefore, no reluctance in setting aside the demand of duty confirmed by the Commissioner in adjudication of show cause notices issued prior to determination of ACP by him.

8. We find that Id. Commissioner has treated the appellants' furnace to be of the pusher type, relying on the first verification report of Prof. L. Vijayaraghavan of IIT, Madras. That was a report submitted by Prof. L. Vijayaraghavan after verifying the parameters of the furnace in the presence of the jurisdictional Assistant Commissioner of Central Excise. We may contextually mention that the assessee themselves had declared their furnace as of the "pusher type" in their

declaration fixed in 1997. Prof. L. Vijayaraghavan gave a contrary opinion, as to the type of the furnace in his second verification report. This opinion has been considered but rejected by the Commissioner. Prof. L. Vijayaraghavan in his first report certified the assessee's furnace to be of the "pusher type" after verification of its parameters. But he certified it to be of the "batch type" after a second verification of parameters. We are at a loss to comprehend as to how an expert of the stature of Prof. L. Vijayaraghavan can take such a volte face without stating cogent reasons for it. Suffice to say that the expert, by this conduct, brought discredit to both the reports. In this backdrop, we agree with the counsel's suggestion that a second opinion be obtained and considered by the Commissioner. Again, the Commissioner, having accepted the change of parameters, ought to have reckoned the same in the matter of determination of ACP. The case law cited by counsel supports this position. On these two grounds, we have to send the case back to the Commissioner for fresh determination of the appellant's ACP. Insofar as the demand of duty is concerned, it is up to the department to raise demand, depending on ACP to be determined by the Commissioner in accordance with law. Insofar as the penalty is concerned, the challenge succeeds as the demand of duty has been set aside.

9. In the result, we set aside the impugned orders and allow the appeals by way of remand, directing Id. Commissioner of Central Excise to determine afresh the ACP of the appellant's furnace for the period of dispute in accordance with law and in terms of this order."

6. Being aggrieved by the same, the appellant has preferred the present Civil Miscellaneous Appeals. Record of proceedings shows that on 24-6-2009, both the appeals have been admitted on the following substantial questions of law,

"(1) Whether the Tribunal is correct in holding that the demand notices are not valid as the ACP order was set aside by the Tribunal in the first remand order where in the Tribunal has only asked the Commissioner to issue a speaking order in fixing the ACP?

(2) Whether the Tribunal is correct in directing that a second opinion be obtained and considered by the Commissioner, especially when the expert Sri. L. Vijayaraghavan, Professor of IIT gave a verification certificate, dated 2-9-1997 as a member of committee and gave a contradictory opinion, dated 11-1-2001, only on the request of the assessee behind the back of the Department?"

7. Mr. A.P. Srinivas, learned Senior Standing Counsel for the appellant submitted that the finding of the Tribunal that since ACP was set aside by its first remand order and there is no valid basis for demand of duty, is incorrect, as the Tribunal, in the first remand order, only asked the Commissioner to pass a speaking order, in fixing the ACP, without setting aside the ACP fixed, which the Commissioner had complied with, and therefore, the demand notices remain valid.

8. Regarding the type of furnace in the factory, learned Senior Standing Counsel appearing for the appellant submitted that the Tribunal, while accepting the

suggestions of the assessee's counsel, at Paragraph 8, held that a second opinion has to be obtained and considered by the Commissioner, which is incorrect, as the assessee themselves have declared their furnace "pusher type", vide their declaration, dated 11-7-1997 and the said declaration was verified by the Assistant Commissioner along with Dr. L. Vijayaraghavan, in the presence of authorised signatory of the assessee and a verification report, dated 2-9-1997, was given by him as a member of the Committee. However, on the request of the assessee, the same expert Dr. L. Vijayaraghavan, gave a contradictory opinion.

9. Learned senior standing counsel for the appellant that the Tribunal has erred in accepting the contention of the assessee, by following a decision made in M/s. Kanishk Steels Industries Ltd. v. CCE [Final Order Nos. 1083 to 1086 of 2004, dated 16-12-2004] [2005 (191) E.L.T. 231 (Tribunal)], wherein, it has been held that since the parameters have changed, the ACP cannot be fixed, by invoking Rule 5 of the HRMACD Rules, 1997 and should be determined afresh.

Heard the learned counsel for the parties and perused the materials available on record.

10. Two issues are involved in the present appeals. One relates to penalty. The Tribunal, while directing the Commissioner to fix the ACP, has set aside the penalty also. Penalty, as such, cannot be imposed, in the light of the decision of the Hon'ble Supreme Court in Shree Bhagwati Steel Rolling Mills v. Commissioner of Central Excise reported in 2015 (326) E.L.T. 209 (S.C.), wherein, the issue, which came up for consideration before the Hon'ble Supreme Court, was to the correctness of the judgments of High Courts, which struck down Rules 96ZO, 96ZP and 96ZQ of the Central Excise Rules, 1944, relating to penalty, as ultra vires of a parent Act and violative of Articles 14 and 19(1)(g) of the Constitution of India. Insofar as penalty is concerned, the Hon'ble Apex Court held that it is ultra vires. In other respects, the Apex Court upheld the scheme. In the light of the above reported decision, the case of the revenue, regarding penalty, has to fail.

11. Insofar as the contentions raised in C.M.A. No. 2856 of 2005, perusal of the common order of the Tribunal shows that all the contentions raised have been dealt with in detail, and answered accordingly. We do not find that the orders impugned before us, require any interference. All the substantial questions of law raised in the appeals are answered against the revenue.

12. Accordingly, both the Civil Miscellaneous Appeals are dismissed. No costs.