
(2010) 06 MAD CK 0178

In the Madras High Court

Case No : Civil Miscellaneous Appeal No. 884 of 2010

Commissioner of Central Excise and Service Tax Large Tax
Payer Unit

APPELLANT

Vs

EID Parry (India) Ltd. Sugar Factory

RESPONDENT

Date of Decision : 11-06-2010

Acts Referred:

Central Excises and Salt Act, 1944 — Section 35B(1)
CENVAT (Credit) Rules, 2004 — Rule 15

Citation : (2010) 180 ECR 184

Hon'ble Judges : M.M. Sundresh, J;F.M. Ibrahim Kalifulla, J

Bench : Division Bench

Advocate : K. Ravi Ananthapadmanabhan, for the Appellant; No Appearance, for the Respondent

Final Decision : Allowed

Judgement

M.M. Sundresh, J.—Heard the learned Counsel for the appellant. Even though notice has been served on the respondent, none has appeared for the respondent.

2. The present appeal has been preferred by the appellant formulating the following substantial questions of law:

1. Whether the Tribunal has the power to dispose an appeal, which does not fall within the discretionary power conferred by the second proviso to

Sub-section 1 of Section 35B of the Central Excise Act, 1944, without passing a reasoned order on merits, especially in view of the Hon'ble

Supreme Court's observation in the case of Standard Radiators Pvt. Ltd. Vs. Commissioner of Central Excise, and Unimac India Ltd. reported in

2006 (198) ELT 488 (SC) that the Tribunal is the final court of fact.

2. Whether credit of duty availed on the inputs used in generation of electricity to the extent to which it has been wheeled out the TNEB grid and

hence not utilised in the manufacturing process, is recoverable in view of the Supreme Court judgment in the case of Collector of Central Excise

Vs. Solaris Chemtech Limited and Others, .

3. It is seen from the records that in pursuance of the show cause notice dated 09.05.2007, an order was passed on 14.11.2007 in Order-in-

Original No. 37 of 2007, wherein the demand for a sum of Rs. 55,611/- which is inclusive of Cenvat Rs. 54520/- and Education Cess Rs. 1,091/-

, being the amount of wrong credit taken on the inputs used exclusively in the generation of electricity, for which no duty is levied, has been

confirmed. Further, a sum of Rs. 55,611/- has been imposed as penalty under Rule 15 of Cenvat Credit Rules, 2004, on the assessee. Being

aggrieved by the same, the assessee preferred an appeal. By order dated 30.07.2008 in Appeal No. 7 of 2008, the Commissioner of Central

Excise and Service Tax (Appeals) has set aside the order passed in Order-in-Original No. 37 of 2007, thereby allowing the appeal filed by the

assessee. Challenging the same, the appellant herein preferred a further appeal before the Tribunal in Final Order No. 1876 of 2009. The said

appeal was taken on file by the Tribunal and an order of stay was granted initially. However, when the matter was taken up for final disposal, the

Tribunal has passed an order to the effect that the amount involved being very small, the issue raised by the appellant need not be considered and

the same shall be considered in an appropriate case. Challenging the said order of the Tribunal, the appellant has preferred the present appeal.

4. Admittedly, in the present case on hand, the first authority has confirmed the demand for Rs. 55,611/- with penalty for a further amount of Rs.

55,611/-. Challenging the same, the assessee filed an appeal and being aggrieved by the order passed by the Appellate Authority, the appellant has

preferred a further appeal to the Tribunal.

5. In order to appreciate the contention of the learned Counsel for the appellant, second proviso to Sub-section 1 of Section 35B is extracted

hereunder:

Provided further that the Appellate Tribunal may, in its discretion, refuse to admit an appeal in respect of an order referred to in Clause (b) or

Clause (c) or Clause (d) where:

(i) in any disputed case, other than a case where the determination of any question having a relation to the rate of duty of exercise or to the value of

goods for purposes of assessment is in issue or is one of the points in issue, the difference in duty involved or the duty involved; or

(ii) the amount of fine or penalty determined by such order, does not exceed [fifty thousand rupees].

6. A reading of the above said proviso would clearly show that a discretion lies with the Tribunal to admit or refuse to admit an appeal in respect of

an order where the difference in duty involved or the duty involved or the amount of fine or penalty determined by the said order does not exceed

Rs. 50,000/-. Therefore, if the difference in duty involves Rs. 50,000/- or more or the penalty is more than Rs. 50,000/- as the case may be, the

Tribunal has to admit the appeal and decide the matter on merits. Even in a case, where the amount referred to above involves less than the said

sum, the Tribunal has to exercise the discretion and then decide as to whether the appeal has to be admitted or not. Admittedly, in the present case

on hand, the appeal has already been admitted by the Tribunal and an order of stay has been granted. The respondent has been served with notice

and only at the time of final hearing, the Tribunal has dismissed the appeal without going into the merits of the case. The said order passed by the

Tribunal is totally without jurisdiction. The Tribunal is a creation of statute. It has to act in accordance with the statute. When the Tribunal is duty

bound to decide the appeal on merits and when no discretion lies with the Tribunal to refuse to entertain an appeal on merits, then the said order is

one without jurisdiction or authority on the part of the Tribunal.

7. In the present case on hand, as aforesaid earlier, the Tribunal has entertained the appeal, which admittedly involves more than Rs. 50,000/-

falling on account of difference in duty and on account of penalty and therefore, the Tribunal have no other option except to decide the appeal on

merits.

8. In this connection, it is useful to refer to the judgment of the Apex Court in Standard Radiators Pvt. Ltd. Vs. Commissioner of Central Excise, ,

wherein the Supreme Court has observed as follows:

2. We are satisfied that far greater consideration should have been given by the

Tribunal to the case of the assessee than is shown by the order under challenge. The Tribunal is the last fact finding authority and it is expected that it will discuss the facts in some detail and not cursorily and come to briefly stated conclusions on that basis. We, therefore, think it appropriate that the order of the Tribunal, which is under appeal, should be set aside and the assessee's appeal (E/316/88-Bom.) should be restored to the file of the Tribunal Bench at Bombay to be heard and disposed of afresh, having due regard to what we have stated above.

9. Similarly, in *Commissioner of Customs, Mumbai v. Unimac India Ltd.* 2006 (198) ELT 488 (SC), the Supreme Court has observed as follows:

Unfortunately the Tribunal, though the final court of fact, has not recorded the findings after considering the voluminous evidence which was present on the record. Tribunal has not adverted to the evidence present on the record. We are not satisfied with the impugned order. The Tribunal being the final court of fact should have been given considered findings after delving into the evidence which was present on the record. Accordingly, these appeals are accepted and the impugned order of the Tribunal is set aside and the case is remitted back to the Tribunal for passing a fresh order after considering the evidence on record.

2. The intervention application filed by the CBI is dismissed reserving liberty with the applicant to move similar application before the Tribunal, if so advised and if such an application is maintainable.

10. Following the above said judgments of the Supreme Court and after going through the relevant provisions, we are of the considered view that

the Tribunal has totally failed in its duty in deciding the appeal on merits. Therefore, the order passed by the Tribunal in Final Order No. 1876 of

2009 dated 04.12.2009 is hereby set aside and the Tribunal is directed to decide the appeal on merits and in accordance with law by deciding the

various issues raised by the appellant. The questions of law are affirmatively answered in favour of the appellant. The Tribunal is directed to

dispose of the appeal within a period of three months from the date of receipt of a copy of this order. The appeal is allowed. No costs.