(2019) 04 UK CK 0033

In the Uttarakhand High Court

Case No : Central Excise Appeal No. 05 Of 2019

Commissioner Of CGST & Central Excise Commissionrate APPELLANT

Vs

M/s Rai Bahadur Narain Sugar Mills Ltd RESPONDENT

Date of Decision : 03-04-2019

Acts Referred:

Central Excise Act, 1944 — Section 11A, 11AA, 11A(4), 35G
Cenvat Credit Rules, 2004 — Rule 6(4), 15(1), 15(2)

Citation : (2019) 04 UK CK 0033

Hon'ble Judges : Ramesh Ranganathan, CJ;N.S. Dhanik, J

Bench : Division Bench

Advocate : Shobhit Saharia

Final Decision : Dismissed

Judgement

Ramesh Ranganathan, CJ

1. This appeal is preferred under Section 35G of the Central Excise Act against the order passed by the Customs, Excise and Service Tax Appellate Tribunal, New Delhi in its final order No. A/52812/2018-EX[DB] dated 16.08.2018.

2. Facts, as noted in the order passed by the CESTAT, are that the assessee availed cenvat credit of Rs. 44,23,305/- on capital goods used in fabrication of machinery. The assessee made substantial expansion of plant and machinery w.e.f. 08.11.2004, and availed area based exemption under Notification No. 50/2003-CE dated 10.06.2003 as amended. On an audit being conducted, during the period 12.12.2005 to 16.12.2005, certain remarks were made regarding availment of cenvat credit by the assessee, to which the assessee submitted its reply.

3. Before the adjudicating authority, the assessee contended that admissibility of cenvat credit should be judged with reference to the date of receipt of goods/ capital goods; on the date of receipt of capital goods i.e. during the period April, 2004 to October, 2004, the assessee was paying duty; in terms of Rule 6(4) of

the Cenvat Credit Rules, 2004, cenvat credit was admissible; since, on the date of receipt of capital goods the assessee was paying duty, the provisions of Rule 6(4) were inapplicable; the demand show-cause notice was time barred; and while an audit was conducted during the period 12.12.2005 to 16.12.2005, and they had submitted their reply to the audit objections on 31.06.2006, a show cause notice was issued more than two years thereafter on 25.04.2008.

4. On the show cause notice being confirmed by the Order-in-Original dated 30.03.2017, a demand was raised against the assessee of Rs. 72,43,029/- along with interest and equal amount of penalty under Rule 15(2) of the Cenvat Credit Rules, 2004, and further penalty was imposed on the Chairman and Managing Director of the company under Rule 15(1), and penalty of Rs. 1,00,000/- was imposed on the General Manager of the assessee. Aggrieved thereby, the assessee carried the matter in appeal.

5. In the order under appeal before us, the CESTAT observed that Rule 6(4) of the Cenvat Credit Rules did not permit cenvat credit on capital goods used exclusively in manufacture of exempted goods; credit eligibility is required to be determined with respect to dutiability of the final product on the date of receipt of capital goods; they had, therefore, rightly taken cenvat credit; as the show cause notice was issued after two and a half years of audit, the same was bad in law; and the transaction had been properly recorded in the ER-I return filed from time to time. The CESTAT was of the view that the issues raised in the appeal were squarely covered by its earlier order in Spenta International Vs. CCE : 2007 (216) ELT 133. The CESTAT, while holding the issue in favour of the assessee and against the revenue, also observed that the show cause notice was bad for invocation of the extended period of limitation.

6. Section 11A of the Central Excise Act relates to recovery of duties not levied or not paid or short-levied or short-paid or erroneously refunded. Under sub-section (4) thereof, where any duty of excise has not been levied or paid or has been short-levied or short-paid or erroneously refunded by reason of (a) fraud; (b) collusion; (c) wilful mis-statement; (d) suppression of facts; (e) contravention of any of the provisions of the Act, or of the Rules made thereunder, with intent to evade payment of duty by any person chargeable with duty, the Central Excise Officer shall, within five years from the relevant date, serve notice on such person requiring him to show cause why he should not pay the amount specified in the notice, along with interest payable thereon under Section 11AA, and a penalty equivalent to the duty specified in the notice. The extended period of limitation of five years is available to the revenue only in cases where any one of sub-clauses (a) to (e) of Section 11A(4) are attracted.

7. In the case on hand, the show-cause notice does not even state that the assessee had contravened anyone of clauses (a) to (e) of Section 11A(4). In his order, under appeal before the CESTAT, the Commissioner of Appeals held that the question of limitation was a mixed question of facts and law; the department would get five years in case of suppression etc under Section 11A from the

relevant date which is the due date from the date of monthly return; the assessee did not declare these particulars to the department which came to know of this only at the time of audit; and, if this was not detected by audit, the evasion would have gone unnoticed causing permanent loss to the exchequer.

8. In this context it is relevant to note that the assessee did not declare these particulars to the department on the ground that, since the exemption notification was inapplicable on the date of receipt of the goods by the assessee, they were entitled to claim the benefit of Cenvat credit.

9. The bonafide belief of the assessee, that they were not liable to pay duty, would not, by itself and without anything more, amount to fraud or collusion or wilful mis-statement or suppression of facts or contravention of the provisions of the Act or the Rules with intention to evade payment of duty. The extended period of limitation would apply only to cases where the adjudicating authority has put the assessee on notice of its falling within any one of the clauses (a) to (e) of Section 11A(4). In the present case that was not done and, consequently, the extended period of limitation is not available to assess the assessee to excise duty. The order-in-original, passed by the adjudicating authority, was beyond the period of limitation.

10. Interference in an appeal under Section 35G of the Central Excise Act is permissible only if the order under appeal gives rise to a substantial question of law. Only findings of fact which are either perverse, or are based on no evidence, give rise to a substantial question of law. No substantial questions of law arise from the order passed by the CESTAT.

11. We see no reason, therefore, to entertain this appeal under Section 35G of the Central Excise Act. The appeal fails and is, accordingly, dismissed.

