(2015) 02 MP CK 0085

In the Madhya Pradesh High Court

Case No : C.E.A. No. 5/2013

Commissioner of Customs and Central Excise — APPELLANT

Vs

Bhilai Jaypee Cement Plant — RESPONDENT

Date of Decision : 05-02-2015

Acts Referred:
Central Excises and Salt Act, 1944 — Section 35G

Citation : (2015) 320 ELT 730

Hon'ble Judges : C.V. Sirpurkar, J.;Rajendra Menon, J.

Bench : Division Bench

Advocate : Sushrut Dharmadhikari, Learned Counsel, for the Appellant; Avinash Zargar, Learned Counsel, Advocates for the Respondent

Judgement

1. This is the Revenue''s appeal under Section 35G of the Central Excise Act, 1944 challenging the concurrent orders and findings recorded by the Appellate Authorities vide Annexure A and B respectively.

2. Respondent Company has established a cement plant which is situated in Babupur, District Satna. It is engaged in the manufacture of cement clinker and cement and is registered with the Central Excise Authorities and is availing the benefit of CENVAT credit in terms of the CENVAT Credit Rules, 2004. During the assessment year in question, petitioner availed of the benefit of capital good CENVAT amounting to Rs.44,67,572/- on rail tracks, ''concrete sleepers'' and ''brackets and connectors'' used for laying down railway tract from the petitioner''s manufacturing unit to the railway yard. It was said that the material so used comes within the definition of "capital goods" as per rule 2(a) of the CENVAT Credit Rules, 2004.

3. It was the case of the assessee respondent before the authorities that in view of the law laid down in the case of Aditya Cement Vs. Union of India - 2008(221) ELT 362 (Rajasthan), the railway track along with locomotive used is nothing but a conveyor system for the purpose of transporting the material from one place to another and as railway track, ''concrete sleepers'' and other material were used

for laying down the railway track for establishing the factory, it was said to be nothing but capital good. However, the Assessing Authority rejected the contention and imposed duty to the tune of Rs.44,67,552/- and exercising the powers under Section 15(2) of the CENVAT Credit Rules, 2004, imposed a further penalty of Rs.44,67,552/-. On appeals and revision being filed the Appellate Authority having interfered with imposition of penalty, this appeal under Section 35G by the Revenue.

4. Shri Sushrut Dharmadhikari invited our attention to the show cause notice issued to the petitioner for non payment of duty as contained in Annexure E dated 14.3.2011, the reason given by the Assessing Officer for imposing penalty and the judgment of Supreme Court in the case of Union of India (UOI) Vs. Rajasthan Spinning and Weaving Mills, to say that when a mandatory provision for penalty is available under the Central Excise Act, imposition of penalty should not be interfered with. It was said that in the present case as penalty has been imposed on account of deliberate evasion of duty, the Appellate Authority committed error in interfering with the discretions exercised by the Assessing Officer in imposing penalty.

5. However, refuting the aforesaid, Shri Avinash Zargar invited our attention to Rule 15(2) of the CENVAT Credit Rules, 2004 and argued that in respect of inputs and capital goods penalty can be imposed only if it is found that the benefit of credit is sought on wrong or fraudulent grounds, by making wilful misstatement, collusion or suppression of facts, or in contravention to any of the provisions or statute or Rules framed thereunder with a view to evade payment of duty. It is said that in the present case on a wrong assumption of a legal provisions and heavily placing reliance on a judgment in the case of Aditya Cement (supra) as the benefit was claimed by the petitioner the Appellate Authorities found that this was a genuine reason, there is no sufficient evidence to prove Mens rea on the part of the appellant, it was a simple case where the assessee availed the benefit on wrong interpretation of the provision, there was no fraud, misstatement or collusion and therefore imposing penalty was found to be unsustainable. Shri Zargar argued that the discretion exercised concurrently by the Appellate Authorities in the matter does not call for any interference and he prays for dismissal of appeal on the ground that no substantial question of law arises for consideration.

6. We have considered the rival contentions and we find that sub rule 2 of Rule 15 of the CENVAT Act reads as under :

"RULE 15. Confiscation and penalty : (1) If any person, takes CENVAT credit in respect of input or capital goods, wrongly or in contravention of any of the provisions of these rules in respect of any input or capital goods, then, all such goods shall be liable to confiscation and such person, shall be liable to a penalty not exceeding the duty on the excisable goods in respect of which any contravention has been committed or two thousand rupees, whichever is greater.

(2) In a case, where the CENVAT credit in respect of input or capital goods has been taken or utilised wrongly on account of fraud, wilful misstatement, collusion or suppression of facts, or contravention of any of the provisions of the Excise Act or the rules made thereunder with intention to evade payment of duty."

The aforesaid provision clearly contemplates that in cases where the CENVAT credit in respect of capital good has been taken or utilized wrongly on account of fraud, willful misstatement, collusion or suppression of fact or contravention of any provision of the Act or Rules made thereunder, with an intention to evade payment of duty then only penalty is liable to be imposed. In the present case Rajasthan High Court in the case of another manufacturing Unit namely Aditya Cement came to the conclusion that the Railway Track along with locomotive used by a cement factory for the purpose of transportation of its material is indeed a conveyor system and they are entitled to benefit of exemption from payment of duty which was found to be nothing but capital good. It is the case of the assessee that by taking benefit of this judgment the credit facility was availed of. However, in doing so, it cannot be said that the credit facility in respect of the capital good was wrongly used on account of fraud, willful misstatement, collusion or suppression of fact. It is also not an intentional contravention of any statutory provision. At best it may amount to misunderstanding the law and its applicability and in the absence of any mens rea on the part of the assessee, if two Appellate Authorities namely the Commissioner and the Appellate Tribunal found that imposition of penalty in the instant case is not called for as there is no sufficient evidence to prove Mens rea or guilt on the part of the assessee, we see no reason to interfere with such a reasonable approach adopted by Appellate authorities concurrent in nature.

7. Imposition of penalty that also equal to the amount of the credit facility availed of in a penal consequence and a penal consequence is to be enforced only when the conduct of the assessee shows certain positive action indicating fraud, misstatement collection etc.. This action of the assessee may be in contravention to the statutory provision but it was with a bona fide reason or belief by interpretation of a judgment of a High Court, then the imposition of penalty in such circumstances was not warranted. The Appellate Authority and the Appellate Tribunal in para 5 of the impugned order has dealt with the matter in detail and when the discretion has been exercised finding there to be no ill intention, malafide or collusion on the part of the Assessee in availing of the facility, we are not inclined to interfere into the matter as no substantial question of law is involved in the matter.

8. Accordingly, finding no case made out for interfering with the concurrent findings recorded by the authorities, the appeal is dismissed at the stage of admission itself.

