

(2019) 03 CAL CK 0107

In the Calcutta High Court

Case No : Appeal From Order (APO) No. 391 Of 2017, General Application
(GA)No. 2872 Of 2017 In Writ Petitions (WP) No. 681 Of 2014

Kesoram Spun Pipes And Foundries Ltd

APPELLANT

Vs

Commissioner Of Central Excise & Ors

RESPONDENT

Date of Decision : 15-03-2019

Acts Referred:

Central Excise Act, 1944 — Section 11D
Cenvat Credit Rules, 2004 — Rule 6, 6(3), 6(3)(a), 6(3)(b), 6(3)(c)
Central Excise Rules, 1944 — Rule 57CC
Constitution Of India, 1950 — Article 32, 226

Citation : (2019) 03 CAL CK 0107

Hon'ble Judges : Sanjib Banerjee, J;Suvra Ghosh, J

Bench : Division Bench

Advocate : J. P. Khaitan, Anupa Banerjee, Siddhartha Das, Malay Seal, Somnath Ganguli, Bhaskar Prasad Banerjee

Final Decision : Disposed Off

Judgement

The Court : The assessee questions the propriety of an order-in- original on the ground that it completely misread a judgment of the Tribunal that was binding on it and it failed to notice an explanation to a provision that was applicable in the present case.

In short, the case made out by the appellant assessee is that the adjudicating authority acted in error of jurisdiction in passing the order impugned.

The order of the adjudicating authority was amenable to appeal. However, the Commissioner (Appeals) could not entertain the appeal since it was filed beyond the period permitted and the additional period of 30 days as envisaged by the appellate provision. The appellate authority held that in view of the wording of the provision, the appellate authority had no jurisdiction to condone any delay beyond 30 days after the expiry of the usual period permitted to carry an appeal. Such order of the Commissioner (Appeals) was carried before the Tribunal.

However, the appeal was withdrawn.

It is the submission of the appellant that since the Commissioner (Appeals) had declined to entertain the appeal on merits as it had been filed beyond the period of limitation and the further period within which the appeal could be entertained, there was no grievance against the order of the Commissioner (Appeals) that could be pursued before the Tribunal in the further appeal and, hence, such appeal was withdrawn.

After abandoning the further appeal before the Tribunal, the assessee challenged the order-in-original dated May 7, 2008 by way of a petition under Article 226 of the Constitution. It was held by the order impugned herein dated March 6, 2017 that upon the assessee having exhausted the remedies available, the order of adjudication could not have been assailed in this extraordinary jurisdiction. The Union seeks to support the order impugned on such ground, particularly, since the appeal against the order passed by the Commissioner (Appeals) was withdrawn without any liberty to approach any other forum.

The right to approach a constitutional Court under Article 226 of the Constitution or under Article 32 thereof does not require the permission or liberty of any other forum. Qualitatively, the authority exercised under Article 226 of the Constitution is not akin to appellate authority. As long as it is demonstrated that the quasi-judicial order questioned in this jurisdiction is on account of the breach of the principles of natural justice or in the erroneous exercise of jurisdiction or the like, the writ petition can be entertained, though a constitutional Court always has the discretion to not grant any relief on other grounds which are required to be recorded. In the present case, it is evident that a jurisdictional error may have been committed by the adjudicating authority that the assessee did not get a chance to address on merits because of the delay on the assessee's part to move the appeal.

The matter pertains to Rule 6 of the CENVAT Credit Rules, 2004. Such Rule pertains to the obligation of the manufacturer to make a distinction in maintaining accounts relating to the use of inputs in taxable and exempted goods if inputs on which CENVAT credit has been availed of are used in the manufacture of both exempted goods and taxable goods. Broadly speaking, if the manufacturer avails of CENVAT credit in respect of inputs and manufactures final products which are chargeable to duty or tax as well as final products that are exempted goods, then the manufacturer is required to maintain separate accounts for receipt, consumption and inventory of inputs for use in the manufacture of dutiable final products and separate accounts for similar purpose for use of the exempted inputs in the manufacture of exempted goods. Rule 6(3)(a) of the said Rules of 2004 provides a scheme. However, since the appellant in this case did not follow such scheme, the same is not relevant for the present purpose. Rule 6(3)(b) of the said Rules of 2004 provides as follows:

"if the exempted goods are other than those described in condition (a), the

manufacturer shall pay an amount equal to ten per cent of the total price, excluding sales tax and other taxes, if any, paid on such goods, of the exempted final product charged by the manufacturer for the sale of such goods at the time of their clearance from the factory;"

There are Explanations which apply to the entirety of Rule 6(3) of the said Rules, including the following first Explanation:

"The amount mentioned in conditions (a) and (b) shall be paid by the manufacturer or provider of output service by debiting the CENVAT credit or otherwise."

According to the appellant, the appellant calculated the 10% in term of Rule 6(3) (b) of the said Rules of 2004 and passed it on to the purchasers of the relevant goods from the appellant; but instead of depositing such amount of 10% collected from the purchasers of the appellant's exempted goods, the appellant debited the equivalent amount from the CENVAT credit obtained by the appellant. There is no dispute that the debit of the CENVAT credit matched the amount recovered by the assessee on account of excise duty from its vendors.

However, the adjudicating authority found that such a procedure could not have been adopted by the assessee as the assessee was duty-bound to make over the money component realised from its vendors to the excise authorities.

The appellant refers to the order-in-original dated May 7, 2008 and places the following paragraphs therefrom:

"I have gone through some of the copies of the Central Excise Invoices and the corresponding Commercial Invoices, for the relevant period. I find that in the Central Excise invoice, entries against the Central Excise Duty amount, is NIL, whereas in the corresponding commercial invoice, specific amount against the Central Excise Duty @ 10% has been charged, wherefrom it is crystal clear that the assessee has realized Central Excise Duty @ 10% from its buyers against the clearance of exempted excisable goods, in question and they did not disclose the issue before the Central Excise Department as well. They at the same time, also retained such collection of Central Excise duty with them as they did not deposit the same to the credit of the Central Government.

I find that for the manufacture of both dutiable and exempted goods assessee used common inputs and availed Cenvat Credit on the total inputs before manufacturing both the products. Hence in terms of the Cenvat Credit Rules, 2002, they were required debit @ 10% the already, availed Cenvat credit for the input utilized for the manufacture of exempted goods. Hence, the ratio of the Tribunal's decision since the 8% amount remain already paid to the revenue, and no amount is retained by the assessee, as cited by the assessee to defend themselves, in the case of UNISON METALS LTD. vs. Commissioner of Central Excise, Ahmedabad-I., 2006(2004) ELT 323TLB, is not at all applicable in the instant case, as because no amount was paid to the revenue and they only

neutralized the already availed cenvat credit on the inputs, used for the manufacture of exempted goods.

In the instant case, I find since the assessee did not pay the amount to the Government so collected from the buyers of the exempted goods, representing duty of excise, they have to pay this amount to the Government in terms of Section 11D of the Central Excise Act, 1944..." (Emphasis in original) The appellant refers to an order of a larger Bench of the Customs, Excise and Service Tax Appellate Tribunal reported at 2006(204)ELT 323 (Unison Metals Limited vs CCE, Ahmedabad). Paragraph 8 of the report, in the context of the circular that was then applicable, is of relevance:

"8. In the present case, it is not in dispute that the assessees had paid 8% of the value of the goods in terms of Rule 57CC at the time of removal of the goods from the factory. The amounts so paid are the amounts recovered by them from their buyers. Thus, in the present cases, no amounts collected from the buyers remain unpaid to the revenue, irrespective of whether those amounts were represented in the sales documents as duty or not. In fact, the invoices referred to the payment in different terms such as "8% reversal of assessable value", "8% value", "8% duty etc." As the amounts recovered from the buyers are not retained by the assessees, the question of deposit cannot arise, whether under Section 11D or any other provision. A reading of Section 11D makes it clear that what is required is that amounts collected as duty should not be retained by the manufacturers and should be deposited with the revenue. This was the view that Division Bench took in the case of Nu-Wave shoes. ..."

The appellant also refers to the previous circular of November 12, 2001 pertaining to Rule 57CC of the Central Excise Rules, 1944 and a recent circular of May 16, 2008 covering the decision in Unison Metals Limited and pertaining to Rule 6 of the CENVAT Credit Rules, 2004. The appellant says that though the circular of 2008 had not been issued at the time that the adjudicating authority passed its order in this case about a week earlier, all that the clarificatory circular of May 16, 2008 has done is to accept the legal position as enunciated in Unison Metals Limited.

The Union opposes the appeal on the ground that the adjudicating authority did not commit any error, far less any jurisdictional error, since it interpreted the law as it stood at the relevant point of time. The Union submits that the adjudicating authority noticed the legal position as enunciated in Unison Metals Limited and interpreted it not to apply to the case of the appellant since the appellant had obtained a certain amount from the appellant's buyers on account of excise duty but had not deposited the amount realised by way of excise duty to the excise authorities.

It is clearly such position which was addressed at paragraph 8 of the judgment of the larger Bench of the Tribunal in Unison Metals Limited. Though such judgment dealt with the 8% duty that was relevant at that point of time under Rule 57CC

of the 1944 Rules, the legal principle enunciated was that if there were several modes of making the payment and one of them was adopted, that would do. That appears to have been the ratio in Unison Metals Limited as accepted by the authorities in the circular of May 16, 2008. That the circular of May 16, 2008 came after the judgment of the adjudicating authority was delivered makes no difference since such circular is clarificatory in nature and does not change the position at all.

Since the appellant in the present case adopted the scheme under Rule 6(3)(c) of the Rules of 2004 to which the first Explanation to the sub-rule was also attracted, there was an option available to the appellant to either make over the amount that was realised by the appellant by way of excise duty from the appellant's purchasers or to debit the CENVAT credit obtained by the appellant by the equivalent amount. There is no dispute that the appellant did, in fact, debit the CENVAT credit by the equivalent amount. If the CENVAT credit can be seen as money in the hands of the assessee in some other form, the debiting of the CENVAT credit by an equivalent amount, tantamounts to such amount having made over to the excise authorities or refunded to the excise authorities or the like.

It is evident that the adjudicating authority did not refer to the first Explanation to Rule 6(3) of the said Rules of 2004 while passing the relevant order. In such circumstances, the adjudicating authority committed an error of jurisdiction in failing to appreciate the extent to which the dictum in Unison Metals Limited bound the adjudicating authority. The discussion in paragraph 8 of the judgment pertaining to the then duty of 8 per cent is the same discussion that is relevant in the context of the first Explanation to Rule 6(3) of the 2004 Rules that ought to have guided the adjudicating authority while passing the order of adjudication. In failing to see the ratio in the judgment in Unison Metals Limited in the context of a provision that the adjudicating authority failed to notice, there is a jurisdictional error on the part of such authority.

Since such jurisdictional error was amenable to correction within the scope of judicial review exercised in the extraordinary jurisdiction under Article 226 of the Constitution, there was no impediment to receiving the petition or adjudicating on such aspect notwithstanding the appeal from the order of the adjudicating authority not being entertained on the ground of limitation or the resultant appeal being withdrawn since the Commissioner (Appeals) had only acted within the bounds of his authority.

For the reasons as aforesaid, the order of the adjudicating authority of May 7, 2008 is set aside and it is recorded that the excise claim stands satisfied upon the CENVAT credit of equivalent amount having been debited from the CENVAT credit account of the appellant. As a consequence, since the excise duty realised by the appellant from the purchasers of the appellant's goods would be deemed to have been paid to the excise authorities upon the CENVAT credit account of the appellant being debited, there is no question of the appellant being liable to

pay any penalty or interest. The entirety of the order dated May 7, 2008 stands set aside.

APO No.391 of 2017 and GA No.2872 of 2017 are disposed of by setting aside the judgment and order impugned dated March 6, 2017 and allowing WP No.681 of 2014 as above.

There will be no order as to costs.