
(2009) 05 OHC CK 0037
In the Orissa High Court

Mahanadi Casting Pvt. Ltd.

APPELLANT

Vs

The Commissioner of Central Excise and Customs and
Another

RESPONDENT

Date of Decision : 01-05-2009

Acts Referred:

Central Excises and Salt Act, 1944 — Section 11A, 35B, 3A
Constitution of India, 1950 — Article 11AC, 226, 227, 35F, 35G

Citation : (2009) 108 CLT 487 : (2009) 2 OLR 861 Supp

Hon'ble Judges : L. Mohapatra, J;I. Mahanty, J

Bench : Division Bench

Judgement

I. Mahanty, J.—In this writ application M/s Mahanadi Casting Pvt. Ltd. (Petitioner-Company) seeks to challenge an Order Dated 12.7.2006 passed by the Customs, Excise & Service Tax Appellate Tribunal, Kolkata, Eastern Zonal Bench, Kolkata whereby the Learned CESTAT had directed remand of the matter back to the Learned Commissioner, Central Excise to decide afresh by determining the "annual production capacity" of the Petitioner's factory for levy of excise duty in accordance with Section 3A of the Central Excise Act, 1944 & also challenges the consequent Order Dated 28.11.2008 passed by the Learned Commissioner, Central Excise, Customs & Service Tax, Bhubaneswar, pursuant to said order of remand.

2. Learned Counsel appearing for the Commissioner of Central Excise (O.P.1) at the outset contends that the writ application is not maintainable since both the impugned orders passed by the CESTAT & the Learned Commissioner, Central Excise, Customs & Service Tax under Annexures-7 & 9 respectively are appealable orders under Sections 35G/35H & 35B of the Central Excise Act, 1944 & therefore the Petitioner-Company without exhausting the statutory remedy cannot be permitted to approach this Hon'ble Court under Articles 226 & 227 of the Constitution.

3. On a perusal of the case record it is seen that the Petitioner has filed the

present writ application on 21.11.2008 seeking to challenge the order of the Tribunal under Annexure-7. An interim Order Dated 2.12.2008 was passed directing that the Petitioner shall file his reply to the show cause notice before the Commissioner, but no final order shall be passed till the next date & the matter had been directed to be listed on 18-12.2008. It appears that a copy of this interim order was served on Opposite Party No. 1 on 5.12.2008 & on the very same day the Petitioner received the final Order Dated 28.11.2008 passed by the Learned Commissioner who had passed final orders fixing the annual production capacity of the Petitioner's unit at 6400 MT. & further confirmed Central Excise duty demand of Rs. 56,00,000 under the proviso to Section 11A(1) of the Central Excise Act, 1944, apart from the penalty of Rs. 56,00,000 u/s 11AC of the Central Excise Act.

4. The Petitioner sought for & was granted permission to amend the writ application & accordingly, the same was allowed & Annexure-9 (order dtd. 28.11.2008) passed by the Learned Commissioner, Central Excise came to be challenged in the present writ application.

5. In course of hearing of the writ application the Petitioner- Company had also filed an appeal u/s 35G of the Central Excise Act, 1944 which was registered as OTAPL No. 2 of 2009 seeking to challenge the order of the CESTAT dated 12.7.2006 passed in Central Excise Appeal No. EDM-373/2003 which is the self-same order impugned as Annexure 7 to the writ application & therefore the present Writ Petition was confined to challenge to the final order of the Commissioner under Annexure-9.

6. Since a preliminary objection was raised by the Revenue on the question of maintainability of this writ application it becomes incumbent upon us to deal with such issue at the outset, without entering into the merits of the case, less the same causes any prejudice to the parties in any manner. Clearly from the facts of the present case it appears that by order of the CESTAT under Annexure-7 to the writ application the Tribunal while allowing the appeal of the present Petitioner gave the following directions:

We find that the Bench of this Tribunal while determining the Section 35F application had directed the departmental representative to produce the order under which the Commissioner had determined the annual production of capacity based on the furnace existing in the assessee's factory & after noting that there is no order as to determine of annual capacity u/s 3A of the Central Excise Act, 1944 which is & was fundamental requirement i.e. first determine the capacity & thereafter the amounts required to be discharged, we would therefore set aside the order & remit the matter back to the Ld. Commissioner to determine the issue afresh after determining the capacity as per law & after hearing the assessee & only thereafter proceed to determine the duty & penalties if any required to be formed in this case. Appeal is allowed as remand in above terms.

7. After the aforesaid order was passed by the CESTAT a notice came to be issued to the Petitioner-Company & in response to the said notice the Petitioner raised the objection that an order u/s 3A of the Central Excise Act cannot be passed at this stage. This objection of the Petitioner was turned down by adjudicating authority vide Order Dated 30.10.2008 (Annexure-8), holding therein that, the only issue to be decided was "the annual capacity of the furnace" & the duty liability thereof. Although the Petitioner approached this Court in the present writ application & an interim order was passed in its favour as noted hereinabove, the final order appears to be passed prior to the date of the interim direction passed by this Court on 2.12.2008, i.e., on 28.11.2008. This Order Dated 28.11.2008 impugned as Annexure-9 to the writ application is clearly an appealable order & appeal lies to the CESTAT in terms of Sub-Section 1(a) of Section 35B of the Central Excise Act, 1944.

8. Therefore, we are constrained to note that since the order impugned under Annexure-9 is appealable before the CESTAT & further since Annexure 9 has been passed prior to passing of the interim order o, this Court, the writ application is not maintainable & therefore dismissed as such. Further since the appeal period of three months has already expired in the meantime, we direct that if the Petitioner files an appeal within 4 weeks from today along with a petition for condonation of delay, the petition for condonation of delay shall be considered favourably as the writ application was pending before this Court & the appeal shall be heard & disposed of on merit. Further since the interim order staying the demand of duty as well as the penalty shall continue for a period of 6 weeks or till interim orders are passed by the Appellate authority whichever is earlier.

9. With the aforesaid observation & direction the writ application is disposed of.

L. Mohapatra, J.

I agree.