(2018) 04 CHH CK 0073

In the Chhattisgarh High Court

Case No : TAXC No. 6 of 2018

M/S Era Infra Engineering Ltd. APPELLANT

Vs

State Of Chhattisgarh RESPONDENT

Date of Decision : 09-04-2018

Acts Referred:
Central Excise Act, 1944 — Section 35(G)

Citation : (2018) 04 CHH CK 0073

Hon'ble Judges : PRASHANT KUMAR MISHRA, J;RAM PRASANNA SHARMA, J

Bench : Division Bench

Advocate : Sandeep Dubey, Alok Chandra Rishi, Manish Sharma

Final Decision : Dismissed

Judgement

1. Challenge in this appeal under Section 35-G of the Central Excise Act, 1944 is to the final order dated 31.5.2017 passed by the Custom, Excise and

Service Tax Appellate Tribunal (henceforth 'the Tribunal') dismissing the appellant's appeal refusing to allow cenvat credit on the item 'Bins' supplied

by M/s Simplex Engineering and Foundry Works Pvt. Ltd. (for short 'M/s Simplex') by holding that the said 'Bins' was wrongly classified under the

heading 8474.90 whereas the correct classification would fall under the heading 7308.

2. During the relevant period, M/s Simplex were awarded contract for supply of 'Bins' to the appellant which was supplied to the appellant's unit Bhilai

Steel Plant, who in turn availed cenvat credit of duty paid on the said item under Rule 57-Q of the Central Excise Rules, 1944 (henceforth 'the Rules,

1944'). The Revenue later on found that M/s Simplex had misclassified the 'Bins' supplied to the appellant under Chapter and sub-heading No.8474.90

of the first Schedule to the Central Excise Tariff Act, 1985 (for short 'the Act, 1985') misclassifying them as parts of sintering machine, while these

parts were neither machines nor parts of machines and thus were liable to be classified under Chapter and sub-heading 7308.90 as part of structures.

M/s Simplex not only short paid the duty leviable on the said parts but also facilitated the appellant to avail credit of duty paid in their RG-23C account

under Rule 57-Q of the Rules, 1944, which was otherwise inadmissible inasmuch as Rule 57-Q did not cover the items falling under Chapter 73 of the

first schedule of the Act, 1985 for the purpose of availing the said credit.

3. Based on these facts, a show cause notice was issued to the appellant and M/s Simplex as well on 3.9.2002 (Annexure-A/2) raising demand from

M/s Simplex of the duty amounting to Rs.15,68,462/- with appropriate rate of interest and penalty on the said amount of duty. For the appellant â?

Steel Authority of India, Bhilai Steel Plant, demand of modvat credit amounting to Rs.1,08,88,166/-, wrongly availed by it together with interest and

penalty at the appropriate rate on the said amount, was raised. By order in original dated 28.11.2005, the Commissioner, Central Excise, Raipur,

recorded a finding that the subject items are classifiable under sub-heading 7308.90 and confirmed the demand of duty from M/s Simplex with interest

and penalty and modvat credit together with interest and penalty from the appellant â?" M/s Steel Authority of India, Bhilai Steel Plant. Aggrieved by

the said order, the appellant preferred an appeal before the Tribunal which came to be decided on 6.6.2016 (Annexure-P/7) thereby setting aside the

imposition of penalty, at the same time refusing to decide the appeal on merits pertaining to challenge to denial of credit, as the appellant was not

granted permission by the Committee on Disputes (COD) to prefer appeal.

4. The appellant's appeal to the High Court bearing Tax Case No.140/2016 was disposed of remitting the matter back to the Tribunal for decision on

merits on the issue of denial of credit for the reason that by judgment rendered in Electronics Corporation of India Ltd. Vs. Union of India {2011 (265)

ELT 11 (SC)}, the Supreme Court has done away with the concept of COD with effect from 17.2.2011. The High Court allowed the parties to re-

agitate the issue by placing all requisite materials, as may be relevant for such adjudication. The present impugned order has been passed after the

matter was remitted back to the Tribunal.

5. Shri Sandeep Dubey, learned counsel for the appellant would submit that

classification of 'Bins' under heading 7308 is illegal and perverse. M/s

Simplex had rightly classified the item under heading 8474.90.

6. Per contra, Shri Manish Sharma, learned counsel for the Revenue would support the impugned order.

7. Having heard learned counsel for the parties, it appears to us that the issue as to whether the subject item would fall under heading 8474.90 or 7308

is essentially a question of fact. Interestingly, during the same period, the appellant has obtained supply of the same item i.e. 'Bins' from another

supplier M/s Hindustan Steel, who had, from the very beginning, classified the good under heading 7308, as is reflected in para-27 of the order in

original dated 28.11.2005 passed by the Commissioner.

8. In the case at hand also, M/s Simplex had gone in appeal and argued only on that part of the demand, which is barred by limitation, thus, in a way,

conceding to the demand which was within limitation.

9. The question as to whether the subject item would fall under heading 7308 or 8474.90, is essentially a question of fact. Moreover, if according to the

appellant, the item would fall under heading 8474.90, it was for the appellant to explain as to why it has not claimed cenvat credit for the same item

supplied by M/s Hindustan Steel for whom it had earlier availed credit but later on reversed it when the Revenue brought it to the notice of the same.

Moreover, the present demand to the extent it falls outside normal time period has already been set aside by the impugned order. Thus confirmation of

the demand for reversal of cenvat credit is only to the extent falling within normal time period. The penalty has already been set aside by the Tribunal

in its previous order.

10. In the circumstances, we have not found any substantial question of law to be arising in this appeal for adjudication.

11. The Appeal fails and is hereby dismissed.

