

(2014) 04 CAL CK 0100
In the Calcutta High Court
Case No : W.P. No. 173 of 2014

M/s. Union Enterprises and Another

APPELLANT

Vs

Union of India and Others

RESPONDENT

Date of Decision : 22-04-2014

Acts Referred:

Central Excises and Salt Act, 1944 — Section 35(F), 35F, 35G
Civil Procedure Code, 1908 (CPC) — Section 100, 109, 110
Constitution of India, 1950 — Article 133(1)(a), 226
Foreign Exchange Management Act, 1999 — Section 3(c), 35
Income Tax Act, 1961 — Section 260A

Citation : (2014) 306 ELT 216 : (2014) 46 GST 220 : (2015) 30 GSTR 228

Hon'ble Judges : Harish Tandon, J

Bench : Single Bench

Advocate : Barnik Ghosh, Advocate for the Appellant

Judgement

Harish Tandon, J.—Assailing an order passed u/s 35F of the Central Excise Act by the Custom Excise and Service Tax Appellate Tribunal (CESTAT), by which an application seeking waiver of pre-deposit condition, the instant writ petition is filed before this Court under Article 226 of the Constitution of India.

2. The Company manufactures M/s. Ingot & rolled products classifiable under Chapter No. 72 of the first schedule to the Central Excise Act, 1985 since 1975. A show-cause notice dated 2nd March, 2007 was issued to the petitioner alleging the suppression of the actual production figures of M/s. Ingots for the period 2001-2002 to 2005-2006 being not incommensurate with the pattern of consumption of the electricity. A further show-cause notice dated 03.05.2007 was issued on the identical ground covering the period from April 2006 to February 2007. The petitioner replied the respective show-cause notices and denied the allegation of suppression of actual production figures and annexed certain documents in support of the defence. The adjudicating officer confirmed the demand of duty and imposed penalty and interest. The said order is carried in two separate appeals before the CESTAT. In the said appeal, two separate

applications were filed for waiver of the pre-condition deposit u/s 35F of the said Act. The CESTAT set aside the orders in original passed by the adjudicating authority and remanded the matter for fresh considerations in the light of the decisions rendered in case of Bharat Ingots & Steel Comp. Pvt. Ltd. & Ors. delivered on 10th December, 2008. The proceeding was reconsidered on remand and a duty was imposed upon the petitioner for alleged suppression of the production figures taking into consideration the report submitted by Dr. Batra of IIT Kanpur. The said order is again challenged before the CESTAT and the application for waiver of pre-condition deposit filed therein is disposed of by the impugned order directing the petitioner to deposit 25% of the demand duty which is challenged in this writ petition.

3. The main thrust of the argument before this Court by the petitioner is that the decision is solely based on the report of Dr. Batra of IIT Kanpur which is perverse and liable to be quashed and set aside. It is further submitted that there was another report of the technical expert filed by the petitioner which was not taken note of and the CESTAT wrongly recorded that no other report of a technical expert is available in the proceedings. The petitioner submits that it is a consistent view of the various tribunals that the decisions solely based on the disparity in consumption of electricity is not proper.

4. In support of the aforesaid contentions, the reliance is placed upon the judgment of the Tribunal at Delhi in case of R.A. Castings Pvt. Ltd. vs. Commissioner of Central Excise, Meerut reported in 2009 (237) ELT 674 (Tri-Del.) which is affirmed by Allahabad High Court in case of Commissioner of C. Ex., Meerut-I Vs. R.A. Castings Pvt. Ltd., . It is further submitted that the Apex Court also dismissed the special writ petition and, therefore, the decision rendered in R.A. Castings Pvt. Ltd. (supra) attains finality. The petitioner further submits that in absence of any other material namely the procurement of excess raw material, conversion into a final product and clandestine clearance to the buyers, the decisions based on the disparity in the consumption of electricity cannot be sustained. It is audaciously submitted that when an interpretation is given by the High Court, Supreme Court or Tribunal, the another bench of the Tribunal cannot take a contrary view and should have allowed the total waiver. In support of the above contentions, reliance is placed upon a judgment of the Tribunal at Bangalore in case of 2004 (165) ELT 347 , 2003 (85) ECC 649 and 2012 (286) ELT 93 .

5. The learned Advocate appearing for the respondent took a preliminary objection as to the entertainability of the writ petition on the plea of alternative efficacious remedy. It is submitted that any order passed u/s 35F of the Central Excise Act is amenable to be challenged in an appeal before the High Court u/s 35G of the said Act. It is, thus, submitted that any order includes an order u/s 35F of the said Act and not restricted to the final order as held by the division bench in case Ambika Nahar Exports and Another Vs. Commissioner of Customs (Port) and Others, , M/s. Metal Weld Electrodes and Metro Trading Company

(Electrodes) P. Ltd. Vs. The Customs, Excise and Service Tax and The Commissioner of Central Excise, . The petitioner further submits that once the right of an appeal is provided under the statute, the High Court in exercise of the power of judicial review should not interfere with such order and placed reliance upon a judgment of the Supreme Court in case of Raj Kumar Shivhare Vs. Assistant Director, Directorate of Enforcement and Another, .

6. In reply, the petitioner submits that the existence of alternative remedy is not an absolute bar to entertain the writ petition, if it can be demonstrated that the authority or the tribunal has acted contrary to the clear interpretation and/or pronouncement of the Tribunal or the Court. By placing reliance upon a judgment rendered by me in case of M/s. Nicco Corporation vs. Commissioner of Service Tax & Ors. (W.P. No. 15430(w) of 2013 decided on 03.10.2013), the petitioner says that it has been held that mere existence of an alternative remedy is not a bar in entertaining the writ petition.

7. From the respective submissions, the points evolved for consideration in this writ petition is whether the order seeking dispensation of the deposit of the demand duty can be assailed in a writ jurisdiction; whether the disparity in consumption of electricity can be a sole factor in arriving at the conclusion that the person has suppressed the actual production of the final product which attracts the excise duty in absence of any other corroborative evidence.

8. Section 35F of the Central Excise Act provides that the person desirous of appealing against the decision or order shall deposit with the adjudicating authority, the duty demanded or the penalty levied, pending the appeal. Proviso inserted thereto empowers the Appellate Tribunal or the Commissioner (Appeals) to dispense with such deposit, if it would cause undue hardship to such person; simultaneously therewith it would take into consideration the interest of the revenue. Every order passed by the Appellate Tribunal except an order relating to the determination of any question having a relation to the rate of duty of excise or to the value of goods for the purpose of assessment, is amenable to be challenged in an appeal before the High Court, if the High Court is satisfied that the case involved substantial question of law. The respondent appears to have been swayed by the judgment of the Madras High Court delivered in case of Metal Weld Electrodes (supra) wherein it is held that "every order" passed by the Tribunal includes an order passed u/s 35F and refused to entertain the writ proceeding on the ground of alternative efficacious remedy. The Madras High Court relied upon a judgment of the Apex Court rendered in case of Raj Kumar Shivhare (supra) on the above issue. Before dealing the judgment rendered by the Madras High Court, it would be appropriate to consider the judgment rendered in case of Raj Kumar Shivhare (supra) by the Supreme Court. In the said decision, the dispute pertains to an order passed by the Appellate Tribunal for Foreign Exchange, New Delhi for violation under Foreign Exchange Management Act, 1999 (FEMA). A notice u/s 3(c) of the FEMA was issued to the appellant therein for receiving unauthorized payment worth Rs. 5 Crores from

person living outside the country in connection with illegal cricket baiting operation. The said allegation was proved against the appellant and a penalty is Rs. 2 Crore was imposed. The said order was carried before the Appellate Tribunal wherein an application filed for dispensation of pre-deposit of penalty was rejected. Section 35 of FEMA provides an appeal against any decision and order of the Appellate Tribunal to the High Court. The appellant filed a writ petition before the High Court in stead of filing an appeal under the aforesaid provisions which came to be dismissed on the ground of maintainability. The Apex Court held that where the statutory forum is created by law, a writ petition should not be entertained ignoring the statutory dispensation, it would be relevant if Section 35 of FEMA is quoted herein below which reads thus:

35. Appeal to the High Court.-Any person aggrieved by any decision or order of the Appellate Tribunal may file an appeal to the High Court within sixty days from the date of communication of the decision or order of the Appellate Tribunal to him on any question of law arising out of such order:

Provided that the High Court may, if it is satisfied that the appellant was prevented by sufficient cause from filing the appeal within the said period, allow it to be filed within a further period not exceeding sixty days.

Explanation-In this section "High Court" means-

- (a) the High Court within the jurisdiction of which the aggrieved party ordinarily resides or carries on business or personally works for gain; and
- (b) where the Central Government is the aggrieved party, the High Court within the jurisdiction of which the respondent, or in a case where there are more than one respondent, any of the respondents, ordinarily resides or carries on business or personally works for gain.

9. In Paragraph 35 of the said report, the Apex Court held that the appellant therein failed to demonstrate as to why an appeal before the High Court is not an efficacious remedy. The Apex Court ultimately held that when a question of law can be agitated in a statutory appeal before the High Court, such remedy is equally efficacious and an order of refusal to entertain the writ petition should not be interfered with. The Madras High Court in case of Metal (supra) applied the said decision of the Apex Court without noticing the distinguishing feature enshrined u/s 35(F) of the Central Excise Act under the said provision, the appeal is circumscribed where it involves a substantial question of law. The Madras High Court did not take into consideration that there is a distinction between a "question of law" and "substantial question of law". I had an occasion to deal with above point in Nicco Corporation Ltd.; (supra) in these words:

The inescapable conclusion which could be arrived from the above noted decision is that the order passed u/s 129E of the Act is certainly amenable to an appeal u/s 130 of the said Act provided it involves a substantial question of law. It leads to another question whether what could be said to be a substantial question of law.

The expression "question of law" is qualified with the word "substantial" which admits no ambiguity that mere existence of a question of law does not make the appeal valid unless it is substantial. One can lend support from a judgment of the Supreme Court in case of Santosh Hazari Vs. Purushottam Tiwai (Dead) by Lrs., wherein it is held that to be substantial, the question of law must be debatable and have a material bearing on the decision of the case, in so far as, the rights of the parties are concerned in these words:

The phrase "substantial question of law", as occurring in the amended section 100 is not defined in the Code. The word substantial, as qualifying "question of law", means-of having substance, essential, real of sound worth, important or considerable. It is to be understood as something in contradiction with technical, of no substance or consequence, or academic merely. However, it is clear that the legislature has chosen not to qualify the scope of "substantial question of law" by suffixing the words " of general importance" as has been done in many others provisions such as section 109 of the Code or article 133(1)(a) of the Constitution. The substantial question of law on which a second appeal shall be heard need not necessarily be a substantial question of law of general importance. In AIR 1928 172 (Privy Council) , the phrase "substantial question of law" as it was employed in the last clause of the then existing section 110 of the CPC (since omitted by the Amendment Act, 1973) came up for consideration and their Lordships held that it did not mean a substantial question of general importance but a substantial question of law which was involved in the case as between the parties. In Sir Chunilal V. Mehta and Sons, Ltd. Vs. The Century Spinning and Manufacturing Co., Ltd., , the Constitution Bench expressed agreement with the following view taken by a Full Bench of the Madras High Court in Rimmalapudi Subba Rao Vs. Noony Veeraju and Others, :

.....when a question of law is fairly arguable, where there is room for difference of opinion on it or where the Court thought it necessary to deal with that question at some length and discuss alternative views, then the question would be a substantial question of law. On the other hand, if the question was practically covered by the decision of the highest court or if the general principles to be applied in determining the question are well settled and the only question was of applying those principles to the particular facts of the case it would not be a substantial question of law and laid down the following test as proper test, for determining whether a question of law raised in the case is substantial (page 1318):

The proper test for determining whether a question of law raised in the case is substantial would, in our opinion, be whether it is of general public importance or whether it directly and substantially affects the rights of the parties and if so whether it is either an open question in the sense that it is not finally settled by this Court or by the Privy Council or by the Federal Court or is not free from difficulty or calls for discussion of alternative views. If the question is settled by the highest court or the general principles to be applied in determining the

question are well settled and there is a mere question of applying those principles or that the plea raised is palpably absurd the question would not be a substantial question of law.

In Deputy Commr., Hardoi, in charge Court of Wards, Bharawan Estate Vs. Rama Krishna Narain and Others, , also it was held that a question of law of importance to the parties was a substantial question of law entitling the appellant to certificate under (the then) section 110 of the Code.

A point of law which admits of no two opinions may be a proposition of law but cannot be a substantial question of law. To be "substantial", a question of law must be debatable, not previously settled by law of the land or a binding precedent, and must have a material bearing on the decision of the case, if answered either way, in so far as the rights of the parties before it are concerned. To be a question of law "involved in the case", there must be first a foundation for it laid in the pleadings and the question should emerge from the sustainable findings of fact arrived at by court of facts and it must be necessary to decide that question of law for a just and proper decision of the case. An entirely new point raised for the first time before the High Court is not a question involved in the case unless it goes to the root of the matter. It will, therefore, depend on the facts and circumstances of each case whether a question of law is a substantial one and involved in the case, or not; the paramount overall consideration being the need for striking a judicious balance between the indispensable obligation to do justice at all stages and impelling necessity of avoiding prolongation in the life of any lis.

Had it been a case that the legislature intended to provide the right of an appeal against every order passed by the Appellate Tribunal involving question of law which is of wide import, the position would have been different than if the same is qualified with the word "substantial" which though confers the right of an appeal but in restricted arena.

In case of Vijay Kumar Talwar Vs. Commissioner of Income Tax, Delhi, , the Supreme Court while considering a matter arising from an order passed u/s 260A of the Income Tax Act, 1961 which relates to an appeal before the High Court against an order passed by the Appellate Tribunal if the High Court is satisfied that the case involves a substantial question of law held that the finding of fact may also raise a substantial question of law if it is based on no evidence, non-consideration of relevant admissible evidence, drawing of wrong inferences on a proven facts and against the well-settled proposition of law in these words:

22. In Hero Vinoth v. Seshammal, this Court has observed that:

(SCC p. 556, para 24)

(iii) The general rule is that the High Court will not interfere with the concurrent findings of the courts below. But it is not an absolute rule. Some of the well-recognised exceptions are where (i) the courts below have ignored material

evidence or acted on no evidence; (ii) the courts have drawn wrong inferences from proved facts by applying the law erroneously; or (iii) the courts have wrongly cast the burden of proof. When we refer to "decision based on no evidence", it not only refers to cases where there is a total dearth of evidence, but also refers to any case, where the evidence, taken as a whole, is not reasonably capable of supporting the finding.

23. A finding of fact may give rise to a substantial question of law, inter alia, in the event the findings are based on no evidence and/or while arriving at the said finding, relevant admissible evidence has not been taken into consideration or inadmissible evidence has been taken into consideration or legal principles have not been applied in appreciating the evidence, or when the evidence has been misread. (See *Madan Lal v. Gopi*, *Narendra Gopal Vidyarthi v. Rajat Vidyarthi*, *Commr. of Customs v. Vijay Dasharath Patel*, *Metroark Ltd. v. CCE and W.B. Electricity Regulatory Commission v. CESC Ltd.*)

In a most recent judgment delivered by the Supreme Court in case of *Union of India (UOI) Vs. Ibrahim Uddin and Another*, , it is held that to be substantial, the question of law must be debatable and must have a material bearing on the decision of the case and even the facts can be gone into provided the findings thereupon is vitiated by non-consideration of the relevant evidence or an apparent erroneous approach to the matter in these words:

66. In *Oriental Investment Co. Ltd. v. CIT* this Court considered a large number of its earlier judgments, including *Sree Meenakshi Mills Ltd. v. CIT* and held that where the question of decision is whether certain profit is made and shown in the name of certain intermediaries, were, in fact, profit actually earned by the assessee or the intermediaries, is a mixed question of fact and law. The Court further held that: (*Oriental Investment case*, AIR p. 856, para 29)

29. ... inference from facts would be a question of fact or of law according as the point for determination is one of pure fact or a "mixed question of law and fact" and that a finding of fact without evidence to support it or if based on relevant and irrelevant matters is not unassailable.

67. There is no prohibition to entertain a second appeal even on question of fact provided the Court is satisfied that the findings of the by showing erroneous approach to the matter and findings recorded in the court below are perverse. [Vide *Jagdish Singh v. Natthu Singh*, *Prativa Devi v. T.V. Krishnan*, *Satya Gupta v. Brijesh Kumar*, *Ragavendra Kumar v. Firm Prem Machinery & Co.*, *Molar Mal v. Kay Iron Works (P) Ltd.*, *Bharatha Matha v. R. Vijaya Renganathan* and *Dinesh Kumar v. Yusuf Ali*.]

On the above noted principle enunciated in the above reports, my answer to the first question framed herein above is an affirmative with the rider that it must involve the substantial question of law.

10. Though every order passed by the Tribunal, in a pending appeal is amenable

to be challenged in an appeal but such appeal is entertainable, if the remedy of appeal is somehow restricted, the same cannot be said to be an efficacious remedy and, therefore, the jurisdiction of the High Court under Article 226 of the Constitution cannot be taken away. In *Nicco Corporation Ltd.*; this Court held that the power under Article 226 cannot be brindled to protect the legal rights of a person subjected to injustice in these words:

In the realm of public law, the High Court exercises the power of judicial review against the illegality, irrationality and procedural impropriety of an order passed by the State or the statutory authorities and does not act as an appellate authority. Under Article 226 of the Constitution, High Court not only protects the fundamental right of the citizen but also the other legal right from injustice wherever it is found. The exercise of power under Article 226 cannot be restricted and is an essential part of the rule of law and have been expressly entrusted as sentinel in *qui vive*.

11. There is no absolute bar against the invocation of power of judicial review under Article 226 of the Constitution, even if, there is an alternative remedy available to the aggrieved person. It is not a rule of exhaustion of the remedy but a rule of convenience and discretion.

12. This Court, therefore, does not find the writ jurisdiction is completely taken away because of the existence of an alternative remedy by way of an appeal u/s 35F of the Central Excise Act.

13. So far as the issue relating to the initiation of a proceeding solely on the ground of disparity in recording the consumption of electricity is concerned, this Court finds that the decision in case of *R.A. Castings (supra)* can be aptly applied to. Before the Tribunal, other reports were also available than the report of Dr. Batra and the Tribunal recorded the note of caution that merely on the basis of electricity consumption, the person cannot be saddled with penalty in following words:

21. The law is well settled that the electricity consumption cannot be the only factor or basis for determining the duty liability that too on imaginary basis especially when Rule 173E mandatorily requires the Commissioner to prescribe/fix norm for electricity consumption first and notify the same to the manufacturers and thereafter ascertain the reasons for deviations, if any, taking also into account the consumption or various inputs, requirements of labour, material, power supply and the conditions for running the plant together with the attendant facts and circumstances. Therefore, there can be no generalization nor any uniform norm of 1046 units as sought to be adopted by the Revenue especially when there is no norm fixed under Rule 173E till date by the Revenue and notified by it. The electricity consumption varies from one unit to another and from one date to another and even from one heat to another within the same date. There is, therefore, no universal and uniformly acceptable standard of electricity consumption, which can be adopted for determining the excise duty

liability that too on the basis of imaginary production assumed by the Revenue with no other supporting record, evidence or document to justify its allegations.

23. The Tribunal has consistently taken the view that wherever electricity consumption alone is adopted as the basis to raise demands, the order of the lower authorities have been held to be unsustainable in law and set aside and the Revenue had been directed to carry out experiments in different factories on different dates to arrive at the average to be adopted as a norm, which can be followed thereafter and the Revenue in the present case not having conducted any experiment whatsoever cannot be permitted to justify the demands raised. It will be appropriate on the part of the Revenue to conduct experiments in the factory of the appellants and others and that too on different dates to adopt the test results as the merely on assumptions and presumptions cannot, therefore, be sustained nor could be justified both on facts and in law.

14. The order of the Tribunal rendered in R.A. Casting was assailed before the Allahabad High Court while dismissing the proceeding it is held:

3. Being aggrieved by the impugned orders, the respondents filed appeals before the Customs, Excise & Service Tax Appellate Tribunal, New Delhi. The Tribunal observed that it is settled principle of law that the electricity consumption can not be the only factor or basis for determining the duty liability, that too on imaginary basis, especially when Rules 173E mandatorily requires the Commissioner to prescribe/fix norm for electricity consumption first and notify the same to the manufacturers and thereafter ascertain the reasons for deviations, if any, taking also into account the consumption of various inputs, requirements of labour, material, power supply and the conditions for running the plant together with the attendant facts and circumstances. The Tribunal further observed that no experiment have been conducted in the factories of the appellants for devising the consumption norms of electricity for producing on MT of steel ingots. Tribunal also observed that the electricity consumption varies from one heat to another and from one date to another and even from one heat to another within the same date. Therefore, no universal and uniformly acceptable standard of electricity consumption can be adopted for determining the excise duty liability that too on the basis of imaginary production assumed by the Revenue with no other supporting record, evidence or document to justify its allegations. The Tribunal has also considered the report of Dr. Batra, which has been relied upon for making the allegations that there was higher electricity consumption. It appears that Dr. Batra in his report has observed that for the production of 1 MT of steel ingots, 1046 units electricity required.

15. The Apex Court declined to interfere with the said order as the special writ petition challenging the order of the Allahabad High Court was dismissed. Therefore, mere excess consumption of electricity without any corroborative evidence relating to the purchase of the raw material, conversion of the raw material into a final products and clearance from the manufacturing unit to the respective buyers are produced does not raise presumption of evading the duty.

This has been a consistent view of the Tribunal based upon the said R.A. Casting (supra) in dispensing the pre-deposit condition unless the CESTAT at Delhi in M/s. Amrit Versha Ispat-v.-CCE, Meerut-I took a different view. The said order was assailed before the Delhi High Court in W.P. (C) No. 8141 of 2008 by order dated 19th November, 2008. The division bench of the Delhi High Court set aside the order of the Tribunal and directed reconsideration in the light of the ratio laid down in R.A. Castings Pvt. Ltd. (supra).

16. The show-cause notice issued in the instant case was based on the variation recorded in the consumption of electricity forming the opinion that there has been a clandestine clearance of the final product by relying upon the report of Dr. Batra. There is no other corroborative evidence shown to exist with the department justifying the suppression, clandestine removal of the final product. Furthermore, the letter issued by the IIT Kanpur annexed to this writ petition such that the said report was not submitted by the said institution and, therefore, they do not accept the genuinity and/or credibility recorded therein. The petitioner have also relied upon the report of the another expert which contains a finding contrary to the findings recorded by Dr. Batra. Strangely enough, the Tribunal records that there was no other report available on the record except the report of Dr. Batra. This shows the non-application of mind by the Tribunal in disposing of the said application. Furthermore, when the Tribunal or the Court have interpreted the statutory provisions, the Tribunal cannot take a contrary view but are bound by the same.

17. This Court, therefore, finds that the impugned decision is not capable of being sustained and, therefore, is quashed and set aside. Since all the materials available before the adjudicating authority or the tribunal is not brought before this Court, this Court, therefore, feels that the matter should be relegated back to the Tribunal for reconsideration. The Tribunal must draw a distinction between an existence of a strong prima facie case and making out of an arguable case as in case of forma total waiver should be granted though in case of later, the discretion is to be exercised rationally, reasonably and with judicial mind.

18. Accordingly the Tribunal is directed to consider the said application afresh in the light of the observations made herein above and shall dispose of the same within three weeks from the date of the communications of this order by reasoned order.

19. With these observations, the writ petition is disposed of.

20. However, there shall be no order as to costs.

21. Urgent photostat certified copy of this judgment, if applied for, be supplied to the parties subject to compliance of all requisite formalities.