

(2012) 04 SC CK 0031

In the Supreme Court Of India

Case No : Civil Appeal No. 5049 of 2003

Raja Mechanical Company (P) Ltd.

APPELLANT

Vs

Commnr. of Central Excise, Delhi-I

RESPONDENT

Date of Decision : 19-04-2012

Acts Referred:

Central Excise Rules, 1944 — Rule 173Q, 57G, 57T, 57T(1)
Central Excises and Salt Act, 1944 — Section 11A, 11AB, 11AC
Limitation Act, 1963 — Section 5

Citation : (2012) 5 ALLMR 909 : (2012) 191 ECR 281 : (2012) 279 ELT 481 :
(2012) 345 ITR 356 : (2012) 5 SCALE 27 : (2012) 12 SCC 613 : (2013) 29 STR
81 : (2012) 35 STT 580 : (2012) 51 VST 447

Hon'ble Judges : H.L. Dattu, J;Anil R. Dave, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

1. This Civil Appeal is directed against the judgment and order dated 21.12.2001 passed by High Court of Delhi at New Delhi in Central Excise Case No. 41 of 2001, wherein the High Court has dismissed the reference application filed by the Appellant.

2. The facts in nutshell are that the Assessee is a manufacturer of dutiable excisable goods. For its manufacturing activity, it had purchased certain capital goods, namely Windsor Model Injection Moulding Machine and screw assembly along with toolkit falling under Chapter sub heading 8477.10. The Assessee has availed a MODVAT Credit of Rs. 1,47,000/- by filing a declaration dated 30.6.1995 under Rule 57T(1), whereby it declared the receipt of the said goods from M/s D.G.P. Windsor India Ltd. vide invoice dated 18.6.1995, along with the application for condonation of delay, before the adjudicating authority/assessing authority. However, the said declaration was not filed within the time prescribed under the 'Central Excise Act,1944 (for short 'the Act') and the rules framed thereunder. Accordingly, the adjudicating authority had issued a show cause notice dated 11.10.1995 to the Assessee, inter alia, directing it to show cause as

to why the MODVAT credit to the tune of Rs. 1,47,000/-, availed by it, should not be disallowed and recovered under Rule 57G of the central Excise Rules, 1944 (for short 'the Rules') read with Section 11A of the Act and, further directed it to show cause as to why penalty under Rule 173Q of the Rules should not be imposed. Thereafter, a Corrigendum dated 23.4.1997 to the Show cause notice was issued to the Assessee, inter alia, directing it to show cause to the Assistant Commissioner instead of the Deputy Collector, as mentioned in the Show cause notice dated 11.10.1995. The Assessee was further directed to show cause as to why the penalty u/s 11AC should not be imposed and, further, interest should not be recovered u/s 11AB of the Act.

3. In its reply dated 16.11.1995 and 26.6.1997 to the Show cause notice, the Assessee had submitted that it had received the said goods in the factory only on 30.9.1995, however, had wrongly mentioned the date of receipt of said goods as 18.6.1995 in its declaration filed under Rule 57T due to inadvertence, which was actually the date of invoice issued by the supplier. The Assessee further submitted that it had also filed the application for condonation of delay in filing the declaration.

4. After receipt of the reply that was filed by the Appellant, the adjudicating authority, after taking cognizance of the cash voucher of the Assessee dated 30.6.1997, observed that the cash voucher which shows the payment made by the party is the evidence of delivery of the goods to the party. Therefore, the actual delivery of the goods to the Assessee was made on 30.6.1997 instead of 30.6.1995. It also observed that the whole machinery was transported by one consignment, as evident from the invoice, which bear vehicle number used for transportation. In view of this, the adjudicating authority has confirmed the show cause notice and disallowed the benefit of the MODVAT credit vide his order dated 17.10.1997 and, thereby, had directed the recovery of MODVAT credit of Rs. 1,47,000/-. He also imposed a penalty of Rs. 20,000/-.

5. The Assessee, being aggrieved by the orders so passed by the adjudicating authority, had preferred an Appeal before the same authority which had passed the orders in original. Nearly after a year's time, the Assessee realized that the appeal that was filed by him was not before the appropriate authority but before an authority which had passed the order in original. Thereafter, the Assessee has filed an appeal before the first appellate authority, namely, the Commissioner of Appeals, but by that time there was a delay in filing the appeal. Along with the appeal, the Assessee had also filed an application u/s 5 of the Limitation Act, 1963 explaining the delay in filing the appeal.

6. The first appellate authority, being of the opinion that it has no powers to condone the delay beyond the prescribed period, has rejected the appeal vide its Order dated 1.3.2000. Aggrieved by the same, the Assessee had carried the matter by way of Second Appeal before the Tribunal. The Tribunal, by its judgment and order dated 17.10.2000, confirmed the orders passed by the first appellate authority. Thereafter, the Assessee had filed an application for

rectification of the judgment and orders passed by the Tribunal on the ground that the Tribunal ought to have considered the Assessee's appeal not only on the ground of limitation but also on merits of the case. The Tribunal vide its miscellaneous order dated 9.3.2001, in our opinion, has rightly rejected the application filed for rectification of the order passed. Being aggrieved by the order passed by the Tribunal, the Assessee had approached the High Court by filing the reference application with a request to direct the Tribunal to state the case and the question of law for its consideration and decision. The High Court, after noticing the question of law that was framed by the Assessee, has answered the same in negative and against the Assessee and in favour of the revenue vide its judgment and order dated 21.12.2001. It is the correctness or otherwise of this order of the High Court is the subject matter of this appeal.

7. We have heard Mr. P.C. Jain, Learned Counsel for the Assessee and Mr. Harish Chandra, learned senior Counsel for the revenue. Firstly, Mr. Jain, would contend that the Tribunal ought to have considered the Assessee's appeal not only on the ground of limitation but also on merits of the case. Since that has not been done, according to the learned Counsel, the Tribunal has committed a serious error. The Learned Counsel would further submit that the "doctrine of merger" theory would apply in the sense that though the first appellate authority has rejected the appeal filed by the Assessee on the ground of limitation, the orders passed by the original authority would merge with the orders passed by the first appellate authority and, therefore, the Tribunal ought to have considered the appeal filed by the Assessee not only on the ground of limitation but also on merits of the case. To buttress his arguments, the learned Counsel has drawn our attention to the observations made by this Court in the case of *Collector of Customs, Calcutta Vs. East India Commercial Co. Ltd.*, *Shyam Sundar Sarma Vs. Pannalal Jaiswal and Others*, *Kunhayammed and Others Vs. State of Kerala and Another*, and the decision of the Tribunal in the case of *Mark Auto Industries v. CCE, New Delhi 2000 (41) RLT 756 (CEGAT)*.

8. In reply to the submissions made by Learned Counsel for the Appellant, Shri Harish Chandra, learned senior Counsel appearing for the revenue has invited our attention to the decision of this Court in the case of *Chandi Prasad and Others Vs. Jagdish Prasad and Others*, wherein this Court, after consideration of the earlier decisions has come to the conclusion that the doctrine of merger would not apply to a case where an appeal is dismissed only on the ground of the limitation. In the said decision, this Court has observed asunder:

... when an appeal is dismissed on the ground that delay in filing the same is not condoned, the doctrine of merger shall not apply.

9. The Learned Counsel has also invited our attention to the observations made by this Court in the case of *State of Kerala and Another Vs. Kondottyparambanmoosa and Others*, . In the said decision, the Court has stated as under:

Keeping these principles as enunciated by this Court in the aforesaid three decisions in mind and applying the said principles in the facts of this case, we have no hesitation in our mind to conclude that the High Court in the impugned order did not at all consider that in the earlier revision order of the High Court, revisional application was rejected not on merits but only on the ground of delay. Therefore, it must be held that since the earlier revision application was not rejected on merits, the said order rejecting the same on the ground of delay cannot be said to be the order of affirmance and that being the position, we must hold that since the earlier revision petition was not decided on merits, the doctrine of merger cannot be applied to the facts and circumstances of the present case.

10. In this connection, the observations made by this Court in the case of Chandi Prasad and Ors. (*supra*), needs to be reproduced, which are as under:

It is trite that when an appellate court passes a decree, the decree of the trial court merges with the decree of the appellate court and even if and subject to any modification that may be made in the appellate decree, the decree of the appellate court supersedes the decree of the trial court. In other words, the merger of a decree takes place irrespective of the fact as to whether the appellate court affirms, modifies or reverses the decree passed by the trial court. When a SLP is dismissed summarily, doctrine of merger does not apply but when an appeal is dismissed, it does.

11. The facts are not in dispute and cannot be disputed that there was a delay in filing the prescribed forms before the Assessing authority. Therefore, the assessing authority had rejected the claim of the Assessee and accordingly, had directed him for payment of the excise duty credit availed by the Assessee. Aggrieved by that order, the Assessee had belatedly filed an appeal before the proper appellate authority. Since there was delay in filing the appeal and since the same was not within the time that the appellate authority could have condoned the delay, accordingly had dismissed the same. It is that order which was questioned before the Tribunal. Before the Tribunal, as we have already noticed, the Assessee had requested the Tribunal to first condone the delay and next to decide the appeal on merits, i.e. to decide whether the adjudicating authority was justified in disallowing the benefit of the MODVAT credit that was availed by the Assessee. The Tribunal had not conceded to the second request made by the Assessee and only accepted the findings and conclusions reached by the Commissioner of Appeals, who had rejected the appeal.

12. The question now that falls for our consideration and decision is whether the Tribunal was justified in not considering the case of the Assessee on merits. The Assessee's stand before the Tribunal and before this Court is that the orders passed by the adjudicating authority would merge with the orders passed by the first appellate authority and the Tribunal ought to have considered the appeal filed by the Assessee on merits also. In our opinion, the same cannot be accepted. In view of the plethora of decisions of this Court, wherein this Court

has, categorically, observed that if for any reason an appeal is dismissed on the ground of limitation and not on merits, that order would not merge with the orders passed by the first appellate authority. In that view of the matter, we are of the opinion, that the High Court was justified in rejecting the request made by the Assessee for directing the revenue to state the case and also the question of law for its consideration and decision. In view of the above discussion, we do not find any merit in this appeal.

13. Accordingly, the appeal stands rejected. No costs.

Ordered accordingly.