(2015) 08 BOM CK 0290

In the Bombay High Court

Case No : Writ Petition No. 7889 of 2015

Rakhoh Industries Pvt. Ltd. APPELLANT

Vs

Union of India RESPONDENT

Date of Decision : 31-08-2015

Acts Referred:

Central Excises and Salt Act, 1944 — Section 11A(4)
Constitution of India, 1950 — Article 226

Citation : (2015) 324 ELT 89 : (2016) 36 GSTR 480

Hon'ble Judges : S.C. Dharmadhikari and B.P. Colabawalla, JJ.

Bench : Division Bench

Advocate : Prakash Shah, Prasad Paranjape and Arun Jain i/b. PDS Legal, for the Appellant; Y.R. Mishra and Neelesh V. Kalantri, for the Respondent

Judgement

1. This Petition, under Article 226 of the Constitution of India is challenging an order passed by the Customs, Excise and Service Tax Appellate Tribunal, West Zonal Bench, Mumbai. Ordinarily, a writ petition would not have been maintainable against such an order, but it is stated that the Tribunal has also passed a further order on an application styled as miscellaneous application for rectification of mistakes. That also has been dismissed by the impugned order on 1st May, 2015. Against that order, an appeal would not lie is the submission.

2. For the present petition and its disposal, we do not wish to decide any larger question or controversy. We proceed on the footing that relegating the petitioner to any other remedy, even if existing, would not be efficacious and expedient, bearing in mind the request of the petitioner.

3. Very few facts are necessary to be noted for appreciating the submissions of Mr. Shah appearing for the petitioner. The petitioner was originally constituted as a proprietorship concern. A show cause notice was issued to this proprietorship concern dated 1st March, 2013. With effect from 1st November, 2013, the sole proprietorship concern was taken over by the petitioner-company. The petitioner is engaged inter alia in the manufacture of excisable goods falling under Chapter

73 of the First Schedule to the Central Excise Tariff Act, 1985. The petitioner has described in paras 6 to 9 the nature of the activities and how the excisable goods manufactured were cleared. The petitioner relied upon a Notification dated 1st March, 2006, whereunder the Central Government being satisfied that it is necessary in the public interest, exempted the non-conventional energy devices/ systems specified in List 5 of the said notification falling under any Tariff Entry of the Central Excise Tariff Act, 1985 from the whole of the excise duty specified thereon under First Schedule of the said Central Excise Tariff Act, 1985. Annexure ''C'' is a copy of the said Notification.

4. The petitioner claims that this exemption was available to the manufacturer like the petitioner. Paras 11 and 12 of the petition are devoted to entitlement for exemption. Thereafter, reference is made by the petitioner to an audit conducted in August, 2012 and the show cause notice dated 1st March, 2013 demanding Central Excise Duty in the sum of Rs. 5,36,83,121/- together with interest and penalty. The petitioner replied to this show cause notice, was granted a personal hearing and an order-in-original was passed on 24th June, 2013 confirming the demand of duty, interest and commensurate penalty. Annexure ''G'' is the copy of the order.

5. An appeal was preferred against this order and that was heard by the Tribunal and the petitioner noted that there were two more appeals of two other corporate entities, which were listed for hearing together with the appeal of the petitioner. The Tribunal was of the view that all the three appeals involve similar issue. The appeals were therefore, decided by a common order. The Tribunal passed a final order dated 25th September, 2014 partly allowing the appeal filed by the petitioner. The duty demand was confirmed together with interest, but the penalties were set aside. However, in respect of the other two entities whose appeals were taken up together with the petitioner by the Tribunal, the Tribunal referred a question or issue raised therein for opinion by a Larger Bench.

6. The petitioner, on noticing some mistake in the initial order, particularly while invoking extended period of five years, as provided under Section 11A(4) of the Central Excise Act, 1944, filed an application for rectification of mistakes in the initial order of the Tribunal. That application was heard by the Bench of the Tribunal and it dismissed the same on 1st May, 2015. In the light of the above, the only contention raised before us by Mr. Shah is that if all three appeals involve the same issue or the essential issue was identical therein, then, the Tribunal should have been consistent in its approach. It should have referred the Question in all three appeals for opinion and answer by a Larger Bench. The question formulated by the Tribunal in the initial order of 25th September, 2014 according to Mr. Shah also arises in the case of the petitioner. Therefore, the Registry should have been directed by the Tribunal to place the records in the petitioner''s appeal also before the learned President so as to constitute a Larger Bench or refer all three appeals to the already constituted Larger Bench. That is how the interest of justice would have been served. However, singling out only

the petitioner''s appeal and deciding it without answering any legal question has prejudiced the petitioner enormously. The impugned orders therefore be set aside.

7. On the other hand, Mr. Mishra appearing for the Revenue supported the orders of the Tribunal. He urged that the Tribunal had formulated the question for reference to the Larger Bench. In the case of the present petitioner, the issue of any specially designed device which runs on windmills and in relation thereto, is not raised. The Tribunal has held that the Towers, Anchor Ring, Load Spreading Plates (LSP) do not fall under the phrase ''Wind Operated Electricity Generator'' (WOEG). In the circumstances and for reasons assigned by the Tribunal from para 11 onwards, Mr. Mishra submits that the Tribunal''s order does not require interference in our writ jurisdiction and the writ petition be dismissed.

8. We have heard both sides and with their assistance, perused the petition and all Annexures thereto. Mr. Mishra is right in urging that this Court in writ jurisdiction does not act as a further Appellate Court. It is only issuing a writ of certiorari and for quashing and setting aside the order of a subordinate Court or Tribunal after concluding that the Tribunal has failed to act in accordance with law or failed to exercise the jurisdiction vested in it by law or has exercised a jurisdiction not vested in it by law or that the orders passed by the Court or Tribunal suffer from an error apparent on the face of the record or that its findings and conclusions are perverse. However, in this case, we find that the three appeals were taken together. The Tribunal, in para 9 of the initial order dated 25th September, 2014 observed that the short point to be decided is whether the Load Spreading Plates (LSP) manufactured by the three appellants and Towers can be considered to be covered under "Wind Operated Electricity Generator, its components and parts", which are exemption under Notification No. 6 of 2006. After setting out the background in which the notification was issued and the nature of the product manufactured, its components and parts in para 10, in para 11, the Tribunal held that various judicial pronouncements have, according to the Counsel, allowed exemption to Towers and their parts. However, no judicial pronouncement regarding exemption to foundation parts, namely, Anchor Rings and LSP has been brought to the Tribunal''s notice. It is thereafter that the Tribunal attempted to distinguish the case of the present petitioner. It concluded that a foundation cannot be said to be covered by the notification. Prima facie, the Tribunal lost sight of the fact that it has to first conclude that all the products, namely, LSP and Anchor Rings, Tower Doors are foundational parts or not. We do not find a proper reference being made to all individual manufacturers, their products and thereafter what they claim as a part of WOEG. In para 12, the intention of the Government in issuing the notification has been discussed and reference is made to an interim order in the case of the present petitioner. Those interim findings and tentative views have been relied upon to distinguish the case of the present petitioner from that of the others. Thereafter, in para 13, the Tribunal holds that the Counsel has not been able to satisfy that the terms ''windmill'' and ''WOEG'' are synonymous or used interchangeably. The

guidelines and the forms filed as per requirement of Ministry are referred and on that basis and going by the language of the same, the Tribunal concludes that the Doors, Anchor Rings and LSP do not fall under the phrase ''WOEG''. Then reference is made to the Board letter of 1997, the Notification No. 205/1988, dated 25th May, 1988, the judgment in the case of the co-appellants (Gemini) and we find in all matters a common conclusion has been reached that the notification did not exempt WOEG and their parts. We do not see therefore, any scope for the Tribunal then referring to individual facts pertaining to the present petitioner and upholding the duty demand along with interest. Paras 17 to 20 of the Tribunal''s order read as under:-

"17. We do not consider these cases fit for imposition of penalty as Gemini had been declaring the goods namely wind mill doors in their ER-1 returns. Further there have been contrary judgments on the issue as to what may be considered as parts of windmill and WOEG.

18. In our view, benefit of exemption Notification No. 6/2006 should be denied and duty demands along with interest must be upheld and penalties be set aside.

19. In the case of M/s. Rakhoh Enterprises the duty demand along with interest is upheld. However, penalty is set aside.

20. In the case of Gemini Instratech Pvt. Ltd. though we could have decide this case finally on the basis of our findings recorded above, as a matter of judicial discipline the matter may be placed before the Hon''ble President for constitution of a Larger Bench because our view is contrary to the view taken by a Co-ordinate Bench in the matter of the same assessee for a different period. The issue to be considered by Larger Bench is framed as follows:

Whether a manufacturer is entitled to claim the benefit and exemption from Central Excise duty on ''wind mill doors'' under Notification No. 6/2006, dated 1-3-2006 which grants exemption to "wind operated electricity generator, its components and parts thereof including rotor wind turbine controller"."

9. Upon perusal of these paragraphs, we are unable to agree with Mr. Mishra that there was justification for giving different treatment to the case of the petitioner. The Tribunal was aware of the controversy, the issue before it and stated to be common to all the appellants. If there was justification for rendering a separate finding in the case of the petitioner''s appeal, then, in the first instance it is not clear as to why it was clubbed along with other appeals. If all three appeals involve similar question and issue, then, it is nor clarified as to what distinguishes only the present petitioner''s case from the other two appeals. If the issue was of the exemption notification, its construction and interpretation, the intention of the Government in granting the exemption, then, it is common to all the appellants. In the circumstances, we do not find any support for the argument of Mr. Mishra that the Tribunal''s order is neither erroneous nor illegal.

10. We have summarised the Tribunal''s conclusions in the words of the Tribunal

itself. We have found that there was a common thread and flowing throughout the order up to the discussion on the facts pertaining to the petitioner''s case. We do not find that there was any feature or aspect of the petitioner''s case which demonstrated and proved it to be a distinct or a different matter. No light has been thrown by the Tribunal or by the Revenue before us nor any distinguishing features, save and except noted above by us, are appearing from the record. The Tribunal, rather than deciding the issue and construing and interpreting the exemption notification, has thought it fit to refer the same to a Larger Bench. For, it thought that it may be arising in future cases. If the question or issue is of general public importance, requiring an authoritative pronouncement, then, we have not found any reason, much less cogent and satisfactory for leaving out the petitioner from the reference. The petitioner''s case also requires interpretation of the same notification and its construction is also an issue in the petitioner''s case. Therefore, the Tribunal should have formulated the same question even in the case of the petitioner''s appeal and referred all three matters to be decided and by a Larger Bench.

11. This mistake and which was apparent could have been rectified in the rectification proceedings, but the Tribunal failed to exercise its powers and the jurisdiction vested in it by law. For these reasons, we allow this writ petition. We quash and set aside the Tribunal''s order dated 25th September, 2015 and direct that in the case of the present petitioner M/s. Rakhoh Industries Pvt. Ltd. as well the issue and inter alia framed in para 20 shall be referred for decision by a Larger Bench. After the Larger Bench renders a decision or answers it or opines on the issue referred to it, the Tribunal shall decide all the three appeals in accordance with law in tune with the construction and interpretation of the Notification and the answer of the Larger Bench. All contentions of all parties in that regard are kept open. Equally, it will be open for the petitioner to point out to the Tribunal then that its earlier order and some of the findings therein were patently erroneous and hence it should ignore its initial order as well as the order passed on the Rectification of Mistakes Application. All contentions in that regard are kept open. The petition is allowed accordingly. No order as to costs.

12. We are informed that the Larger Bench is assembling for decision on the question and issue and holding its sitting shortly. That is why we granted an urgent circulation of this matter and decided it finally with the consent of both side. Now that our final order has been passed, the Special Bench of the Tribunal shall call for the records of the petitioner''s appeal and allow the petitioner to participate in the proceedings/reference. All concerned to act upon an authenticated copy of this order.

