(2013) 12 GUJ CK 0223

In the Gujarat High Court

Case No : Special Civil Application No. 12469 of 2013

Rusapi Containers		APPELLANT
	Vs	
Commissioner Appeals		RESPONDENT

Date of Decision : 26-12-2013

Acts Referred:

Citation : (2014) 44 GST 562

Hon'ble Judges : R.P. Dholaria, J;Mukesh R. Shah, J

Bench : Division Bench

Judgement

M.R. Shah, J.—Leave to amend by joining the Assistant Commissioner, Customs, Central Excise & Service Tax, Division-II, Silvassa, as party respondent No. 2 is granted. By way of this petitioner under Article 226 of the Constitution of India, the petitioner has prayed for appropriate writ, order or direction quashing and setting aside the impugned order dated 08.05.2013 passed by the Commissioner (Appeals), Central Excise, Customs and Service Tax, Vapi in Old No. SRP/68/VAPI/2013-14 as well as to quash and set aside the order dated 31.03.2012 passed by the Assistant Commissioner, Customs, Central excise and Service Tax, Division II, Silvassa in OIO No. 88/AC/DEM/2011-12/Silvassa.

2. A show cause notice dated 02.03.2010 was issued by the Adjudicating Authority by which the petitioner was directed to show cause as to why:

(i) The wrongly availed Cenvat Credit amounting to Rs. 412050/- as detailed in Annexure "A" appended herewith, should not be demanded and recovered from them under rule 14 of the Cenvat Credit Rules, 2004 read with proviso to Section 11A(1) of the Central Excise Act, 1944.

(ii) A penalty should not be imposed upon them under Rule 15 of the Cenvat Credit Rules, 2004 read with Section 11AC of the Central Excise Act, 1944.

(iii) Interest at the appropriate rate should not be demanded and recovered from them under Rule 14 of the Cenvat Credit Rules 2004 read with Section 11AB of the Central Excise Act, 1944.

3. That the Adjudicating Authority passed the OIO dated 31.03.2012 and passed the following order:

12.11. The assessee have wrongly availed Cenvat credit Service Tax to the tune Rs. 4,12,050/- (BES Rs. 4,00,049/- + Education Cess 8001/- I- Higher Education cess 4000/-) paid on the commissions for services rendered by their Sales Commission Agents; in the contravention of the statutory provisions stipulated vide Rule 2(1) and Rule 3(1) of the CENVAT Credit Rules, 2004 with intent to avail the Cenvat credit which is not legally admissible to them. Hence, the aforesaid wrongly availed Cenvat credit amounting to Rs. 4,12,050/- (BES Rs. 4,00,049/- + Education Cess 8001/- + Higher Education cess 4000/-) is inadmissible to them and the same are demanded and recoverable from them along with interest at the appropriate rate under provisions of Section 11A(1) and Section 11AB of the Central Excise Act, 1944 read with Rule 14 of the CENVAT Credit Rules, 2004. The above acts of contravention on their part to constitute an offence of the nature as described under erstwhile Rule 15(4) and now Rule 15.

(ii) I order that the interest at the appropriate rate is recoverable on the amount shown as above (i) from them under Rule 14 of Central Credit Rules, 2004 read with Section 11AB (now Section 11AA) of Central Excise Act, 1944.

(iii) I impose the penalty of Rs. 4,12,050/- (Total Rupees Four Lacs Twelve Thousand and Fifty only), on them under Rule 15 Cenvat Credit Rules, 2004, read with section 11AC of Central Excise Act, 1944. If the Cenvat Credit Amount of Rs. 4,12,050/- (Total Rupees Four Lacs Twelve Thousand and Fifty only) as disallowed at (i) above, is paid by the assessee along with interest, as ordered at (ii) above, within thirty days from the date of communication of this order, the amount of penalty stands reduced to twenty five per cent of the penalty of Rs. 4,12,050/- provided the said reduced penalty is also paid within the period of thirty days from the date of communication of this order in terms of proviso to Section 11AC of the Central Excise Act, 1944.

4. Feeling aggrieved and dissatisfied with the OIO dated 31.03.2012, the petitioner has preferred appeal before the Commissioner (Appeals). However, there was a delay of about 222 days. Therefore, the petitioner submitted an application to condone the delay, however, by order dated 08.05.2013, the Commissioner (Appeals) has dismissed the said appeal being time barred and not maintainable u/s. 35 of the Central Excise Act, 1944.

5. Feeling aggrieved and dissatisfied with the impugned order, the petitioner has preferred present Special Civil Application under Article 226 of the Constitution of India.

6. At the time of oral arguments before us, Shri Hardik Vora, learned advocate appearing on behalf of the petitioner has made it clear that he does not

challenge the legality of the order of the Appellate Commissioner but submitted that Adjudicating Authority''s order requires interference. He has relied upon the averments made in the petition to submit that the petitioner had shown sufficient cause for not being able to prefer the appeal in time. It is submitted that after receiving the certified copy of the order, the same was sent to the practicing Company Secretary of the petitioner who handled excise and service lax consultancy of the petitioner. It is submitted that as the petitioner was not aware of any further proceedings, it left the entire file at the discretion of its excise and service tax consultant. It is submitted that, however, the consultant gave the documents to his assistant for preparing and filing appeal before the Commissioner (Appeals). However, he did not make any noting of the last date of filing appeal in his diary. It is submitted that in absence of any follow up, the assistant of the consultant had not prepared the appeal memo in time. Hence, the delay was due to the mistake of the authorized representative of the petitioner (tax consultant). On merits, it is submitted by Shri Vora, learned advocate appearing on behalf of the petitioner that as such the OIO passed by the Adjudicating Authority is beyond the show cause notice issued and as such the OIO is in breach of principle of natural justice as no opportunity had been given to the petitioner with respect to the grounds on which the OIO has been passed. It is submitted that as such the show cause notice for denying the CENVAT credit was issued only on one ground that the assessee has availed the credit of service tax on commission for sale of finished goods, however, the same is not relating to manufacturing activities but relating to sales activities. It is further submitted that though the first Adjudicating Authority held that the Business Auxiliary Service (BAS) on account of sales commission can be considered as Input Services within the definition of Rule 2(1)(ii) of the Cenvat Credit Rules, 2004 and the service tax paid on the said service is admissible as credit to the manufacturer, subject to certain conditions, however, the Adjudicating Authority has denied the CENVAT credit on various other grounds for which no show cause notice was issued and no opportunity was given to the petitioner.

6.1 Relying upon the decision of the Division Bench of this Court in the case of Lathia Industrial Supplies Co. P. Ltd. and Others Vs. Commissioner (Appeal-I) and Another, , it is requested to exercise the powers under Article 226 of the Constitution of India and to consider the legality and validity of the OIO passed by the first Adjudicating Authority.

7. Shri Gaurang Bhatt, learned advocate appearing on behalf of Shri RJ Oza, learned advocate appearing on behalf of the respondent has tried to oppose the present Special Civil Application by submitting that as such no error and/or illegality has been committed by the Commissioner (Appeals) to dismiss the appeal which was clearly time barred. However, he is not in a position to dispute that as such the OIO has been passed by the first Adjudicating Authority on altogether other grounds which have not been mentioned in the show cause notice and therefore to that extent the OIO can be said to be in breach of

principle of natural justice. However, he has submitted that if this Court is inclined to entertain the present Special Civil Application and to consider the OIO on merits, in that case, the matter may be remitted back to the first Adjudicating Authority to consider the issue afresh in accordance with law and on merits and the OIO be treated as a show cause notice, more particularly, the grounds stated in para 12.4 to 12.6 in the said OIO.

8. Heard Shri Vora, learned advocate appearing on behalf of the petitioner and Shri Gaurang Bhatt, learned advocate appearing on behalf of Shri RJ Oza, learned advocate appearing on behalf of the respondent.

9. At the outset, it is required to be noted that the appeal preferred by the petitioner has been dismissed on the ground that the same was time barred. However, considering the averments made in the petition expressing the delay caused in preferring the appeal and/or the explanation in support of the cause for delay on behalf of the petitioner as to why the petitioner could not prefer the appeal within the period of limitation, we are of the opinion that as such sufficient cause has been shown and it is also satisfactory explained why the petitioner could not prefer the appeal within the period of limitation. It appears that the petitioner left the entire file at the discretion of its excise and service tax consultant and there was lapse on the part of the consultant and/or his assistant.

10. Considering the aforesaid facts and circumstances and the OIO which seems to be in breach of principle of natural justice and also considering the decision of the Division Bench of this Court in the case of D.R. Industries Ltd. and Another Vs. Union of India (UOI) and Others, as well as the order dated 20.03.2013 passed by the Division Bench of this Court in the case of Lathia Industrial Supplies Co. (P.) Ltd. {supra), we are of the opinion that this is a lit case to exercise the powers under Article 226 of the Constitution of India and to consider the legality and validity of the OIO.

11. Considering the show cause notice issued by the adjudicating authority as well as the OIO it appears that while passing the OIO the adjudicating authority has denied the CENVAT credit to the petitioner on various other grounds for which no show cause notice was issued and no opportunity has been given to the petitioner. It appears that the show cause notice for denying the CENVAT credit was issued only on the ground that the petitioner has availed the credit of service tax on commission for sale of finished goods, which cannot be said to be relating to manufacturing activities but relating to sales activities (i.e. after manufacturing activities). However, while passing the OIO though the adjudicating authority has held that Business Auxiliary Service (BAS) on account of sales commission can be considered as Input Service within the definition of rule 2(1)(ii) of Cenvat Credit Rules, 2004 and the service tax paid on the said service is admissible as credit to the manufacturer, subject to certain conditions, the adjudicating authority has denied the Cenvat credit on altogether other grounds (mentioned in para 12.4 to 12.6 of the OIO) for which admittedly no show cause notice has been issued and no opportunity has been given to the

petitioner. Under the circumstances, the OIO dated 31.03.2012 can be said to be in breach of principle of natural justice. Under the circumstances, the impugned OIO deserves to be quashed and set aside and the matter is remanded to the first adjudicating authority to consider the issue afresh in accordance with law and on merits and the OIO dated 31.03.2012, more particularly para 12.4 to para 12.6 of the OIO dated 31.03.2012 be treated as a show cause notice. In view of the above and further reasons stated hereinabove, the impugned OIO dated 31.03.2012 is hereby quashed and set aside and the matter is remanded to the First Adjudicating Authority to consider the issue afresh in accordance with law and on merits and the OIO dated 31.03.2012, more particularly para 12.4 to 12.6 of the OIO dated 31.03.2012 be treated as a show cause notice, it will be open for the petitioner to make submissions on the same and to produce the documentary evidence in support thereof within a period of six weeks from today and thereafter the Adjudicating Authority to consider the same and pass appropriate order afresh in accordance with law and on merits and considering the issue with respect to the admissibility of CENVAT credit to the petitioner in accordance with law and on merits at the earliest. The cost of Rs. 7,500/- which the petitioner has deposited pursuant to our earlier order be transmitted to the Gujarat State Legal Services Authority. Rule is made absolute to the aforesaid extent.

