(1999) 11 AHC CK 0026

In the Allahabad High Court

Case No : Civil Miscellaneous Writ Petition No''s. 130-132 of 1999

Salora International Ltd. APPELLANT

Vs

Commr. (A) Cus. and C. Ex. RESPONDENT

Date of Decision : 04-11-1999

Acts Referred:

Central Excise Rules, 1944 — Rule 57G, 57G(2), 57G(3), 57G(4)
Central Excises and Salt Act, 1944 — Section 35F
Constitution of India, 1950 — Article 226
Customs Act, 1962 — Section 129E

Citation : (2000) 120 ELT 299

Hon'ble Judges : P.K. Jain, J

Bench : Single Bench

Advocate : A.P. Mathur, for the Appellant; S.K. Misra and Vikram Gulati, for the Respondent

Judgement

P.K. Jain, J.—In all the three petitions, identical question of facts and law are involved, therefore, all the three Writ petitions are being decided by common judgment.

2. The petitioners are engaged in manufacturer of Television and Audio system falling under Chapter sub-heading Nos. 8527 and 8528 of the Central Excise Tariff Act, 1985 and are duly registered with the Central Excise Department. They are availing facility of Modvat credit on the inputs received and used by them in the manufacture of Television and Audio system. They were served with show cause notices dated 1-12-1995 and 29-2-1996 by Commissioner of Central Excise, Noida and by Assistant Commissioner of Central Excise, Noida, in which it was stated that they had wrongly availed Modvat credit of Rs. 1,07,98,261/- and Rs. 9,94,744.20 paise respectively. By the said notices they were required to show cause why the Modvat credit already availed by them be not reversed.

3. In the first notice the reasons for reversal of Modvat credit were that the petitioner submitted R.T. 12 return but did not submit duty paying documents

i.e. Bill of Entries/Invoices and abstract of R.G. 23-A Part I Register which was required to be submitted under Rule 57G (4) of the C.E. Rules 1944; The quantity of inputs which have been shown to be received in R.G. 23 Part I are not tailing and matching with the quantity shown to be imported under Bill of entries. In some cases inputs appears to have been received in the factory premises as the date of receipt of inputs mentioned are not tailing with the date of clearance of goods from Customs House and in some cases the bill of entries were entered in R.G. 23 Part I Register on a date prior to actual receipt of the goods in the factory and in some cases the inputs are recorded in the statutory records without receipts of inputs in R.G. 23-A Part I which was required in Sub-Rule 57-G(2) Proviso 57G-3(a) of C.E. Rules and in some cases credit on the strength of duplicate copy of Bill of Entry was availed which documents were inadmissible and so on so-forth.

4. In the second notice dated 29-2-1996 the grounds were that petitioners failed to submit duty paying documents i.e. invoices bill of entries and original and duplicate copy of R.G. 23A Part I along with R.T. 12 return and that preliminary scrutiny of duty paying documents reveals that there is no proper system of making entries in R.G. 23F Part I for receipt of inputs and its issue and that in certain cases credit was availed on the strength of duplicate copy of bill of entries which is not a valid document and other similar grounds.

5. Another notice dated 31-10-1995 alleging that Modvat credit availed by the petitioner to the tune of Rs. 1,08,30,844.00 was wrongly availed by him was served upon the petitioner calling upon him to show cause why the same be not reversed. This notice was served on the grounds that credit on the basis of photostat copies of the invoice/bills of entries was availed that Modvat credit on certain inputs was availed without receipt of goods in R.G. 23 Part I Register on the date of credit.

6. The petitioners in 3 petitions submitted separate show cause against the 3 notices served upon them. Against the first notice their main submission was that the inputs received in the factory were recorded and the amounts of Modvat credit availed on such inputs were also recorded in all the other relevant book and the Modvat credit should not be denied merely because receipt of the inputs were not recorded in R.G. 23 Part I Register at the time either prior to the receipt of the inputs in the factory or subsequent to the receipt in the factory. It was stated that the inputs received were invariably recorded by the petitioners in other records maintained by the petitioners in ordinary course of business. As against the notice dated 29-2-1996 the petitioner submitted that so long as the Department did not doubt the duty paid nature of inputs and misuse in final products the Modvat credit should not be denied on mere technical and procedural lapses. Since in the instant case the department neither doubted the duty paid nature of inputs nor its use in final products the dealer was not liable to reversal of Modvat credit allowed to them. Against notice dated 31-3-1995, the show cause filed by the petitioners stated that the Modvat credit were rightly

availed and it cannot be denied on mere technical and procedural lapses. It was also stated that during shifting of their office the file containing the Modvat documents in respect of inputs shown in Annexure-A to the show cause notice were misplaced, hence, they could not place the said documents before the Range Officer at the time of assessment, but produced photo-copy of the original documents. The department did not doubt the authenticity of the photocopies. Hence, Modvat credit due in all respect should not be denied on mere procedural lapses.

7. It appears from the record that a combined order dated 28-11-1997 was passed in respect of notices dated 1-12-1995 and 29-2-1996 and also relating to certain other notices issued to the petitioners. As regards Writ Petition No. 130 of 1999 Modvat credit to the tune of Rs. 1,05,24,441.05 paise was reversed. In Writ Petition No. 131 of 1999 the amount of reversal of Modvat credit is Rs. 3,12,600/- (sic). As regards Writ Petition No. 132 of 1999 order dated 28-11-1997 was passed by the Assistant Commissioner Central Excise and Modvat credit availed by the petitioner to the tune of Rs. 1,07,74,642/ - was disallowed.

8. Aggrieved by the orders passed by the adjudicating authority, the petitioners filed three separate appeals and in the 3 appeals they moved waiver-cum-stay applications u/s 35F of the Central Excises and Salt Act. It was stated in the waiver cum stay applications that full facts of the case have been set out in detail in the accompanying appeals and the grounds taken therein and the same are not being repeated herein for the sake of brevity. That the appellant has a very good case on merits. If the stay as prayed for is not granted it would cause grave and irreparable injury and hardship to the appellant as the appellant is facing great financial difficulty. The respondent No. 1 rejected all the 3 appeals by separate orders dated 22-1-1999,15-1-1999 and 22-1-1999 respectively.

9. Feeling aggrieved by the orders passed by the respondent No. 1 in appeals rejecting the waiver cum stay applications as aforesaid the petitioners have filed the aforesaid 3 writ petitions praying that the impugned orders be quashed and by issue of writ in the nature of mandamus the Commissioner of Appeals, Ghaziabad (respondent No. 1) be directed to decide the appeals in a short stipulated period without insisting on any pre-deposit condition as provided u/s 35F of the Central Excises and Salt Act, 1944.

10. The respondents have filed counter affidavits in Writ Petition No. 131 of 1999 and 132 of 1999. No counter affidavit has, however, been filed in Writ Petition No. 130 of 1999. Office has made a report that pursuant to the order dated 9-9-1999 no counter affidavit has been filed in Writ Petition No. 130 of 1999.

11. In the Counter Affidavit filed in Writ Petition No. 131 of 1999 and 132 of 1999, the claims of the petitioner are challenged almost on the identical grounds. It was stated in the Counter affidavits that M/s. Salora International Limited, now known as Matsushita Television and Audio Industries Ltd., Noida is one of the

largest company in this world having a turnover exceeding U.S. Dollar 62 billion. It is the owner of world famous brands like National Panasonic technics and Quasar. They have wrongly availed Modvat credit on the strength of duplicate copies of bills of Entries without producing the duty paying documents, without filing the declaration under Rule 57G and without entering the inputs in R.G. 23A part I register. The Commissioner of Appeals after considering the merit of the case decided the stay applications. Grant of stay or refusal to stay, his discretion of the authority before whom an appeal lies and High Court should not interfere under Article 226 of the Constitution of India, in the exercise of discretion by the appellate authority. The question whether the petitioner rightly availed the Modvat credit facility or not is essentially a question of fact and can be gone into by the appellate authority at the time hearing of the appeal. The Commissioner of Appeals has decided the case merits as well as on the basis of financial hardship the petitioner however never pleaded his financial hardship even in the Writ Petition. Non-compliance of substantive requirements is not mere technical/ procedural requirement. Substantive requirements are statutory and binding.

I have heard Shri A.P. Mathur, learned Counsel for the petitioners in all the 3 writ petitions, Shri S.K. Misra in writ Petition No. 131 of 1999 of Sri Vikram Gulati in writ petition No. 132 of 1999 appearing for the respondents. No one has appeared on behalf of the respondents in Writ Petition No. 130 of 1999, even though earlier Shri R.C. Joshi has taken notice on behalf of the respondents.

Submission of Shri A.P. Mathur are three fold viz. (i) the petitioner had categorically pleaded in the waiver cum stay applications that it has a prima facie and very good case on merit and that if stay as prayed for is not granted it would cause grave and irreparable injury and hardship to the appellant as the appellant is facing great financial difficulty. He submits that even though merits of the case were discussed in the impugned orders but the financial hardship was not considered by respondent No. 1. The next submission is that prima facie merits of the case is a relevant factor in deciding the question of hardship u/s 35F of the Central Excise and Salt Act. Thirdly, it is submitted that in a large number of cases, the Custom Excise and Gold Control Appellate Tribunal has held that the Modvat credit availed cannot be denied on procedural contravention like non-accountal of inputs in R.G. 23A Part I register, Modvat credit being availed on the basis of photo copies of the relevant documents and non-compliance of Rule 57-G of the Rules unless misuse of the Modvat credit availed is disclosed or found as a fact. The submission is that in the instant cases there has been no finding that there was misuse of the Modvat credit availed by the petitioner. He has also submitted that the Commissioner of Appeals-respondent No. 1 was bound to follow the decisions of the Customs, Excise and Gold (Control) Appellate Tribunal given in various cases which the respondent No. 1 has failed to follow while passing the impugned orders.

12. Shri Vikram Gulati and Shri S.K. Misra, learned counsels for the respondents have however, submitted that once the discretion has been exercised by the

appellate authority it could not be interfered with in exercise of writ jurisdiction unless it is shown that the discretion has been exercised by the authority unreasonably or capriciously and it has ignored relevant facts. It is next submitted that the petitioner has a sound financial condition as it is carrying on business of around 62 billion U.S. dollars whereas the amount involved in the three writ petitions is only around 2 crore 16 lacs it cannot be said that the petitioners has no capacity to deposit the said amount or in case it is directed to deposit the said amount it will be put to undue hardship.

Both sides have cited a number of decisions of this Court as well as Custom Excise and Gold (Control) Appellate Tribunal (for short CEGAT) in support of their original submission.

A look into the impugned orders would show the respondent No. 1 has discussed the prima facie merits of the case, in the impugned orders but has not at all discussed the financial hardship that may be caused to the petitioners if their waiver-cum-stay application is not allowed. Even though in the counter affidavits it is stated that the financial condition was also taken into consideration but this is not correct. Shri Gulati has submitted that no ground with regard to financial hardship was taken in the application or in the Writ Petition. This is also not correct. Para 4 of the waiver-cum-stay application specifically says that "the appellant has a very good case on merits. If the stay as prayed for is not granted it would cause grave and irreparable injury and hardship to the appellant as the appellant is facing great financial difficulty." It is then argued by Mr. Gulati that the appellant-company is having business worth billion of dollars and no financial hardship shall be caused if it is directed to deposit the amount as aforesaid. Controverting the allegations Mr. Mathur has argued referring to the copy of the balance sheet, which according to him was also filed before the respondent No. 1, that the company is running in substantial loss and thus it under financial strains. The copy of the Audit Report discloses that the company is running in loss.

13. It cannot be disputed that undue hardship is not financial hardship alone. The appellate authority is also required to look into strong prima facie case and in deserving an appropriate cases it can grant stay and dispensation pre-deposit condition. In the case of Vijay Prakash D. Mehta and Another Vs. Collector of Customs (Preventive), Bombay, the Supreme Court while considering the provisions of Section 129E of the Customs Act which are in pan material the same as the provisions of Section 35F of the Central Excise and Salt Act held in para 11 that "the proviso gives the discretions to the authority to dispense with the obligation to deposit in case of "undue hardships''. That discretion must be exercised on the materials, honestly, bona fidely and objectively". This Court has also in Shyam Lal Biri Merchant Vs. Union of India (UOI), held that "dispensing with the requirement of deposit or refusing to stay a matter within the judicial discretion of the appellate authority governed by the relevant considerations and attending circumstances in a given case. Unless it is shown that in exercising the

discretion, the authority concerned has acted unreasonably or capriciously or has ignored relevant facts, this court would ordinarily not interfere in exercise of its power under Article 226 of the Constitution of India." There are a number of other decisions where in it has been held that while disposing of the stay cum depensation of pre-deposit matter the Tribunal or the Appellate authority is supposed to consider a prima facie case, the points being arguable and a balanced view is required to be taken even though financial hardship is not established.

14. Shri Mathur has referred to a number of decisions of the Tribunal (C.E.G.A.T) wherein it has been held that the Modvat credit should not be disallowed on grounds of procedural contravention like grounds of non-accountal of inputs in R.G. 23A Part I, Modvat credit being availed on Photostat copies of certain documents and in some cases non-compliance of Rule 57G. It is submitted that the respondent No. 1 was bound to follow such decisions of the Tribunal. It is also submitted that if considered in the light of the decisions of the Tribunal the petitioner has strong prima facie case.

15. Shri Gulati on the other hand, argues that at the preliminary stage, the appellate authority is not required to go meticulously with the prima facie merits of the case and in the instant case the appellate authority-respondent No. 1 has considered the prima facia Therefore, no relief can be granted to the petitioner in the instant Writ Petitions.

16. Having considered the arguments advanced by learned counsel for the parties, I am of the view that in this Writ Petition the merits of the case cannot be gone into as the same shall be considered by the appellate authority-respondent No. 1 at the time of hearing and disposal of the Appeals. However, considering the material which has been placed before this court and without meaning to express any opinion on the merits of the case I am of the view that it was a fit case in which the appellate authority ought to have partly allowed the waiver and dispensation of pre-deposit. On consideration of the facts and circumstances of the present case and material placed before the court I am of the considered opinion that the interest of the revenue shall be safe-guarded if the petitioner is permitted to deposit 10% of the adjudicated amount in cash involved in these writ petitions and for the balance it is directed to furnish security otherwise than bank guarantee.

17. For the reasons stated above the writ petitions and partly allowed. The orders passed by the respondent No. 1 are quashed and it is directed that the petitioner shall deposit within six weeks from today a sum equivalent to 10% of the adjudicated amount in cash and for the balance it would be furnish adequate security except bank guarantee to the satisfaction of the adjudicating authority within the aforesaid period. On compliance of the aforesaid conditions within the aforesaid period the Appeals shall be heard and decided by the respondent No. 1 with 3 months without insisting of compliance of the pre-deposit condition.

The parties shall bear their own cost.

