

(2008) 10 MAD CK 0117

In the Madras High Court

Case No : W.A. No. 3232 of 2002 and W.A.M.P. No's. 5364 to 5366 of 2002

Sterlite Industries Ltd. SIPCOT Industrial Complex

APPELLANT

Vs

The Customs Excise and Gold (Control) Appellate Tribunal
West Zonal Bench, The Customs, Excise and Gold (Control)
Appellate Tribunal South Zonal Bench and The Commissioner
of Central Excise

RESPONDENT

Date of Decision : 21-10-2008

Acts Referred:

Central Excise (Valuation) Rules, 1975 — Rule 6(1)

Central Excises and Salt Act, 1944 — Section 14A, 35F, 4(1)

Citation : (2008) 10 MAD CK 0117

Hon'ble Judges : V. Dhanapalan, J;S.J. Mukhopadhaya, J

Bench : Division Bench

Advocate : AR. L. Sundaresan, SC for A.L. Gandhimathi, for the Appellant; M. Ravindran, ASG assisted by A.S. Vijayaraghavan, A.C.G.S.C., for the Respondent

Final Decision : Dismissed

Judgement

S.J. Mukhopadhaya, J.—The petitioner, assessee, having directed to deposit Rs. 15 Crores as pre-deposit, challenged the order No. CII/2820/WZB/2001 dated 2nd Nov., 2001, passed by the 1st respondent, Customs Excise and Gold (Control) Appellate Tribunal (hereinafter referred to as "CEGAT"). Learned single Judge having found nothing wrong with the order, dismissed the writ petition giving rise to the present appeal.

2. The petitioner is engaged in the manufacture of anode out of copper concentrate. According to it, the anode manufactured by petitioner is transferred to its plant in Silvasa, Gujarat in entirety to manufacture cathodes and/or copper rods. The petitioner has been discharging appropriate duty at the time of clearance at its factory gate in Tuticorin on the anodes. Since anodes manufactured by petitioner are 100% captively consumed by petitioner at its factory in Silvasa, those anodes are valued u/s 4(1)(b) of Central Excise Act, 1994 as it stood prior to 1st July, 2000 r/w Rule 6(1)(b) of the Central Excise

(Valuation) Rules, 1975, it is entitled to the benefit and credit cost duty paid at Tuticorin plant by way of modvat credit u/s 57-A of the Central Excise Rules, 1944. The short levy or short payment of duty in the Tuticorin plant is thus irrelevant as the duty paid at the Tuticorin plant is available by way of modvat credit. Thus, according to the petitioner, the entire issue is revenue neutral and the exercise of jurisdiction by the Commissioner of Central Excise, Bibikulam, Madurai, in its order in original No. 1/01 dated 20th April, 2001, was academic, but the action on the part of the respondent has exposed the petitioner to the risk of demand to the tune of Rs. 85 Crores without any revenue implication to the exchequer.

3. It appears that the respondent issued seventeen show cause notices on the petitioner as shown in order dated 20th April, 2001. The above show cause notices were issued based on the cost audit report given by the Special Auditor appointed u/s 14-A of the Central Excise Act, 1944. As per the said report, anode was valued at Rs. 1,32,738/= per metric tonne, manufactured at Tuticorin plant. Pending adjudication of the proceeding, the petitioner deposited Rs. 15.20 Crores of duty. The 3rd respondent, thereafter, proceeded and passed order confirming the demand.

The petitioner, being aggrieved, preferred appeal before the CEGAT, Mumbai, along with an application for waiver of pre-deposit of duty u/s 35-F of the Central Excise Act, 1944. On 23rd Aug., 2001, Mumbai Bench of CEGAT passed the following order:

The counsel for the applicant tells us that by merging the two together, by addition of the margin of profit (the other issues not being disputed), the duty payable would come down to Rs. 44.56 crores. The applicant has deposited Rs. 15.00 crores. He offers to deposit as an indicator of goodwill another Rs. 15.00 crores within four weeks from today. We find this offer reasonable and accept it.

The petitioner-company, thereafter, filed an application for modification of the said order. It was contended that the petitioner-company was running through severe financial liquidity crunch, the bank limits have been exceeded and there is recession in demand, both in domestic as well as international market. The Mumbai Bench of CEGAT noticed that the petitioner-company made profit of Rs. 120 Crores in the preceding financial year ending 30th June, 2001, out of which Rs. 28 Crores was distributed towards dividend. The company also informed that it expects a profit in the first quarter of the next year ending 30th September of Rs. 13 Crores approximately. Having noticed the aforesaid fact, CEGAT refused to waive further amount by impugned order dated 2nd Nov., 2001.

4. At that stage, on behalf of the company, it was contended that the company has filed an application for refund of drawback claim duty with the department amounting to Rs. 43 Crores. Out of the said amount, drawback claim of Rs. 11 Crores was pending since May, 2001, some of the claim have been filed recently and claim for Rs. 18 Crores was filed on 26th Sept., 2001. Having noticed the

said position, Mumbai Bench of CEGAT observed as follows:

The mere fact that the claim has been filed cannot by itself indicate that the amounts are due to the applicant. We do not find any inordinate delay by the department in dealing with the claim. The presence of these claims does not justify reduction in the amount to be deposited. We however clarify that if within the time that we have provided for deposit, any of these claims become payable to the applicant they may be adjusted against the amount payable by it.

5. The aforesaid order having affirmed by learned single Judge, when the present appeal was preferred, by interim order dated 4th Feb., 2003, a Division Bench of this Court having noticed the observation of CEGAT that if within the time prescribed for deposit of Rs. 15 Crores, refund claim of the applicant is accepted, out of the said amount, the amount of Rs. 15 Crores can be withheld, directed the Deputy Commissioner, Central Excise and Customs, Central Excise Division-III, Silvasa and Dadar Nagar Haveli, India to consider and dispose of the application of the company dated 16th May, 2001 and 20th Sept., 2001. In view of such interim order of this Court passed in the present appeal, dated 2nd April, 2003, the company has received the total refund amount of Rs. 44 Crores and no amount was withheld by the authorities.

6. When this appeal was taken up for hearing, Addl. Solicitor General, appearing for the revenue brought to the notice of the Court that the petitioner-company has received the amount of Rs. 44 Crores and no amount has been withheld by the authorities of Customs and Central Excise, but the petitioner-company has also not deposited the said amount of Rs. 15 Crores.

Learned senior counsel appearing on behalf of the petitioner-company, on the other hand, argued the case on merit to show that it is a bare case of remand to be made by CEGAT to the original authority, which could be done without asking for depositing pre-deposit amount. Reliance was placed on a recent circular of Central Board of Excise and Customs issued from the Ministry of Finance, Department of Revenue, Government of India, vide circular F. No. 692/8/2003-CX dated 13th Feb., 2003.

According to learned senior counsel for the petitioner-company, it did not sell copper anode to any person, but is consumed by the company at Silvasa, Gujarat. So far as seventeen show cause notices are concerned, out of them show cause notices shown at Sl. Nos. 10 to 13 of the impugned order have already been accepted, but the reply in regard to the show cause notices shown at Sl. Nos. 1 to 9 have not been accepted. Referring to Section 4(1)(b) of the Central Excise Act, 1944, it was submitted that the value of the goods have not been determined in appropriate manner, which is now to be determined as per prescription shown in circular F. No. 692/8/2003-CX dated 13th Feb., 2003. According to learned senior counsel, the earlier circular No. 258/92/96-CX dated 30th Oct., 1996, issued by the Central Board of Excise and Customs being incorrect, it was replaced by current circular dated 13th Feb., 2003. Therefore,

the calculation earlier made on the basis of circular dated 30th Oct., 1996 was incorrect, which has to be recalculated in the light of the present circular dated 13th Feb., 2003. It was brought to the notice of this Court that in many matters, CEGAT, while dealt with similar matters, where duty demand was confirmed relying on Board's circular No. 258/92/96-CX dated 30th Oct., 1996, having noticed subsequent circular F. No. 692/8/2003-CX dated 13th Feb., 2003, by which earlier circular was modified, waived the pre-deposit of the duty and penalty and remitted the matter for reconsideration. The cases reported in 2004 (170) ELT 506 , etc. were relied upon.

7. On merit, it has not been disputed by learned senior counsel for the revenue that the earlier circular dated 30th Oct., 1996 stands superceded by subsequent circular dated 13th Feb., 2003. In other cases, even for the assessment period 1998-99, 1999-2000, etc., wherever the matter was pending before the authority of the CEGAT, the value of the items have been calculated as per circular dated 13th Feb., 2003 of their own or on remand.

We have perused the circular F. No. 692/8/2003-CX dated 13th Feb., 2003. Though the circular do not envisage whether it will come into effect from prospective or retrospective date, but in view of the fact that the matter relates to determination of assessable value of goods, captively consumed, if earlier determination as shown vide circular dated 30th Oct., 1996 was not found to be correct and in consultation with the cost accountant branch of the department of Expenditure Board, it was decided to observe the method of calculation provided under Rule 6(b)(ii) of the Central Excise (Valuation) Rules, 1975, in the manner as prescribed in the circular dated 13th Feb., 2003, we are of the opinion that in all matters where calculation or re-calculation to be made for determination of assessing the value of the goods captively consumed, irrespective of their year of assessment, it is to be calculated in the appropriate manner, i.e., in the manner as now correctly reflected in the circular dated 13th Feb., 2003 and not in the manner it was instructed vide circular dated 30th Oct., 1996, old circular having found to be incorrect has been superceded.

8. Now, the only question raised is whether CEGAT was justified under the law by directing the petitioner-company to deposit a sum of Rs. 15 Crores as pre-deposit.

9. It has not been disputed that u/s 35-F there is a pre-requisite to deposit demand amount or penalty against which a person has preferred appeal, but in any particular case the appellate authority or the Appellate Tribunal, if it is of the opinion that the deposit of duty demanded or penalty levied would cause undue hardship to such person, it may dispense with such deposit subject to such condition as he or it may deem fit to impose so as to safeguard the interest of the revenue. In the said provision, irrespective of merit of a case, the appellant is required to pre-deposit the amount and in case there is undue hardship, may apply for waiver.

10. In the present case, it will be evident that the petitioner-company, on 23rd Aug., 2001, of their own, informed that by addition of merging the profit, the duty payable would come down to Rs. 44.56 Crores and that the company had deposited Rs. 15 Crores. The company itself offered to deposit further sum of Rs. 15 Crores as an indicator of goodwill within four weeks. It is only thereafter the company filed the petition for modification of the order. In the said case, CEGAT noticed that the company ended with a profit of Rs. 120 Crores in the preceding financial year ending 30th June, 2001, out of which Rs. 28 Crores was distributed as dividend. It further noticed that the applicant had filed application for refund of drawback claim duty with the department amounting to Rs. 44 Crores approximately. Taking into consideration such financial position, while it did not choose to modify the earlier order dated 23rd Aug., 2001, observed that in case the department refunds the amount, the sum of Rs. 15 Crores may be adjusted. The earlier order dated 23rd Aug., 2001, having not challenged by the appellant and in the present appeal the appellant having obtained an interim order for refund of the said amount of Rs. 44 Crores and in view of the interim order dated 2nd April, 2003, the appellant having received the total amount of Rs. 44 Crores, without any adjustment, giving reference to a subsequent circular dated 13th Feb., 2003, arguing the case on merit, they cannot derive any advantage to declare the order passed by CEGAT dated 2nd Nov., 2001 as illegal.

The position of the company financially being better since the matter was pending before the CEGAT, it having received further amount of Rs. 44 Crores by way of refund in view of interim order passed in this appeal, being in advantageous position, it cannot claim for waiver of amount in terms with the proviso to Section 35-F of the Central Excise Act, 1944.

11. We find no merit in this appeal and it is accordingly dismissed. But there shall be no order as to costs.