(2011) 07 BOM CK 0217

In the Bombay High Court

Case No : Central Excise Appeal (Lodging) No. 52 of 2011

Vinar Ispat Ltd. APPELLANT

Vs

Commissioner of Central Excise RESPONDENT

Date of Decision : 26-07-2011

Acts Referred:

Central Excise Rules, 2002 — Rule 25, 26
Central Excises and Salt Act, 1944 — Section 11A(1), 11AC, 35F
Constitution of India, 1950 — Article 226

Citation : (2012) 275 ELT 34 : (2012) 28 STR 95

Hon'ble Judges : D.Y. Chandrachud, J;Anoop V. Mohta, J

Bench : Division Bench

Advocate : Prakash Shah with Jas Sanghavi instructed by PDS Legal, for the Appellant; Pradeep S. Jetly with Jitendra B. Mishra, for the Respondent

Judgement

D.Y. Chandrachud, J.—This Appeal by the assessee arises from an order of the Customs, Excise and Service Tax Appellate Tribunal dated 11th April 2011 on an application for waiver of pre-deposit. The Appellant has formulated the substantial questions of law that are raised in the Appeal as follows :-

(a) Whether in the facts and circumstances of the case, the Hon''ble Appellate Tribunal was justified in directing the Appellants to deposit Rs. 11.52 lakhs u/s 35F of the Act?

(b) Whether in the facts and circumstances of the case, the Hon''ble Appellate Tribunal was justified in holding that the Appellants have not made out a prima facie case for total waiver of duty, interest and penalty on totally extraneous grounds?

2. The Appeal is admitted and is taken up for hearing and final disposal at this stage, by consent.

3. The Commissioner of Central Excise, Nagpur by an order dated 1st June 2009 confirmed the duty demand of Rs. 1,15,46,696/- on the Appellant under the

proviso to Section 11A(1) of the Central Excise Act, 1944 together with interest u/s 11AB. A penalty was imposed u/s 11AC and under Rules 25 and 26 of the Central Excise Rules, 2002.

4. The Appellant undertook the work of converting billets, blooms and slabs purchased from various manufacturers on a job work basis into angles and channels. Upon conversion, the angles/channels were cleared upon payment of excise duty on the basis of the landed cost of raw material and conversion charges. During the course of the conversion, waste and scrap was generated which was retained by the Appellant and cleared on the payment of duty. According to the department, the sale proceeds received by the Appellant on the sale of scrap was additional consideration for the job work undertaken and ought to have been but was not included in the value of the finished products supplied by the Appellant between 2003-2004 and 2007-2008. The Department alleged that there was a suppression of facts on the part of the Appellant. A notice to show cause was issued on 2nd February 2009 applying an extended period of limitation. The Commissioner of Central Excise, Nagpur confirmed the duty demand as noted earlier.

5. The Tribunal, while considering the application for stay and for waiver of pre-deposit held prima facie that there was no suppression on the part of the Appellant with intent to evade payment of duty particularly having regard to the fact that there were contrary decisions regarding the inclusion or exclusion of the cost of scrap in the assessable value of the product and until 10th March 2005 the Tribunal had taken the view that the price of scrap sold was not to be included in the assessable value. Hence, the Tribunal was of the view that only a part of the demand was within limitation and no suppression could be alleged. Nonetheless, the Tribunal was of the view that a case for complete waiver had not been made out. Accordingly, the Appellant was directed to pre-deposit an amount of Rs. 11.52 lacs, representing approximately the demand for duty within the normal period of limitation, within a period of eight weeks.

6. The Tribunal relied upon the judgments of the Supreme Court in General Engineering Works v. CCE, 2007 (212) E.L.T. 295 (S.C.) and the decision in 1997 (70) ECR 638 of the Tribunal in support of the proposition that if the value realized on account of the sale of scrap has depressed either the raw material value or the job charges, then the same is includable in the assessable value of goods,

7. The submission of the Appellant is that though the Tribunal in determining the issue of whether there is a prima facie case relied upon the judgment of the Supreme Court in General Engineering Works (supra), it did not consider the impact of the judgment of the Supreme Court in International Auto Limited v. CCE, 2005 (183) E.L.T. 239 (S.C.) though this was cited before the Tribunal. In this regard, Counsel submitted that the Bangalore Bench of the Tribunal in 2010 (249) ELT 232 (Tri.-Bang.) has taken a final view on the subject after taking note of all the aforesaid judgments and hence, a complete waiver ought to have been

granted.

8. On the other hand, it has been submitted on behalf of the Revenue that: (i) The jurisdiction to entertain the present Appeal would lie before the Nagpur Bench since the Appellant has its registered office there and the order of adjudication was passed by the Commissioner of Central Excise at Nagpur; and (ii) The view of the Tribunal is consistent with law and does not warrant reconsideration.

9. Insofar as the preliminary objection on the ground of jurisdiction is concerned, at least a part of the cause of action has arisen within the jurisdiction of this Court in view of the fact that the impugned order was rendered by a Bench of the Tribunal at Mumbai. In Sri Nasiruddin Vs. State Transport Appellate Tribunal, the Supreme Court held that where a part of the cause of action had arisen within the jurisdiction of the Lucknow Bench of the Allahbad High Court that Bench would have jurisdiction to entertain a Petition und Article 226 of the Constitution. The same principle has been reiterated in a judgment of a Division Bench of this Court in The Commissioner of Customs v. Standard Industries Limited, Bombay, 2007 109 (1) Bom. L.R. 677. In the case which arose before the Division Bench, a notice to show cause was issued to the importer by the Commissioner of Customs, Trichy-I and was adjudicated upon, resulting in a final order. An Appeal was filed before the Tribunal at Mumbai which allowed the Appeal. Aggrieved by the decision of the Tribunal, the Commissioner approached this Court with an application for raising certain substantial questions of law, and a prayer to call upon the Tribunal to refer the questions for the opinion of this Court. A preliminary objection was raised on behalf of the importer to the jurisdiction of this Court. The Division Bench, after adverting to the law laid down by the Supreme Court, held that the cause of action for moving the application was the order of the Tribunal which is located at Mumbai and consequently this Court would have jurisdiction. As a matter of fact the Division Bench held that both the High Courts of Madras as well as this Court would have territorial jurisdiction and it was open to a suitor to select a forum which was normally the case when the cause of action fell within the territorial jurisdiction of two Courts. Following the law laid down by the Supreme Court and as reiterated in the judgment of the Division Bench, we decline to accede to the preliminary objection.

10. On the question of merits, we are of the view that it would be appropriate in the interests of justice to remand the proceedings back to the Tribunal for re-consideration. This is in view of the fact that prima facie it would appear that the Bangalore Bench of the Tribunal has taken a view which would have a material bearing on the issue involved, in P.R. Rolling Mills Pvt. Ltd. (supra). The Tribunal ought to have considered the impact of the judgment of the Supreme Court in International Auto Ltd., (supra) which was cited before it. In this view of the matter and without expressing any opinion on the merits of the question as to whether a prima facie case has been made out, we set aside the impugned order

of the Tribunal and remand the proceedings for a fresh determination. In view of the order of remand, it is not necessary for the Court to answer the questions of law as framed.

11. The Appeal is accordingly disposed of with no order as to costs.

