CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL, MUMBAI
REGIONAL BENCH
Single Member Bench

Excise Appeal No. 88145 of 2019

(Arising out of Order-in-Original No. GOA/CGST/ADJ/17/18-19 dated 18.07.2018 passed by the Commissioner of Central Excise & Service Tax, Goa)

M/s. Mandovi Metals Pvt. Ltd. **Appellant**
Plot No.200, Kundaim Industrial Estate,
Kundaim – Goa 403 115.

Vs.

Commissioner of Customs, Goa **Respondent**
Custom House, Marmagoa,
Goa 403 803.

<u>Appearance:</u>

Shri C.S. Biradar, Advocate, for the Appellant
Shri Amrendra Kumar Jha, Deputy Commissioner, Authorised Representative for the Respondent

<u>CORAM:</u>

HON'BLE MR. SANJIV SRIVASTAVA, MEMBER (TECHNICAL)

Date of Hearing: 24.08.2022
Date of Decision: 24.08.2022

FINAL ORDER NO. A/85855/2022

This appeal is directed against Order-in-Original No. GOA/CGST/ADJ/17/18-19 dated 18.07.2018 of the Commissioner of Central Excise & Service Tax, Goa. By the impugned order, the Commissioner has held as follows:-

"ORDER

18. Accordingly I pass the following order;

(i) I allow the abatement as claimed under Rule 9670(2) of the Central Excise Rules. 1944 for the period from 19.10.1997 to 31.03.2000 as detailed above.

(ii) I confirm the amount of short payment of Rs. 3,32,025/- (Three Lakh Thirty Two Thousand and Twenty Five only).

(iii) I don't confirm any interest liability proposed under the above referred Show Cause Notices against the noticee for the reason stated above.

(iv) I don't impose any penalty proposed under the above referred Show Cause Notices against the noticee for the reason stated above."

2.1 I have heard Shri C.S. Biradar, Advocate for the appellant and Shri Amrendra Kumar Jha, Deputy Commissioner, Authorised Representative for the Revenue.

3.1 I have considered the impugned order along with the submissions made in appeal and during the course of argument.

3.2 In para 7 of the impugned order, the Commissioner has observed as follows:-

"7. Aggrieved by the above O-1-0 No. 16/Commr/Goa/CX/2004 dated 20.01.2005 passed by the Commissioner of Customs & Central Excise, Goa the assessee preferred an appeal before the Hon'ble CESTAT, Mumbai. The Hon'ble CESTAT vide Order No. A/609/11/EB/C-11 dated 23.06.2011 remanded the matter to the adjudicating authority to quantify the amount of abatement entitled to the appellants. The relevant para of the order is reproducing here:

………… ………"

3.3 It is interesting to note that appeal against the same order-in-original as referred to in para 7 of the impugned order, has been decided by the Tribunal in favour of the appellant vide order No. A/799/15/EB dated 07.04.2015. Paras 1 and 5.1 are reproduced below:-

"This appeal is directed against Order-in-Original No. 16/Commr. Goa/Cx/2004, dated 20-1-2005 passed by the Commissioner of Customs & Central Excise Goa, wherein total demand of Rs. 54,04,368/- was confirmed in terms of Rule 96ZO(3) of the Central Excise Rules, 1944. A penalty of equal amount and interest on the demand was also confirmed. The fact of the case

is that the appellant is engaged in the manufacture of mild steel ingots falling under chapter 72 of the First Schedule to the Central Excise Tariff Act, 1985. The appellant filed declaration dated 10-11-1997 with the Commissioner of Central Excise, Goa for availing the scheme of payment of Central Excise duty as provided under Rules 96ZO(3) of the Central Excise Rules, 1944. According to such provision appellant was required to pay Central Excise duty on the basis of the Annual Capacity of production under Section 3A of the Central Excise Act, 1944. During the period October, 1997 to March, 2000 in terms of above provision the Commissioner has fixed Annual capacity of the production of the assessee vide letter F. No. V/30/16(k)/97-CX.I dated 18-3-1998 and according to such fixation capacity of the induction furnace installed in the appellant's factory was fixed at 3 M.T. and accordingly appellant is required to pay Central Excise duty of Rs. 5 lakhs per month. Since the appellant did not pay full amount of Central Excise duty during the period of October, 1997 to March, 2000, five show cause notices were issued demanding total duty of Rs. 54,04,368/-. In the first round of adjudication the authority vide order-in-original No. 10/Commissioner Goa/CX/2003 dated 31-3-2003 confirmed demand and imposed penalty. Aggrieved by the said order dated 31-3-2003 the appellant filed appeal before the CESTAT Mumbai, CESTAT vide their order No. 790/2003-B and stay order No. 338/2003-B both dated 13-10-2003 remanded the matter to the Commissioner for considering the abatement claim filed by the assessee. In the de novo adjudication the Commissioner once against confirmed the demand and imposed penalty and interest vide impugned order dated 20-1-2005, therefore appellant is before us.

5.1 *Therefore in view of undisputed factual position we are of the considered view that appellant is legally entitled for abatement and accordingly the demand is not sustainable. We therefore set aside the impugned order and allow the appeal of the appellant with consequential relief, if any, in accordance with law. Misc. Application for urging additional grounds also stands disposed of, accordingly."*

3.4 In para 8 of the order-in-original, the Commissioner has observed as follows:-

"8. Accordingly, a fresh Personal hearing was granted to the assessee on 16.02.2016, 1.03.2016 & 30.06.2016. However, the assessee did not appear for the personal hearing or did they respond to the Department's letter despite having been given the opportunity to so. Hence, the case was taken up for deciding the matter ex-parte on the basis of the evidence and facts available on record and the submissions made by the assessee. The fresh 1-0 dated 05.07.2016 was issued with following findings:

…… ……"

3.5 In para 9 the Commissioner has observed that the appellant filed appeal against the order of the Tribunal, which was decided by the Tribunal vide order No. A/85288/2018 dated 15.02.2018. The order is reproduced below:-

"The issue involved in the present case is that while calculating the abatement under Rule 96 ZO(2) of Central Excise Rules, 1944, whether first day or the last day should be excluded or included in calculating the days of closure of the production.

2. Shri C.S. Biradar, learned counsel appearing for the appellant, at the outset, submits that the appellant could not appear for the hearing. Therefore, the order was passed ex parte. He prays for remand of the matter to the adjudicating authority for passing fresh order. He promised to co-operate with the adjudication process.

3. Shri S.J. Sahu, learned Assistant Commissioner (AR) appearing for the Revenue, reiterates the findings of the impugned order. He submits that three opportunities were given to the appellant, but they have not availed the same. Therefore, passing an ex parte order is just and legal and does not require any interference.

4. On careful consideration of the submissions made by both the sides, I find that though the learned Commissioner has *followed the principles of natural justice by giving three opportunities for personal hearing, but in the interest of justice, I am of the view that the appellant should be given one more opportunity for presenting their case. Accordingly, I set aside the impugned order and remand the matter to the adjudicating authority for passing a fresh order, keeping all the issues open.*

5. Appeal is allowed by way of remand to the adjudicating authority."

3.6 While recording the above, the Commissioner has missed out two orders of the Tribunal. Order dated 23.06.2011 remanding the matter back to the adjudicating authority was recalled by the Tribunal vide order No. M/778/14/EB/C-II dated 14.02.2014 in ROM application filed by the appellant, and relisted for hearing.

3.7 In the recall proceedings, the Tribunal after considering the matter had passed order No. A/799/15/EB dated 07.04.2015 in favour of the appellant, as observed by me in para para 3.3 above. Once the appeal itself against the order of 2005 was allowed by the Tribunal vide the above order dated 07.04.2015, there was no jurisdiction left with the Commissioner to pass any further order in 2016 on the basis of order of 2011 which has been recalled by the Tribunal. The order of 2011 had become null and void as being recalled and ROM allowed as above.

3.8 It is also noted that against the order of Commissioner passed in 2016, being order-in-original No. GOA-EXCUS-000-COM-08-16-17 dated 05.07.2016, the appellant had filed appeal to the Tribunal which was decided by the Tribunal vide final order No. A/85288/2018 dated 15.02.2018 by remanding the matter back to the Commissioner for following the principles of natural justice. This order has been passed without taking note of the Tribunal order of 2015 finally deciding the appeal in favour of the appellant, against the order of 2005.

3.9 In my view, the entire proceedings acquired finality by the order of 2015 whereby the appeal has been decided in favour of the appellant. This order of the Tribunal has not been challenged by the Revenue. There being so, the entire proceedings in the matter subsequent to the order of the Tribunal of 2015 are without any legal basis and jurisdiction. The impugned order cannot be sustained for this very reason.

4.1 Appeal is allowed.

(Order pronounced in the open court)

(Sanjiv Srivastava)
Member (Technical)

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