Otis Elevators Co. Vs. Commissioner of Central Excise

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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Mumbai

Decided On : Jan-13-2004

Reported in : (2004)(92)ECC521

Judge : S T S.S., K Kumar

Appellant : Otis Elevators Co.

Respondent : Commissioner of Central Excise

Judgement :

1. The miscellaneous application for modification has been filed by the applicants seeking modification of the stay order dated 31.10.2003, whereby the applicants were directed to make a pre-deposit of Rs. 1.25 crores as against the duty of Rs. 3.13 crores and an equivalent amount of penalty. The matter was listed for compliance on 02.12.2003. By virtue of present application the applicants have inter alia stated in the application as under:- "6. The Appellant-Applicant submits that the basis on which the Impugned Order proceeds is factually erroneous. The Impugned Order states that the goods in question are not meant for captive consumption and in consequence thereof the Boards' Circular of 2003 does not apply in the present case. The relevant portion of the Impugned Order is set out hereunder.

"6. We do not find that the Board's circular of 2003 comes into the picture. It relates to the valuation of the captively consumed goods. The goods under consideration by us are not capital goods..." The Appellant-Applicant submits that this is an error of fact apparent from the face of the record as the goods in question were clearly meant for captive consumption and not for sale in the open market. The Show Cause Notice and the Order in Original passed by the Respondent both accept and proceed on the basis on the goods on which the demand is raised were captively consumed and were assessed under Rule 6(b)(ii) of the Central Excise Valuation Rules, 1975.

The issue in controversy in the Show Cause Notice was that the Applicant has not included Head Office Expenses and proportionate profit margin in the assessable value of goods captively consumed for the purpose of levy of Excise Duty on the said goods. The Findings of the Commissioner set out in the Order in Original dated 13.03.03, clearly states at Para 21 (Page 111 of the compilation and internal page 8 of the Order in Original) that the :basic issue involved in the subject case is the realization of duty on account of under valuation of goods, captively consumed at site for erection of lift and not included certain expenses....". Thus, it has never been the case of the Department that the goods were not meant for captive consumption. The finding of this Hon'ble Tribunal in the impugned Order that the goods in question were not captively consumed clearly is erroneous in fact and is also beyond the scope of both the Show Cause Notice issued and the Order in Original passed by the Commissioner.

7. The Applicant submits that since the goods in question have been used for captive consumption, the finding in the Impugned Order, as to the Boards' Circular of 2003 being inapplicable would require reconsideration by this Hon'ble Bench.

8. The Impugned Order also comes to a finding that it appears that Manufacturing Costs such as procurement of Raw Material, payment to Labour, maintenance of Machinery, and up keep of the Factory etc, have to be included in the Manufacturing Costs and it appears that these eexpenses have not been included. From the facts on record, inter alia, the statement of Mr. Michael Veigas (at pages 47 to 51 of the Appeal) and the Chartered Accountant's certificates filed with the Price Declaration under Rule 6(b)(ii) of the Central Excise Valuation Rules 1975 (pages 86 to 89 of the Appeal), it is apparent that the costs of Raw Material, direct and indirect labour, factory overheads, packing charges and manufacturing profit

have been included in computing Assessable Value. The facts on record indicate that the finding in this behalf is erroneous.

9. In the impugned order, there is a finding that the applicant has not included Head Office Expenses in relation to the purchase of material related to activities resulted in the manufacturing of goods. From the records, it is clear that for determining the assessable value of goods captively consumed, Standard Costs including all costs related to material and labour have been taken into account. It is submitted that the issue of Head Office Expenses related to purchase of material has never specified as an issue either in the Show Cause Notice or the Order in Original. The facts on record clearly indicate that costs related to purchase of material have been included in the Assessable Value. This issue has never been in dispute between parties at the stage of adjudication.

10. The impugned order comes to a finding that the Head Office expenses incurred on account of procurement of raw material, payment to labour, maintenance of machinery, up keep of the factory etc.

have not been included in the assessable value. These specific expenses were not the subject matter of either the Show Cause Notice or the Order in Original.

11. The Impugned Order at Para 6 (at page 4) provides that Michael Veigas in his statement has admitted that :he was aware that the expenses have been made good". From a perusal of the Statement given by Mr. Veigas, no such admission can be found. The findings based on the purported admission on Mr. Veigas are erroneous.

12. The issue that longer period of limitation does not apply was intrinsic to the Applicants plea that the limitation of pre-deposit should be dispensed with. In the Impugned Order there is a reference to the issue of limitation but no findings whatsoever on this relevant issue, which is set out hereunder: "6 In these circumstances, the applicability of the extended period of limitation and imposition of penalty." 2. The Hon'ble Apex Court in the case of CIT v. Hero Cycles reported in AIR 1998 SC page 1555 have inter alia while considering the rectification under Section 154 of the IT Act, 1961, have observed that rectification under that Section

can only be made when glaring mistake of fact or law has been committed by the Officer passing the order becomes apparent from the record. Rectification is not possible if the question is debatable. Moreover, the point which was not examined on fact or in law cannot be dealt with as mistake apparent on the record.

The Hon'ble Delhi High Court in the case of Deeksha Suri reported in 1998 (102) ELT 524, while considering the rectification of mistake under Section 254(2) of the IT Act 1961 have inter alia held that a mistake apparent on the record must be an obvious and patent mistake and not something which can be established by a long drawn process of reasoning on points on which there may be conceivably two opinions. A decision on debatable point of law is not a mistake apparent on the record. It is also observed in para 35 that it is now a well settled law that statement of facts recorded by a Court or Quasi Judicial Tribunal in its proceedings as regards the matters which transpired during the hearing before it could not be permitted to be assailed as incorrect, unless steps are taken before the same forum. It is not open to the parties or the Counsel to say that the proceedings recorded by the Tribunal are incorrect (Bhagwat Prasad v. DSMDC - AIR 1990 SC 371).

That being the law, it necessarily follows from the statement of facts recorded by the Tribunal that the petitioners had acquiesced in the appeal being decided on merit without insisting on the application under Section 29 being decided first. The Larger Bench in the case of Om Prakash Bhatia reported in 2001 (77) ECC page 300 while considering the application under Section 29B(2) of the Customs Act, 1962, have observed that the mistake apparent from the record contemplated by the Section cannot be one that is to be brought out by a long drawn out argument. The mistake apparent from the record cannot be spelt out on the ground that all the grounds mentioned in the memo of appeal were not dealt with by the Tribunal when it pronounced by the Final Order.

3. The learned counsel appearing on behalf of the applicants inter alia contended that the stay order has wrongly recorded the issue and as such that would be a mistake apparent on the face of the record; the Tribunal has inherent power under Rule 41 of the CEGAT Rules for rectification of mistake; that wrong recording of

the issue of by the Tribunal has resulted in the miscarriage of justice; that the Tribunal has failed to give its finding on the point of limitation and the order has been passed ex-parte. He also relied on the decision in the case of Ram Kirpal v. Union of India reported in 1998 (103) ELT 8 (Gujarat) on the point that the Tribunal has inherent power under Rule 41 of CEGAT (Procedural) Rules, 1982 to do complete justice between the parties.

4. Shri. K.L. Bablani, learned Jt.CDR appearing on behalf of the Revenue submitted that as regards the wrong recording of the issue is concerned, it may be stated that the issue as recorded in para 6 of the Stay Order and that as recorded in column 8 of the EA-3 form, is the same and as such the issue has been correctly recorded by the Tribunal.

Therefore, it is not open for the applicant to contend that the issue has been wrongly recorded. Besides, the learned Jt.CDR submitted that there is no error apparent on the face of the record. The Tribunal has considered all the points raised by the applicants in his present application while passing the said stay order and no miscarriage of justice has resulted as claimed by the applicants. The applicants are only seeking re-appreciation of the evidence and reconsideration on the facts as well as law which is not permissible in the rectification of mistake. He, therefore, submitted that since there is no glaring mistake apparent from the face of the record and the application filed by the applicant merely seeks reconsideration on merits, the same is liable to be dismissed.

5. After hearing rival submissions, perusal of the records and the case law relied on by the applicants and the relevant paras 6 to 12 quoted from their application, it is clear that the applicants are seeking reconsideration on merits and none of the grounds mentioned above reveal any glaring clerical or numerical mistake so as to warrant rectification sought for by the applicants. As already mentioned in para 4, there is no error apparent on the face of the record. A wrong conclusion drawn by the Tribunal cannot be basis for rectification of mistake as alleged by the applicant. We, therefore, do not find any merits in the modification application filed by the applicant. The same is accordingly dismissed.