

**2014 (2) ECS (36) (HC - Mum)**

In the High Court of Judicature at Bombay

Ordinary Original Civil Jurisdiction

**INDIA STEEL WORKS LIMITED**

**VS.**

**THE UNION OF INDIA**

**Date of decision:16.12.2013**

Writ Petition (L) No. 3092 of 2013

Mr. Sushanth Murthy & Ms. Sparsh

Prasad i/b. Economic Laws Practice for the Petitioner.

Mr. Pradeep S. Jetly with Mr. J. B. Mishra for the Respondent.

**CORAM:**

Mohit S. Shah, C.J. &

M. S.Sanklecha, J.

**"The newly added third proviso to Sub section 2A of Section 35C specifically provides that the extension of stay would come to an end after 365 days from its grant, is very similar to Section 254(2C) of the Income Tax Act, 1961. In this case, the revenue is seeking to exercise its power under Section 11 of the Act by adjusting the amount which is due to the petitioner from the revenue against the amount payable by the petitioner to the revenue as per the July, 2006 order. It is to be noted that the so called stay which was granted to the petitioner by the tribunal was not in exercise of its inherent powers but in exercise of powers under Section 35F which only dispenses with the requirement of pre-deposit duty and penalty for entertaining the appeal on merits. This would not estop the revenue from adjusting amounts which become subsequently due to the petitioner. Besides, introduction of the said proviso appears to dilute the applicability of the decision relied by the petitioner." (Para 6)**

**PC:-**

By this petition under Article 226 of the Constitution of India, petitioner challenges:-

- (i) The three orders, one dated 11 November 2013 and two dated 21 November 2013 to the extent that the said orders of respondent No.2 i.e. Assistant Commissioner of Central Excise direct appropriation of the rebate claims being sanctioned against confirmed duty demand recoverable in pursuance of order dated 31 July 2006 which has not been stayed; and
- (ii) Notice dated 27 November 2013 issued by respondent No.3

i.e. Superintendent of Central Excise, seeking after the above appropriation to recover the balance amount of penalty from the petitioner-company its two Directors.

2 The facts of the present case leading to the petition are as under:-

- (i) Investigations were initiated against the petitioner alleging evasion of central excise duty. During the Course of investigation, the petitioner had deposit an amount of Rs. 20 lakhs towards the alleged duty demand. Consequent to investigation, a show cause notice dated 30th September 2005 was issued;
- (ii) By order dated 31 July 2006 the Commissioner of Central Excise, Raigad, confirmed a duty demand of Rs.53,53,452/- along with interest thereon and equivalent amount of penalty. Besides, imposing a penalty of Rs.5,00,000/- and Rs.2,00,000/- on the two Directors of the petitioner respectively;
- (iii) Being aggrieved by the above order dated 31 July 2006, the petitioner and its Directors preferred appeals to the Customs Excise and Service Tax Tribunal (Tribunal). The petitioner and its two Directors also filed applications for dispensing with the pre-deposit duty, interest and penalty before the Tribunal for the purposes of hearing its appeals on merits;
- (iv) By order dated 15 December 2006, the Tribunal disposed of the application of the petitioner and its two directors by a common order in the following terms:  
“After hearing both sides, we find that the applicants have already deposited an amount of Rs.20 lakhs during the course of investigation out of the total duty demand of Rs.53,53,452/-. By treating this deposit as sufficient under Section 35F of the Central Excise Act,1944, we dispense with the condition of pre-deposit of balance amount of duty and the entire amount of penalties imposed upon the applicants. All he stay petitions are disposed of the above manner.”
- (v) The Tribunal has from time to time granted extension of the above stay. The last such extension was granted on 24 August 2012 and in view of proviso of Section 35C (2A) of the Central Excise Act, 1944 (the Act) the said stay order remained effective till 24 February 2013;
- (vi) We are informed that the petitioner filed another application for extension on 22 November 2013 and the same is pending before the Tribunal. In the meantime, between 23 August 2013 to 16 October 2013, petitioner had made various applications to the respondents for rebate of duty paid in respect of goods which were exported under various shipping bills;
- (vii) By the three orders- one dated 11 November 2013 and two

dated 21 November 2013, the Assistant Commissioner of Central Excise sanctioned the petitioner's rebate claims aggregating to Rs.87,05,330/-. However, the above orders while sanctioning the claim for rebate also directed that the same be appropriated against confirmed dues recoverable in pursuance of the order in original dated 31 July 2006 passed by the Commissioner of Central Excise, Raigad.

- (viii) Thereafter by impugned notice dated 27 November 2013 the Superintendent of Central Excise, called upon the petitioner and its two Directors to forthwith pay the balance amount of duty and also penalty remaining unpaid after appropriation of the rebate;
- (ix) The petitioner-company has therefore moved this Court challenging the above three orders, one dated 11 November 2013 and two dated 21 November 2013, passed by the Assistant Commissioner of Central Excise for adjusting the petitioner's duty liability and the penalty against the rebate sanctioned by revenue and subsequent communication dated 27 November 2013.

3 Mr. Murthy learned Counsel for the petitioner submits that the petitioner's appeal from the order dated 31 July 2006 before the Tribunal is still awaiting disposal. The Tribunal by order dated 15 December 2006, granted stay with regard to the deposit of balance duty and penalty amount considering the fact that the petitioner had already deposited an amount of Rs.20 lakhs. This stay granted by the Tribunal was extended from time to time for six months each and last such extension was granted on 24 August 2012. The petitioner thereafter filed a fresh application for extension of stay and the same is awaiting disposal before the Tribunal and this delay on the part of the Tribunal in disposing of the application for extension of stay as well as the appeal is not on account of any act on the part of the petitioner. In these circumstances, it was submitted that the stay granted by the order dated 15 December 2006 should be deemed to be continued till the disposal of the appeal as held by this Court in *Nedumparambli P. George v/s. Union of India* 2009 (242) E.L.T. 523 and *Larsen and Toubro Limited v/s. Union of India* 2013 (29) S.T.R. 449 and Supreme Court in *Commissioner of Customs and Excise, Ahmedabad v/s. Kumar Cotton Mills Pvt., Ltd.* 2005 (180) E.L.T. 434. On the above basis, it is submitted that it should be deemed that the stay of the order dated 31 July 2006 is extended and, therefore, no occasion to appropriate any part of the petitioner's rebate aggregating to Rs.87,05,330/- against the dues payable under the impugned order of the Commissioner dated 31 July 2006 can arise.

4 As against the above, Mr. Jetly, learned Counsel appearing for the respondent-revenue invites our attention to newly added third

proviso to Sub-Section 2A of Section 35C of the said Act w.e.f.2013. The newly added proviso specifically provides that the stay granted by the Tribunal would come to an end at the conclusion of 365 days from its grant. This statutory amendment it was submitted, was introduced to get over the decision of the various Courts which provides that the extension of the stay is deemed to be granted by the Tribunal in case the application for extension of stay is pending before the Tribunal and the appeal is yet not been disposed of Besides, reliance is also placed upon the decision of the Karnataka High Court in Commissioner of Income Tax v/s. M/s. Ecom Gill Coffee Trading Pvt. Ltd., (Income Tax Appeal No.160/2012 rendered on 5 July 2012) wherein on identical fact situation, the Court held that there was no right to claim an extension of stay beyond the period of 365 days as provided in third proviso to Section 254 (2C) of the Income Tax Act, 1961. The Income Tax provisions are identically worded to the newly introduced third proviso to Section 35C of the Act. In the above circumstances, it was submitted that the authority was justified/ entitled to adjust the rebate claim granted to the petitioner against the dues of the petitioner under the Central Excise Act as it is specifically provided for in Section 11 of the Act that the proper Officer may deduct any amount payable to any person so as to adjust the same with any sum payable by the person concerned to the revenue. In view of the above, it is submitted that the petition should not be entertained.

- 5 We have considered the rival submissions. The decision of this Court in Nedumparambli P. George (supra) was dealing with the situation where the revenue initiated proceedings for recovery of dues on the expiry of the 180 days period provided under the Customs Act (identical provision in the said Act), pending the disposal of the appeal. Similarly in the case of L & T (supra), the Court was dealing with a Circular issued by Central Board of Excise and Customs dated 1 January 2013 directing recovery proceeding even in situation where the stay applications are pending before the appellate authorities. So far as the Apex Court's decision in Kumar Cotton Mills Ltd. (supra) is concerned, it was dealing with the effect of stay order passed prior to introduction of sub-section 2A to Section 35C of the Act. In the above context, it was held that the above amendment did not curtail the power of the Tribunal to extend the stay exceeding six months.
- 6 In the present case, the revenue is not seeking to initiate recovery proceeding on the expiry of a stay. In this case, the revenue is seeking to exercise its power under Section 11 of the Act by adjusting the amount which is due (rebate claim) to the petitioner from the revenue against the amount payable by the petitioner to revenue as a consequence of the order dated 31 July 2006. It is to be noted that the so called stay which was granted to the petitioner on 15

December 2006 by the Tribunal was not in exercise of its inherent powers but was in exercise of powers under Section 35F of the Act which only dispenses with the requirement of pre-deposit of duty and penalty for entertaining the appeal on merits. The dispensing with the requirement of pre-deposit of duty and penalty under the proviso to Section 35F of the Act for the purposes of hearing the appeal could at the highest be said to restrain the revenue from taking any coercive action for recovery but would not estop the revenue from adjusting amounts which become subsequently due to the petitioner towards the amount payable by the petitioner to the department. Besides, introduction of the third proviso, to subsection (2A) of Section 35C of the Act introduced in 2013 would appear to dilute the applicability of the decision relied upon by the petitioner. However, it must be pointed out that a Division Bench of this Court in CIT v/s. Ronuk Industries Ltd. (2011) 333 ITR 99 while dealing with an identical provision to the third proviso to Section 35C (2A) of the Act as found in the third proviso to Section 254 (2A) of the Income Tax Act dismissed the revenue's appeal before it by upholding the view of the ITAT that even after the introduction of the above third proviso, the ITAT can extend the stay.

7 In view of the above and in the facts of the case, interests of justice will be met by disposing of this Writ Petition in terms of the following directions:-

- (a) The respondent shall adjust the rebate amount only to the extent that the duty amount of Rs.53,53,452/- is payable by the petitioner to the revenue in terms of order dated 31 July 2006.
- (b) The respondent shall not adjust the rebate amount to satisfy the penalties due from the petitioner-company and its directors in the pending appeals before the Tribunal.
- (c) After adjustment of the duty amount from rebate sanctioned, the balance amount would be released in favour of the petitioner- company by revenue.
- (d) The notice dated 27 November 2013 issued by the Superintendent of Central Excise, is quashed and set aside
- (e) It is clarified that this order is passed without prejudice to the rights and contentions of the parties in the appeal pending before the CESTAT.

Writ Petition is disposed of in the above terms with no order as to costs.