

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATE : 25.06.2015

CORAM

THE HONOURABLE MR. JUSTICE R.SUDHAKAR
AND
THE HONOURABLE Ms. JUSTICE K.B.K.VASUKI

C.M.A. No.1170 of 2015

&

M.P.No.1 of 2015

M/s.Shrushthi Plastics Pvt. Ltd.,
B23, B22, PIPDIC Industrial Estate,
Mettupalayam,
Puducherry - 605 009.

...Appellant/Respondent

- Vs -

1. The Commissioner of Central Excise,
No.1, Gouber Avenue, Beach Road,
Puducherry - 605 001.
2. The Hon'ble Customs, Excise and Service Tax
Appellate Tribunal, South Zonal Bench,
Haddows Road, Shastri Bhavan,
Chennai - 600 006.

...Respondents

Appeal filed under Section 35-G of the Central Excise Act,
against the order dated 30.1.2012 passed by Customs, Excise & Service
Tax Appellate Tribunal, South Zonal Bench, Chennai, made in Final
Order No.65 of 2012

For Appellant : Mr.G.Derrick Sam

For Respondents : Mr.A.P.Srinivas - R1

J U D G M E N T
(DELIVERED BY R.SUDHAKAR, J.)

This Civil Miscellaneous Appeal is filed by the assessee as
against the order passed by the Tribunal raising the following
substantial questions of law:

"1. Whether the Tribunal was justified in passing Final Order in the appeal without hearing the counsel of the appellant company and thereby violating the principles of natural justice?

2. Whether the Tribunal had erred in not following its own earlier decision in the case of M/s.Nebulae Healthcare Ltd. Vs. Commissioner [2007 (209) ELT 125 (Tri.Chennai)] and also the decision of the co-ordinate Bench at Delhi in the case of M/s.Cure Quick Remedies Pvt. Ltd. Vs. Commissioner of Central Excise, Panchkula [2010 (255) ELT 249 (Tri-Delhi)] particularly when the hearing of the appeal was repeatedly adjourned due to the pendency of the Department's appeal before the Hon'ble Supreme Court reported in Commissioner Vs. Nebulae Healthcare Ltd. [2008 (221) ELT A82 (SC)]?"

2. The brief facts of the case are as follows:

The appellant is engaged in the business of manufacture of goods, falling under Chapter sub-heading 3922.90 and 3923.90 of the Schedule to the Central Excise Tariff Act, 1985. The assessee availed the benefit of Notification No.8/99 dated 28.2.1999 in respect of goods falling under chapter sub-heading 3922.20, which are bearing their brand name and in respect of goods falling under chapter sub-heading 3923.90, which are goods manufactured as per the specifications of M/s.HLL, they paid full rate of duty. They filed declaration under Rule 123B on 1.4.1999 and on the same day sought permission for simultaneous availment of Notification No.8/99 dated 28.2.1999 and option to pay full rate of duty with Modvat benefit. Accordingly, permission was granted under C.No.IV/16/148/99-T3 dated 19.4.1999. However, the said permission was sought to be withdrawn vide Show Cause Notice dated 3.5.2000 with consequential demand of differential duty of Rs.7,02,609/- under Section 11A of the Central Excise Act, 1944. The Adjudicating Authority, after due process of law, dropped the proceedings initiated against the assessee. Aggrieved by the said order of adjudication, the Revenue preferred review before the Commissioner of Central Excise for filing an appeal before the Commissioner (Appeals). The Commissioner passed an order directing the Assistant Commissioner of Central Excise, Pondicherry to file an application before the Commissioner (Appeals), Trichy to set aside the order-in-original. Accordingly, appeal was filed by the Department before the Commissioner (Appeals), who after following the ratio laid down by the Five Member Bench of the Tribunal, dismissed the appeal holding as follows:

"I find that the Board's circular and the decision of the Tribunal in the case of Kamani Foods were anterior to the decision of the Supreme Court upholding the decision of the Tribunal in the case of Faridabad Tools Pvt. Ltd. I also find that a Five Member Bench of the Tribunal in the case of Franco Italian Co. Pvt. Ltd.

held that:

"Insofar as the availing of Modvat credits and the full exemption under small scale exemption Notification on different specified goods is concerned, the matter is already covered by the Tribunal's decision in the case of Faridabad Tools Pvt. Ltd. v. CCE - 1993 (63) ELT 759 (Tribunal), which has since merged with the order of the Hon'ble Supreme Court. The Hon'ble Supreme Court has confirmed the view taken by the Tribunal by dismissing the Revenue's Civil Appeal, as mentioned in the Court Room Highlights at page A149 of 1996 (82) ELT. Thus, the view taken by the Tribunal that the full exemption under small scale exemption notification on the one hand, and the Modvat credit on the other hand, could be availed of simultaneously by a manufacturer, but on different goods, has been confirmed by the Supreme Court by virtue of doctrine of merger.

In this case, the Tribunal also considered the availment of modvat facility as well as full exemption simultaneously in the case of same specified goods. The Tribunal said

"drawing the similar analogy, we consider that subject to the reversal of the modvat credit taken with regard to the inputs which were utilised for the manufacture of duty free goods, the manufacturer could avail of the modvat credit as well as the full duty exemption under the applicable small scale exemption Notification with regard to the same specified goods".

Respectfully following the ratio of the above decision I uphold the order-in-original passed by the lower authority and dismiss the Revenue appeal.

Appeal dismissed. "

3. Aggrieved by the said order of the Commissioner (Appeals), the Department once again pursued the matter before the Tribunal by filing an appeal in the year 2003. Before the Tribunal, the matter was adjourned from time to time for various reasons, the details of which are extracted below:

Date of hearing	Order
20.7.2009	Adjourned to 08.10.09. Issue notice
08.10.2009	No Bench Sitting Adjourned To 9.12.09. Issue notice.
9.12.2009	Adjourned to 9.2.10.
9.02.2010	No Bench Sitting Adjourned to 7.4.10

Date of hearing	Order
7.4.10	Adjourned to 4.5.10 at the request of the counsel
4.5.10	Adjourned to 24.8.10 to await Apex Court decision in Nebulae Health Care.
24.8.10	Adjd. To 19.10.10 at the request of the counsel
19.10.10	No Bench Sitting Adjourned to 11.1.11. Issue notice
11.1.11	Adjd. To 8.6.11 to await Apex Court decision in Nebulae Health Care
8.6.11	No DB Sitting on 8.6.112 as Hon'ble V.P. On leave. Adjd. To 24.8.11.
24.8.11	No Bench Sitting. Adjourned to 14.12.11.
14.12.11	No DB sitting. Adjourned to 2.1.12.
2.1.12	No DB sitting Adjourned to 30.1.12.
30.1.12	Allowed. Amount of Rs.7,02,609/- with interest confirmed.

4. On 30.1.2012, the Tribunal had passed an order allowing the appeal filed by the Department holding as follows:

"2. The question involved in this case is whether the respondents can avail Cenvat Credit as well as full exemption under the SSI exemption scheme in respect of same goods. The issue now seems to be no longer res integra, as it has been given a finality by the Hon'ble Supreme Court in the case of CCE, Admedabad Vs. Ramesh Food Products reported in 2004 (174) ELT 310 (S.C). In the said case, it has been held by the Hon'ble Supreme Court that it would not be possible to allow the manufacturer simultaneously to avail Modvat credit and full exemption under the SSI exemption scheme. This view has been reiterated by the Hon'ble Supreme Court while allowing the department's appeal in the case of Collector Vs. Universal Drinks Pvt. Ltd. reported in 2007 (217) ELT A76 (S.C.). In view of the settled position of law emerging from the above two decisions of the Hon'ble Supreme Court, we set aside the impugned order and allow

the department's appeal holding that the respondent-assessee are not entitled to simultaneous availment of Cenvat credit and full exemption under the SSI scheme. Hence, consequently, the demand of duty raised in the Show Cause Notice to the extent of Rs.7,02,609/- is confirmed along with interest as payable under the law. However, considering the disputed nature of the issue, it is ordered that no penalty be imposed on the respondent-assessee."

5. Aggrieved by the said order of the Tribunal, the appellant/assessee is before this Court raising the above-mentioned substantial questions of law.

6. Learned counsel appearing for the appellant submits that the Tribunal had not given an opportunity of hearing to address the case, which caused great prejudice to the assessee. He further submits that the date on which the Tribunal passed the final order, i.e., on 30.1.2012, the learned counsel on record could not appear and therefore a request was made by his junior Mr.Vijayabalan to adjourn the matter stating that there is a bereavement in the family of Mr.Hari Radhakrishnan, learned counsel on record and that he had gone to Trivandrum. The said junior counsel has filed an affidavit before us to this effect and supporting document, namely, travel tickets of Mr.Hari Radhakrishnan evidencing the travel. This is enclosed as document in page Nos.88 to 91 of the typed set of papers before us. He also submits that the case was adjourned from time to time for various reasons and not due to the non-cooperation of the appellant. The case of Nebula Health Care was pending before the Supreme Court and hence adjournment was effected time to time. For some strange reasons, the Tribunal following another decision decided the case in favour of the Department, thereby dismissed the appeal, without affording an opportunity to the assessee to argue the matter, which is in violation of principles of natural justice. The appellant counsel was not able to put forth his case effectively and hence prejudice is caused.

7. Learned Standing Counsel appearing for the respondent supported the order of the Tribunal.

8. Heard learned counsel appearing for the appellant and the learned Standing Counsel appearing for the respondent and perused the materials placed before this Court.

9. The short issue that the learned counsel for the appellant pleads is that no opportunity has been given by the Tribunal to the assessee to address the case and therefore great prejudice is caused. We find from the copy of the note sheet pertaining to this case before the Tribunal that the case was adjourned from time to time

awaiting the decision of the Apex Court in the case of Nebulae Health Care. But we find from the impugned order that the Tribunal, on merits, proceeded to dispose of the matter based on other decisions in the case of CCE, Admedabad Vs. Ramesh Food Products reported in 2004 (174) ELT 310 (S.C) and in the case of Collector Vs. Universal Drinks Pvt. Ltd. reported in 2007 (217) ELT A76 (S.C.). There is no reference to the decision in the case of Nebulae Health Care. Even otherwise, the Tribunal does not consider the decisions of the Supreme Court, based on which the Original Authority as well as the Commissioner (Appeals) have held in favour of the assessee and there is no discussion on merits on the decision rendered by the lower authorities. The Tribunal, the final fact finding Authority, should go into the merits of the case of the assessee/appellant and render a finding, if not inclined to accept, which legal plea is in favour of the appellant before lower Authorities. Hence, we are of the view that the opportunity as sought for by the appellant should have been granted by the Tribunal to enable them to put forward its case. The plea of prejudice is apparent and the counsel has shown bona fides for his absence. The Department counsel, on verification, has no serious objection to the said plea.

10. In the light of the above, without going into the merits of the case, we set aside the order of the Tribunal and remand the matter back to the Tribunal to dispose of the matter afresh after affording an opportunity to the assessee/appellant.

In the result, this Civil Miscellaneous Appeal is allowed by way of remand. No costs. Consequently, M.P.No.1 of 2015 is closed.

Sd/-
Assistant Registrar(CS-IV)

//True Copy//

सतगमनेन न्यायते
Sub Assistant Registrar

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To

The Customs, Excise & Service Tax Appellate Tribunal
South Zonal Bench, 1st Floor, Shastri Bhavan Annexe
26, Haddows Road, Chennai 600 006.

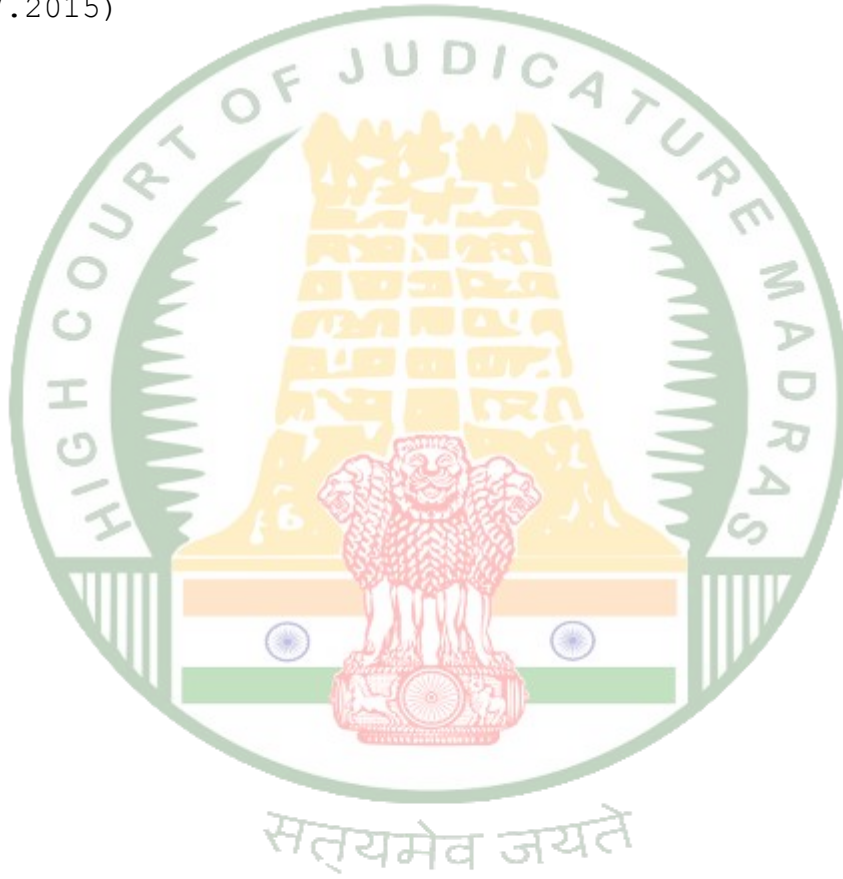
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1 CC to Mr.A.P.Srinivas, Advocate SR.No. 31722

1 CC to Mr.hari Radhakrishnan, Advocate SR.No. 31850

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& M.P.No.1 of 2015

RV (CO)
PSI (10.07.2015)



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