IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATE : 18.06.2015

CORAM

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

C.M.A. NO. 1765 OF 2011
AND
M.P. NO. 1 OF 2011

M/s. V.N.K. Menon & Co.
Mani Rice Mill Compound
241-B, Perur Main Road
Coimbatore 641 026. .. Appellant

- Vs -

1. The Customs, Excise & Service Tax Appellate Tribunal
Haddows Road
Chennai 600 006.

2. The Commissioner of Central Excise
Coimbatore 641 018. .. Respondents

Appeal filed under Section 35-G of the Central Excise Act against the order dated 19.5.2010 passed by the Customs, Excise & Service Tax Appellate Tribunal, South Zonal Bench, Chennai, made in Final Order No.570/2010 arising against the order in Appeal No.369/03-CE dt.28.10.03 passed by the Commissioner of Central Excise Appeals, Coimbatore

For Appellant : Mr. T.Ramesh

For Respondents: Mr. K.Ravindranath for R-2

JUDGMENT
(DELIVERED BY R.SUDHAKAR, J.)

The assessee, Aggrieved by the order of the Tribunal has filed the present appeal before this Court. Vide order dated 8.7.2011, this Court, while admitting the appeal, framed the following substantial question of law for consideration :-

" In the facts and circumstance where it has been held that there is no intention to evade payment of duty and extended period of limitation cannot be invoked for the period subsequent to August, 1996, whether the Tribunal was correct in holding that the extended period of limitation can be invoked for the period prior to August, 1996, when facts involved is identical for both the periods?"

2. The facts, in a nutshell, are as follows : -

The assessee/appellant herein manufactured housing and freight containers on job work basis for its principal, M/s.Balmer Lawrie & Co., Cochin, on being supplied with raw materials free of cost under invoice and the appellant took Modvat credit on the raw materials and M/s.Balmer Lawrie cleared the said goods on payment of duty. M/s.Balmer Lawrie was paying labour charges in addition to a fixed amount of Rs.50,000/= towards the following services rendered by the appellants :-

> "i) provide covered space of a minimum area of 200 sq.ft., for the purpose of storage of materials;
>
> ii) provide open space of a minimum area of 12,500 sq.ft., including electrical power upto a maximum of 5HP for taking up furnishing work of housing containers/insulated containers, etc.;
>
> iii) provide all necessary facilities including manpower and personal computer and undertake the stores management including receipting, issues, storage accounting etc., and taking up the responsibilities for the physical controlling of the total material;
>
> iv) provide round the clock security service;
>
> v) arrange for unloading and subsequent handling of all incoming materials and loading and despatch of materials to shell manufacturing sub-contractors finished goods to customers, as required, from the premises after complying with necessary statutory requirements; and
>
> vi) undertake the furnishing/outfitting work of housing containers/insulated containers in the premises."

3. The contract between the appellant and M/s.Balmer Lawrie explicitly specifies that apart from the above-mentioned service charges, furnishing charges for individual containers would be determined based on the model, nature of work, etc. The Department was of the view that these expenses incurred for providing the services were in the nature of overheads essential for manufacturing activity and therefore were required to be reckoned while the assessable value of the finished goods was calculated for the purpose of payment of duty. Since the service charges had not been included in the assessable value of housing containers and freight containers, a show cause notice dated 13.10.98 was issued proposing to recover duty to the tune of Rs.2,55,000/=, which was alleged to have been short-paid during the period 1995-1996, 1996-1997 and 1997-1998 upto November, 1997 and also invoking the extended period of limitation as well as proposing recovery of interest and imposition of penalty.

4. After adjudication, the demand made, including interest and penalty, were upheld by the adjudicating authority by passing the following order :-

> "1) I demand an amount of Rs.2,55,000/- under Rule 9 (2) of Central Excise Rules, 1944 read with proviso to Section 11A (1) of Central Excise Act, 1944;
> 2) I impose a penalty of Rs.2,55,000/- under Section 11AC of Central Excise Act, 1944 read with Rule 173Q, 226 of Central Excise Rules, 1944;
> 3) Interest payable under Section 11AB also to be paid in terms of Section 11A of Central Excise Act, 1944."

5. Aggrieved over the said adjudication order, the assessee preferred appeal to the Commissioner (Appeals), who, by order dated 28.10.03, while modifying the penalty and interest imposed on the appellant, on the question of demand, confirmed the order passed by the adjudicating authority.

6. The assessee, aggrieved over the said order, filed appeal before the Tribunal. The Tribunal found that there was a case of suppression and, therefore, rejected the plea of the assessee that the demand was barred by limitation. The Tribunal also upheld that the intention of the assessee to evade payment of duty for the receipt of service charges from their principal has been established by the Department for the period upto August, 1996 and confirmed the order. However, the Tribunal held that for the period post August, 1996, the department having recorded a statement from the officials of the assessee-company, it is clear that the department knew of the nature of activity therefrom and, therefore, the Tribunal came to hold that there cannot be any act of suppression post August, 1996 and, accordingly, the demand was set aside for the period subsequent to August, 1996 and interest under Section 11AB and penalty under Section 11AC for the said period, viz., post August, 1996 were also set aside. However, the penalty of Rs.50,000/= imposed under Rule 173Q and Rule 226 was upheld. Para-2 of the order of the Tribunal, is quoted hereinbelow, for better clarity :-

> "2. We have heard both sides. We find no merit in the contention of the assessee that the service charges are not required to be included in the assessable value of housing containers and freight containers. From the nature of the services it is clear that they were provided to facilitate manufacture of the goods and, therefore, the expenses incurred for providing such services were in the nature of overheads essential for manufacturing activity. We, therefore, uphold the duty demand. We also find no merit in the assessee's contention that the entire demand is barred by limitation for the reason that they have not been able to establish any basis for the belief that such charges were not includible in the assessable value, let alone a bona

> fide belief. Intention to evade payment of duty is clearly brought out for the reason that the receipt of services charges from their principal was not disclosed to the Department. However, we find force in the submission that the demand for the period subsequent to August, 1996 is not sustainable as suppression cannot co-exist with knowledge and it is not disputed that all the facts came to the knowledge of the Department by August, 1996 when the statements of the officials were recorded. We, therefore, set aside the demand for the period subsequent to August, 1996. Interest under Section 11AB and penalty under Section 11AC are also set aside as a consequence of the setting aside of the demand for the period subsequent to August 1996. However, we uphold the penalty of Rs.50,000/= imposed under Rule 173Q and Rule 226 for the period prior to 28.9.1996."

Aggrieved by the said order of the Tribunal, the assessee/appellant is before this Court by filing the present appeal.

7. Heard the learned counsel appearing for the assessee/appellant and the learned standing counsel appearing for the respondent/Department and perused the materials available on record.

8. On a careful consideration of the entire gamut of facts, the answer to the question of law raised by the assessee is found in para-2 of the order of the Tribunal itself. It has been held by the Tribunal that there is a clear case of suppression for invocation of extended period of limitation for the period prior to August, 1996, as the activities of the appellant/assessee came to light subsequent to an investigation by the Department. However, insofar as the period post August, 1996, on the plea of suppression, the Tribunal was correct in setting aside the demand on the ground that the department was aware of the activities of the appellant/assessee and, therefore, post August, 1996, the case of suppression, as held by the adjudicating authority, cannot be sustained. The plea of the appellant is that if there is no suppression post August, 1996, no extended period could be invoked post August, 1996 and, therefore, the same analogy will have to be applied for the period prior to August, 1996 as well. That plea cannot be sustained as all the activities of the appellant/assessee came to light based on investigation by the Department and recording of statement in August, 1996. Therefore, for the period prior to August, 1996, the department was justified in invoking the plea of suppression for larger period. The findings recorded by the Tribunal insofar as the period prior to August, 1996 and post August, 1996 stems from strong judicial reasoning and, this Court is of the considered view that there is no error on record warranting interference with the well considered finding of the Tribunal.

9. For the reasons aforesaid, we find that the order passed by the Tribunal is justified in the facts of the case. Accordingly, the

substantial question of law is answered in favour of the respondent/Revenue and against the appellant/assessee.

10. In the result, this appeal is dismissed confirming the order passed by the Tribunal. Consequently, connected miscellaneous petition is also dismissed. However, in the circumstances of the case, there shall be no order as to costs.

Sd/-
Assistant Registrar

True Copy

Sub Assistant Registrar

To

1. The Customs, Excise & Service
   Tax Appellate Tribunal
   Haddows Road
   Chennai 600 006.

2. The Commissioner of Central Excise
   Coimbatore 641 018.

+1 cc to M/s.T.Ramesh, Advocate,Sr.29882

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krd 15/7

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