IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 05.06.2015

CORAM:

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

Civil Miscellaneous Appeal No.932 of 2015

The Commissioner of Central Excise,
Chennai – IV Commissionerate
692, MHU Complex,
Anna Nagar, Nandanam,
Chennai – 600 035.
.. Appellant

versus

1. M/s.Mahavishnu Cylinders,
Survey Nos.195/1, 2 & 3
Sholinganallur Village,
Sholinganallur, Chennai – 600 119.

2. Customs, Excise and Service Tax Appellate Tribunal,
South Zone Bench, Shastri Bhavan Annexe,
1st Floor, No.26, Haddows Road,
Chennai – 600 006. .. Respondents

PRAYER: APPEAL under Section 35G of the Central Excise Act, 1994 against the order dated 25.07.2014 made in Final Order No.40425 of 2014 on the file of the Customs, Excise and Service Tax Appellate Tribunal, Chennai as against the order dated 28.11.2008 made in order No.53 & 57 on the file of the Commissioner (Appeal) Central Excise (Appeals) Chennai-34 as agaisnt the order dated 27.2.2007 made in original No.5/2007 on the file of the Additional Commissioner Central Excise IV, Commissionerate, Chennai.

For Appellant : Mr.P.Mahaadevan SCGSC

J U D G M E N T

(Judgment of the Court was delivered by R.SUDHAKAR,J.)

This Civil Miscellaneous Appeal is filed by the Department as against the order dated 25.07.2014 made in Final Order No.40425 of 2014 on the file of the Customs, Excise and Service Tax Appellate

Tribunal, Chennai raising the following substantial questions of law:

> "a. Whether the order of the Tribunal in holding the breakup figures of Excise Duty shown in the invoices issued under Rule 11 of Central Excise Rules, 2002 as a genuine clerical error is correct or not?
>
> b. Whether the duty demand made under Section 11D of Central Excise Act, 1944 as made out in the Show Cause Notice is correct or not, inasmuch as duty has been charged on the value as per Section 4 of the Central Excise Act, 1944 and the goods removed on invoices as per Rule 11 of Central Excise Rules, 2002?"

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

The first respondent/assessee was engaged in the manufacture of LPG Cylinders falling under Chapter 73 of the Central Excise Tariff Act, 1985 and were supplying the same to M/s.Indian Oil Corporation Ltd. through a open tender. They have opted for SSI exemption for the financial year 2005-06 under Notification No.8/2003 and cleared the goods at 'Nil' rate of duty and on crossing the SSI exemption limit, they cleared the goods on payment of appropriate Central Excise Duty. Alleging that the first respondent had collected excise duty during the period from 01.04.2005 to 14.05.2005 from M/s.IOCL, but failed to remit the same to the Government Account while availing SSI exemption under Notification No.8/03, show cause notice was issued demanding duty under Section 11D of the Central Excise Act. After due process of law, the Adjudicating Authority passed an order confirming the demand made in the show cause notice. Aggrieved by the order of the Adjudicating Authority, the first respondent/assessee filed an appeal before the Commissioner (Appeals), who after hearing the submissions of both sides allowed the appeal holding that there was no suppression of facts and the entire demand was made based on the invoices and based on statutory documents and based on the statutory returns filed by the assessee to the Department. There was no allegation in the Show Cause Notice to the effect that the assessee suppressed the facts. Accordingly, he came to the conclusion that except the erroneous invoice, no amount in excess of the Net Delivered Price (NDP) of Rs.300/- was collected. This amount was the amount payable on reconciliation while availing exemption and even after crossing the exemption limit. Before availing SSI exemption they have availed Cenvat Credit available to them. He further held that there was no excess amount charged and collected so as to enable the Department to invoke the provisions of Section 11D of the Central Excise Act. The relevant findings of the Commissioner (Appeals) reads as follows:

> " It is seen from the records that the appellant were availing SSI exemption during the year 2004-2005. During February 2005 when they had crossed the exemption limit, they started paying excise duty by availing the Cenvat Credit available to them. At that time they had programmed their computer to print invoice showing the

excise duty component also. At the beginning of the year 2005-2006, they have exercised their option to avail the value-based exemption under Notification No.8/2003. But due to negligence on the part of their staff, the invoices issued after 01.04.2005 and upto 14.05.2005 continued to show the excise duty component. On crossing the exemption limit and starting to pay duty during May 2005 only, they found out the mistake that occurred while preparing the invoices for the period from 01.04.2005 to 14.05.2005.

From the above, the counsel argued, it is clear that there is no intention on the part of the appellant to collect excise duty from their client and to retain it without depositing to the government account, in as much as they have claimed exemption during 2004-05, started paying duty from Feb'05 by utilizing the Cenvat Credit available to them; exercised their option at the beginning of 2005-06 to operate under SSI scheme; and started paying duty by availing Cenvat Credit once they crossed the exemption limit after 14.05.2005. All the above acts are conscious decisions on the part of the appellant after understanding the provisions of the law and what occurred was only a mistake in the preparation of the invoice by filling up the column "excise duty" even when availing the exemption.

The above position is strengthened, the counsel's argument runs, when the pricing pattern is observed. The price of the cylinder is arrived at Rs.300/- through an open tender by the appellant and agreed upon by their client and the price will be inclusive of excise duty. As far as the appellant is concerned, they charged Rs.300/- while availing the exemption and continued to charge Rs.300/- even after crossing the exemption limit and borne the excise duty component from out of the Cenvat credit amount available to them for utilization. So they charged and collected nothing extra and hence are not liable to pay duty to warrant invoking of the provisions of Section 11D of the Central Excise Act, 1944."

3. Not satisfied with the order of the Commissioner (Appeals), the Department pursued the matter before the Tribunal, which was rejected by the single Member of the Tribunal concurring with the view of the Commissioner (Appeals) primarily on the ground that there was no material to show that the first respondent/assessee had collected in excess of excise duty over and above what was paid. The relevant portion of the order of the Tribunal reads as follows:

"Heard both sides and perused the records. The main allegation of the department is that the first respondent realized the duty from IOCL but not deposited the same with the department. Therefore duty was demanded under Section 11D. There is no dispute on the fact that the first respondent is an SSI unit and availing the SSI exemption under Notification 8/03. Further, the first respondent entered into a contract with IOCL for manufacture and supply of LPG cylinders and as per the said contract and the price is fixed on NDP basis. It is also noticed that the first respondents after crossing the SSI limit during the relevant period, i.e. 14.5.2005, started paying duty from 15.5.2005 onwards. It is not a case here that first respondent have collected in excess of excise duty over and above what was paid. I also find that as per the contract, IOCL paid only fixed amount of Rs.300/- per cylinder as per their approved NDP rate and nothing extra irrespective of the fact whether the first respondents are availing SSI exemption or clearing on payment of duty. The only lapse on the part of the first respondent is while opting for SSI exemption from 1.4.2005, the computer generated invoices continued to indicate the excise duty, ie. From 1.4.2005 to 14.5.2005. I find that the first respondent has not collected any excess amount over and above the price of the cylinder which is fixed at NDP by IOCL which is inclusive of excise duty. The first respondent had charged only Rs.300/- while availing the exemption and continued to charge Rs.300/- even after cross the exemption limit. The clerical error, in the consolidated invoices showing break up of excise duty appears to be genuine as the revenue has not disputed the eligibility of SSI exemption. The case law relied by the revenue in the case of Kisan Sahakari Chini Mills Ltd. (supra) is not applicable to the present case."

4. Aggrieved by the order of the Tribunal, the Department has filed the present appeal.

5. Heard learned Standing Counsel appearing for the Department and perused the materials placed before this Court.

6. It is seen from the order of the Authorities below that the first respondent/assessee were supplying cylinders through open tender to IOCL. They have fixed the price of the cylinder at Rs.300/-. Even though they were availing SSI exemption, even after crossing the SSI exemption limit, they were supplying the cylinders at the agreed price at Rs.300/-. They had not collected in excess of the price fixed at NDP by IOCL, which is inclusive of excise duty. It is seen from the order of the Adjudicating Authority that he has not recorded any finding to sustain the demand. The Commissioner (Appeals), after verifying the facts and records and after perusing

the statements given before the Central Excise Officers, held that the first respondent/assessee had not collected in excess of over and above what was paid. It is to be noted that the Department had not disputed the eligibility of the SSI exemption availed by the first respondent/assessee and there is no proposal to deny the SSI exemption. When such being the case, because of the error committed by the clerk in generating the invoice, the first respondent/assessee could not be faulted with. In the absence of any intention to collect excess duty, we hold that the first respondent/assessee had not violated the provisions of Section 11D for the Department to invoke the said provision and demand duty.

7. Being pure question of fact, we do not find any question of law much less any substantial question of law arises for consideration in this appeal. Accordingly, the order of the Tribunal stands confirmed and this Civil Miscellaneous Appeal stands dismissed. No costs.

Sd/-
Asst.Registrar (CO)

/true copy/

Sub Asst. Registrar

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To

1. Customs, Excise and Service Tax Appellate Tribunal, Shastri Bhavan Annexe, No.26, Haddows Road, Chennai - 600 006.

2. The Commissioner of Central Excise (Appeals), Chennai.

3. The Additional Commissioner of Central Excise, Chennai IV Commissionerate.

4. The Commissioner of Central Excise
Chennai IV, Commissionerate,
Anna Nagar, Nanadanam, Chennai 35

1 cc to Mr.P.Mahaadevan, Advocate, sr. 26935

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