

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATE : 24.04.2015

CORAM

THE HONOURABLE MR. JUSTICE R.SUD HAKAR
AND
THE HONOURABLE MS. JUSTICE K.B.K.VASUKI

C.M.A. NO. 1172 OF 2009

Commissioner of Central Excise
Puducherry Commissionerate
Goubert Avenue, Beach Road
Puducherry 605 001.

... Appellant

- Vs -

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

2. M/s.HCL Peripherals
Special A-2, Industrial Estate
Thattanchavadi
Pondicherry 605 109.

... Respondents

Appeal filed under Section 35-G of the Central Excise Act against the order dated 16.6.08 passed by the Customs, Excise & Service Tax Appellate Tribunal, Chennai, made in Final Order No.584/08.

Against Order - in - Appeal No.4/2006(P) dated 19.1.2006 passed by the Commissioner of Central Excise Appeals, Chennai - 34.

Against Order in - order No.13/2005 dated 18.4.2005, passed by the Assistant Commissioner, Central Excise, Central Excise Division - 1, Pondicherry- 605 010.

For Appellant : Mr. A.P.Srinivas

For Respondents : Mr. S.Jaikumar for R-2

JUDGMENT

(DELIVERED BY R.SUDHAKAR, J.)

Aggrieved by the order of the Appellate Tribunal in dismissing the appeal filed by it, the Revenue is before this Court challenging the said order by filing the present appeal. This Court, vide order dated 30.04.09, while admitting the appeal, framed the following substantial questions of law for consideration:-

"1) Whether the first respondent is justified in observing that according to settled law, neither any interest on duty can be levied under Section 11 AB nor any penalty can be imposed under Section 11 AC, where the duty was paid prior to the issuance of show cause notice inspite of legal provisions available under Central Excise Act, 1944?

2) Whether the first respondent is right in dismissing the petitioner's appeal by merely relying upon the decisions of the case law which are not applicable to the facts and circumstances of the present case?"

2. The 2nd respondent is a manufacturer and service provider of computer peripherals and parts and accessories for computers. A show cause notice was issued, which was agitated and a demand for service tax of Rs.3,19,863/= in addition to imposition of interest under Section 11AB and penalty under Section 11AC of the Act equal to the duty payable under the Central Excise Act and a further penalty of Rs.30,000/= under Rule 25 of the Central Excise Rules, 2002 was imposed.

3. Aggrieved against the said adjudication order, the assessee preferred appeal to the Commissioner (Appeals), who upheld the demand of duty, but set aside the demand of interest and penalty by following the judgments of the Supreme Court. Aggrieved against that portion of the order by which the interest and penalty was set aside, the department preferred appeal before the Tribunal. The Tribunal, on analysis of the case, confirmed the order passed by the Commissioner (Appeals), against which the Department has preferred the present appeal.

4. Heard the learned standing counsel appearing for the appellant and the learned counsel appearing for the second respondent and also perused the documents available in the typed set of document as also the decisions relied on by the learned counsel for the parties.

5. Insofar as the issue relating to the imposition of penalty under Section 11AC of the Central Excise Act is concerned, if tax is paid before issuance of show cause notice under the provisions of the

Finance Act, 1994, the said issue now stands resolved by a Larger Bench decision of the Supreme Court in Union of India and others - Vs - Dharamendra Textile Processors & Ors. 2008 (231) ELT 3 (SC), wherein it was held that penalty under Section 11AC of the Central Excise Act is mandatory and there is no element of discretion. The relevant portion of the said decision reads as under:

"26. In Union Budget of 1996-97, Section 11AC of the Act was introduced. It has made the position clear that there is no scope for any discretion. In para 136 of the Union Budget reference has been made to the provision stating that the levy of penalty is a mandatory penalty. In the Notes on Clauses also the similar indication has been given.

27. Above being the position, the plea that the Rules 96ZQ and 96ZO have a concept of discretion inbuilt cannot be sustained. Dilip Shroff's case (supra) was not correctly decided but Chairman, SEBI's case (Supra) has analysed the legal position in the correct perspectives. The reference is answered...."

6. Similar view was taken by the Supreme Court in Union of India v. Rajasthan Spinning & Weaving Mills, 2009 (238) ELT 3 (SC). It is apposite to refer to paragraphs (23) to (25) of the said decision, which read as under:

"23. The decision in Dharamendra Textile must, therefore be understood to mean that though the application of Section 11AC would depend upon the existence or otherwise of the conditions expressly stated in the section, once the section is applicable in a case the concerned authority would have no discretion in quantifying the amount and penalty must be imposed equal to the duty determined under sub-section (2) of Section 11A. That is what Dharamendra Textile decides.

24. It must, however, be made clear that what is stated above in regard to the decision in Dharamendra Textile is only in so far as Section 11AC is concerned. We make no observations (as a matter of fact there is no occasion for it!) with regard to the several other statutory provisions that came up for consideration in that decision.

25. In the light of the discussion made above it is evident that in both the appeals, orders were passed by the Tribunal on a wrong premise. In both the appeals, therefore, the impugned orders passed by the

Tribunal are set aside and the matters are remitted to the respective Tribunals for fresh consideration, in accordance with law, and in the light of this judgment...."

7. The next limb pertains to the challenge to interest levied under Section 11AB of the Act, though the period is prior to the enactment of Finance Bill, 2001, to mean thereby, prior to 2001, Section 11AB was not applicable. The provisions of Section 11AB of the Central Excise Act came into effect from 28.9.1996 by Finance (No.2) Act, 1996. No doubt that in the year 2001, there is a change in the rate of interest from 11.5.2001 from 10% - 36% to 18% - 36%, but that is irrelevant. Therefore, the plea of the appellant that the adjudicating authority was fully justified in imposing interest is sustainable. Further, there is no escapement for the assessee from payment of interest under Section 11AB of the Act, even though the assessee had paid the duty prior to issuance of show cause notice. Accordingly, the order of the Tribunal deleting the interest levied under Section 11AB of the Central Excise Act is also liable to be set aside.

8. In the light of the law enunciated in the decisions referred supra, we have no hesitation to hold that interest and penalty are imposable and there is no discretionary power vested with the authorities for waiving the same. This Court, following the above said decisions, is of the considered view that both the Commissioner (Appeals) and the Tribunal have no discretion to waive the interest and penalty and, therefore, the orders are liable to be interfered with. In view of the above, the substantial questions of law are answered against the assessee/respondent and in favour of the Revenue/appellant.

9. For the reasons aforesaid, the order dated 16.6.08, passed by the Tribunal is set aside and this appeal is allowed. However, there shall be no order as to costs.

Sd/-
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Assistant Registrar(CO)

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Sub Assistant Registrar

GLN

To

1. Customs, Excise and Service
Tax Appellate Tribunal
Shastri Bhavan Annexe
No.26, Haddows Road
Chennai 600 006.
2. Commissioner of Central Excise
Puducherry Commissionerate
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Puducherry 605 001.

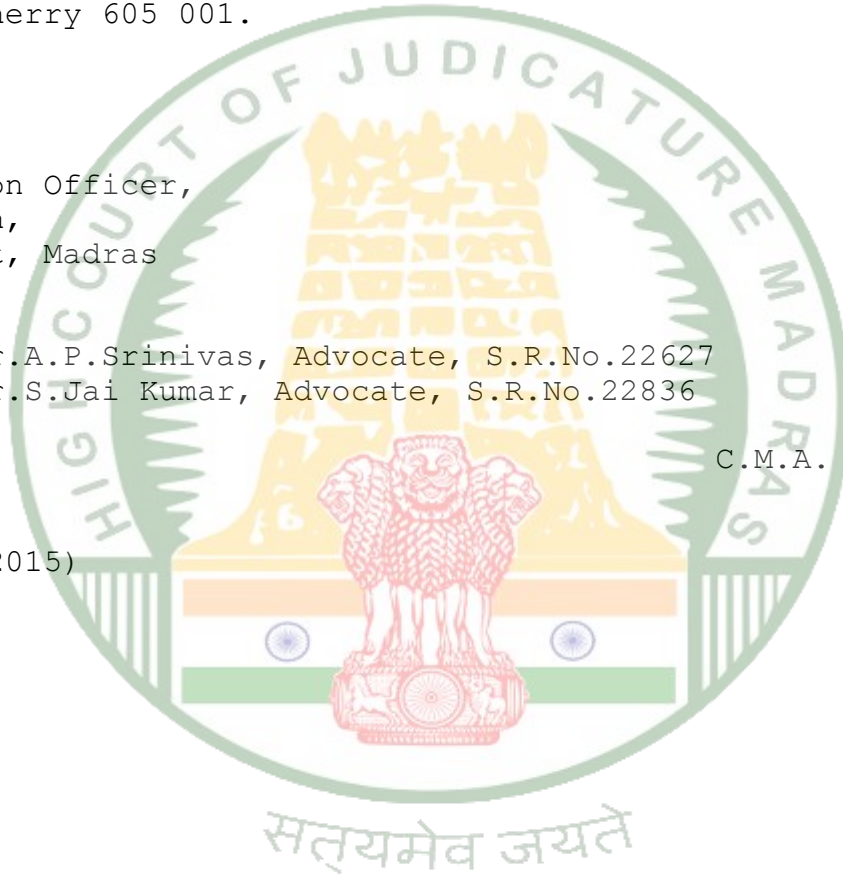
Copy To

The Section Officer,
VR Section,
High Court, Madras

+1cc to Mr.A.P.Srinivas, Advocate, S.R.No.22627
+1cc to Mr.S.Jai Kumar, Advocate, S.R.No.22836

C.M.A. NO. 1172 OF 2009

CNR(CO)
CA(20/05/2015)



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