In the High Court of Judicature at Madras

Dated: 12.03.2015

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The Honourable Mr.JUSTICE R.SUDHAKAR
and
The Honourable Mrs.JUSTICE S.VIMALA

Civil Miscellaneous Appeal No.1633 of 2010

The Commissioner of Central Excise,
Chennai II Commissionerate,
No.692, MHU Complex, Anna Salai,
Nandanam, Chennai - 600 035.
..... Appellant/Appellant

Vs.

1. M/s.Sundaram Dynacast Ltd.,
Post Bag No.17, Padi,
Chennai - 600 050.

2. The Custom, Excise and Service Tax
Appellate Tribunal, South Zonal Bench,
Shastri Bhavan Annexe, 1st Floor,
No.26, Haddows Road, Chennai - 600 006.
.... Respondents/Respondents

APPEAL under Section 35-G of the Central Excise Act, 1944 against the order dated 10.11.2009 made in Final Order No.1666 of 2009 on the file of the Customs, Excise and Service Tax Appellate Tribunal (CESTAT), South Zonal Bench, Chennai.

arising out of the Order of the Commissioner of Central Excise (Appeals) Chennai 34 in Appeal No.77/03(M.II) dated 6.8.2003 against the order of the Addl.Commissioner (RCT) Chennai 35 dated 17.10.2002 in Order in Original No.61/2002.

For Appellant : Mr.E.Vijay Anand
Standing Counsel

For Respondents : No appearance

J U D G M E N T

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

This Civil Miscellaneous Appeal filed under Section 35G of the

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Central Excise Act, 1944 challenging the order dated 10.11.2009 made in Final Order No.1666 of 2009 on the file of the Customs, Excise and Service Tax Appellate Tribunal (CESTAT), South Zonal Bench, Chennai was admitted by this Court on the following substantial questions of law:

> "1. In the facts and circumstances of the case, whether the 2nd respondent can accept the incorrect statement given by the ld. Counsel?
>
> 2. Why the value as per Rule 6 of the Central Excise Valuation (Determination of price of Excisable Goods) Rules, 2000 should not be considered for the valuation of the impugned goods for demanding duty?"

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

The first respondent/assessee is engaged in the business of manufacturing excisable goods falling under Chapter 79, 84, 85, 90, 91 and 96 of the CETA, 1985. On verification of documents maintained by the assessee during the period from 1994-95 to 1997-98, more particularly debit notes raised by the assessee, it was found that amounts realised through debit notes were relevant to preparatory work charges including design, drawings and development charges for dies and tools that were used in the manufacture of various excisable goods manufactured and supplied by them. Alleging that the assessee had not declared the correct assessable value, show cause notice was issued raising the following allegations:

> "Further verification conducted revealed that M/s. SDL are realising certain amounts towards manufacture and supply of excisable goods as per purchase orders issued by various customers from time to time. Over and above such purchase orders, M/s. SDL have also entered into agreements with various customers for compensation against design, drawing and development charges of dies and tools used for goods manufactured and supplied by them. Certain such agreements also relates to design, drawing and development charges of dies and tools required for manufacture and supply of goods contracted between them. A cross verification of the invoices raised by M/s.SDL along with relevant purchase orders shows that M/s.SDL have discharged duty liability only on the cost of material contracted, without including the design, drawing and development charges realised from the customers.
>
> Whereas it appears that design drawing and development activities are directly relevant to the manufacture and supply of goods. Therefore, any charge representing design drawing, development of product shall form part of the manufacturing cost and manufacturing profit of a product.

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The said activities are related directly to the manufacture and supply of goods. Hence it appears that the money value of such activities should form part and parcel of the value of the goods manufactured and supplied. Similarly, the financial compensation for design, drawing, development of tools and dies extended by the customer for manufacture and supply of goods, appears to have a direct influence on the contracted price entered into between M/s.SDL and their customers.

In view of the above facts, it appears that the prices adopted for the purpose of levy of excise duty by SDL are not the sole consideration and hence the base price cannot be determined under Section 4(1)(a) of Central Excise Act, 1944. Thus the price of excisable goods for the purpose of levy of excise has to be ascertained under Section 4(1)(b) read with Rule 5 of Central Excise (Valuation) Rules, 1975. Therefore, an amount of Rs.63,77,776/- realised towards design, drawing and development charges are required to be included in the price of the goods for the purpose of determining assessable value. The goods under reference falling under various chapters during the relevant period are liable to duty at the rate of 15% adv. Hence the differential duty payable on the additional amount realised by M/s.SDL works to be BED Rs.9,56,666.40

Consequently, the show cause notice proposed to demand duty as follows:

"Now. therefore, M/s.SDL are hereby called upon to show cause to the Additional Commissioner of Central Excise (P&V), Chennai - II Commissionerate No.473, M.H.U. Complex, Nandhanam, Chennai - 35 within 30 days from the date of receipt of this show cause notice as to why:-

(1) the differential duty amount of Rs.9,56,666.40 detailed in Annexure 'A' to this notice should not be demanded under proviso to Section 11A(1) of Central Excise Act, 1944;

(2) a penalty should not be imposed under Section 11AC and under Rule 173Q of Central Excise Act, 1944;

(3) Interest on delayed payment of duty should not be demanded under section 11AB of Central Excise Act, 1944.

3. Thereafter, the case was adjudicated by the jurisdictional Assistant Commissioner, who held that the Chartered Engineer's certificate filed by the first respondent/assessee could not be

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accepted in view of certain discrepancy. He further held that since the assessee could not establish the pro-rata amortization cost per piece through a legally sustainable manner, the entire cost of moulds has to be taken for the purpose of demanding duty. The relevant portion of the order of the Adjudicating Authority reads as follows:

> "In the circumstances, I hold the view that since M/s.SDL could not establish the pro-rata amortization cost per piece through a legally sustainable manner, the entire cost of moulds are required to be amortized."

4. Accordingly, the Adjudicating Authority confirmed the demand together with interest and penalty.

5. Aggrieved by the same, the assessee preferred an appeal before the Commissioner (Appeals), who came to hold that the dispute between the Department and the assessee centers around the Chartered Engineer's certificate and even if the Chartered Engineer's certificate has to be rejected, there should be other information available on record. He further held that if there were some discrepancy in the Chartered Engineer's certificate, the same could not be rejected in its entirety. He placed reliance on the decision of the Gujarat High Court in the case of Mangal Textile Mills Pvt. Ltd. v. UOI and came to hold that the adjudication proceeds on the basis to demand duty on the moulds without taking into consideration the amortization of cost of moulds. For better clarity, the relevant portion of the order of the Commissioner (Appeals) reads as follows:

> "Further I agree that there is no possibility to demand duty on moulds, when the issue is regarding amortization of cost of moulds and inclusion of such amortization cost on the value of components. When the proceedings is for demanding duty on components, the order demands duty on the value of moulds. This totally unacceptable. Therefore, the impugned order is set-aside. However, the department may again proceed against the appellant, if it is found that they have not correctly amortized the value of moulds and included such amortized cost on the components cleared during the disputed period."

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6. Not satisfied with the order of the Commissioner (Appeals), the Department went on appeal before the Tribunal. The Tribunal, took note of the submission of the learned counsel appeared for the assessee held as follows:

> "3. Shri M.Kannan, ld. Counsel appearing for the respondents states that the respondents are not challenging the inclusion of amortised cost of mould in the value of the components and further states that the actual amortised cost has been so included for the relevant period.

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4. In view of the fact that amortised cost of the mould has been included in the value of the components for the relevant period as stated by the ld. Counsel for the respondents, we see no reason to interfere with the impugned order passed by the lower appellate authority. Consequently, the department's appeal is dismissed. The cross objection filed by the respondent is also disposed off."

7. As against the above-said order of the Tribunal, the present appeal has been filed by the Department.

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

9. We find that this appeal was admitted by this Court on two issues. The primary issue that arise for consideration is whether the Tribunal could pass an order based on the statement made by the learned counsel for the respondent/assessee that the actual amortised cost has been included in the value of the components during the relevant period, which is not supported by any material. It is seen that the Tribunal has merely recorded the statement made by the learned counsel for the assessee and dismissed the appeal filed by the Department. In this view of the matter, the findings of the Tribunal appears to be based on conjectures and surmises. Even though the

Tribunal has accepted the findings of the Commissioner (Appeals), proceeded on a wrong premise and recorded a new and undecided fact at the instance of the counsel for the assessee to dismiss the appeal filed by the Department.

10. We, therefore, of the view that the order passed by the Tribunal is not in consonance with the proceedings in issue or material available on record. Accordingly, this appeal deserves to be remanded back to the Tribunal for fresh consideration.

11. In the result, the order of the Tribunal stands set aside and the matter is remanded back to the Tribunal for fresh consideration of the issue. This Civil Miscellaneous Appeal stands disposed of. No costs.

Sd/-
Assistant Registrar

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Sub Assistant Registrar

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To

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

2.The Customs Excise and Service Tax Appellate Tribunal
(CESTAT)South zonal Bench, Chennai.

3.The Commissioner of Central Excise(Appeals)
Chennai 34.

4.The Addl.Commissioner (R & T)
M4U Complex, Anna Salai, Nandanam, Chennai 35.

1 cc to Mr.E.Vijay Anand ,Advocate, SR.No.14134

C.M.A.No.1633 of 2010

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