

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. 3135 OF 2009

Sree Vishnu Electronics
No. 7 & 9, Gandhi Street
Kaveri Nagar
Chennai 600 015
rep. by Mrs. M.Hemalatha

.. Appellant

- Vs -

1. Commissioner of Central Excise
Chennai II Commissionerate
MHU Complex
692, Anna Salai, Nandanam
Chennai 600 035.

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

.. Respondents

Appeal filed under Section 35-G of the Central Excise Act against the order dated 09.09.2009 passed by the Customs, Excise & Service Tax Appellate Tribunal, South Zonal Bench, Chennai, made in Final Order No.1235/2009.

For Appellant : Mr. T.R.Ramesh

For Respondent I : Mr. E.Vijay Anand for R-1

For Respondent II : Tribunal

JUDGMENT

(DELIVERED BY R.SUDHAKAR, J.)

Aggrieved by the order of the Tribunal in allowing the appeal filed by the Revenue, the appellant/assessee is before this Court by filing the present appeal. Vide order dated 16.11.09, this Court, while admitting the appeal, framed the following substantial questions of law for consideration :-

"1) Whether or not the Appellate Tribunal was in error in overruling the submissions of the appellant herein that the formation of opinion by the Commissioner before filing of appeal by Revenue is mandatory under Section 35B (2) of the Central Excise Act, as held by Hon'ble Gujarat High Court in the case of Commissioner of Central Excise & Customs, Surat-I, - Vs - Shree Ganesh Dyeing & Printing Works reported in 2008 (232) ELT 775 (Guj.)?"

2) Whether or not the Appellate Tribunal was in error in overruling the objection of the appellant herein that the Revenue's appeal before it did not challenge the limitation issue decided in favour of the appellant hereby by the first appellate authority and consequently no demand survives?"

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

The appellant/assessee is engaged in the manufacture of chokes, transformers, coils, etc., was visited with a show cause notice by the respondent for contravening various provisions of Central Excise Act. The allegation of the Department in the instant case is that the appellant assessee cleared excisable goods using bogus set of invoices (second/parallel) and further cleared excisable goods using the invoices of dummy unit, viz., Sree Transtechnic (for short 'STT'), which act came to light during the investigation by the authorities and, accordingly, the goods were undervalued when cleared to M/s.TVS Electronics.

3. Therefore, a show cause notice was issued demanding duty on clandestine removal. After affording opportunity, the matter was adjudicated and the adjudicating authority passed the order holding that the case of clandestine removal stands established and further there is also a clear case for invocation of proviso to Section 11A as the records seized and the statements recorded establish that the entire operation was with clear intent to evade payment of duty and, therefore, the demand of duty for larger period under proviso to Section 11A (1) is justified. Accordingly, the adjudicating authority confirmed the duty demand in the following manner :-

"I confirm the demand of duty of Rs.7,67,362/= (Rupees Seven Lakhs Sixty Seven Thousand Three Hundred and Sixty Two only) on M/s.SVE under Section 11A (2) of the Act.

I impose a penalty of Rs.7,67,362/= (Rupees Seven Lakhs Sixty Seven Thousand Three Hundred and Sixty Two only) on M/s.SVE under Section 11 AC of the Act.

I impose a penalty of Rs.80,000/= (Rupees Eighty

Thousand only) on M/s.SVE under rule 173Q of the Rules.

I impose a penalty of Rs.75,000/= (Rupees Seventy Five Thousand only) on Shri M.Ramprasad, Chief Executive of M/s.SVE under Rule 209A of the Rules.

M/s.SVE are liable to pay interest under Section 11AB of the Act.

I appropriate the sum of Rs.6,50,000/= (Rupees Six Lakhs Fifty Thousand only) paid by M/s.SVE towards the above dues."

4. Aggrieved against the said order of the adjudicating authority, the assessee preferred appeal to the Commissioner (Appeals), who allowed the appeal including the plea of no suppression. The Department, aggrieved by the same, filed appeal to the Tribunal through the Chief Commissioner of Central Excise, Chennai II Commissionerate, inter alia contending vide the reply to the show cause notice dated 8.4.02, the assessee had accepted the entire charges leveled against them and stated that it was done knowingly, however without knowing the consequences and accepting the mistakes had deposited a sum of Rs.6.50 Lakhs towards duty liability. It was submitted that since the assessed had accepted the allegations in toto, cannot plead ignorance of the consequences for the violation. Therefore, it was submitted that the order passed by the Commissioner (Appeals) is liable to be interfered with.

5. The Tribunal accepted the contention of the Department and set aside the order of the Commissioner (Appeals) and remanded the matter to the Tribunal to pass a reasoned and speaking order, both on merits as well as on limitation. The relevant portion of the said order of the Tribunal is quoted hereinbelow :-

"8. We have noticed that learned adjudicating authority has examined plethora of evidence in pages 2 to 7 of the Order-in-Original and made his finding considering submissions of the assessee. Allegation of clearance of excisable goods using bogus (second/parallel) set of invoices of a dummy unit, namely, M/s.STT came to light during investigation and that was established according to scope and manner of examination in adjudication. Goods were also undervalued and cleared to M/s.TVS Electronics Ltd. Pleas raised by the respondent before the adjudicating authority was not acceptable to him for no merits therein for which he held that the assessee failed to defend the main charge of clandestine removal, evading duty. He has also brought to record that the assessee has knowingly acted in defiance of law stating to be unaware of consequence thereof. Consequently, duty liability of the assessee was bound to arise with other consequences of law

followed.

9. We are surprised to note how the learned Commissioner (Appeals) without evaluating the evidence on record, both oral and documentary, could safely rely on the submission of the assessee when evidence on record self-speak the nature of the allegation and gravity thereof. When respondent stated that parallel set of documents were prepared by them for producing before bank to get bank loan, learned appellate authority has failed to examine veracity thereof and its impact on public revenue without testing such material with evidence on record. He presumed innocence of the respondent. He proceeded on different aspects holding that there was no contrary evidence in relation to receipt of raw material, transport goods, version of buyers and correlation of stock. He further viewed that no statement was recorded from workers. All these suppositions enabled him to grant relief to the assessee. Precisely, we may state that weight of evidence on record was given go bye by the learned Commissioner (Appeals) with scanty regard to the principles of preponderance of probability.

10. The question of time-bar being a mixed question of fact and law, conduct of the assessee shall only decide its motive of evasion of duty to come to the decision on time-bar aspect. Once motive is determined, the time-bar is also determinable according to the ingredients of Section 11A of the Act.

11. Having noticed some of the legal infirmities in the order passed by the learned Commissioner (Appeals), as aforesaid, it would be proper to remit back the matter for reappraisal and evaluation of evidence giving regard to the weight of evidence and to come to a rational conclusion. When governing facts and surrounding circumstances suggest fate of the fact, there is no question of any assumption or presumption which are sworn enemies of justice. Therefore, learned Commissioner (Appeals) after granting fair opportunity to both the sides shall properly consider weight of evidence and pleadings of both sides and pass a reasoned and speaking order on both the aspect of merit as well as on limitation issues, which have emanated from cause of action."

Aggrieved by the said order, the present appeal is filed by the assessee.

6. Learned counsel appearing for the appellant/assessee

contended that the appeal filed by the Chief Commissioner is not maintainable in terms of Section 35 (b) (2). Learned counsel further contended that the Tribunal erred in overruling the objection of the appellant/assessee that in the appeal filed by the Department, no challenge is made to the finding on limitation passed by the Commissioner (Appeals), and in the absence of the same, the demand is unsustainable. It is further submitted that there being no formation of opinion by the Commissioner before filing of the appeal, which is mandatory under Section 35B (2) of the Central Excise Act, the appeal filed by the Department is bad and, therefore, the same is liable to be interfered with.

7. Refuting the above submissions, it is submitted by Mr. Vijay Anand, learned standing counsel for the Department that plea with regard to formation of opinion by the Commissioner not having been raised by the appellant/assessee before the Tribunal, the appellant/assessee cannot raise the said plea at this point of time. In regard to the power of the Chief Commissioner to file an appeal, it is submitted that the Chief Commissioner is empowered to file the appeal as provided under Rule 3 (3) of the Central Excise Rules, 2002. It is submitted by the learned standing counsel for respondent/Revenue that as per Rule 3 (3) of the Central Excise Rules, the appeal filed by the Chief Commissioner is maintainable. It is further submitted that the plea of limitation cannot be sustained as it has been considered by the Tribunal in extenso and, therefore, no interference is called for with the order passed by the Tribunal.

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

9. From a careful perusal of the order passed by the Tribunal, it is evident that the issue as regards the mandatory requirement for formation of opinion by the Commissioner before filing of appeal by Revenue under Section 35B (2) of the Central Excise Act has not been raised by the assessee. The submissions advanced by the learned counsel for the assessee clearly shows that apart from the plea that the appeal filed by the Chief Commissioner is not maintainable, no plea with regard to formation of opinion by the Commissioner before filing the appeal has been raised. In the absence of the plea raised before the Tribunal, the said plea cannot be raised before this Court at this point of time and, accordingly, the said plea raised as a question of law is rejected.

10. Insofar as the contention raised by the learned counsel for the appellant that the Chief Commissioner is not empowered to file an appeal, the answer to the same lies in Rule 3 (3) of the Central Excise Rules, 2002. For better clarity, Rule 3 (3) is extracted hereinbelow :-

"Rule 3. Appointment and jurisdiction of Central Excise Officers. - (1) The Board may, by notification,

appoint such person as it thinks fit to be Central Excise Officer to exercise all or any of the powers conferred by or under the Act and these rules.

2) The Board may, by notification, specify the jurisdiction of a Chief Commissioner of Central Excise, Commissioner of Central Excise or Commissioner of Central Excise (Appeals) for the purposes of the Act and the rules made thereunder.

3) Any Central Excise Officer may exercise the powers and discharge the duties conferred or imposed by or under the Act or these rules on any other Central Excise Officer who is subordinate to him."

11. A reading of Rule 3 (3) of the Central Excise Rules, 2002, makes it clear that any Central Excise Officer may exercise the powers and discharge the duties conferred or imposed by or under the Act or these Rules on any other Central Excise Officer who is subordinate to him, meaning thereby that the Chief Commissioner, the highest officer in the Central Excise Department is empowered to discharge the duties conferred or imposed by or under the Act or the rules on any other Central Excise Officer, who is subordinate to him. Therefore, in view of the power under Rule 3 (3) of the Central Excise Rules, the Chief Commissioner is entitled to file the appeal and, therefore, this objection raised by the assessee/appellant cannot be sustained. Nevertheless, with regard to the question of power to file appeal is concerned, it is seen from the record that no such plea was raised before the Tribunal and, therefore, we are not inclined to accept the plea at this stage and, therefore, the 1st substantial question of law is rejected.

11. Insofar as the plea that no issue of limitation was raised, we find that after setting out the grounds of appeal on the various clandestine activities of the assessee, resulting in the issuance of show cause notice and initiation of proceedings for recovery of duty and for invoking proviso to Section 11A for demanding duty for the larger period, the respondent/Revenue has prayed before the Tribunal as under :-

"It is therefore prayed that the Honourable Tribunal may be pleased to set aside the Order in Appeal No.96 & 97 /2002 M-II dated 23/07/2002 of the learned Commissioner of Central Excise (Appeals) and restore the Order-in-Original No.28/2002 dated 22/05/2002 passed by the Additional Commissioner of Central Excise, or pass such other order as may be deemed fit."

12. From the above prayer, it is clear that a prayer has been made to restore the Order-in-Original passed by the Additional Commissioner of Central Excise, wherein the demand of duty invoking the larger period was taken up. The above prayer, in the considered

opinion of this Court, protects the limitation of the respondent/Revenue. In such view of the matter, it cannot be contended that there was no plea of limitation raised before the Tribunal. Accordingly, the 2nd substantial question of law is answered in favour of the Revenue and against the assessee.

13. In the result, the appeal fails and the same is dismissed confirming the order passed by the Tribunal. However, in the circumstances of the case, there shall be no order as to costs.

Sd/-

Assistant Registrar

True Copy

Sub Assistant Registrar

GLN

To

1. Commissioner of Central Excise
Chennai II Commissionerate
MHU Complex
692, Anna Salai, Nandanam
Chennai 600 035.

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

1 cc to Mr.P.Ramamoorthy, Advocate Sr.No.29865

1 cc to Mr. E.Vijay Anand, Advocate Sr.No.30165

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EV(CO)

PMK.11.8.2015

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