

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 22.01.2015

CORAM

THE HONOURABLE MR.JUSTICE R.SUDHAKAR
AND
THE HONOURABLE MR.JUSTICE R.KARUPPIAH

Civil Miscellaneous Appeal No.2749 of 2008

The Commissioner of Central Excise,
Coimbatore.

...Appellant

Vs.

1. M/s.The Indian Humes & Pipe Co. Ltd.,
11/4, Coimbatore-Siruvani Road,
Mathampatty, Coimbatore - 35.
2. The Customs, Excise and Service
Tax Appellate Tribunal, South Zonal Bench,
Shastri Bhavan, No.26, Haddows Road,
Chennai - 600 006.

...Respondents

APPEAL under Section 35G of the Central Excise Act, 1944 against
the Final Order No.794 of 2007 dated 28.06.2007 on the file of the
Customs, Excise and Service Tax Appellate Tribunal, Chennai.

For Appellant : Mr. E.Vijay Anand
Standing Counsel

For Respondents : Mr.K.S.Venkatagiri - R1

J U D G M E N T
(Delivered by R.SUDHAKAR, J.)

This Civil Miscellaneous Appeal, filed by the Revenue as against
the Final order No.794 of 2007 dated 28.06.2007 on the file of the
Customs, Excise and Service Tax Appellate Tribunal, Chennai, was
admitted by this Court on the following substantial question of law:

"Whether the Tribunal is justified in allowing the

assessee's appeal against the impugned O.I.A. on account of the doctrine of merger while the subject matters of the assessee's appeal and the department's appeal before the Commissioner appeal against the common order in original are entirely different?"

2. The brief facts are as follows:

The first respondent/assessee cleared pre-stressed pipes (PSC Pipes) manufactured in their factory to the work site belonging to the Nagapattinam Panchayat for execution of a water supply scheme in March, 2004. For the purpose of payment of duty, the assessee adopted the cost construction method as per Rule 8 of the Central Excise (Determination of Price of Excisable Goods), Rules, 2000. According to the Department, the cost construction method can be adopted only in case of captive consumption and since the assessee had claimed before the various forums that the impugned goods have been sold at the factory gate, the Deputy Commissioner issued show cause notice dated 4.4.2005 demanding differential duty, which is based on the contractual price of the impugned goods agreed by the assessee and the customer. In the show cause notice, penalty was also proposed to be initiated under Rule 25 of the Central Excise Rules, 2002.

3. In response to the show cause notice, the assessee filed a reply stating that the pipes were manufactured by them and supplied on turnkey basis and the pipes were not sold at factory gate. The turnkey contract includes digging the trenches, laying and joining of pipes, commissioning of pipeline and maintenance of pipeline for the specified period. It was also stated that the assessable value has been determined on the basis of the cost of production of pipes, manufactured and supplied by them in terms of turnkey contract.

4. The Adjudicating Authority was of the view that the usage of pipes for the project has to be treated as captive consumption and since the goods are consumed not in the factory but removed to the work site and utilized for laying of pipes, the freight component should be added to the cost construction method adopted by the assessee. Accordingly the Adjudicating Authority passed an order dated 10.1.2006 demanding duty of Rs.27,624/-.

5. Aggrieved by the order passed by the Adjudicating Authority, the assessee filed an appeal before the Commissioner (Appeals) contending that the addition of freight charges under cost construction method (captive consumption) was not correct and the duty paid on the cost of production plus profit margin as per Rule 8 of the Valuation Rules was correct.

6. The Commissioner (Appeals) vide order dated 12.7.2006 came to hold that when the place of removal of pipes is a factory, freight cannot be added to the cost of pipes. Accordingly, the Commissioner (Appeals) allowed the appeal filed by the assessee holding as follows:

"4. I have gone through the records, contentions put forth in the grounds of appeal and submissions made during the personal hearing. I notice that lot of confusion prevailed on this issue. I too consider this is a case of interpretation of law. Considering this, I waive the condition as to pre-deposit of duty under Section 35 F of ibid in their case and take up the case for final decision.

4a. The issue before me for decision is whether the project site (work site), which did not belong to the appellant was "place of removal" and the transportation charges incurred upon the said site is includable in the assessable value for payment of duty. I observe from the records available that the impugned goods have been removed from the factory to the work site not to make any further sale from there. It is not even alleged that appellant had further sold the same goods from the said site or the original removal was on stock transfer basis. I find that any of situation did not exist. Hence the work site could be a "place of delivery" and not "place of removal". Hence, it was not correct to hold the work site on par with Branch, Depot or Godown and concluding that the cost of transportation from factory to the work site is includable in the value for payment of duty.

In view of the above, the appeal is allowed and the impugned order is set aside".

7. As against this order, the Department did not pursue the matter any further. After the order passed by the Commissioner (Appeals), in Order-in- Appeal No.63 of 2006 dated 12.7.2006, the Revenue sought to file an appeal against the Order-in-Original dated 10.1.2006 before the Commissioner (Appeals) contending that the excise duty should be charged on the basis of sale price, i.e., tender breakup price of pipe per metre as laid. The Commissioner (Appeals) took up the department's appeal in Appeal No.25 of 2007 and by order dated 27.3.2007 overruled the objection raised by the assessee that doctrine of merger will apply and held that the issue raised by the Revenue in further appeal is independent of the one already decided by the earlier Commissioner (Appeals) and therefore, doctrine of merger will not apply. Accordingly, the Commissioner (Appeals) allowed the appeal filed by the Revenue holding as follows:

"5.10. In a nutshell I am of the considered view that the case is to be governed under Section 4(1)(a) of Central Excise Act, 1944 taking the assessable value of the pipes cleared from the factory to the respondents. I find great force in the contention of the appellant. The order of the lower authority requires to be set aside. It is also to be stressed that when it is held that value adoption was incorrect, penal action has to be invoked. The duty demanded in the show cause notice has to be confirmed and interest also to be confirmed under Section 11AB. It would be in the fitness of things if a penalty of Rs.10,000/- (Rupees Ten Thousand Only) is imposed on the respondents under Rule 25 of Central Excise Rules, 2002.

6. In the result, the appeal succeeds."

8. Aggrieved by the order passed by the Commissioner (Appeals) in the appeal filed by the Revenue, the assessee pursued the matter before the Tribunal by way of appeal.

9. The Tribunal was of the view that in view of the order of adjudication passed by the Adjudicating Authority has been finally decided in Appeal No.63 of 2006 dated 12.7.2006, there was no order of adjudication in existence beyond 12.7.2006 for the Department to file an appeal. Thus the Tribunal, taking note of the fact that the issue raised and decided by the Commissioner (Appeals) in order in Appeal No.63 of 2006 dated 12.7.2006 has a direct bearing on the issue raised by the Department in Appeal No.25 of 2007, allowed the appeal filed by the assessee holding that doctrine of merger will apply to the case.

10. The Department, not satisfied with the order of the Tribunal, in allowing the appeal filed by the assessee holding that doctrine of merger will apply, has filed the present appeal.

11. Learned Standing Counsel appearing for the Revenue submitted that the appeal filed by the assessee before the Commissioner (Appeals) was with regard to the inclusion of transportation charges of the impugned goods in the assessable value, whereas the appeal filed by the Department was with regard to the adoption of factory gate price for the purpose of valuation of the impugned goods. Hence, the doctrine of merger will not apply to the case. In support of his contention, he relied on the decision in the case of Commissioner of C.Ex., Mumbai - II V. Godrej & Boyce MFg. Co. Ltd. reported in 2010 (18) S.T.R. 682 (Bom) to contend that if two appeals filed are in respect of the different part of the same order, merely because an appeal preferred by one of the parties is dismissed, the

doctrine of merger will not apply and the other appeal will have to be decided on its own merits.

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

13. We have perused the issue raised in the original show cause notice. It is seen that the order of the Adjudicating Authority resulted in two appeals, one at the instance of the assessee and the other at the instance of the Revenue. In the earlier appeal filed by the assessee, namely Appeal No.63 of 2006 dated 12.7.2006, the Commissioner (Appeals) clearly held that the transportation charges should not be included in the assessable value for payment of duty. He further held that the work site could be a "place of delivery" and not "place of removal" and hence the cost of transportation from factory to the work site should not be included in the value for payment of duty. Hence, the entire show cause notice came to be dropped. In the light of such order, the plea of the Revenue is that there is no doctrine of merger in the present case cannot be countenanced. What the Revenue seeks to review in the further appeal against the adjudication order is that the demand was made in the show cause notice on the basis of sale price. When the Commissioner (Appeals) vide order dated 12.7.2006 in Appeal No.63 of 2006 has already held that the demand in the show cause notice is not maintainable, there is no scope for the Commissioner (Appeals) to review that order in the appeal filed by the Department.

14. We find that the specific issue raised by the Department in the show cause notice was considered in the adjudication order and the demand has been set aside by the Commissioner (Appeals) vide order dated 12.7.2006 in Appeal No.63 of 2006, which has not been challenged by the Department before the Tribunal. Hence, the Department is not justified in filing further appeal on the same issue before another Commissioner (Appeals) contending that the doctrine of merger will not apply and that the issue raised in the earlier appeal by the assessee is different.

15. The core issue in both the appeals before the Commissioner (Appeals), whether the payment of duty should be on the cost of production plus profit margin as per Rule 8 of the Valuation Rules or whether the demand of duty should be on the basis of sale price, i.e., tender breakup price of pipe per metre as laid, having been decided by the Commissioner (Appeals) in the order-in-Appeal No.63 of 2006 dated 12.7.2006, there is no scope for re-construction of the same in the appeal filed by the Department in Appeal No.25 of 2007.

16. The decision of the Bombay High Court in the case of Commissioner of C.Ex., Mumbai - II V. Godrej & Boyce MFg. Co. Ltd. reported in 2010 (18) S.T.R. 682 (Bom), relied on by the learned Standing Counsel appearing for the Revenue stands distinguished, wherein various show cause notices have been issued, which were subject matter of adjudication and appeal before the first Appellate Authority and CESTAT was distinguished by the High Court to hold that the rival issues that were before the Appellate Forum are not on the same issue and therefore, the doctrine of merger will not apply.

17. We find no reason to fall back upon this decision, as the facts in the present case, as stated above, are distinguishable. In the present case, the issue raised by the assessee and the Revenue is one and the same. When once the first Appellate Authority has set aside the order of the Adjudicating Authority setting aside the demand, thereby upholding the assessable value, it should be treated as the order passed by the Adjudicating Authority is merged with the Order-in-Appeal. Accordingly, we find no infirmity in the order of the Tribunal.

18. In the result, the question of law raised and admitted by this Court is answered in favour of the assessee and against the Revenue. This Civil Miscellaneous Appeal stands dismissed. No costs.

Sd/-
Assistant Registrar(CO)

//True Copy//

Sub Assistant Registrar

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To

The Customs, Excise and Service Tax Appellate Tribunal,
South Zonal Bench, Shastri Bhavan,
No.26, Haddows Road, Chennai.

1 CC to Mr. E.Vijay Anand, Advocate SR.No. 3253

1 CC to Mr.K.S.Venkatagiri, Advocate SR.No. 3251

C.M.A.No.2749 of 2008

MG (CO)

PSI (09.02.2015)