

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATE : 22.01.2015

CORAM

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

C.M.A. NO. 3019 OF 2007

Commissioner of Central Excise
Salem Commissionerate
Salem 636 001.

.. Appellant/ Respondent

- Vs -

1. Customs, Excise & Service
Tax Appellate Tribunal
South Zonal Bench
Chennai 600 006.

2. M/s. Nallam Textiles Pvt. Ltd.
Kangeyam - Karur Main Road
Olappalayam PO
Kangeyam Tk. 638 701.

.. Respondents/ Appellant

Appeal filed under Section 35-G of the Central Excise Act,
against the order dated 18.05.2007 passed by the Customs, Excise &
Service Tax Appellate Tribunal, South Zonal Bench, Chennai, made in
Final Order No.630 of 2007.

against the order of the Commissioner of Central Excise
(Appeals) Salem dated 27.11.2004 and made in appeal No.403/2004 (CE)
(SLM) against the order of the Deputy Commissioner of Central
Excise, Erode I Division Erode dated 15.4.2004 and made in C.No.V
52/39/2001.

For Appellant : Mr.Vikram Ramakrishnan

For Respondents: No Appearance R2
R1 Tribunal

JUDGMENT

(DELIVERED BY R.SUDHAKAR, J.)

Aggrieved by the order of the Tribunal in modifying the penalty imposed on the assessee, the Revenue is before this Court by filing the present appeal. This Court, vide order dated 4.12.2007, while admitting the appeal, framed the following substantial questions of law for consideration :-

"1) Whether the Customs, Excise and Service Tax Appellate Tribunal (for short 'CESTAT') was correct in reducing the penalty amount which was imposed as an equivalent amount of duty under Section 11-AC of the Central Excise Act?

2) Whether, without reducing the duty amount and without legal sanctity of any rule or section, CESTAT is empowered to reduce the penalty amount imposed by the adjudicating authority? And

3) Whether the action of the Tribunal by reducing the penalty equivalent to the duty amount demanded is correct, having found that the 2nd respondent had evaded duty by suppressing facts by issuing parallel invoice with mala fide intention, which was proved beyond doubt by the Department?"

2. The facts of the case would reveal that the 2nd respondent had cleared yarn to M/s.Poongothai Textiles, Palladam under an invoice. However, it was found that under the same invoice number, 38 chippams of cotton hank yarn valued at Rs.3,07,571/= was cleared to another dealer. On finding out the said clandestine transaction, a case was registered and after due process of law, the lower authority passed an order confirming the demand of duty at Rs.2,32,308/= with appropriate interest and also imposed penalty under Section 11-AC of the Central Excise Act and imposed a penalty equivalent to the duty demanded on the appellant under Rule 173Q of the Central Excise Rules, 1944 read with Section 38 of the Central Excise Act, 1944.

3. Aggrieved against the said order, the 2nd respondent herein preferred an appeal before the Commissioner (Appeals), who, while confirming the order of the original authority, however, waived only the penalty imposed under Rule 173Q.

4. Aggrieved against the said order, the 2nd respondent preferred appeal before the Tribunal. The Tribunal also, while concurring with the view of the authorities below, held that it finds no reason to interfere with the impugned order. However, insofar as penalty portion is concerned, the Tribunal took a lenient

view by reducing the penalty imposed, which is equivalent to the duty demanded, to Rs.20,000/=, observing that the equal amount of penalty imposed is a little too harsh. Aggrieved against that portion of the order by which the penalty portion was modified, the Revenue is before this Court by filing the present appeal.

5. Heard Mr.Vikram Ramakrishnan, learned standing counsel appearing for the appellant/Revenue. However, there is no representation on behalf of the 2nd respondent.

6. For better clarity, the relevant portion of the impugned order is extracted hereunder :-

"4. It is seen from the impugned order that the appellants had raised a new ground before the first appellate authority that their request for cross examination had not been allowed by the Joint Commissioner. The Commissioner (Appeals) found that no such request had been made before the Joint Commissioner also. No valid ground has been taken in the appeal against the impugned order. In the circumstances, I do not find any reason to interfere with the impugned order. However, I find the equal amount of penalty imposed to be a little too harsh and modify the same to Rs.20,000/=. But for the above modification, the impugned order is sustained and the appeal disposed of accordingly."

7. It is brought to the notice of the Court by the learned standing counsel appearing for the appellant/Revenue that the issue stands covered by the decision of the Supreme Court in Union of India - Vs - Dharamendra Textile Processors (2008 (231) ELT 3 (SC) and Union of India - Vs - Rajasthan Spinning and Weaving Mills (JT 2009 (7) SC 314 :: 2009 (238 ELT) 3 (SC)).

8. This Court also, following the abovesaid decisions of the Supreme Court, in CMA No.1099 of 2008, held as under :-

"8. While considering the pari materia provision, namely, Section 11AC of the Central Excise Act, the Supreme Court in the decision reported in 2008 (231) E.L.T. 3 (S.C.) (Union of India V. Dharamendra Textile Processors), held as follows:

"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...."

9. The above-said decision was followed by the Supreme Court in the case of Union of India V. Rajasthan Spinning and Weaving Mills reported in JT 2009 (7) SC 314 = 2009 (238) E.L.T. 3 (S.C.), wherein, the Supreme Court held as follows:

"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...."

10. In view of the categorical statement of law and taking note of the specific provision of Section 11AC where there is a specific mandate that the assessee shall be liable to pay penalty, the mere payment of duty even after the show cause notice is not a ground to waive penalty. Hence, the Tribunal is not justified in deleting the penalty imposed under Section 11AC of the Central Excise Act. Such

a mandate under the Statute cannot be given a go-by by the Tribunal. We therefore, answer the question of law in favour of the Revenue.

9. In the light of the above, following the abovesaid decisions, the substantial questions of law raised and admitted are answered in favour of the Revenue and against the assessee. Accordingly, the order of the Tribunal stands set aside and this Civil Miscellaneous Appeal stands allowed. However, there shall be no order as to costs.

Sd/-
Asst.Registrar (CS IV)

/true copy/

Sub Asst. Registrar

GLN

To

1. The Commissioner of Central Excise
Salem Commissionerate
Salem 636 001.
2. The Customs, Excise & Service
Tax Appellate Tribunal
South Zonal Bench
Chennai 600 006.
3. The Deputy Commissioner of Central Excise
Erode I Division
Erode

C.M.A. NO. 3019 OF 2007

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