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IN THE HIGH COURT OF DELHI AT NEW DELHI

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DECIDED ON: 05.02.2015

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CEAC 3/2006

C.M. Nos.7916-7917/2014 (CM FOR
RESTORATION)

COMMISSIONER OF CENTRAL EXCISE Petitioner
Through: Mr. Satish Kumar, Sr. Standing Counsel
with Ms. Shruti Yadav, Advocate.

versus

M/S MODERN INDUSTRIAL ENTERPRISES Respondent
Through: Mr. C. Hari Shanker, Sr. Advocate with
Mr. Saket Sikri and Mr. Jagdish N., Advocates.

CORAM:

HON'BLE MR. JUSTICE S. RAVINDRA BHAT

HON'BLE MR. JUSTICE R.K. GAUBA

S.RAVINDRA BHAT, J. (OPEN COURT)

C.M. No.7917/2014 (for condonation of delay)

For the reasons mentioned in the application, the application stands allowed.

C.M. Nos.7916/2014 (for restoration of appeal)

For the reasons mentioned in the application, the application stands allowed. Appeal stands restored to the file of this Court.

CEAC 3/2006

1. The following questions of law were framed at the stage of admission: -

“1. Whether the Commissioner of Central Excise, Delhi-I had

territorial jurisdiction to issue a show cause notice to M/s. Florida Electrical Industries Limited?

2. Whether on the facts and circumstances of the case, the Customs, Excise and Service Tax Appellate Tribunal was right in law, in concluding that duty demand against M/s. Modern Industrial Enterprises could not be confirmed since it was not possible to arrive at the value of clearances separately between M/s. Florida Electrical Industries Limited and M/s. Modern Industrial Enterprises?”

2. In view of the final order, this Court proposes that the facts are not elaborated. Two respondents’ units (hereafter referred to as assesseees), M/s MIE and M/s FEIL respectively, were subject to independent search operations by the Central Excise authorities on 22.09.2001. The respondents asked by a show cause notice dated 25.3.2003, why, on the basis of the materials seized, duty assessment ought not to be finalised and penalty imposed. The show cause notice was resisted, and, *inter alia*, the assesseees contended that the Commissioner who issued the show cause notice lacked jurisdiction to do so. It was also contended that without attributing the extent of clandestine removal alleged in respect of each unit specifically, duty liability could not be imposed. Besides these, the assesseees also urged other contentions. The show cause notice was confirmed by the Commissioner by order dated 30.06.2004. He upheld the duty liability against FEIL to the extent of Rs.94,41,485/-. The assesseees appealed to the Customs, Excise and Service Tax Appellate Tribunal (CESTAT) which, by the impugned order, held firstly that the show cause notice could not have been issued against FEIL, given that it

fell within the jurisdiction of the Central Excise Commissioner, Delhi-II, Delhi, whereas the Commissioner of Central Excise, Delhi-I had issued show cause notice. In respect of both, it was held secondly, that without attributing the actual removals and consequently working out the duty liability, the Commissioner could not have on a derivative or deductive basis that is premised upon the proportion of past production records, imposed duty liability in respect of each unit. The Commissioner was influenced by the fact that the proportion of production figures available with him worked out to 57 : 43, and used this as the basis of imposing duty liability on the premise of proven clandestine removal.

3. It was contended, on behalf of the Revenue, that the CESTAT's reasoning is flawed since there was sufficient material to indicate clandestine removal and this aspect was not gone into. Learned counsel also urged that inherent in the concept of clandestine removal, is the fact that the assessee has been able to get past the Revenue and upon being caught, some extent of calculation is involved. Justifying the imposition of a proportion principle or ratio in the present case, learned counsel stated that this is as fair as any other method, given that the nature of the objectionable behavior i.e. removal of goods without declaration was proscribed and in fact called for action under Section 11A.

4. Learned counsel for the assessee, on the other hand, contended that CESTAT's order is justified in the fact situation. He pointed out that CESTAT's findings are based on the fact that there is no principle authorizing the proportion rule in the case of clandestine

removal. In the absence of any clarity as to which of the two units are responsible for not reporting the production and for clandestine removal, the segregation sought to be done by the Order in Original was not sustainable. Counsel submitted that logically, therefore, the CESTAT acted justifiably in setting aside the Commissioner's determination.

5. On the question of jurisdiction, learned counsel fairly submitted that the question is somewhat but not wholly addressed by Section 38A of the Central Excise Act - which was inserted by Act 40 of 2001 - though with retrospective effect. While undoubtedly FEIL's premises was searched at a time when, there was only one Commissionerate, yet show cause notice was issued by the Commissioner who did not possess jurisdiction in the light of the notification No.14/2002-CE(NT). Contending that Section 38A clearly envisioned different stages of action such as investigation or legal proceedings, the culmination of which would logically result in different conclusion, learned counsel urged that this Court ought not to disturb the findings of the CESTAT on the question of absence of jurisdiction in the present case.

6. This Court has considered the submissions of the parties. A look at the CESTAT's order would reveal that the Tribunal was guided principally by the proportion rule directed by the Commissioner in apportioning liability. The Commissioner had dealt with, at some length the nature of evidence and materials gathered during the investigation which included statements of various individuals recorded. It also included several receipts, copies of

ledgers, books etc. As to whether it was completely unfeasible for him to attribute production figures based on such seized materials is something which this Court can only speculate on, but not determine through any finding. Undoubtedly, the show cause notice was issued in a composite manner to both the parties. However, in our opinion, that *ipso facto* did not vitiate the proceedings. If at the stage of determination of liability or at the final stage, it was open to the Commissioner to ascribe one figure or the other, to each of the parties, that course ought to have been adopted. To that extent, the submission of the assessee/respondent that no rule or principle authorizes the apportionment of liability based upon the past figures is justified.

7. In these circumstances, we are of the opinion that the matter requires to be re-examined on the merits of the clandestine removal. The CESTAT may, depending upon the submissions made and the extent of materials available with it, take such course, as is available in law, for this purpose, of course after giving due opportunity to both the parties.

8. So far as the question of jurisdiction is concerned, this Court is of the opinion that Section 38A takes care of the situation completely. It has the effect of saving investigations, legal proceedings etc. The respondent's submissions that upon the issuance of Notification in 2002, legality of investigations stood protected but upon the ceasing of such proceedings, the appropriate Commissioner necessarily had to exercise jurisdiction is textual and narrow. This Court has to be alive to the fact that the provision was brought with retrospective effect,

keeping in mind the larger public interest to avoid precisely the kind of contentions that were successfully urged in the present instance. In tax proceedings, such as the present one, there is certain seamlessness to the entire process, and splitting up that into different stages, i.e., investigation, adjudication, etc. and the spelling up of the process would defeat the underlying object of Section 38A, and lead to startling as well as anomalous results. Consequently, the second question of jurisdiction is answered in favour of the Revenue and against the assessee.

9. In the light of the answer to question no.1 returned above, this Court partly sets aside the impugned order, and remits the matter for reconsideration to the CESTAT in accordance with the above directions. Parties shall be present before the CESTAT on 20.02.2015.

**S. RAVINDRA BHAT
(JUDGE)**

**R.K. GAUBA
(JUDGE)**

FEBRUARY 05, 2015
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