

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 29.07.2016

CORAM:

THE HONOURABLE MR.JUSTICE S.MANIKUMAR
and
THE HONOURABLE MR.JUSTICE D.KRISHNAKUMAR

C.M.A.No.3301 of 2011

The Commissioner of Central Excise,
No.1, Foulks Compound
Anaaimedu
Salem - 636 001

... Appellant

versus

1.M/s.Adhavan Processor (P) Ltd.,
Souripalayam
Chithode
Erode - 638 102

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

... Respondents

Prayer: Civil Miscellaneous Appeal filed under Section 35(G) of the Central Excise Act, 1944 against the Final order of Customs, Excise and Service Tax Appellate Tribunal, Chennai - 600 006 dated 08.02.2011 made in Final Order No.291/2011.

For Appellant :Mr.V.Sundareswaran,
Senior Standing Counsel for Central Ex.

For Respondents :No Appearance for R1
R2-Tribunal

JUDGMENT

(Judgment of the Court was made by S.MANIKUMAR, J.)

Though the first respondent M/s.Adhavan Processor (P) Ltd has been served and their name has been shown in the cause list, they have not chosen to appear either in person or through counsel.

2. Facts deduced from the material records are that M/s.Adhavan Processor (P) Ltd, Erode, are processors of textile fabrics and were paying duty under Section 3 of the Central Excise Act, 1944. From 16.12.1998, compounded levy scheme was introduced to independent textile processors under Section 3-A of the Central Excise Act, 1944 and Rules were framed as per Notification No.36/98-Central Excise and 42/98-Central Excise, both dated 10.12.1998. From 01.03.2000, the first respondent/assessee was required to pay duty in terms of the annual production capacity, determined by the Commissioner. Accordingly, after taking note of all the factors contained in the Rules, the Assistant Commissioner, Erode, determined the annual production capacity and consequently, the rate of duty applicable for March 2000 and with effect from 01.04.2000 respectively, under sub rule (3) of Rule 4 of Hot Air Stenter Independent Textile Processors Annual Capacity Determination (Amendment) Rules, 2000 vide orders in (a) C.No.IV/16/109/2000 Pol.Misc. dated 28.6.2000 and (b) C.No.IV/16/51/2000 Pol.Misc. dated 21.03.2001. Vide proceedings in C.No.IV/16/109/2000 Pol.Misc. dated 28.6.2000, the Assistant Commissioner of Central Excise, Erode Division, Erode, determined the annual capacity production in terms of the above said rules. The rate of duty was Rs.2,00,000/- per month per chamber. Vide proceedings dated 21.03.2001 in C.No.IV/16/51/2000 Pol.Misc. another order was passed by the Assistant Commissioner of Central Excise, Erode, determining the rate of duty applicable as Rs.2,00,000/- per month per chamber.

3. Being aggrieved by the determination of the annual production capacity and consequential rate of duty, the assessee/first respondent has filed two appeals in Nos.341-342/2003 before the Commissioner of Central Excise (Appeals), Salem. A perusal of the common order passed by the appellate authority dated 19.12.2003 shows that when the said appeals came up for hearing, submission has been advanced that W.P.No.3891/2000 filed by the first respondent/assessee challenging the Notification Nos.36/98 Central Excise and 42/98 Central Excise, both dated 10.12.1998 made by the Ministry of Finance was allowed in their favour holding the impugned notifications as invalid and inoperative. On that score, the first respondent/assessee prayed to set aside the orders of the jurisdictional Commissioner determining the annual production capacity and consequently the duty. Accepting the contention of the first respondent/assessee, at paragraph No.5.3 of the common order in Appeal Nos.341-342/2003 dated 19.12.2003, the appellate authority held as follows:

5.3 In the order dated 20.02.2002, the Hon'ble High Court, Madras in the WP No.3891/2000 WMP No.5977/2000 filed by the very same appellants has held that, -

"3. In this writ petition, the petitioner has challenged the validity of section 3A of the Central Excise Act and the notifications issued there under. In the decision of this court referred to above, while upholding the validity of Section 3A, this court has held that Rule 3 of the Rules issued in the Notification No.42/98 cannot be sustained as such rule is ultra vires of section 3A of the Act. It has been further held that the other rules issued under the other notifications are also invalid.

4. Applying the aforesaid decision, this writ petition is disposed of with the observation that the notifications impugned in the writ petition are invalid and inoperative. It is however made clear that the petitioner is liable to pay the duty of excise under Section 3 of the Act or under any other provisions contemplated for the same."

Inasmuch as they have been directed to pay duty under Section 3, after quashing the Rule 3 of the Hot Air Stender Independent Textile Processors Annual Capacity Determination Rules, 1998 and other rules issued under other notifications, the ACP orders issued by the Lower Authority, challenged in the present appeals are no longer valid and the same are set aside."

4. Aggrieved by the aforesaid common order of the Commissioner of Central Excise (Appeals), Salem, Commissioner of Central Excise, Salem has filed an appeal No.E/431/2004. After hearing the representation of the department and the records, Customs, Excise and Service Tax Appellate Tribunal, Chennai, has taken note of the fact that being aggrieved by the order made in W.P.No.3891/2000 dated 20.02.2002, the Revenue Department has filed a writ appeal in W.A.No.640 of 2003 and that the same has been dismissed for non-prosecution vide judgment dated 18.07.2008. In the above said circumstances, CESTAT, Madras in Appeal E/431/2004 dated 08.02.2011 has dismissed the appeal.

5. Being aggrieved by the same, the Commissioner of Central Excise, Salem has filed the instant Civil Miscellaneous Appeal on the following substantial questions of law:

"1. Whether it is correct on the part of Hon'ble CESTAT, Chennai in dismissing the appellant's appeal in Writ Appeal No.640 of 2003 which was dismissed not on merits of the case only for non prosecution, while restoration petition was filed by the Hon'ble High Court of Madras?

2. Whether it is correct on the part of the Hon'ble CESTAT to dismiss the case when a similar issue is pending before the Hon'ble Supreme Court of India?

3. Whether the Hon'ble Tribunal is correct in ignoring Notification 42/98 issued under Section 3-A of Central Excise Act, 1944 read with sub Rule (3) of Rule 4 of Hot Air Stenters Independent Textile Processors Annual Capacity Determination (Amendment) Rule, 2000?"

6. On 21.11.2012, this court has recorded as follows:

"The question of admitting this appeal depends upon the application filed by the Revenue to restore W.A.No.640 of 2003, which was dismissed for non prosecution as early as 18.7.2008. Mr.Mahadevan, learned counsel appearing for the Revenue in that appeal has submitted that already steps have been taken for restoration.

In view of the above, the matter is adjourned for three weeks."

7. Fate of the application stated to have been filed for restoration is not known. However, inviting the attention of this court to the decision of the Hon'ble Supreme Court in M/s.Shree Bhagwati Steel Rolling Mills vs. Commissioner of Central Excise & Anr. reported in 2016 (3) SCC 643, Mr.V.Sundareswaran, learned Senior Standing Counsel for the appellant submitted that, having regard to the dictum laid down by the Apex Court in the aforesaid judgment upholding compounded levy scheme, order made in W.P.No.3891/2000 dated 20.02.2002, striking down the notification as invalid and inoperative, should be treated as a nullity.

8. As we have already observed, Civil Miscellaneous Appeal is yet to be admitted, Substantial Questions of Law raised by the appellant as it stood, does not merit any consideration. But, having regard to the effect of the judgment of the Hon'ble Supreme Court in M/s.Shree Bhagwati Steel Rolling Mills vs. Commissioner of Central Excise & Anr. reported in 2016 (3) SCC 643, on pending matters, and on the facts and circumstances of this case, and in the light of the subsequent developments, we deem it fit to admit the appeal on the following substantial question of law:

"Whether the Tribunal failed to appreciate the law that the omission of Section 3A of the Central Excise Act, 1944 is an Amendment to the Central Excise Act, 1944 and is saved by Section 6A of the General Clauses Act, 1897?"

9. At the outset, we have recorded the absence of the first respondent, despite service and their name being shown in today's cause list. Decision of the Hon'ble Supreme Court in M/s.Shree Bhagwati Steel Rolling Mills vs. Commissioner of Central Excise & Anr. reported in 2016 (3) SCC 643, is squarely applies to the case on hand and therefore, the substantial question of law now framed, is answered in the affirmative and we are of the considered view that the same requires to be adjudicated afresh, by the Tribunal.

10. For the reasons stated supra, civil miscellaneous appeal is allowed. Order dated 08.02.2011 made in Final Order No.291/2011 is set aside and the matter is remanded to the Tribunal for fresh adjudication, on the substantial question of law now framed by this court. The Tribunal is further directed to issue notice to the respondent/assessee, proceed in accordance with law and to pass a speaking order. No costs.

-s/d-

Assistant Registrar

True Copy

Sub-Assistant Registrar

To

The Customs, Excise and Service Tax Appellate Tribunal, South Zonal Bench, Chennai - 600 006.

+1 cc to Mr.V.Sundareswaran Advocate sr.43214

C.M.A.No.3301 of 2011

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