

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED:14.06.2016

Date of Reserving the Order	Date of Pronouncing the Order
07.06.2016	14.06.2016

Coram

The Hon'ble Mr. Justice T.S. SIVAGNANAM

W.P.No 10700 of 2015

M/s.Robust Hotels Pvt Ltd.,
Rep., by its Whole-time Director,
Mr.A.Srinivasan,
365, Anna Salai,
Teynampet, Chennai - 600 018. Petitioner

Vs

The Additional Commissioner
Office of the Commissioner of Central Excise,
Chennai -II Commissionerate,
M.H.U.Complex, Nandanam,
Chennai - 600 035. Respondent

Prayer :- This Writ Petition is filed under Article 226 of the Constitution of India, seeking for a Writ of Certiorari to call for the records comprised in impugned order in Original No.2&3/2015, dated 30.01.2015, issued by the respondent and quash the same.

For petitioners .. Mr.Mohammed Shaffiq

For Respondents .. Mr.A.P.Srinivas

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O R D E R

Heard Mr.Mohammed Shaffiq learned counsel appearing for the petitioner and Mr.A.P.Srinivas, learned Senior Standing counsel appearing for the respondent and with their consent, the Writ Petition is taken up for final disposal.

2. The petitioner, a company incorporated under the Companies Act, engaged in hospitality industry and registered under the provisions of the Tamil Nadu Value Added Tax Act and

the Finance Act on the file of the respondent, has filed this Writ Petition, challenging the order in Original Nos.2&3 of 2015, dated 30.01.2015. By the impugned order, the respondent confirmed the demand of Rs.5,36,733/- being the duty payable by the petitioner during the period 01.04.2012 to 30.11.2012, under Section 11A(10) of the Central Excise Act, 1944, (Act), apart from ordering recovery of interest under Section 11AA of the Act and imposing equal penalty. In respect of show cause notice No.2 of 2014, the demand of Rs.7,08,455/- was confirmed, apart from ordering recovery of interest and imposing penalty of Rs.1,50,000/-, under Rule 25 of the Central Excise Rules and Rs.5,000/- under Rule 27 of the Central Excise Rules 2002.

3. Before the learned counsel could commence his submission, this Court posed a question as to why the petitioner has not availed the alternate remedy of filing an appeal before the CESTAT as against the impugned order, pointing out that the said remedy is not only effective, but efficacious. The learned counsel of the petitioner submitted that in the light of the decision of the Hon'ble Supreme Court in the case of Indian Hotels Co., Ltd., & Ors., vs. Income Tax Officer, Mumbai & Ors., reported in (2000) 7 SCC 39, the petitioner is entitled to challenge the impugned order by way of a Writ Petition. Therefore, the learned counsel was requested to make submission on the preliminary issue. However, while doing so, the learned counsel had also touched upon the various aspects regarding the nature of activity done by his client.

4. The facts, which are necessary for the disposal of the Writ Petition are that the petitioner is engaged in the manufacture of excisable goods, such as cakes, pastry, ice creams etc. They had been paying duty and filing excise returns till February 2012. From March 2012, they did not remit excise duty and filed monthly returns claiming that their aggregate value of clearances has not crossed the threshold limit as provided under Notification 8 of 2003, CE, dated 01.03.2003, as amended. The Department, on scrutiny, found that "edible food preparation" manufactured and removed by the petitioner is exempted from payment of duty vide Notification No.12, 2012-CE, dated 17.03.2012, but the petitioner has not paid duty on items like cakes, pastries, ice creams etc., claiming benefit under the SSI exemption notification No.8 of 2003, CE, dated 01.03.2003, since their aggregate value of clearances does not exceed Rs.150 lakhs in a financial year. The department found that they have not included the value of edible food preparation falling under chapter heading 2106 9099, which turnover exceeds Rs.400 lakhs during the financial year 2011-12, claiming that edible food preparations are not excisable.

5. In the background of these facts, a show cause notice dated 09.05.2013, covering period from April 2012 to November 2012, was issued and another show cause notice dated 08.01.2014, covering period from December 2012 to September 2013 was issued. The petitioner submitted their reply vide letters dated 21.06.2013, and 28.01.2014, contending that benefit of exemption is available to cooked food, as it is not covered under the definition of 'manufacture' as provided under Section 2(f) of the Central Excise Act, 1985, and hence, not excisable. Further, it was contended that cooked food is not appearing under any of the chapter headings 16 to 21, including 2106. Therefore, the value of the food sold, cannot be included in arriving at the value of clearance for the purpose of exemption notification. Further, it was stated that the value of clearance of cakes, pastries, chocolates and ice creams did not exceed the exemption limit and hence, no excise duty was payable by the petitioner. Thus, their contention was that cooking of food in kitchen cannot be said to be a process amounting to manufacture, as it is necessary that a new distinct commercial product must come into existence after undergoing the manufacturing process. However, after cooking pulses, rice etc., they continue to remain as pulses, rice etc and no distinct commodity emerges after cooking. After affording an opportunity of personal hearing, the Commissioner framed two issues for consideration, namely:-

(i) whether the food cooked and served in Hotels and Restaurants are excisable; and

(ii) whether the value of the food sold in Restaurants should be taken into account to compute the aggregate value of clearances so as to decide the eligibility of availing the exemption provided under the Notification 8/2003-CE, dated 01.03.2003.

6. To decide the above questions, the Commissioner referred to the definition of 'manufacture' as defined under Section 2(f) of the Act, definition of excisable goods as defined under Section 2(d) of the Act and proceeded to discuss the contention raised by the petitioner stating that after cooking no distinct product emerges and held that such a plea was fallacious. Further, after taking note of the decision of the Hon'ble Supreme Court in UOI vs. Delhi Cloth and General Mills, reported in (1997) 4 SCC 303 held that after cooking, a new and different product emerges and therefore, it is manufacture. Ultimately, the proposals made in the show cause notice was confirmed and the impugned order came to be passed. The submission of the learned counsel for the petitioner is that though the decision of the Hon'ble Supreme Court in Indian

Hotels Co., Ltd., & Ors., case was placed before the Commissioner, he has not considered the same and Hon'ble Supreme Court held that the raw material is at the most proposed so as to make it eatable and it would not be applicable in cases, where only processing activity is carried on. Thus, the above is the sheet anchor of the submissions of the learned counsel and it is his endeavour to state that what is done by the petitioner is not "manufacture" and processing of food to make it edible would not fall within the definition of "manufacture" as defined under Section 2(f) of the Central Excise Act.

7. The learned Senior Standing counsel appearing for the respondent submitted that all issues raised by the petitioner have been threadbare considered by the respondent and if the petitioner is aggrieved, he has to approach the CESTAT by way of an appeal and the issues raised by the petitioner being factual in nature, this Court would not normally entertain a Writ Petition and by filing affidavits, it cannot be decided whether a particular process is manufacture or not.

8. After hearing the learned counsels for the parties and perusing the materials placed on record, it is seen that the case of the petitioner itself largely rests upon the decision in the case of Indian Hotels Co., Ltd., & Ors., (supra). The said decision arose under the provision of the Income Tax Act and the matter pertains only to the flight kitchen operated by the appellant Hotel. Therefore, the Hon'ble Supreme Court did not deal with the other contentions. In the said case, CIT (Appeals) accepted the contention of the assessee that Taj Flight Kitchen cannot be considered as a hotel, as it is a separate industrial undertaking, which is engaged in production of food packages on a large, organised and mechanised basis for the use of various International Airlines. It was held that the appellant therein was engaged in "manufacture" or "production" of articles within the meaning of Section 80-J-(4)(iii) of the Income Tax Act, 1961 and it was not part of the hotel activity of the assessee. Therefore, the CIT (Appeals) held that the activity would not come within the purview of Section 80-J(6), which provides for approval by the Central Government. Accordingly, the Income Tax Officer was directed to allow the deductions under Section 80-J, in respect of the capital employed in the flight kitchen. Though two other cases were also dealt with in the said judgment, at present, I am not referring to the same, as they are not germane to the facts of the instant case. After referring to Sections 80-J(1) proviso, 80-J(4), 80-J(6) and Section 32A of the Income Tax Act, the Hon'ble Supreme Court pointed out that for getting benefit of deduction or investment allowance, the requirement is that the assessee company must be engaged in the business of manufacture

or production of any article or things and in case of preparing food packages or selling the same or preparing foodstuffs for serving in the hotel, there is no question of manufacture or production. It was further pointed out that the raw material is at the most processed so as to make it eatable. The word "manufacture" has various shades of meaning, but unless defined under the Act, it is to be interpreted in the context of the object and the language used in the Sections. In the context of the provisions which deal with grant of investment rebate or deduction under section 80J it is apparent that it is used to mean production of a new article or bringing into existence some new commodity by an industrial undertaking. It would not be applicable in cases where only processing activity is carried out.

9. Thus, the decision of the Hon'ble Supreme Court pertained to the question as to whether an assessee would be entitled to the benefit of deduction or investment allowance and what are the para meters. It was specifically pointed out that in the context of the provisions namely, Sections 80-J(1) proviso, 80-J(4), 80-J(6) and Section 32A of the Income Tax Act, which dealt with the grant of investment rebate or deduction under Section 80-J, the Hon'ble Supreme Court made such observations. The case on hand arises under the Central Excise Act and the definition of 'manufacture' as defined under Section 2(f) of the Central Excise Act, 1944, is as under:-

(f) "manufacture" includes any process,- (i) incidental or ancillary to the completion of a manufactured product;

(ii) which is specified in relation to any goods in the Section or Chapter notes of the First Schedule to the Central Excise Tariff Act, 1985 (5 of 1986) as amounting to manufacture; or

(iii) which, in relation to the goods specified in the third schedule, involves packing or repacking of such goods in a unit container or labeling or relabeling of containers including the declaration or alteration of retail sale price on it or Adoption of any other treatment on the goods to render the product marketable to the consumer.

and the word "manufacturer" shall be construed accordingly and shall include not only a person who employs hired labour in the production or manufacture of excisable goods, but also any person who engages in their production or manufacture on his account ;

10. The above definition is an inclusive definition and manufacture has been defined to include any process incidental or ancillary to the completion of the manufactured product. Therefore, the definition of manufacture is very widely couched

and in the light of the same, the petitioner cannot rest his case solely based on the interpretation given by the Hon'ble Supreme Court in the case of Indian Hotels Co., Ltd., & Ors., case, which arose under the Income Tax Act.

11. As rightly pointed out by the learned Senior Standing counsel appearing for the respondent what the petitioner seeks to agitate is a disputed question of fact and such disputed questions would not be normally adjudicated in a Writ Petition, more particularly, when it involves a taxation statute. Therefore, the petitioner has not made out any grounds to entertain a Writ Petition as against the impugned order.

12. Accordingly, the Writ Petition fails and the same is dismissed. However, liberty is granted to the petitioner to pursue his remedy before the CESTAT, if so advised. Taking note of the fact that this Writ Petition was filed well within the period of 60 days from the date on which the impugned order was received by the petitioner, in the event the petitioner prefers an appeal, the CESTAT while computing limitation the Tribunal shall exclude the period during which this Writ Petition was pending before this Court i.e., from 30.03.2015 to till date. No costs. Consequently, connected Miscellaneous Petition is closed.

Sd/-
Assistant Registrar(CS-II)

//True Copy//

Sub Assistant Registrar

pbn

To

The Additional Commissioner
Office of the Commissioner of Central Excise,
Chennai -II Commissionerate,
M.H.U.Complex, Nandanam,
Chennai - 600 035.

1 cc to M/s.Mohammed Shaffiq, Advocate, sr. 32387

W.P.No 10700 of 2015

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kra 22.06.2016