BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: 02.12.2016

CORAM:
THE HON'BLE MR.JUSTICE M.SATHYANARAYANAN
AND
THE HONOURABLE MRS.JUSTICE J.NISHA BANU

C.M.A.(MD)No.1560 of 2011

K.Sreenivasan : Appellant

Vs.

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

2.The Commissioner of Central Excise,
Bibikulam,
Madurai-625 002. : Respondents

Prayer: Civil Miscellaneous Appeal is filed under Section 35G of Central Excise Act, 1944, against the final order No.1133/11, dated 07.10.2011 in A.No.E/432/2011.

For Appellant : Mr.S.Renganathan
For Respondents : Mr.R.Nandakumar
For Mr.Gurumoorthy

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JUDGMENT

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(Judgment of the Court was delivered by **M.SATHYANARAYANAN, J.)**

The appellant is the husband of one of the partners of M/s.Shri Jayamuruga Paper Mart, Sivakasi, viz., Smt.Amsa and aggrieved by the impugned order dated 07.10.2011 passed by the Customs, Excise and Service Tax Appellate Tribunal, South Zonal Bench, Chennai, had filed this appeal and it was admitted on the following substantial question of law:

"Whether the Appellate Tribunal was justified in sustaining the penalty on the husband of the dormant partner, while sustaining the penalty on the Partnership Firm?"

2. A perusal of the Order-in-original dated 22.11.2010 passed by the Assistant Commissioner of Central Excise, Dindigul II Division, Dindigul, would disclose that based on the intelligence gathered by the Officers of HPU, Madurai, that M/s.Paragon Paper

Private Limited, 543/2, Perumal Goundanpatti, B.Ammapatty, Theni District (In short "PPPL") are selling the Duplex Boards to the safety matches manufacturers situated in and around Sivakasi, Sattur and Kovilpatti, through M/s.Shri Jaya Muruga Paper Mart, Sivakasi, (In short "SJPM"), at undervalued price, and are receiving amount in excess of invoices raised through SJPM, which are not accounted to evade payment of central excise duty, the above said Officers had visited the residence of Sri.K.Seenivasan at Sivakasi-husband of one of the partners of SJPM, viz., Smt.Amsa as well as Office premises of SJPM at various places in Sivakasi and Factory premises of PPPL on 22.01.2009 for scrutiny of documents and records and based on the investigation, certain incriminating documents were also seized. In the residential premises of the appellant as well as in the Office premises of SJPM, 80 pages note books were seized and the statement of the appellant herein dated 22.01.2009 was also recorded and based upon the scrutiny of the incriminating documents, especially, 80 pages note books, which were seized at the residence of the appellant herein as well as other documents seized from the Office premises of SJPM, it came to light that the amounts received in excess of invoices issued by PPPL were unaccounted and, therefore, show cause notice dated 01.04.2010 was issued to the concerned persons, which include the appellant herein and he has submitted his response in the form of letter dated 17.07.2010, contending, among other things, that though his wife is the partner, for all practical purposes, he was acting on her behalf as the partner and associating with Shri.N.Chittaranjan, the appellant in C.M.A.(MD)No.1559 of 2011, in the business of SJPM and since he is happened to be the husband of Smt.Amsa, apart from imposition of penalty on SJPM, no penalty can be imposed on him. The Original Authority had gone through the materials. The appellant herein was also granted with an opportunity of personal hearing and the Original Authority, after going through the entire materials, has arrived at a finding as to the imposition of penalty on the appellant, by taking into consideration of the fact that his statement would reveal that he had paid excess amount to PPPL than what was covered by the bill and had knowledge that PPPL have suppressed the value of paper and hence, there are evidences to show that SJPM and the individuals had the knowledge about the evasion of duty of PPPL. Therefore, the said authority has passed the following order:

"ORDER

(i) I confirm the duty amount of Rs.3,76,086/- (Rupees Three Lakhs Seventy Six Thousands and Eighty Six only) (CENVAT- Rs.3,61,240/- + Edu Cess - Rs.7,335/- + SHE Cess - Rs.2,031 + Paper Cess - Rs.5,480) on M/s.Paragon Paper Private Limited under sub section (2) of Section 11A of Central Excise Act 1944. I adjust an amount of Rs.3,76,086/- (Rupees Three Lakhs Seventy Six Thousands and Eighty Six only) already paid by them on 24.02.2010, 27.03.2010, 23.04.2010 and 21.06.2010 towards the said duty liability.

(ii) I impose penalty of Rs.3,76,086/- (Rupees Three Lakhs Seventy Six Thousands and Eighty Six only) on M/s.Parago Paper Private Limited, under Section 11AC of Central Excise Act 1944. However, they may exercise the option for payment of reduced penalty subject to the fulfillment of the condition stipulated therein.

(iii) M/s.Paragon Paper Private Limited is also liable to pay interest as applicable under Section 11AB of Central Excise Act 1944. I adjust an amount of Rs.1,40,617/- (Rupees One Lakhs Forty Thousands Six Hundred and Seventeen only) already paid by them on 30.06.2010 towards the interest liability.

(iv) I impose penalty of Rs.1,00,000/- (Rupees One Lakhs only) on Shri.R.Rajkumar, Director of M/s.Paragon Paper Private Limited under Rule 26 of Central Excise Rules 2002.

(v) I impose penalty of Rs.1,00,000/- (Rupees One Lakhs only) on M/s.Shri Jaya Muruga Paper Mart, Sivakasi under Rule 26 of Central Excise Rules 2002.

(vi) I impose penalty of Rs.1,00,000/- (Rupees One Lakhs only) on Shri N.Chittaranjan, Partner of Shri Jaya Muruga Paper Mart, Sivakasi under Rule 26 of Central Excise Rules 2002.

(vii) I impose penalty of Rs.1,00,000/- (Rupees One Lakhs only) on Shri K.Seenivasan, (H/O Smt.Amsa, Partner of Shri Jaya Muruga Paper Mart, Sivakasi), under Rule 26 of Central Excise Rules 2002.

(viii) The other penal proceedings initiated in the notice are hereby dropped."

3. The appellant herein and three others, aggrieved by the said order imposing/confirming the penalty, had filed Appeal Nos.12 to 15 of 2011 before the Commissioner of Central Excise (Appeals), Madurai-2 and all the appeals were taken up for disposal and the appellate authority has reduced the penalty from Rs.1,00,000/- imposed on the appellant herein to a sum of Rs.50,000/- and modified the impugned order as stated below:

"ORDER

The impugned Order-in-Original is modified as under

(a) Demand of duty of Rs.3,76,086/- on M/s.Paragon Paper Private Limited under Sub section (2) of Section 11A of Central Excise Act 1944 and adjustment the same amount already paid towards the demand is upheld.

(b) Imposition of penalty of Rs.3,76,086/- on M/s.Paragon Paper Private Limited under Section 11AC ibid and the provision option for payment of reduced penalty subject to the fulfillment of the conditions stipulated therein is upheld.

(c) Demand of appropriate interest under Section 11AB ibid and also adjustment of amount of Rs.1,40,617/- already paid towards the interest is upheld.

(d) The penalty Rs.1,00,000/- imposed on Shri R.Rajkumar, Director of M/s.Paragon Paper Limited under Rule 26 of Central Excise Rules 2002 is reduced to Rs.50,000/-.

(e) The penalty Rs.1,00,000/- imposed on M/s.Shri Jaya Muruga Paper Mart, Sivakasi under Rule 26 of Central Excise Rules 2002 is reduced to Rs.50,000/-.

(f) The penalty Rs.1,00,000/- imposed on Shri N.Chittaranjan, Partner of M/s.Shri Jaya Muruga Paper Mart, Sivakasi under Rule 26 of Central Excise Rules 2002 is reduced to Rs.50,000/-.

(g) The penalty of Rs.1,00,000/- imposed on Shri K.Seenivasan (H/o.Smt.Amsa, Partner of M/s.Shri Jaya Muruga Paper Mart, Sivakasi) under Rule 26 of Central Excise Rules is reduced to Rs.50,000/-.

(h) Stay petitions also stand disposed accordingly."

4. The appellant herein, aggrieved by the same, filed appeal before the CESTAT and in the grounds of appeal, has stated that he is the husband of the one of the partners of SJPM, viz., Smt.Amsa and for all practical purposes, he was doing the functions as a partner in the Firm and since the Firm has been imposed with penalty for abetting the commission of offence by PPPL and that he did not stand to gain anything out of the said deal and the further fact that one Mr.R.Rajkumar, Director of PPPL, has also been imposed with penalty, penalty imposed on him is liable to be set aside.

5. The Tribunal had taken up all the appeals filed by SJPM, Mr.Chittaranjan (appellant in C.M.A.(MD)No.1559 of 2011) and the appeal filed by the appellant herein as well as Mr.R.Rajkumar and having taken note of the submission made by the respective learned counsel, as to the quantum of penalty alone, the Tribunal has reduced the quantum of penalty to Rs.25,000/- and challenging the same, the present appeal is filed.

6. The learned counsel appearing for the appellant would contend that since the appellant is the husband of one of the partners of the Firm, viz., SJPM and since the Firm has been imposed with penalty, there is no necessity to impose a separate penalty on him and that apart, the major role was played by PPPL and one of the directors has also been imposed with penalty and, therefore, prays for setting aside the order.

7. Per contra, the learned Standing Counsel appearing for the revenue has drawn the attention of this Court to the order passed by the Original Authority and would contend that on a thorough consideration of entire materials, the authority reached the conclusion to impose the penalty and what was urged before the appellate authority and CESTAT was only as to the quantum of penalty and as such, it is not open to the appellant herein to canvass this appeal on merits and prays for dismissal of this appeal.

8. A perusal of the impugned order passed by the CESTAT would indicate that quantum of penalty alone was put in issue and,

therefore, the Tribunal has taken into consideration the said submission and has reduced the penalty to Rs.25,000/- on each of the appellants. The core issue is as to the imposition of penalty on the husband of the agreement partner, viz., the appellant herein. The said issue is no longer res integra, in the light of the Full Bench judgment rendered by Bombay High Court reported in 2016 (335) E.L.T. 225 (Bom.) (FB) [Amritlakshmi Machine Works vs. Commr. of Cus.(Import), Mumbai. It is relevant to extract the following:

"We note that Section 135 of the Act begins with the words 'without prejudice to any action that may be taken under the Act' while listing out the offence of evasion of duty or prohibition under Chapter XVI of the Act. The offences listed out in Section 135(1)(a) of the Act would include within it all acts and/or omission to act on the part of any person in relation to any goods, in any way, knowingly, concerned with misdeclaration of value, fraudulent evasion of duty or evasion of any prohibition either under the Act or any other Act. The list is exhaustive to include all acts/omissions which would render the goods liable for confiscation under Section 111 of the Act for which penalty is provided under Section 112(a) of the Act if they are accompanied with knowledge/mens rea. Thus, the acting or omitting to act leading the goods becoming liable to confiscation would be an offence under Chapter XVI of the Act as it is specified in Section 135(1)(a) of the Act, provided it is done knowingly. Thus, the provisions of Section 140 would apply to such offences. It is pertinent to note that Section 140 of the Act while restricting its application to an offence under Chapter XVI of the Act, does not restrict its application only to prosecutions in criminal Court. Thus Section 140 of the Act could be read into adjudication proceedings resulting in penalty under Section 112(a) of the Act provided the act or omission on the part of any person in making the goods liable to confiscation is also an offence under Section 135(1)(a) of the Act. Section 112(a) of the Act to the extent it covers a person who abets the doing or omitting the doing of any act as plainly read would also be an offence under Section 135(1)(a) of the Act also. This is so as the requirement of knowledge is found only in case of abetment and not in other cases listed in Section 112(a) of the Act. The word abetment is not defined in the Act, therefore the meaning assigned to it in Section 3(1) of the General Clauses Act, 1897 which is as given under Section 107 of the Indian Penal Code. An abetment would include by definition intentional aiding when covered by Explanation 2 read with third category listed in Section 107 of the Indian Penal Code. (See Supreme Court decision in Shree Ram v. State of U.P.) Mere facilitation without knowledge would not amount to abetting an offence. Parliament has specifically included abetment in Section 112(a) of the Act, to include acts done with knowledge, otherwise the first provision thereof "Any person - (a) who in relation to any goods does or omits to do any act.........." would cover acts done or omitted to be done on account of instigation and/or encouragement without knowledge. However, the first portion of Section 112(a) of the Act is only to make person of first degree in relation to the act or omission strictly liable. Persons who are not directly involved in the act or omission to act, which has led the goods becoming liable for confiscation cannot be made liable unless some knowledge is attributed to them. Therefore, it is to cover such cases that Section 112(a) of the Act also includes a person who abets the act or omission to act which has rendered the goods liable to confiscation. Imposing penalty upon an abettor without any mens rea on his part would bring all business to a halt as even innocent facilitation provided by a person which has made possible the act or omission to act possible could result in imposing of penalty. To illustrate innocent transferee of a license which enabled the purchaser of the license to misuse the license could be imposed with penalty. This could never be the intent or objective of Section 112(a) of the Act. [paras 25, 27, 29]."

9. In the light of the fact that what was canvassed before the CESTAT is only as to the quantum of penalty, coupled with the fact that the Order-in-Original dated 22.11.2010, passed by the Assistant Commissioner of Central Excise, Dindigul II Division, Dindigul, had also dealt with the factual and legal issues, this Court is of the view that the substantial question of law raised in this appeal is to be answered in favour of the Revenue. Accordingly, this Civil Miscellaneous Appeal is dismissed, confirming the order passed in Final Order No.1133/11, dated 07.10.2011 in A.No.E/432/2011. However, in the facts and circumstances of the case, there shall be no order as to costs.

Sd/-
Assistant Registrar (AS)

/True copy/

Sub Assistant Registrar

To
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26-Haddows Road,
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2.The Commissioner of Central Excise,
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SML
PSM/PN/10.02.2017/6P/3C

Judgment made in
C.M.A.(MD)No.1560 of 2011
Dated: 02.12.2016
(2/2)