IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 07.04.2017

C O R A M

THE HONOURABLE MR.JUSTICE RAJIV SHAKDHER

THE HONOURABLE MR.JUSTICE R. SURESH KUMAR

Civil Miscellaneous Appeal No.2157 of 2016

The Commissioner of Central Excise,
Chennai I Commissionerate,
No.26/1, Mahatma Gandhi road,
Nungambakkam,
Chennai 600 034. ... Appellant/Appellant

Vs.

1 . M/s Indian Oil Corporation,
Lube Blending Plant,
Tondiarpet,
Chennai 600 081.

2 . Customs, Excise and Service Tax Appellate
Tribuna, South Zonal Bench,
Shastri Bhawan Annex, 1st Floor,
26, Haddows Road, Chennai 600 006. ... Respondents

Prayer Civil Miscellaneous Appeal filed under Section 35G of Central Excise Act, 1944 against the Final Order No.41537 of 2015 dated 02.11.2005 passed by the Customs Excise and Service Tax Appellate Tribuna, Chennai Bench in Appeal No.E/712/2007.

For Appellant ... Mr.A.P.Srinivas,
Senior Standing Counsel

For Respondents ... Mr.N.Venkataraman,
Senior Counsel for
M/s.S.Muthu Venkataraman
for R1
R2 - Tribunal

J U D G E M E N T
(Judgement of the Court was delivered by Rajiv Shakdher, J.)

1. This is an appeal preferred by the Revenue against the judgement and order dated 02.11.2015, passed by the Customs, Excise and Service Tax Appllate Tribunal (in short 'the Tribunal').

2. In order to adjudicate upon the appeal, the following brief facts are required to be noticed :

2.1. The first respondent herein, i.e., Indian Oil Corporation Limited (in short 'IOCL') is engaged in the business of manufacturing lubricating oils falling under Chapter 27 and 34 of the Central Excise Tax Act, 1985 (in short 'CETA'). It appears that IOCL filed a classification list in 1992 for various products and claimed exemption under Notification No.287/1986, as amended by Notification No.8/1992 dated 01.03.1992, Notification No.120/1984, and Notification No.94/1989-CE dated 01.03.1989 (in short 'the 1989 Notification').

2.2. It appears that the Department, upon verification, came to a prima facie conclusion that IOCL had misclassified certain products and consequently, wrongly, availed the benefit of the 1989 Notification.

2.3. Resultantly, a Show Cause Notice dated December 1992 (in short SCN) was served upon IOCL. The said SCN only indicated that IOCL had, wrongly, classified the subject products and, incorrectly availed the benefit of the 1989 Notification. IOCL responded to the said SCN vide reply dated 25.08.1983. In the reply, IOCL, particularly, took the stand that what purported to be a SCN was, in fact, not a SCN in the eyes of law. In particular, IOCL took the stand that it did not indicate as to what should be the classification qua the subject products vis-a-vis, which the Revenue had raised objection.

2.4. The reply filed by IOCL, however, did not impress the Adjudicating Authority, who vide the Order-in-Original dated 21.12.1993, classified the subject products, qua which objection has been raised, and held that the said products were not eligible for availing the benefit of the 1989 Notification.

2.5. Being aggrieved, IOCL preferred an appeal with the Commissioner of Central Excise (Appeals), Chennai (in short 'the Commissioner'). The Commissioner, based on the appeal filed by IOCL, set aside the order dated 21.12.1993, and remanded the matter to the Adjudicating Authority for a fresh decision on the aspect of eligibility of IOCL to claim exemption under the 1989 Notification, after carrying out a chemical analysis of the subject products.

2.6. The record appears to reveal that apart from anything else, parties were also at lis as to whether the subject products fell in the category of "lubricating oil/grease" or "lubricating preparations".

2.7. It is, in this background that chemical analysis of the subject products was ordered.

3. The record shows that the opinion of the Chemical Examiner was obtained by the Adjudicating Authority and after hearing the representative of IOCL, an order dated 07.05.1999, was passed.

3.1. By virtue of the said order, IOCL's stand that the subject products were lubricating oil/grease was rejected. The Adjudicating Authority held that the subject products were "lubricating preparations", and hence, the benefit of exemption, under the 1989 Notification was not available to IOCL.

3.2. IOCL, being aggrieved, carried the matter further, in appeal, to the Commissioner. The Commissioner, once again, set aside the order of the Adjudicating Authority and remanded the matter. The Commissioner, *inter alia*, directed the Adjudicating Authority to re-examine the entire issue, after obtaining the opinion of the concerned technical experts or, the Chief Chemical Examiner, Delhi.

3.3. It appears that before the Commissioner, an issue was raised by IOCL that the mineral content of the subject products had not been ascertained by the Chemical Examiner.

3.4. Upon the remand, directions issued were complied with, and the matter received the attention of the Adjudicating Authority for the third time, when, an order dated 31.10.2005 was passed.

3.5. The Adjudicating Authority, this time around, noted that the Chief Chemical Examiner had opined that there was no standard method available for ascertaining the percentage of mineral oil content in a finished product. Furthermore, the Adjudicating Authority observed that IOCL had furnished all technical details in respect of the subject products. Consequently, the decision, according to the Adjudicating Authority, had to be based on, in so far as the classification was concerned, on the declarations furnished by the Assessee. Accordingly, the Adjudicating Authority classified the subject products under the following sub headings :

"Products	Sub Headings
(i).TAK 40	3403.00
(ii).RP 150	2719.99
(iii).Gear Compound-30	3403.00
(iv).SM 85/175/260	3403.00"

3.6. Furthermore, out of the four products referred to above, exemption was extended only to the product referred to as RP 150, while exemption was denied qua the other three products. Pertinently, this apart, duty was demanded for the period spanning between 1992 and 1994. The duty element was calculated and reflected in the said order in the following manner :

Sl No	Name of the Product	Clearance (in Litres)	Value adopted (per Litre) (Rs.)	Value (Rs.)	BED @ 15%	SED at 15% on BED
1	SM-260	40,200	36.00	14,47,200	2,17,080	32,562
2	SM-175	3,42,200	36.00	1,23,19,200	18,47,880	2,77,182
3	SM-85	5,01,716	37.00	1,85,63,492	27,84,524	4,17,679
4	TAK-40	2,37,200	25.00	59,30,000	8,89,500	1,33,425
5	IOC Gear Compound 30	46,600	633.00	2,94,97,800	44,24,670	6,63,701

TOTAL DUTY : BED : Rs.1,01,63,654
SED : Rs. 15,24,549

Rs.1,16,88,203

4. Since, IOCL continued to remain aggrieved, it preferred an appeal, for the third time, before the Commissioner. The record shows that the Revenue also filed an appeal against the Order-in-Original dated 31.10.2005.

4.1. The Commissioner disposed of both the appeals via a common order dated 31.07.2007. The Commissioner, by this order, allowed the appeal of the Revenue and rejected the appeal preferred by IOCL. The net effect was that the duty liability (BED+SED) of IOCL was enhanced to a sum equivalent to Rs.1,25,90,015/-, as against what was provided in the Order-in-Original, which was equivalent to a sum of Rs.1,16,88,203/-. Furthermore, IOCL was directed to pay the aforementioned amount along with appropriate interest.

4.2. It is for this reason, IOCL had preferred the statutory appeal with the Tribunal.

4.3. The Tribunal, vide the impugned judgement and order, allowed the appeal of IOCL. The short ground, on which, the Tribunal allowed the appeal was that the SCN was vague; it did not indicate the sub headings under which the subject goods had to be classified; and lastly, did not quantify the duty, which was being demanded by IOCL. This conclusion was reached by the

Tribunal, based on a perusal of record and the ratio of the judgement of the Supreme Court in the matter of : Metal Forgings V. Union of India, 2002 (146) ELT 241 (SC).

4.4. The Revenue, being aggrieved by the conclusion reached by the Tribunal, approached this Court by way of appeal.

5. In support of the appeal, Mr.A.P.Srinivas, has submitted that the Tribunal's order is erroneous in law, as no decision has been made on the merits of the matter. It is the learned counsel's contention that the observations made by the Tribunal with regard to the deficiencies in the SCN had no relevance, in view of the fact that the matter had been agitated by IOCL, on previous two occasions as well, and that, during the course of the proceedings before the Adjudicating Authority, albeit, on the third occasion, the duty and the period, for which, the duty was demanded, was, in fact, crystalised. In other words, according to Mr.Srinivas, since, in the earlier rounds the purported deficiencies in SCN had not been made an issue, there was, in a sense, acquiescence on the part of the IOCL.

5.1. Furthermore, Mr.Srinivas, sought to draw our attention to the fact that, even the classification of the subject products, had been indicated in the order of the Adjudicating Authority, which was passed, though, in the third round, i.e., in the order dated 31.10.2005.

5.2. In sum, it was Mr.Srinivas's contention that none of the findings of fact returned by the Tribunal had any relevance to the merits of the matter, as they had already been taken care of by the Adjudicating Authority.

6. As against this, Mr.Venkataraman, learned Senior Advocate, submitted that the objection qua the deficiencies in the SCN went to the root of the jurisdiction of the Revenue to impose any liability on IOCL. It was the learned Senior Advocate's submission that the SCN had four deficiencies : (i) First, it did not re-classify the subject products, (ii) Second, it did not indicate the period, for which, duty was proposed to be levied, (iii) Third, it did not quantify the proposed duty, and (iv) Lastly, the order passed by the Adjudicating Authority in the third round seeks to proceed beyond the legal periphery of the SCN, as duty, is demanded, for the period beyond December 1992, which is the date of the SCN.

6.1. Learned Senior Counsel submitted that given the facts obtaining in the case, and the decision rendered by the Tribunal, no question of law arises for consideration of this Court. According to the learned Senior Counsel, the Tribunal had, in its decision, adverted to undisputed facts, and simply applied the law, which had been laid down by the Supreme Court in the matter of : Metal Forgings V. Union of India, 2002 (146) ELT 241 (SC), and thus, the matter did not require any interference by this Court.

6.2. In a nutshell, Mr.Venkataraman, submitted that the appeal had no merit and ought to be dismissed at this stage itself.

7. We have heard the learned counsel for the parties and perused the record.

8. Upon perusal of the record, what clearly emerges is as follows :

(i).The SCN dated December 1992, was served, admittedly, on IOCL.

(ii).The SCN took objection to the classification of the subject products by IOCL.

(iii).The SCN did not indicate as the sub-heading, under which, the subject products ought to have been classified.

(iv).The SCN did not indicate the period, for which, duty was being demanded.

(v).The SCN did not quantify the amount of duty, which was sought to be levied on IOCL.

9. Given these undisputed facts, we are inclined to accept the contention of Mr.Venkataraman, that the SCN was a deficient in material particulars. The submission of Mr.Srinivas, that the deficiencies pointed out hereinabove, in the SCN, had no relevance, in view of the fact that in the earlier rounds, the issues raised by IOCL, were different from that which were sought to be propounded before the Tribunal in this round and the Court in the instant appeal, does not cut much ice with us. The reason being that the deficiencies pointed out by IOCL go to the root of the jurisdiction of the Revenue to impose penalty based on the said SCN.

10. It is well settled that the issues pertaining to jurisdiction can be raised at any stage and even in collateral proceedings. The instant proceedings are the proceedings, which, in fact, emanate from the SCN issued in December 1992, and therefore, in that sense, the principle of law adverted to above applied with greater vigour in IOCL's case.

11. Furthermore, the record shows, as indicated above, that right at the very inception, when, reply dated 25.08.1993, was filed by IOCL, the objection with regard to the untenability of the SCN was taken by IOCL. For the sake of convenience, we may only extract the relevant assertions made in the reply dated 25.08.1993 :

> "..... As the show cause notice do not contemplate any specific classification / reclassification, denial of complete exemption from BED and contemplate only denial of SED that too on reasons not enumerated, and in the absence of details of further examination of product, study of the tariff and as the show cause notice do not specify any reasons or findings consequent to examination of the product and study of the tariff, we request the learned Assistant Collector to drop further proceedings as contemplated in the notice.
>
> It is also submitted that the show cause notice is not self explanatory and do not refer to any provisions of law, under which the proceedings are proposed.
>
> Hence the letter is not be treated as show cause notice, but as simply a letter not based on Law. ...."

12. Furthermore, the record shows that even in its third round before the Commissioner, IOCL continued to press the said objection. This is discernable from the following observations made in the order of the Commissioner dated 31.07.2007 :

> "...... The claim that there was no specific proposal in the SCN for recovery of duty is baseless since denial of exemptions, would suo-motu, imply obligation to pay the duty not paid by such wrong availment of exemptions. In view of the same, there is no merit in the respondent/appellant's appeal that demand was not sustainable in the absence of specific proposal in the SCN for such demand. The same is liable to be disallowed. ....."

13. Therefore, there was no reason for the Tribunal not to entertain the objection and decide the matter, accordingly, since, the very basis and the foundation of the entire proceedings initiated by the Revenue was in jeopardy. It is, in these circumstances, that the Tribunal did not proceed to adjudicate upon the merits of the matter and, in our opinion, quite correctly so, as on jurisdiction, it came to a conclusion that the SCN, based on which proceeding against IOCL had been triggered, was not viable in law.

14. We may also indicate, as noticed above, that it was suggested by Mr.Srinivas, though, rather feebly, that this was a case of acquiescence. According to us, there could be no acquiescence, where, the issue involved pertains to jurisdiction. As a matter of fact, in our view, even the Lawyer could not have made a concession in this behalf. Moreover, even otherwise, it is a question of law qua which facts were not in

dispute and hence, could have been raised before the Tribunal.

15. Therefore, for all these reasons, we find no merit in the appeal. In our view, no question of law, much less a substantial question of law, arises for consideration.

16. The captioned appeal is, accordingly, dismissed. No costs.

Sd/-
Assistant Registrar(CS VI)

//True Copy//

Sub Assistant Registrar

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To
The Customs, Excise and Service Tax Appellate Tribunal,
South Zonal Bench, Chennai.

+1 cc to Mr.S.MuthuVenkatraman Advocate sr21171

C.M.A.No.2157 of 2016

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