

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 05.04.2017

CORAM:

THE HONOURABLE MR. JUSTICE RAJIV SHAKDHER
and
THE HONOURABLE MR. JUSTICE R.SURESH KUMAR

C.M.A.No.66 of 2011
and C.M.P.No.1 of 2011

Thermo Electric Furnaces,
286, Sidco Industrial Estate,
Ambattur,
Chennai - 600 098.
Represented by Mr.G.P.Swamy.

... Appellant

vs.

Commissioner of Central Excise,
Chennai II Commissionerate,
MHU Complex,
692, Anna Salai, Nandanam,
Chennai - 600 035.

... Respondent

[R2 deleted as per the order of
this Court dated 02.03.2017]

Civil Miscellaneous Appeal filed under Section 35G of the Central Excise Act, 1944 praying to consider the above appeal and set aside the impugned Final Order No.1177/2010 dated 12/11/2010 of the Hon'ble Tribunal, Order-in-Appeal no.45/2002 (M-II) dated 26.03.2003 and Order-in-Original No.28/2001 dated 16.07.2001.

For Appellant : Mr.T.R.Ramesh

For Respondent : Mr.S.Rajasekaran

JUDGMENT

[Judgment of the Court was made by **RAJIV SHAKDHER, J.**]

1. The captioned appeal was admitted, vide order dated 11.01.2011, when, the following substantial questions of law were framed for consideration by this Court:

“(i) Whether or not Appellate Tribunal was in error in not considering the jurisdiction to issue the Show Cause Notice, beyond the normal period by the incompetent authority and thus the same is void ab initio?

(ii) Whether or not Appellate Tribunal was in error in holding that the appellant had suppressed the manufacture of the activity warranting invocation of extended period of time limit under proviso to Section 11A of the Central Excise Act, especially when the matter involves interpretation of the said activity and no active suppression as contemplated by the Supreme Court is involved?

(iii) Whether the demand is barred by limitation inasmuch as the Show Cause notice is not served with six months from the material period i.e. 1995-96, 1996-97 and 1997-98?”

2. During the course of argument, both counsels agreed that one more question of law, ought to have been framed, that is, "Whether the authorities below have failed in appreciating in entirety the defence taken

by the appellant in its reply dated 06.03.2001 ?"

2.1. We agree with this submission of the counsels, and accordingly, frame the said question of law for our consideration.

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

3.1. The appellant, who is in the business of manufacturing various types of electric furnaces made clearance by taking benefit of SSI Exemption Notification No.1/93 for the period in issue, i.e., 1995-1996, 1996-1997 and 1997-1998.

3.2. Upon specific intelligence being received by the Department that the SSI exemption limit of Rs.30 lakhs had been crossed, the factory premises of the appellant were inspected on 22.05.2000. The records of the appellant were inspected, which were, admittedly, submitted by it to the concerned Officers on 26.05.2000, and pertained to the period 1995-1996 to 1999-2000.

3.3. The scrutiny of records by the Department made them to come to a prima facie conclusion that the appellant had raised invoices of three kinds, i.e., (i) Invoices concerning the manufactured goods for the supply of full set of electrical furnaces, such as, Aluminium melting furnaces, Holding furnaces and Electric resistance Baleout furnace etc. along with Control Panels, Industrial ovens and other special fabrications. The manufacture of these goods, even according to the Department, was carried out, at the

specific request of the customers; (ii) Trading Invoices for bought out goods, like Cerwool, Ceramic fibre, Ceramic blanket, Refractory bricks, fire clay, Accoset, SS Studs, SS Washers, Thermocouple etc. along with heating elements; and (iii) Invoices for Labour Charges.

3.4. The Department, evidently, aggregated the turnover of heating elements, as also furnaces, and thereafter, came to the conclusion that the exemption limit for each of the relevant years had been exceeded by amounts indicated hereafter:

Year	Amount
	Rs.
1995-1996	18,87,289/-
1996-1997	16,38,816/-
1997-1998	1,16,065/-

3.5. It is pertinent to note that during the course of inspection, the Officers of the Department also recorded the statement of a partner of the appellant, on 30.11.2000, which is also the date, when, apparently, the investigation into the affairs of the appellant stood completed.

3.6. Accordingly, the Department came to the prima facie conclusion that excise duty was payable in respect of the aforesaid years for clearance made over and above the exemption limit. The component of duty worked out in this behalf was Rs.1,82,108/-. As to the manner, in which, the said amount had been calculated was set forth in Annexure A, the relevant

details of which are extracted hereafter:

<i>Year</i>	<i>Exemption Limit</i>	<i>Value Exceeding Exemption Limit</i>	<i>Duty @ 5%</i>
1995-96	30 LAKHS	18,87,289	94,364
1996-97	30 LAKHS	16,38,816	81,941
1997-98	30 LAKHS	1,16,065	5,803
1998-99	50 LAKHS	NIL	NIL
1999-2000	50 LAKHS	NIL	NIL
TOTAL DUTY =			Rs.1,82,108/-

3.7. It is, in this background that a Show Cause Notice dated 03.01.2001, (in short "SCN") was issued. By virtue of the said SCN, the appellant was called upon to pay duty amounting to Rs.1,82,108/-, in addition to interest and penalty.

3.8. In the SCN, the suggestion made, was that, the appellant had suppressed clearance made over and above the exemption limit specified in Notification No.1/93, as amended for the financial years in issue, i.e., 1995-1996 to 1997-1998 vis-a-vis electric furnaces and heating elements, which fell under Chapter Sub Heading 85.14 and 85.16 of the Central Excise Tariff Act, 1985 (in short "CETA"), respectively.

3.9. In other words, the allegation was that, the excisable goods had been cleared, without following the requisite procedures and without payment of excise duty.

4. In response thereto, the appellant submitted a reply dated 06.03.2011.

4.1. In the reply to the SCN, the appellant took the following defences :

- (i). The SCN was not issued by a competent authority. The SCN for the extended period could have been issued, only, by the Commissioner of Central Excise.
- (ii). The heating element, which fell under Chapter Sub Heading 85.16 of CETA had not been fabricated by the appellant. The explanation given vis-a-vis the said aspect, in the reply, was as follows :

".... (a) We well Nichrome, an alloy and Kanthal A1 wire an alloy both purchased from Kanthal India Ltd., Hosur. The wire and strips are sold as such by cutting to required length to customers and also the same in coiled form in some cases. It must be noted that any case there is no terminal is attached at the end to make it an element. The wire after above mentioned operations remain the same article without any change and no new article emerge with distinct characteristics, nomenclature or use, as laid down in the concept of manufacture under Sec 2(f).

(b) We state the mere cutting of wire would not amount to manufacture as per law. We place reliance on the ratio of decision in the following cases."

- (ii)(a). In sum, it was stated that mere cutting of wires would not amount to manufacture.
- (iii). The computation of aggregate value of clearance of manufactured products by the Department was not correct. The inclusion of tailor-

made items/goods, made, as per specific design given by the customers, which could not be bought and sold in the market had to be excluded from the aggregate value of clearances. The emphasis was on the fact, that if, tailor-made goods are excluded, the appellant would be well within the exemption limit qua the three years, which were in issue.

(iii)(a). It was also suggested that manufacture alone would not make the goods dutiable, unless marketability was established.

(iv). There was no wilful suppression of facts. The statement of the partner recorded on 30.11.2000, was not voluntary. The said statement was recorded, without the record placed at the disposal of the person making the statement, as the books had already been secured by the Officers of the Department on 22.05.2000. The person, who made the statement, neither had the records, nor any worksheets at his disposal.

(v). No penalty could be levied, retrospectively, under Section 11 AC, as the said provision came into force only on 28.09.1996, and that, for the period after 28.09.1996, in any event, penalty could not be levied, as the clearances were well within the exemption limit.

(vi). The demand for interest under Section 11 AB was also not sustainable, as the clearances were well within the exemption limit.

(vii). The appellant ended its reply, by saying that even, if, it is assumed that manufacture of goods took place, then, the appellant could have

availed of MODVAT credit and paid duty out of the said period.

5. After considering the reply of the appellant, an Order-in-Original dated 16.07.2001, was passed. By virtue of the said order, the demand raised via the SCN was sustained, in its entirety.

6. Being aggrieved, the appellant carried the matter in appeal to the Commissioner of Central Excise (Appeals) (in short, “the Commissioner”). The appeal did not meet with success and was accordingly, dismissed vide order dated 26.03.2003.

7. Against the order of the Commissioner, the appellant carried the matter further to the Customs, Excise and Service Tax Appellate Tribunal (in short, “the Tribunal”), which met with the same fate. The Tribunal dismissed the appeal vide order dated 12.11.2010.

7.1. The appellant being aggrieved, preferred the instant appeal, before this Court.

8. In support of the appeal, arguments have been advanced by Mr.T.R.Ramesh, while, in so far as the Revenue is concerned, submissions were advanced by Mr.S.Rajasekaran.

9. It is submitted by the learned counsel for the appellant that the Tribunal failed to take into account the fact that, if, the following adjustments had been made in the aggregate clearances, then, the appellant's clearances could have been well within the specified exemption limit, for each of the years in issue :

- (i).The value of the tailor-made items/goods, which had no marketability and were taken to the construction site of the customers in a Completely Knocked Down (CKD) condition, and thereafter, were configured with in the plant, which was, in turn, embedded in earth.
- (ii).The mere cutting of wires/strips did not involve manufacture. The allegation that winding-up of wires was carried out on some occasions failed to take into account the fact that this was done at the premises of the customers, and not at the appellant's premises.
- (iii).Bought out items, which were supplied to the customers, as such, could not be included in the value of clearances, as they were not subjected to any process.
- (iv).The furnaces manufactured, as per the customers specifications, which were delivered to the specified site, albeit, in CKD condition and embedded in earth could not have been included in the aggregate value of clearances.

9.1. It is also the submission of the learned counsel for the appellant

that in its reply to the SCN, a specific ground of challenge was taken, which was that the SCN had been issued by a person, who was not vested with the requisite authority, in that behalf.

9.2. The learned counsel relied upon the first proviso to Section 11A (1) of the Act in this connection.

9.3. It was submitted that the SCN could only have been issued by the Commissioner of Central Excise, as it was based on an allegation of fraud/ suppression having been employed by the appellant.

9.4. The learned counsel submitted that in this case, the SCN was issued by the Joint Commissioner, who could, if, at all, have issued the SCN only with the approval of the Commissioner.

9.5. The contention of the learned counsel thus, was that, at no stage did any of the authorities make any reference, as to the mode and manner, in which, approval was accorded to the Joint Commissioner by the Commissioner.

9.6. The learned counsel says that none of the issues adverted to above, were referred to, either by the Tribunal or by the Commissioner, in the appeal preferred before him.

9.7. The learned counsel, therefore, contended that given the fact that these issues had not been considered, the order impugned, ought to be set aside and the matter be remanded for fresh consideration.

10. Mr.S.Rajasekaran, who appears for the Revenue, cannot, but

submit that most of the issues have not been adverted to by the Tribunal, or, the Commissioner, except the aspects pertaining to limitation and the other aspect, which is, whether the mere cutting of wires/strips from purchased Nichrome coils, which are sold, without fixing terminals, would amount to manufacture.

11. We must, however, indicate that the learned counsel has drawn our attention to the order of the Commissioner on the aspect of the authority vested in the Joint Commissioner to issue the SCN.

11.1. The relevant observations, which have been made in the Order in Original dated 16.07.2001, for the sake of convenience, are set out hereafter:

"...2. With regard to the competency of Joint Commissioner to issue a notice invoking the extended proviso (1) to Section 11A(1), I am of the view that the show cause notice itself is being issued after getting the approval of the Commissioner, which is in tune with the substantial compliance of statutory requirements. Further, once the power to adjudicate the case involving suppression of facts/willful mis-statement is delegated to authorities like Additional Commissioner and Joint Commissioner etc., the power to issue Notices involving such offences is also bestowed concurrently along with the power to adjudicate. For every such notice is an essential pre-requisite in exercising the delegated power of adjudication by the authorities subordinated to

Commissioner. Viewed in this context, the statutory requirements by way of Commissioner's approval accorded prior to the issue of notice is a working substitute and therefore the plea that the Notice lacks jurisdiction cannot be acceded to....."

11.2. As regards the remaining aspects, Mr.Rajasekaran relied on the impugned order.

12. Heard the learned counsels for the parties and perused the record.

13. According to us, the learned counsel for the appellant, is right in his submission that the Tribunal via the impugned order, has only decided the issue of limitation and the issue pertaining to the aspect concerning, as to whether cutting of wire would amount to manufacture. The other aspect of the matter, to which, reference is made by the learned counsel for the appellant, that is, as to whether furnaces, which were transported to the customers' site in CKD condition and thereafter, embedded in earth were goods or not was not decided. Similarly, the aspect concerning, bought out goods being treated as manufactured goods, due to lack of correlation with purchases, is not dealt with in the impugned order.

14. Furthermore, in so far as the challenge to the authority of Joint Commissioner to issue the SCN is concerned, quite clearly, the record shows

that the appellant, right from inception, had taken the stand that the SCN was issued by an authority, which was not empowered in law, to do so.

14.1. A mere perusal of Section 11A of the Act would show that in a case where duty has not been levied or paid or has been short-levied or short-paid or erroneously refunded and the said amount is Rs.1 Crore or less, a SCN under Section 11A(1) read with first proviso to the sub-section could only be issued by the Commissioner of Central Excise or, with his prior approval, by any officer, subordinate to him.

14.2. The fact, that this ground was raised, is evident upon reading the following portion of the reply, dated 06.03.2001:

"... ii) The SCN issued by the Joint Commissioner is not a competent authority to issue SCN for extended period. Only Commissioner alone should issue the SCN as per the several decisions and settled law on the matter. There are about 16 decisions in this regard from tribunals/High Courts. We rely on two decision mentioned below..."

14.3. As indicated above, in the Order-in-original, the Joint Commissioner tried to deal with the point by observing that, since, the SCN adverted to the fact that it was issued with the approval of the Commissioner of Central Excise, it would settle the matter.

14.4. Furthermore, the Joint Commissioner went on to observe, once, the power to adjudicate the case involving suppression of facts/wilful mis-statement is delegated to an authority like the Additional Commissioner and

the Joint Commissioner etc., the power to issue notice involving such offences is also bestowed concurrently, along with the power to adjudicate.

15. According to us, the conclusion reached in the Order-in-Original, in this behalf, is flawed for several reasons. In so far as the first reason is given, it assumes that, since, a statement has been made in the SCN, it would be correct. It was, to our minds, incumbent upon the Joint Commissioner to advert to the document, by which, the Commissioner of Central Excise had approved the issuance of SCN by the Joint Commissioner. This was so, as a pointed challenge, in that behalf, has been raised in the reply filed by the appellant. As regards, the other reason furnished by the Adjudicating Authority, is concerned, it is, also erroneous, as it is in the teeth of the provisions of Section 11A(1) read with first proviso to the said Section. The said provision, clearly requires that the SCN can either be issued by the Commissioner of Central Excise or by the Joint Commissioner, albeit, with the approval of the Commissioner of Central Excise.

15.1. The record also shows that the appellant continued to raise this ground before the first appellate authority i.e., the Commissioner of Central Excise as also before the Tribunal. Despite, a specific ground having been taken before both the authorities, there has been a failure on the part of the said authorities, to discuss the issue relatable to jurisdiction, which, as is obvious, goes to the root of the matter.

16. Thus, having regard to the foregoing discussion, we are constrained to note that vital issues, which had been raised by the appellant, were not dealt with, by the authorities below.

16.1. Furthermore, we must note that in the order of the Tribunal, there is no discussion, as to how it came to the conclusion that there has been suppression of material facts by the appellant, except based on an answer to a query raised by the Bench, which was directed to the Consultant of the appellant. A perusal of the SCN would show that suppression was alleged against the appellant on account of the fact that clearances of Electric Furnace and Heating Elements had been made over and above the exemption limit specified qua an SSI unit, in Notification No.1/93. The SCN further shows that the factory premises of the appellant were inspected on 22.05.2000 and, pursuant thereto, all relevant documents and records were taken away by the respondent. Furthermore, the SCN also reveals that the appellant had submitted all records and documents for the periods spanning between 1995-96 and 1999-2000.

16.2. Therefore, the observation made in paragraph 4 of the impugned order that, upon receiving a response to a query raised by the Bench, with regard to submission of monthly returns, the Tribunal came to the conclusion that suppression was made out since, the Consultant submitted that there was no evidence available with him to prove that, returns had

been filed regularly along with requisite invoices by the appellant is, in our view, clearly insufficient. To our minds, the observation is general in nature. A charge of suppression is required to be levelled with specificity and, it is only when an assessee is unable to rebut such a charge with relevant material, that a conclusion of suppression can be reached by an Adjudicating Authority.

16.3. To be noted, as to whether mere cutting of wires / strips from the purchased coils of Nichrome, without fixing terminals, would amount to manufacture, the Tribunal has merely replicated the findings of the Commissioner. The Tribunal has not examined as to whether such wires / strips were marketable. There is no discussion on this aspect of the matter (see *Bhor Industries Ltd. vs. CCE Bombay*, 1989 (40) ELT 280 SC and *UOI vs. Indian Aluminium Co.*, 1995 (77) ELT 268, SC).

16.4. Furthermore, it appears that the Tribunal has supported its conclusion, by relying upon the statement given by one of the partners, to which, we have made a reference above.

17. In view of what is adverted to above, and, in particular, on account of failure of the authorities below to discuss the issues and/or the defences raised by the appellant, we are constrained to answer the questions, as framed, including one framed via this order, in favour of the

appellant. The appeal is allowed. The impugned order is set aside. The matter is remanded to the Adjudicating Authority for a fresh decision. It is, however, made clear that the observations made hereinabove will not come in the way of the Adjudicating Authority to consider the matter anew and pass a fresh order. The Adjudicating Authority will remain uninfluenced by the observations made herein above. Needless to say, a fresh order will be passed, only after giving due opportunity of a personal hearing to the appellant. The appellant will have the liberty to raise all defences, which, stand articulated, before the authorities below.

18. The Civil Miscellaneous Appeal is consequently allowed in the aforesaid terms and consequently, the connected pending application is also closed. There shall, however, be no order as to costs.

(R.S.A., J.) (R.S.K., J.)
05.04.2017

vsm

To

Commissioner of Central Excise,
Chennai II Commissionerate,
MHU Complex,
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RAJIV SHAKDHER, J.
and
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