

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 04.10.2017

CORAM:

THE HONOURABLE MR.JUSTICE S.MANIKUMAR

and

THE HONOURABLE MR.JUSTICE R.SURESH KUMAR

C.M.A.No.2687 of 2017

Commissioner of Central Excise,
Chennai II Commissionerate,
Chennai-35. ... Appellant/Respondent

versus

Chennai Micro Print Pvt. Ltd.,
New No.130, Old No.34,
Nelson Manickam Road,
Aminjikarai, Chennai-29. ... Respondent/Appellant

Prayer: Civil Miscellaneous Appeals are filed under Section 35G of Central Excise Act, 1944, against the Final Order No.40079 of 2016, dated 18.01.2016, on the file of Customs, Excise and Service Tax Appellate Tribunal, Chennai Bench, Chennai.

For Appellant : Mr.A.P.Srinivas

For Respondent : Mr.S.Murugappan

J U D G M E N T

(Judgement of this Court was made by S.MANIKUMAR, J.)

Challenge in this Appeal is to the Final Order No.40079 of 2016, dated 18.01.2016, on the file of Customs, Excise and Service Tax Appellate Tribunal, Chennai Bench, Chennai..

2. Short facts leading to the appeal are that M/s.Chennai Micro Prints Pvt. Ltd., (CMP-Unit I), Aminjikarai, Chennai, assessee herein, are the manufacturers of printed books and leftlets, falling under Chapter 49 and packing cartons and boxes falling under Chapter 48 of Central Excise Tariff Act. The excisable goods, falling under Chapter 49, are chargeable to Nil rate of duty and the excisable

goods, falling under Chapter 48 are chargeable to duty. During the year 2006, the assessee started their Unit-II at Vanagaram, Chennai, as a printing division and retaining their unit at Aminjikarai, as a packing material Division, CMP-Unit I, registered with Central Excise, during November' 2006.

3. According to the Commissioner of Central Excise, Chennai, the appellant herein, on 27.03.2007, the Officers of HPU, visited CMP-Unit I and upon verification of the records, it was found that CMP-Unit I, had sold both exempted and dutiable goods, during the period from 2002-03 to 2005-06 and the aggregate turnover, exceeded 300 lakhs (prior to 01.04.2004)/400 lakhs (after 01.04.2016) and therefore, the assessee was not eligible to claim exemption for the financial years 2003-04 to 2006-07, as the condition, under clause (vii) of paragraph 2 of Notification No.08/2003 CE, as amended, has not been satisfied.

4. In this regard, a show cause notice, dated 13.06.2007, was issued to the assessee, denying the benefit of SSI exemption, on the above grounds and proposed to demand a sum of Rs.79,65,089/-, being the duty payable on the packing cartons and boxes manufactured and cleared by them, during the period from 2003-04 to 2006-07 (upto 12/2006), without payment of duty and without satisfying the condition, under clause (vii) of paragraph 2 of the abovesaid notification, as amended under proviso to sub-section (1) of Section 11 A of Central Excise Act, 1944 (hereinafter referred to as "the Act"), along with interest, under Section 11AB of the said Act. It was also proposed to impose penalty of Rs.79,65,089/- under Section 11-AC of the Act and also the penalty of Rs.15,00,000/-, under Rule 25 of Central Excise Rules, 2002.

5. After due process, the adjudicating authority, vide Order-in-Original No.15/2007, dated 11.09.2007, confirmed both the demand and penalty. Aggrieved by the same, the assessee has filed an appeal, before the CESTAT, Chennai in Appeal No.E/800/2007-DB. The main question, which came up for consideration, before the Tribunal, was whether, on the basis of the facts pleaded, the assessee is entitled to the benefit of SSI exemption, under Notification No.8/2003-CE, dated 01.03.2003, excluding certain clearance/turnover from the aggregate clearance computed, as per the Notification, on the following grounds,

(i) The assessee has made clearance of the packing materials to the units which have exported the ultimate goods using the packing materials manufactured by it and such clearance of packing materials was claimed to be deemed Export and deductible from computation of total clearance.

(ii) The assessee had manufactured packing materials as well as printed leaflet containing the name of the user thereof. Such printed materials were branded goods.

(iii) The assessee being a manufacturer of packing materials manufactured by its Unit I which is dutiable goods and other printing materials printed by its Unit II, both were different units and Unit I was registered with Central Excise Authority for which clearances of each such unit is to be computed separately for exclusion."

6. Before the Tribunal, the assessee contended that it was initially manufacturing packing materials, as well as printing leaflets, in its Unit I. The packing materials are dutiable goods, for which, it was registered with Central Excise Authority, its clearance of Packing materials being below the SSI limit and it was not liable to excise duty. While carrying out manufacture of packing materials by its Unit I, it separated its printing activity of leaflets and created a separate printing division called Unit II. According to the assessee, it maintained proper record, in respect of the goods cleared to the exporting units, who were using such packing materials for export of ultimate goods.

7. Placing reliance on a decision of CESTAT, Chennai, in the case of Vadapalani Press Vs. CCE, Chennai [2007 (217) ELT 248], the appellant has submitted that when packing materials are cleared to the exporting unit, such clearance shall be treated as deemed export and turnover thereof shall be excluded while computing the SSI exemption benefit, under Notification No. 8/2003-CE dated 1.3.2003. It has used cenvatable input, in manufacture of the dutiable goods. If there arises any duty liability, it shall be entitled to the CENVAT credit of the input, which is available to it, legitimately on production of respective evidence in that regard.

8. Before the Tribunal, the assessee contended that their case is not covered by para 2 (vii) of the Notification and also by para 3A (a) to (e) of the notification above and therefore, if the turnover of deemed export and also the turnover of non-dutiable goods, is excluded, it is still entitled to the SSI exemption with the CENVAT credit allowance. It has manufactured branded printed materials, which needs to be excluded, while computing SSI exemption limit. The assessee has further contended that the extended period is not invokable and if a re-computation of exemption limit is made, considering the aforesaid facts as well as the decision of the Tribunal in Vadapalani press's case, it may not have further dispute, since the issues, as stated above can be settled at the grass root level.

9. On the other hand, the Commissioner of Central Excise, Chennai, has contended that the assessee, being aware of its liability, the extended period of limitation is invokable and secondly, the assessee is not entitled to the benefit of deemed export, in respect of the packing materials manufactured and such

materials, whether used by the exporting concerns, is not on record. It was further contended that entire turnover, extracted in page 2 of Order-in-Original shall be considered to deny SSI exemption limit. After hearing the parties, vide Final Order No.40079 of 2016, dated 18.01.2016, the Tribunal, observed and held as follows:-

"5. It appears from the impugned order that there is mis-carriage of justice in the entire adjudication process for no consideration of Appellants specific pleading that Tribunals decision in Vadapalani Press (supra) was considerable. It is a fact that decision of the Tribunal in this case was rendered eight months before the adjudication order was passed. Learned adjudicating authority should have considered that decision when a pleading was made by appellant in that behalf before him.

6. Appellants grievance that it manufactured both dutiable goods as well as exempted goods needs thorough scrutiny to determine appropriate quantum turnover on each count and whether any cenvatable inputs were used to manufacture the same is to be ascertained to compute the exemption limit and plea of exclusion of certain turnover/clearance under the notification should be specifically addressed by a reasoned and speaking order to prevent further litigation.

7. Appellants grievance that if at all dutiability arises by aggregation of different clearances, CENVAT credit of duty/tax paid on inputs and input services used in manufacture of dutiable goods should be allowed, deserves consideration.

8. The leaflets manufactured by the appellant are not branded goods since that was not traded as such for purchase by general public. Such fundamental test negates stand of the appellant that it manufactured branded goods. Accordingly, turnover therefrom shall enter into aggregation process to compute the limit prescribed by the Notification stated above.

9. As both the parties were in dispute as to determination of liability under the mandate of the notification, in question, there shall be no penalty on the appellant upon readjudication of the matter proposed by this order. However, duty liability if any arises shall follow interest if such duty is not already paid or short paid.

10. With the aforesaid observations and directions, the matter is remanded to adjudicating authority to re-do the adjudication a fresh. The appellant is entitled to reasonable opportunity of hearing. A reasoned and speaking order is expected to be passed by learned Adjudicating Authority dealing every legal and factual plea raised by the appellant. Appellant is at liberty to raise all question of law and fact during remand proceeding.

11. Consequential relief if any arises upon readjudication shall follow in accordance with law subject to result thereof."

10. As against the abovesaid order, instant Civil Miscellaneous Appeal has been filed, on the following substantial question of law,

"Whether decision of the Hon'ble CESTAT is legally correct in holding that "there shall be no penalty on the appellant upon readjudication of the matter proposed by this order" thereby directing the adjudicating authority to abstain from imposing penalty under Section 11 AC of CEA, 1944, whereas, the duty is confirmed under Section 11 A (2) of CEA, 1944, invoking extended period, for suppression of facts with an intent to evade payment of duty."

11. In support of the above substantial questions of law, the appellant has raised following grounds,

"(i) The CESTAT remanded the case back to the adjudicating authority, to redo the adjudication afresh, with a direction to refrain from imposing penalty by observing that since there is only dispute with regard to determination of duty. The CESTAT made the above observation without considering merits other aspects of the case viz. suppression of facts by the assessee with an intention to evade payment of duty and contravention of provisions under Central Excise Rules and notifications issued there under. The CESTAT also failed to take cognizance of discussions made by the adjudicating authority, in this regard, in the impugned order. Hence, the observation of CESTAT that there is only dispute with regard to determination of duty is totally incorrect and; and on this notion, CESTAT ordering of the adjudicating authority to refrain from imposing any penalty, is not tenable in law.

(ii) In the instant case, the assessee failed to file declaration under Rule 9 of CCR, 2002, before JAC/JDC, disclosing the details of excisable goods manufactured by them and failed to get registration certificate and failed to pay appropriate duty even after crossing exemption limit. The above suppression of facts were brought out in para 9 of the SCN, for which the assessee did not offer proper explanation. and it is clearly established in para 16 of the Order In Original that the assessee suppressed the above facts with a deliberate intention to evade payment of duty, thereby rendering themselves liable for penal action under Section 11 AC. The dutiable goods have been cleared without payment of duty and without registration contravening provisions of Rules 4, 6, 8, 9, 10, 11 and 12 of CER, 2002, thereby rendering themselves liable for confiscation and penalty under Rule 25 of Central Excise Rules, 2002.

(iii) Section 11AC stipulates that penalty is to be levied equivalent to the duty amount in cases where duty is short levied or short paid or erroneously refunded by way of fraud, collusion or any willful misstatement or suppression of facts, or contravention of any of the provisions of this Act or the Rules, with an intent evade duty. Rule 25 of Central Excise Rules, 2002, is a penal provision wherein a penalty could be imposed on a manufacturer, on a registered dealer or a warehouse-owner on one of the four grounds enumerated alphabetically. This provision also lays down the quantitative extent to which such penalty could be imposed. When the language of the statute is clear, there should be no room for anything other than what is provided therein and if the situation demands imposition of penalty under Section 11AC of the Act! under Rule 25 of the CER, 2002, then the same has to be imposed. In other words, if the adjudicating authority is able to establish the fact of suppression, with intent to evade payment of duty in the fresh order, penalty naturally becomes imposable.

(iv) Once the facts alleged in the demand are proved and established; and based on which the adjudicating authority confirms the duty by invoking extended proviso, then the penalty under Section 11AC of the Act would automatically be attracted; and in the absence of any discretionary provisions laid out under Section 11AC, there would be no scope to reduce the quantum of penalty already imposed or refrain from imposing penalty under the said Section. Reliance is placed on the case of M/s.Rajasthan

Spinning & Weaving Mills reported in 2009 (238) ELT 3 (SC), the Apex court held that "Penalty under Section 11AC of Central Excise Act, 1944 is punishment for an act of deliberate deception by the assessee with the intent to evade duty by adopting any of the means mentioned in the section. Both proviso to sub-section (1) of Section 11A of Central Excise Act, 1944 and Section 11AC ibid use same expressions like fraud, collusion, wilful mis-statement, suppression of facts, or contravention of provisions with intent to evade payment of duty. If the notice under Section 11A(1) states that the escaped duty was the result of any conscious and deliberate wrong doing and in the order passed under Section 11A(2) there is a legally tenable finding to that effect then the provision of Section 11AC would also get attracted". The Board had also issued a circular on this issue vide Circular No. 88910912009-CX dated 21.05.2009 clearly stating that there is no discretion to reduce the mandatory penalty equal to duty provided under Section 11AC of the Act.

(v) In the instant case, the allegation of suppression of facts with intention to evade payment of duty and contravention of rules are clearly discussed and established and duty is confirmed under Section 11 A(2) by invoking extended period, the adjudicating authority cannot refrain from imposing penalties that follow as per law. Moreover, it is a clear case of contravention of provisions of Central Excise Rules and Notifications made there under and hence imposition of penalty under Rule 25 of the Central Excise Rules, 2002 becomes mandatory for the contravention of Rules/Notifications, subject to provisions under Section 11 AC of Central Excise Act, 1944.

(vi) The Tribunal in the impugned Final Order directed the adjudicating authority to pass order after considering the Tribunal's decision in the case of Mis. Vadapalani Press vs. CCE, Chennai -2007 (217) ELT 248. In the Final Order No.101/07 dated 31.01.2007 of the Hon'ble Tribunal in the case of M/s.Vadapalani Press, it is held that, "It is for the Commissioner to verify these particulars of exports to satisfy him that every consignment of "printed cartons" removed from the appellants factory under an invoice was exported by the buyer. For this purpose, the appellants shall be given an opportunity of adducing documentary evidence and of being personally heard. Ld. Commissioner shall examine such evidence along with other evidence already on record, consider the party's submissions and record fresh findings on the surviving issues". In terms of the said Tribunal order, the adjudicating authority has to

establish the genuineness of Form-H certificates that every carton was ultimately exported. Only after correlation of the cartons cleared by the assessee, using Schedule H Forms with the other export documents, the genuineness of the export can be established. Knowing the outcome of such verification only, the adjudicating authority will be able to decide on invoking or not invoking extended proviso in this case. Without such verification, the decision of honorable CESTAT that "as both parties were in dispute as to determination of liability under the mandate of the notification in question, there shall be no penalty on the appellant upon readjudication" is not correct in law.

(vii) While filing appeal before CESTAT, the assessee themselves admitted a duty liability of Rs. 20,19,273/-, after deducting Form-H clearances from the total value of clearances. The duty liability may extend upto Rs..79,65,089/- on re-adjudication. The assessee has not disclosed these facts to the Department. But for verification by the Preventive officers, the fact of such evasion of duty would not have come to the knowledge of the department. Without considering such facts, the CESTAT giving clean chit to the assessee and directing the adjudicating authority to abstain from imposing penalty is not tenable in law.

(viii) The tribunal order is not correct in law in directing to abstain from imposing penalty under Section 11 AC of CEA, 1944, whereas, the Board Circular No. 889/09/2009-CX dated 21.05.2009 clearly states that there is no discretion to reduce the mandatory penalty equal to duty provided under Section 11AC of the Act."

12. On the above grounds, Mr.A.P.Srinivas, learned counsel for the appellant made submissions and prayed to pass suitable orders.

13. Per contra, Mr.S.Murugappan, learned counsel appearing for the respondent submitted that the issue relates to interpretation and admissibility of the notification to the case on hand, and in such circumstances, levy of penalty would not arise. He further submitted that the invoking extended period is impermissible. He prayed to sustain the order.

Heard the learned counsel appearing for the parties and perused the materials available on record.

14. Show Cause Notice No.90 of 2007, dated 13.06.2007, has been issued to the assessee, as to why,

(i) the benefit of exemption on the basis of value of clearances in a financial year in terms of Notification No.08/2003-CE, dated 01.03.2003, as amended should be denied to them for the Packing cartons and boxes manufactured and cleared by them, during the period from 2003-04 to 2006-07 (upto 12/2006), without payment of duty and without satisfying the condition, under clause (vii) of paragraph 2 of Notification No.08/2003-CE, as amended;

(ii) the consequent duty of Rs.79,65,089/- (Rupees seventy-nine lakhs, sixty-five thousand and eight-nine only) payable on the Packing cartons and boxes manufactured and cleared by them, during the period from 2003-04 to 2006-07 (upto 12/2006), as detailed in Annexure should not be demanded from them, under proviso to sub-section (1) of Section 11A of the Central Excise Act, 1944;

(iii) the appropriate interest payable on the duty payable should not be recovered from them under Section 11AB of the Central Excise Act, 1944;

(iv) a penalty should not be imposed on them, under Section 11 AC of the Central Excise Act, 1944 and

(v) a penalty should not be imposed on them, under Rule 25 of the Central Excise Rules, 2002.

15. After considering the explanation and affording a personal hearing, material on record, forming a prima facie opinion that the assessee has not offered any explanation, on suppression of facts and considering the decisions relied on by the respondent, notification, under which, exemption was claimed, the Commissioner of Central Excise, Chennai-II Commissionerate, Chennai, has held that the assessee is not eligible for the benefit of exemption, on the basis of value of clearances, in a financial year, in terms of Notification No.08/2003-CE, dated 01.03.2003, as amended for the packing cartons and boxes manufactured and cleared by them, during the period from 2003-04 to 2006-07 (upto 12/2006). He further held that the assessee is liable to pay the consequent duty of Rs.79,65,089/-, proposed in the show cause notice and that the assessee is liable to pay appropriate interest. The Commissioner has imposed a penalty of Rs.79,65,089/-. Claim of Cenvat Credit has been declined. Ultimately, the Original Authority, on 11.09.2007, ordered as follows:

"(1) I hold that M/s.CMP are not eligible for the benefit of exemption, on the basis of value of clearances, in a financial year, in terms of Notification No.08/2003-CE, dated 01.03.2003, as amended. I confirmed and demand the amount of Rs.79,65,089/- (Rupees seventy-nine lakhs, sixty-five thousand and eight-nine only) from M/s.Chennai Micro Print Pvt. Ltd., towards duty payable on the packing cartons and boxes manufactured and cleared by them, during the period from 2003-04 to 2006-07 (upto 12/2006), under Section 11A(2) of the Central Excise Act, 1944.

(2) I impose a penalty of Rs.79,65,089/- (Rupees seventy-nine lakhs, sixty-five thousand and eight-nine only) on M/s.Chennai Micro Print Pvt. Ltd., under Section 11AC of the Central Excise Act, 1944.

(3) I demand appropriate interest, under Section 11AB of the Central Excise Act, 1944.

(4) I impose a penalty of Rs.15,00,000/- (Rupees Fifteen Lakhs Only) under Rule 25 of the Central Excise Rules, 2002."

16. Though in the appeal, before the CESTAT, Chennai, a contention has been made that the extended period is not invocable, there is no specific finding, in favour of the assessee. No appeal has been filed by the assessee before this Court, on the above issue. While considering the submissions of the assessee that Vadapalani Press's case (cited supra), decided eight months prior to adjudication, ought to have been considered and addressing the grievance of the assessee that there should have been a thorough scrutiny to determine the appropriate quantum of turnover on each count and further submissions, CESTAT, Madras, at Paragraph 10 of the Final Order No.40079 of 2016, dated 18.01.2016, ordered as follows:

"10. With the aforesaid observations and directions, the matter is remanded to adjudicating authority to re-do the adjudication a fresh. The appellant is entitled to reasonable opportunity of hearing. A reasoned and speaking order is expected to be passed by learned Adjudicating Authority dealing every legal and factual plea raised by the appellant. Appellant is at liberty to raise all question of law and fact during remand proceeding."

17. While doing so, the CESTAT, Chennai, at Paragraph 8 of the above Final Order, also ordered as hereunder:

"8. The leaflets manufactured by the appellant are not branded goods since that was not traded as such for purchase by general public. Such fundamental test negates stand of the appellant that it manufactured branded goods. Accordingly, turnover therefrom shall enter into aggregation process to compute the limit prescribed by the Notification stated above."

18. As stated supra, show cause notice, dated 13.06.2007, has been issued, seeking for an explanation for imposing duty, interest and penalty. All the issues, including invoking of extended period, have been considered by the adjudicating authority in Order-in-Original, dated 11.09.2007. When the Tribunal has remitted the matter to the adjudicating authority, to re-do the matter afresh and to pass a reasoned order, on all legal and factual plea, further directions that no penalty should be imposed on the respondent, upon re-adjudication, would be amount to pre-judging the issue, by the Tribunal, on the issue of penalty. When the entire matter is directed to be adjudicated afresh, there cannot be a finding by the Tribunal, on one of the issues, raised in the show cause notice, viz., penalty. Order of the Tribunal is contrary to the exercise to be done, afresh by the adjudicating authority and the same requires to be set aside.

19. With reference to the statutory provisions, the appellant has made out a case. Final order directing the matter to be adjudicating authority to re-do the adjudication, is sustained. The adjudicating authority is directed to give opportunity to the respondent, to raise all legal and factual plea. Order, directing the adjudicating authority, not to impose penalty, is set aside. Substantial questions of law, is answered in favour of the appellant.

20. In the result, the Civil Miscellaneous Appeal is partly allowed. No costs. Consequently, connected Miscellaneous Petition is also closed.

-s/d-

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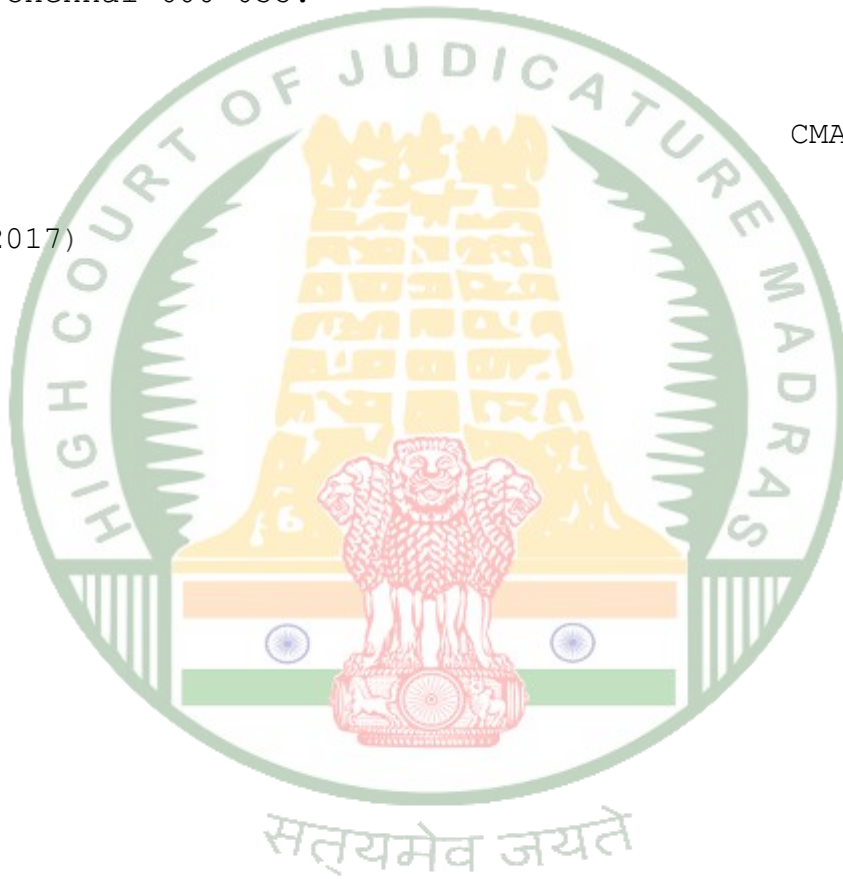
To

1 The Customs Excise and Services Tax
Appellate Tribunal, Chennai Bench, Chennai.

2 The Commissioner of Central Excise
Chennai II Commissionerate,
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SR(CO)
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