THE HON'BLE SRI JUSTICE V. RAMASUBRAMANIAN
AND
THE HON'BLE MS. JUSTICE J. UMA DEVI

C.E.A.No.43 of 2016

JUDGMENT: (Per Hon'ble Sri Justice V. Ramasubramanian)

The Revenue has come up with this appeal under Section 35G of the Central Excise Act, 1944, raising several questions of law.

2. Heard Mr. B. Narasimha Sarma, learned Standing Counsel appearing for the appellant/Revenue. Mr. Karan Talwar, learned counsel appearing for the respondent/assessee.

3. The respondent was registered with the Excise Officer Range-II, Kakinada for warehousing of non-duty paid Naphtha under Chapter-VII of Central Excise Rules, 1944. The Naphtha was cleared on payment of duty of excise to two companies.

4. Contending that the respondent collected delivery charges from the customers to the tune of nearly Rs.3.00 crores and that the said amount represented additional consideration flowing from the customers to the respondent, the Commissioner of Excise initiated proceedings, which culminated in Order In Original, dated 18.02.2002. By the said order, the Original Authority confirmed the duty demand of Rs.44,64,005/- and appropriated the said amount paid by the respondent. He also imposed a penalty for an equivalent amount under Section 11 AC, apart from directing the respondent to pay interest under Section 11AB. Additionally a penalty of Rs.50,000/- under Rule 173Q of the Central Excise Rules 1944 was also imposed.

5. The respondent/assessee filed a statutory appeal before the Customs, Excise and Service Tax Appellate Tribunal (CESTAT). The

CESTAT allowed the said appeal by an order dated 24.06.2005, on the basis of the orders passed in a batch of cases without independently analyzing the facts of the present case.

6. Aggrieved by the said order passed in 2005, the Revenue came up with the above appeal in the year 2006, along with an application for condonation of delay. For reasons not within the control of any one, the delay was condoned after 10 years in 2016 and the appeal has now come up.

7. As we have stated earlier, the Revenue has raised several questions of law. But most of them revolve around questions of fact. In our considered view the only question of law that arises for consideration is as to whether the Tribunal was justified in setting aside the entire order, when the respondent did not press before the Tribunal the amount of duty demanded.

8. It is true that the respondent did not press at the time of hearing before the Tribunal, their challenge to the Order In Original on merits, as seen from the statement recorded in para-2 of the order of the Tribunal. But it appears that the respondent, which is a wholly owned Government of India Company, approached the Tribunal with a plea that the demand itself is not in accordance with law. Therefore, the concession granted at the time of hearing, will not debar the appellant from challenging the demand for interest and penalty on the ground that the very liability to pay duty is questionable.

9. It is true that the Tribunal could not have allowed the entire appeal which may result in the duty also being set aside and the claim for refund possibly being made by the respondent. To that extent the order of

the Tribunal requires modification, especially in view of the concession made at the time of hearing before the Tribunal.

10. But on merits we find that the delivery charges cannot constitute part of the consideration. We say this, on the assurance that no claim for refund will be made on duty already appropriated from the respondent. Once it is clear that delivery charges cannot form part of the sale consideration, the demand for interest and penalty are liable to be set aside.

11. Therefore, the question of law is answered partly in favour of the appellant/revenue holding that the Tribunal was wrong in setting aside the entire Order In Original. But the portion of the order setting aside the interest and penalty is sustained. This is on the basis that the collection of delivery charges was reflected in the invoices and there was no suppression on the part of the respondent.

12. As a sequel, pending miscellaneous petitions, if any, shall stand closed. There shall be no order as to costs.

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JUSTICE V. RAMASUBRAMANIAN

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JUSTICE J. UMA DEVI

24th January, 2017
Js.

THE HON'BLE SRI JUSTICE V. RAMASUBRAMANIAN
AND
THE HON'BLE MS. JUSTICE J. UMA DEVI

C.E.A.No.43 of 2016

Date: 24-01-2017

Js.