THE HON'BLE SRI JUSTICE C.V.NAGARJUNA REDDY

AND

THE HON'BLE SRI JUSTICE CHALLA KODANDA RAM

C.E.A.No.204 of 2017

Date: 09.11.2017

Between:

M/s.Nagarjuna Construction Company Ltd.,
(Light Engineering Division),
Survey No.296/7/9, IDA, Bollaram,
Jinnaram mandal, Medak district,
Telangana. … Appellant

And

Commissioner,
Customs, Central Excise and Service Tax
Hyderabad-I Commissionerate,
Kendriya Shulk Bhavan,
L.B.Stadium Road, Basheerbagh,
Hyderabad-500 004. … Respondent

Counsel for the Petitioner : Mr. Karan Talwar

Counsel for the Respondent : …..

The Court made the following:

Judgment: (Per the Hon'ble Sri Justice C.V.Nagarjuna Reddy)

This appeal by the assessee is against order, dated 05.07.2017, in Appeal No.E/25360/2013 on the file of the Customs, Excise and Service Tax Appellate Tribunal, Regional Bench at Hyderabad (for short 'CESTAT'). The assessee, *inter alia,* is carrying on the business of production and supply of ready mix concrete at the site of the customers. The audit party has noticed that for the period 2006-07, 2007-08 and 2008-09, the appellant had not included the value of turnover of ready mix concrete produced and supplied by it. Based on the audit objection, a demand was raised for payment of central excise duty for the years 2007-08 and 2008-09. On receipt of the demand notice, the appellant has paid the duty along with interest. Thereafter, the department has issued a demand under Section 11AC of the Central Excise Act, 1944 (for short 'the Act'), for payment of penalty. Questioning the said demand, the appellant has filed an appeal before the Additional Commissioner of Customs, Central Excise and Service Tax, Hyderabad-I Commissionerate. By his order dated 28.09.2012, the first appellate authority has dismissed the appeal. Assailing the said order, the appellant has filed further appeal before the CESTAT and the said appeal was also dismissed. Assailing both these orders, the appellant has filed this appeal.

2. At the hearing, Mr.Karan Talwar, learned counsel for the appellant, has strenuously submitted that the department failed to

satisfy the ingredients of Section 11A of the Act, as it has not proved that the non-remittance of excise duty was due to the reason of fraud, collusion or any willful mis-statement or suppression of facts, or contravention of any of the provisions of the Act or of the Rules made thereunder, with intent to evade payment of duty. The learned counsel has further submitted that the appellant was availing Small Scale Industries (SSI) exemption, as per which, if the aggregate value of the product during the previous year does not exceed Rs.4 crores, the unit is entitled for exemption from payment of duty and that while calculating the said amount, it *bona fide* excluded the value of the ready mix concrete manufactured at the sites of the customers, that, therefore, its non inclusion in the returns, was a *bona fide* error and that, immediately after receipt of the demand, the appellant paid the duty along with interest, which establishes its *bona fides*. In support of his submissions, the learned counsel has placed reliance on the judgments of the Apex Court in TAMIL NADU HOUSING BOARD VS. COLLECTOR OF CENTRAL EXCISE, MADRAS[1] and COMMISSIONER OF CENTRAL EXCISE, PONDICHERRY VS. HONDA SIEL POWER PROJECTS LIMITED[2].

3. We have carefully considered the submissions of the learned counsel for the appellant and perused the record.

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[1] 1994 (74) E.L.T. 9 (SC)
[2] 2015 (323) E.L.T. 644 (SC)

4. It is not in dispute that the appellant has not included the turnover relating to the ready mix concrete during the assessment years 2007-08 and 2008-09. The only explanation sought to be given by the appellant for this was that, he *bonafide* thought that the ready mix concrete manufactured at the sites of the customers, need not be included in the aggregate value for availing the benefit of exemption from duty made available to the SSIs and, therefore, the said exclusion was *bona fide*. The first appellate authority rendered its findings in this regard as under:

> "However, with regard to the penalty imposed under Section 11AC, I find that there is no force in the contention of the appellants. It is on record that the appellants had been availing the benefit of SSI exemption under Notification No.1/2003-CE dated 01.03.2003, even prior to 2006-07. The appellants were not new to the Central Excise and their turnover had been substantial during each year. Therefore, their contention that non-inclusion of the value of ready mix concrete mix was a bonafide mistake, had no basis at all. Hence their contention that the non-inclusion of the value of the premix for computation of value was a bonafide mistake, cannot be accepted at all. The preponderance of probability suggests that the appellants had taken a calculated risk by not including the value of their exempted goods (pre mix concrete) and had discharged their entire duty liability, on being pointed out by the department. Moreover, the appellants had not reflected the value of premixed concrete in the ER1 returns nor had revealed the details of the same to the department any time before it was detected by the officers of the department. I therefore, find that the non-payment in the instant case was by reason of suppression of relevant facts and intention to evade payment of duty besides contravention of relevant provisions of the law. Hence, I hold that the appellants were liable for penalty under Section 11AC of CEA to an extent of the amount equal to the Central Excise Duty involved (Rs.45,54,355). I, therefore, uphold the penalty imposed under Section 11AC of CEA."

5. When we questioned the learned counsel for the appellant as to the basis for the appellant forming an opinion that the ready mix

concrete manufactured at the sites of the customers need not be included in the aggregate value of the total concrete mix for the purpose of claiming exemption from duty, he did not place before us, any material in support of such opinion formed by the appellant. No doubt, for imposition of penalty, the initial burden lies on the department to show that there was willful attempt to evade duty. The first appellate authority in its order observed that the appellant is not new to the Central Excise subject, that they had been availing the benefit of SSI exemption from payment of this Excise Duty under notification dated 01.03.2003, even prior to 2006-07. The Tribunal has concurred with the finding and held that the plea of the appellant that non inclusion of the value of ready mix concrete is a *bona fide* mistake, had no basis. The very fact that the appellant had not included the value of ready mix concrete manufactured at site throws the burden on it to explain that its non inclusion is *bona fide*. Both the appellate authorities were not prepared to accept the vague explanation offered by the appellant. Exercising jurisdiction under Section 35G of the Act, this Court would not embark upon re-appreciation of facts and review the findings rendered by both the appellate authorities in the impugned orders, as they do not give rise to any substantial question of law.

6. As regards judgments cited by the learned counsel, the facts in TAMIL NADU HOUSING BOARD VS. COLLECTOR OF

CENTRAL EXCISE, MADRAS (1 supra), are clearly distinguishable. It was a case where the assessee was a non-profit making body. Further, it had two units, one, a concrete unit and the other, a wood unit, manufacturing frames, shutters, etc, which were to be fixed in the buildings constructed by the assessee. Though the assessee has obtained license for the concrete unit, as the finished products manufactured in the unit were not sold to outsiders, the unit manufacturing frames, shutters, etc., was not registered on the *bona fide* impression that they were being used for captive consumption in manufacturing the finished products to be sold to its customers. On those facts, the Supreme Court held that the provisions of Section 11A were not attracted as the assessee acted *bona fide* in thinking that the unit manufacturing frames, shutters, etc., for capital consumption was not required to take license.

7. In COMMISSIONER OF CENTRAL EXCISE, PONDICHERRY VS. HONDA SIEL POWER PRODUCTS LIMITED (2 supra), under a notification, concessional rates of duty on excisable goods were provided subject to fulfillment of two conditions. However, when an objection was raised, the benefit availed by the assessee was paid back by utilization of Cenvat credit and the Department has imposed the penalty and also interest, for wrongly availing the exemption. Questioning the same, the assessee filed an appeal before the Tribunal, which allowed the same in toto.

The Supreme Court while holding that the assessee was not entitled to exemption, however set aside the penalty and imposition of interest on penalty, by rendering a finding that on the facts, the availment of exemption under the notification was a *bona fide* mistake. In our opinion, this judgment which turned on its own facts, does not come to the aid of the appellant.

8. Having regard to the aforementioned reasons, we do not find any error in the order of the Tribunal and consequently, no substantial question of law arises for consideration in this appeal.

9. The Appeal is, accordingly, dismissed.

(C.V.Nagarjuna Reddy, J)

(Challa Kodanda Ram, J)

Date: 9th November, 2017

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