IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

CEA No.29 of 2017(O&M)
Date of decision: 18.12.2017

Commissioner of Central Excise Gurgaon II, Opposite Medanta Hospital, Plot No.36 and 37, Sector 32, Gurgaon.

……Appellant

Vs.

M/s Honda Motorcycle & Scooters India Pvt. Limited, Plot No.1 and 2, Sector 3, IMT Manesar, Gurgaon, Haryana through its Managing Director.

…..Respondent

CORAM: HON'BLE MR. JUSTICE AJAY KUMAR MITTAL
HON'BLE MR. JUSTICE AMIT RAWAL

Present: Mr. Tejinder Kumar Joshi, Sr. Standing Counsel for the revenue.
Mr. Amrinder Singh, Advocate for the respondent.

Ajay Kumar Mittal,J.

1. The delay in refilling the appeal is condoned.

2. This appeal has been filed by the appellant-revenue under Section 35G of the Central Excise Act, 1944 (in short, "the Act") against the order dated 5.8.2016, Annexure A.5 passed by the Customs, Excise and Service Tax Appellate Tribunal, Chandigarh Bench (in short, "the Tribunal") in Appeal No.E/4001/2012, claiming following substantial questions of law:-

i) Whether the CESAT was right in dropping the demand towards duly pertaining to the extended period of limitation?

ii) Whether the Hon'ble Tribunal was justified in dropping the demand towards duty pertaining to the extended period of limitation despite the finding of the adjudicating authority that the State tax/ VAT amounts collected by the assessee from their customers were retained by them and not paid to the Haryana Government?

iii) Whether the Hon'ble Tribunal was correct in dropping the demand towards duty pertaining to the extended period of limitation when it had itself relied upon the judgment of Hon'ble apex court in the case of Maruti Suzuki India Limited vs. CCE, Delhi-2014(307)ELT 625 (SC) and Super Synotex (India) Ltd vs. CCE Jaipur-2014 (301) ELT 273 wherein it was held that amount of sales tax concession retained by the respondent is required to be added in the assessable value?

iv) Whether the Hon'ble Tribunal was justified in setting aside the consequential penalty imposed upon the respondent when the Tribunal had itself held that the amount of sales tax concession retained by the respondent is required to be added in the assessable value and the respondents had intentionally not done so?

v) Whether the Hon'ble Tribunal was justified in setting aside the consequential penalty imposed upon the respondent in respect of the period that was admittedly within limitation and the demand for which was confirmed by the Tribunal itself?

3. A few facts relevant for the decision of the controversy involved as narrated in the appeal may be noticed. The respondent-assessee – M/s Honda Motorcycle and Scooters India Private Limited is engaged in the manufacture of excisable goods falling under the first Schedule to the Central Excise Tariff Act, 1985. It is availing CENVAT credit of the duty paid on inputs and capital goods used in the manufacture of final products under CENVAT Credit Rules, 2002/2004. It is holding VAT registration number as required under the relevant rules. During the course of audit, it was noticed that it had been retaining 50% of the sales tax collected by it from its customers on account of tax concession allowed to it under Rule 69

of the Haryana Value Added Tax Rules 2003. Under the deferment scheme, 50% of the total sales tax payable to the sales tax department was to be retained by it on the basis of entitlement certificate issued by the Haryana Government and it was not required to pay this retained amount of sales tax to the sales tax department in future. Accordingly, show cause notices dated 12.5.2009 were issued to the assessee for recovery of central excise duty not paid on the amount retained by the parties as this amount forming part of the income was on account of sales of the goods and was liable to be added in the value of the goods for payment of duty. The said show cause notices were adjudicated by the Commissioner of Central Excise, Delhi III, Gurgaon and vide order dated 27.9.2012, Annexure A.4, the demands were confirmed alongwith interest, and penalty equal to the duty amount was also imposed on the party. Aggrieved by the order, the respondent-assessee filed an appeal before the Tribunal. Vide order dated 5.8.2016, Annexure A.5, the Tribunal decided the case on merit in favour of the department and held that amount of sales tax concession retained by the respondent was required to be added to the transaction value but set aside the demand pertaining to the extended period of limitation and remanded the matter to the adjudicating authority with a direction to quantify the demand pertaining to period within limitation. Hence the instant appeal by the appellant-revenue.

4. We have heard learned counsel for the parties.

5. Learned counsel for the respondent-assessee raised an issue regarding the maintainability of the appeal on the ground that one of the issue which was adjudicated by the Tribunal related to classification/valuation of the goods for the purpose of central excise duty, and therefore, an appeal under Section 35G of the Act is not permissible.

6. On the other hand, learned counsel for the appellant-revenue submitted that the findings recorded by the Tribunal with regard to deleting the demand pertaining to the extended period of limitation and remanding the matter to the adjudicating authority with a direction to quantify the demand pertaining to the period within limitation are illegal and contrary to the settled law on the point. It was urged that the questions of law as claimed do not touch the classification/valuation of the goods and, thus, the appeal under Section 35G of the Act has been rightly filed.

7. The matter is no longer *res integra*. In a recent decision of this Court in ***Principal Commissioner of Central Excise, Gurgaon II, Commissionerate, Gurgaon, Haryana vs. M/s Minda Industries Limited,*** CEA No.23 of 2016 decided on 22.3.2017, relying upon the order dated 14.3.2017 in CEA No.18 of 2016, ***Principal Commissioner of Central Excise and Service Tax vs. M/s Raja Dyeing, Ludhiana,*** it has been held that where the order of the appellate Tribunal deals with a question of rate of duty or valuation of the goods for the purpose of assessment as well as with questions relating to other aspects, an appeal is not maintainable under Section 35G of the Central Excise Act, 1944.

8. In ***M/s Raja Dyeing's*** case (supra), after considering the relevant statutory provision and the case law on the point, it was recorded as under:-

> "14. Whether an appeal lies to the High Court under Section 35G or to the Supreme Court under Section 35L cannot possibly depend upon the nature or scope of the appeal that the party intends filing. A party may seek to challenge only that part of the order of the Tribunal which relates to questions other than those relating to the rate of duty of excise or the value of the goods for the purposes of assessment. Such an appeal would, absent any other questions, lie to the High Court. Once

it is held that an appeal against the order of the Tribunal which deals with questions that fall within the ambit of Section 35L as well as other questions lies to the Supreme Court under Section 35L the mere fact that the party chooses to challenge only that part of the order that falls within the ambit of Section 35G would make no difference. In other words, it cannot be held that the party that chooses to challenge the order of the Tribunal only so far as it relates to the determination of questions falling within the ambit of 35G must file the appeal before the High Court even though the order also deals with questions that fall within the ambit of Section 35L. In that event, if the other party files an appeal against the order of the Tribunal on issues that fall within the ambit of Section 35L in the Supreme Court, the very purpose of Section 35G of bringing the appeals either before the Supreme Court or before the High Court would be defeated. It can hardly be suggested that in that case, the appeal filed under Section 35G before the High Court ought to stand transferred to the Supreme Court. The scheme of the Act in general and Sections 35G and 35L in particular do not indicate such a mechanism."

9. In view of the above, the appeal is dismissed only on the ground that it is not maintainable under Section 35G of the Act.

(Ajay Kumar Mittal)
Judge

December 18, 2017 **(Amit Rawal)**
'gs' **Judge**

Whether speaking/reasoned Yes
Whether reportable Yes