In the High Court of Judicature at Madras

Dated : 16.8.2018

Coram :

The Honourable Mr.Justice T.S.SIVAGNANAM

and

The Honourable Mrs.Justice V.BHAVANI SUBBAROYAN

Civil Miscellaneous Appeal No.2475 of 2015 and MP.No.1 of 2015

M/s.Anglo French Textiles,
Pondicherry-605004. ...Appellant

Vs

1.The Customs, Excise and Service
Tax Appellate Tribunal, Shastri
Bhavan, Annexe Building, I Floor,
26, Haddows Road, Chennai-6.

2.The Commissioner of Central
Excise, No.1, Williams Road,
Cantonment, Tiruchirapalli.
Pin : 620001. ...Respondents

APPEAL under Section 35G of the Central Excise Act, 1944 against final order No.40777 of 2015 on the file of the Customs, Excise and Service Tax Appellate Tribunal, South Zonal Bench, Chennai dated 03.7.2015.

For Appellant :Mr.Krishna Srinivas for
M/s.S.Ramasubramaniam & Associates
For Respondent-2 :Mr.A.P.Srinivas, SSC

ORDER

Judgment was delivered by T.S.SIVAGNANAM,J

This appeal by the assessee is directed against Final Order No.40777 of 2015 passed by the Customs, Excise and Service Tax Appellate Tribunal, South Zonal Bench, Chennai dated 03.7.2015.

2. The above appeal was admitted on 27.11.2015 on the following substantial questions of law :

"i. Whether the demand raised by the Department vide its Show Cause Notice dated 27.3.2002 is barred by limitation inasmuch as the period of one year prescribed under

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law ought to be computed from the date of filing of RT 12 Returns by the appellant or at the latest from the date of special stock taking and filing of report?

ii. Whether, arising from the same set of facts, the Department is entitled to raise two Show Cause Notices, one within the period of limitation of one year and the other beyond the period of limitation on the allegations of clandestine removal and suppression by the appellant ? and

iii. Whether the second respondent can render findings on technical aspects squarely contrary to expert reports (i.e.) according to the second respondent, cotton and other fabrics undergo shrinkage and do not elongate when reports from experts were filed by the appellant which categorically stated that such fabrics undergo elongation which is the subject matter of the present appeal?"

3. The following facts would be necessary to consider as to what would be the correct answer for the substantial questions of law framed for consideration :

There was, once upon a time, a very renowned textile factory called M/s.Ango French Textiles namely the appellant, which was engaged in the manufacture of cotton fabrics, man made fabrics, woven fabrics, apparels and articles falling under various headings under Chapters 52, 55, 58, 62 and 63. Based on Intelligence that there were differences in physical stock of goods when compared to their statutory records, the Officers of the Preventive Group of the respondent Department in their Puducherry Division conducted an inspection in the factory on 05.9.2000. Enquiries were made with the managers of the appellant and their internal audit reports were verified. It appears that the Investigating Team reported that there has been difference in physical stock when compared to their statutory records.

4. Pursuant to the above investigation, a special stock taking was ordered under Rule 223A of the Central Excise Rules, 1944 (hereinafter called the Rules). The assessee has four units namely A, B, C and H. The special stock taking, as ordered by the Department, was conducted by the officers in A, B and C Units on 12.12.2000 and in H Unit on 14.12.2000. The Department would state that the stock taking report revealed excess physical stock in certain variety of goods as compared to R.G.-1 records. The goods, which were found in excess at A, B and C Units, were valued at Rs.61,33,214/- and they were seized under

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mahazar dated 16.2.2001 on a reasonable belief that they were kept unaccounted for removal without payment of duty. The goods found in excess in Unit H were valued at Rs.1,58,597/- and seized for the same reason on 08.5.2001.

5. The official of the assessee, in his statement given to the Superintendent of Central Excise, on 06.2.2001, explained the reasons for the excess stock and among other things, he stated that it was due to wrong accounting of book stock. A further statement was recorded from the very same official of the assessee on 26.2.2001 in respect of Unit H wherein he stated among other things that it was due to accounting errors in maintaining production records. Subsequently, the assessee submitted a letter dated 26.4.2001 stating that the difference in stock was due to accounting errors, but the same could not be exactly identified to a particular transaction on a given day or some clerical errors, as the volume of data was huge. The assessee was unable to locate as to where the so called accounting errors occurred.

6. The Commissioner of Central Excise was of the prima facie opinion that the claim made by the assessee defied probity and appeared to be unacceptable, as there had been huge variation in the physical stock and in the recorded stock of the said goods. Accordingly, the Commissioner held that the assessee contravened the provisions of Rule 53 read with Rule 173G of the Rules, that the goods under seizure were liable to be confiscated under Rule 173Q of the Rules and that assessee was liable for penalty.

7. Based on the above statement of facts, the Assistant Commissioner of Central Excise, Central Excise Division, Pondicherry, who is answerable to the Commissioner of Central Excise, issued a show cause dated 14.8.2001. There were two proposals in the said show cause notice, which read as under:

> "i. The goods valued at Rs.62,91,811/- under seizure at various units of the assessee should not be confiscated to the Government under Rule 173Q of the Central Excise Rules, 1944 and
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> ii. A penalty under Rule 173Q of the Central Excise Rules, 1944 should not be imposed on them."

8. To the said show cause notice dated 14.8.2001, the assessee submitted their reply dated 31.12.2001, styled as written submissions denying the allegations against them stating that they never resorted to any clandestine activity, but duly accounted the stocks and also filed RT - 12 returns to the Range Officer and that there was no justification for imposing penalty. With regard to the seizure of goods, it was stated that

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it was on apparent misconception of law in as much as no unaccounted goods were seized by the Preventive Department on 16.2.2001 and 08.5.2001. Thus, the assessee contended that the goods seized by the Preventive Department were duly accounted for in the DSA/RG-1 records, for which, monthly RT-12 returns were submitted to the Department, that the goods were stored legally for removal on payment of duty as mandated under the Central Excise Act, 1944 (hereinafter referred to as the Act) and the Rules framed thereunder and that the action of the Preventive Department was unsustainable in law. On these submissions, the assessee requested the Department to drop the proceedings.

9. The reply given by the assessee was considered and the Commissioner of Central Excise passed Order-in-Original No.2/2002 dated 07.1.2002. The discussion and finding are from paragraphs 11 to 14 of the said order. Ultimately, the Commissioner imposed a penalty of Rs.10,000/- for not maintaining RG-1 register properly under the erstwhile Rule 173Q of the Rules and the seized goods were ordered to be released to the assessee with a direction that they should be properly accounted for in the RG-1 register.

10. After about two months, another show cause notice dated 27.3.2002 was issued, in which, the following proposal was made by the Commissioner of Central Excise, Trichy :

> "(a) The central excise duty amounting to Rs.1,87,30,437/- (BED – Rs.1,04,04,022/- ; ADE – Rs.82,32,684/-; AED (T & TA) – Rs.36,563/-; interest on yarn duty – Rs.4,194/- & Cess – Rs.52,974/-) payable on the said excisable goods should not be demanded from them under erstwhile Rule 223A of the Central Excise Rules, 1944 read with Proviso to Sub-Section (1) of Section 11A of the Central Excise Act, 1944;
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> (b) A penalty under Section 11AC of the Central Excise Act, 1944 should not be imposed on them; and
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> (c) Interest at the appropriate rate under Section 11AB of the Central Excise Act, 1944 on the duty demanded should not be collected from them."

11. To be noted, the officer, who issued the second show cause notice is the very same officer, who had concluded the proceedings vide Order-in-Original dated 07.1.2002 and it is he who concluded the proceedings in the second show cause notice dated 27.3.2002 vide order dated 07.10.2002.

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12. The assessee submitted their reply dated 28.5.2002 to the second show cause notice dated 27.3.2002. The preliminary objections taken by the assessee were that there could not be two show cause notices on the same cause of action and that it was against the principles of natural justice. Apart from that, an elaborate reply was given on the factual matrix.

13. We find the reply dated 28.5.2002 to be elaborate running to 16 pages. Subsequent to that, written submissions dated 24.7.2002 were filed wherein apart from clarification on facts, several decisions were relied upon in support of their stand. Thus, the written submissions also appear to have been elaborately drafted. We also find that personal hearing was fixed on 24.7.2002 and on that day, the written submissions dated 29.7.2002 were filed stating that pursuant to the directions issued by the Commissioner, the assessee was submitting their annual reports for the years from 1995-96 to 1999-2000. It was pointed out that in the annual reports, they had given only the physical stock after conducting physical verification on 31st March of every year. Thus, they reiterated that only true position of stock was recorded in the annual reports and that no facts were suppressed.

14. It was further pointed out in the written submissions dated 29.7.2002 that the auditors had given their remarks about the physical verification in their report/annexure to auditors' report wherein it had been mentioned that physical verification was conducted in respect of finished goods at the end of the year and the procedure of physical verification of the stock followed by the management was reasonable and adequate in relation to the size of the company and nature of business. It was also pointed out that the discrepancies noticed on verification between physical stock and book records, though not material, were properly dealt with in the books of accounts. In this regard, the relevant pages in the annual report were appended. It was pointed out that the annual reports were already submitted to the Excise Officials every year for their perusal and the assessee requested the Commissioner of Central Excise to drop the proceedings.

15. The Commissioner of Central Excise passed the second Order-in-Original dated 07.10.2002 and the discussion and finding are found in paragraph 30 of the order and ultimately, the Commissioner demanded duty of Rs.1,84,19,199/- under Proviso to Section 11A(1) of the Act read with Rule 223A of the Rules and imposed equivalent penalty under Section 11AC of the Act and also demanded interest on the said amount under Section 11AB of the Act. Aggrieved by the order of the Commissioner of Central Excise dated 07.10.2002, the assessee preferred an appeal before the Tribunal, which, by the impugned order, dismissed the

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appeal, as against which, the present appeal has been filed before this Court.

16. We have heard Mr.Krishna Srinivas, learned counsel appearing on behalf of the assessee – appellant and Mr.A.P.Srinivas, learned Senior Standing Counsel appearing for the Revenue.

17. The first and foremost question to be considered will be substantial question of law No.2 and the necessity to answer question Nos.1 and 3 arises subject to the decision, which we take on substantial question of law No.2. For better appreciation, substantial question of law No.2 is quoted as hereunder :

> "Whether, arising from the same set of facts, the Department is entitled to raise two Show Cause Notices, one within the period of limitation of one year and the other beyond the period of limitation on the allegations of clandestine removal and suppression by the appellant?"

18. After we initially heard the learned counsel for the parties, we are of the view that though this question of law, as framed above, touches upon the question of limitation, essentially when the plea of the assessee is that two show cause notices could not have been issued on the same cause of action, with this modified submission, we proceed to decide the matter.

19. As pointed out in the preceding paragraphs, the first show cause notice dated 14.8.2001 was sequel to the inspection conducted by the Audit Department of the respondent on 05.9.2000. The Audit Department appeared to have submitted a report, which led to an order being issued under Rule 223A of the Rules for a special stock taking in all the four units of the assessee. Accordingly, the special stock taking commenced on 25.10.2000 and continued till 14.12.2000 in respect of all the four units. Based on the findings in the special stock taking as well as the report submitted by the Internal Audit Wing of the Department, the show cause notice dated 14.8.2001 came to be issued. The said show cause notice dated 14.8.2001 proposed confiscation of the goods and imposition of penalty as quoted in the preceding paragraphs.

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20. What is important to note is the 'statement of facts' appended to the first show cause notice dated 14.8.2001, which, in other words, is the basis for issuance of the first show cause notice. Therefore, we are essentially required to look into the question as to what was the basis for issuance of the first show cause notice and what weighed in the mind of the Assistant Commissioner prior to issuance of the first show cause

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notice. Admittedly, the first show cause notice emanated from the inspection and the special stock taking. Thus, entire materials were available with the Commissioner and what the Commissioner proposed in the first show cause notice was to confiscate the seized goods and levy penalty under Rule 173Q of the Rules.

21. The assessee submitted their reply and written submissions and the Commissioner adjudicated the matter and accepted the stand taken by the assessee that the excess goods were still lying in the factory premises, that there was no evidence that they were likely to be cleared clandestinely and that there was no justification for confiscation of the goods, as the same were required to be released to the assessee.

22. The discussion and findings rendered by the Authority in paragraphs 12 and 13 would be relevant and are quoted as hereunder :

> "12. In defence, the assessee submitted that the goods seized on 16.2.2001 and 08.5.2001 were the goods accounted in the daily stock register maintained under Rule 53. All the physical stock lying in all their units as on 11.12.2000 were duly recorded in RG-1/DSA register based on which, the monthly RT-12 return for December 2000 was submitted to the Department. They further submitted that physical stock taking was conducted in their units on 12.12.2000 and 14.12.2000 as per the directions of the Preventive Group and there were some differences in the physical stock as compared to RG-1 stock. These were accumulated differences over a period of 15 years due to the reasons that workmen might have boosted the production figures on record and some errors were likely to happen due to illiteracy, elongation, etc. They could not adjust the stock position till a clear picture of the difference was arrived at by a systematic stock taking. From the above, it is clear that differences were found in the physical stock as compared to the RG-1 stock and for these differences, no proper explanation was given at the time of seizure of the goods. One of the reasons given by them was that these were accumulated differences over a period of 15 years. It is not clear as to how the excess stock lying in the mill could not be entered in the records. To that extent, they had not maintained the

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> stock register properly and there is a clear violation of the erstwhile Rule 53 read with Rule 173G of the Central Excise Rules, 1944.
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> 13. They had submitted that this was a technical violation and therefore, the goods are not liable to confiscation and penalty was not required to be imposed. In their defence, they relied upon various decisions of the Hon'ble Tribunal as mentioned in paragraphs 9.2, 9.4 and 9.8 to 9.11 supra. The Hon'ble Tribunal in the case of Garden Silk Mills [(1991) 51 ELT 373] has held that if the goods are still within the factory premises and not attempted to be cleared clandestinely, confiscation under Rule 173Q is not sustainable. Similarly, in the case of Threads India Ltd. [(2000) 117 ELT 644], the Hon'ble Tribunal has held that excess stock is not a ground for confiscation of goods when no allegation is there about the clandestine removal. Relying on the above judgments, I come to the conclusion that since the excess goods were still lying in the factory premises and there was no evidence that these goods were likely to be cleared clandestinely, there is no justification for the confiscation of the said goods and the same are released to the assessee."

23. On the above findings, the Commissioner of Central Excise dropped the proposal to confiscate and directed the seized goods to be released with a direction to be properly accounted for in the RG-1 register and also imposed a penalty of Rs.10,000/- for not maintaining the RG-1 register. Thus, the assessee was of the firm view that the curtain had been drawn and the proceedings had attained finality. However, this belief was short lived, as, within two months, the second show cause notice dated 27.3.2002 was issued proposing to demand excise duty, levy penalty and demand interest.

24. We find from the second show cause notice dated 27.3.2002, more particularly in paragraph 8, which refers to certain documents, based on which, it came to be issued. All those documents are all prior to issuance of the first show cause notice dated 14.8.2001. Thus, on the date when the second show cause notice dated 27.3.2002 was issued, the Commissioner of Central Excise had no fresh material to justify as a cause of action for the issuance of the second show cause notice dated 27.3.2002. In fact, there is no reference to the Order-in-

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Original passed by him dated 07.1.2002 nor the proceedings, which were initiated earlier. In fact, that should have been specifically referred to in the second show cause notice, which is an inherent error and it will vitiate the second show cause notice dated 27.3.2002.

25. In the statement of facts, there appears to be some references to the earlier proceedings. In our considered view, we need not dwell much on the factual aspect, as we are called upon to decide a legal issue as to whether, with the same set of facts, the Authority could have issued the second show cause notice, especially when the second show cause notice was issued after the first show cause notice culminated in an Order-in-Original dated 07.1.2002.

26. The answer to this question should be in the negative i.e in favour of the assessee and against the Revenue. We support such a conclusion with the following reasons :

Mr.A.P.Srinivas, learned Senior Standing Counsel appearing for the Revenue has vehemently contended that the first show cause notice dated 14.8.2001 was issued only for the purpose of confiscation whereas the second show cause notice dated 27.3.2002 was issued for recovery of central excise duty, penalty and interest.

27. We find, on facts, that the Authority was not justified in doing so in the absence of fresh materials for issuance of the second show cause notice dated 27.3.2002. That apart, in the statement of facts appended to the first show cause notice dated 14.8.2001, it is evidently clear that the entire material was available with the Commissioner and that the question of initiation of fresh proceedings on the same set of facts would amount to double jeopardy or in other words, the assessee cannot be vexed twice for the same set of allegations. If, in the opinion of the Assessing Officer, the facts only require a proposal to confiscate and impose penalty, later on, another Authority cannot turn around and state, on the same set of facts, that he would proceed to demand duty from the assessee on the ground of stock differences. It was well open to the Assessing Officer to issue a comprehensive show cause notice, as the full facts are available with the Officer. In fact, while passing the Order-in-Original, the Officer dealt with the matter and took note of the submission made by the assessee that the accumulated differences were for over a period of 15 years.

28. Mr.A.P.Srinivas, learned Senior Standing Counsel for the Revenue has contended that the observations contained in paragraph 12 of the order dated 07.1.2002 are the submissions of the assessee.

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29. However, we do not agree with the said submission because it is contained in the portion relating to 'discussion and finding' in the order passed by the Commissioner i.e. to say that the the submissions of the assessee were found acceptable to the Commissioner and accordingly, he held that there was no question of clandestine removal. In such circumstances, the finding rendered by the Tribunal that the Adjudicating Authority decided the first show cause notice for confiscation and imposition of penalty under Section 173 of the Act for improper maintenance of the records and that the second show cause notice was entirely different, as it related to excess stock, cannot be accepted.

30. At the risk of repetition, we wish to point out that there was only one inspection of the factory on 05.9.2000, followed by the special stock taking conducted on 25.10.2000, 12.12.2000 and 14.12.2000 and this was the basis for the entire proceedings. Therefore, the Tribunal fell in error in stating that the second show cause notice dated 27.3.2002 was entirely different, as it related to excess stock. The Revenue cannot draw an analogy as normally drawn when the Departmental proceedings are initiated against the officials stating that whenever criminal case is registered against the officials for defalcation and other criminal charges, simultaneously, the Departmental proceedings are also initiated and it has been held that there is no bar for proceeding simultaneously except in cases of exceptions, which have been carved out.

31. In the instant case, the Officer, who proposed to initiate the proceedings against the assessee, had full and complete material before him and in his opinion, he thought fit to issue the first show cause notice proposing confiscation and impose penalty and ultimately, dropped the proposal and imposed only a fine of Rs.10,000/- for not proper maintenance of the records. Therefore, the second Order-in-Original, which was impugned before the Tribunal, is, in fact, an order reviewing the earlier decision, which is impermissible under the provisions of the Act.

32. Thus, for all the above reasons, we are of the clear view that the Commissioner of Central Excise and the Tribunal fell in error in coming to the conclusion that the second show cause notice initiated was entirely different and not relatable to the first proceedings initiated vide show cause notice dated 14.8.2001.

33. Therefore, substantial question of law No.2, as re-framed in paragraph 18 above, is answered in favour of the assessee holding that the second show cause notice dated 27.3.2002 could not have been issued on the same set of facts

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and this is peculiar on account of the admitted facts in the instant case. For such a reason, the assessee is entitled to succeed in this appeal. As mentioned above, there is no necessity for us to answer substantial questions of law Nos.1 and 3 and they are left open for a decision in any other case.

34. Accordingly, the above civil miscellaneous appeal is allowed and the orders passed by both the Commissioner of Central Excise dated 07.10.2002 as well as the Tribunal dated 03.7.2015 are set aside for the reasons stated above. No costs. Consequently, the connected MP is closed.

35. Record of the proceedings shows that the assessee paid a sum of Rs.30 lakhs as a condition precedent for maintaining the appeal before the Tribunal. It is made clear that the petitioner is entitled for refund of the same.

Sd/-
Assistant Registrar(CS VII)

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Sub Assistant Registrar

To
1.The Registrar, Customs, Excise and Service Tax Appellate Tribunal, No.26, Sastri
Bhavan Annexe Building, Haddows Road, Chennai-6.
2.The Commissioner of Central Excise, No.1, Williams Road, Cantonment,
Tiruchirapalli. Pin : 620001.

+1cc to Mr.S.Ramasubramanian & Associates SR.NO.56348
+1cc to Mr.A.P.Srinivas, Advocate SR.NO.56597

GJ(CO)
sm:4.9.2018

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