

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 24.09.2018

Coram

THE HON'BLE MR.JUSTICE T.S.SIVAGNANAM

&

THE HON'BLE MRS.JUSTICE V.BHAVANI SUBBAROYAN

C.M.A.No.1372 of 2018

and C.M.P.No.10961 of 2018

Judgment Reserved on

Judgment pronounced on

23.08.2018

24.09.2018

M/S. Integral Power Packs

6/21, Lakshmi Nagar, Ist floor

Kavundampalayam road

Edayarpalayam

Coimbatore-641 025

Represented by its

Proprietor Mr.K.Thangarathinam ... Appellant

Vs.

Commissioner of Central Excise

Coimbatore Commissionerate

6/7, A.T.D. Street

Race Course road, Coimbatore-641 018. .. Respondent

PRAYER: Appeal filed under Section 35G of the Central Excise Act, 1944, to set aside the impugned final order No.42792/2017 dated 03.11.2017 of the Customs, Excise and Service Tax Appellate Tribunal, Chennai, in respect of Appeal No.E/00464/2010, which held that the extended period of time limit would apply resulting in confirmation of penalty under Section 11AC of the Central Excise Act and interest under Section 11AB of the Central Excise Act, 1994.

For Appellant : Mr.T.R.Ramesh

For Respondent : Mr.A.P.Srinivas

Senior Panel Counsel

J U D G M E N T

(Judgment of this Court was delivered by T.S.SIVAGNANAM,J.)

This appeal by the assessee is directed against the order passed by the Customs, Excise and Service Tax Appellate Tribunal (CESTAT), South Zonal Bench, Chennai, in Appeal No.E/00464/2010, dated 03.11.2017. This appeal has been filed raising the following substantial questions of law:

1. Whether the CESTAT'S impugned order rejecting the Appellant's plea on limitation is sustainable when the identical issue was decided in favour of the Appellant on limitation and thus there is hostile discrimination?

2. Whether the CESTAT'S impugned order is sustainable in the light of the decision of this Hon'ble Court in the case of Micro Chem Products(India) Pvt. Ltd vs. CESTAT, Chennai reported in 2017 (355) ELT 45 (Mad.), wherein under similar circumstances, this Hon'ble Court has held that the extended period of time limit is not applicable.

3. Whether the impugned order is outside the scope of Show Cause Notice when there is no allegation or foundation for sustaining the reasoning of the impugned order?

4. Whether the impugned order is correct in ignoring the submissions of the Appellant that when the decisions of the Tribunal were in favour of the Appellant and ultimately the merits of the issue was finally decided by the Hon'ble Supreme Court against the Appellant, the extended period cannot be invoked?

2. The respondent Department issued a show cause notice to the appellant assessee dated 09.08.2000 inter alia alleging that the assessee has contravened the provisions of Central Excise Rules inasmuch as they have manufactured and cleared the excisable goods with brand name 'Cansoft', which belongs to another manufacturer, without payment of excise duty and without following excise procedures. The facts of the case were furnished in the form to an annexure to the show cause notice. The assessee was directed to show cause as to why the proviso to Section 11A of the Central Excise Act, 1944 (hereinafter referred to as "the Act") should not be invoked in their case to demand duty; why duty of Rs.14,30,991/- should not be demanded; why penalty should not be imposed under Section 11AC of the Act as well as under Rule 173Q of the Central Excise Rules, 1944 (hereinafter referred to as "Rules"); why interest should not be demanded under Section 11AB of the Act and why the seized goods should not be confiscated under Section 110 of the Customs Act made applicable to the Central Excise Act.

3. The assessee filed their reply dated 05.03.2001 stating that they had not manufactured the said goods namely, offline UPS with brand name of another person as alleged in the show cause notice and that there is no mention in the show cause notice that any other manufacturer has manufactured offline UPS with this indication Cansoft Tiny etc. and that if a brand name is registered for a particular product, another manufacturer can use it for another product that they had manufactured and supplied offline UPS with Cansoft Gold etc. to M/s. Cansoft Systems Private Limited with effect from 1996 and if anybody else use this brand name, they have to be considered as manufacturers of goods bearing the brand name of others. Thus, it was contended that burden of proof lies on the Department, which has not been discharged and therefore, the show cause notice is not sustainable in law. Further, it was stated that investigation has been done only on the ground that M/s. Cansoft Systems stated that they have engaged in trading activities only and therefore, onus is on the Department to establish the allegations in the show cause notice. After referring to certain decisions in support of their contentions, the assessee stated that the demand made in the show cause notice is barred by time, as they had not suppressed any information with intent to evade payment of duty, even if at all there has been any omission, it was without any malafide intention. Accordingly, the assessee prayed for dropping the proceedings initiated against them and also release the goods, which were seized.

4. Personal hearing was offered to the assessee, who was represented by their authorised

representative, who had stated that M/s.Cansoft Systems do not manufacture UPS and in view of the fact that the petitioner is a SSI unit, exemption would be applicable to them. This submission was in addition to the submissions made in the written reply given by the assessee to the show cause notice. The Adjudicating Authority namely, Additional Commissioner of Central Excise, Coimbatore, by order in original dated 28.03.2001 rejected the contentions raised by the assessee and confirmed the demand in the show cause notice dated 09.08.2000. Apart from denying the claim for SSI exemption under notification Nos.1/93 and 7/97 as amended, it was held that show cause notice is not time barred as the assessee had not filed any declaration to the Department declaring the product manufactured by them as required under notification No.13/92 as amended in order to claim exemption from registration from the Department. Therefore, the Adjudicating Authority came to the conclusion that assessee had suppressed information to the Department and therefore, demand in the show cause notice is sustainable.

5.The assessee preferred appeal before the Commissioner of Central Excise (Appeals), Coimbatore, which was dismissed by the order dated 07.04.2003. Against the said order, the assessee filed appeal before the Tribunal and the Tribunal by final order dated 13.02.2004 allowed the appeal filed by the assessee and set aside the order passed by the lower authorities. Among other things, the Tribunal held that M/S.Cansoft Systems are not manufacturers of offline UPS with the said name and therefore, benefit of the notification has to be extended to the assessee. The revenue filed an appeal before the Division Bench of this Court in C.M.A.No.26 of 2005 raising the following two substantial questions of law:

□(i) Whether the Tribunal was right in holding on a purposive interpretation of the provisions of the SSI exemption Notification No.1/93 CE by stating that para 4 of the said notification stipulates that the 1st respondent should have used the brand name of other person on the same item which was manufactured by other person who were not entitled to the benefit of SSI exemption?□

(ii) Whether on facts and circumstances of the case, the Tribunal was right in holding that it was not the case of Revenue that both the name affixed by the 1st respondent was registered brand name used by another manufacture who was disentitled to the benefit of Notification and were affixing the same on □offline UPS?□

6.The Division Bench, to which one of us as a party (T.S.S.J.) by judgment dated 01.04.2009 allowed the appeal filed by the revenue and decided the substantial question of law No.1(supra) in favour of revenue and remanded the matter to the Tribunal to decide the claim for exemption strictly in terms of the notification. On remand before the Tribunal, the assessee accepted the decision on merits, but submitted that the assessee has a good case on limitation and the question of limitation was not decided either by the Tribunal or by the lower Appellate Authority, in the earlier orders, though it was raised. Considering the said submission, the Tribunal held that the decision of limitation is a mixed question of law and fact and has not been decided by the lower Appellate Authority and accordingly, set aside the order and remanded the matter to the lower Appellate Authority for fresh decision. Thus, the matter stood remanded to the Commissioner of Central Excise (Appeals), Coimbatore.

7.The lower Appellate Authority by order dated 11.05.2010 upheld the order of the lower Adjudicating Authority and dismissed the appeal and held that the extended period under proviso to Section 11A of the Central Excise Act, was rightly invoked in the case of the assessee. Against the said order, the assessee preferred appeal before the Tribunal and sought for waiver of pre-deposit. The Tribunal vide order dated 20.03.2012 directed the assessee to deposit a sum of Rs.6,00,000/- within a period of six weeks. Challenging the said order, the assessee filed an appeal before this Court in C.M.A.No.3691 of 2013 contending that the Tribunal was not justified in directing the assessee to pre-deposit a sum of Rs.6,00,000/-. The Division Bench, to which one of us as a party

(T.S.S.J.) disposed of the appeal by judgment dated 05.02.2004 to take up the appeal on merits on the ground that in the case of M/S. Data Tech Systems Vs. Commissioner of Central Excise, Coimbatore, an order was passed, which was placed before the Tribunal by the assessee, which was not considered by the Tribunal, while taking a decision on the issue relating to pre-deposit. Pursuant to the said judgment, the Tribunal took up the matter for hearing and has dismissed the appeal holding that the extended period of limitation was rightly invoked, however, remanded the matter for re-consideration of demand. Aggrieved by the said order dated 03.11.2017, the assessee is before us by way of this appeal.

8.The learned counsel appearing for the assessee submitted that the assessee's case is not on merits, as the assessee has reconciled with the fact that they are liable to pay duty. The assessee seeks to contest only one issue before us with regard to whether the extended period of limitation can be invoked. The assessee's case is that they are manufacturers and sell offline UPS and they being a small scale industry coming under the turnover limit of exemption notification No.1/93 and assessee cleared the manufactured goods without payment of duty due to exemption. Further, the assessee's case is that for the purpose of identification of the goods for despatch to the buyers, the assessee affixed the name of 'Cansoft'. It is submitted that order passed by CESTAT is not sustainable, as it is contrary to the decision of the Division Bench of this Court in the case of Micro Chem Products (India) Pvt. Limited v. CESTAT, Chennai, 2017 (355) ELT 45 (Mad.) Further, it is submitted that the order of the Tribunal is not sustainable because the grounds, which were never raised in the show cause notice, were the basis of the decision of the Tribunal. Further, the assessee has been discriminated inasmuch as the orders passed in the case of other similarly placed assesseees were not taken into consideration, more particularly, the order passed in the matter of M/S.Data Tech Systems. Further, on the merits of the issue, there were two views and ultimately the matter was decided by the Hon'ble Supreme Court in the case of Commissioner of Central Excise, Trichy v. Grasim Industries Ltd., 2005 (183) E.L.T. 123 (S.C.). In such circumstances, the question of suppression will not arise. The assessee has also placed reliance on the decision of the Hon'ble Supreme Court in Pushpam Pharmaceuticals Company v. Collector of Central Excise, Bombay, 1995 (78) E.L.T. 401 (S.C.) and submitted that the said decision though brought to the notice of the Tribunal, the same was not considered. Further, the assessee sought to distinguish the decision in the case of Commissioner of Central Excise, Raigad Vs. Ramply (India) Limited, 2010 (249) E.L.T. 31 (Bombay), which was relied on by the Tribunal in the impugned order by stating that it deals with disclosure in the classification list, which is applicable only for the registered assesseees and such allegation did not figure in the show cause notice issued to the assessee. Thus, it is submitted that the Tribunal fell in error in dismissing the appeal filed by the appellant. Further, it is submitted that the second proviso to notification No.22/98, dated 04.06.1998 clearly states that no declaration is required to be filed by the assessee, if it is SSI unit and they are entitled for full exemption limit.

9.The revenue seeks to sustain the order passed by the Tribunal contending that it had rightly applied the decision in the case of Ramply (India) Limited and held that the extended period of limitation was rightly invoked. Further, it is submitted that the assessee was not justified in stating that he is not required to file any declaration, since notification No.22/98 provides for filing a declaration and earlier notification namely, notification No.13/92, dated, 14.05.1992 also makes it necessary to file a declaration. It is further submitted that the contention of the assessee that because the legal issue attained finality only after the decision in the case of Grasim Industries Limited, is incorrect submission and it was never the case of the assessee before the Department and a new case is sought to be canvassed before this Court, which should not be permitted. Further, it is submitted that in the case of Micro Chem Products (India) Private Limited, the requirement for being entitled to the benefit of the exemption, notification Nos.13/92 and 22/98 the pre-requisite is that declaration is required to be filed. Further, the decision in the case of Ramply (India) Limited was considered by the Division Bench in the case of Micro Chem Products (India) Private Limited

and it was held to be factually not applicable to the case before the Division Bench. Furthermore, in the case of Micro Chem Products (India) Private Limited, the assessee took a specific stand that since it was below the monetary limit fixed for clearance qua SSI unit, it never had an occasion to make any disclosure via classification list. Therefore, it is submitted that the decision in the case of Micro Chem Products (India) Private Limited, is not applicable to the assessee's case and the Tribunal rightly upheld the invocation of the extended period of limitation and upheld the orders passed by the lower Appellate Authority and the Adjudicating Authority.

10. Heard Mr. T. R. Ramesh, learned counsel appearing for the assessee and Mr. A. P. Srinivas, learned Senior Panel Counsel for the respondent.

11. As noticed above, the assessee has not contested the matter on the merits of the assessment, as they had reconciled to the fact that they are liable to pay duty. The bone of contention raised by the assessee is on the ground that extended period of limitation could not have been invoked in their case. In support of such contention, the assessee would state that they are manufacturers and sell offline UPS and they being a small scale industry with SSI registration coming under the turnover limit of exemption notification No. 1/93. They had cleared manufactured goods without payment of duty owing to the benefit of exemption. It is the further case of the assessee that only for the purpose of identification of the goods for dispatch to the buyers, they had affixed the name "Cansoft". The sheet anchor of the argument of the learned counsel for the assessee is based on the decision in the case of Micro Chem Products (India) Pvt. Limited (supra). In the said case, the assessee manufactured chemicals for use in printing and photographic industry and in respect of the sale of its goods, it used the brand name "Micro", which was, admittedly, the brand name of another sister concern. The assessee had been claiming exemption from excise duty, as it was a SSI unit and it did not get itself registered with the Central Excise Authorities. They claimed that since, their clearance is below the sum of Rs. 30,00,000/-, there is no need to register itself with the Central Excise Authorities. The Central Excise Authorities on coming to know about the clearances effected by the said assessee without payment of duty, issued show cause notice proposing to deny exemption from excise duty and also levy penalty. The show cause notice was adjudicated and the order in original was in favour of the assessee.

12. The Revenue being aggrieved by such order, preferred an appeal to the First Appellate Authority and the appeal of the Revenue was dismissed. The Revenue filed further appeal before the Tribunal. In such appeal, the assessee preferred cross objections raising the issue of limitation. The Tribunal reversed the view of the Adjudicating Authority and the First Appellate Authority. The issue, which was taken up for consideration, was whether the extended period of limitation would be applicable to the said case. The Division Bench noted that the assessee was not registered with the Central Excise Authorities on account of the fact that its clearances were below the monetary limit, specified in various notifications, issued from time to time. The Court held that the assessee had no occasion to file a classification list and that the Tribunal without appreciating the said fact applied the decision in the case of Ramply (India) Limited (Supra). The decision in the case of Ramply (India) Limited was distinguished by observing that there was a factual finding against the said assessee to the effect that, even though a classification list has been filed, the assessee had failed to disclose the use of brand name belonging to another person. Accordingly, the Court held that the Tribunal wrongly rejected the cross objections filed by the assessee. The moot question would be whether a declaration is required to be filed by the assessee for being entitled to claim the benefit of the exemption notification.

13. It is the submission of the learned counsel for the assessee that there is no such requirement and in this regard, reference was made to notification No. 22/98-CE (NT), dated 04.06.1998. We are required to examine the notification to test the correctness of the stand taken by the assessee. The said notification deals with Registration - Exemption to manufacturers of wholly exempted goods.

The notification was issued in exercise of the powers conferred under Rule 174(2) of the Central Excise Rules, 1944, exempting from the operation of Rule 174, the persons who manufacture goods specified in the Schedule to the Central Excise Tariff Act, 1985 (5 of 1986) so long as the goods are chargeable to nil rate of duty or remain exempt from the whole of the duty of excise leviable thereon. The proviso states that where the goods are chargeable to nil rate of duty or from where the whole of the duty exempted leviable thereon is granted based on the value of the goods or based on the process of manufacture of goods or on the ground that appropriate duty has been paid in respect of raw materials or based on the value or quantity of clearances of the goods made in a financial year or subject to conditions, if any, specified in any notification issued under Rule 8(1) of the said rules or Section 5A(1) of the Central Excise Act, as the case may be. The notification further states that the manufacturer who makes a declaration and gives an undertaking as specified in the Form annexed along with the notification while claiming exemption under this notification. The second proviso under the notification states that where the exemption from the whole of the duty of excise leviable on the said goods is granted, based on the value of the clearances made in a financial year, no such declaration shall be filed, if the aggregate value of the said goods is cleared by a manufacturer from one or more factories, or from any factory by one or more manufacturers, for home consumption, was less than the specified limit during the preceding financial year or in case of a new factory or manufacturer, such value of clearances is estimated to remain less than the specified limit during the current financial year. Thus, in terms of the notification, where exemption from whole of the duty of excise leviable thereon is granted based on the factors mentioned, the manufacturer who makes a declaration and gives an undertaking in the specified form while claiming exemption under this notification. The second proviso dispenses with the filing of such declaration, if the aggregate value of the goods is less than the specified limit during the current financial year.

14. Admittedly, in the instant case, the assessee was using the brand name of a different entity and presumed to have full knowledge that they are not entitled to the benefit of the exemption notification. The Tribunal relied upon the decision in Ramply (India) Limited, the assessee therein was not the owner of the mark "Ram's" and was not entitled to the exemption of payment of excise duty, whereas the assessee being a small scale industry would be entitled to concessional rate of duty, if otherwise eligible. While considering as to whether in the facts of the said case extended period of limitation could be invoked, it was held that in the said case, the assessee in the classification list did not disclose the use of brand name belonging to another person and 1993 notification sets out that, where a manufacturer affixes the specified goods with a brand name or trade name of another person, who is not eligible for the grant of exemption under this notification, then they are not entitled to the exemption. It was held that the assessee in the said case, admittedly was using the mark of another company, which may be a group company and that group company was not eligible for exemption. Furthermore, in the notification dated 28.02.1993, it is stated that exemption contained in the notification shall not apply to the specific goods, if the brand name or trade name used is registered or owned by another person. Thus, if the assessee herein has used the brand name of another person, they are not entitled for exemption and this was not made known to the department as no declaration was filed by the assessee. In our considered view, the second proviso to the notification would stand attracted subject to fulfilment of the condition in the first proviso. Thus, having not disclosed the same nor filed the declaration as provided in the first proviso to the notification, it is, undoubtedly, a case of suppression and the department was justified in invoking the extended period of limitation.

15. In the case of M/s. Grasim Industries Limited (Supra), the appeals filed before the Supreme Court were against the judgment of the Tribunal. In the said case, the assessee was a subsidiary of one M/s. Grasim Industries Limited and on the bags of cement manufactured by them, they used the

words "Manufactured by Dharani Cements Ltd. A subsidiary of Grasim Industries Ltd." The Tribunal by following the decision in the case of Astra Pharmaceuticals Private Limited Vs Collector of Central Excise reported in 1995 (75) E.L.T. 214 (SC), held that the benefit of notification No.5/98 (CE), dated 02.06.1998 is not lost by the assessee, because they show on their product the name of the holding company namely, M/s.Grasim Industries Limited. The Revenue challenging the correctness of the finding, contended that the assessee by using the name of Grasim Industries with the purpose of indicating a connection between the product i.e., cement manufactured by them and M/s.Grasim Industries Ltd. The assessee contended that the words "Grasim Industries Limited" are neither a brand name nor a trade name. The Honourable Supreme Court after examining the facts, pointed out that it is clear that the assessee was using the trade name of some other company with the purpose of indicating a connection in the course of trade between the product and that person and the assessee was therefore, clearly not entitled to the benefit of the notification. It was held that the decision of the Tribunal was clearly erroneous and required to be set aside. Ultimately, the appeal filed by the Revenue was allowed and the order passed by the Commissioner was restored. However, the assessee therein was granted relief from levy of penalty. Thus, by applying the decision in the case of M/s.Grasim Industries Limited, the only conclusion that can be arrived at is to confirm the impugned decision of the Tribunal and dismiss the appeal filed by the assessee. The learned counsel for the assessee contended that the legal issue attained finality only after the decision in the case of Grasim Industries Limited. However, we find that such contention was never raised by the assessee at any point of time. Therefore, we cannot permit the assessee to raise such contention for the first time in this appeal, especially in the earlier round of litigation, which was challenge to levy of duty had attained finality against the assessee.

16. One more reason to hold that the decision in Micro Chem Products (India) Pvt. Limited, would not be applicable to the facts of the present case is that the assessee therein took a specific stand that it was below the monetary limit fixed for clearances qua SSI unit and never had an occasion to make any disclosure via classification list. Thus, the decision in the case of Micro Chem Products (India) Pvt. Limited can render no assistance to the case of the assessee.

17. As noted above, the question regarding limitation was remanded for being considered by the Appellate Authority by order passed by the CESTAT dated 08.09.2009 on the ground that it has not been decided by the Appellate Authority. On such assumption, the Appellate Authority considered the said aspect and passed the order dated 11.05.2010 upholding the order passed by the lower Adjudicating Authority. In the said order, it has been specifically mentioned that the proprietor of the assessee has given a statement on 28.02.2000 admitting that they were manufacturing offline UPS using the brand name "Cansoft". Almost all their products sold to M/s.Cansoft Systems Private Limited, during the period 1996 to 1997 to 1999-2000. Thus, on facts, it became clear that the assessee cleared the branded offline UPS to M/s. Cansoft Systems Private Limited, without payment of duty. The assessee's stand was that he was not aware of the Central Excise procedures. However, the assessee admitted that the brand name did not belong to them. Thus, the Appellate Authority held that the assessee being a manufacturer doing business for several years, he is expected to be aware of the duty liability on the goods manufactured by him and also the Central Excise procedure. It is further pointed out that, but for the investigation conducted by the officers, the usage of the brand name by the assessee would not have come to notice and therefore extended period under Section 11A of the Central Excise Act, 1944, is invokable. Thus, the Appellate Authority held that the assessee has suppressed the fact to the department and the extended period was rightly invoked and the same is legal.

18. The original authority in his order dated 28.03.2001 considered this question as to whether the show cause notice is barred by limitation as the assessee contended that there was no suppression of information with an intention to evade payment of duty and there is no mala fide intention. The

original authority held that the said contention of the assessee is incorrect, since the assessee had not filed any declaration to the department declaring the product manufactured by them, as required under notification No.13/92 as amended, in order to claim exemption from registration from the department. It is further held that the department became aware of the fact of their manufacturing activity only when the officers made a surprise visit to their manufacturing unit. Therefore, it is held that the assessee had suppressed information from the department. The case on hand is one pertaining to the claim for exemption. The burden is on the assessee to establish that the goods manufactured by them will come within the ambit of the exemption notification and the burden of proof is on the assessee to establish on facts that they are entitled for exemption. Furthermore, the exemption notification are required to be interpreted strictly and in favour of the department and in case of any ambiguity or doubt, it will be resolved in favour of the Revenue and not in favour of the assessee. Thus, in our considered view, the Tribunal rightly held that the extended period of limitation was invokable in the facts and circumstances of the case. However, with regard to levy of penalty, we apply the observations of the Hon'ble Supreme Court in the case of Grasim Industries and delete the penalty. In other respects, the order of the Tribunal is confirmed.

19. In the result, the substantial questions of law framed for consideration are answered against the assessee. However, the penalty levies on the assessee is deleted. No costs. Consequently, connected Miscellaneous Petition is closed.

[T.S.S.,J.] [V.B.S.,J.]

24.09.2018

Index:Yes/No

Speaking/Non-speaking Order:Yes/No

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To

Commissioner of Central Excise

Coimbatore Commissionerate

6/7, A.T.D. Street

Race Course road, Coimbatore-641 018.

T.S.SIVAGNANAM,J.

&

V.BHAVANI SUBBAROYAN,J.

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Pre-delivery judgment in
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