

In the High Court of Judicature at Madras

Dated : 23.8.2018

Coram :

The Honourable Mr.Justice T.S.SIVAGNANAM

and

The Honourable Mrs.Justice V.BHAVANI SUBBAROYAN

Civil Miscellaneous Appeal No.3112 of 2010
and MP.No.1 of 2010

Honeywell Electrical Devices and
Systems India Limited, Kuthambakkam
Village, Poonamalee Taluk, Tiruvallur
-602103.

....Appellant

Vs

1.The Customs, Excise and Service
Tax Appellate Tribunal, South Zonal
Bench, No.26, Haddows Road,
Chennai-6.

2.The Commissioner of Central Excise
(Appeals), 26/1, Mahatma Gandhi
Road, Chennai-34.

3.The Joint Commissioner of Central
Excise, office of the Central Excise
Chennai IV Commissionerate,
Chennai-35.

...Respondents

APPEAL under Section 35G of the Central Excise Act, 1944
against final order No.747 of 2010 on the file of the Customs,
Excise and Service Tax Appellate Tribunal, South Zonal Bench,
Chennai dated 06.7.2010 in Appeal No.E/35/10.

For Appellant : Mr.Joseph Prabhakar

For Respondents 2 & 3 : Mr.A.P.Srinivas, SSC, SPC

Judgment was delivered by T.S.SIVAGNANAM, J

This appeal filed by the assessee is directed against the
order passed by the Customs, Excise and Service Tax Appellate
Tribunal, South Zonal Bench, Chennai in Appeal No.E/35/10
dated 06.7.2010.

2. The above appeal has been admitted by order dated 09.11.2010 on the following substantial questions of law :

"1. Whether excise duty can be demanded on the ground of clandestine removal when the Department did not allege clandestine removal at the stage of show cause notice, Order-in-Original and Order-in-Appeal ?

2. Whether larger period under Proviso to Section 11A(1) of the Central Excise Act, 1944, could be invoked alleging suppression of facts when stock discrepancy is explicitly disclosed in the annual report ?

3. Whether the Tribunal can make out a case for the Revenue based on a new ground, when show cause notice, Order-in-Original and Order-in-Appeal did not speak about the said ground ?

4. Whether larger period under Proviso to Section 11A(1) could be invoked in a case where there was no intention to evade payment of excise duty ?

5. Whether, in the facts and circumstances of the case, the first respondent is correct in applying the ratio of the decision in CCE, Chennai Vs. Composite Boards (P) Ltd., [reported in (2009) 244 ELT 561] ?

6. Whether the levy of penalty is in accordance with the provision of Section 11AC of the Central Excise Act, 1944 ?"

3. The Department issued the show cause notice dated 20.6.2007 stating that the assessee is engaged in the manufacture of switches, sockets and parts of switches falling under Chapter Heading 85365020 and 85366910 of the Central Excise Tariff Act, 1985 and that they are availing CENVAT credit under the CENVAT Credit Rules, 2004 for the discharge of payment of duty on their final products. It has been further stated in the said show cause notice that during inspection of the records of the assessee, in the annual report for the year 2005-06, it was noticed as follows :

"On the basis of our examination of inventory records, in our opinion, the company is maintaining proper records of inventory. The discrepancies between the physical stocks and the book stocks as revealed by the physical verification is considered to be material and accordingly, an amount of Rs.29,10,650/- (net debit) has been properly adjusted in the books of account."

4. In the said show cause notice, the Department also stated that it was evident that there had been shortage of raw materials and components, intermediate and finished goods in the assessee's factory. Thus, it was alleged that the assessee had failed to inform the Department about the shortage with a clear intention to evade payment of excise duty and invoking the extended period of limitation under the Proviso to Section 11A (1) of the Central Excise Act, 1944 (for brevity, the Act), the said notice was issued calling upon the assessee to show cause as to why duty of Rs.81,058/- should not be demanded, as to why the CENVAT credit availed on the raw materials and components found short should not be recovered, as to why appropriate interest should not be demanded and as to why penalty should not be levied.

5. The assessee submitted their reply dated 26.7.2007 inter alia stating that the shortage as regards the finished goods related to finished goods, which were traded by them and some of the quantum of shortage also pertained to their DTA and EOU units and that the shortage was due to the fact that they migrated from the regular system to ERP; the net shortage was less than 1% of the total goods dealt by them; and all the goods were cleared by them only on payment of duty. The assessee also placed reliance on the decisions in the case of Widia India Ltd Vs. CCE, Bangalore [reported in (2007) 207 ELT 562] and in the case of Maruti Udyog Vs. CCE, Delhi [reported in (2004) 173 ELT 382] and requested to drop the proceedings.

6. However, the Original Authority, vide Order-in-Original dated 27.9.2007, rejected the plea raised by the assessee and confirmed the proposals in the said show cause notice largely on the ground that the assessee had not produced documentary evidence in respect of the stand in their reply. As against the said Order-in-Original dated 27.9.2007, the assessee preferred an appeal before the Commissioner (Appeals), who, by an order dated 16.10.2009, allowed the appeal. Aggrieved by the same, the Department preferred an appeal before the Tribunal and it was allowed by the Tribunal vide impugned order dated 06.7.2010. Being aggrieved by the impugned order, the assessee is before this Court by way of this appeal, which has been admitted on the substantial questions of law mentioned above.

7. We have heard Mr. Joseph Prabhakar, learned counsel for the appellant and Mr. A.P. Srinivas, learned Senior Standing Counsel appearing for the Revenue.

8. The first and foremost aspect to be considered in the instant case is as to whether the extended period of limitation could have been invoked by referring to the Proviso to Section 11A(1) of the Act. The extended period is invocable where any duty of excise has not been levied or paid or has been short levied or short paid or erroneously refunded by reason of fraud, collusion or any willful mis-statement or suppression of facts for contravention of any of the provisions of the Act with an

intention to evade payment of duty. If this is prima facie established by the Department by reasonable material, then the extended period is invocable.

9. Admittedly, in the said show cause notice dated 20.6.2007, there was no allegation of clandestine removal. The Department alleged shortage solely based upon the annual report of the assessee for the year 2005-06. In fact, in the annual report, it has been clarified that the discrepancy, which was found, had been properly adjusted in the books of accounts. Thus, based on the material available in the annual report, the said show cause notice came to be issued and there was no material placed in the said show cause notice to support the allegation of either willful mis-statement or clandestine removal or suppression of fact or fraud or collusion with an intention to evade payment of duty. Thus, in the absence of such material, the extended period of limitation is not invocable. There are long line of decisions on this aspect.

10. The First Appellate Authority namely the Commissioner (Appeals), in our considered view, rightly and elaborately discussed the issue by referring to various case laws on the point and pointed out that it is not the case of the Department that excise duty has not been paid by reason of collusion or fraud or willful mis-statement or suppression of facts for contravention of any provisions of the Act or the Rules made thereunder with an intention to evade payment of duty and held that the extended period could not have been invoked and penalty under Section 11AC of the Act could not have been imposed. Further, the First Appellate Authority was fully justified in coming to the conclusion that the allegation of clandestine removal was required to be established by the Revenue by producing satisfactory or positive evidence and it cannot be based on assumptions and presumptions.

11. As pointed out earlier, there was no such material with the Original Authority, when the show cause notice dated 20.6.2007 was issued. The well considered order passed by the Commissioner (Appeals) stood reversed by the Tribunal, which, in our considered view, by a cryptic order, without discussing the facts and circumstances of the case, had not properly appreciated as to what was the allegation against the assessee. We find that the Tribunal reversed the order of the First Appellate Authority based on a presumption that if there was a shortage, it would amount to a case of clandestine removal. We do not subscribe to the view taken by the Tribunal.

12. Mr.A.P.Srinivas, learned Senior Standing Counsel for the Revenue, while placing reliance on the decision of the Hon'ble Supreme Court in the case of CCE Vs. Maruti Suzuki India Ltd. [reported in (2015) 319 ELT 549], has submitted that the issue as to whether there is any shortage or not, is purely a question of fact and is based on the finding of fact recorded in such cases and more particularly in the case of Maruti Suzuki India

Ltd., the Hon'ble Supreme Court held that the finding of fact recorded by the Tribunal cannot be interfered with. Therefore, it is his submission that Courts should not interfere with the findings recorded by the Tribunal.

13. As pointed out earlier, the Tribunal has not recorded any finding of fact. In fact, it has not even given proper reasons as to why the order of the Commissioner (Appeals) requires to be reversed, when the same is a very reasoned order. The Tribunal proceeded merely on assumptions and presumptions and ignored the basic requirement of clinching material to prove the clandestine removal. In the instant case, there is not even enough material to presume the clandestine removal. Thus, the finding of the Tribunal is perverse. Hence, this Court is fully justified in interfering with the impugned order.

14. For the above reasons, the civil miscellaneous appeal is allowed, the impugned order is set aside and substantial question of law Nos.1 and 2 are answered in favour of the assessee and against the Revenue. In the light of the above decision, there would be no necessity for us to answer the other substantial questions of law namely substantial question of law Nos.3 to 6 and those issues are left open. No costs. Consequently, the connected MP is closed.

Sd/-

Assistant Registrar(CS V)

//True Copy//

Sub Assistant Registrar

RS

To

1.The Customs, Excise and Service Tax Appellate Tribunal, South Zonal Bench, No.26, Haddows Road, Chennai-6.

2.The Commissioner of Central Excise (Appeals), 26/1, Mahatma Gandhi Road, Chennai-34.

3.The Joint Commissioner of Central Excise, office of the Central Excise

Chennai IV Commissionerate, Chennai-35.

+lcc to Mr.A.P.Srinivas, Advocate SR.NO.58289

+lcc to M/s.Joseph Prabhakar, Advocate SR.NO.57964

MP(CO)

sm:20.9.2018

CMA.No.3112 of 2010
and MP.No.1 of 2010