IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 21.08.2018

CORAM :

THE HONOURABLE MR.JUSTICE T.S.SIVAGNANAM
and
THE HONOURABLE MRS.JUSTICE V.BHAVANI SUBBAROYAN

Civil Miscellaneous Appeal No.2922 of 2012

M/s.Nivaran Herbal (P) Ltd.,
No.23, (Basement), Dr.Ambedkar Road,
Kodambakkam,
Chennai-600 024. ... Appellant

Vs.

1. The Customs, Excise and Service Tax Appellate Tribunal,
Sashtri Bhavan Annexe,
Chennai.

2. The Commissioner of Central Excise,
Chennai II Commissionerate,
MHU Complex, Nandanam,
No.692, Anna Salai,
Chennai-600 035. .. Respondents

* * *

Prayer : Civil Miscellaneous Appeal filed under Section 35 G of Central Excise Act against the Misc. Order No.130/2012 in E/ROM/2010 E/ROM/80/2010/ in E/598/2002, dated 02.02.2012 passed by the first respondent-Tribunal and further direct the first respondent-Tribunal to recall the order passed in Final Order No.517/2010, dated 04.05.2010 and hear the appeal E/598/2002 of the appellant afresh.

* * *

For Appellant : Mr.K.Jayachandran

For Respondents : Mr.T.L.Thirumalaisamy, Central Govt. Standing Counsel

J U D G M E N T

[Judgement of the Court was delivered by T.S.Sivagnanam, J.]

Heard Mr.K.Jayachandran, learned counsel for the appellant/ assessee and Mr.T.L.Thirumalaisamy, learned Central Government

Standing Counsel for the Revenue.

2. This appeal by the Assessee is directed against the order passed by the Customs, Excise and Service Tax Appellate Tribunal, South Zonal Bench, Chennai, ("the Tribunal") in Misc. Order No.130/2012 in E/ROM/2010 in E/598/2002, dated 02.02.2012 rejecting the application filed by the appellant for rectification of mistake in the order dated 04.05.2010.

3. The Tribunal, by the impugned order, has pointed out that the appellant/assessee is essentially seeking to review the order passed by the Tribunal dated 04.05.2010 and accordingly, dismissed the appeal.

4. This appeal has been admitted on the following substantial question of law :

> "Whether the Tribunal is right in rejecting the rectification application filed by the appellant establishing the legal infirmity that Rule 9B of Central Excise Rules can no longer be pressed into service after amendment to Rule 173-B of Central Excise Rules and show cause notice under Section 11-A of the Act is mandatory and the adjudication order without issue of a notice, is a patent error on the fact of it ?"

5. Learned counsel for the appellant/assessee vehemently contended that the points, which were canvassed by the appellant/assessee from the stage of appeal, were not taken into consideration, in the sense that there is no provision in Rule 173B to approve 173B declaration provisionally and that the Department should have issued Show Cause Notice (SCN) for the entire disputed period as provided in Rule 173B. In this regard, reliance was placed on a letter issued by the Directorate of Drugs Control, Madras, dated 13.06.1995.

6. Firstly, before we consider as to whether the application seeking for rectification of mistake or not, we are required to consider as to whether such an application was maintainable before the Tribunal. After going through the facts of the case and upon hearing the learned counsels, our answer to the said question is in the negative, that is, against the appellant/assessee and in favour of the Revenue. This is so because there should be two appellants before the Tribunal ; one of whom is the appellant before us and the other is M/s.Velvette

International Pharma Products Ltd.,. Both are stated to manufacture an Herbal Ayurvedic Cough Syrup. The Tribunal by the common order dated 04.05.2010 rejected the plea raised by both the Assessees. However, for the reasons best known, the Assessee before us did not file any appeal against the said order. M/s.Velvette International Pharma Products Ltd., preferred an appeal in C.M.A.No.2759 of 2010. The said appeal was partly allowed by the judgment dated 19.10.2011.

7. The Hon'ble Division Bench in paragraph 11 of the order remanded one of the questions, namely, the first substantial question of law, which has been framed for consideration, in the said appeal for decision of the Tribunal. The said question is as hereunder :

> "(1) Whether in the facts and circumstances of the case, the date of inspection has any bearing in deciding the period of limitation to issue show cause notice in a case covered by the first proviso to Section 11-A of the Central Excise Act ?"

8. The Hon'ble Division Bench in paragraph 11 of its judgement dated 19.10.2011 gave the following reasons for remanding the above question for consideration by the Tribunal :

> "11. We have perused the memorandum of grounds of appeal before the CESTAT. The appellant had raised the said ground in paragraph 2(e) of the grounds of appeal. The CESTAT had considered and rejected the same solely on the ground of suppression. In our opinion, the question of limitation should be considered with reference to the above provisions, which the CESTAT had not gone into, and for that reason, the contention of Mr.K.Jayachandran must be accepted. Though we are not inclined to interfere with the impugned order in regard to the substantial questions of law 2 & 3, we find that the challenge in the appeal on the first substantial question of law must be accepted. Accordingly, the civil miscellaneous appeal is partly allowed and the matter is remitted back to the CESTAT only for consideration on the first substantial question of law. Consequently, M.P.No.1 of 2010 is closed. No costs."

9. The said Assessee, namely, M/s.Velvette International Pharma Products Ltd., has filed an appeal to the Supreme Court against the judgement dated 19.10.2011 in C.M.A.No.2759 of 2010. Thus, the order of remand has not fructified because of the

pendency of the appeal at the instant of the said Assessee. Interestingly, when the matter was pending before the Hon'ble Division Bench in C.M.A.No.2759 of 2010, the application for rectification at the instance of the appellant/assessee was pending before the Tribunal vide application dated 15.06.2010. It appears that it was not brought to the notice of the Hon'ble Division Bench, though the appeal was by the other Assessee. In our considered view, this should have been brought to the notice of the Hon'ble Division Bench, because it is the case of both the Assessees that they are manufacturing the same product. The Hon'ble Division Bench having passed the judgement dated 19.10.2011 on the above lines, the Tribunal would have absolutely no jurisdiction to entertain an application for rectification, because the correctness of the order passed by the Tribunal dated 04.05.2010 has been decided by the Hon'ble Division Bench, though at the instance of the other Assessee and the doctrine of Merger would apply. Thus, the Tribunal should have dismissed the application for rectification on the ground that it is not maintainable. In any event, we find that the grounds now canvassed in the rectification application require a long drawn reasoning, which is impermissible in a review application. Thus, we find no ground to interfere with the order passed by the Tribunal.

10. Accordingly, this civil miscellaneous appeal stands dismissed and the substantial question of law framed for consideration is answered against the appellant/assessee and in favour of the Revenue. No costs.

11. We make it clear that any observations contained in this judgement will not in any manner prejudice the rights of the appellant/assessee or the other assessee, namely, M/s.Velvette International Pharma Products Ltd.

Sd/-
Assistant Registrar(CS VII)

//True Copy//

Sub Assistant Registrar

To

1. The Registrar Customs, Excise & Service Tax Appellate Tribunal,
No:26, Sashtri Bhavan,
Annexe Building, Haddows Road,
Chennai - 600 006.

2. The Commissioner of Central Excise,
Chennai II Commissionerate,
MHU Complex, Nandanam,
No.692, Anna Salai,
Chennai-600 035.

+1cc to Mr.K.Jayachandran, Advocate sr.no.57108
+1cc to Mr.T.L.Thirumalaisamy, Advocate sr.no.57125

C.M.A.No.2922 of 2012

mr(co)
nr 12/09/2018