

IN THE HIGH COURT OF JUDICATURE AT MADRAS

CORAM:

THE HONOURABLE MR.JUSTICE T.S.SIVAGNANAM
and
THE HONOURABLE MR.JUSTICE N.SATHISH KUMAR

C.M.A. Nos.2688 to 2690 of 2017

Judgment reserved on 14.11.2018	Judgment pronounced on 29 .11.2018
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The Commissioner of Central Excise,
No.1, Foulkes Compound,
Anaimeadu,
Salem - 636 000

.. Appellant/Petitioner in all CMAs

-vs-

1.Customs Excise and Service Tax
Appellate Tribunal, Chennai.

2.Erode Annai Spinning Mills (P) Ltd.,
Perundurai R.S.,
Erode.

3.Sri.P.K.Duraiswamy, Managing Director,
Erode Annai Spinning Mills (P) Ltd.,
Perundurai R.S.,
Erode.

4.Sri.M.K.Kailasam,
M/s.Sri Amman Traders,
155, Karumandapalayam,
Melayampalayam Post,
Erode District.

.. Respondents/Applicants in all CMAs

COMMON PRAYER: Tax Case Appeal filed under Section 35G of the Central Excise Act, 1944 against the Final Orders in 213-215 of 2017, dated 05.03.2007, passed in the Appeal Nos.773, 774, 775/05, by the first respondent to be set aside.

For Appellant
in all C.M.As : Mr.V.Sundareswaran

For Respondent
in all C.M.As : Mr.Raghvan Ramabadran for
M/s.Lakshmikumaran & Sridharan

COMMON JUDGMENT

T.S.Sivagnanam, J.

These Appeals have been filed by the Revenue under Section 35G of the Central Excise Act, 1944, ('Act' for brevity), challenging the Final Order passed by the Customs Excise and Service Tax Appellate Tribunal, South Zonal Bench, Chennai (Tribunal) in Final Order No.213 to 215 of 2007, dated 13.03.2007.

2. In these appeals following questions of law have been raised for consideration.

a) Whether the Tribunal is right in holding that in any case the impugned goods can be procured duty free by exporters in terms of Notification No.47/94-CE(NT), dated 22.09.04 and 43/2001 CE from the defendant notwithstanding the fact that the assessee (2nd respondent) had not followed the procedure laid down for procurement of yarn duty free in terms of the said Notification and also in the light of the fact that eventually such exporters are barred from availing 'duty drawback' on their exports in terms of Rule 3 of Customs and Central Excise Duties Drawback Rules 1995, which was not appreciated by the Tribunal?

b) Whether Tribunal was correct in holding that there was no motive behind the fraud alleged that they cleared cheese yarn in the guise of hank yarn as hank yarn attracts nil rate of excise duty and lesser rate of sales tax (2%) as against yarn in any other form, which attracts excise duty of 9.2% (8% BED plus 15% on BED as AED) and 4% sales tax.

c) Whether Tribunal was correct in holding that the department has failed to prove the charge against the defendant (2nd respondent, the assessee) that they had cleared cheese yarn in the guise of hank yarn when majority of the buyers have admitted in their statements recorded under Section 14 of the CEA, 1944, that they were manufacturing terry towels out of the impugned goods in the power looms, which in any case cannot use hank yarn and no appreciable evidence was brought on record by the defendant before Tribunal that the buyers have deposed to have converted hank yarn into cheese yarns during the cross examination?

d) Whether Tribunal was correct in holding that the available (material) evidences should contain all the receipts in chronological order and not couple of cases each randomly for a number of years in the light of the fact that the Tribunal has failed to appreciate the evidences on record in the form of 'in-passes', which were having serial numbers and relevant to the case, so are the sizing records maintained by Muthu Industries, which establish that these records were being maintained regularly and chronologically, further the Tribunal has failed to take note of the fact that a sizing unit is incapable of using hank yarn?

3. The facts which are necessary for the disposal of the appeals could be succinctly culled out as hereunder. The assessee is the manufacturer of cotton yarn falling under Chapter 52 of the Central Excise Tariff Act, 1985, (for brevity 'Tariff Act'). On 19.02.2003 and 10.07.2003, the officers of the Central Excise Investigation visited two companies at Sankarankoil, which are engaged in the manufacture of terry towels. During the course of such visit, statements were obtained and certain documents relating to transaction with the assessee were recovered. According to the department, the documents obtained from the said terry towels manufacturers and sizing unit situated at Sankarankoil indicated that those units had received 10's cotton yarn on cheese from the assessee, which were described as plain reel hank yarn in the invoices raised by the assessee. Statements of Managing Directors of terry towels manufacturing unit and sizing unit were obtained, apart from documents, which were recovered. On the basis of the evidence of statements and documents gathered, the officers of the Central Excise Investigation visited the assessee's unit at Perundurai and its registered office on 17.07.2003. Statement was recorded from the Managing Director of the assessee and certain records were seized under mahazar. Statement was also recorded from the Accountant of the assessee and other persons connected with the assessee. Thus, the department was of the view that the assessee removed cotton yarn on cheese in the guise of hank yarn with an intent to evade the payment of excise duty and clandestinely cleared the same. Further, the assessee intentionally destroyed the evidences of manufacture of sales of cheese yarn, once the yarn reached the destination and raised the invoices for the said supply of hank yarn, as there were exempted from the Excise duty at the relevant time. Accordingly, a show cause notice was issued calling upon the assessee to explain as to why

(i) Central Excise duty amounting Rs.71,08,503/- (BED) and Rs.10,66,276/-(AED) totalling Rs.81,74,779/- (Eighty One Lakhs Seventy Four Thousand and Seven Hundred and Seventy Nine Only) involved on the cotton yarn cleared, for the period from 01.02.1999 to 28.02.2002, in violation of Central Excise Rules should not be demanded from them under sub-section (1) of Section 11A of the Central Excise Act, 1944;

(ii) Penalty equivalent to the amount of duty mentioned above should not be imposed on them under Section 11AC of the Central Excise Act, 1944;

(iii) Penalty should not be imposed on them under Rules 9(2), 52A and 173Q of the Central Excise Rules, 1944 (erstwhile) and Rule 25 of Central Excise (No:2) Rules, 2001 (erstwhile);

(iv) the interest liable on the duty being demanded as at(i), should not be demanded from them under Section 11AB of the Central Excise Act, 1944;

(v) the total duty of Rs.3,04,750/-. Already paid by them vide TR-6 challan No.6/03-04, dated 27.08.2003, for Rs.2,01,250/- and No.11/03-04, dated 02.12.2003 for Rs.1,03,500/-, should not be adjusted against the duty liability detailed in sub para (i) above.

4. The assessee submitted their reply on 27.01.2005, stating that they manufacture cone yarn, cheese yarn and hank yarn. The other allegations made against them were also denied. The Commissioner of Central Excise, Salem, Adjudicating Authority adjudicated the show cause notice after hearing the counsel for the assessee and passed order-in-original, dated 20.06.2005, confirming the demand of Rs.71,70,347/- under Section 11A(2) of the Act and appropriated the amount already paid and demanded interest under Section 11AB, imposed equivalent penalty under Section 11AC and also personal penalty on the Managing Director and Director. The assessee preferred appeals against such order before the Tribunal. The Tribunal, after hearing the parties, in paragraph 16 of the impugned order pointed out that the assessee assailed the order of the adjudication on the ground that two important statements which the Adjudicating Authority had heavily relied upon in support of his findings have been made by witnesses, who were not produced for cross examination as requested by the assessee and when this issue was pointed out to the Adjudicating Authority, the same was brushed aside.

5. After noting such a contention raised by the assessee, the Tribunal has taken note of the finding recorded by the Adjudicating Authority and held that the department's case is built on various statements obtained from buyers of yarn from the assessee and the major buyers have stated that they had converted the yarn bought into terry towels and exported the

same. The Tribunal pointed out that in such a situation, the buyers could have legitimately procured the yarn on cheese without paying duty in terms of Notification 47/94 (NT) CE and later Notification No.43/2001 for export consumption or they could have paid duty, if they cleared cheese yarn and claimed refund of the duty credit. The Tribunal observed that non-fulfilling the procedural conditions was not fatal to their claim for export relief and do not find any motive behind the fraud alleged against the assessee. Further, the Tribunal held that the assessee had no facility to manufacture cone yarn, as they have open ended machines by which cheese yarn alone could be manufactured. After taking note of the details given in the adjudicating order, the Tribunal opined that the evidence is too weak and insufficient to sustain the charge that clearances made by the assessee to several customers during the material period and this is so in the absence of the documentary evidence to substantiate such an allegation. Further, the Tribunal observed that retractions by the buyers of hank yarn from the assessee during the hearing will be prejudicial to the case of the revenue and once, the Tribunal accepts the claim of the assessee that they have not cleared cheese yarn in the guise of hank yarn, duty liability on the clearances cannot be made. Further, on the registers maintained by the assessee, the Tribunal observed that the records relied on by the Adjudicating Authority had not been maintained in the normal course of business and was unreliable. Thus, the Tribunal concluded by saying that the Commissioner had glossed over several significant controversial aspects and the order is not based on acceptable evidence. Accordingly, the appeals stood allowed. Aggrieved by the same, the Revenue has preferred these Appeals raising the questions of law as mentioned above.

6. We have heard Mr.V.Sundareswaran, learned counsel appearing for the Appellant/Revenue and Mr.Raghvan Ramabadran, learned counsel for M/s.Lakshmikumaran & Sridharan Associates learned counsel for the assessee.

7. The allegation against the assessee is one of clandestine removal by way of removing dutiable product namely cheese/cone yarn in the guise of exempted product-hank yarn to their buyers. The Tribunal faulted the Commissioner for confirming the duty liability on the ground that there was no acceptable evidence available with him and the assessee cannot be charged with the offence of clandestine removal of goods without payment of duty based upon confession statement, which were retracted. Further, the Tribunal opined that the registers were not properly maintained and they were unreliable and there cannot be any demand for duty, based on those documents. The burden of proof in a case of clandestine removal is undoubtedly on the department. It cannot be denied that clandestine removal is often done in a surreptitious and secret manner and will never

be an open transaction. At times, in such cases of clandestine removal, clinching documents will be available. Thus, if the department is able to prima facie establish a case of clandestine removal, violation of excise procedure, the burden shifts on the assessee to prove that he is innocent. Thus, the standard and degree of proof which is required in other cases may not be the same as that of the case, where the allegation is one of clandestine removal. Similar view was taken in the case of M/s.Lawn Textile Mills Pvt., limited vs. CESTAT and others in CMA No.1011 of 2017, dated 04.09.2018.

8. Mr.V.Sundareswaran, learned counsel appearing for the Revenue contended that the order of the Tribunal is perverse inasmuch as it failed to consider the investigation done and the statements recorded and the documents recovered from several buyers, who confirmed that the yarn received was cone/cheese and not hank yarn. The Tribunal failed to appreciate the modus operandi adopted by the assessee by removing dutiable products in the guise of exempted products, which the Tribunal was not justified in doing. Further, it is submitted that even for exemption to be availed, procedure set out under the relevant notification for availment of exemption has to be followed, which was not followed in the case of assessee. Further, the buyers from the assessee have confirmed that they received only cone yarn and not hank yarn. The discrepancies pointed out by the Tribunal are minor in nature and the same could not have been a reason to exonerate the assessee. Relying upon Section 9D(1)(a) of the Act, the statement made and signed before the Central Excise/Customs Officers is admissible in evidence and if a statement had been recorded under Section 14 of the Act, it shall be allowed in evidence. Further, it is submitted that non-availability of certain witnesses for cross examination is not fatal to the proceedings. Further, it is submitted that the Tribunal ignored the universal truth that only cheese yarn can be manufactured out of open ended machines and that power looms cannot use the hank yarn in the manufacture of terry towel. Further, the voluminous records which were recovered was completely brushed aside by the Tribunal. Relying upon the decision in the case of CC vs. Bhoormull [1983 13 ELT 1546 (SC)], it is submitted that the department is not required to prove its case with mathematical precision, but what is required is the establishment of such a degree of probability that the prudent man on its basis believe in the existence of the facts in issue. On the above grounds, the learned counsel prayed for interfering with the order passed by the Tribunal and answering the question in favour of the Revenue.

9. Mr.Raghvan Ramabadran, learned counsel's first contention is that the appeal before this Court under Section 35G is not maintainable, since it pertains to the claim for benefit of a notification, which relates to a rate of duty and this Court is

barred from deciding it under Section 35G of the Act. In this regard, the learned counsel referred to the decision in the case of Naveen Chemicals Mfg., Trading Co., Ltd., vs. CC, [1993 (68) ELT 3 (SC)] and SRF Limited vs. CESTAT [2017 (350) ELT 33 (Mad)]. The second question canvassed before us is that the Court exercising power under Section 35G of the Act cannot decide questions of fact and no question of law arises for consideration in this appeal, as the matter revolves entirely on the factual matrix, much of which has been disputed before the Tribunal. In this regard, the learned counsel placed reliance on the decision of the Hon'ble Supreme Court in the case of Mohtesham Mohd., Ismail vs. Spl., Director [2007 (220) ELT 3 (SC)]; Paras Ship Breakers Ltd., vs. CCE [2007 (217) ELT 321 (SC)]; and decision of this Court in the case of Caress Industries (P) Ltd., vs. CESTAT [2015 (322) ELT 828(Mad)]. The next submission is that this Court will not interfere in the order passed by the Tribunal even if a different view is possible on the same material, unless the order is perverse. In support of his contention, the learned counsel placed reliance on the decision of the Gujarat High Court in the case of CCE vs. Motabhai Iron & Steel Industries [2015 (316) ELT 374 (Guj)] and CCE vs. Shree Krishna Industries [2017 (345) ELT 629 (Guj)]. Finally it is submitted that the statements of persons not made available for cross examination cannot be relied upon as evidence. In support of such contention, reliance was placed on the decision of the Single Bench in Karan Traders vs. JCCE [2016 (339) ELT 249 (Mad)] and CCE vs. Gujarat Cypromet Ltd., [2017 (345) ELT 520 (Guj)].

10. Firstly, we take up the issue as regards the jurisdiction of this Court to examine the correctness of the order passed by the Tribunal in exercise of the powers conferred under Section 35G of the Act.

11. There is no requirement to refer to any decisions on the point, as if the assessee claims a benefit of a notification and the matter relates to a rate of duty, this Court will be barred from deciding the same, while exercising appellate powers under Section 35G of the Act. What is required to be seen in the instant case is whether the case pertains to a rate of duty touching upon the fact as to whether the assessee is entitled to claim the benefit of the exemption notification or the assessee's buyers would be entitled to avail the exemption under the relevant notifications. The facts of the case clearly show that proper records were not maintained by the assessee. This has been recorded by the Tribunal in paragraph 25 of the impugned order. However, the Tribunal went perverse in its approach by holding that the records having not been maintained properly, cannot be relied on and has to be treated as unreliable. This findings of the Tribunal is thoroughly perverse, since the provisions of the Central Excise Act

mandates the assessee to maintain records, this is more so, if the assessee claims a benefit of an exemption. The onus is on the assessee to establish that they are entitled for the benefit of an exemption notification. There can be no liberal interpretation on this issue and strict compliance is required. Thus, if the Tribunal found that no records have been maintained, it should have drawn adverse inference against the assessee and confirmed the order of the Adjudicating Authority. Thus perversity is writ large on the face of the order passed by the Tribunal.

12. The assessee's contention is that the Court cannot adjudicate on the rate of duty of the product or whether the benefit of a notification relating to a rate of duty could be applicable. We need not travel this far in the instant case, since to avail the benefit of any exemption notification, strict procedures have been laid down and without adhering to the procedures, no assessee registered under the provisions of the Act, is entitled to any relief. Therefore, we hold that the case on hand does not relate to the applicability of a notification pertaining to rate of duty. Therefore, the decisions relied on by the learned counsel for the assessee in the case of Naveen Chemicals Mfg., Trading Co., Ltd., (supra) and SRF Limited (supra) cannot be applicable to the facts of the present case. The assessee's contention is that this Court cannot decide the questions of fact, it cannot interfere with the order of the Tribunal, even if it comes to a conclusion that there is a different view possible. However, the assessee does not dispute the legal position that in cases of perversity, the Court has power to interfere. In fact, the decisions cited by the learned counsel for the assessee more particularly, the decisions of the Gujarat High Court in Motabhai Iron & Steel Industries (supra) and Shree Krishna Industries (supra) are to the said effect. However, in these cases, the Court declined to interfere on the ground that there was no perversity in the order of the Tribunal. We are not deciding a question of fact. We are deciding the correctness of the order of the Tribunal, the decision making process and the conclusion arrived at by the Tribunal to upset the order passed by the Adjudicating Authority. We find that the assessment of the material by the Tribunal was extremely superficial, without addressing the epicentre of the issue. The bulk of the documents, which were recovered, voluntary statements given by the Managing Director and the Director of the assessee was brushed aside. The statements recorded from the buyers and the documents recovered which wholly corroborate the statements cannot be brushed aside, as done by the Tribunal. Every case, where opportunity of cross examination was not allowed, will not vitiate the entire proceedings. The Adjudicating Authority was not conducting a trial of a criminal case, but was adjudicating a show cause notice as to whether there has been clandestine removal of

excisable goods without payment of excise duty. In such cases, preponderance of probabilities would be sufficient. On examining the extensive factual details set out in the adjudicating order dated 20.06.2005, we have no hesitation to hold that the initial burden of proof has been discharged by the department and thus, the burden of proof shifts to the assessee to establish by independent evidence that there was no clandestine removal and the assessee cannot escape from the rigour of law by picking loopholes in the evidence placed by the department. It would be too far-fetched for the assessee to contend that even assuming that there was removal of excisable goods, yet the goods having been used for manufacture of product for export, benefit of exemption notification would be available. The assessee appears to have lost sight of the fact that any exemption from levy of duty is not automatic. Exemptions come along with conditions. Exemptions are either product specific or purpose specific or on other parameters. Exemptions can be conditional or absolute, yet it is an exemption. Therefore, strict interpretation is to be given and a person, who is charged of clandestine removal with sufficient evidence has to establish his innocence, having failed to discharge the burden cast on them and cannot be heard to say that despite all the charges against them, they are still entitled for exemption.

13. As pointed out by us, perversity is manifest in the order passed by the Tribunal. The materials such as gate passes etc., which were recovered during the search and analysed by the Adjudicating Authority have been totally brushed aside. No proof of prejudice had been shown by the assessee for not making available for cross examination of two of the persons, who were the buyers from the assessee, who had candidly stated about the clandestine transaction. There is also an allegation of destruction of records at the assessee's end after the products were delivered to the buyers. Thus, in our considered view, there was sufficient material to establish that the assessee was guilty of clandestine removal and consequently, is liable for payment of duty, penalty and interest. Thus, we find that the Tribunal wholly erred in reversing the order passed by the Commissioner and as we are satisfied that the order passed by the Tribunal is perverse and we are inclined to interfere with the order.

14. The assessee laid a claim that the goods, which were allegedly clandestinely removed can be procured duty free by exporters in terms of Notification 47/94-CE(NT), dated 22.09.2004, and Notification No.43/2001-CE. This contention is to be outrightly rejected, since the assessee who had failed to follow the procedure for procurement of yarn duty free in terms of the aforesaid notification is not entitled for any relief. Consequently, the purchases of such "tainted material" are

prohibited from availing any duty draw back on their exports. This vital issue has not been considered by the Tribunal.

15. The Adjudicating Authority is right in his conclusion that there are good and sufficient reasons as to why the assessee had effected clandestine clearances under the guise of clearing hank yarn. It attracts NIL rate of duty. Majority of the buyers of yarn from the assessee have given statements under Section 14 of the Act stating that they are manufacturing terry towels from the goods purchased from the assessee in their power looms, which goes to show that they cannot use hank yarn and this evidence was also brushed aside by the Tribunal. Equally, the reasoning given by the Tribunal for ignoring and discrediting the evidence in the form in-passes is utterly perverse. Further, the Tribunal did not take note of the submission of the department that the sizing unit is incapable of using hank yarn. These are all sufficient reasons to hold that the impugned order passed by the Tribunal is perverse.

16. In the result, the Appeals filed by the Revenue are allowed and the questions framed for consideration are answered in favour of the Revenue and against the assessee and the order passed by the Adjudicating Authority, dated 20.06.2005 is restored. No costs.

s/d-
Assistant Registrar (CS VIII)

True Copy

Sub-Assistant Registrar

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To

1. Customs Excise and Service Tax
Appellate Tribunal, Chennai.

2. Customs Excise and Service Tax Appellate Tribunal, South Zonal
Bench, Chennai (Tribunal)

+1 CC to Mr. V. Sundareswaran, Advocate sr 81632.
+1 CC to Mrs. Lakshmikumaran Advocate sr 81631.

C.M.A. Nos. 2688 to 2690 of 2017

EV (CO)
SP (29/01/2019)