IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 07.03.2019

CORAM

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

Civil Miscellaneous Appeal No.607 of 2011
and
Miscellaneous Petition No.1 of 2011

M/s.Anghinghu Nice Tobacco (Firm),
No.19, Railway Station Road,
Dindigul-624 001. .. Appellant/Appellant

-vs-

1.Customs, Excise and Service Tax Appellate Tribunal
Shastri Bhavan Annexe, 1st Floor,
No.26, Haddows Road, Chennai-600 006.

2.The Commissioner of Central Excise (Appeals),
Central Revenue Building,
Madurai-625 002.

3.The Assistant Commissioner of Central Excise,
Dindigul I Division,
Dindigul-624 001. .. Respondents/Respondents

Appeal under Section 35G of the Central Excise Act, 1944 to set aside the Final Order No.894/2010, dated 13.08.2010 on the file of the Customs, Excise and Service Tax Appellate Tribunal, South Zonal Bench, Chennai.

For Appellant : Mr.S.R.Sankaraeshwaraa
For RR2 and 3 : Mr.T.Pramodkumar Chopda,
Senior Panel Counsel

JUDGMENT
(Delivered by T.S.Sivagnanam, J.)

This appeal, has been filed by the appellant/assessee under Section 35G of the Central Excise Act, 1944 (hereinafter referred to as “the Act”), challenging the order of the Customs, Excise and Service Tax Appellate Tribunal, South Zonal Bench, Chennai (for brevity "the Tribunal"), dated 13.08.2010, in Final Order No.894/2010.

2.The above appeal was admitted, on 01.04.2011, on the following substantial questions of law:-

> (ii) Whether the extended period applied against the appellant Firm is valid when the Tribunal has not confirmed the demand under proviso to Section 11A(1) has not been substantiated, when more so the Hon'ble Supreme Court in Commissioner of Central Excise, Chandigarh Vs. Punjab Laminates Pvt. Ltd., 2006 (202) ELT 578 (S.C.) has held that Proviso to Section 11A(1) of Central Excise Act, 1944, is trite, provides for an exception?
>
> (ii) Whether the order is not enforceable in view of Section 11(2A)(a) of the Central Excise Act, 1944, when case was registered on 08.06.2001 and the SCN was issued 20.09.2002 and the Order-in-Original was passed 30.06.2005 i.e., after a period of about 2 years 9 months since the SCN was serve?"

3.Mr.S.R.Sankaraeshwaraa, learned counsel for the appellant submitted that though this Court has admitted the appeal only on two substantial questions of law, the Court may consider substantial question of law no.D, which is as follows:-

> "D. Whether the statements obtained during investigation and listed in relied upon can be ignored if they are not comfortable to proceedings to the revenue when the statements under Section 14 of the Central Excise Act, 1944 before the Superintendent are admissible as evidence in the proceedings and is not against the principles laid down in Hon'ble High Court of Calcultta in Manidra Chandra Dey Vs. CEGAT 1992 (58) ELT 192 (Cal) "Confessional statement even if found admissible, should be treated as light weight document needing independent corroboration by other than the confessional statement of the accused is relevant"?"

4.Considering the facts and circumstances of the case, we entertain this appeal on the above three substantial questions of law.

5.The Directorate General of Central Excise Intelligence, South Zonal Unit, Chennai (DGCEI) issued a show cause notice dated 12.09.2002, calling upon the assessee to show cause as to why an amount of Rs.1,40,093/- towards non payment of duty on excisable goods, viz., Branded Chewing Tobacco (Super Deluxe/Deluxe) should not be demanded under proviso to Section 11A(1) of the Act for the period from 01.04.1999 to 2001-02; why penalty should not be imposed under Section 11AC of the Act; why penalty should not be imposed under Rules 52A, 173Q and 210 of the Act; and why interest at the appropriate rate should not be demanded under Section 11AB of the Act.

6.The sum and substance of the allegation against the assessee is with regard to the clandestine removal of chewing tobacco. The officers of DGCEI searched the business premises of the assessee on 08.06.2001 and records were recovered including registers which contain details of date-wise production, clearance of chewing tobacco, customer-wise details, day books, ledgers, invoices etc. Statements were obtained from two of the employees by name Mr.M.Sundararajan, Manager; and Mr.M.Chandramohan, Accountant. Both appeared to have admitted that there has been clandestine removal. Statement was also obtained from one Mr.M.V.M.Veeramuthu Pillai, Managing Partner of the firm, who appears to have stated that whatever they manufactured and cleared with or without accounting, were under the brand of 'Super Deluxe/Deluxe'. Based on this, show cause notice was issued. The assessee filed reply and relied upon the retraction given by both the employees as well as what was said by the Managing Partner. However, the Assessing Officer did not agree with the stand taken, proceeded to consider the case based on the statutory registers which have been maintained and confirmed the proposal in the show cause notice and levied penalty equivalent to the amount of duty as well as interest on the said amount, and personal penalty on the two employees, viz., Mr.M.Sundararajan, and Mr.M.Chandramohan.

7.On appeal before the Commissioner of Central Excise (Appeals), the first appellate authority by an elaborate order, after taking note of the statements, retractions, registers etc., confirmed the demand of duty, but however, with regard to the penalty, the first appellate authority took note of the decision of the Hon'ble Supreme Court in the case of State of Madhya Pradesh vs. Bharat Heavy Electricals 1998 (99) ELT 33 (SC), wherein it was observed that the statute may prescribe maximum penalty but, the Assessing Officer has to exercise discretion in the matter. Thus, by exercising discretion, the penalty imposed on the firm was reduced to Rs.15,000/- and the penalty on the employees was reduced to Rs.2,500/-.

8.Aggrieved by the same, the appellant and the employees filed appeals before the Tribunal. The Tribunal after taking note of the factual position, re-appreciated the same and found that the retraction was clearly an attempt to wriggle out of the statement given earlier and this only reveals loyalty of the employees towards their bosses. Therefore, the Tribunal confirmed the finding of the first appellate authority, with regard to the demand of duty. However, the Tribunal restored the penalty as imposed by the Assessing Officer, though the first appellate authority had granted substantial relief to the firm.

9.So far as the demand of duty is concerned, the learned counsel for the assessee would vehemently contend that the retraction which was done not only by the employees as well as the Managing Partner was not taken into consideration in a proper manner and if the same had been done, the entire demand would have been set aside.

10.We have carefully perused the order passed by the first appellate authority and we find the order to be a well reasoned order and after taking note of the factual position, the order has been passed. In fact, the order has been provided in a unique manner by which, the relevant statements, copies of registers etc., have been photocopied in the order itself so as to show continuity. Exercising power under Section 35G of the Act, the Court cannot sit as a second appellate authority over the factual findings recorded by the first appellate authority and the Tribunal. Therefore, we are not inclined to interfere with the findings rendered by the Tribunal with regard to the demand of duty.

11.So far as the imposition of penalty is concerned, the firm and the employees were before the Tribunal challenging the levy of penalty on them. Admittedly, the Revenue did not prefer any appeal against the order passed by the first appellate authority reducing the penalty from that of what was imposed by the Assessing Officer. In such circumstances, in an appeal filed by the assessee, they cannot challenge the penalty and the Tribunal lacked jurisdiction to restore the penalty imposed by the Assessing Officer. Therefore, to that extent, the order passed by the Tribunal calls for interference.

12.The appellant/firm is before us because, the Tribunal exceeded its jurisdiction and restored the penalty imposed on the employees. Admittedly, the assessee is not carrying on business and much of the business has now been either banned or regulated by various Acts enacted by the Central Government and State Government.

13.The learned counsel for the appellant would plead that the appellant/assessee is in a great financial trouble.

14.We have gone through the order passed by the first appellate authority wherein, statement of the family members of the employees and others have been recorded from which, we find that the particular trade in which, the assessee was engaged, viz., manufacture of chewing tobacco is a cottage industry in and around the said area. The statement of one of the employee's wife, viz., Mr.M.Chandramohan who appears to be a non literacy woman states that she did not know wherefrom her husband brings the tobacco and she only put them into the plastic pouches and seal them with a candle. Therefore, certain leverage can be granted to the assessee, considering the nature of trade and the trading practices which have been violated. Therefore, this Court is of the view that the penalty imposed on the firm has to be vacated in toto.

15.For the above reasons, the appeal filed by the assessee is partly allowed and the penalty imposed on the assessee-firm is deleted. However, the demand of duty stands confirmed. No costs. Consequently, connected miscellaneous petition is closed.

Sd/-

Assistant Registrar (CS-IV)

//True Copy//

Sub Assistant Registrar

abr

To

1.Customs, Excise and Service Tax Appellate Tribunal
Shastri Bhavan Annexe, 1st Floor,
No.26, Haddows Road, Chennai-600 006.

2.The Commissioner of Central Excise (Appeals),
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3.The Assistant Commissioner of Central Excise,
Dindigul I Division,
Dindigul-624 001.

+1cc to Mr.R.Anish Kumar, Advocate, S.R.No. 21890
+1cc to Mr.T.Pramod Kumar, Advocate, S.R.No.21668

C.M.A.No.607 of 2011

PVS(CO)
GN(21/05/2019)