IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 20.11.2019

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THE HONOURABLE DR. JUSTICE ANITA SUMANTH

Writ Petition No.2439 of 2007
and M.P. No.1 of 2007

I. Lakshmanan ...Petitioner

Vs

1. The Deputy Commissioner of Customs,
Group VI, Chennai Customs House,
Chennai - 600 001.

2. The Assistant Commissioner of Customs,
Tax Recovery Officer, Chennai Customs house,
Chennai - 600 001.

... Respondents

Prayer: PETITION filed under Article 226 of The Constitution of India praying for the issuance of Writ of Certiorarified Mandamus calling for the records comprised in file number F.No.S.Misc.33/2001-Gr6 of the first respondent herein and to quash the first respondent's order No.17 of 2002 dated 31.12.01.

For Petitioner : Mr.N.Viswanathan

For Respondents : Mr.Pramod Kumar Chopda,
Senior Standing Counsel.

ORDER

The petitioner challenges Order-in-original dated 31.12.2001 raising a demand on a difference of opinion between the petitioner and the respondent on the classification of 'Pocket Bricks Game' (in short 'game').

2. According to the petitioner, the game is liable to be classified in terms of heading CTH 9503.20, whereas, according to the respondent, it is liable to be classified as 'hand held Brick Video Game', under CTH 9504.30 and CET 9504.90. In adopting this view the Assessing Authority follows the order of Commissioner (Appeals), Chennai in the case of Sujatha Enterprises where vide order-in-Appeal No.C3/510/0/2001 (Sea), the authorities had upheld the classification of the very same type of goods under the heading CTH 9504.30 and CET 9504.90, at the rate of 16%.

3. The sequence of relevant dates and events is as follows:

(i) The Petitioner filed a Bill of Entry bearing No.317740 dated 10.03.2001 for clearance of 45,000 pieces of the game in various models.

(ii) Classification was sought under CTH 9503.20, and CET 9503.00

(iii) An order-in-original was passed by the Assessing Authority classifying the game as 'hand held Brick Video Games', classifiable under CET 9504.90 and confirming the demands of differential duty. Recovery was sought to be effected in terms of Section 28(2) of the Customs Act, 1962, (in short 'Act').

(iv) The petitioner filed an appeal before the first appellate authority, albeit belatedly with a delay of 1000 days and the appeal came to be rejected on 18.02.2005 on the ground that the first appellate authority had the power to condone delay only upto 30 days and thus, the appeal was time barred. Further appeal before the Customs, Central Excise and Service Tax Appellate Tribunal (in short 'CESTAT') was also dismissed confirming the order of the first appellate authority. Repeated attempts were made for recovery of the demand.

4. It transpires that in the meanwhile, the order of the Commissioner (Appeals) in the case of Sujatha Enterprises was carried in Appeal by the assessee before the CESTAT that, by order dated 16.07.2001 reversed the order of the Commissioner (Appeals). After a detailed discussion on the subject of Pocket Brick games and the relevant entries, the appeal of the assessee was allowed, and the stand of the assessee to the effect that the goods are classifiable under heading CTH 95.03, accepted.

5. This writ petition is now filed challenging order-in-original passed in 2001, on the ground that on merits, the very same issue has been held in favour of the assessee and the order of the CESTAT to such effect has been accepted by the Department.

6. Learned counsel for the petitioner urges that this being the law, it should be applicable across the Board and in rem and there cannot be a different interpretation in the case of the identical products in the hands of other assessees.

7. Mr.PramodKumar Chopda, learned Senior Standing Counsel would reiterate the enormous delay that had been occasioned at every stage in this proceeding pointing out that not only was the appeal to the Commissioner (Appeals) belated but the present Writ Petition filed in 2007, challenging order passed in 2001. He thus states that there is no merit in the Writ Petition and the same is liable to be dismissed.

8. Having heard both learned counsel, I am of the view that this writ petition deserves to be allowed. My reasons are as follows: Firstly, the fact that the issue on merits in regard to classification as hand held Brick Video Games has been confirmed by the Tribunal is admitted by the Revenue. In such a case there is some merit in the stand of the petitioner that the same rationale would and should apply in his case as well. This position does not change merely because the challenge to the assessment is belated and the assessment and consequent demand have attained finality. The Classification of the goods and the taxability thereof should be no different in the case of the petitioner and/or other similarly placed assessees.

9. A Division Bench of this Court in the case of Rayalseema Constructions V. The Deputy Commercial Tax Officer and others [(10 STC 345)] considered a challenge to recovery proceedings in a case where the assessment had become final and had not been carried further in Appeal. The issue in that case related to the taxability of works contract. The Division Bench states that pursuant to the framing of assessments in that assessees' case, the law had stood amended. In the case of Gannon Dunkerley (Madras) Ltd. V. The State of Madras, (15 STC 40) the Supreme Court had held that works contract did not involve any element of sale of materials per se and thus the levy of sales tax upon such transactions was invalid. The Division Bench was of the view that such law would apply uniformly to all similarly and identically placed assesses. Thus, notwithstanding that the assessments in that case had become final and though there were neither appeals filed or in some cases, appeals that had failed on one ground or the other, the Division Bench after a detailed exposition of law, expressed the view that the impugned recovery action would fail. The Bench noted that the objections raised by the petitioner therein, very similar to those before me, were fundamental and went to the root of the matter. The assessment was held to be without jurisdiction and framed in pursuance of a provision that had been found to be ultravires. A writ of mandamus was thus issued forbearing the respondents from collecting the amounts forming the subject matter of those writ petitions.

10. The aforesaid decision of the Division Bench came to be confirmed by a Bench comprising three Judges of the Supreme Court in the case of the Deputy Commercial Tax Officer Vs. Rayalseema Constructions (17 STC 505) wherein at Paragraph Nos. 5 and 6 the Bench holds as follows:

> '5.Referring to Article 265 of the Constitution, it is contended that it did not permit calling in question an assessment that had already become final. In State of Madras Gannon Dunkerley & Co. (Madras) Ltd., (1959) SCR 379, this Court held, agreeing with the Madras High Court, that the provision introduced by the Madras General Sales Tax (Amendment) Act, 1947 were ultra vires

the powers of the Provincial Legislature. After considering the relevant constitutional provisions, this Court came to the definit conclusion that the state Legislature had no competence to impose a tax on indivisible building contracts. There is therefore no doubt that the relevant provisions of the Madras General Sales Tax Act insofar as they deal with indivisible building contracts are ultra vires the powers of the State Legislature and therefore void. It follows that in the instant case, the Sales tax Authorities have acted outside the Act in making an assessment on the basis of the relevant part of the charging section which was declared to be ultra vires by this Court. In K.S.Venkataraman & Co. (P) Ltd. V. State of Madras, Civil Appeal 618/63 decided on18-10-65, this Court, by a majority, held that by reason of the fact that the relevant part of the charging section was held to be ultra-vires, Section 18A of the Act was not a bar for the maintainability of a suit claiming refund of the tax illegally collected.

6. Learned counsel for the appellant has however contended that the High Court was in error in issuing a writ of mandamus when the proper remedy of the respondent was to file a suit. It is no doubt true that when there is an alternative remedy, the High Court will not normally entertain an application under Article 226, but where, as in the instant case, the High Court has chosen to exercise its jurisdiction to grant relief to the respondent, this Court will not interfere with the jurisdiction exercise by the High Court'

11. Then again, the Full Bench of the Andhra Pradesh High Court in the case of Electronics Corporation India Ltd. V. Union of India (2018 (361) ELT 22) had also noted that notwithstanding that an order-in-original had not been carried in appeal or had been carried in appeal but dismissed on the ground that the same was not maintainable/barred by limitation, it did not foreclose a remedy sought for by the assessee in terms of Article 226 of the Constitution of India. The Court concluded that a petition under Article 226 of the Constitution of India may be preferred challenging the order passed by the original adjudicating authority in the following circumstances:

'(A.1) The authority has passed the order without jurisdiction and by assuming jurisdiction which there exist none, or

(A.2) Has exercised the power in excess of the jurisdiction and by overstepping or crossing the limits of jurisdiction, or

(A.3) Has acted in flagrant disregard to law or rules or procedure or acted in violation of

principles of natural justice where no procedure is specified.
(B) Resultantly, there is failure of justice or it has resulted into gross injustice.

We may also sum up by saying that the power is there even in aforesaid circumstances, but the exercise is discretionary which will be governed solely by the dictates of the judicial conscience enriched by judicial experience and practical wisdom of the judge.'

12. The aforesaid decision /judgments reveal the position that where a demand emanates from an order of assessment which is without authority, as in the present case where the issue on merits has been held in favour of the assessee and such decision accepted by the Department, judicial review is permissible subject to discretion exercised by the Court.

13. Having applied my mind to the facts and circumstances of the present case, I am of the view that this is an appropriate case for exercise of jurisdiction in terms of Article 226 of The Constitution of India. Thus, since the present case involves identical goods as in the case of Sujatha Enterprises, as stated by the original Authority even in the impugned order-in-original, no counter has been been filed despite the grant of several opportunities for the same, I proceed on the basis that there is identity as regards the goods in question and those dealt with by the CESTAT in the case of Sujatha Enterprises.

14. In the light of the discussion as aforesaid, this Writ Petition is allowed and the impugned order dated 31.12.2001 stands quashed. Connected Miscellaneous Petition is closed. No costs.

Sd/-
Assistant Registrar(CS)

//True Copy//

Sub Assistant Registrar

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To
1. The Deputy Commissioner of Customs,
Group VI, Chennai Customs House,Chennai - 600 001.

2. The Assistant Commissioner of Customs,
Tax Recovery Officer, Chennai Customs house,
Chennai - 600 001.

+1cc to Mr.N.Viswanathan , Advocate SR.No. 96295
+1cc to Mr.Mr.Pramod Kumar Chopda , Advocate SR.No. 96533

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A.SK(25/02/2020)