IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 06.12.2019

CORAM:

THE HONOURABLE DR.JUSTICE VINEET KOTHARI
AND
THE HONOURABLE MR.JUSTICE R.SURESH KUMAR

C.M.A.No.1034 of 2018

MOBIS INDIA LIMITED
G1 SIPCOT INDUASTRIAL PARK IRUNGATTUKOTAI
SRIPERUBUDUR TAMIL NADU -117.
... Appellant /Appellant

Vs

THE COMMISSIONER OF CENTRAL
EXCISE AND GST GST OUTER COMMISSIONERATE
NEWRY TOWERS ANNA NAGAR
CH-40 ... Respondent/Respondent

Appeal filed against the final order No.43011 of 2017 dated 6.11.2017 on the file of the Customs Excise and Service Tax Appellate Tribunal, South Zonal Bench, Chennai, which seeks to levy Tax and demand payment of penalty under Section 78 of the FA 1994, on the Appellant and thus allow the appeal.

For Appellant : Mr.K.Senguttuvan

For Respondent : Mr.A.P.Srinivas

J U D G M E N T

(made by DR.VINEET KOTHARI, J.)

This appeal is filed by the Assessee M/s.Mobis India Ltd., aggrieved by the order of the learned Customs, Excise and Service Tax Appellate Tribunal, dated 6.11.2017, whereby the learned Tribunal gave partial relief to the Assessee with regard to the applicability of the extended period of limitation under Section 11A(1) of the Central Excise Act, with the following observations:-

> 9. Viewed in this light, we find that the Department was very much aware of the assessment procedure followed by the Appellant for the disputed period. In fact,

the Department themselves have advised the Appellant vide their letter dated 12.6.2009 to adopt the value using CAS-4 costing method which is exactly what the Appellant did. Having given such direction to the Appellant, the Department cannot then make allegations of suppression or misstatement etc. and invoe extended period provided u/s 11A(1) of the Central Excise Act, 1944 to justify issue of the show cause notice on 29.8.2013 that is almost more than four years after the aforementioned letter of the Department. We therefore hold that the differential demand cannot encompass the extended period of limitation. Hence the demand beyond the normal period of limitation as calculated backwards from the date of issue of the show cause notice cannot then sustain and is therefore set aside.

10. Accordingly, on the part of the demand which relates to the normal period of limitation alone will sustain is upheld along with interest thereon. However, for the limited purpose of ascertaining the quantum of such reduced duty liability, for the normal period of limitation, the matter is being remanded to the adjudicating Commissioner. Needless to say, that in such denovo proceedings, the Appellant shall be allowed to present their case including production of any additional document or evidence in their support.

11. Coming to the matter of penalty, as found herein above, none of the ingredients justifying the invocation of extended period under proviso to section 11A(1) are present in this case. Hence there is no justification for imposition of penalty under section 11AC of the Act. For this reason, there can be non penalty under Section 11AC. So ordered.

12. In the result, the appeal is partly allowed in the above terms.”

2. Since the learned Appellate Tribunal upheld the imposition of Excise Duty within the normal period of limitation on the Assessee, the Assessee has preferred this appeal before this court.

3. This appeal was admitted by a Co-ordinate Bench of this Court on the following substantial questions of law :-

> (i) Whether in law, a demand for differential payment of duty is legal and sustainable, if such demand arises after following the valuation instructions given by the Department?
>
> (ii) Whether in law, the principle of Revenue Neutraliaty can be invoked in cases where, clearances made to own sister unit u/s 4 of the Central Excise Act, 1944 instead of Sec.4A of the Central Excise Act, 1944 leads to demand of differential Central Excise duty?
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> (iii) Whether in law, a transaction which is not held to be a sale, be made to fall within the ambit of "retail sale" under the Legal Metrology Act, 2009/Standard Weights & Measures Act, 1976?
>
> (iv) Whether in law, a transaction not attracting the provisions of Legal Metrology Act, 2009 / Standard Weights & Measures Act, 1976 be valued under Section 4A of the Central Excise Act, 1944?

4. The learned counsel for the Revenue, Mr.Srinivas, has raised preliminary objection about the maintainability of this appeal before this court in view of Section 35G read with section 35L(iii)(b) of the Central Excise Act (hereinafter referred to as "the Act"). The learned counsel submitted that the learned Appellate Tribunal in its impugned order has held that the Assessee was not guilty of any suppression about the valuation in view of the letter dated 12.06.2009, advising the Assessee to adopt the value using CAS IV -Costing Method.

5. The Assessee is engaged in the business of manufacture of Automotive parts which were repacked and relabled and this

activity admittedly falls within the definition of “manufacture” as defined under Section 2(f)(iii) read with Section 4(A) of the Act, which pertains to valuation of excisable goods with reference to retail sale price. Therefore, the issue raised with regard to valuation adopted by the Assessee within the limited period was the question pertaining to levy of duty or valuation of the goods in question and according to the aforesaid position of the maintainability of appeal before the High Court/ Supreme Court, the present appeal can be maintained by the Assessee only before the Supreme Court and not before this Court. He therefore raised a preliminary objection with regard to the maintainability of the appeal before this Court.

6. The provisions of the Act under Sections 2(f)(iii), 35G and 35L of the Act are quoted below for ready reference :-

> 2(f) “manufacture” includes any process -
>
> (iii) which, in relation to the goods specified in the Third Schedule, involves packing or repacking of such goods in a unit container or labelling or re-labelling of containers including the declaration or alteration of retail sale price on it or adoption of any other treatment on the goods to render the product marketable to the consumer, and the word “manufacturer” shall be construed accordingly and shall include not only a person who employs hired labour in the production or manufacture of excisable goods, but also any person who engages in their production or manufacture on his own account;
>
> SECTION 35G. Appeal to High Court.
>
> (1) An appeal shall lie to the High Court from every order passed in appeal by the Appellate Tribunal on or after the 1st day of July, 2003 (not being an order relating, among other things, to the determination of any question having a relation to the rate of duty of excise or to the value of goods for purposes of assessment), if the High Court is satisfied that the case involves a substantial question of law.
>
> SECTION 35L. — An appeal shall lie to the Supreme Court from —

(a) any judgment of the High Court delivered -

(i) in an appeal made under section 35G; or

(ii) on a reference made under section 35G by the Appellate Tribunal before the 1st day of July, 2003;

(iii) on a reference made under section 35H, in any case which, on its own motion or on an oral application made by or on behalf of the party aggrieved, immediately after passing of the judgment, the High Court certifies to be a fit one for appeal to the Supreme Court; or

(b) any order passed [before the establishment of the National Tax Tribunal] by the Appellate Tribunal relating, among other things, to the determination of any question having a relation to the rate of duty of excise or to the value of goods for purposes of assessment.

7. Per contra, the learned Counsel for the Assessee Mr.K.Senguttuvan submitted that though the activity of re-packing and re-labelling of the goods may fall within the definition of "Manufacture" under section 2(f)(iii) of the Act and the goods manufactured by the Assessee may fall within the "List of Goods" notified by the Central Government under the provisions of the Legal Metrology Act, (earlier known as Standard of Weight and Measures Act). But since the Assessee, which manufactures these automotive parts in Chennai does not sell in Chennai, and transfers them to its own depots in other States like Delhi, Mumbai and Kolkata, the requirement of affixing MRP as required under the said Act would get attracted only at the time of actual sales by those respective depots in Mumbai, Delhi or Kolkota, to the automobile manufacturers and therefore, at this stage, the learned Appellate Tribunal has erred in upholding the levy of duty on the Assessee on the basis of the said valuation, by the impugned order within the period of limitation and therefore, the said question can be raised before this Court in the present appeal filed u/s 35G of the Act.

8. We have heard the learned Counsel on either side on the aforesaid preliminary objection raised by the learned Counsel for the Appellant and the learned Counsel for the Revenue.

9. We are of the opinion that the present appeal filed by the Assessee in this Court is not maintainable before this Court but as per the provisions of Sections 35G and 35L of the Act, quoted above, the said appeal would lie only before the Hon'ble Supreme Court, as the matter pertains to valuation of goods in question.

10. The reasons for our holding so are as follows:-

The Assessee is admittedly manufacturing the goods which fall within the ambit and scope of the Legal Metrology Act, 2009 and goods in question also have been notified by the Central Government, issued under the provisions of the said enactment. There is also no dispute before us that the Assessee undertakes the re-packing and re-labelling work of those goods. Therefore, those goods would fall within the definition of “manufacture” u/s 2(f)(iii) of the Act. Therefore, the question of excisability of duty is not in doubt. The only question that is sought to be raised in the present appeal is as to what should be the valuation of goods, which should be adopted. The Assessee on merits of the case may contend that the requirement of affixing MRP would arise only when the actual sales takes place. But that question necessarily depends upon the valuation adopted by the Assessee for the said purpose: whether valuation would be adopted as per CAS-4 Costing Method, which is cost of manufacturing + 10%, or valuation as per Section 4A, which is MRP affixed as per the requirement of the Legal Meterology Act. Therefore, this contention of the Assessee on the merits of the case is a ground of appeal which can be raised before the Hon'ble Supreme Court. The objection raised by the Revenue before us is valid and well founded and we agree that the appeal is maintainable only before the Hon'ble Supreme Court as per the relevant provisions of the Act. Since the difference of the stand taken by the Assessee and Revenue hovers around the question of valuation, the present appeal in our opinion would lie before the Hon'ble Supreme Court as per the aforesaid provisions and not before this Court. Whether the aforesaid contention of the Assessee on merits of the case is acceptable or not is on the merits of the case which cannot be considered at this stage while deciding the question of jurisdiction as to where the appeal would lie. Therefore, we dismiss the present appeal as not maintainable before this Court, with liberty to the Assessee to prefer such appeal before the Hon'ble Supreme Court of India.

11. In the result, the Civil Miscellaneous Appeal is dismissed. No costs. Consequently, C.M.P.No.8356 of 2018 is also dismissed.

Sd/-
Assistant Registrar(CS V)

//True Copy//

Sub Assistant Registrar

To

1) THE COMMISSIONER OF CENTRAL
EXCISE AND GST GST OUTER COMMISSIONERATE
NEWRY TOWERS ANNA NAGAR CHENNAI-40.

2.CUSTOMS EXCISE AND SERVICE TAX APPELLATE TRIBUNAL,
CHENNAI.

+1cc to Mr.K.Senguttuvan, Advocate Sr.102452
1cc to Mr.A.P.Srinivas, Advocate Sr.102291

C.M.A.No.1034 of 2018

vba[co]
srg 10/03/2020