IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED :18.01.2019

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THE HON'BLE MR.JUSTICE S.M.SUBRAMANIAM

W.P.Nos.25291 & 8234 to 8236 of 2006
and
W.P.M.P.Nos.9163 to 9165 of 2006 & M.P.No.1 of 2011

Carista Herbal Products(P) Ltd.,
Represented by its Manager, Accounts & Finance
A.Balamurugan,
B-48-49 & 50, PIPDIC Industrial Estate,
Sedarapet,
Pondicherry - 605 111. ..Petitioner in all W.Ps

vs

1.The Commissioner of Central Excise
Beach Road, Pondicherry - 605 001.

2.The Central Board of Excise & Customs
North Block, Ministry of Finance,
Department of Revenue
Government of India,
New Delhi. ..Respondents in all W.Ps

Prayer in W.P.No.25291 of 2006: Writ Petition filed under Article 226 of the Constitution of India praying to issue a Writ of Certiorarified Mandamus, calling for the records comprised in Show Cause Notice in C.No.V/Ch.33/15/38/2006-Cx.Adj/SCN No.19/2006 dated 03.05.2006, on the file of the first respondent and quash the same and consequently direct the first respondent to assess the clearances of the petitioner under Section 4 of the Central Excise Act, 1944.

Prayer in W.P.No.8234 of 2006: Writ Petition filed under Article 226 of the Constitution of India praying to issue a Writ of Certiorarified Mandamus, to call for the records comprised in Show Cause Notice in SCN.No.10/2005 dated 5.8.2005 and C.No.V/Ch.33/15/36/2005-CxAdj on the file of the first respondent and quash the same and consequently direct the first respondent to assess the clearances of the petitioner under Section 4 of the Central Excise Act, 1944.

Prayer in W.P.No.8235 of 2006: Writ Petition filed under Article 226 of the Constitution of India praying to issue a Writ of Certiorari, to call for the records comprised in Circular No.492/58/99-ex dated 2.11.1999 on the file of the second respondent and quash the same.

Prayer in W.P.No.8236 of 2006: Writ Petition filed under Article 226 of the Constitution of India praying to issue a Writ of Certiorari, to call for the records comprised in Circular No.673/64/2002-ex, dated 28.10.2002 on the file of the second respondent and quash the same.

For Petitioner : M/s.Amrutha Aravind
for Mr.R.Karthikeyan (in all W.Ps)

For Respondents:Mr.V.Sundareswaran,
Senior Panel counsel
for R1 & R2 (in all W.Ps)

C O M M O N   O R D E R

In respect of W.P.Nos.25291 & 8234 of 2006, the Show Cause Notices issued by the first respondent dated 03.05.2006 and 05.08.2005 are sought to be quashed and to direct the first respondent to assess the clearances of the petitioner under Section 4 of the Central Excise Act, 1944 and in respect of W.P.Nos.8235 & 8236 of 2006, the Circulars issued by the second respondent dated 02.11.1999 and 28.10.2002 are sought to be quashed.

2.M/s.Amrutha Aravind, learned counsel appearing on behalf of the writ petitioner vehemently contended that the writ petitioner is not liable for any Tax and other liability as proposed under the impugned show cause notices.

3.It is further argued that the writ petitioner has already challenged the circular issued by the respondents and pursuant to the circular, the impugned orders are liable to be scrapped. In view of the circular issued by the Ministry of Finance, the respondents / Commissioner of Central Excise has no authority to adjudicate the issues set out in the impugned show cause notices. Thus, the impugned show cause notices are untenable and in violation of the circular issued by the Ministry of Finance under the provisions of the Central Excise Act, 1944.

4.The learned counsel for the writ petitioner further urged this Court by stating that the subject matter involved in the impugned show cause notices were already decided by the

Appellate Tribunal, South Zonal Bench Chennai in the case of Cavinkare Pvt. Ltd. Vs. Commissioner of Central Excise, Pondicherry reported in 2017 (347) E.L.T.514(Tri.-Chennai). The petitioner in the present writ petitions are the petitioner in that case also. Paragraphs 4, 4.1 & 4.2 of the judgment cited supra are relevant and the said paragraphs are extracted hereunder:-

> "4.In so far as the facts depicted at the outset are concerned, there is no dispute by Revenue. The legal dispute of Revenue is that the goods of the above nature and description are not exempt under Rule 34 of the 1977 Rules. In view of no factual difference raised by Revenue, proposition of the assessee on the point of law is considered for the purpose of decision in the present appeals.
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> 4.1 No doubt, the goods were in retail pack covered by a mono-pack carton. What that was cleared was mono-pack carton but not the retailable goods. Rule 34 of the 1977 Rules at the material time very specifically states that the goods weighing less than 20 grams or less than 20 milli litres when sold by weight or measure, are out of the purview of 1977 Rules.
>
> 4.2 In the present case, the categorical fact finding by the Authority below is that the appellants had cleared 6 gms. Sachet of the Hair Dye in a monopack carton containing six numbers of such sachet. The weight of goods in individual sachet satisfies the condition of Rule 34 of 1977 Rules. Therefore, goods of appellant are covered by Rule 34 of the 1977 Rules and enjoy exemption from application of the 1977 Rules. Once there is an exemption, the judgment of the Apex Court in the case of Krafftech Products(supra) shall apply. It is relevant to reproduce paras-15, 21 and 23 of the judgment of the Apex Court in Krafftech Products (supra) to appreciate the law on the subject and meaning of the term "multi-piece package", as well as applicability of Rule 34 and exemption granted by that rule as under:-
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> 15. It is beyond any doubt or dispute that the commodity in question is being sold in "multi-piece package". Identical quantity of commodity is packed in each sachet. Yet again admittedly three sachets are packed in one packet. The weight of three sachets is 9 gm, that is, less than the prescribed weight of 10 gm.

....

21. Rule 34(b) provides for exemption from the application of the Rules. The expression contained therein that "nothing contained in these Rules shall apply to any package containing a commodity" is of wide amplitude. There cannot be any doubt whatsoever that Rule 34 would apply in a case of this nature if it is sold by weight or measure. The respondents not only do so, they are permitted to do in terms of Schedule V read with sub-rule (2) of Rule 12 of the Rules.

....

23. We have noticed hereinbefore that each package offered to sell to the customer contains three sachets. Net weight of all the three sachets are stated thereon. It is a "multi-piece package" which is capable of being offered to sell as such only because a package is a "multi-piece package", the same cannot be taken out of the umbrage of exemption clause contained in Rule 34 of the Rules. Why the commodity cannot independently be sold either by weight or measure is beyond our comprehension, particularly when Rule 12(2) permits the same. The illustration appended to Rule 2 (j) brings out a clearer picture. It states that the combined net weight shall be taken into consideration for the purposes mentioned therein. After combined weight is taken into consideration for the purpose of applicability of the Rules, there is no reason as to why the said purpose shall not be considered to be a relevant factor for applying the exemption provision. Assuming Rule 2(j) was otherwise vague or unambiguous, illustration appended thereto brings out the true meaning and purport thereof. The reasoning adopted by the Madras High Court in Varnica Herbs [supra] does not appeal to us. It was rendered per incuriam. It was held to be so in Urison Cosmetics Ltd. [supra] by a larger Bench of the Customs, Excise and Service Tax Appellate Tribunal. We agree with the said opinion of the Tribunal."

5.The learned counsel for the writ petitioner relied on the case of Commissioner of Central Excise VAPI Vs. Kraftech Products reported in 2008(224) E.L.T.504 (S.C) and the paragraph 23 is relevant and the same is extracted hereunder:-

"23. We have noticed here in before that each package offered to sell to the customer contains three sachets. Net weight of all the three sachets are stated thereon. It is a "multi-piece package" which is capable of being offered to sell as such only because a package is a "multi-piece package", the same cannot be taken out of the umbrage of exemption clause contained in Rule 34 of the Rules. Why the commodity cannot independently be sold either by weight or measure is beyond our comprehension, particularly when Rule 12(2) permits the same. The illustration appended to Rule 2 (j) brings out a clearer picture. It states that the combined net weight shall be taken into consideration for the purposes mentioned therein. After combined weight is taken into consideration for the purpose of applicability of the Rules, there is no reason as to why the said purpose shall not be considered to be a relevant factor for applying the exemption provision. Assuming Rule 2(j) was otherwise vague or unambiguous, illustration appended thereto brings out the true meaning and purport thereof. The reasoning adopted by the Madras High Court in Varnica Herbs [(2004) 163 ELT 160 (Mad)] does not appeal to us. It was rendered per incuriam. It was held to be so in Urison Cosmetics Ltd. [(2006) 198 ELT 508 (Tri)] by a larger Bench of the Customs, Excise and Service Tax Appellate Tribunal. We agree with the said opinion of the Tribunal."

6.Relying on the above two decisions, the learned counsel for the petitioner states that the very issuance of the show cause notices are not in accord with law and the respondent has no authority to issue the show cause notices. In view of the fact that the issues involved and set out in the impugned notices had already been adjudicated by the Tribunal and a decision was rendered in favour of the writ petitioner.

7.The learned Senior Panel Counsel appearing on behalf of the respondents disputed the points raised by the writ petitioner by stating that the circulars were issued for providing instructions to the Subordinate officials and the same cannot supersede the powers conferred on the competent authority under the provisions of the Central Excise Act. The power of adjudication conferred under the Act to an authority cannot be taken away by way of a circular by the Commissioner or as a matter of fact by any other authority. This apart, the issues set out in the impugned show cause notices are to be adjudicated with reference to the facts and by considering the materials available on record. Such a power of adjudication can never be taken away, which is vital for the purpose of assessment of the tax and other liabilities. Thus, the very contention raised on behalf of the writ petitioner is untenable and in violation of the very spirit and the provisions of the Central Excise Act.

8.Considering the arguments advanced by the respective learned counsels appearing on behalf of the petitioner and the respondents, this Court is of an opinion that the instructions / circulars issued by the competent authorities can supplement the provisions of law. However, such circulars/instructions can never supplement the provisions of statutes. Thus, the provisions of the statutes alone should prevail over and the powers conferred on the authority competent to adjudicate the issues on facts and based on the materials and the provisions of the statutes can never be diluted or taken away by way of a circular by the Commissioner or by any other authority. In this regard, Section 37B(a) denotes that "provided that no such orders / instructions or directions shall be issued - a) so as to require any Central Excise Officer to make a particular assessment or to dispose of a particular case in a particular manner".

9.The above provision is unambiguous that the Central Excise officer is competent to adjudicate the facts and the materials available on record and pass an assessment order in respect of the tax liabilities and other charges to be paid by the assessee concerned. Such a power when provided under the provisions of the statute, the writ petitioner cannot challenge the show cause notices by stating that the show cause notices are in contravention with the circular issued by the Commissioner. Circulars/instructions are issued for the purpose of clarifying certain procedures to be followed or to provide instructions to the Subordinate officials. Such circulars/instructs would not have any statutory enforceability and the same cannot be equivalent with the statutes or rules as a matter of fact. Thus, it is made clear that the instructions/circulars cannot have any enforceability as far as the statutory provisions are concerned and therefore, the very ground raised in this regard by the writ petitioner deserves no merit consideration.

10.The learned counsel for the petitioner states that the circular/instructions issued by the Head of the Department are binding on the Subordinate officials. Undoubtedly, the circulars/instructions are issued for the purpose of following the procedures and to implement the same. However, the if such circulars violates the provisions of the Statutes or rules, then the Act alone will prevail and not the circular or the instructions. In other words, the Act and the Rules will prevail over the circulars or instruction. I any instructions or circulars issued by the authorities competent authorities in violation of the statutory provisions, then the statute alone will prevail and all the officials including the Subordinate officials are bound to follow the statute and not the circular.

11.Thus, it is clarified that the circular/instructions, if it runs contrary to the spirit of the Act, the Act alone should be followed by the authorities competent and with reference to the present writ petitions, it is clarified that the powers conferred on the Central Excise officer to adjudicate the facts and the materials available on record for the purpose of assessment has to be adhered to and there cannot be any deviation. Thus, the power conferred to the Central Excise officer for adjudication cannot be taken away by way of a circular and all such circulars are meant for the purpose of issuing certain instructions/guidelines to the Subordinate officials for the purpose of considering the case or to effect assessments in a particular manner.

12.In respect of the show cause notices, which are under challenge in these writ petitions, this Court is of an opinion that no writ can be entertained against a show cause notice in a routine manner. A writ against the show cause notice can be entertained only if the same has been issued by an incompetent authority having no jurisdiction or if an allegation of mala fides are raised or if the same is in violation of the statutory rules in force. Even in case of raising an allegation of mala fides, the authority against whom such an allegation is raised is to be impleaded as a party respondent in his personal capacity in the writ proceedings. In the absence of any one of these legal grounds, no writ proceedings can be entertained against a show cause notice. The writ petitioner has to submit his explanations/objections on the show cause notices with reference to the facts set out in the notice and defend his case in the manner known to law. Contrarily, a writ petition cannot be filed for the purpose of adjudication of the merits with reference to the allegations or facts set out in the show cause notice. Such an exercise can never be done in a writ proceedings under Article 226 of the Constitution of India. Adjudication of merits at this point of time involves verification of original documents and adducing of evidences, if required by the original authority.

13.This being the procedures and principles to be followed, the writ petitioner has to approach the original authority for the purpose of adjudication of the facts and the materials available on record.

14.Under these circumstances, this Court is of an undoubted opinion that the writ petitioner has not raised any acceptable ground for the purpose of granting the relief as such sought for in the writ petitions. However, it is made clear that the writ petitioner is at liberty to file his objections / explanations if any along with the documents to the respondents within a period of four weeks from the date of receipt of a copy of this order and on receipt of any such explanations/objections from the writ petitioner, the respondents are bound to consider the same with reference to the materials available on record and adjudicate the matter by following the procedures as contemplated and by affording opportunity to the writ petitioner and decide the issues on merits and in accordance with law without causing any undue delay.

15.With these observations, all the writ petitions stand dismissed. However, there shall be no order as to costs. Consequently, connected miscellaneous petitions are closed.

Sd/-
Assistant Registrar

//True Copy//

Sub Assistant Registrar

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To

1.The Commissioner of Central Excise
Beach Road, Pondicherry - 605 001.

2.The Central Board of Excise & Customs
North Block, Ministry of Finance,
Department of Revenue
Government of India, New Delhi.

+1 cc to M/s.R.Karthikeyan, Advocate Sr.No.3830

W.P.Nos.25291 & 8234 to 8236 of 2006

PPA(CO)
CSL/18/02/2019