IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 03.6.2019

CORAM :

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

Tax Case Appeal No.287 of 2019

The Principal Commissioner of Income Tax, Puducherry-3. ...Appellant/Respondent

Vs

M/s.DXN Herbal Manufacturing India Pvt. Ltd., Pondicherry. PIN : 605102. ...Respondent/Appellant

APPEAL under Section 260A of the Income Tax Act, 1961 against the order dated 13.12.2018 in ITA No.2438/Chny/2014 on the file of the Income Tax Appellate Tribunal Chennai 'A' Bench for the assessment year 2010-11 against the Appellate order passed by the The Commissioner of Income Tax, (A) (VI), Chennai -34, and against the Assessment order passed by the Asst. Commissioner of Income Tax, pondicherry, dated 27.12.2012 made in PA/GINo.AABCD4141M1A-16.

For Appellant : Mrs.K.G.Usharani

For Respondent : Mr.K.Ravi

Judgment was delivered by T.S.SIVAGNANAM,J

Heard the learned Standing Counsel for the appellant.

2. This appeal, filed by the Revenue under Section 260A of the Income Tax Act, 1961 (for short, the Act), is directed against the order dated 13.12.2018 passed by the Income Tax Appellate Tribunal, Chennai 'A' Bench (for brevity, the Tribunal) in ITA No.2438/Chny/2014 for the assessment year 2010-11.

3. The Revenue has filed this appeal by raising the following substantial question of law :

> "Whether the Appellate Tribunal is correct in following the High Court's judgment of the assessee's own case in TCA.Nos.341 and 342 of 2007 without going

into the merits where the Department has filed SLP(C) Nos.4047 and 5220 of 2019 pending before the Hon'ble Supreme Court ?"

4. The Tribunal, by the impugned order, allowed the appeal filed by the respondent - assessee by taking note of the earlier decision in the case assessee's own case for the assessment years 2003-04 and 2004-05 in TCA. Nos.341 and 342 of 2007 dated 21.6.2018. In those appeals, the assessee was on appeal before this Court as against the orders passed by the Tribunal and the following substantial question of law arose for consideration in those appeals :

> "1. In the facts and circumstances of the case, whether the Appellate Tribunal was right in holding that the appellant is not entitled to the claim under u/s. 80IB?
>
> 2. In the facts and circumstances of the case, whether the Appellate Tribunal was right in denying the claim made u/s.43B when in fact the question of the payment itself was not disputed ? And
>
> 3. In the facts and circumstances of the case, whether the Appellate Tribunal was right in holding that the violation of the principles of the natural justice by the lower authorities has not resulting a injury to the appellant ?"

5. By judgment dated 21.6.2018, a Division Bench of this Court, to which, one of us (TSSJ) was a party, allowed the appeals filed by the assessee and the substantial questions of law framed for consideration were decided in favour of the assessee. The relevant portions of the said judgment read thus :

> "16. In our considered view, the decision of the Division Bench in TCA.No.730 of 2015 is an answer to question No.1, which has been framed for consideration. In other words, unless there is a manufacturing unit, the question of payment of excise duty does not arise. For the subsequent years, the assessees claim has been accepted and the Revenues appeals have been dismissed. Therefore, the petitioners earlier assessment order cannot be sustained. We support this finding with some more additional reasons. In the assessment year, the Assessing Officer has culled out the admitted facts. On perusal of the order, it is seen that the Assessing Officer has accepted that the petitioner has obtained

the Central Excise Registration Certificate dated 23.02.2004 for manufacturing of excisable goods. Further, it is admitted that a copy of the return dated 07.12.2005 for excisable goods and availment of CENVAT credit for the month of November 2005, to the Superintendent of Central Excise, Range II-B was produced. Further the Assessing Officer states that the return shows that it classified the goods under CETSH No.3004.90.11, on which excise duty was paid along with necessary description of receipts and consumption of principle inputs and finished products were cleared and waste and scrap arising during process were not cleared, but destroyed.

17. The above factual finding which has been recorded in the Assessment Order and termed to be a admitted fact is sufficient to hold that the petitioner was engaged in the manufacturing process and there is also proof to show that payment of excise duty was made by the assessee and consequently, the finding of the Tribunal has to be held unsustainable.

18. We may note that even as per statement given by the employee of the petitioner to the officials of the Department when they inspected the unit, the process involved in the production activity was described. The same has been quoted in paragraph No.6 of the order passed by the Tribunal, which would clearly show that the bulk powders are filled in the power hopper and the empty gelatine capsules are filled in capsules hopper of semi-automatic filling machine, and the filling machine would be operated by machine operators and it will be set in such a manner to achieve the weight required for filing each capsules, that the prescribed weight for RG capsule is 270 mg and GL capasule is 450 mg. During production process, it should be ensured that the temperature and humidity are within the limits and the weight of the filled capsules are within the limit. Simultaneously, quality control would carry out necessary tests like disintegration test, microbiological test, moisture content test, stability test, weight test parameters and

specification test etc, of the filled capsules, for which, separate records are maintained in the production department. Thereafter, the capsules are polished and quality check was done in Polishing Section, which also maintains a separate job record. Thereafter sorting and inspection is done, followed by a Quality Check Inspector and personnel, who would reject and remove the defective capsules, after which, the product, the sorted out capsules are sent to Counting and Bottling Section, then to Labelling Section, Batch Printing Section, Shrink Pack Section and Packing Section. Further it is stated that all the above manufacturing process of each section in production shall be done in the specified temperature and humidity as well as quality control and testing and manufactures as per schedule T of Drugs and Cosmetics Rules, 1945. In our view, the statement given by the employee of the assessee, would in fact substantiate the stand taken by the assessee with regard to the manufacturing process adopted by them. Therefore, for such reasons also, we hold that no prejudice was caused to the assessee on account of not making available his former employee for cross-examination.

19. We agree that the submissions of the learned counsel for the assessee that the end product is not the same product which was fed into the machines at the first instance as it paced in a gelatine capsule, which is consumed by the user. In Commissioner of Income-tax Vs. N.C.Budharaja & Co., reported in [(1993) 70 Taxman 312 SC], it was held that the word production has wider connotation than the word manufacture, while every manufacture can be characterised as production, every production need not amount to manufacture. It was pointed out that the word production or produce when used in juxtaposition with the word manufacture takes in bringing into existence new good by a process which may or may not amount to manufacture. It also takes in all the byproducts, intermediate products and residual products, which emerge in the course of manufacture of goods. In the

absence of definition for the word article as is not defined in the Act or the Rules, it must be understood in its normal connotation in the sense in which it is understood in the commercial world.

20. The assessee specifically contended before the Tribunal that the bulk powder cannot be consumed directly as it may lead to inaccurate intake and the dose may be influenced by many factors such as size of spoon, density of the powder, humidity, degree of setting fluffiness due to agitation and processing pattern. Hence, administration of drug in capsule form is required. The assessee also demonstrated the various advantages of putting the drug in capsule form and thus submitted, the preparation of capsule is very important activity of the manufacturing process.

21. The Department stated that the assessee was importing bulk mushroom powder and putting it in gelatine capsules. As per the agreement with the foreign company, the foreign company has exclusive expertise and know how in respect of the product and the foreign company is fully guarded itself in the product said to be manufactured by the assessee.

22. Upon hearing all these submissions, the Tribunal came to the conclusion that the activity does not bring any new article or product and the mushroom powder even after capsulation remains the same and if it is removed from the capsule, the mushroom powder emerges out of it. It is not known as to how the Tribunal rendered such a finding as there was no material available before the Tribunal that there is no change in the composition of the drug on capsulation. As already pointed out, the Tribunal gave a finding wholly unsubstantiated by any material that the bulk form of the drug can be nakedly consume without putting them in an enclosure such as gelatine capsule. It is relevant to note that the agreement between the assessee and the International parent company dated 26.4.2004 states that the Indian Company (assessee) has set up a factory at Pondicherry with an intent to

manufacture similar products and has requested the foreign company to make available the know-how to the Indian Company and after negotiations, the foreign company has agreed to make available the know how on the terms and conditions set out in the agreement. The agreement specifically states that the foreign company shall supply to the Indian company all materials such as know how of materials, such as process sheets, calculation sheets, standards and other information as is necessary to understand the utilisation of the said know how and to implement the same in the manufacture of the said product.

23. The factual matrix clearly demonstrates that what has been done by the assessee is manufacture. The decision relied on by the Revenue in the case of Sacs Eagles Chicory Vs. Commissioner of Income Tax reported in [(2003) 255 ITR 178 SC] is distinguishable on facts as the activity which was the subject matter of the said case was making powder from chicory roots and the appeal by the assessee was dismissed as the assessee failed to satisfy the test laid down in Aspinwall & Co. Ltd., case. The learned counsel for the Revenue relied upon the decision of the Division Bench of this Court in Commissioner of Income-tax Vs. Madurai Pandian Engg. Corpn. Ltd., reported in [(1999) 239 ITR 375 (Madras)]. The question was whether the business of tyre retreading done by the assessee amounts to production of a new article and whether the assessee was entitled to relief under Sections 80J and 80HH of the Act.

24. This Court held that the common thread which runs in all the decisions is that only when a new distinct commodity commercially accepted as such, comes into existence as a result of processing, that a commodity can be said to have been manufactured and in the said context, retreading of tyres did not result in the production of an articles for the purpose of Section 80HH of the Act. The said decision is clearly distinguishable on facts. In the assessees case, the product which emerges after the process of

manufacture is commercially a distinct commodity, can be of consumption as such containing a requisite amount of ingredients in the appropriate percentage, preserved in proper form as contained in the licence issued under the authorised enactments as well as the technical logo shared by the foreign company.

25. For the above reasons, the Question No.1 is in favour of the assessee and against the Revenue.

26. Question No.2 is framed by the order dated 20.03.2007, is to the effect that whether ITAT was right in denying the claim under Section 43B, in fact, the question of payment itself was not disputed. The Assessing Officer rejected the claim on the ground that the payment was not made at the time of filing the return, but was made only during the course of assessment and that such step could not have taken unless the revised return had been filed. To that effect, the Assessing Officer, referred to the decision of the Supreme Court in Goetze (India) Ltd., Vs. Commissioner of Income Tax reported in [(2006) 157 Taxman 1 (SC)] and same was the view taken by CIT(A). However, ITAT proceeded on a slightly different angle, not on the ground that the petitioner had not filed the revised return that being entitled to the claim of the benefit under Section 43B, i.e., to say, on the ground that while the assessee is not in a position to spell out the nature of the liability, and it was making only verbal argument without stating the nature of expenditure and that the assessee has not produced any order of the Excise Department, through which the liability stated to have emerged and it also opined that, to avail deduction, the payments are required to be actually paid within the time stipulated to the proviso to Section 43B of the Act. In the previous paragraphs, we have noted the admitted facts recorded by the Assessing Officer, which clearly shows the assessee has availed the CENVAT credit and paid the excise duty. That apart, the assessee won

the case for the subsequent year 2009-2010 in T.C.A.No.730 of 2015, which was filed by the Revenue against the assessee. Thus, the substantial question of law No.2 is answered in favour of the assessee and against the Revenue.

27. This leaves us with only one question whether the Appellate Tribunal was right in holding that violation of principles of the natural justice by the lower authorities has not resulted an injury to the appellant. The settled legal position is that every lack of opportunity cannot be construed as to be a violation of principle of natural justice. The aggrieved person has to establish before the court or the forum that on account of not providing an opportunity to him, he was put to prejudice. In fact, though the assessee took a stand that its former employee should be made available for cross-examination,he contested the matter before the Assessing Officer by placing facts to substantiate their case that they are engaged in the process of manufacturing and excise duty has been paid.

28. Thus, in the absence of any proof produced to show that the statement obtained from the employee has caused prejudice to the assessee, the Tribunal has to only justify the decision taken by the Assessing Officer and CIT(A). We further hold at best that the statement given by the former employee of the assessee is not conclusive and it would not bind the assessee. Furthermore, the statement is stated to have been recorded at the time of inspection and one can easily perceive the mood in which the employee would have been.

29. For the reasons stated in the previous paragraph, we are of the view that the question of law No.3 is answered in favour of the Revenue and against the assessee.

30. Accordingly, these tax case appeals are allowed in part. No costs."

6. In the light of the above, this appeal filed by the Revenue is dismissed as being covered by the earlier decision and the substantial question of law is answered against the Revenue. No costs.

Sd/-
Assistant Registrar

//True Copy//

Sub Assistant Registrar

To
1.The Income Tax Appellate Tribunal,
Chennai 'A' Bench.

2. The Commissioner of Income Tax, (Appeals-VI,
Chennai.

3. The Assistant Commissioner of Income Tax,
Pondicherry.

+1cc to Mr.T.R.Senthil Kumar, Advocate, SR.No.45016
+1cc to Mr.K.Ravi Advocate, SR.No.44840

TCA.No.287 of 2019

Kak(11/07/2019)