

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON:20.07.2020

PRONOUNCED ON: 05.08.2020

CORAM

THE HONOURABLE MR. JUSTICE M.S. RAMESH

W.P.No.15517 of 2012
and WMP No.17837 of 2019

M/s Ambadi Enterprises Limited,
(Formerly M/s.Ambadi Trading Company Limited)
Rep. by its Deputy Manager-Exports,
J.Baskaran,
No.43, Moor Street,
Parry House, 5th Floor,
Chennai- 600 001. Petitioner

-Vs-

1.The Department of Revenue,
Ministry of Finance,
Rep., by its Joint Secretary,
14, Hudco Vishala Bldg "B" Wing,
6th floor, Bhikaji Cama Place,
New Delhi 110 066.

2.The Commissioner of Central Excise,
No.1, Foulks Compound, Annai Medu,
Salem 636 001.

.... Respondents

PRAYER: Writ Petition filed under Article 226 of the Constitution of India, praying to issue a Writ of Certiorari, calling for the records comprised in Order No.511/12-CX dated 30.04.2012 on the file of the first respondent and to quash the same.

For Petitioner : Mr.K.Magesh

For Respondent-2: Mrs.Hema Muralikrishnan
Standing Counsel for Central Excise

O R D E R

The Writ Petition is heard through Video Conferencing on 20.07.2020. With the consent of Mr.K.Magesh, learned counsel for the petitioner and Mrs.Hema Muralikrishnan, learned Standing counsel appearing on behalf of the second respondent, the matter is taken up for final disposal.

2. The petitioner herein had processed grey powerloom woven fabrics through a processor, namely M/s. Erode Rana Textile Processors Private Ltd., (herein after referred to as M/s.ERTP) and received rebate of duty to the tune of Rs.15,84,083/- for the period between December 1998 and March 2000, by producing a Disclaimer Certificate issued by M/s.ERTP.

3. On verification of the correctness of the Disclaimer Certificate, it was found that the production particulars submitted to the department by the processor was found lesser than the actual production and thus, the rebate claimed by the petitioner on the suppressed production was demanded through a notice dated 12.12.2003. The petitioner, in his reply dated 03.01.2004, sought for certain documents. The Joint Commissioner of Central Excise, after permitting the petitioner to inspect the documents, had confirmed the demand of Rs.15,84,083/-, being the excess rebate sanctioned paid to the petitioner. In addition to it, a penalty under Section 11AC of the Central Excise Act and Rule 173Q and 210 of the erstwhile Central Excise Rules, 1944 read with Section 38A of the Central Excise Act, 1944 was imposed apart, from interest under Section 11AB, as well as additional penalty of M/s.ERTP.

4. In the appeal before the Commissioner of Central Excise (Appeals), Salem, the petitioner herein had predominantly raised two grounds stating that their request for certain copies of documents recovered from the processor, namely M/s.ERTP, was not furnished to them, inspite of their request and that the imposition of penalty under Section 11 AC was made without a proposal in the show cause notice. The Appellate Authority had held that the non-furnishing of the documents was in violation of the principles of natural justice and thereby, remanded the matter to the lower authority for de-novo proceedings, through an order dated 26.03.2007. The petitioner's Revision peition against the order of remand, was rejected by the Government on 22.09.2008.

5. In the de-novo proceedings conducted pursuant to the remand, the original authority had again confirmed the original demand of Rs.15,84,083/- along with the penalty under Section 11 AC of the Central Excise Act, together with interest, through an

order dated 08.01.2010. While holding so, the Original Authority was of the view that there was no necessity to provide copies of the documents to the petitioner and that the imposition of the mandatory penalty under Section 11 AC was justifiable. As against the same, the petitioner had preferred an appeal before the Commissioner of Central Excise (Appeals), reiterating the grounds of violation of principle of natural justice and questioning the imposition of penalty under Section 11 AC of the Central Excise Act. The Appellate Authority had rejected the appeal on 28.05.2010, as against which, the petitioner had preferred a revision before the Government, which was also rejected on 30.04.2012. Aggrieved against the same, the present Writ Petition has been filed.

6. In line with the grounds raised before the authorities, the learned counsel for the petitioner submitted before this Court that the non-furnishing of the documents requested by them in connection with M/s.ERTP Disclaimer Certificate, would amount to violation of the Principles of Natural Justice and the failure to issue a show cause notice for a proposal to impose penalty under Section 11AC of the Act, would disentitle the respondents to impose such a penalty.

7. The learned Standing Counsel appearing for the respondents, on the other hand, would rely on the findings of various authorities of the department and submit that there is no necessity for furnishing of the documents claimed by the petitioner. She further submitted that the respondents were justified in imposing penalty under Section 11 AC of the Act.

8. Insofar as the first ground raised by the petitioner touching upon the violation of the Principles of Natural Justice is concerned, in normal circumstances, non-furnishing of the requested documents, on which reliance is placed by the department for the purpose of making a demand, could be termed as violation of the Principles of Natural Justice and thereby, the consequential demand itself requires to be rendered invalid. But, the relevance and nature of the documents demanded, apart from the conduct of the party, also plays a significant role for such a consideration. The extent of the application of the principles also depends upon the fact situation of a given case, as held by the Hon'ble Supreme Court in BCCI - US - CAB (2016) 8 SCC 535.

9. In the present case, the petitioner had claimed and received rebate of duty by production of a Disclaimer Certificate issued by M/s.ERTP. On investigation by the department, it was found that production particulars submitted by M/s.ERTP to the department was less when compared to the actual production, since M/s.ERTP had suppressed the same. The

issue therefore before the department, at that point of time, was as to whether M/s.ERTP suppressed the production during the relevant time and thereby, enabling the petitioner to claim rebate based on such suppressed production. The fact of suppression was revealed to the department through a private file seized by them, which contained details of processed fabrics, dispatched by M/s.ERTP during January 1997 to July 2000. In this background, showcause notices dated 12.12.2003 was issued both to the petitioner, as well as M/s.ERTP, to showcause as to why the excess rebate amount along with interest should not be demanded from them as well as imposition of penalty.

10. When the disclaimer certificate issued by M/s.ERTP was based on suppression of production details, it is for M/s.ERTP to substantiate the issue raised by the department in this regard. However, M/s.ERTP neither replied to the show cause notice nor participated in the hearing conducted by the department thereafter, but had rather accepted the contents of the documents relied upon by the department and admitted their guilt. Thus, the proceedings initiated against M/s.ERTP was never challenged and had become final.

11. Insofar as the show cause notice issued to the petitioner herein is concerned, it is seen that the notice extended an opportunity to the petitioner to peruse the records relied upon by the department and take copies, if required, within 15 days of the receipt of the notice dated 12.12.2003. However, the petitioner had replied that it was inconvenient for them to peruse the documents relied upon in the case and sought for copies of all the relied documents. The respondents had thereafter permitted the representative of the petitioner to inspect the documents on 01.08.2006 and 02.08.2006 as well as allowed them to take copies of certain documents. Pursuant to this, the petitioner had chosen to seek for further documents during the personal hearing and when the relevancy of such documents were questioned by the original authority, there was no satisfactory explanation from the petitioner's side. All the above said facts are reflected in the various orders passed by the authorities both before and after the remand.

12. In this background, the learned counsel for the petitioner would submit that non furnishing of the documents sought for by them would violate the principles of natural justice.

13. The answer to this issue would be two fold. Firstly, as to whether a reasonable opportunity was extended to the petitioner during the course of the proceedings? And secondly, the relevancy of the documents sought for by the petitioner for

establishing his case and their bona-fides in making such a request?

14. As stated earlier, when the show cause notice dated 12.12.2003 was issued to the petitioner, there was a specific statement therein that the petitioner was at liberty to peruse the records relied upon by the department and take copies, if required, within 15 days of its receipt. This statement in the show cause notice is not disputed by the petitioner. However, without availing the opportunity, the petitioner had insisted the department to send the copies of all the documents through a reply letter dated 03.01.2004, which was received by the department on 06.01.2004. Even this reply was not made within the 15 days period stipulated in the show cause notice. Subsequently, during the course of personal hearing, another opportunity was extended to the petitioner to peruse the document and take copies thereof. The petitioner's representative has perused the documents relied upon by the department on 01.08.2006 and 02.08.2006 and had chosen to take copies of some of the documents. The petitioner thereafter had sent a letter dated 11.08.2006, requesting for further documents. This aspect is also not disputed by the petitioner and has been admitted in the affidavit filed by the petitioner in the present Writ Petition.

15. Thus, it is seen that a reasonable opportunity was indeed extended to the petitioner to peruse and take copies of the documents relied upon by the department, which the petitioner did not avail of. Therefore, the substance of the petitioner's submission that the documents relied upon by the department was not furnished to them, is unacceptable. What can be construed from the event narrated above, is that the petitioner instead of availing the opportunities to peruse and take copies of the documents relied upon by the department, had been insisting the department to give them the copies, even after the period stipulated in the show cause notice had expired.

16. The second issue relates to the relevancy of the documents sought for by the petitioner for establishing his case and their bona-fides in making such a request. This issue that requires to be answered by the petitioner was as to why the excess rebate amount claimed on the basis of suppressed production furnished by M/s.ERTP, should not be demanded from the petitioner. The proposal to recover was only on the basis of suppression of production details by the petitioner's processor namely M/s.ERTP. The documents relied upon by the department are the ones depicting the actual production and clearance of goods made by M/s.ERTP. This Court is unable to comprehend as to how these documents could be of any help to them to give their

reply, since if at all the suppression of production details is to be disputed, the same can be done only by the processor, namely, M/s.ERTP. Incidentally, M/s.ERTP has not chosen to challenge the claim made against them for suppression of production details. Accordingly, I do not find any bona-fides on the part of the petitioner in insisting for the copies of documents which may not be relevant or sufficient to enable them to give a reply.

17. Thus, I am of the view that the petitioner, had not only refrained from availing the opportunities given to them for perusing and taking copies of the documents, but had, after obtaining some of the copies, chosen to seek for further documents, which will not assist them in anyway for giving an effective reply to the show cause notice. Consequently, it can be held that there were reasonable opportunities extended to the petitioner and therefore, there is no violation of principles of natural justice in this regard.

18. In Sahara India Real Estate Exchange Corporation Limited Vs. SEBI reported in 2013 1 SCC (1), the Hon'ble Apex Court had held that the rules of natural justice have limitations and the party concerned cannot always enjoy the advantage of procedural discrepancies under the rules of natural justice were fair or not. The rules of natural justice, being founded on principles of fairness, can be available only to the party which has itself been fair and therefore, deserves to be treated fairly. In the instant case, the petitioner's claim itself is unfair and in the light of the aforesaid decision of the Hon'ble Apex Court, the advantage of violation of principles of natural justice would be unavailable to them.

19. The second line of submission made by the petitioner is that prior to imposition of penalty under Section 11AC of the Act, there was no proposal in the show cause notice and therefore, the respondent had not justified in imposing such a penalty. In the order in Original dated 22.09.2008, the authorities had imposed a penalty of Rs.15,84,083/- on the petitioner under Section 11AC of the Central Excise Act. It is not in dispute that prior to passing of this order imposing penalty under Section 11AC, there was a show cause notice proposing such a levy of penalty under Section 11AC. The authorities, while imposing the penalty and confirming in the appeal, had not dealt with this issue at all, but, had only justified in imposing the penalty. When it is not in dispute that the imposed penalty was not proposed earlier, the respondents will not be justified in not giving the petitioner an opportunity to reply as to why such a penalty under Section 11 AC should not be imposed. It is a settled proposition of law that whenever a penalty of such a nature is imposed, the same

should be preceded with a prior notice of proposal. In the absence of the same, it would be appropriate to give an opportunity to the petitioner to put forth his objections with regard to the imposition of penalty under Section 11 AC of the Act alone. However, the petitioner shall not once again indulge in seeking for the documents relied upon by the department for the purpose of giving a reply to the proposal for penalty under Section 11AC, but, shall address this issue independently on its legal permissibility.

20. In the light of the above observations and findings, the Order-in-Original in No.16/2008 dated 22.09.2008 passed by the Additional Commissioner of Central Excise, Salem, as well as the Orders-in-Appeals and revisions filed therefrom stands confirmed, except the portion of the order imposing penalty of Rs.15,84,083/- under Section 11AC of the Central Excise Act, which is set aside. The second respondent, if they choose to do so, shall issue a show cause notice with the proposal for imposition of penalty under Section 11AC of the Act and thereafter take further course of action, after giving due opportunity to the petitioner, in a time bound manner. Such an exercise commencing from the show cause notice till the passing of final orders shall be completed within a period of 12 weeks from the date of receipt of a copy of this order.

21. The Writ Petition stands disposed of accordingly. Consequently, the connected Miscellaneous Petition is closed. No costs.

Sd/-
Assistant Registrar

//True Copy//

सत्यमेव जयते
Sub Assistant Registrar

To

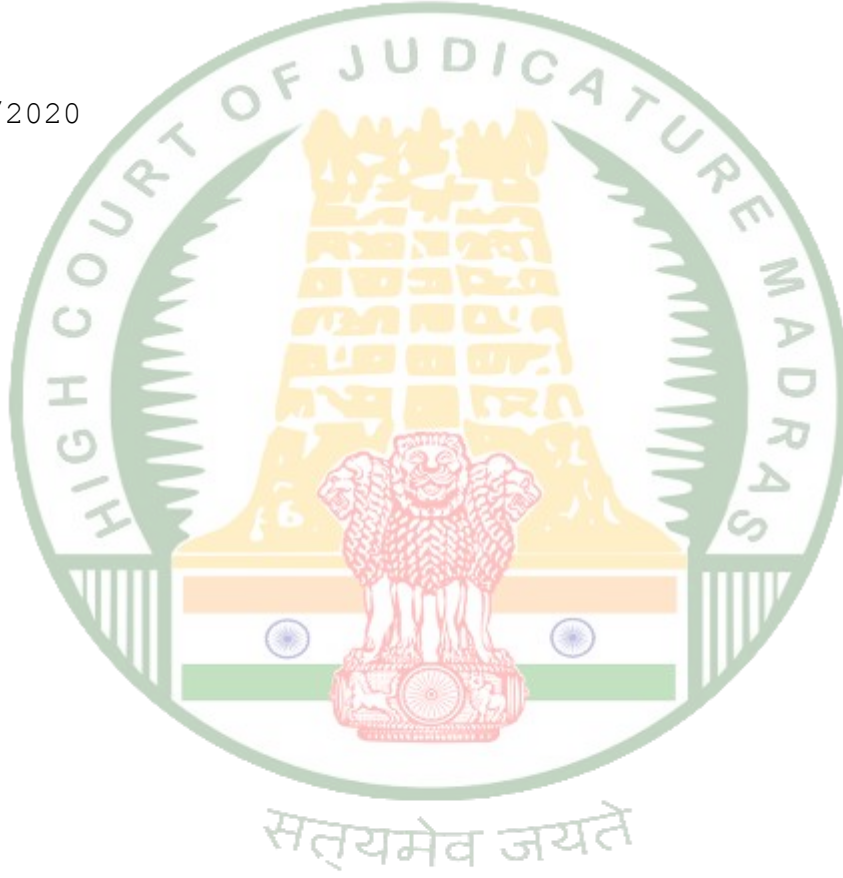
1. The Joint Secretary,
Department of Revenue,
Ministry of Finance,
14, Hudco Vishala Bldg "B" Wing,
6th floor, Bhikaji Cama Place,
New Delhi 110 066.

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2.The Commissioner of Central Excise,
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Salem 636 001.

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