(2011) 03 DEL CK 0496

In the Delhi High Court

Case No : Writ Petition (Civil) No. 12604 of 2009

AGV Alfab Limited — APPELLANT

Vs

Commissioner of Central Excise, Delhi II — RESPONDENT

Date of Decision : 15-03-2011

Acts Referred:

Central Excises and Salt Act, 1944 — Section 11A
Constitution of India, 1950 — Article 136, 226

Citation : (2011) 270 ELT 331

Hon'ble Judges : Dipak Misra, C.J;Sanjiv Khanna, J

Bench : Division Bench

Advocate : Rajesh Jain, for the Appellant; Mukesh Anand and Shailesh Tiwari, in Writ Petition (Civil) No. 12604/2009 and Satish Kumar, Senior Standing Counsel in Writ Petition (Civil) No. 2003/2010, for the Respondent

Judgement

1. The Petitioner, AGV Alfab Limited, by these two writ petitions, has challenged and questioned three show cause notices dated 8/13th October, 2008, 17/31st August, 2009 and 8th February, 2010 issued by the Assistant Commissioner of Central Excise, u/s 11A of the Central Excise Act, 1944 (Act, for short) and the relevant Rules.

2. The Petitioner, as per the show cause notices, is engaged in manufacture of aluminum doors, windows, partitions, frameless doors, curtain walls etc. According to show cause notices, the items manufactured by the Petitioner are dutiable and fall under the heading 7610 of the First Schedule to the Central Excise Tariff Act, 1985.

3. The contention of the Petitioner on the other hand is that it is engaged in doing work of structural glazing (curtain walls) and cladding which cannot be regarded as identifiable commercial products in a factory or in any other manufacturing premises. It is alleged that the said activity involves only erection and installation of curtain walls and cladding and not manufacturing and, therefore, no excisable goods come into existence.

4. The Petitioner is right in their contention that a similar issue/question had arisen and was decided by the Central Excise and Service Tax Appellate Tribunal, Northern Bench, in the case of the Petitioner vide their decision dated 22nd November, 2004 which is reported in 2005 (98) ECC 372 . On a query being made it is revealed that this decision relates to the years 1999-2004. The three impugned show cause notices pertain to the year 2007 onwards. In the counter affidavit filed by the Respondent, the Respondent has relied upon a Larger Bench decision of the Tribunal in the case of Mahindra and Mahindra v. CCE 2005 (190) ELT 30 and it is stated that the earlier decision of the Tribunal, in the case of the Petitioner, does not bar and prohibit them from examination of the issue on merits. The Petitioner, in the rejoinder, has submitted that the Larger Bench decision in the case of Mahindra and Mahindra (supra) is not applicable to them. It is further stated that the said decision does not notice and consider the judgment of the Supreme Court in CCE, Thane and Madras v. Ajit India Pvt. Ltd. 2000 (119) ELT 274.

5. Strictly speaking, principles of res judicata do not apply to tax proceedings. Each assessment period is treated as a separate unit. What is decided in one year might not apply in the following year. However, it is equally true that unless there is a justification and change in circumstances, the Revenue authorities should not depart from the previous decision. There should be some material or reason to make a departure. Certainty and consistency are hall-marks of good tax administration.

6. In the present case, only show cause notices have been issued and there has not been any determination or decision by the authorities. The stand taken by the Respondent in the counter affidavit is that the matter requires examination and consideration in view of the Larger Bench decision of the Tribunal in the case of Mahindra and Mahindra (supra). The contentions raised by both sides require consideration and debate. The exact nature of activities undertaken and the method and technique involved in the "assembly/manufacture" has to be examined. This necessarily also involves the factual aspect. We do not think that in the circumstances it will be proper for us to step in and quash the show cause notices at the initial stage. Justification and reason for examination of the case/ issue has been indicated in the counter affidavit.

7. Generally, parties are not encouraged to seek writ remedy, if alternative remedy is available. In Whirlpool Corporation Vs. Registrar of Trade Marks, Mumbai and Others, the Supreme Court pointed out the three contingencies in which writ remedies may be sought namely "where the writ petition has been filed for the enforcement of any of the fundamental rights or where there has been a violation of the principle of natural justice or where the order or proceedings are wholly without jurisdiction or the vires of an Act is challenged." In the present case in view of the observations made above, we are not satisfied that the present case, justifies interference inspite of the alternative remedy. The Supreme Court has observed in a catena of decisions over the years that a writ

court should not interfere at the stage of issuance of show cause notice by the authorities. In Union of India (UOI) Vs. Hindalco Industries, it was observed by the Supreme Court that in taxation matters it is not proper for the High Court to interfere in exercise of jurisdiction under Article 226 of the Constitution at the stage of show cause notice especially if there is an alternative remedy available i.e. by way of filing a reply or appeal. It was held:

12. There can be no doubt that in matters of taxation, it is inappropriate for the High Court to interfere in exercise of jurisdiction under Article 226 of the Constitution either at the stage of the show-cause notice or at the stage of assessment where alternative remedy by way of filing a reply or appeal, as the case may be, is available but these are the limitations imposed by the courts themselves in exercise of their jurisdiction and they are not matters of jurisdictional factors. Had the High Court declined to interfere at the stage of show-cause notice, perhaps this Court would not have been inclined to entertain the special leave petition; when the High Court did exercise its jurisdiction, entertained the writ petition and decided the issue on merits, we do not think it appropriate to upset the impugned order of the High Court under Article 136 of the Constitution on a technical ground.

8. Although the rule is not without exception and a writ court may interfere even at the stage of issuance of show cause notice if it is issued without jurisdiction or in an abuse of process of law, however, the Supreme Court has asserted that such interference should be rare and not a matter of routine. It has been held in Union of India (UOI) and Another Vs. Vicco Laboratories, :

31. Normally, the writ court should not interfere at the stage of issuance of show-cause notice by the authorities. In such a case, the parties get ample opportunity to put forth their contentions before the authorities concerned and to satisfy the authorities concerned about the absence of case for proceeding against the person against whom the show-cause notices have been issued. Abstinence from interference at the stage of issuance of show-cause notice in order to relegate the parties to the proceedings before the authorities concerned is the normal rule. However, the said rule is not without exceptions. Where a show-cause notice is issued either without jurisdiction or in an abuse of process of law, certainly in that case, the writ court would not hesitate to interfere even at the stage of issuance of show-cause notice. The interference at the show-cause notice stage should be rare and not in a routine manner. Mere assertion by the writ Petitioner that notice was without jurisdiction and/or abuse of process of law would not suffice. It should be prima facie established to be so. Where factual adjudication would be necessary, interference is ruled out.

9. As of now, there is no determination of the questions raised even by the authorities. No final view has been taken by the Respondent. The situation is still fluid. It cannot be disputed that the Respondent i.e. the Commissioner of Central Excise has jurisdiction to decide and go into the said questions by issue of notice u/s 11A of the Act. The said authority can adjudicate and decide the objections

and contentions raised by the Petitioner. In these circumstances, we are not inclined to entertain the present writ petition against the show cause notices and the Petitioner is given liberty to file reply within three weeks to the show cause notices along with the citations relied upon by them. The Commissioner of Excise will examine the said contentions including the judgments relied upon by the Petitioner. The contention that the Petitioner is registered and paying service tax for the activities of fabrication and erection of wall curtains will also be examined. The Commissioner shall deal with the contention that both service tax and excise duty cannot be levied on the same activity. The Commissioner of Excise will pass a speaking and reasoned order. The Petitioner will be at liberty to challenge and question the same, if aggrieved. The Petitioner will also be at liberty to apply for stay and if necessary, approach this Court for protection. The observations made in this order are for the purpose of disposal of these writ petitions and will not be construed as observations or findings on merits which are binding on the authorities.

