(2000) 02 GUJ CK 0048

In the Gujarat High Court

Case No : Special Civil Application No. 2925 of 1999 with Spl. C.A. No. 689 of 2000

Apurva J. Parekh APPELLANT

Vs

Union Of India and Others RESPONDENT

Date of Decision : 08-02-2000

Acts Referred:

Central Excise Rules, 1944 — Rule 173Q, 173Q(1), 209, 209A
Central Excises and Salt Act, 1944 — Section 11, 11A

Citation : (2000) 69 ECC 786 : (2001) 95 ECR 415

Hon'ble Judges : D.H. Waghela, J;B.C. Patel, J

Bench : Division Bench

Advocate : Paresh M. Dave, for the Appellant; Akshay H. Mehta, for the Respondent

Judgement

1. Petitioner being aggrieved by an order passed on 8.1.1999 in two different sets of declarations has moved this court. The declarations filed under the provision containing the Kar Vivad Sarnadhan Scheme (hereinafter referred to as ''Scheme'') came to be rejected on the ground that the request for settlement of penalty is not covered under the scheme as amount of penalty was not determined on 31.3.1998 as per definition of the words "tax arrear" as per Section 87(m)(ii)(a) of the Finance Act, 1998. The facts, briefly, required to be considered for the disposal of these petitions are as under :

2. M/s. ESSEN Peripherals Ltd., and M/s. ESSEN Computer Ltd., having their manufacturing activity at Gandhinagar were subjected to the proceedings under the provisions contained in Central Excise Act. After detailed investigation, show cause notices were served upon the petitioners. By a show cause notice at 14.7.92, M/s. ESSEN Peripheral Ltd. was called upon to show cause to Collector of Central Excise, Custom House, near All India Radio, Ahmedabad, as to why

"(a) Central Excise amounting to Rs. 80,57,440.75ps of the goods illicitly removed as discussed hereinabove should not be demanded and recovered from them u/s 11 of the Central Excise Act, 1944 read with aforesaid rules on the ground stated hereinabove by taking the five years period instead of six months.

(b) Credit of duty paid on floppy diskettes amounting to Rs. 26,681,55/- should not be recovered from them under Rule 57I of Central Excise Rules, 1944 by taking five years period instead of six months.

(c) Penalty should not be imposed on M/s. EPL Gandhinagar under sub-rule (1) of Rule 173-Q read with sub rule (bb) of the said rules."

3. Similarly, a show cause notice was issued on 12.8.92, calling upon M/s. ESSEN Computers Ltd., to show cause to the Collector as to why :-

"(a) A Central Excise duty amounting to Rs. 35,58,706-08 as shown in Annexure - ''AA'' on the goods illicitly cleared as discussed hereinabove should not be demanded and recovered from them u/s 11-A of Central Excise and Salt Act, 1944 read with aforesaid rules, on the grounds stated hereinabove by taking the period of five years instead of six months.

(b) Penalty should be imposed on them under, sub Rule (1) of Rule 173-Q of the said rules on the grounds stated hereinabove."

4. Shri Apurva J. Parekh M.D. of M/s. ECL was also required to show [cause] to the above authority as to why penalty should not be imposed on him under Rule 209-A of the said rules as he being M.D. of the said company was responsible for all the activities of the said company, and had thereby defrauded the Government of its legitimate revenue to the tune of Rs. 35,58,706-08 as detailed in Annexure - ''AA''."

5. It appears that the adjudicating authority passed orders on 18.8.1998 and 1.9.1998. The adjudicating authority in case of ECL imposed a penalty of Rs. 1 lac on Shri Apurva J. Parekh the petitioner who was at the relevant time Managing Director of the said M/s. ESSEN Computer Ltd., Gandhinagar. By another order, the petitioner herein was similarly subjected to a penalty of Rs. 1 lac under the provision of Rule 209 of the Central Excise Rules, 1944, who was at the relevant time Managing Director of M/s. ESSEN Peripheral Ltd. By this order over and above the penalty imposed on said Shri Apurva J. Parekh, the, duty demanded was confirmed against the company and penalty was also imposed on the Company. But since we are not concerned with that, we are not referring the details thereof.

6. Against the order made by adjudicating authority appeal and applications for stay were preferred before the Tribunal and both are pending even today. The declarations filed before the authority were rejected on the ground that the provision contained u/s 87(m)(ii)(a) of the Finance Act, 1998 is not applicable. The words "tax arrear" are defined in Clause (m) of Section 87. The relevant portion thereof reads as under :-

"(a) the amount of duties (including drawback of duty, credit of duty or any amount representing duty), cesses, interest, fine or penalty determined as due or payable under that enactment as on the 31st day of March, 1998 but remaining unpaid as on the date of making a declaration u/s 88; or

(b) the amount of duties (including drawback of duty, credit of duty or any amount representing duty), cesses, interest, fine or penalty which constitutes the subject matter of a demand notice or a show cause notice issued on or before the 31st day of March, 1998 under that enactment but remaining unpaid on the date of making a declaration u/s 88, but does not include any demand relating to erroneous refund and where a show cause notice is issued to the declarant in respect of seizure of goods and demand of duties, the tax arrears shall not include the duties on such seized goods have not been quantified."

7. Mr. Dave, learned counsel appearing for the petitioner submitted that in view of provision contained in Section 96 of the Scheme, circulars have been issued. The relevant Sub Clause 1 of Section 96 reads as under :-

"96. Power of Central Government to issue directions - (1) The Central Government may, from time to time, issue such orders, instructions and directions to the authorities, as it may deem fit, for the proper administration of this Scheme, and such authorities, and all other persons employed in the execution of this Scheme shall observe and follow such orders, instructions and directions of the Central Government;

Provided that no such orders, instructions or directions shall be issued so as to require any designated authority to dispose of a particular case in a particular manner."

8. Mr. Dave submitted that in view of power conferred, clarifications have been issued by the authority itself. The instructions have been issued by Trade Notice dtd. 2.11.1998 which is based on Central Board of Excise & Custom letter No. F.275/33/98/CX dtd. 28.10.98. The doubt involved was indicated in the said circular which reads as under :

"Can the KVS Scheme be availed of in a case where a show cause notice/demand notice has been issued prior to 31.3.1998 and (a) xxxxx (b) adjudication has been made after 31.3.98 ?" Clarification issued in this behalf is as under :

"Only, where party is in dispute i.e. it has filed an appeal against the order and the appeal is admitted and pending on the date of declaration, the benefit under the scheme can be claimed."

9. Reading the aforesaid clarification it should have been clear to respondent no. 2 that it is not necessary that in the show cause notice amount of penalty must have been determined or there must be an order by adjudicating authority on or before 31.3.98. It is required to be noted that the competent authority issuing the notice will call upon the party to show cause as to why duty of particular amount which has been calculated should not be levied. If the party satisfies, there is no question of levying any duty, and there would not be any question of

penalty. Once the show cause notice has been issued on or before 31.3.98 the authority ought to have considered the question whether sub clause (b) of sub-clause (m) of Section 87 would be attracted or not. When the amount of duty or penalty which constitute the subject matter of a demand notice or a show cause notice issued on or before 31.3.1998, the authority was required to consider the case whether sub clause (b) of sub clause (ii) of clause (m) of Section 87 is attracted or not. Show cause notice was issued in one case on 14.7.92 and in another case on 12.8.92. Adjudicating authority adjudicated on 18.8.98 and 1.9.98. Learned counsel stated at the bar that appeals were preferred against the order made by adjudicating authority on 5.11.98 and the declarations were filed on 10.11.98. On the date of making a declaration u/s 88 a crucial question to be examined by respondent no. 2 was whether case is covered by either of the sub clauses of sub clause (ii) of clause (m) of Section 87 or case is not covered under the scheme. In the instant ease, as pointed out, the show cause notices issued had culminated in the orders at a latter(sic) [later] point of time. But once the show cause notice was issued on or before 31.3.1998 and the declarations was made u/s 88 of the Scheme, the authority was required to consider the case. In the instant case Commissioner (Technical) Central Excise, Ahmedabad, while rejecting the application arrived at a conclusion that the amount of penalty was not determined as on 31.3.98 and therefore it cannot be said that the declarant was entitled to get the benefit. As we have indicated hereinabove in the instant case sub clause (b) of sub clause (ii) of Clause (m) of Section 87 would be attracted and not sub clause (a) of sub clause (ii) of clause (m) of Section 87. As a matter of fact in the instant case whether the provisions contained in 87(m)(ii)(a) would be attracted or provision contained in Section 87(m)(ii)(b) of the Scheme would be attracted was the question to be examined. We are of the view that the impugned orders are required to be quashed and set aside and are hereby quashed and set aside with the direction to respondent no. 2 to dispose of the declarations in accordance with the law. The time as mentioned in Section 90(1) of the Scheme shall be taken from the date of the order passed by this court.

10. The petitions stand allowed accordingly with no order as to costs. Rule made absolute.

