
(2015) 07 GUJ CK 0003
In the Gujarat High Court

Case No : Special Civil Application Nos. 11987, 12228 and 12229 of 2014

Claris Lifescience Ltd.

APPELLANT

Vs

Union of India

RESPONDENT

Date of Decision : 17-07-2015

Acts Referred:

Central Excises and Salt Act, 1944 — Section 11A(1), 35D, 35E(1)
Finance Act, 2007 — Section 138

Citation : (2015) 52 GST 1094

Hon'ble Judges : M.R. Shah and Sonia Gokani, JJ.

Bench : Division Bench

Advocate : Paresh M. Dave, Advocate, for the Appellant; Y.N. Ravani, Advocate, for the Respondent

Judgement

M.R. Shah, J.—As common question of law and facts arise in this group of petitions, they are disposed of by this common judgment and order. In all these petitions respective petitioners have prayed for an appropriate writ, direction and order, more particularly, writ of prohibition prohibiting the respondents, their servants and agents from taking any action against the respective petitioner companies for recovering and collecting Education Cess as well as Secondary and Higher Education Cess on the excise duty calculated as an amount equal to the Custom Duty leviable on similar goods if imported in India in case of DTA clearances made by the respective petitioner companies.

1.1 The respective petitioners have also challenged the impugned show cause notices, the particulars of which are given in respective show cause notices, by which, the respective petitioners are called upon to show cause why the short payment of education cess and secondary and higher education cess should not be demanded and recovered from them under the provisions of Section 11A(1) of the Central Excise Act, 1944 r/w. Section 93 of the Finance (No. 2) Act, 2004 and Section 138 of the Finance Act, 2007.

1.2 The respective petitioners have challenged the impugned show cause notices

on the ground that issue sought to be raised by the department in such show cause notices is already held in favour of the assessee by virtue of judgments of the Tribunal in the case of these very assessees. It is the case on behalf of the respective petitioners that further appeals by the department to the Supreme Court has been rejected as time barred. It is the case of the respective petitioners that in the past similar show cause notices have been issued, the same have been set aside by the Division Bench of this Court on the ground that once the issue is concluded by the decision of the Tribunal in favour of the assessee thereafter it is not open for the department to re-agitate the same question.

2. Shri Dave, learned advocate for the respective petitioners has heavily relied upon the decision of this Court in the case of *Claris Lifesciences Ltd. v. Union of India*, 2013 (298) ELT 45 as well as in the case of *Claris Lifesciences Ltd. Vs. Union of India*, . Relying upon the aforesaid decisions, it is submitted that the similar show cause notices issued by the department have been set aside by the Division Bench of this Court.

2.1 It is vehemently submitted by Shri Dave, learned advocate for the respective petitioners that as such authority who has issued the show cause notice is subordinate to the learned Tribunal and therefore, even if the show cause notices are adjudicated upon; the adjudicating authority is bound to obey and follow the decision of the Tribunal and cannot take a contrary view than the view taken by the learned Tribunal. In support of his above submissions, he has heavily relied upon the decision of the Hon''ble Supreme Court in the case of *Union of India and others Vs. Kamlakshi Finance Corporation Ltd.*, .

Making above submissions, it is requested to allow the present Special Civil Applications.

3. Shri Y.N. Ravani, learned advocate has appeared on behalf of the department. It is submitted that as such the department and the Central Government does not accept the correctness of the view of the Tribunal, and wishes to carry the matter further. It is submitted that as such against the decision of the learned Tribunal, upon which, reliance has been placed by the respective petitioners, the department did challenge the same before the Hon''ble Supreme Court, however the Hon''ble Supreme Court dismissed the appeal/SLP on the ground of limitation. It is submitted that therefore, in the subsequent proceedings, it will always be open for the department to challenge the decision before the Hon''ble Supreme Court.

3.1 It is further submitted by Shri Ravani, learned advocate for the department that in view of the above and to keep the issue alive, the department is required to issue show cause notice so that ultimately matter can be carried to the Hon''ble Supreme Court. It is submitted that in taxation, each year is separate and distinct and in subsequent year it would always be open for the department to raise demand, for which, show cause notices are required to be issued and

therefore such notices have been issued. It is submitted that if the department is precluded from raising such demand and/or issue show cause notice the validity of the Tribunal's view would never be tested before the Higher Court. It is submitted that therefore, to keep the issue alive and so as to see that ultimately department can approach the Hon''ble Supreme Court, when the department has issued the show cause notice, it cannot be said that the authority has committed any error and/or illegality in issuing the impugned show cause notices.

3.2 It is further submitted by Shri Ravani, learned advocate for the department that even in the earlier decision in the case of Claris Lifesciences Ltd. (supra) even the Division Bench had specifically observed and clarified that allowing the aforesaid Special Civil Application would not been seen as any indication of our view of upholding the view of the Tribunal contained in its decision dated 21.6.2010 and it would be for the Department to call in question such a view in appropriate proceedings, as is permissible to the Department. It is submitted that issuing show cause notice and thereafter to carry the matter to the Hon''ble Supreme Court can be said to be initiating the appropriate proceedings as in the manner permissible to the Department. Therefore, it is requested to dismiss the present petitions. However, Shri Ravani, learned advocate for the department/ Adjudicating Authority has fairly conceded that so far as adjudicating authority is concerned, as on today unless and until contrary view is taken by the Higher Forum/Court, the decision of the Tribunal is binding to the adjudicating authority. However, according to Shri Ravani, learned advocate for the department impugned show cause notices are issued to keep the issue alive so that the matter can be carried to the Hon''ble Supreme Court and the decision of the Tribunal upon which, much reliance has been placed by the petitioner can be tested by the Hon''ble Supreme Court.

4. In reply to the aforesaid, Shri Paresh Dave, learned advocate for the petitioner in the alternative, has requested to direct the adjudicating authority to adjudicate the show cause notices at the earliest and within stipulated time.

5. Heard the learned advocates for the respective parties at length. At the outset, it is required to be noted that in all these petitions respective petitioners have challenged the respective show cause notices, by which, the respective petitioners are called upon to show cause why the short payment of education cess and secondary and higher education cess should not be demanded and recovered from them under the provisions of Section 11A(1) of the Central Excise Act, 1944 i/w Section 93 of the Finance (No. 2) Act, 2004 and Section 138 of the Finance Act, 2007. It is the case on behalf of the respective petitioners that aforesaid issue is as such concluded in favour of the assessee in view of the decision of the learned Tribunal dated 21.6.2010 and therefore, it is not open for the respondent/adjudicating authority to issue show cause notice and to re-agitate the same issue again. It is also the case on behalf of the petitioners that decision of the Tribunal dated 21.06.2010 is binding to the adjudicating authority. On the other hand, it is the case of the department that as such department

does not accept the decision of the learned Tribunal dated 21.06.2010 and as such department did challenge the decision of the Tribunal before the Hon''ble Supreme Court, however the department lost before the Hon''ble Supreme Court solely on the ground of limitation. Therefore, it is the case on behalf of the department that only with a view to keep the issue alive so that ultimately matter can be carried to the Hon''ble Supreme Court, impugned show cause notices have been issued.

6. It is true that the decision of the Tribunal dated 21.06.2010 is as such binding to the adjudicating authority. Being the subordinate to the Tribunal, the adjudicating authority cannot take contrary view than the view taken by the learned Tribunal. In the case of Kamlakshi Finance Corpn. Ltd. (supra) in para 6 and 7 the Hon''ble Supreme Court has observed and held as under:

"6. ... It cannot be too vehemently emphasized that it is of utmost importance that, in disposing of the quasi-judicial issues before them, revenue officers are bound by the decisions of the appellate authorities. The order of the Appellate Collector is binding on the Assistant Collectors working within his jurisdiction and the order of the Tribunal is binding upon the Assistant Collectors and the Appellate Collectors who function under the jurisdiction of the Tribunal. The principles of judicial discipline require that the orders of the higher appellate authorities should be followed unreservedly by the subordinate authorities. The mere fact that the order of the appellate authority is not acceptable to the department - in itself an objectionable phrase - and is the subject-matter of an appeal can furnish no ground for not following it unless its operation has been suspended by a competent Court. If this healthy rule is not followed, the result will only be undue harassment to assessees and chaos in administration of tax laws.

7. The impression or anxiety of the Assistant Collector that, if he accepted the assessee's contention, the department would lose revenue and would also have no remedy to have the matter rectified is also incorrect. Section 35D confers adequate powers on the department in this regard. Under sub-section (1), where the Central Board of Excise and Customs [Direct Taxes] comes across any order passed by the Collector of Central Excise with the legality or propriety of which it is not satisfied, it can direct the Collector to apply to the Appellate Tribunal for the determination of such points arising out of the decision or order as may be specified by the Board in its order. Under sub-section (2) the Collector of Central Excise, when he comes across any order passed by an authority subordinate to him, if not satisfied with its legality or propriety, may direct such authority to apply to the Collector (Appeals) for the determination of such points arising out of the decision or order as may be specified by the Collector of Central Excise in his order and there is a further right of appeal to the department.

The position now, therefore, is that, if any order passed by an Assistant Collector or Collector is adverse to the interests of the Revenue, the immediately higher administrative authority has the power to have the matter satisfactorily resolved

by taking up the issue to the Appellate Collector or the Appellate Tribunal as the case may be. In the light of these amended provisions, there can be no justification for any Assistant Collector or Collector refusing to follow the order of the Appellate Collector or the Appellate Tribunal, as the case may be, even where he may have some reservations on its correctness. He has to follow the order of the higher appellate authority. This may instantly cause some prejudice to the Revenue but the remedy is also in the hands of the same officer. He has only to bring the matter to the notice of the Board or the Collector so as to enable appropriate proceedings being taken under S. 35E(1) or (2) to keep the interests of the department alive. If the officers view is the correct one, it will no doubt be finally upheld and the Revenue will get the duty, though after some delay which such procedure would entail."

7. However, the view of the higher authority or the Tribunal can be further carried to the High Court or Supreme Court and for that adjudicating authority is required to issue show cause notice so that ultimately matter can be carried to the Higher Court/Forum. However, so far as adjudicating authority is concerned, being subordinate to the Tribunal, it is bound to follow the decision of the learned Tribunal. However, it will always been open for the department to call in question such a view in appropriate proceedings as in the manner permissible to the Department. The appropriate proceedings as in the manner permissible to the Department would be that after adjudicating authority passes an order as per the decision of the learned Tribunal, the matter can be further carried to the Tribunal and the learned Member of the Tribunal either may take the same view and/or may refer to the Larger Bench. If the learned Tribunal takes the same view, in that case, it will always be open for the Department to carry the matter further to the Higher Court and in such proceedings the view of the Tribunal can be tested and/or considered. The aforesaid can be said to be permitting the department to call in question the view of the Tribunal in appropriate proceedings as in the manner permissible to the department. However, for the aforesaid purpose, the department/adjudicating authority is required to issue show cause notice, may be for the aforesaid limited purpose and to keep the issue alive. In view of the above and for the reasons stated above, all these petitions are disposed of by directing the adjudicating authority to adjudicate the respective show cause notices at the earliest but not later than three months from the date of receipt of the writ of the present order and adjudicate the show cause notices in light of the observations made herein above so that if so advised the department may call in question such a view, more particularly, view taken by the Tribunal in its decision dated 21.06.2010 upon which reliance has been placed by the respective petitioners in appropriate proceedings as in the manner permissible to the department as observed herein above. With this, present petitions are disposed of accordingly.