(2010) 09 GUJ CK 0110

In the Gujarat High Court

Case No : Tax Appeal No. 1554 of 2009

Commissioner of C. Ex. and Customs APPELLANT

Vs

Rikhab Mehta RESPONDENT

Date of Decision : 16-09-2010

Acts Referred:

Central Excises and Salt Act, 1944 — Section 35(G)

Citation : (2010) 259 ELT 518

Hon'ble Judges : K.A. Puj, J;Harsha Devani, J

Bench : Division Bench

Advocate : Amee Yajnik, for the Appellant; None, for the Respondent

Final Decision : Dismissed

Judgement

H.N. Devani, J.—In this appeal u/s 35G of the Central Excise Act, 1944 (the Act), the Commissioner of Central Excise and Customs, Daman has challenged the order dated 4-2-2009 [2009 (245) E.L.T. 449 (Tri. - Ahmd.)] made by the Customs, Excise and Service Tax Appellate Tribunal (the Tribunal) proposing the following three questions stated to be substantial questions of law for determination by this Court:

"1. Whether in the facts and circumstances of the case, the Hon''ble CESTAT was justified in remanding the matter for de novo adjudication which was affirmed erroneously by the Tribunal and tagging the appeals along with other appeals that were decided by dealing with only stay applications?

1. On appeal from 2009 (245) E.L.T. 449 (Tri. - Ahmd.).

2. Whether, in the facts and circumstances of the case, the Hon''ble CESTAT was right in concluding that principles of natural justice have not been followed in the Order-in-Original although Order-in-Original has elaborated as to why cross-examination of witnesses and co-accused could not be granted?

3. Whether, in the facts and circumstances of the case, on alleged prima facie

case, the Hon''ble CESTAT has misdirected itself in its approach overlooking salient features of the case and misreading the evidence on record and instead of deciding the appeal one way or the other, whether justified in remanding the matter to the Adjudicating Authority?"

2. The facts stated briefly are that pursuant to the search carried out on the premises of the Respondent, show-cause notice dated 10-2-2006 came to be issued to the Respondent-Assessee which culminated into an Order-in-Original dated 31-12-2007 made by the Joint Commissioner, Central Excise and Customs, Daman. Being aggrieved by the said order, the Respondent preferred an appeal before the Commissioner (Appeals) who vide order dated 30-9-2008 allowed the appeal by setting aside the Order-in-Original and remanding the matter to the adjudicating authority. While making the said order the Commissioner (Appeals) placed reliance upon a decision of the Tribunal dated 1-8-2008 whereby in collateral proceedings, the Tribunal had set aside the order made by the adjudicating authority, and remanded the matter to the adjudicating authority for fresh adjudication on various grounds including on the ground that the Adjudicating Authority had not permitted cross-examination of the witnesses.

3. Being aggrieved, the Appellant-herein preferred appeal before the Tribunal. By the impugned order, the Tribunal has disposed of the appeal preferred by the Revenue by remanding the matter to the Commissioner, Central Excise, Daman, who was the adjudicating authority in the collateral proceeding, instead of Joint Commissioner, Central Excise and Customs who was the adjudicating authority in the present case. Being aggrieved, the Appellant has preferred the present appeal.

4. Assailing the impugned order of the Tribunal, Ms. Amee Yajnik, learned Senior Standing Counsel for the Appellant reiterated the reasoning adopted by the adjudicating authority. It was submitted that when the adjudicating authority had given elaborate reasons as to why cross-examination of the witnesses and co-accused should not be granted, the Tribunal was not justified in concluding that the principles of natural justice have not been followed. It was further submitted that view taken by the Tribunal that the Commissioner should adjudicate the show cause notice in the present case along with the other show cause notice is erroneous as both the show cause notices although linked together are not the same. The proceedings before the Joint Commissioner were in respect of seizure and consequent confiscation of unaccounted stock of raw material and finished goods whereas the proceedings before the Commissioner were in respect of recovery of irregular CENVAT credit. That when separate proceedings were initiated pursuant to two different show cause notices on two different issues, although linked, there was no infirmity in deciding them separately. It was, accordingly, submitted that the Tribunal was not justified in remanding the matter to the Commissioner, Central Excise and Customs, Daman, and as such, the appeal does give rise to the questions of law as proposed or as may be formulated by the Court and deserves to be admitted.

5. The facts of the case as emerging from the record are that pursuant to the search carried out on 12-8-2005 by officers of the Directorate General of Central Excise Intelligence on different premises, investigation came to be carried out. Subsequently, two show-cause notices came to be issued, one being the show-cause notice dated 10-2-2006 which forms the basis of the proceedings leading to the present appeal and the other being show-cause notice dated 24-4-2006 which was the parent show-cause notice. The show-cause notice dated 24-4-2006 came to be adjudicated by the Commissioner of Central Excise, Daman, which was carried in appeal before the Tribunal. The Tribunal vide order dated 1-8-2008 remanded the matter to the adjudicating authority, namely, the Commissioner, Central Excise, Daman, for fresh adjudication after permitting cross-examination of the witnesses. In relation to the show-cause notice pertaining to the present case, Order-In-Original came to be made on 31-12-2007 by the Joint Commissioner, Central Excise and Customs, Daman. Against the said order, the Respondent Assessee preferred appeal before the Commissioner (Appeals). Before the Commissioner (Appeals), on behalf of the Respondent it had, inter alia, been contended that the order impugned had been passed in a pre-judged manner and in contravention of the principles of natural justice, inasmuch as the adjudicating authority had not allowed cross examination of witnesses. The Commissioner (Appeals) noted that from the show-cause notice dated 10-2-2005 it appears that the main allegation against the Respondent was that the Respondent had wrongly availed huge amount of CENVAT credit and evaded Central Excise duty and did not account for the manufactured goods in relevant statutory records which was investigated and a separate show cause notice for the same appears to have been issued which was adjudicated by Commissioner of Central Excise and Customs, Daman vide order in original No. 15/MP/Daman/07 dated 14-12-2007. That the show cause notice dated 10-2-2005 issued in respect of the seized goods appears to be only an off-shoot of the main Show Cause Notice adjudicated by the Commissioner of Central Excise. That the said order dated 14-12-2007 came to be challenged by the Respondent before the Tribunal who vide order dated 25-6-2008/1-8-2008 set aside the order and remanded the case to the Commissioner for fresh adjudication on various grounds including the ground that the adjudicating authority had not permitted cross-examination of the witnesses and therefore, principles of natural justice had been violated. The Commissioner (Appeals) recorded that the Tribunal, in effect had held that denial of cross-examination by the Commissioner amounted to violation of the principles of natural justice. The Commissioner (Appeals) found as a matter of fact that in the order-in-original which was subject matter of appeal before him, the cross examination of the same set of witnesses had been denied by the adjudicating authority. Following the aforesaid order of the Tribunal, the Commissioner (Appeals) vide order dated 30-9-2008 held that denial of cross examination of the witnesses amounts to violation of the principles of natural justice and remanded the matter to the adjudicating authority, being Joint Commissioner, Central Excise and Customs, Daman for fresh decision after permitting the cross-examination of the

witnesses. Against the said order, revenue preferred appeal before the Tribunal. The Tribunal placed reliance upon the CBEC''s Circular No. 362/78/97-CX., dated 9-12-1997 wherein it has been clarified that all show-cause notices involving the same issue will be adjudicated by the adjudicating authority competent to decide the cases involving the highest amount of duty and held that since both the show-cause notices involve same issues, the same should be adjudicated by the authority competent to decide the cases involving highest amount of duty, being the Commissioner. The Tribunal, accordingly, disposed of the appeal preferred by the revenue by modifying the order made by the Commissioner (Appeals) to the effect that the matter came to be remanded to the Commissioner, Central Excise, Daman instead of the Joint Commissioner, Central Excise and Customs, Daman, to adjudicate the present case, along with the other case remanded by the Tribunal.

6. From the facts noted hereinabove, it is apparent that in the present case the adjudicating authority had denied the opportunity to cross-examine the witnesses to the Respondent. A perusal of the order made by the adjudicating authority indicates that the Respondent had disputed certain facts recorded in the panchnama and had also alleged suppression of the statement of Shri Pitham-berwala recorded during the panchnama proceedings. Allegations regarding vehicles of Jogibhai having been used for transportation of scrap to the factory premises had also been disputed. It is in these circumstances that the Respondent had sought for cross examination of the witnesses on whose statements the Appellant wanted to rely against the Respondent; as well as the panchas and officers who had drawn the panchnama and conducted the search proceedings. In the circumstances, the action of adjudicating authority in refusing to allow the Respondent to cross-examine the said witnesses would seriously prejudice the defence of the Respondent and as such is undoubtedly violative of the principles of natural justice. Moreover, a perusal of the grounds for denying the Respondent the opportunity to cross examine the witnesses makes it apparent that the adjudicating authority has cursorily brushed aside the request on irrelevant grounds stating reasons which are neither any valid nor germane. In the circumstances, the Commissioner (Appeals) was justified in following the order made by the Tribunal in proceedings arising out of the parent show-cause notice and setting aside the order made by the adjudicating authority and remanding the matter for a fresh decision after affording the Respondent an opportunity to cross-examine the witnesses, more so when the witnesses sought to be cross examined in both the proceedings were the same. The Tribunal, in the appeal preferred by the revenue has merely modified the order made by the Commissioner (Appeals) and remanded the matter to the Commissioner, Central Excise, Daman, so as to enable him to adjudicate both the matters together.

7. In this regard it may be pertinent to refer to the contents of the CBEC Circular No. 752/68/2003-C.X. dated 1-10-2003 as reproduced in the impugned order which clarifies that in case where show cause notices have been issued on the

same issue answerable to different adjudicating authorities, all the show cause notices involving the same issue will be adjudicated by the adjudicating authority competent to decide the cases involving the highest amount of duty. Thus, the Tribunal has merely given effect to the above referred Circular of CBEC and remanded the matter to the adjudicating authority competent to decide the cases involving highest amount of duty and as such it is not possible to state that the Tribunal has committed any legal error so as to warrant interference.

8. In view of the facts and circumstances noted hereinabove, the impugned order of the Tribunal does not give rise to any question of law, much less a substantial question of law. The appeal is, therefore, dismissed.

