(2015) 08 GUJ CK 0014

In the Gujarat High Court

Case No : Tax Appeal No. 453 of 2015

Commissioner of Central Excise, Ahmedabad, I — APPELLANT

Vs

Rajesh Malleables Ltd. — RESPONDENT

Date of Decision : 11-08-2015

Acts Referred:

Central Excises and Salt Act, 1944 — Section 11A, 35-G
Constitution of India, 1950 — Article 14, 19(1)(g)

Citation : (2015) 08 GUJ CK 0014

Hon'ble Judges : A.J. Desai and Abdullah Gulamahmed Uraizee, JJ.

Bench : Division Bench

Advocate : V.D. Nanavati, Advocate, for the Appellant

Judgement

Abdullah Gulamahmed Uraizee, J.—The Revenue has filed this appeal under section 35-G of the Central Excise Act, 1944 to challenge Order No. A/10035/2015 dated 8/1/2015 passed by the Customs, Excise Service Tax Appellate Tribunal, West Zonal Bench, Ahmedabad in Appeal No. E/1589/2009 whereby the order in Appeal No. 222/2009 AHD-I dated 31/8/2009 passed by the Commissioner (Appeals), Ahmedabad is confirmed.

2. The Revenue has filed this appeal to consider the following substantial questions of law:

"a. Whether a provision of fiscal statute which is procedural in nature if held unconstitutional by the Hon''ble High Court in Indsur Global Ltd. Vs. Union of India, can be stricto senso applied in the facts of other case especially when the said judgment had not yet attained finality as the limitation period to file appeal was still not over?

b. Whether the Tribunal was right in adjudicating the matter relying on a judgment striking down a provision of law when the said judgment was stayed for a further period to enable the department to file an appeal before the Hon''ble Supreme Court of India especially when the challenge was to a statutory provisions which may affect the government exchequer with regards to collection of revenue?

c. Whether the action of the department to penalize an assessee for non-compliance of statutory provisions can be held to be bad in law when the legality of the said provision is still to be challenged before the Hon''ble Supreme Court of India?

d. Whether reliance can be placed by the Hon''ble Appellate Tribunal on an order of Hon''ble High Court before it is made operational more so when the said order was stayed until 15.01.2015 and the impugned order is passed on 08.01.2015?

e. Whether Hon''ble Tribunal can treat Rule 8(3A) of Central Excise Rules, 2002 unconstitutional and demand for payment of duty from cenvat account current void when the issue of constitutionality of Rule 8(3A) of Central Excise Rules, 2002 has not yet attained finality in view of the fact that order of Hon''ble High Court of Gujarat in the case of Indsur Global Ltd. Vs. Union of India, has not yet attained finality as the department is in the process of approaching the Hon''ble Apex Court?

f. Whether Hon''ble Tribunal can treat Rule 8(3A) of Central Excise Rules, 2002 unconstitutional and demand for recovery of interest under Section 11AB of the Central Excise Act, 1944 void when the issue of constitutionality of Rule 8(3A) of Central Excise Rules, 2002 has not yet attained finality in light of the fact that order of Hon''ble High Court of Gujarat in the case of Indsur Global Ltd. Vs. Union of India, has not yet attained finality as the department is in the process of approaching the Hon''ble Apex Court, after being stayed upto 15.01.2015?

g. Whether Hon''ble Tribunal can treat Rule 8(3A) of Central Excise Rules, 2002 unconstitutional and imposition of penalty under Rule 25 of the Central Excise Rules, 2002 void when the issue of constitutionality of Rule 8(3A) of Central Excise Rules, 2002 has not yet got finality in light of the fact that order of Hon''ble High Court of Gujarat in the case of Indsur Global Ltd. Vs. Union of India, has not yet attained finality as the department is in the process of approaching the Hon''ble Apex Court, after being stayed up to 15.01.2015?"

3. The above substantial questions of law are posed for the consideration of this Court in the background of the following facts:

"The respondent has defaulted for discharging monthly payment of duty for the month of June 2006 and not paid within the stipulated period and was paid in August 2006 to February, 2007 along with interest. A show cause notice was issued for disallowing the duty paid from the cenvat account in violation of Rule 8(3A) of the Central Excise Rules, 2002 read with Section 11A of the Central Excise Act, 1944 along with interest and impose penalty. Adjudicating authority confirmed the demand and imposed penalty. Commissioner (Appeals) set aside the adjudication order."

4. We have heard learned advocate Mrs. V.D. Nanavati appearing for the

appellant. Mrs. Nanavati, learned advocate appearing for the appellant would submit that the CESTAT has committed serious error in rejecting the appeal of the appellant relying upon the judgment of this Court in the case of Indsur Global Ltd. Vs. Union of India, .

5. She would further submit that the department is contemplating to challenge the judgment of this Court in case of Indsur (supra) in the Hon''ble Apex Court and therefore, she has urged that the appeal may be admitted.

6. We do not find any force in the argument of the learned advocate Mrs. Nanavati. It is apposite to note that the judgment of the Division Bench of this Court in case of Indsur (supra) is decided on 26-27/11/2014 i.e. almost around nine months ago. So far the department has not preferred any appeal to challenge the said decision of this Court in the Honourable Apex Court, hence in our opinion, the ratio expounded by this Court in the Indsur (supra) still holds the field. Relevant para 34 has held as under:

"34. By no stretch of imagination, the restriction imposed under sub-rule (3A) of Rule 8 to the extend it requires a defaulter irrespective of its extent, nature and reason for the default to pay the excise duty without availing Cenvat credit to his account can be stated to be a reasonable restriction. It leads to a situation so harsh and a position so unenviable that it would be virtually impossible for an assessee who is trapped in the whirlpool to get out of his financial difficulties. This is quite apart from being wholly reasonable, being irrational and arbitrary and therefore, violative of Article 14 of the Constitution. It prevents him from availing credit of duty already paid by him. It also is a serious affront to his right to carry on his trade or business guaranteed under Article 19(1)(g) of the Constitution. On both the counts, therefore, that portion of sub-rule (3A) of rule must fail."

7. We are therefore, of the opinion that since the judgement of this Court is so far not challenged before Honourable the Apex Court and therefore, it holds the field, we are of the opinion that the CESTAT (West Zonal) Bench, Ahmedabad has not committed any error or irregularities in rejecting the appeal of the Revenue by the impugned order dated 8/1/2015. In our opinion, no substantial questions are involved in this appeal. Hence, dismissed.