(2015) 06 MAD CK 0036

In the Madras High Court

Case No : C.M.A. Nos. 1103-1104 of 2009

Commissioner of Central Excise APPELLANT

Vs

Entex Pvt. Ltd. RESPONDENT

Date of Decision : 26-06-2015

Acts Referred:
Central Excises and Salt Act, 1944 — Section 11A, 3, 3A, 3-A

Citation : (2015) 324 ELT 466

Hon'ble Judges : R. Sudhakar and K.B.K. Vasuki, JJ.

Bench : Division Bench

Advocate : P. Mahadevan, for the Appellant; S. Jaikumar, for the Respondent

Judgement

R. Sudhakar, J.—These Civil Miscellaneous Appeals are filed by the Revenue as against the order of the Customs, Excise and Service Tax Appellate Tribunal [2009 (236) E.L.T. 294 (Tri. - Chennai)] in dismissing the appeals filed by the Revenue being aggrieved by the dropping of demands of duty in favour of the assessee for the material periods (June, 1999 to March, 2000 in one case and April to October, 2000 in the other case). This Court admitted these appeals on 23-4-2009 on the following substantial questions of law:

"1. Whether, in the facts and circumstances of the case, the 2nd respondent Tribunal is justified in dismissing the appeals of the Revenue and whether the 2nd respondent Tribunal has further erred in law in not holding that the duty should be paid first and then abatement claimed under Rule 96ZQ(7)(e) of Central Excise Rules, 1994? And

2. Whether, in the facts and circumstances of the case, the 2nd respondent Tribunal has further erred in law in holding that a revenue neutral situation is discernible in this case without taking into consideration the mandatory penalty prescribed under Rule 96ZQ of the Central Excise Rules, 1944?"

The brief facts of the assessee''s case are as follows:

"The assessee is an independent processor engaged in the manufacture of processed textile fabrics falling under Chapter Sub-Heading 5207.21, 5207.22 and 5207.23. The unit was working under compounded levy scheme under Section 3-A with effect from 16-12-1998. The Commissioner has provisionally fixed the Annual Capacity Production at Rs. 421.92 lakhs and rate of duty payable per month is at Rs. 4.5 lakhs. As the assessee did not pay the duty during the period 1-6-1999 to 30-11-1999 a show cause notice dated 13-12-1999 was issued by the Range Officer to demand the duty, interest and to impose penalty. Another show cause notice dated 5-5-2000 was issued for the period from 1-12-1999 to 31-3-2000. After due process of law, the Order-in-Original came to be passed demanding a sum of Rs. 2,73,226/- from the assessee under Rule 96ZQ of the Central Excise Rules, 1944 read with Section 11A of the Central Excise Act, 1944. The statutory interest of a sum of Rs. 1,64,739/- under Rule 96ZQ(5)(i) of the Central Excise Rules, 1944 was also demanded from the assessee. Along with these demands, a total penalty of a sum of Rs. 20,000/- was also levied on the assessee."

2. Aggrieved by the Order-in-Original, the assessee pursued the matter before the Commissioner (Appeals). The Commissioner (Appeals) allowed the appeals by setting aside the Orders-in-Original. As against the said order of the Commissioner (Appeals), the Revenue went before the Tribunal.

3. The Tribunal, while dismissing the appeals held as follows:

"4. After hearing both sides and considering their submissions, we are of the considered view that, as the provisions of Section 3A of the Act remained the same, prior to and after 28-2-1999, the Board''s circular has got to be examined in the light of the said provisions. Sub-section (3) of Section 3A provided for levy and collection of duty of excise on notified goods. Its proviso provided for abatement of duty for any continuous period of closure of factory of not less than 7 days subject to fulfilment of such conditions as might be prescribed. These conditions were prescribed under sub-rule (7) of Rule 96ZQ insofar as independent textile processors were concerned. Sub-rule (7) expressly provided that the Commissioner of Central Excise shall deal with a claim of abatement of duty. It was after examining these provisions that the board, in the cited circular, took the view that an independent textile processor claiming abatement of duty for any period of non-operation of stenter (being not less than 7 days) should not be compelled to pay duty first and then claim abatement. We do not find any reason why this liberal approach suggested by the Board should be resisted by the department. Yet another reason which we have found in favour of the respondents is that it is not the case of the Revenue that the abatement claims in question would have been rejected for any reason whatsoever, had they been filed after payment of duty. In other words, a revenue-neutral situation is discernible from the facts of this case. For the aforesaid reasons, without commenting on the case law, we sustain the order of the learned Commissioner (Appeals) and dismiss these appeals."

4. Being aggrieved by the orders of the Tribunal, the Revenue has filed these appeals before this Court.

5. Heard learned Standing Counsel appearing for the Revenue and the learned counsel appearing for the assessee and perused the materials placed before this Court.

6. It is brought to our notice by the learned counsel on either side that in the decision reported in Beauty Dyers Vs. Union of India (UOI), , this Court has held that Hot Air Stenter Independent Textile Processors Annual Capacity Determination Rules, 1998; Rules framed under Notification Nos. 14/2000-C.E. (N.T.) and 19/2000-C.E. and Notification No. 2/99-C.E. are ultra vires of erstwhile Section 3A of the Central Excise Act, 1944. The relevant paragraphs of the order reads as under:

"13. As rightly submitted by learned counsel all chambers irrespective of the nature, age and their capacity cannot be treated equally for the purpose of fixing the annual capacity of production, as the same has been done under Notification No. 42/1998. The rules framed under Notification No. 42/1998 is not having acceptable method to arrive at the capacity of production, which is absolutely necessary to levy and collect duty of excise under Section 3A of the Act. So, the said rules cannot be adopted for determination of excise duty as they cannot level the correct capacity of production of the factory for the purpose of levying excise duty. So the Rule 3 of the rules issued in the Notification No. 42/1998 cannot be sustained as they are ultra vires Section 3A of the Act.

14. The Order rules issued under other Notifications which are impugned in the other writ petitions are only based on the rules issued in Notification No. 42/1998 and so the reasoning given above will apply to these rules also. So they also cannot be sustained consequently, they are set aside. But the petitioners are liable to pay duty of excise under Section 3 of the Act or under any other provisions contemplated for the same."

In view of the order passed by this Court in the case of Beauty Dyers Vs. Union of India (UOI), in and by which the Hot Air Stenter Independent Textile Processors Annual Capacity Determination Rules, 1998 are held to be ultra vires of erstwhile Section 3A of the Central Excise Act, 1944, the questions of law raised in these two appeals become academic in nature. Accordingly, these two Civil Miscellaneous Appeals are closed.