
(2010) 03 BOM CK 0043

In the Bombay High Court

Case No : Central Excise Appeal No. 110 of 2004

Commissioner of Central Excise

APPELLANT

Vs

Otis Elevator Co. (I) Ltd.

RESPONDENT

Date of Decision : 12-03-2010

Acts Referred:

Central Excises and Salt Act, 1944 — Section 11AC, 35G
Constitution of India, 1950 — Article 20

Citation : (2010) 6 BomCR 862 : (2010) 26 STT 1

Hon'ble Judges : V.C. Daga, J;K.K. Tated, J

Bench : Division Bench

Advocate : R.B. Pardeshi, for the Appellant; Madhur Baya, for the Respondent

Judgement

V.C. Daga, J.—This appeal filed u/s 35G of the Central Excise Act, 1944 ("the Act") is directed against the order dated 28-4-2004 passed by the Customs, Excise and Service Tax Appellate Tribunal, West Zonal Bench at Mumbai ("Tribunal"). Appeal was admitted vide order dated 29-9-2005 to consider the following substantial question of law:

Whether the provisions of Section 11AC are applicable to cases where show-cause notice is issued subsequent to the enforcement of provisions of Section 11AC, i.e., 28-9-1996 even though the period of dispute is prior to 28-9-1996 ?

2. Section 11AC of the Act is brought on the statute book for the first time by the Act of 33 of 1996 with effect from 28-9-1996. The show-cause notice was issued on 12-6-1998 for the period prior to the period 28-9-1996, which was subsequently confirmed in an order-in-original dated 18-1-1999 passed by the Deputy Commissioner of Central Excise, Mumbai-V. The said order was set aside by the Commissioner of Central Excise (Appeals) vide order dated 11-7-2001 in an appeal filed by the assessee.

3. Aggrieved by the aforesaid order revenue preferred appeal before the Tribunal. The Tribunal vide its order dated 28-4-2004 partly allowed the appeal of

the revenue holding that the provision of Section 11AC will not apply since period involved is prior to 28-9-1996 when the subject section was not on the statute book.

4. The aforesaid order is a subject-matter of challenge in this appeal raising the question referred to hereinabove.

Submissions

5. Mr. Pardeshi, learned Counsel appearing for the revenue submits that two Judge Bench of the Apex Court in the case of Impression Prints Vs. Commissioner of Central Excise, Delhi-1, has held that Section 11AC would be applicable even though the period of dispute is prior to 29-9-1996, i.e., prior to the enactment of Section 11AC, since adjudication order has been passed in the year 1998, by that time the said section was brought on the statute book. He placed reliance on the observation made by the Supreme Court in para 22 of the said judgment, reading as under:

(22) Mr. Bagaria next submitted that penalty has been levied u/s 11AC of the Central Excise Act. He submitted that this section was introduced only with effect from 28-9-1996. He relied upon the case of CCE v. Elgi Equipments Ltd. and submitted that it has been held that this section only operates prospectively and not retrospectively. He submitted that thus penalty could not have been imposed. We find that no such point had been raised before the Tribunal and no such point is raised even in the Memorandum of Appeal before this Court. In any event the adjudication had taken place in 1998 at which time Section 11AC was on the statute book.

6. Per contra, Mr. Baya, learned Counsel appearing for the respondent submits that the aforesaid question is squarely covered by the decision of the two judge Bench of the Apex Court in the case of CCE v. Elgi Equipments Ltd. followed by the another Bench of the Apex Court in the case of CCE v. Lal Mining Engg. Works 2007 (215) ELT 167; wherein the Apex Court observed as under:

(3) Section 11AC being a penal provision providing for a mandatory penalty, in our opinion, cannot be invoked in a case of this nature as the same would amount to give retrospective operation thereto which is impermissible in law. The view which we are taking find support from a Judgment of this Court in CCE v. Elgi Equipments Ltd. .

7. Mr. Baya further urged that the judgment in Elgi Equipments Ltd. (supra) is based on the Larger Bench judgment of the Apex Court in the case of Mithilesh Kumar and Another Vs. Prem Behari Khare, ; wherein the Apex Court observed as under:

(3) The learned Attorney General has placed reliance on the judgment of this Court in Mithilesh Kumar and Another Vs. Prem Behari Khare, . But the following observation in that decision need to be noted:

The presumption against retrospective operation is strong in cases in which the statute, if operated retrospectively, would prejudicially affect vested rights or the illegality of the past transactions, or impair contracts, or impose new duty or attach new disability in respect of past transactions or consideration already passed.

8. Mr. Baya also relied upon the judgment of the Orissa High Court in the case of J.K. Corporation Ltd. Vs. Commissioner of C. Ex. and Cus., ; wherein the High Court has taken a view that Section 11AC of the Act is prospective in operation and any illegality committed prior to insertion of Section 11AC *ibid* cannot be subject-matter of penalty u/s 11AC *ibid*.

9. Mr. Baya further pointed out that the High Court of Madhya Pradesh in the case of Jindal Strips Ltd. v. Union of India 2003 (158) ELT 439, has also taken a view that Section 11AC of the Act is prospective in operation.

10. Mr. Baya in order to counter the submissions of Mr. Pardeshi, who has placed reliance on the Apex Court judgment in the case of Impression Prints (*supra*), submitted that one line order cannot be said to be the ratio of the said judgment. According to him, those passing observations made in para 22 were casual observations and that the issue as to whether Section 11AC has prospective or retrospective effect was not the issue for consideration before the Supreme Court.

11. Mr. Baya further urged that at any rate any legislation for the first time creating offence under the Act cannot be given retrospective effect in view of Article 20 of the Constitution of India. He placed reliance on the judgment of the Apex Court in the case of Collector of Central Excise, Ahmedabad Vs. Orient Fabrics Pvt. Ltd., . He further pressed into service another judgment of the Apex Court in the case of Collector of Customs, Bombay Vs. East Punjab Traders and Others, ; wherein the Apex Court observed as under:

(7) ...The consequence of this interpretation would lead to certain penal liability in regard to payment of penalty, etc., and therefore, we find it difficult to hold that this entry prescribing the limit of the width has to be read retrospectively. The majority was clearly of the opinion that such an interpretation would lead to unforeseen consequences so far as the importers are concerned and many of them who imported lining material of the width exceeding the prescription would become liable to penalty, etc. We think that this view taken by the majority is unassailable.

12. Mr. Baya, thus, submits that question of law framed by this Court needs to be answered in favour of the assessee and against the revenue.

Consideration

13. Having heard, it is not in dispute that the observation made by the Apex Court in para-22 [extracted in para-5 (*supra*)] in the case of Impression Prints (*supra*) cannot constitute ratio. There is no threadbare discussion or reasoning given in the said finding. These observations cannot be said to be the ratio of the

judgment.

14. The two Judge Bench judgments in the case of Lal Mining Engg. Works (supra) and Elgi Equipments Ltd. (supra) take a contrary view and hold that Section 11AC of the Act is prospective in operation. No doubt, these judgments are also by the Co-ordinate Bench but in the said judgments the issue was directly involved for consideration. As such, both these judgments have a ratio which is binding on this Court.

15. The issue needs to be tested on the legal principle laid down in the judgment in the case of Orient Fabrics (P.) Ltd. (supra), being a Larger Bench judgment. The Full Bench judgment of this Court in the case of Kamleshkumar Ishwardas Patel v. Union of India 1994 Mh.LJ. 1669 in para-15 lays down that when the Court is confronted with contrary decisions of the higher court emanating from co-equal strength, both being binding on the subordinate courts by reason of their authority, the courts cannot but have the unpleasant task of choosing that one which appears to be better authority of reasons.

16. On the above backdrop, considering the weight of authorities, the judgments of the Apex Court in Lal Mining Engg. Works (supra) and Elgi Equipments Ltd. (supra) need to be followed since the view taken therein is better in point of law which, unequivocally, hold that Section 11AC of the Act being a penal provision providing for mandatory penalty cannot have retrospective operation as such it cannot be invoked in a case where the period of dispute or offence is prior to 28-9-1996, i.e., prior to its enactment.

17. For the reasons stated hereinabove, the question of law framed is answered in favour of the assessee and against the revenue. Appeal stands disposed of accordingly with no order as to costs.