(2015) 06 MAD CK 0197

In the Madras High Court

Case No : C.M.A. No. 2274 of 2007

Commissioner of Central Excise APPELLANT

Vs

Tablets India Ltd. and Others RESPONDENT

Date of Decision : 19-06-2015

Acts Referred:
Central Excises and Salt Act, 1944 — Section 35E(4), 4

Citation : (2015) 322 ELT 885

Hon'ble Judges : R. Sudhakar, J;K.B.K. Vasuki, J

Bench : Division Bench

Advocate : Rajnish Pathiyil, for the Appellant; T. Ramesh, Advocates for the Respondent

Judgement

R. Sudhakar, J.—Aggrieved by the order passed by the Tribunal in allowing the appeal filed by the first respondent, the Revenue/appellant is before this Court by filing the present appeal. This Court, vide order dated 24.09.2007, while admitting the appeal, framed the following substantial questions of law for consideration :-

"(a) When the whole matter relates to provisional assessment and when provisional assessments are considered "provisional" for all issues relating to the determination of the correct assessable value and when only the factual discrepancies and ineligible abatements covered by the provisional assessment are sought to be rectified by the Commissioner (Appeals), whether the appellate Tribunal is right in holding that the Commissioner (Appeals) has travelled beyond the show cause notice? and

(b) When the provisional assessments are covered by independent provisions and when no fresh grounds have been brought out in the appeal by the appellant before the Commissioner (Appeals), whether the appellate Tribunal is right in holding that it was not open to the appellant to demand as differential duty a higher amount than what was demanded in the show cause notice, by way of an explanation under Section 35E(4) of the Central Excise Act, 1944 against the order passed by the original authority?"

2. The first respondent/assessee is engaged in the business of manufacturing medicines falling under Chapter 30 of the Central Excise Tariff Act, 1985. They were claiming abatement towards quantity discount, freight, cash discounts and turnover tax from the assessable value during the years 1992-93 to 1996-97. Since the actual abatements were known only at the end of the financial years, they resorted to provisional assessment. By a proposal for finalizing the provisional assessment for the said period, the assessee claimed refund of duty for a sum of Rs. 11,76,418.34 paid in excess for the said period. However, the Department found that the abatements claimed were excessive and did not accept the proposal for finalization of assessment and on the contrary, issued show cause notice dated 12.09.2000 calling upon the assessee to state as to why the assessable value should not be re-determined. For better clarity it is apposite to extract below the relevant portion of the show cause notice:

"In such a case, when the abatements claimed is more than what is allowable, the assessable value will be less and hence duty paid will also be less when compared to duty payable. But the assessee claims refund of duty based on the duty paid as per RT12 and duty payable, which is worked out as per the abatements allowable as per C.A certificate. It defies logic that though the abatements claimed is more than the abatements allowable the assessee still claims refund of duty. Hence the department chose to work out the duty paid, by deducting the abatements actually claimed from the net price given in the worksheet submitted by the assessee. By doing so the duty paid was calculated which is less than the duty payable (as shown in the table below).

In view of the above, M/s. Tablets India Limited are directed to show cause to the Deputy Commissioner of Central Excise, "C" Division, No. 121, Mahatma Gandhi Road, Chennai - 600 034 within 30 days from the date of receipt of this notice as to why:-

1. The assessable value should not be re-determined and assessments should not be finalised by taking into consideration the assessable value and duty paid as reworked by the department.

2. Why the differential duty of Rs. 13,16,071.25/- as shown in Table above read with the ANNEXURE 1 (A,B,C,D&E) and ANNEXURE II (A,B,C,D &E) should not be recovered from them on account of finalisation of their assessments under subrule 5 of Rule 9B of the Central Excise Rules."

3. In response to the above-said notice, the assessee filed objections and thereafter, the Jurisdictional Officer passed an order observing as follows:

"The proposals for finalization of the Provisional Assessment from 1992-93 upto September 1996 along with Chartered Accountant''s Certificate for the said period were submitted by the assessee. On perusal of the finalization proposals it was noticed that the abatements claimed was more than the abatements allowable as per the C.A. Certificate.

In such case, when the abatements claimed was more than what was allowable, the assessable value will be less and hence duty paid will also be less when compared to duty payable. But the assessee in the finalization proposal claimed refund of duty based on the duty paid as per RT12 and duty payable, which was worked out on the basis of the assessable value arrived after deducting allowable abatements as per the CA Certificate above the abatements claimed was more than the abatements allowable and the assessee still claimed refund of duty, the Department chose to work out the duty paid by deducting the abatements actually claimed from the net price. The duty paid details calculated in the above said manner was less than the duty payable worked out the basis of CA Certificate. In view of the above, a show cause notice was issued to the assessee as to why the assessable value should not be re-determined and assessments should not be finalized by taking into consideration the assessable value and the duty paid as re-worked by the department. A differential duty of Rs. 13,16,071.25 was demanded in the show cause notice dated 12.09.2000."

4. After discussing elaborately on the Department''s claim for differential duty and the assessee''s claim for abatement based on the duty paid as per RT12 return and the Chartered Accountant''s certificate, the Jurisdictional Authority gave a finding in respect of each one of the goods to determine the assessable value by framing the following two issues:

"1. Whether cash discount is to be allowed to all the products or only in the case of products where the assessee has claimed the abatement in the price lists.

2. Whether the calculations of the department adopted to arrive at the duty paid details incorporated in the Show Cause Notice is correct."

5. On the first issue, the Jurisdictional Authority held that the cash discount should be allowed only when claimed in the price lists and accordingly, upheld the working of the Department. Insofar as the second issue is concerned, he accepted the assessee''s contention that the established practice of finalization of provisional assessment should be followed. However, he came to the conclusion that based on the duty paid details available with the Department in the Annexures and the claim for abatement on the basis of his Chartered Accountant''s certificate, there appears to be a clear case of excess payment of duty. In this regard, the Jurisdictional Authority further held as follows:

"I endorse the assessee''s reasoning that cash discount passed on actually, taken as a percentage of total sales would be lower than the cash discount taken as a percentage on the sales made that allows these cash discounts as abatements.

After taking into consideration the lower percentage of abatement on cash discount as per the C.A. certificate given in the workings of the dept and the assessee''s workings and after giving allowances to certain clerical errors pointed out by the assessee in the assessable value relating to 1994-95, despite the difference in the duty worked out by the department in the annexures and summary of the SCN, the demand amount scales, down.

when duty payable is deducted from the duty paid details arrived in the SCN. However, the duty payable as per the CA certificate works out to less than the duty paid determined as per the statutory records resulting in refund of duty .

Having concurred with the assessee''s contention that statutory records should be the basis for computing duty paid particulars, verification of records reveals that the assessee has paid duty for the clearances made under provisional assessment which are as follows:-

The above duty paid particulars does not include duty on free supplies of samples as in samples clearances, no abatements were claimed."

6. In the result, the Jurisdictional Authority passed the following order by dropping the proceedings.

"I am of the opinion that the assessee has paid in excess of the extent of Rs. 223924/- (Duty paid Rs. 783,67,005/- less Duty payable Rs. 781,43,081/-), since the assessee vide their letter dated 29.09.2003 has affirmed that they will not be claiming refund, if any, arising on account of finalization of provisional assessments for the years 1992-93 to 1996-97 (upto Sep.''96) the excess amount indicated above is not refundable.

Hence, I finalise the provisional assessments for the years 1992-93 to 1996-97 (upto 9/96) on the terms mentioned in pre-para.

I proceed to pass the following order

ORDER

I drop the demand proposed the Show Cause Notice in the light of the above observations.

I finalise the provisional assessments for the years 1992- 93 to 1996-97 (Sep.''96) in terms of Rule 9B of CER 1944 and the duty paid in excess determined on finalization is not refundable."

7. Not satisfied with the order passed by the Jurisdictional Authority, the Department pursued the matter by filing an application under Section 35E(4) of the Central Excise Act, 1944 before the Commissioner (Appeals) raising the following grounds:

"The main Grounds of Appeal preferred by the Applicant are:

The lower authority has relied upon the working sheets and the Chartered Accountant Certificates submitted by the respondent assessee without taking into account the data available in the RT 12 Returns and other relevant documents filed from time to time by the respondent assessee.

The clearance of a product namely Relasmin injection (2ml) was in singles during the period 1995-96 whereas the clearances were in 100s during the period 1994-95. But in the worksheet of the final assessment order, the clearances of the said product was taken wrongly which did not match with the correct quantity of Relasmin Injection resulting in loss of revenue of Rs. 5,93,857/-.

The total freight allowed as abatement in the Order based on CA certificate was Rs. 91,15,218. Out of the said amount, Rs. 69,80,398/- represented the abatements such as Cartage and Freight on depots, Freight on samples, Freight on Sales returns, Cartage Charges, Freight on export clearances and packing and Forwarding charges as could be seen from the sub schedules of freight expenses submitted by the respondent assessee and the same are not entitled for deduction from the sale price to arrive at the value. But the same were allowed by the lower authority resulting in loss of revenue of Rs. 31,71,218/- for the period in question."

8. The Commissioner (Appeals), after hearing both sides, came to hold as follows:

"12. I have gone through the records, arguments and submissions made in this case. I find that it is a fact that figures in the RT-12 Returns and working sheet attached to final assessment order are not matching. The Applicant Department has pointed out that the assessment order has failed to take into account the correct quantity of Relasmin Injection (2ml) cleared. I further find that the assessment order has proceeded on the basis of price of Rs. 1.70 per pack of Relasmin Injection 100x 2ml. Considering that even as per the "worksheet showing the assessable value as finally determined under section 4 on finalisation of price lists" for the period 01.04.91 to 31.07.91, the whole sale price is Rs. 105/-, it does not appeal to reason that the same item is sold as Rs. 1.70 for the period 1992-93 for the same pack. Obviously there is a discrepancy. The entire worksheet therefore require to be reexamined for reconciliation of the said discrepancies, for which exercise, the matter requires to be remanded back to the lower authority. Ordered accordingly.

13. As regards the various abatements allowed by the ld. lower authority, I am of the considered view that cartage and freight on depots, are eligible abatements so long as they represent the freight incurred from depot to the point of delivery as has been held in the case of Government of India and Others Vs. Madras Rubber Factory Ltd. and Others, (1995) 51 ECC 1 : (1995) 77 ELT 433 : (1995) 4 JT 512 : (1995) 3 SCALE 299 : (1995) 4 SCC 349 : (1995) 3 SCR 1143 . The ratio is equally applicable for samples and for sales returns (when such samples/ sales returns already suffered duty.) also. However, I am of the considered view that freight incurred for bringing back the sales return goods to either depot or factory premises is not entitled for abatement. As regards the abatements such as freight on export clearances, the same are not entitled for abatement in as much as the export goods are normally cleared under bond without payment of duty or for claim for rebate and such goods are not covered under provisional assessment. Packing and forwarding charges form part and parcel of the cost of

production and hence the same are includible in the assessable value. The lower authority will therefore be required to re examine these aspects with reference to the data available and pass such orders as deems fit. Ordered accordingly."

9. Aggrieved by the said order, the assessee pursued the matter before the Tribunal. The Tribunal, after taking note of the fact that the Jurisdictional Commissioner finalised the assessment under sub-rule (5) to Rule 9B of the Central Excise Rules and dropped the proceedings, held that the appeal filed under Section 35E(4) claiming higher differential duty of Rs. 37,65,075/- was not justified and such a demand could be only on the basis of corrigendum to the said show cause notice and not by way of an application under Section 35E(4) of the Central Excise Act. Hence, the Tribunal allowed the appeal holding as follows:

"2. After hearing both sides and considering their submissions, we have to accept the contention of the appellants that the lower appellate authority travelled beyond the scope of the SCN to hold in favour of the Revenue. The SCN had worked out the amounts of differential duty payable by the assessee for each financial year comprised in the period of dispute and had, accordingly, proposed to finalize the assessments and to demand total differential duty of Rs. 13,16,071.25 from the assessee. The assessments were finalized by the Dy.Commissioner who found excess duty payment of only Rs. 2,23,924/- by the assessee. While the assessee accepted this decision of the original authority, the Revenue wanted to recover from them an amount of duty much higher than what was demanded in the SCN. This action of the Revenue, not permissible in law, was upheld by the lower appellate authority. If the department had a case that the finalization of provisional assessment required to be made on a basis different from what was proposed in the SCN, they should have issued an appropriate corrigendum to the said notice. It was not open to them to demand as differential duty a higher amount than what was demanded in the SCN, by way of an application under Section 35E(4) of the Central Excise Act against the order passed by the original authority in adjudication of the dispute arising out of the SCN. Hence the impugned order accepting the department''s appeal against the Dy.Commissioner''s order cannot be sustained."

10. Aggrieved against the order of the Tribunal, the Department is before us raising the above-mentioned substantial questions of law.

11. Heard learned Standing Counsel appearing for the appellant and the learned counsel appearing for the first respondent/assessee and perused the materials placed before this Court.

12. We find from the narration of facts that the plea of the Department before the Commissioner (Appeals) was the lower Authority had relied upon the working sheets and Chartered Accountant''s certificate submitted by the assessee without taking into account the data available in the RT12 returns and other relevant documents filed by the assessee and therefore the lower Authority had passed an erroneous order while finalising the provisional assessment. The other grounds

raised are quantification of freight charges to arrive at the revised figure of Rs. 31,71,218/-.

13. The primary ground on which the order of the provisional assessment was sought to be revised appears to be on an erroneous assumption that records like RT12 returns was not considered by the lower Authority. We have already extracted the show cause notice and the order of the Original Authority, which clearly show that the claim of the assessee for finalising of the provisional assessment and for refund of duty was based on RT12 returns and the abatement claim in respect of the goods cleared was supported by the Chartered Accountant''s certificate and the manner in which similar provisional assessment was made for the previous years. The Original Authority, in extenso, dealt with the matter as to how the two issues that he raised were considered and gave a reasoned finding.

14. We find that in the present case the revised demand for higher duty is merely based on a presumption that one or other factor has not been considered by the Original Authority. When the show cause notice itself clearly demanded a sum of Rs. 13,16,071.25, which was based on the records already available, we find no justification how such a demand should be amended without issuing a corrigendum, as rightly pointed out by the Tribunal. When the facts relevant for the purpose of finalising the provisional assessment were already available with the Original Authority and the demand was based on such data, we find justification in the assessee''s plea that the Commissioner (Appeals), at the behest of the Department, has proceeded to travel beyond the show cause notice to claim higher duty. The Department''s plea that no fresh grounds have been brought in appeal before the Commissioner (Appeals) is erroneous, as we have already pointed out, in the appeal, as a first ground, they have raised a plea that RT12 returns were not considered, which is factually incorrect. We, therefore, no hesitation to uphold the order of the Tribunal and answer the questions of law in favour of the assessee and against the Revenue.

In the result, the questions of law are answered in favour of the assessee and against the Revenue and consequently, this Civil Miscellaneous Appeal stands dis missed. No costs.