(2010) 07 GUJ CK 0073

In the Gujarat High Court

Case No : Tax Appeal No. 1862 of 2009

Commr. of C. Ex. and Cus. APPELLANT

Vs

Rajputana Steel Casting P. Ltd. RESPONDENT

Date of Decision : 22-07-2010

Acts Referred:
Central Excises and Salt Act, 1944 — Section 35, 35C

Citation : (2010) 257 ELT 343 : (2011) 21 STR 321

Hon'ble Judges : H.N. Devani, J;D.A. Mehta, J

Bench : Division Bench

Advocate : Varun K. Patel, for the Appellant; None, for the Respondent

Final Decision : Dismissed

Judgement

H.N. Devani, J.—The appellant revenue has challenged order dated 3-3-2008 made by the Customs, Excise and Service Tax Appellate Tribunal (the Tribunal) [2008 (229) E.L.T. 307 (Tribunal)], proposing the following three questions:

(A) When a decision of lower authority is set aside only on the ground that his superior authority had jurisdiction to adjudicate the matter, whether the superior authority can de novo start and adjudicate the proceedings?

(B) When a decision of lower authority is set aside only on the ground that his superior authority had jurisdiction to adjudicate the matter, whether such order implies that the matter is remanded to such authority having jurisdiction for adjudication afresh or not?

(C) When Tribunal passes a decision of setting aside an order of adjudicating authority on misrepresentation by the applicant that such authority did not have jurisdiction to pass such order suppressing the law that he in fact had jurisdiction, whether such decision of the Tribunal is binding on the Principal Authority in de novo starting the proceedings?

2. The facts of the case stated briefly are that the respondent assessee is

engaged in the manufacture of goods falling under Chapter 72 and Chapter 73 of the Schedule to the Central Excise Tariff Act. Pursuant to show cause notice dated 10-7-1998 alleging clandestine removal of excisable goods without payment of duty and fraudulent availment of Modvat credit, vide order-in-original dated 23-3-1999, duty to the tune of Rs. 2,55,254/- came to be confirmed with penalty and Modvat credit of Rs. 1,56,668/- came to be disallowed. Against the said order the respondent assessee preferred the appeal before Commissioner (Appeals), which came to be dismissed vide order dated 13-10-2000. The assessee preferred second appeal before the Tribunal but did not succeed. The assessee thereafter carried the matter before this High Court in Tax Appeal No. 426 of 2004 which came to be disposed of vide judgment and order dated 14-9-2004 whereby the appeal was permitted to be withdrawn with a view to enable the respondent to prefer review application before the Tribunal. The assessee, thereafter, moved an application before the Tribunal contending that, since the show cause notice contains ground of fraud, willful mis-statement and suppression, in the light of the CBEC Circular No. 299/15/97-CX., dated 27-2-1997, the show cause notice should have been issued by the Commissioner and also adjudicated by him. The Tribunal vide order dated 2-2-2005 allowed the miscellaneous application on the ground of jurisdiction holding that the case should have been adjudicated by the original authority at the level of Commissioner/Additional Commissioner.

3. Subsequently the matter was taken up by the Commissioner, who vide order dated 12-1-2007 confirmed the duty and imposed penalty. Against the said order the assessee preferred appeal before the Tribunal which came to be allowed vide the impugned order dated 2-3-2008.

4. Learned Standing Counsel for the appellant revenue has vehemently assailed the impugned order submitting that since the earlier order made by the Adjudicating Authority had been set aside on the technical ground that the concerned officer did not have the jurisdiction to adjudicate the matter, it was always permissible for the officer having the jurisdiction to adjudicate the matter to de novo examine the matter. It is submitted that in the circumstances, the Tribunal had erred in holding that the original authority had no power to initiate de now proceedings. In support of the submission reliance was placed upon a decision of the Supreme Court in the case of Anand Narain Shukla Vs. State of Madhya Pradesh,

5. In the impugned order the Tribunal after referring to the contents of the earlier order dated 2-2-2005 made on the miscellaneous application filed by the respondent, has observed thus:

6. As is seen from the above, though the Tribunal has observed that the case should have been adjudicated by the Commissioner/Deputy Commissioner, there are no such directions to re-adjudicate, in the said order of the Tribunal. The application for setting aside the impugned orders passed earlier stands allowed by the Tribunal without any direction of remand. I find that an identical situation

was considered by the Hon''ble Madras High Court in the case of Collector or Central Excise, Madras v. V.K. Palappa Nadar 2000 (123) E.L.T. 14 (Mad.). The order passed by the Central Board of Revenue vacating the impugned order, without prejudice to the merits of the case, was held as not being a remand order. It was observed in para 6 of the said judgment that Section 35 of the Central Excise Act is a self-contained set of rules. The appellate authority has got powers to confirm, alter, annul or remand the matter. However, the order passed in appeal shall be final subject to the power of revision. The Appellate Tribunal has been given powers of the widest character, which will include the power of remand. Finality is also attached to the order of the Appellate Tribunal. This would clearly show that after disposal of the matter by the Appellate Tribunal, jurisdiction can be revived in the original Tribunal only if there are specific directions in the Appellate order to that effect. If the Appellate order merely annuls the original order without containing any other direction, there shall be no power in the original authority to ensue de now proceeding.

6. The Tribunal has thereafter referred to the observations made by the High Court in para 8 of the said decision, and has held thus:

6. By applying the ratio of the law declared by the Hon''ble High Court, it is seen that the Tribunal''s order only adopts the reasoning of the impugned order not having been adjudicated by the proper officer, for the purpose of setting aside the impugned order. There is no clear direction to the Commissioner to adjudicate the matter afresh. Once the impugned order is set aside unconditionally, the Commissioner, in my view, was not right in reopening the proceedings to re-decide the matter afresh in absence of any direction to the contrary. The observations made by the Tribunal to the effect that "the case should have been adjudicated by the original adjudicating authority at the level of Commissioner/Deputy Commissioner" cannot be interpreted or construed as a direction to the Commissioner to decide the same afresh. The same, at best, is the reasoning adopted by the Tribunal for setting aside the impugned order.

7. Thus, is apparent that while setting aside the original order made by adjudicating authority on the ground of lack of jurisdiction, the Tribunal had not restored the original matter nor had it made any observation that it would be open for the competent authority to reopen the case de novo. The order made by the Tribunal was an order u/s 35C of the Central Excise Act, 1944. Section 35C of the said Act, provides that the Appellate Tribunal may, after giving the parties to the appeal an opportunity of being heard, pass such orders thereon as it deems fit, so as to either (i) confirm, or (ii) modify the order, or (iii) annul the decision or order appealed against, or (iv) may refer the case back to the authority which passed such decision or order with such directions as the Appellate Tribunal may think fit, for a fresh adjudication or decision, as the case may be, after taking additional evidence, if necessary. A plain reading of the said provision indicates that for an adjudicating authority to assume jurisdiction to pass an order once again, a direction of the Appellate Tribunal specifically empowering the

adjudicating authority for passing such an order is necessary. This becomes clear when one considers that the first three powers of confirmation, modification or annulling a decision are grouped together, while referring the matter back has to be with directions which the Tribunal may think fit for a fresh adjudication or decision. In the circumstances, once the statute has laid down powers available to the Tribunal it is not possible to accept the contention raised on behalf of the appellant that upon the original order of adjudication having been quashed on technical ground fresh adjudication was always permissible. The powers of the Tribunal are statutorily granted. The Tribunal itself being a creature of statute, there is no question of any other statutory authority under the same statute reading something more than in the order of the Tribunal, viz. more than what is stipulated by the statute.

8. In the circumstances, the impugned order of the Tribunal being in consonance with the provisions of Section 35C of the Act, it cannot be stated that the Tribunal has committed any legal error giving rise to a question of law, so as to warrant interference. In absence of any question of law as proposed or otherwise, much less a substantial question of law, the appeal is dismissed.

