(2010) 10 BOM CK 0255

In the Bombay High Court

Case No : First Appeal No. 3678 of 2008

Commr. of C. Ex. and Cus., Aurangabad — APPELLANT

Vs

Specialty Polyfilms (I) P. Ltd — RESPONDENT

Date of Decision : 20-10-2010

Acts Referred:

Central Excises and Salt Act, 1944 — Section 11(A)(C), 11A

Citation : (2012) 26 STR 595

Hon'ble Judges : Naresh H. Patil, J;K.K. Tated, J

Bench : Division Bench

Advocate : Alok Sharma, for the Appellant; D.S. Kudale, holding for Pratap Rodge, for the Respondent

Final Decision : Allowed

Judgement

Naresh H. Patil, J.—Heard learned counsel for the parties. The Appeal is Admitted on following substantial question of law:

"Whether principle of doctrine of merger in the facts of the present case is applicable to deny right of appeal to revenue?"

2. By Consent of the learned Counsel for the parties the Appeal is taken up for final hearing.

3. Respondent-assessee is engaged in manufacturing excisable goods. On 7th April, 2004 the Preventive Officer of Head-Quarters visited respondent assessee''s Unit and during the verification of record and the stock of goods, it was observed that the finished goods weighing 1467.540 Kg of LLDPE plain Stretch Cling Film was found in full packed condition and goods were ready for dispatch. All these goods were valued at Rs. 1,03,206/- (Rupees One Lac Three Thousand Two Hundred and Six), involving duty of Rs. 16,513/- (Rupees Sixteen Thousand Five Hundred Thirteen) and goods were duly packed and marked with labels showing the description of goods, date of manufacture, Roll Number, Gross Weight, Net Weight, Number of Rolls Packed.

4. The Preventive Officer held that because of clandestine removal, the goods were seized under Panchnama dated 7th April, 2004. The Preventive Officer, thereafter, recorded statements on 7th April, 2004 and 9th April, 2004. The Preventive Officer also found certain deficiencies in observance of the procedure established by law in maintaining register, daily stock account, invoice numbers etc.

5. A Show cause notice was issued on 4th October, 2004. The Adjudicating Authority decided the case vide its order-in-original No. 74/DMD/2005 dated 30-1-2006. The Adjudicating Authority dropped the demand of Rs. 18,069/- (Rupees Eighteen Thousand Sixty Nine), Rs. 9,960/- (Rupees Nine Thousand Nine Hundred Sixty) and Rs. 3,35,126/- (Rupees Three Lacs Thirty Five Thousand One Hundred Twenty Six) and had ordered confiscation of seized goods valued at Rs. 1,03,026/- (Rupees One Lac Three Thousand Twenty Six) under Rule 25 of the Central Excise Rules, 2002.

6. The Appellant further contended that as per said order, the respondent-assessee was given an option to redeem the same on payment of redemption fine of Rs. 5,000/- (Rupees Five Thousand) and confirmed the demand of Rs. 1,32,427/- (Rupees One Lac Thirty Two Thousand Four Hundred Twenty Seven) u/s 11A of Central Excise Act, 1944 and imposed an equal penalty of Rs. 1,32,427/- (Rupees One Lac Thirty Two Thousand Four Hundred Twenty Seven) under Rule 25 of the Central Excise Rules, 2002 read with Section 11(A)(C) of the Central Excise Act, along with interest u/s 11AB.

7. The respondent-assessee preferred an appeal to the Commissioner (Appeals) and the learned Commissioner (Appeals) vide his order dated 7-11-2006 allowed the appeal and set aside the order passed by First Adjudicating Authority.

8. The Appellant submits that Order passed by the Commissioner (Appeals), in the Appeal filed by the respondent - assessee, is challenged before CESTAT by the Revenue. The said Appeal bearing No. E-132/2007 is still pending.

9. In the meanwhile, the Revenue preferred an Appeal before the Commissioner (Appeals) against order passed by First Adjudicating Authority, in which certain claims were raised by the Revenue. The Appeal was allowed on 13-9-2007.

10. The respondent-assessee challenged the said Judgment and Order passed by the Commissioner (Appeals) before CESTAT. The CESTAT allowed the said Appeal by holding that principle of doctrine of merger is applicable to the case. The Revenue, being aggrieved by the same, approached this Court by preferring present Appeal.

11. Mr. Sharma, learned counsel appearing for appellant submits that CESTAT has wrongly and illegally applied principle of doctrine of merger to this case. The learned counsel appearing for appellant in support of his submissions placed reliance on the Judgment in the case of Commissioner of Central Excise, Mumbai v. (1) Godrej and Boyce Manufacturing Company Limited, Mumbai; (2) Costrol

India Limited, Raigad; (3) The Commissioner of Central Excise Vs. Godrej and Boyce Mfg. Co. Ltd., .

12. The learned Counsel further submits that in case the Appeal filed before CESTAT is not entertained, then interest of Revenue would be prejudiced. In the light of the facts of the case and principle underlying doctrine of merger, dismissal of the Appeal of the Revenue is required to be quashed and set aside by this Court.

13. Mr. Kudale, learned counsel appearing for respondent-assessee submits that in the facts of the case CESTAT did not commit any. illegality and therefore, substantial question of law does not arise in this Appeal. According to learned counsel Appeal deserves to be dismissed.

14. We have perused the relevant orders placed before us, and the Judgment cited supra. We have considered the submissions advanced by the Counsel for respective parties.

15. In the facts of the case, we find that principle underlying doctrine of merger can not be made applicable. The Revenue was aggrieved by part of, the Order, which was detrimental to their interest.

16. The Revenue was entitled to file an independent proceeding in the shape of Appeal before the appropriate Authorities and Tribunal. Accordingly, the Revenue preferred Appeal to the Commissioner (Appeals). In the facts of the case, the Appeal filed by the Revenue before the Commissioner (Appeals) was maintainable. The Order passed by the Commissioner (Appeals) was challenged by respondent-assessee before the CESTAT. The CESTAT allowed the appeal on the ground of principle of doctrine of merger. In the light of facts of the case and principle enunciated in respect of doctrine of merger, we find that CESTAT committed error in allowing Appeal filed by the respondent-assessee. The matter needs to be remanded back to CESTAT for consideration on merits.

ORDER

(i) The order passed by CESTAT, Mumbai bearing Order No. A/291/08/SMB/C-III, dated 26-2-2008 is quashed and set aside and matter is remanded back to CESTAT.

(ii) We direct the CESTAT to consider the Appeal filed by respondent-assessee on merits along with Appeal filed by the Revenue bearing No. E/132-2007 and dispose of the same by a common Judgment and order, after hearing concerned parries.

(iii) All the issues on merits are kept open.

(iv) The Appeal is allowed accordingly:

(v) No order as to costs.

