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(2014) 10 AHC CK 0160

In the Allahabad High Court

Case No : Central Excise Appeal Defective No. 110 of 2014

Commr. of Cus. & C. Ex. APPELLANT

Vs

Atul Goyal RESPONDENT

Date of Decision : 30-10-2014

Acts Referred:

Citation : (2017) 345 ELT 177

Hon'ble Judges : Dr. Dhananjaya Yeshwant Chandrachud, CJ. and Pradeep Kumar Singh Baghel, J.

Bench : Division Bench

Advocate : Shri M.P. Devnath, Counsel, for the Appellant; Shri Parv Agarwal and Rahul Agarwal, Counsels, for the Respondent

Final Decision : Disposed Off

Judgement

The appeal by the Revenue arises from a decision of the Customs, Excise and Service Tax Appellate Tribunal (the Tribunal) [2015 (327) E.L.T. 197 (Tribunal)] on an application for waiver of deposit.

2. The Commissioner, Central Excise and Service Tax, Allahabad by an order dated 17 October, 2012 adjudicated upon two show cause notices respectively dated 9 February, 2011 and 5 September, 2011. In respect of the first of the two notices, the adjudicating officer ordered confiscation of certain seized raw material valued at Rs. 78,12,165/- and since the goods had already been provisionally released, imposed a redemption fine of Rs. 20 lacs in lieu of confiscation. Personal penalties of Rs. 10 lacs and Rs. 1 lac respectively were imposed on the company and its Managing Director. In respect of the second show cause notice, the adjudicating officer confirmed a duty demand of Rs. 3.85 crores. Interest was awarded under Section 11AB of the Central Excise Act, 1944. A penalty in the like amount was imposed on the company, besides a penalty of Rs. 10 lacs on the Managing Director.

3. The assessee filed an appeal together with a stay application before the

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Tribunal. On 3 December, 2013, two Members of the Tribunal differed on the quantum of pre-deposit. Whereas, one Member, taking note of the fact that the assessee had already deposited an amount of Rs. 40 lacs, accepted the statement of the assessee that a further amount of Rs. 20 lacs would be deposited within eight weeks, which was regarded as a fair offer, the second Member, on the other hand, was of the view that in addition to the amount of Rs. 40 lacs, which was already deposited, a further amount of Rs. 1 crore should be ordered to be pre-deposited as a condition for the grant of stay. The difference of opinion was referred to a third Member, who has held that the ends of justice would be met by directing the assessee to make a pre-deposit of a total amount of Rs. 20 lacs in addition to the amount of Rs. 40 lacs, which has already been deposited.

4. The Revenue has formulated the following questions of law :

"(i) Whether, Hon''ble CESTAT has erred in granting stay on the condition of pre-deposit of Rs. 20 Lakhs, in favour of the respondent, on the basis of majority decision?

(ii) Whether, third member of the CESTAT was justified in deciding the referred points of difference on the basis of CESTAT decision, which was never pleaded before the original Bench?

(iii) Whether, Hon''ble third Member of CESTAT was justified in deciding the points of difference, on the basis of fresh evidence?"

5. The appeal is admitted on these questions and by consent, has been heard for final disposal.

6. The assessee carries on activities of printing and lamination of poly films and has two factories at Varanasi and at Rudrapur. Proceedings were initiated after a search was conducted by the Directorate General of Central Excise Intelligence on the basis of the information received that neither of the units were registered with the Central Excise Department though they had a turnover in excess of Rs. 14 crores. The case of the assessee was that its customers deposit the plain poly film rolls as raw material and the assessee carries out job work thereon. Notices to show cause were issued to the assessee on 9 February, 2011 and 5 September, 2011 inter alia for recovery of central excise duty, which had not been paid. The basic allegation was that the assessee had removed dutiable goods clandestinely and had suppressed its production. The notice to show cause dated 5 September, 2011 alleged that there was a wilful suppression of facts with an intent to evade payment of duty and hence, the extended period of limitation was invoked for the recovery of an amount of Rs. 4.66 crores. Both the show cause notices were adjudicated upon by the Commissioner of Central Excise and Service Tax and resulted inter alia in an order dated 17 October, 2012, as noted above, confirming a duty demand of Rs. 3.85 crores, a penalty in the like amount, an order for confiscation of raw material and the imposition of a redemption fine in lieu of confiscation together with personal penalties on the

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company and its Managing Director.

7. The Member (Judicial) of the Tribunal, while disposing of the stay application, was of the view that the issue as to whether the process of printing as well as lamination of printed poly films amounts to manufacture, has to be considered in the light of different judgments on the issue. Moreover, even if the printing amounts to manufacture, the final product which emerges would be printing and hence, classifiable under Chapter 49 of the Central Excise Tariff thereby attracting a nil rate of duty. The Member (Judicial) was also of the view that the extended period of limitation, prima facie, would not be available to the Revenue. Taking into account the statement which was made on behalf of the assessee that an amount of Rs. 20 lacs would be deposited in addition to the deposit of Rs. 40 lacs, which had been made earlier, that statement was held to meet the ends of justice.

8. On the other hand, the Member (Technical) noted that the assessee had not adduced any evidence or proof regarding movement of inputs from its alleged clients to the unit. According to the second Member, goods which were manufactured on a job work basis were exempted from the payment of central excise duty if they are used in the manufacture of goods on which duty of excise is leviable or such goods are cleared from the factory of the supplier of raw material on payment of duty. Moreover, the supplier of raw material has to furnish an undertaking to the Assistant Commissioner that the goods would be used in the manufacture of dutiable final products in his factory and would be removed on payment of duty. In such a case, the supplier of raw material is required to produce evidence that the goods have been used or removed in the manner prescribed. In the present case, it was found prima facie that the principal manufacturers were not registered under the Central Excise and were neither paying central excise duty on the goods received from the assessee nor were they using the same in the manufacturing of dutiable goods. The procedure prescribed in the exemption Notification No. 214/86-C.E., dated 25 March, 1986 was found to have not been followed and no undertaking, as required, had been filed. Accordingly, it was held that the goods which were manufactured by the assessee on so called job work basis were not exempted from duty. Moreover, reliance was placed on the statement of the Managing Director of the assessee that the unit was undertaking manufacturing activity without obtaining central excise registration and was clearing the goods without payment of excise duty. The second Member held that the manufacturing process was explained in the statement of the Managing Director and the assessee was not doing only printing alone or lamination alone but both the activities. The second Member held that when both the processes are taken together, a new and distinct commodity comes into existence which is printed and laminated plastic film and once it is printed in accordance with the requirement of the customer and laminated, it becomes a commodity ready to use for packing of goods. It was held that the film does not remain a film. When a bare plastic film is taken and is printed as per the specification of the product, which is to be packed and laminated, it was

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held that a new product having a distinct name, character and use emerges. In these circumstances, the second Member was of the view that the activity of printing and laminating of the plastic film amounted to manufacture. On the aspect of classification under Chapter 49 of the Central Excise Tariff as a product of printing industry, the second Member was of the view that this issue was not raised before the adjudicating authority. On these findings, the second Member held that the assessee had undertaken manufacturing activity without the authority of law and had cleared the goods clandestinely, as it was admitted in the statement of the Managing Director that no central excise registration had been obtained, and it was noted that the assessee had wrongly shown the activity as job work when no document to that effect had been produced. On these findings, the second Member directed a pre-deposit of a further amount of Rs. 1 crore, in addition to Rs. 40 lacs which had already been deposited during investigation.

9. The third Member, before whom the difference of opinion between the Member (Judicial) and the Member (Technical) came up for resolution, relied upon a decision of the Tribunal taking the view that the activity of printing and plastic coating does not amount to manufacture. The third Member was of the view that this was an issue which had to be considered at the final hearing and since there were contrary decisions of the Tribunal, an order for a further deposit of Rs. 20 lacs, in addition to Rs. 40 lacs already deposited, would meet the ends of justice. In holding thus, the third Member has agreed with the final order passed by the Member (Judicial).

10. Learned counsel appearing on behalf of the Revenue submits that in the present case there was a clandestine removal of dutiable goods. The assessee was carrying on manufacturing activity since in the course of printing and lamination of poly films a new and distinct product emerges. In the present case, it was submitted that the extended period of limitation was validly invoked since there was a clear suppression on the part of the assessee and no central excise registration had been obtained. In these circumstances, it has been submitted that a direction for deposit only of an amount of Rs. 20 lacs (in addition to the amount of Rs. 40 lacs already deposited) is not appropriate and proper particularly since the duty demand, which has been confirmed, is in the amount of Rs. 3.85 crores.

11. On the other hand, learned counsel appearing on behalf of the assessee has submitted that the issue as to whether the activity of the assessee, which involves printing and lamination is a manufacturing activity, requires to be decided by the Tribunal in the light of conflicting judgments and once it is held that the law on the subject is ambiguous, an order for dispensation of deposit would be justified. Moreover, it was submitted that in such an event, the extended period of limitation cannot be invoked. In the alternative, it was urged that even if the activity of printing and lamination is held to amount to manufacture, then the final product would yet constitute printed material

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attracting a nil rate of duty under Chapter 49 of the Central Excise Tariff. Learned counsel relied upon certain decisions, which would be examined during the course of this order.

12. At the outset, we may make it clear that the observations contained in this judgment are only confined to a prima facie evaluation of the submissions and limited to the appeal, which arises from an order on an application for waiver of pre-deposit.

13. In Laminated Packings (P) Ltd. v. Collector of C. Ex. - 1990 (49) E.L.T. 326 (S.C.) the Supreme Court held as follows :

"4. Lamination, indisputably by the well settled principles of excise law, amounts to ''manufacture''. This question, in our opinion, is settled by the decisions of this Court. Reference may be made to the decision of this Court in Empire Industries Ltd. & Ors. v. Union of India & Ors. - [1985 (20) E.L.T. 179 (S.C.) : 1985 (3) SCC 314]. Reference may also be made to the decision of this Court in Collector of Central Excise, Kanpur v. Krishna Carbon Paper Co. - [1988 (37) E.L.T. 480]. We are, therefore, of the opinion that by process of lamination of kraft paper with polythylene different goods come into being. Laminated kraft paper is distinct, separate and different goods known in the market as such from the kraft paper."

14. In a subsequent decision in Metlex (I) Pvt. Ltd. v. Commissioner of C.Ex., New Delhi - 2004 (165) E.L.T. 129 (S.C.) the Supreme Court dealt with a case where the assessee purchased duty paid film which was laminated or metallised. While dealing with the case, the Supreme Court observed as follows :

"15. In this case the Appellants purchase duty paid film. They merely laminate or metallise it. The product is a film to start with and remains a film after process of lamination or metallisation. Thus there is no new distinct product which has come into existence and it would have to be concluded that there is no manufacture."

15. In the present case, the assessee carries on the business of printing and lamination. As the Member (Technical), who differed with the Member (Judicial), noted, the activity of the assessee is not either printing or lamination alone but an activity which involves both the components, namely, of printing and lamination. Prima facie, the judgment of the Supreme Court in Laminated Packings (supra) which is based on two earlier judgments would indicate that the activity does amount to manufacture. Unlike the situation in the decision in Metlex (I) Pvt. Ltd. (supra) here, the assessee undertakes both printing & lamination. This must be coupled with the facts which have been discussed in the order passed by the Member (Technical). Those aspects in the order by the Member (Technical) had not been analysed or dealt with either in the order that was passed by the Member (Judicial) or in the order of the third Member, to whom the reference proceeded. Admittedly, in the present case, the assessee had not obtained central excise registration. The principal manufacturers, from whom the assessee had obtained the poly film allegedly on job work basis, were not registered for the purposes of central excise and were not found to be paying

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central excise duty on the goods received from the assessee nor were they found to be using the goods in the manufacture of dutiable goods. The Managing Director of the assessee admitted during the course of his statement that the assessee was undertaking manufacturing activity without obtaining central excise registration and was clearing the goods without payment of excise duty. These facts cannot simply be brushed aside particularly at the prima facie stage while considering an application for waiver of pre-deposit. On these facts, it cannot be held that the assessee had made out a prima facie case either for a waiver of pre-deposit in totality or for an order to the effect that a further amount of Rs. 20 lacs, as stated on behalf of the assessee, would amount to a fair order on the application for waiver of pre-deposit. The order passed by the Member (Judicial) is, to say least, laconic. Except for stating that the process of printing and lamination would have to be determined in the light of different judgments on the issue, there has been no prima facie evaluation of the case. As the learned Member (Technical) observed, the alternative submission that even if printing amounts to manufacture, the final product would be classifiable under Chapter 49 of the Central Excise Tariff attracting a nil rate of duty, was not a submission which was urged before the adjudicating authority. Though that may not foreclose the assessee from urging the submission before the Tribunal at final hearing, but at least at the stage of the waiver of pre-deposit, the fact that the assessee has not even urged the submission before the adjudicating authority, was a material and relevant consideration. Prima facie, it is evident that the assessee carries on both printing and lamination. The question as to whether the assessee was doing it on job work basis, would undoubtedly be decided at the final hearing of the appeal but at this stage, the circumstances which have been adverted in the order of the Member (Technical) are, in our view, of some significance.

16. In this view of the matter, we are of the view that having due regard to the quantum of duty demand of Rs. 3.85 crores, an order for the deposit of Rs. 20 lacs over and above the amount of Rs. 40 lacs, which has already been deposited by the assessee, cannot be regarded as amounting to a proper exercise of the discretion in law by the Tribunal. We are of the view that the ends of justice would be met if the assessee is directed to deposit a total amount of Rs. 1 crore after giving due credit for the amount of Rs. 40 lacs, which has already been deposited by the assessee. In the event the assessee has deposited a further amount of Rs. 20 lacs, as stated on behalf of the assessee during the course of the hearing in pursuance of the order of the Tribunal, that amount shall also be given credit. The order of the Tribunal would, to that extent, stand modified. The questions of law, which have been framed, would stand accordingly answered. The time to deposit the balance amount shall stand extended by a further period of two months from today, on the request made by learned counsel for the assessee.

17. The appeal is, accordingly, disposed of. There shall be no order as to costs.

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