

(2009) 06 MAD CK 0141
In the Madras High Court
Case No : Writ Petition No. 375 of 2005

Devala Tea Factory

APPELLANT

Vs

The Central Board of Excise and Customs and Office of the
Assistant Commissioner of Customs and Central Excise,
Coonoor Division

RESPONDENT

Date of Decision : 26-06-2009

Acts Referred:

Central Excise Rules, 2002 — Rule 25, 4
Central Excises and Salt Act, 1944 — Section 11A, 11A(1), 11AB(1), 11AC, 25(3)
Central Sales Tax Act, 1956 — Section 2
Constitution of India, 1950 — Article 226
Customs Act, 1962 — Section 142

Citation : (2009) 242 ELT 219

Hon'ble Judges : V. Dhanapalan, J

Bench : Single Bench

Advocate : M. Vidya, for the Appellant; K. Ramakrishna Reddy, for the Respondent

Final Decision : Dismissed

Judgement

V. Dhanapalan, J.—This Writ Petition has been filed, praying for issuance of a writ of certiorari, to call for the records of the second respondent pertaining to the notice dated 10.12.2004, bearing Serial No. 8 of 2004, and quash the same.

2. The case of the petitioner is as under:

2.1. It is a manufacturer of black tea, falling under Central Excise Tariff Act, holding Registration Certificate No. 2/97. Vide Notification No. 41/99-Central Excise, dated 26.11.1999, it is exempted from payment of excise duty. Intending to avail the benefit of the notification, it has filed an undertaking with the second respondent to the effect that not less than 2/3rd of the green leaves used in manufacture of black tea in the factory are purchased from growers having holding not exceeding 10 Hectares under tea cultivation.

2.2. When the petitioner received show cause notice from the Superintendent, Gudalur Range, demanding duty, the petitioner was informed that the undertaking referred to in the notification should be filed every financial year. Accordingly, the petitioner despatched the undertaking, dated 30.03.2001 for the financial year 2001-2002 by post to the 2nd respondent. Despite the receipt of the said undertaking, the second respondent issued a show cause notice dated 10.01.2002, stating as to why the duty of excise from 01.04.2001 to 10.04.2001 for 18,286 kgs. of black tea cleared amounting to Rs. 36,572/- together with the applicable interest and penalty should not be imposed.

2.3. The petitioner sent a reply, dated 04.09.2002, stating that it had dispatched the undertaking on 30.03.2001, but, due to postal delay, the undertaking was received by the office of the second respondent only on 11.04.2001. In spite of the said reply, the second respondent proceeded to pass an order dated 26.09.2002, imposing a duty of Rs. 36,572/- u/s 11AB(1) of the Central Excise Act, 1944, and penalty of Rs. 10,000/-.

2.4. There was a recession in the tea industry and several persons, including the petitioner, were facing severe financial crisis, and the petitioner firm was kept running only for sentimental reasons, although it had been making continuous losses. Therefore, it was not in a position to file an appeal against the order before the Commissioner of Central Excise. Thereafter, the second respondent issued other orders, dated 18.08.2003, imposing cess of Rs. 47,632/- and Rs. 53,309/-, applicable interest and mandatory penalty; dated 24.03.2003, imposing cess of Rs. 1,02,189/- and Rs. 61,011/- applicable interest thereon and penalty of Rs. 5,000/-, against which orders also, it did not prefer appeals, but made a payment of Rs. 40,022/-. The petitioner also sent letters to the second respondent, explaining its position and seeking for payment of cess in instalments.

2.5. Under the circumstances, the petitioner has received the impugned notice, dated 10.12.2004, from the second respondent, calling upon to pay an amount of Rs. 3,95,654/-. Hence, this Writ Petition.

3. Second respondent has filed a counter, stating as follows:

3.1. The petitioner is due for payment of arrears of Rs. 3,11,632/- (Rs. 40,000/- since paid) as confirmed in four different orders of demand notices issued to it by the Divisional Office as well as the Range Office to pay the dues failing which action was proposed to be taken u/s 142 of the Customs Act, 1962 to attach movable/immovable properties of the assessee/petitioner. The petitioner has then filed this writ petition to deter the action proposed by the department for realisation of the arrears.

3.2. As on 10.12.2004, the petitioner was due to pay an amount of Rs. 3,71,632/-. During the pendency of the Writ Petition, this Court directed the petitioner to deposit a sum of Rs. 2,50,000/- in two instalments of four weeks duration each and granted interim stay on 06.01.2005. However, the petitioner

paid only Rs. 60,000/- in total in two instalments of Rs. 35,000/- and Rs. 25,000/- on 25.02.2005 and 23.02.2005 respectively. The petitioner failed to comply with the order of this Court. Slum in the entire industry is no excuse for not paying statutory taxes.

3.3. The Department has granted sufficient time to pay the arrears and after expiry of the time only, action was proposed u/s 142 of the Customs Act. Further, the amount due from the petitioner, after payment of Rs. 60,000/-, is, Rs. 3,11,632/-. The petitioner has not made payment regularly, as claimed. The payments towards arrears have been very irregular, which too are very meagre. The regular monthly payments of cess have also been delayed and in one case another demand has been confirmed in addition to the above said amount. The petitioner has further paid an amount of Rs. 10,000/- on 06.10.2005. In view of non-compliance of the conditions of the interim order granted by this Court on 06.01.2005, interim order is deemed to have been vacated and as such the respondents can pursue the recovery proceedings, as per the orders. Therefore, the Writ Petition is liable to be dismissed.

4. Learned Counsel for the petitioner has relied upon a decision of the Supreme Court in *The Cement Marketing Co. of India Ltd. v. The Assistant Commissioner of Sales Tax* 45 STC (SC) 197, wherein it is held as follows:

The assessee effected certain transactions of sale of cement in accordance with the provisions of the Cement Control Order and deducted from the price shown in the invoices sent to the purchasers, the amount of freight, which was included in the "free on rail destination railway station price" and which was paid by the purchasers : Held, that the amount of freight formed part of the sale price within the meaning of the first part of the definition of that term in Section 2(o) of the Madhya Pradesh General Sales Tax Act, 1958, and Section 2(h) of the Central Sales Tax Act, 1956, and was rightly included in the taxable turnover of the assessee.

5. In the above backdrop, I have heard the learned Counsel for the parties and also gone through the records.

6. Though the petitioner has stated that it is entitled for exemption from payment of excise duty vide Notification No. 41/99-Central Excise, dated 26.11.1999, and to that effect it has filed an undertaking with the second respondent, except mere ipse dixit, it is not able to establish the same to this Court, by producing either the notification or the so called undertaking. In the absence of production of such documents, this Court is in dark to know as to what the notification and the undertaking contain. Therefore, the petitioner cannot plead that he is exempted from payment of excise duty.

7. By an order dated 06.01.2005, this Court, while granting interim stay, directed the petitioner to deposit a sum of Rs. 2,50,000/- in two equal instalments in a duration of four weeks each. Though the petitioner did not stick to the time frame, it was represented to the Court on 27.07.2006 that the petitioner had

paid the said amount, by making a final payment of Rs. 10,000/- on 02.06.2006.

8. The second respondent has passed an order dated 26.09.2002, confirming the duty of Rs. 36,572/- u/s 11A of the Act and ordering interest on the amount of duty u/s 11AB(1) and also imposing penalty of Rs. 10,000/- u/s 38A read with Rule 25 of the Central Excise Rules, 2002. Also, on 08.08.2003, the second respondent passed another order, confirming the demand of cess on tea at Rs. 47,632/- and Rs. 53,309/- u/s 11A(1) of the Act read with 25 of the Tea Act and Rule 4 of the Rules, 2002, and also imposing mandatory penalty equivalent to cess u/s 11AC of the Act read with Rule 25 of the Rules, 2002. Similarly, on 24.03.2004, the second respondent confirmed the demand of cess on tea at Rs. 1,02,189/- and Rs. 61,011/- u/s 11A(1) of the Act read with 25(3) of Tea Act and Rule 4 of the Rules, imposing interest and penalty of Rs. 5,000/- under Rule 25.

9. All the above orders are final in nature and the petitioner has not chosen to prefer appeals against those orders even after a lapse of considerable number of years.

10. The reliance placed by the learned Counsel for the petitioner in the case of The Cement Marketing Co. of India Ltd. in respect of the respondent's obligation to impose 25% of the penalty is not directly in question in this case. The facts and circumstances of this case are totally different and therefore the said decision is not of any avail to the case of the petitioner. The second respondent, after a careful consideration of the case and applying its mind, has calculated and assessed the duty, interest and also penalty, with which this Court cannot interfere with.

11. More so, admittedly, as against the order impugned in this Writ Petition, the petitioner has an appeal remedy before the Commissioner of Customs and Central Excise (Appeals), which is not availed of by it. Nothing also prevented the petitioner from availing such remedy. Without availing the said remedy, the petitioner has directly approached this Court under Article 226 of the Constitution of India by way of this Writ Petition, which is not maintainable.

12. In the light of what is discussed above, this Writ Petition is dismissed. No costs. The second respondent is at liberty to recover the balance amount, as demanded in the order impugned in this Writ Petition, and the petitioner is granted a month's time for the said payment.