

(2011) 12 GAU CK 0021

In the Gauhati High Court

Case No : C. EX. Tax. Ref. No. 1 of 2008 and C-EX. Appeal No. 3 of 2008

Dharampal Satyapal Ltd.

APPELLANT

Vs

Deputy Commissioner, Guwahati

RESPONDENT

Date of Decision : 01-12-2011

Acts Referred:

Additional Duties of Excise (Textiles and Textile Articles) Act, 1978 — Section 3
Central Excises and Salt Act, 1944 — Section 11A, 35G
Finance Act, 2003 — Section 164

Citation : (2012) 283 ELT 14

Hon'ble Judges : Adarsh Kumar Goel, Acting C.J.;Ujjal Bhuyan, J

Bench : Division Bench

Advocate : A. Kashyap, S.K. Medhi and S. Kashyap, for the Appellant; D. Choudhury, SC, Central Excise Deptt., for the Respondent

Final Decision : Dismissed

Judgement

A.K. Goel, ACJ.

1. This appeal has been preferred by the assessee u/s 35G of the Central Excise Act, 1944, ("the Act"), against the Customs, Excise & Service Tax Appellate Tribunal (hereafter referred to as "CESTAT") [2007 (217) E.L.T. 127 (Tri. - Kol.)], upholding the demand of the Revenue with reference to Section 154 of the Finance Act, 2003, retrospectively withdrawing the exemption granted u/s 5A of the Act read with sub-section (3) of Section 3 of the Additional Duties of Excise Goods of Special Importance Act, 1957 and sub-section (3) of Section 3 of the Additional Duties of Excise (Textiles and Textile Articles) Act, 1978. The appellant has claimed the following substantial questions of law :

I. Whether the decision in the R.C. Tobacco case leaves open the question as to whether a Show Cause Notice is required under law to be issued before recovery of excise duty refunds u/s 154 of the Finance Act, 2003 ?

II. Whether the Hon'ble CESTAT has wrongly considered itself bound by the

decision in the R.C. Tabacco case to reject the Appellant's contention that a Show Cause Notice must mandatorily be issued prior to recovery of excise duty refunds u/s 164 of the Finance Act, 2003?

III. Whether Section 154 of the Finance Act, 2003 could only have validated actions already taken prior to the passing of the Finance Act, 2003 for the recovery of excise duty refunds, and whether therefore no subsequent action for recovery of the said refunds from the Appellants could stand validated?

IV. Whether Section 154(3) of the Finance Act, 2003 only bars the maintenance or continuance of any suit or proceedings for any action taken or anything done or omitted to be done in respect of any goods covered by Excise Notifications Nos. 32/99-C.E. and 33/99-C.E., dated 8-7-1999, and does not apply to appeals, or to proceedings against actions taken or anything done or omitted to be done in respect of such goods?

V. Whether interest ought to have been levied for periods for which payment was not made in view of the then valid and subsisting Order-in-Appeal No. 40/CE(A)/Ghy/05, dated 25-6-2005 passed by the Commissioner, Customs Central Excise (Appeals)?

VI. Whether the subsequent notifications issued by the department, passed which excluded the Appellant and other similarly placed industries in the region outside the purview of Section 154 of the Finance Act, 2003.

VII. Whether the subsequent notifications treated the Appellant and other similarly placed industries in the region as a separate category by restoring benefits that allegedly were withdrawn by the issuance of Notification 6 of 2001, dated 1-3-2001 under the provisions of Section 154 of Finance Act, 2003.

The appellant is a manufacturer of Pan Masala containing tobacco falling under Chapter 24 of the Central Excise Tariff Act, 1985. The impugned notification dated 8-9-1999 was issued u/s 5A of the Act, subject to certain conditions. The exemption continued up to 21-2-2001. The appellant filed writ petition in this Court challenging withdrawal of the exemption notification. The writ petition was allowed and the notification dated 1-3-2001 was quashed. However, on appeal, the Division Bench of this Court vide judgment dated 3-12-2002 held, that withdrawal of exemption was violative of principle of "promissory estoppel". The said judgment was challenged by the Revenue before the Hon'ble Supreme Court. During the pendency of the said appeal, the Finance Act, 2003 was passed whereby the exemption was withdrawn with retrospective effect. In pursuance thereof, order-in-original dated 6-6-2003 was issued for recovery of the amount of exemption availed by the appellant. The appellant filed departmental appeal and also sought waiver of pre-deposit which was declined. The appellant filed writ petition in this Court challenging refusal to waive pre-deposit and also the order dated 6-6-2003. The writ petition was considered on merits and was dismissed by Single Bench of this Court on 18-5-2004 holding that order dated 6-6-2003 was not vitiated on account of absence of notice to the appellant

before the said order. Judgment of the Hon''ble Supreme Court in J.K. Cotton Spinning and Weaving Mills Ltd and Another v. Union of India and Others, 1987 (Supp) SCC 35 was held to be distinguishable. This Court held that no prejudice was caused to the appellant by absence of show cause notice. The relevant finding is as under :

It is in the above backdrop that the petitioners have approached this Court invoking its writ jurisdiction challenging the legality and validity of the aforementioned impugned orders. The basic thrust of argument made by Mr. Sridharan was that on the face of it the appellate authority having admitted that no notice was issued to the petitioners giving an opportunity of hearing and it also having noticed that the purported supersession of the earlier notification dated 8-8-2003 by subsequent notifications could not be placed on records and thus the earlier notification dated 8-8-2003 by which the decision to keep in abeyance the show cause notices and/or recoveries was conveyed held that field, could not have ordered for depositing the amount in question within 30 days of receipt of the order by way of rejecting the stay application. Placing reliance on the decision of the Apex Court in J.K. Spinning & Weaving Mills Ltd. v. Union of India as reported in 1987 (32) E.L.T. 234 (S.C), it was argued by Mr. Sridharana that amendment to Section 154 of the Finance Act, 2003 retrospectively will always be subject to Section 11A of the Central Excise Act, 1944 under which a notice is required to be issued on person chargeable within the duty. Referring to paragraph 31 of the judgment, he submitted that the provisos of Section 51 of the Finance Act, 1982 by which retrospective effect to the amendments of Rules 9 and 49 of Central Excise Rules, 1944 was brought about and which is *pari materia* to the provisions of Section 154 of the Finance Act, 2003, such retrospective operation cannot override the express provisions of Section 11A and in the instant case the petitioners having not been issued with any notice before passing the impugned order dated 6-6-2003 and this position having been admitted by the appellate authority in its order dated 31-3-2004 and yet having ordered for depositing the entire amount in question, the impugned orders are not sustainable.

The Deputy Commissioner while passing the impugned order dated 6-6-2003 elaborately dealt with the materials on record and the judgments of this Court and their effect. It also recorded as to how the petitioners have been discharging their duty liability by way of adjustments as was provided for by the Division Bench of this Court in writ appeals and have been claiming refund of the amount so adjusted in terms of the earlier notification dated 8-7-1999. It also noticed as to how the notification dated 8-7-1999 stood amended retrospectively in terms of Section 154 of the Finance Act, 2003 and the stipulations therein. There was question of entertaining the refund claim after the retrospective amendment brought about by the Finance Act, 2003 for the period from March, 2001 to April, 2003 which stood at Rs. 85,31,17,836/-. The Deputy Commissioner also found that the petitioner cleared their finished goods without payment of appropriate duty since 2nd fortnight of November, 2002 amounting to Rs. 25,46,34,087/-

calculated upto 31st May, 2003 and kept informing the department from time to time by their various correspondences that in defiance of the judgment and order of this Court dated 3-12-2002 passed in the writ appeals, the duty payable on clearance may be adjusted from the amount of pending refund which the department never exceeded to. Having regard to the provisions of Section 154(3) of the Finance Act, 2003, he observed that the said judgment and order dated 3-12-2002 is not enforceable and consequently the duty not paid by the petitioners during the period from 2nd fortnight of November, 2002 till 30th April, 2003 is liable to be recovered. It is on this basis recovery of the amount of Rs. 25,46,34,087/- has been ordered as duty not paid against the goods cleared during the aforesaid period along with interest payable.

In the impugned order dated 31-3-2004 although the appellate authority prima facie found fault with non-issuance of show cause notice to the petitioners before passing the order dated 6-6-2003 and it also recorded that the stand of the department that the earlier notification dated 8-8-2003 has already been superseded could not be substantiated, but dealing with the moot point that the Division Bench judgment of this Court dated 3-12-2002 quashing the notification dated 1-3-2001 is pending consideration before the Apex Court, it has referred to the stay order dated 12-1-2004 passed by the Apex Court staying operation of the said judgment and order dated 3-12-2002. It also noticed the observation of the Apex Court that if the Government has taken any decision independent of the judgment of this Court, the stay order would not come in the way thereof. Referring to the impugned order dated 6-6-2003 passed by the Deputy Commissioner in terms of Section 154 of the Finance Act, 2003, it found that the relief granted in writ appeal was no longer available to the petitioner in view of the stay order passed by the Apex Court. It is in this context the appellate authority has held that the petitioners does not have a strong prima facie case on merit. Accordingly the stay application has been rejected by the impugned order dated 31-3-2004 with a direction to the petitioners to deposit the entire amount before the appeal could be heard.

The concept of natural justice has undergone a great deal of change in recent years. Over the years by a process of judicial interpretation two rules have been evolved as representing the principle of natural justice to judicial process including therein quasi judicial and administrative process. What is known as "useless formality theory" received consideration of the Apex Court in the case of M.C. Mehta Vs. Union of India (UOI) and Others, . The Apex Court while not expressing any opinion on the correctness or otherwise of the "useless formality theory" left the matter for decision in an appropriate case having found from admitted and indisputable facts of that case that grant of a writ will be in vain. The Apex Court in the case of Canara Bank and Others Vs. Shri Debasis Das and Others, while discussing in detail the concept, meaning, object, scope and applicability of "natural justice" held that, unless failure of justice is occasional or that it would not be in public interest to dismiss a petition on the fact situation of a case, the Court may refuse to exercise the jurisdiction. It further held that legal

formulations cannot be divorced from the fact situation of the case. Likewise in the case of Escorts Farms Ltd., Previously known as Escorts Farms (Ramgarh) Ltd. Vs. The Commissioner, Kumaon Division, Nainital, U.P. and Others, , the Apex Court observed, reiterating the same position that rules of natural justice are to be followed for doing substantial justice and not for completing a mere ritual of hearing without possibility of any change in the decision of the case on merits.

In the instant case the petitioners, to show that they have been prejudiced by the impugned action having placed to material. In the aforesaid case of Canara Bank (supra) the Apex Court also observed that though in all cases post decisional hearing cannot be a substitute for pre-decisional hearing, in a given case the position might be different. In the present case, the petitioners apart from attacking the impugned order dated 6-6-2003 more emboldened by the observation made by the appellate authority have not stated anything as to what material they could have placed before the Deputy Commissioner, had they been issued with a notice. The entire action on the part of the Deputy Commissioner was upon assessing the situation that had arisen pursuant to the judgment in writ appeals and the effect and retrospective operation of Section 154 of the Finance Act, 2003 coupled with the stay order passed by the Apex Court. Undisputed facts for which there is no plausible explanation from the petitioners dilute the plea of non-issuance of notice to the petitioners. The principle that in addition to breach of natural justice, prejudice must also be proved has been developed in several cases. The Apex Court have also emphasized that not mere violation of natural justice but de-factor of K.L. Tripathi Vs. State Bank of India and Others, , the Apex Court quoting Wade's Administrative Law observed as follows :

It is not possible to lay down rigid rules as to when the principles of natural justice are to apply, nor as to their scope and extent. There such thing as a merely technical infringement of natural justice. The requirements of natural justice must depend on the facts and circumstances of the case, the nature of the inquiry, the rules under which the tribunal is acting, the subject matter to be dealt with, and so forth.

The Apex Court has consistently applied the principle of prejudice in several cases. In absence of any prejudice shown, the absence of a notice to show cause does not make any difference.

Thereafter, the appellant agitated the same issue before the departmental appellate authority and vide order dated 24-6-2005, the appellate authority set aside the order in original dated 6-6-2003 and remanded the matter for fresh consideration, ignoring the judgment of this Court dated 18-4-2004. However, on further appeal by the Revenue, the CESTAT set aside the said order holding that the appeal itself was not maintainable and objection to the recovery proceeding was not open to the appellant in view of judgment of the Hon"ble Supreme Court in R.C. Tobacco Pvt. Ltd. and Another etc. Vs. Union of India (UOI) and Others, .

The CESTAT noticed the stand of the learned counsel appearing for the appellant as follows :

Shri A. Madhav Rao, learned Advocate appearing for the respondents and vice versa, does not challenge the duty-liability, but states that interest is not payable for the entire period in view of the Order-in-Appeal subsisting in favour of the appellants. He also states that where the refunds have been granted after finalization of assessment, the same is not required to be paid back as no appeals have been preferred by the Department against the same.

The CESTAT concluded as follows :

In view of our findings above, we are of the view that the lower Appellate Authority was not justified in allowing the appeals and setting aside the Order-in-Original, particularly in the light of the specific provision regarding non-maintainability of appeal contained in Section 154(3) of the Finance Act, 2003 and the Hon''ble Supreme Court's decision in the case of R.C. Tabacco (cited supra).

2. We have heard the learned counsel for the parties.

3. Learned counsel for the appellant submitted that R.C. Tabacco (supra) was wrongly applied to the case of the appellant and the appellant had not been given any opportunity of being heard as required u/s 11A of the Act and even if Section 154 of the Finance Act, 2003 was valid, the same could not affect the procedure for recovery of the amount due, in accordance with Section 11A of the Act.

4. We are unable to accept this submission. The correctness and validity of the order 6-6-2003 has already been put in issue by the appellant in a writ petition before this Court and it was held that absence of show cause notice u/s 11A did not affect the validity of the order dated 6-6-2003. The said judgment has admittedly become final and the finding recorded therein is res judicata. The same, therefore, cannot be allowed to be re agitated. It appears that for this reason, the learned counsel for the appellant fairly stated before the CESTAT that the appellant did not dispute the liability and limited himself to the issue of interest. No argument whatsoever has been raised by the learned counsel for the appellant on the issue of interest. Only contention relates to validity of order dated 6-6-2003 on the ground that no notice was given which issue already stands concluded against the appellant. In view of above, the questions raised before us have to be decided against the assessee. The appeal is dismissed. No costs.