

(2015) 02 KAR CK 0437
In the Karnataka High Court
Case No : CEA No. 60 of 2014

Dhariwal Industries Limited

APPELLANT

Vs

Commissioner of Central Excise Custom and Service Tax

RESPONDENT

Date of Decision : 26-02-2015

Acts Referred:

Central Excises and Salt Act, 1944 — Section 35C
Customs Act, 1962 — Section 129B

Citation : (2015) 321 ELT 550 : (2015) ILR (Kar) 4257

Hon'ble Judges : Vineet Saran, J;S. Sujatha, J

Bench : Division Bench

Advocate : Sujay Kantavala, Advocate for B. Venugopal and Hari Radhakrishnan, for the Appellant; Y. Hariprasad, Sr. SC, Advocates for the Respondent

Judgement

Vineet Saran, J.—This appeal is filed by the assessee against the order dated 20.12.2014 passed by the Customs, Excise and Sales Tax Appellate Tribunal, South Zone Bench, Bangalore whereby, after allowing the appeal filed by the assessee, the matter has been remanded back to the Commissioner of Central Excise, Custom and Service Tax, Bangalore, (Adjudicating Authority), with the condition that the appellant-assessee shall deposit an amount of Rs. 40.00 lakhs within 8 weeks. The appellant is aggrieved only by the latter part of the order requiring the appellant to deposit Rs. 40.00 lakhs as a precondition of remand to the Adjudicating Authority.

2. The brief facts of the case are:

"- The appellant M/s. Dhariwal Industries Limited, Bangalore is a manufacturer of Panmasala and Gutka and is registered under the Central Excise Act, 1944. Proceedings were initiated against the appellant, for which a show cause notice was issued on 1.8.2012 demanding Central Excise Duty, alleging that for the period July '07 to February '08, the appellant had got cleared certain goods without paying Excise Duty. The demand was confirmed by the Adjudicating Authority vide its order dated 22.07.2013, and besides Central Excise Duty,

interest and penalty were also imposed.

Challenging the said order, the appellant preferred an appeal before the Tribunal, which has allowed the appeal primarily on the ground that sufficient opportunity was not afforded to the appellant, and remanded the matter to the adjudicating authority, with the condition that the appellant shall deposit a sum of Rs. 40.00 lakhs."

3. This appeal was admitted by order dated 18.2.2015, on the following substantial question of law:

"Whether the Hon"ble Tribunal has jurisdiction to put a condition of depositing Rs. 40 lakhs while remanding the issue back to the Commissioner of Central Excise for fresh adjudication?"

4. We have heard Sri Sujay Kantavala, learned counsel appearing along with Sri Hari Radhakrishna for the appellant and Sri Y Hariprasad, standing counsel appearing for the respondent and perused the records.

5. The main contention of the learned counsel for the appellant is that though detailed reasons have been given by the Tribunal for setting-aside the order passed by the adjudicating authority and remanding the matter for fresh decision, but no reason, whatsoever, has been given for imposing the condition of deposit of Rs. 40.00 lakhs before the matter is to be reheard and considered by the adjudicating authority afresh.

6. It has been contended that the order has been passed by the Tribunal under Section 35C of the Central Excise Act, 1944 which does not empower the Tribunal to impose any such condition as has been done in the present case. According to the appellant, since the order passed by the adjudicating authority has been set-aside, there was no liability of payment of any Excise Duty on the appellant, and as such, the imposition of the condition of deposit of Rs. 40.00 lakhs was beyond the scope of the provision of Section 35C. In the alternative, it has been submitted that in the absence of any reasons having been given for computing the amount of Rs. 40.00 lakhs or for imposing any such condition for deposit, the order impugned is liable to be set-aside.

7. Learned counsel for the appellant has also submitted that the appellant is an assessee which pays Excise Duty to the tune of few crores every month, and is regularly assessed by the authorities concerned and as such, it is not a case where such condition of deposit should have been imposed, especially in the facts and circumstances of the case, when it has been held that the assessing authority had passed the order without affording the appellant adequate opportunity.

8. Sri Y Hariprasad, learned counsel appearing for the respondent/department has submitted that Section 35C of the Act empowers the Tribunal to pass orders, "with such direction" as the Tribunal may deem fit and as such, it cannot be said that the Tribunal does not have the power to impose the condition as has been

imposed in the present case. He has submitted that while remanding the case to the Adjudicating Authority for fresh decision, sufficient reasons have been given in the order requiring the appellant to deposit Rs. 40.00 lakhs.

9. In support of their contention, learned counsel for the parties have relied on certain decisions, which shall be referred to herein after.

10. Sub-section (1) of Section 35C of the Central Excise Act, 1944, which requires consideration, reads as under:

35C. Orders of Appellate Tribunal:--(1) The Appellate Tribunal may, after giving the parties to the appeal an opportunity of being heard, pass such orders thereon as it thinks fit, confirming, modifying or annulling the decision or order appealed against or 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".

(emphasis supplied)

11. Much emphasis has been laid on the fact that the Tribunal has the power to pass such orders as it thinks fit, confirming, modifying or annulling the decision or order appealed against, or may refer the case back to the authority which passed the decision with such directions as the appellate Tribunal may think fit.

12. It has been submitted by the learned counsel for the appellant that "with such directions" referred to in the aforesaid Section would mean directions on the merits of the case or the procedure, but not imposing any such condition of deposit, as has been done in the present case. It has been contended that there is a distinction between "issuing directions" and "imposing conditions" and since, there is no provision of imposing any such condition of deposit of any amount while remanding the case, though "directions" may be permissible with regard to the merits, no "condition" can be imposed while remanding the matter.

13. In the case of NATIONAL OXYGEN LIMITED v. COMMISSIONER OF CUSTOMS, CHENNAI (2008(231) ELT 410(Mad.)) the Division Bench of the Madras High Court was dealing with a case under Section 129B of the Customs Act, 1962 which are similar to the provisions of Section 35C of the Central Excise Act, 1944. The Madras High Court has held that no such precondition directing the appellant to deposit 50% of the differential value could be imposed while setting-aside and remanding the matter to the authority below for fresh decision, and that the only power which could be exercised by the Tribunal was to refer the case back to the authority which passed such order, with such direction as the Appellate Tribunal may think fit for fresh adjudication or decision, as the case may be, after taking additional evidence, if necessary.

14. In another case of the High Court of Telangana and Andhra Pradesh MAA MAHAMAYA INDUSTRIES LTD v. COMMISSIONER OF CENTRAL EXCISE, CUSTOMS AND SERVICE TAX VISAKHAPATNAM-I, COMMISSIONERATE (2014-TIOL-2014-HC-

AP-CX), it has been held that unlike Civil Court, the Tribunal, being an appellate authority, has no power or jurisdiction to ask for security before adjudication after remand, as the Tribunal does not have any inherent power, like Civil Court, to pass appropriate order to meet the ends of justice. In the said case, it has also been held that the Tribunal has specific powers mentioned in the Statute itself, and in the absence of their being any provision for making any deposit for adjudication after remand, the same would be without jurisdiction.

15. In the case of Satvik Industries Vs. Commissioner of Central Excise, (2010) 252 ELT 182 : (2011) 21 STR 680 , a Division Bench of the Delhi High Court also has held that since the Tribunal had set-aside the order-in-original, there was no duty or penalty leviable against the appellant and, as such, the question of making any deposit would not arise.

16. On the other hand, the Punjab and Haryana High Court, in the case of SAMRAT PLYWOOD LTD. v. COMMISSIONER OF C.EX., CHANDIGARH (2012(300) ELT 228 (P&H)) and the Gujarat High Court in the case of Avaya Global Connect Ltd. and Another (Now AGC Networks Ltd.) Vs. Union of India and Others, (2014) 24 GSTR 163 : (2014) 67 VST 455 , have held that while setting-aside and remanding the case, direction to deposit certain amount can be given but not without reason, as such discretion may be there with the Tribunal, but it has to be exercised judiciously.

17. We have considered the decisions of various High Courts relied on by the learned counsel for the parties, as well as the submissions of the learned counsel.

18. In the facts of the present case, the Tribunal has dealt with the merits of the case at length, and held that there was no discussion or evidence available on record to show excess consumption of raw material and electricity, or any other material to show that the appellant removed the products clandestinely. It has also been recorded in the impugned order that in the audit which was conducted, no discrepancy was found in the records of the company. The Tribunal has also held that there was no indication to show that there was excess consumption of raw material, or there was misdeclaration of consumption by the appellant. After giving a detailed finding of fact that the Adjudicating Authority had not considered the various evidences which were led, and that no proper opportunity of cross-examination or hearing was afforded to the appellant, the Tribunal has set-aside the order passed by the Adjudicating Authority which had imposed liability of over Rs. 26.00 crores on the appellant.

19. The Tribunal has, thus, for valid reasons, remanded the matter for fresh consideration of each and every point that may be submitted by the appellant. In the end, all that the Tribunal has observed is that, "we consider that the matter is required to be remanded for fresh adjudication by the learned Commissioner, and we direct the appellant DIL to deposit an amount of Rs. 40.00 lakhs (Rupees Forty Lakhs only) within eight weeks and report compliance to the original adjudicating authority who shall take up adjudication of the matter thereafter".

20. The submission of the learned counsel for the appellant, that no reason whatsoever has been given for imposing such condition of deposit of Rs. 40.00 lakhs, has merit. Though we are of the opinion, that in terms of the language of Section 35C, the power of the Tribunal of imposing certain conditions with regard to deposit may be there, while setting-aside and remanding the matter to the Adjudicating Authority, yet the same can be done only with valid reasons and in a judicious manner. There may be cases where the Tribunal may hold that on certain issues, the liability of the assessee to pay excise duty may be there, but not on all issues and thus, after giving reasons, the Tribunal may impose the condition of depositing certain amount, but, not as a routine course and without assigning reasons. There could be other circumstances, such as the assessee adopting dilatory tactics or not coming forward in adducing evidence, for which reason also the Tribunal may impose any such condition of deposit while remanding the matter, so that justice is done, but not in a case like the one in hand, where the Adjudicating Authority has not followed the procedure or given sufficient opportunity to the assessee, because of which the order is set-aside and then a condition of deposit is imposed.

21. In the facts of the present case, it is clear that though for setting-aside the order passed by the Adjudicating Authority and remanding the case for fresh decision, sufficient reasons have been given, but no reason, whatsoever, has been given for imposing a precondition of deposit of Rs. 40.00 lakhs by the appellant. There is even no justification for quantifying the amount Rs. 40 lakhs to be deposited by the appellant.

22. In the aforesaid facts and circumstances of the case, we hold that the Tribunal may, for some specific and valid reason, have the jurisdiction to impose the condition of deposit of certain amount while remanding the case back to the Adjudicating Authority, but the same can be done only in a judicious manner and not in arbitrary manner and without justification. In the present case, the same is totally lacking.

23. For the foregoing reasons, this appeal stands allowed and the condition of deposit of Rs. 40.00 lakhs, as directed by the Tribunal, is set-aside. The Adjudicating Authority shall decide the matter afresh, after affording adequate opportunity to the appellant, and in accordance with law, without requiring the appellant to deposit the sum of Rs. 40.00 lakhs, as directed by the Tribunal. It is made clear that this Court is not interfering with the other findings recorded by the Tribunal in its order dated 20.12.2014.