(2014) 01 CAL CK 0041

In the Calcutta High Court

Case No : Writ Petition No. 735 (W) of 2014

J.J. Exporters Ltd. APPELLANT

Vs

Deputy Commissioner of Central Excise RESPONDENT

Date of Decision : 17-01-2014

Acts Referred:
Central Excises and Salt Act, 1944 — Section 11AC, 35

Citation : (2014) 29 GSTR 331

Hon'ble Judges : Harish Tandon, J

Bench : Single Bench

Advocate : A.K. Lal Gupta and Rajiv Shaw, Advocate for the Appellant

Judgement

Harish Tandon, J.—Despite service, there is no appearance on behalf of the respondent when the matter is taken up today. The petitioner has challenged a show-cause notice dated July 22, 2009, order dated December 1, 2009 and notice of demand dated November 20, 2013 in this writ petition.

2. The petitioner, at the outset, submits that the show-cause notice, issued by the authority, was beyond the normal period of limitation but within the extended period. The learned advocate further submits that the extended period can only be invoked, provided the conditions, enshrined for such purposes, are fulfilled. Issuance of the show-cause notice by the authority, in colourable exercise of power, by mere recording of the ingredients required therefor, without specifying other facts and materials, is not permissible and the said show-cause notice is liable to be struck down.

3. It is an admitted fact that there was a shortfall in payment of the duty by the petitioner. The petitioner, subsequently, paid the differential duty as well as the interest, as provided under the Act. The authorities, thereafter, issued a show-cause notice contemplating to initiate a proceeding for imposition of penalty for non-payment of the duty by the petitioner within the prescribed period.

4. The petitioner replied to the said show-cause notice and submitted to the

jurisdiction of the said authority to decide the issue. The authority passed an order dated December 1, 2009 in a proceedings initiated on the basis of the said show-cause notice and imposed penalty equivalent to differential duty under section 11AC of the Central Excise Act, 1944.

5. The petitioner carried the said order to statutory appeal before the Commissioner of Central Excise (Appeals) but beyond the statutory period. The appeal was preceded with an application for condonation of delay. The appellate authority held that the appeal is incompetent and rejected the application for condonation of delay on the premise that section 35 of the Central Excise Act, 1944 does not bestow any power to condone delay beyond the extended period provided thereunder. The said order was further appealed before the Customs, Excise and Service Tax Appellate Tribunal and stood affirmed on the dismissal of the appeal. The Department, thereafter, issued a notice for recovery of the penalty imposed by the authority. The petitioner not only assailed the said notice, issued by the authority for recovery of the penalty, but has also challenged the show-cause notice, on the basis whereof the proceeding was initiated. It is tried to be contended by the petitioner that the authorities have acted in colourable exercise of power, which strikes at the root of the jurisdiction, and, therefore, the entire proceedings should be held to be nullity.

6. It is further contended that the genesis of the show-cause notice originated from the various disclosures and/or payment of the differential duty and, therefore, the authorities have abused the power conferred by the statute.

7. As a last resort it is submitted that when there is no wilful suppression of the fact, the authorities could not have invoked and/or applied the extended period in issuing the show-cause notice.

8. In support of the aforesaid contention, reliance is placed upon an unreported judgment of the Supreme Court rendered in the case of Hindustan Metal Pressing Works v. CCE (reported as [2003] 1 RC 12), (Appeal (Crl) No. 2050 of 2000 decided on February 27, 2003) and a judgment of the Supreme Court rendered in the case of Union of India (UOI) Vs. Rajasthan Spinning and Weaving Mills, .

9. There is no dispute to the proposition of law, as laid down in the aforesaid reports. One distinguishing feature, which this court would like to indicate, is that in the aforesaid reports the order was carried in an appeal and ultimately against the original order, a special leave petition was filed. This court does not feel any hesitation to accept the proposition that when the original order is carried to a higher forum, the entire issue is at large and the higher forum can go into the merit of the matter and can affirm and/or reverse the original order. It is absolutely a different thing when the order is assailed before the higher forum and stood affirmed upon dismissal of the proceedings and the original order is thereafter, challenged in a collateral proceeding. The main thrust of the petitioner, in this case, is upon the show-cause notice, which, according to him, was issued in colourable exercise of the power. The defence, which is now being

canvassed before this court was very much available to the petitioner before the authority as well.

10. It is submitted on behalf of the petitioner that those points were taken before the authorities in reply to the show-cause notice but the authorities have not dealt with those points.

11. There is a distinction between an erroneous order and an order which is per se illegal and without jurisdiction. An erroneous order is capable of being corrected by going higher but an order, which is per se without jurisdiction and a nullity, can be assailed in a collateral proceeding. Had it been a case of the petitioner that the show-cause notice is issued by an authority, not competent under the statute and the entire proceeding is carried out by an authority not competent therefor, the proposition of law, as tried to be contended by the petitioner, could very well be accepted.

12. It has not been said by the petitioner that the authority, who passed the original order, was incompetent to pass such order. What is tried to be contended is that the show-cause notice was issued on an illusionary cause of action and upon assumption of the jurisdiction which, otherwise, could be termed as abuse of the power.

13. I am afraid whether the aforesaid plea is at all available to the petitioner in this proceedings. The original order merges with the order of the appellate authority and finally merges with the order of the Tribunal upon dismissal of a validly constituted appeal. The order of the Tribunal is not appealed by the petitioner. Once the dispute has reached its finality, the aforesaid orders cannot be branded to be a nullity on the ground of being passed by an authority who is otherwise competent to do so.

14. This court, ''therefore, feels that the said plea cannot be allowed to be reagitated by the petitioner. Furthermore, the principle of estoppel should also be made applicable. The plea which was available to the petitioner before the competent authority, and having taken so which did not yield fruitful and/or desired result, cannot be allowed to be reagitated in another proceedings not originated from the original order.

15. This court, therefore, feels that if the plea, as tried to be taken by the petitioner, is allowed at this stage of the proceedings, it would open a pandora box for all and the sundry and no lis could attain finality.

16. This court does not find that there is any merit of the writ petition. The writ petition is, thus, dismissed. There shall, however, be no order as to costs.

