(2010) 09 BOM CK 0110

In the Bombay High Court

Case No : Central Excise Appeal No. 81 of 2004

Mahalaxmi Dyeing and Ptg (I) Pvt. Ltd. APPELLANT

Vs

Union of India RESPONDENT

Date of Decision : 27-09-2010

Acts Referred:

Central Excise Rules, 1944 — Rule 11B, 96ZQ
Central Excises and Salt Act, 1944 — Section 35G, 3A
Hot Air Stenter Independent Textile Processors Annual Capacity Determination Rules, 1998 — Rule 3, 3(1), 3(4)

Citation : (2011) 271 ELT 194

Hon'ble Judges : V.C. Daga, J;R.M. Savant, J

Bench : Division Bench

Advocate : S.N. Kantawala with Brijesh Pathak, instructed by Yogesh M. Rohira, for the Appellant; R.B. Pardeshi, for the Respondent

Judgement

V.C. Daga, J.—Heard.

Perused appeal.

2. This is an appeal filed u/s 35G of the Central Excise Act 1944 ("the said Act" for short) against the impugned order dated 27th February, 2004 passed by the Customs, Excise and Service Tax Appellate Tribunal, West Regional Bench, Mumbai ("the Tribunal" for short) raising following substantial questions of law :

(a) Whether the appellant could be denied the refund on the extended length of galleries despite the judgment of the Supreme Court in the case of Commissioner of Central Excise, Jaipur-II v. S.P.B.E. Ltd. (Civil Appeal No. 4972 of 2001 decided on 17th September, 2002) ?

(b) Whether the appellant could be denied refund when the order dated 1st July, 1999 determining the capacity on the basis of goods which have been declared ultra vires to Section 3(a) of the Madras High Court ?

The facts :

3. The appellant M/s. Mahalakshi Dyeing and Printing Works is engaged in the manufacture of processed textile fabrics, falling under Chapter Heading 52, 54 and 55 of the Schedule to the Central Excise Tariff Act, 1985. The processed textile fabrics have been specified under Notification No. 41/98 CE(NT) dated 10th December, 1998, as notified goods on which duty of excise is leviable and payable in accordance with the provisions of Section 3-A of the Central Excise Act, 1944. The Assessee has to accordingly discharge the excise duty liability from 16th December, 1998 on the notified goods in terms of Rule 96 ZQ of the Central Excise Rules, 1944 ("the Rules of 1944" for short) read with the Hot Air Stenter Independent Textile Processors Annual Capacity Determination Rules, 1998 ("the Rules of 1998). The said assessee had declared the details vide declaration dated 16th December, 1998 as required under Sub Rule (1) of Rule 3 of the Rules of 1998 read with Section 3-A of the said Act.

4. Pending the verification of the declaration furnished by the assessee, a provisional order No. 2/98 dated 17th December, 1998 was issued in exercise of the powers conferred on the Commissioner under proviso to Sub Rule (4) of Rule 3 of the Rules of 1998 to determine the annual capacity of production of the said independent processor. The annual capacity of production was determined provisionally and the assessee appellant was directed to discharge its duty liability in respect of the processed textile fabrics under the provisions of Rule 96 ZQ of the Rules 1944 and after determining the annual capacity the appellant was directed to pay the differential duty involved, if any, along with interest and penalty under the provisions of the said Act and the Rules of 1944 and the Rules of 1998, vide order dated 1st July, 1999.

5. Thereafter, the appellant filed a refund claim before respondent No. 3 on the ground that the length of galleries were not to be added to the length of the chamber of stenters for the computation of the annual capacity determination. The said claim was rejected by the Deputy Commissioner, Central Excise, Belapur-I vide order-in-original dated 25th February, 2002.

6. Aggrieved by the above order-in-original, the appeal was preferred by the petitioner before the Commissioner (Appeal), Central Excise, Mumbai who vide its order-in-appeal dated 8th February, 2002 allowed appeal. Acting upon this order-in appeal, the Deputy Commissioner Central Excise, Belapure-1 Dn. Mumbai-VI sanctioned refund claim vide its order dated 28th October, 2002 since there was no stay in the appeal filed by the Revenue which was pending before the Tribunal. Ultimately, thus appeal was allowed by the Tribunal and the order of the 1st appellate authority granting refund was set aside by an order passed by the Tribunal on 19th February, 2004.

7. Being aggrieved by the above order, this appeal has been preferred to challenge the order refusing to grant refund on the grounds mentioned in the impugned order.

Rival submissions :

8. Mr. Kantawala, submitted that the order dated 1st July, 1999 was not a final order since it was a conditional order. On the repeated representations being made by the appellant, they were informed that their case was kept alive, since the Board had decided to file an appeal before the Hon''ble Supreme Court. It is, thus, urged that the Department had agreed that the re-determination would be subject to the decision of the Apex Court. Thus, it is submitted that the denial of the refund after the dismissal of the said appeal by the Apex Court, for want of challenge to the order dated 1st July, 1999 is palpably erroneous and misconceived. It is the case of the appellant that the annual capacity of production was determinable for the relevant financial year only. Consequently, the annual capacity determination order can be operative only for the financial year for which it pertained. The submission is that the exercise of determining annual capacity was not a one time excise but a periodic exercise to be conducted annually during each financial year. Thus, the order dated 1st July, 1999 passed in conjunction with the provisional order No. 2/98(F) dated 17th December, 1998 cannot be held to be operative for the financial year commencing from April, 1999.

9. Mr. Kantawala, learned Counsel appearing on behalf of the appellants submits that the Final Order No. 2/98 (F) 98-99 dated 1st July 1999 was not set aside by the higher forum cannot be a basis for rejection of refund claim because the said order, passed under the Rules of 1998, specifically states that the duty liability would be subject to redetermination and the provisions of the said Rules of 1998 were required to be followed by the appellants. When the length of galleries was not legally includible in counting the length of chambers as per the law laid down by the Apex Court in Commissioner of Central Excise Vs. S.P.B.L. Limited, the annual capacity ought to have been redetermined as per the ratio of the Apex Court, especially in view of the fact that the order No. 2/98 was subject to redetermination.

10. He submits that the appellant had filed various representations assailing the parameters and claiming redetermination of the annual capacity under the Rules of 1998. However the capacity was not re-determined despite the representations. Despite the request of the appellant no opportunity of impersonal hearing was granted to the appellant to make a representation regarding re-determination of the annual capacity In fact; vide letter dated 19th September, 2001 (Page 41) it was communicated to the appellant that the Appeal against the judgment of the Tribunal in case of 2002 (82) ECC 196 was being contemplated and thus the cases were to be kept alive till the decision of the case. The above letter dated 19th September 2001 was in response to the letter dated 20-8-01 (Page 43) of the appellant to expedite the matter of redetermination in accordance with the settled law as per the decision of the larger bench of the Tribunal. It is submitted that once the appellant was informed that the issue was kept alive as per the aforesaid letter, the order dated 28th February, 2002 rejecting the refund claim holding that the Final order No. 2/98 dated 1st July, 1999 has become final and conclusive since it was not set aside is

patently bad in law. It is submitted that it was not open to the Department on the one hand to state that the issue of re-determination was subject to the outcome of the proposed Appeal against the order of the Larger Bench of the Tribunal in the case of 2002 (82) ECC 196 especially when the issue was totally settled by the Apex Court in appellants'' favor.

11. Mr. Kantawala further contends that the impugned order of the Tribunal is also contrary to the ratio laid down by this Court in the case of M/s. Om Textiles as reported in 2006 (74) RLT 233 (Mum). It is submitted that this Court has categorically held that in the light of the judgment of the Apex Court in SBPL Ltd, the length of galleries in counting the number of chambers was rendered illegal, consequently, the Tribunal ought to have considered the applicability of the law laid down by the Apex Court in the case of SPBL Ltd. He also contends that in the present case the appellant had made various representations against the Order No. 2/98 (F) 98-99 dated 1st July, 1999 and were also specifically informed, vide letter dated 19th September 2001, that the issue was kept alive because of the proposed appeal to the Apex Court against the order of the Larger Bench of the Tribunal. It is submitted that in view of the judgment of this Court in case of Om Textiles (supra), the Department was under an obligation to re-fix the annual capacity of production on the basis of Apex Court judgment in case of Sangam Processors. Thus, the impugned order holding adversely against the appellants is patently unsustainable and deserves to be set aside.

12. Mr. Kantawala further submits that without prejudice to the above submissions, the vires of Rule 3 of the Hot Air Stenter Independent Textiles Processors (annual capacity Determination) Rules, was challenged before the High Court of Madras by M/s. Beauty Dyers. In the case of M/s. Beauty Dyers - 2004 (166) E.L.T. 27 (Mad.) the High Court of Madras held that Rule 3 of Hot Air Center Independent Textiles Processors Annual Capacity Determination Rules is ultra vires the provisions of Section 3A. When the capacity determination rules have been held to be ultra vires, there is no basis for denying the refund of the duty paid under the said rules. Furthermore; the Madras High Court has, vide its order dated 18th July, 2008 dismissed the appeal filed by the Department against the judgment of the learned Single Judge in the case of Ms. Beauty Dyres - 2004 (166) E.L.T. 27 (Mad). The SLP filed by the Revenue against the aforesaid judgment of the Madras High Court has also been dismissed by the Apex Court holding it to be devoid of merits vide its order dated 6-2-2009 (EXB. III). Thus the judgment of the Madras High Court in the case of M/s. Beauty Dyers has attained finality. The High Court, in the case of Beauty Dyers, had dismissed the writ appeals after it was submitted on behalf of the appellants therein (The Union of India) that nothing survived for adjudication after omission of Section 3A from the statute book w.e.f. 11-5-2001. It is thus manifest that even in the Departmental perception no proceeding can survive in terms of Section 3A of the rules framed there under or Notification issued under the said Section after Section 3A had been omitted w.e.f. 11-5-2001. It is, thus, submitted that in view of the judgment in Beauty Dyers, there could be no basis for recovering the

refund granted to the appellant; especially when the order dated 28th October, 2002 sanctioning the refund has not been assailed by the Revenue.

13. Mr. Kantawala also submits that the Tribunal has failed to consider various submissions in support of O-I-A No. KKS (93) 93/M-VI/02) made in the rejoinder before the Tribunal on 22nd October, 2002. The appellant had, inter alias, contended that the duty on the galleries was paid by the appellant under protest and in addition, they also gave letters dated 8th September, 1999, 25th May, 2000 & 20th August, 2001 intimating that the duty on the galleries was paid by them under protest and in addition to that they also made the debits in the PLA mentioning clearly that these amounts were being paid towards galleries under protest. It was also submitted that the findings of the Deputy Commissioner that the respondents had not followed the procedure under Rule 233 was without any basis. According to Mr. Kantawala, the appellant had also made various other submissions vide the aforesaid rejoinder. The said submissions had not been dealt with in the impugned order. Thus, the impugned order deserves to be set aside as unsustainable.

Per contra :

14. Mr. Pardeshi, learned Counsel for the respondent-Revenue tried to canvass the sole contention that the order of the Commissioner dated 1st July, 1999 passed by the Commissioner of Central Excise, Mumbai-VI under Rules of 1998 is a final order and not provisional one.

15. He, thus, submits that unless the final order of determination is set aside, it will hold the field until it is set aside by the competent Court or forum. In his submission for want of appeal against the final order, the appellant is deemed to have accepted this order as correct and now the appellant cannot be allowed to take stand contrary to the said order.

16. Mr. Pardeshi further submitted that the duty was not paid under protest. Hence, appellant is not entitled for refund. Thus, he tried to support order of the Tribunal on both counts.

Consideration :

17. Having heard rival parties, a short issue is involved in the present case as to whether the order dated 1st July, 1999 is a final order operating as res judicata or that it was not a final. Consequently, the subject order left the issue open for consideration afresh. The factual matrix reveal that the provisional order dated 17th December, 1998 was passed by the Commissioner of Central Excise, Mumbai-6 to facilitate the processor to discharge his liability under the new Scheme till such time the verification and final determination of annual capacity of production is made. In the said order, it was made clear that in the event determination of duty liability is held to be on the higher side, or the appellant is found to be ineligible under the scheme, then it shall have to pay differential duty involved.

18. After the aforesaid provisional order, the identical issue went to the Apex Court in the case of Kamakshi nuance Corporation v. Commissioner of Central Excise, wherein, no stay was granted by the Apex Court. Under this circumstance, the Commissioner of Central Excise while determining the annual capacity of the petitioner''s unit though passed an order dated 28th June, 1999 styling it as final order but with the following rider :

It may be noted that this determination has been made on the basis of the existing parameters. In case there is any change in any relevant parameters, M/s. Mahalakshmi Dying and Printing Works are required to follow the provisions of the Hot Air Stenter Independent Textile Processors Annual Capacity Determination Rules, 1998 and the duty liability would be subject to redetermination.

Subsequent to the above order, a circular was issued by the Central Board of Excise and Customs dated 22nd February, 2001 directing not to hold up the refund proposal. Pursuant to that, it appears that the petitioner was granted refund in the sum of Rs. 9,05,559/- under the provisions of Section 11B of the Central Excise Rules. However, this order was not acted upon by the Revenue. Consequently, aggrieved thereby, appellant herein had filed Writ Petition No. 225 of 2005 seeking directions against Revenue in the matter of payment of refund. Aggrieved by the order granting refund, Revenue invoked appellate jurisdiction of the Tribunal. The Tribunal vide its impugned order dated 27th February, 2004 allowed appeal filed by the Revenue and set aside the order directing refund on the following two grounds :

(a) That the Higher Judicial Forum did not set aside the capacity of the unit already determined under order dated 1st July, 1999 and;

(b) that the refund was not filed under protest as prescribed u/s 233(b) by the respondents.

Against the above order, this appeal was admitted to consider the questions extracted in the opening part of this judgment.

19. As already indicated hereinabove, the Apex Court, in the group of matters, the Commissioner of Central Excise Vs. S.P.B.L. Limited, held that the length of galleries having no fan or radiator attached to it shall not be taken into consideration while counting number of chambers in each of hot air stenter. Obviously, in the light of the judgment of the highest Court of the land in the case of SPBL Ltd., the inclusion of length of the galleries having no fan or radiator attached to it in counting number of chambers was rendered illegal. It seems that despite the aforesaid law laid down by the Apex Court entertaining the belief that order dated 1st July, 1999 is a final order, no further order redetermining the capacity was passed.

20. In so far as the present case is concerned, as indicated above, the appellant did not challenge the correctness of the order dated 1st July, 1999 in

independent and substantive proceedings, in response to the show cause notice believing that the question of annual capacity would be determined after the decision of the Apex Court. In our considered view, since the law has now been settled by the Apex Court holding that the length of galleries having no fan or radiator attached to it cannot be taken into consideration while determining the number of chambers. The Adjudicating Authority ought to have considered the applicability of the law laid down by the Apex Court in the case of SPBL Ltd., to the facts of the present case. Since the issue has not yet been finally determined, we remit the proceeding back to the Adjudicating Authority to redetermine the capacity of the appellant''s Unit by a reasoned order following principles of natural justice. On determination of the capacity of the Unit, if the duty is found to be payable, the same shall be paid by the appellant in accordance with law. If it is found to be short-paid, the respondent shall be free to resort to the provisions of the Act relating to the recovery, since refund has already been granted to the appellant. Order accordingly.

