(2013) 01 AHC CK 0335

In the Allahabad High Court

Case No : Civil Miscellaneous Writ Petition (Tax) No. 7 of 2013

M/s. Tirupati Cigarettes Ltd. APPELLANT

Vs

Union of India and Others RESPONDENT

Date of Decision : 15-01-2013

Acts Referred:

Central Excises and Salt Act, 1944 — Section 14, 9D
Constitution of India, 1950 — Article 226

Citation : (2013) 4 ADJ 734

Hon'ble Judges : S.P. Mehrotra, J;A.N. Mittal, J

Bench : Division Bench

Advocate : K.K. Arora, for the Appellant; V.K. Srivastava, for the Respondent

Final Decision : Dismissed

Judgement

1. The present writ petition has been filed, inter-alia, praying for quashing the order dated 27.11.2012 (Annexure 7 to the writ petition) and the order dated 27.12.2012 (Annexure 9 to the writ petition). It appears that the petitioner had obtained Central Excise Licence/Registration from the Central Excise Department at Varanasi, and it was engaged in the business of manufacture of Cigarettes falling under Chapter/Sub-Heading 2403.11 of the Central Excise Tariff Act, 1985 at Varanasi as a franchisee of M/s. G.T.C. Industries Limited, Bombay.

2. A show-cause notice dated 29.9.1995 (Annexure 1 to the writ petition) was issued to the petitioner (and others) by the Commissioner of Central Excise, New Delhi. The said notice required the petitioner (and others) to show-cause as to why various actions mentioned in the said notice be not taken against the petitioner (and others).

3. The petitioner filed a writ petition before this Court being Civil Misc. Writ Petition No. 143 of 2000. By the order dated 11.2.2000, this Court disposed of the writ petition, inter-alia, directing that photo-stat copies of all the relevant documents, which were to be relied upon against the petitioner must be supplied

to the petitioner before proceeding further in the matter.

It is not disputed that photo-stat copies of the relevant documents relied upon against the petitioner have since been supplied to the petitioner.

It further appears that personal hearing in the matter has been going on before the respondent No. 3.

4. A perusal of the proceedings dated 14.12.2011 shows that the petitioner made prayer for cross-examination of various persons (including the co-notices), whereupon the petitioner was asked to submit fresh list (excluding the co-notices), keeping in view the points mentioned in the said order dated 14.12.2011.

5. A perusal of the proceedings held on 11.1.2012 show that summons were directed to be issued to the witnesses excluding the co-notices.

6. On 13.8.2012, the petitioner made an application before the respondent No. 3 copy whereof has been filed as Annexure 5 to the writ petition. In the said application, the petitioner made prayer for sending summons to the co-notices also.

7. On 22.8.2012, the respondent No. 3 passed an order reiterating that u/s 14 of the Central Excise Act, 1944, summons could not be issued to compel the co-notices to appear for cross-examination. However, it was open to the co-notices to voluntarily appear for cross-examination without issuing summons u/s 14 of the said Act, The respondent No. 3 further directed the petitioner to file their reply, and it was observed that "if any person appears for cross-examination, they may file Additional Reply."

8. On 27.11.2012, the respondent No. 3 passed an order observing that the co-notices had not turned-up for cross-examination and could not be compelled to come for cross-examination. The respondent No. 3 further directed the petitioner to file defence reply including the submissions as to why the statements tendered by various witnesses should not be considered in terms of Section 9-D of the Central Excise Act, 1944. It has further directed that final reply be filed by the petitioner on or before 20.12.2012.

9. The petitioner again submitted an application dated 19.12.2012 (Annexure 8 to the writ petition) reiterating that cross-examination of various Officers/ Witnesses was necessary so that an effective final reply on behalf of the petitioner could be filed.

10. The respondent No. 3 has thereafter, passed the order dated 27.12.2012 (Annexure 9 to the writ petition) wherein the respondent No. 3 has referred to the proceedings of personal hearing held on 20.12.2012. It has been noticed in the order dated 27.12.2012 that in personal hearing held on 20.12.2012, it was emphasised that the reply of the petitioner was overdue, and the petitioner should file the same on or before 27.12.2012. However, on 27.12.2012, fifteen

days'' time was sought on behalf of the petitioner for filing the reply.

11. It has been observed in the order dated 27.12.2012 that repeated request for time to file reply was only a delaying tactics. It has further been observed that sufficient opportunity had been given for filing the reply on merit, however, in case the petitioner so desired, it could file reply by 28.12.2012.

12. After the said order dated 27.12.2012, it appears that the petitioner has submitted a letter dated 31.12.2012, inter-alia, stating that Part ''A'' of the reply is being filed by the petitioner.

The petitioner has, thereupon, filed the present writ petition seeking the reliefs as mentioned above.

13. We have heard Sri K.N. Tripathi, learned Senior Counsel assisted by Sri K.K. Arora, learned counsel for the petitioner and Sri Vinod Kant Srivastava, learned Senior Standing Counsel appearing for the respondent Nos. 1, 2 and 3.

14. It is submitted by Sri K.N. Tripathi, learned Senior Counsel appearing for the petitioner that cross-examination of the witnesses whose statements were recorded by the authority was necessary prior to the submission of reply by the petitioner as the cross-examination would enable the petitioner to property defend its case.

15. Sri K.N. Tripathi, learned Senior Counsel appearing for the petitioner has relied upon the decision of the Supreme Court in Lakshman Exports Limited Vs. Collector of Central Excise, .

16. Sri Vinod Kant Srivastava, learned Senior Standing Counsel appearing for the respondent Nos. 1, 2 and 3 submits that prior to the submission of reply by the petitioner, there was no occasion for permitting the petitioner to cross-examine the witnesses whose statements had been recorded by the authority. It is submitted that only after the petitioner submits its reply that the adjudication case will start and the question of cross-examination would arise. Sri Vinod Kant Srivastava places reliance on the decision of this Court in Commissioner of Central Excise Vs. Parmarth Iron Pvt. Ltd.,

17. We have considered the submissions made by the learned counsel for the parties.

18. From the above narration of facts, it is evident that the show-cause notice was given to the petitioner in the year 1995. The petitioner has not as yet submitted its final reply to the show-cause notice.

19. From a perusal of the proceedings of various dates before the respondent No. 3, it is evident that the respondent No. 3 has been requiring the petitioner to submit its final reply to the show-cause notice so that the matter could proceed further. However, the petitioner has been insisting that the petitioner be first permitted to cross-examine the witnesses whose statements had been recorded during the proceedings by the authority concerned, and thereafter, the petitioner

would submit its final reply.

20. In our view, the insistence of the petitioner that the petitioner be first permitted to cross-examine the witnesses, and thereafter, it would submit its reply, is not correct. The petitioner is first required to submit its reply to the show-cause notice putting its defence. The petitioner has already been provided photostat copies of the relevant documents relied upon against the petitioner. Therefore, there is no question of any prejudice to the petitioner in submitting its reply to the show-cause notice.

21. In Commissioner of Central Excise, Meerut-I v. Parmarth Iron Put. Ltd. (supra), this Court has laid down as under (Paragraphs 15, 16 and 17 of the said E.L.T.):

15. The question, however, before us is, does the respondent have a right to call upon the appellants to make available the witnesses for cross-examination even before they being examined or their statements relied upon by the Department in proceedings in adjudication. None of the judgments cited above were on the issue of making available the witnesses for cross-examination in order to reply to a show-cause notice. Those judgments as already explained were in the course of adjudicating proceedings.

Is, therefore, an assessee entitled to cross-examine the witnesses at the stage of filing a reply to the show-cause notice? A show-cause notice is issued on the basis of uncontested material available before the Assessing Authority, who based thereon, has arrived at prima facie finding whether a show-cause notice ought to be issued or not. The material, thus, which has to be considered is, untested and uncorroborated. A party is called upon to reply to the said show-cause notice in order to enable the Revenue to know the stand of the assessee, in the context of the material produced as to whether the proceedings should be further proceeded with. It is an opportunity to the party being proceeded against to disclose any material that the party, may have to rebut the prima facie opinion. Even if, the assessee fails to reply to the show-cause-notice, that does not amount to an ''admission'' of the contents of the show-cause notice in the absence of any statutory provision and it is always open to an assessee to cross-examine the witnesses whose statements are relied upon or sought to be examined on behalf of the Revenue.

At the stage of show-cause notice, there is no adjudication. It is only a step in the process of adjudication. The show-cause notice by itself is not an order of assessment. The order of assessment will be passed only after considering the evidence and the material, which is placed before the quasi judicial authority/ tribunal. Therefore, as the show-cause notice is based on prima facie material and constitutes a prima facie opinion, that does not result into an order of adjudication. The question, therefore, of an assessee being entitled to cross-examination, even before the adjudication has commenced, in our opinion, surely would not arise. It is only after the adjudication proceedings have commenced pursuant to the show-cause notice and if the Revenue seeks to reply upon the statements or documents, then the principles of natural justice would require in the absence of any statutory provision, that the person whose statement was recorded is made available for cross-examination to test the veracity of the statement.

16. We, therefore, have no hesitation in holding, that there is no requirement in the Act or Rules, nor do the principles of natural justice and fair play require that the witnesses whose statements were recorded and relied upon to issue the show-cause notice, are liable to be examined at that stage. If the Revenue choose not to examine any witnesses in adjudication, their statements cannot be considered as evidence. However, if the Revenue choose to rely on the statements, then in that event, the persons whose statements are relied upon have to be made available for cross-examination for the evidence or statement to be considered.

17. We are, therefore, clearly of the opinion that there is no right, procedurally or substantively or in compliance with natural justice and fair play, to make available the witnesses whose statements were recorded, for cross-examination before the reply to the show-cause notice is filed and before adjudication commences. The exercise of cross-examination commences only after the proceedings for adjudication have commenced.

(Emphasis supplied)

22. This decision has thus laid down that at the stage of show-cause notice, there is no adjudication. It is only a step in the process of adjudication. The show-cause notice by itself is not an order of assessment. The order of assessment will be passed only after considering the evidence and the material, which is placed before the quasi-judicial authority/tribunal. Therefore, as the show-cause notice is based on prima facie material and constitutes, a prima facie opinion, that does not result into an order of adjudication. The question, therefore, of an assessee being entitled to cross-examination, even before the adjudication has commenced, would not arise. It is only after the adjudication proceedings have commenced pursuant to the show-cause notice and if the Revenue seeks to rely upon the statements or documents, then the principles of natural justice would require in the absence of any statutory provision, that the person whose statement was recorded is made available for cross-examination to test the veracity of the statement.

23. There is no requirement in the Act or Rules nor do the principles of natural justice and fair play require that the witnesses whose statements were recorded and relied upon to issue the show-cause notice, are liable to be examined at that stage.

24. It has been concluded that there is no right, procedurally or substantively or in compliance with natural justice and fair play, to make available the witnesses whose statements were recorded, for cross-examination before the reply to the

show-cause notice is filed and before adjudication commences. The exercise of cross-examination commences only after the proceedings for adjudication have commenced.

25. This decision thus shows that the petitioner cannot insist that the petitioner be first permitted to cross-examine the witnesses and thereafter it would submit its reply. The impugned order passed by the respondent No. 3, in our view, does not suffer from any illegality or infirmity.

26. Even otherwise, on the facts and in the circumstances of the case, this is not a fit case for interference in exercise of writ jurisdiction under Article 226 of the Constitution of India.

27. Before parting with the case, we may refer to the decision of the Supreme Court in Lakshman Exports Ltd. v. Collector of Central Excise (supra), relied upon by Shri K.N. Tripathi, learned Senior Counsel appearing for the petitioner. In the said case, in the reply to the show-cause notice, the assessee had specifically asked to be allowed to cross-examine the representations of the two concerns to establish that the goods in question had been accounted for in their books of account and the appropriate amount of Central Excise Duty had been paid. The logic of such request was thus clear. Their Lordships of the Supreme Court, therefore, allowed the appeals, set-aside the impugned order and remanded the matter.

Thus, in the above case, the Reply to the show-cause notice had already been filed by the assessee and in the said Reply, prayer was made for being permitted to cross-examine.

28. The facts of the above case were thus different from those of the present case. In the present case, the final reply to the show-cause notice has not so far been submitted by the petitioner. In view of the above discussion, the writ petition filed by the petitioner is liable to be dismissed.

The writ petition is, accordingly, dismissed.

