(2011) 03 BOM CK 0036

In the Bombay High Court

Case No : Writ Petition (L) No''s. 570-571 of 2011

Reliance Media Works APPELLANT

Vs

Commissioner of C. Ex., Mumbai-V RESPONDENT

Date of Decision : 30-03-2011

Acts Referred:

Citation : (2011) 270 ELT 328

Hon'ble Judges : Roshan Dalvi, J;J.P. Devadhar, J

Bench : Division Bench

Advocate : R.V. Desai with K.R. Pardeshi and A.M. Khare, for the Appellant; S.I. Shah, for the Respondent

Final Decision : Dismissed

Judgement

1. By these two Writ Petitions, show cause notices dated 21-2-2011 and 18-8-2010 respectively are challenged. By the said show cause notices the petitioner is called upon to show cause as to why duty should not be recovered with penalty and interest on clearances of the chemical preparation for cinematography film manufactured by the petitioner.

2. According to the petitioner the activity carried on by the Petitioner does not amount to manufacture and that issue is covered by the decision of the CESTAT which is confirmed by this Court and therefore, the above show cause notices are liable to be quashed and set aside.

3. The Petitioner produces chemical preparations for processing cinematography films. By treating that the above activity constitutes manufacture, similar show cause notices were issued by the Excise Authorities, however the said show cause notices were dropped by an order-in-original dated 31st May, 2000 by holding that the activity carried on by the petitioner did not amount to manufacture.

4. Subsequently by an order-in-original dated 24th April, 2007 the adjudicating authority took a contrary view and held that the activity carried on by the

petitioner amounts to manufacture and therefore the petitioner was liable to pay excise duty.

5. Challenging the aforesaid order, the petitioner filed an appeal and the Tribunal by its order dated 11th July, 2008 set aside the order-in-original dated 24-4-2007 and remanded the matter back to the adjudicating authority to decide the issue afresh. In Para 17 of its order the Tribunal has referred to the order-in-original dated 31-5-2000 and held that the said order is not binding on the Appellate Authority.

6. Challenging the aforesaid order the Revenue filed an appeal being Central Excise Appeal No. 13 of 2009 and the said Appeal was dismissed by this Court vide order dated 24th June, 2009 as amended on 12th November, 2009. Thus the order of CESTAT dated 11-7-2008 in remanding the matter was upheld by this Court and all contentions were kept open for consideration by the adjudicating authority on remand.

7. Thereafter the matter was heard afresh and by an order-in-original dated 25th August, 2009 the adjudicating authority held that the activity carried on by the assessee amounts to manufacture and accordingly confirmed the duty demand with penalty and interest. Challenging the aforesaid order the assessee filed an appeal before the CESTAT and the same is pending.

8. By the impugned show cause notices the adjudicating authority has called upon the petitioner to show cause as to why the excise duty on the goods clear during the period April, 2010 to October, 2010 and September, 2009 to March, 2010 respectively should not be recovered with penalty and interest. Challenging the aforesaid order the present Writ Petitions are filed.

9. Mr. Desai, learned Senior Advocate appearing on behalf of the petitioner submitted that the show cause notices impugned in these petitions are illegal and the said show cause notices have been issued totally disregarding the order of the Tribunal dated 11-7-2008 which is upheld by this Court vide order dated 24-6-2009/12-11-2009.

10. Relying upon the judgment of the Apex Court in the case of Union of India and others Vs. Kamlakshi Finance Corporation Ltd., , the decision of Madras High Court in the case of TVL Ragam Polymers v. Commercial Tax Officer Chennai reported in 2007 (6) S.T.R. 292 (Mad.) and the decision of this Court in the case of GKN Sinter Metals Private Limited (formerly known as GKN Sinter Metals Limited) Vs. Union of India (UOI) and The Dy. Commissioner of Customs, , Mr. Desai submitted that the judicial discipline demands that the lower authorities must follow the decision of the higher authorities. In the present case the impugned show cause notices have been issued on '' the basis of an order dated 31-5-2000 which is set aside by the Tribunal by order dated 11-7-2008 and confirmed by this Court vide order dated 24-6-2009/12-11-2009. Accordingly it is submitted that the impugned show cause notices which are null and void be quashed and set aside.

11. We see no merit in the aforesaid contentions. Admittedly in compliance with the order of the Tribunal dated 11-7-2008 which is confirmed by this Court vide order dated 24-6-2009/12-11-2009, the adjudicating authority has passed a fresh order on 25-8-2009 by holding that the activity carried on by the petitioner amounts to manufacture. On the basis of the said order-in-original dated 25-8-2009, the present show cause notices have been issued. Admittedly the appeal filed by the petitioner against order in original dated 25-8-2009 is pending before the CESTAT. During the pendency of the said appeal the competent officer, on the basis of the order-in-original dated 25-8-2009, was justified in issuing show cause notices demanding duty in respect of the clearances made during the period specified in the show cause notices.

12. The argument advanced on behalf of the petitioner that the impugned show cause notices have been issued contrary to the decision of the Tribunal dated 11-7-2008 as also the decision of this Court dated 24-6-2009/12-11-2009 is also totally incorrect. By order dated 11-7-2008 the Tribunal has set aside the order-in-original dated 24-4-2007 and not the order dated 31-5-2000. In para 17 of its order dated 11-7-2008, the Tribunal has merely referred to the order dated 31-5-2000 (issued on 26-6-2000) and has not set aside the order dated 31-5-2000. Even this Court in its order dated 24-6-2009 has declined to go in to the validity of the earlier order (31-5-2000) which was in favour of the assessee and disposed of the appeal leaving all contentions open so that the adjudicating authority on remand could pass fresh order on merits. Thus, the contention of the petitioner that the order-in-original dated 31-5-2000 (issued on 26-6-2000) has been set aside by the Tribunal cannot be accepted.

13. In any event the impugned show cause notices have been issued on the basis of the order in original dated 25-8-2009 and not on the basis of the order dated 31-5-2000 issued on 26-6-2000. It may be noted that the view taken in the order dated 25-8-2009 is contrary to the view taken in the order dated 31-5-2000. The impugned show cause notices have been issued with a view to follow the decision dated 25-8-2009 and not the decision dated 31-5-2000. Therefore, merely because the order dated 31-5-2000 is referred to in the impugned show cause notices, it cannot be inferred that the show cause notices are issued on the basis of the order dated 31-5-2000.

14. As regards the merits of the show cause notices, it is open to the petitioner to show cause in the adjudication proceedings as to why the duty demand should not be confirmed.

15. In these circumstances, we see no reason to quash the impugned show cause notices even before they are adjudicated. Accordingly both the petitions are dismissed.