(2015) 06 MAD CK 0350

In the Madras High Court

Case No : C.M.A. Nos: 924 to 944 of 2005

The Commissioner of Central Excise — APPELLANT

Vs

Customs, Excise and Service Tax Appellate Tribunal and Others — RESPONDENT

Date of Decision : 26-06-2015

Acts Referred:

Citation : (2015) 325 ELT 97

Hon'ble Judges : R. Sudhakar, J;K.B.K. Vasuki, J

Bench : Division Bench

Advocate : Santhanaraman, for the Appellant

Judgement

R. Sudhakar, J—Aggrieved by the order passed by the Tribunal in allowing the appeals filed by the assessee, the Revenue/appellant is before this Court by filing these appeals, 21 in number. These appeals were admitted by this Court, on 11.08.2005, on the following substantial question of law:-

" Whether the failure to challenge the finding in favour of Shri.M.S. Jain in a connected matter would operate on the principle of res judicata on the Tribunal from examining the other cases on merits? "

2. The brief facts of the case leading to the filing of the present appeals are as follows :

" (i) Based on investigations and by referring to statements recorded, in all, five show cause notices dated 29.09.1994, 29.09.1994, 04.10.1994, 29.09.1994 and 28.09.1994 respectively, were issued to various units of M/s. Kiran Group of Companies situated at Tamil Nadu, Andhra Pradesh and Kerala. Upon gathering intelligence information that Kiran Group of Companies situated in the States of Tamil Nadu, Andhra Pradesh and Kerala were indulging in evasion of Central Excise duty by clandestinely removing Sodium Silicate without payment of duty and by wrongly availing S.S.I. Exemption under Notification No: 175/86 as amended, the Directorate General of Anti-Evasion (CE) Chennai, conducted search in their factories, common registered office and the residential premises of persons connected with their activities, certain records were recovered and statements were also recorded from the concerned individuals. On the basis of the search, two charges viz. (i) Clandestine Removal - different units of the Kiran Group manufactured and cleared Sodium Silicate / Soluable glass without payment of duty and (ii) Deliberate Fragmentation of Manufacturing activities so as to wrongly avail the S.S.I. Exemption were framed.

(ii) There were 13 private limited companies and 8 proprietory concerns belonging to the Kiran Group of Companies, the constitution of them are as follows :

PRIVATE LIMITED COMPANIES :

SOLE PROPRIETORY CONCERNS :

(i) M/s. Sri Kiran Chemicals at Madras with Smt. Kiran Jain wife of Shri. M.S. Jain as the Proprietrix.

(ii) M/s. Prem Chem Co., Madras with Smt. Prem Jain wife of Shri. S.K. Jain as the Proprietrix.

(iii) M/s. Kanyakumari Silicata Industries at Nagercoil with Shri.P.K. Jain, elder brother of Shri. M.S. Jain as the proprietor.

(iv) M/s. Silicate India at Pondicherry, with Shri.D.K. Jain yet another elder brother of Shri.M.S. Jain as the proprietor.

(v) M/s. Sagar Chemicals, Kerala, with Shri.S.K. Jain, the younger brother of Shri.M.S. Jain as the proprietor.

(vi) M/s. Shree Vijay Vallabh Silicate Industries in Kerala, with Shri.K.K. Jain, son of Shri.P.K. Jain, as the proprietor.

(vii) M/s. Atul Silicates at Nellore with Smt. Padmavathy Jain, mother of Shri.M.S. Jain as Proprietrix.

(viii) M/s. Pushpa Chemicals at Nellore with Smt. Susheel Kumari Jain as the Proprietrix.

It is seen that all the above units were under the Proprietorship of Shri.M.S. Jain and his family members or they were one of the Directors in the units.

(iii) Prima facie, it appeared that one M.S. Jain aided by S.K. Jain master minded the alleged offence along with other Directors and their family members. The show causes notices were issued for recovery of duty and for penalty under Rule 9 (2), 173 Q, 52 A and 226 of Central Excise Rules, 1944 on each of the units. Besides this, penalty was also sought to be imposed on the following individuals under Rule 209 A of Central Excise Rules, 1944:

(iv) Replies to show cause notices were submitted and based on the replies given by various individuals, the adjudication order came to be passed. The adjudicating authority dealt with the charges in the show cause notice one after another by placing reliance on the statement of persons recorded in the course of investigation, the details of which are stated in paragraph 56 of the order of adjudication.

(v) In so far as the charge of clubbing the clearances of all concerns, after discussing one after another issue in paragraphs 39 to 47 of his order, the adjudicating authority has held that,

" 48. In view of the above discussion, the charge of clubbing the clearances of all the 13 private limited companies and 8 proprietory has not been established. "

(vi) On the second charge of production ratio of Soda Ash to Soluble Glass and Soda Ash to Sodium Silicate, the respective allegations and the defence put forth by the assessee were discussed in paragraphs 49 to 54 of the adjudicating authority''s order. The final conclusion arrived at by the said authority is as follows :

" 55. From the above it is clear that the goods were either cleared on payment of duty or on job work basis under Rule 57 F (4) and therefore, clearances of Sodium Silicate / Soluable Glass without payment of duty is not conclusively established by any documentary evidence except in respect of the clearances made to M/s. Akila Color Company and M/s. Nandagopal Chemicals as discussed above and for which they are liable to pay the duty at the appropriate rate.........."

(vii) As regards the charge of clandestine removal of Sodium Silicate / Soluble glass without payment of duty, the adjudicating authority held that,

" 63. In view of the above evidence it is clear beyond doubt that the above quantities of Sodium Silicate were cleared without payment of duty and the said charge had not been rebutted by the assessee as the said goods were accounted for in their private records but a lesser quantity was reflected in the statutory records............

64. The above units are therefore liable to pay duty at the appropriate rate on the above quantities of Sodium Silicates as the same were cleared without payment of duty as has been established with reference to the private records recovered from the units. The customers who had received the said goods had confirmed that they had received the goods without payment of duty. Thus the charges of contravention of Rule 9 (1) and Rule 173 F have been established against them. They duty leviable on the said goods will be quantified by Assistant Commissioner of Central Excise concerned after taking into account their value of clearances during the relevant period under Notfn. No. 175/86-CE. "

3. As against the order of the adjudicating authority declining to club the clearances of 13 private limited companies and 8 proprietory concerns, the Department filed an appeal and the Tribunal came to pass the following order on

14.07.2004 in Appeal Nos: E/956 to 976 of 2000 :

"6.............. In the instant case, as we have already noted, no appeal has been filed by the department against Shri.M.S. Jain despite the fact that what was dropped by the Commissioner was, mainly, a proposal for clubbing of clearances of the 21 units which was squarely based on investigative findings pertaining to the role of the said person. When the Board reviewed the Commissioner''s order, it took a definite stand that, according to the evidence in the case, Shri.M.S. Jain was the real manufacturer of the goods and had manufactured the goods through the 21 units over which he was held to have "absolute control". The review order underlined the " nexus between Shri. M.S. Jain and the 21 units". The Board went to the extent of saying that the 21 units were only dummies of Shri.M.S. Jain. In the context of defending the invocation of the larger period of limitation in the show cause notices for demanding duty from Shri. M.S. Jain and the 21 units, the Board again focused on the role of Shri. M.S. Jain and held that it was Shri. Jain who suppressed facts to evade payment of duty. All the grounds raised in the review order have found a place in the memoranda of Appeals before us. These appeals are against an order (of the Commissioner) which neither treated Shri.M.S. Jain as manufacturer of the goods nor held him liable for penalty. Yet the Revenue would not prefer appeal against Shri. M.S. Jain. The central figure in the Board''s review order has not been arraigned before us by the Revenue. In such circumstances, these appeals cannot be decided on merits. This case stands on a stronger footing than Sompura Ceramics (supra) and Supreme Electrical Appliances (supra) on the maintainability issue. Following the view taken in the said cases, we hold that these appeals of the Revenue, wherein clearances of goods by the 21 units are sought to be clubbed for the purpose of denial of SSI exemption on grounds integrally connected with the role of Shri. M.S. Jain, cannot be maintained for want of appeal as against Shri. M.S. Jain. "

4. According to the Tribunal, in the absence of any appeal being filed against the said M.S. Jain, the other appeals filed on the ground of integrally connected with the role of Shri.M.S. Jain, cannot be considered and on this short ground all the appeals have to fail.

5. We find from the adjudication order that the adjudicating authority has proceeded on two charges namely (i) Clandestine Removal and (ii) Deliberate Fragmentation of manufacturing activities so as to wrongly avail the S.S.I. Exemption. It relies on the reply statements of M.S. Jain and also other persons which we have already referred to. Records of the various group companies have been perused and on the basis of that, the Department has issued the show cause notice against the group companies and proprietory concerns. The adjudicating authority, according to the Department, had failed to consider that it is a case of wrong availment of the benefits of the notification and all the units were clubbed together and the benefit granted under the exemption notification should be denied. It is of no consequence that merely because M.S. Jain, one of the person who suffered the penalty order, did not file any appeal, it does not

change the colour of the stand of the department in the show cause notice. It is the specific case of the department that the clearances of all these units and the proprietory concerns should be clubbed together for the purpose of denying the benefit of notification. However, the Department can always sustain its allegations, de hors the statement of M.S. Jain, if there are other materials to support its case. Merely because the case of M.S. Jain has not been appealed against, it does not, and would not, dilute the case of the Department.

6. The case of Viteralli v. Saton, 359 US 535; relied upon by the respondent assessee will not apply to the facts of the present case as it is a case of failure on the part of the department to file an appeal against other units except filing an appeal against the main unit. Whereas in the case on hand, appeals have been filed in respect of all units which is sought to be clubbed. On facts it differs and, therefore, we are not inclined to agree with the Tribunal''s view. The Tribunal was clearly in error in holding that merely because no appeal has been filed against M.S. Jain, all the other appeals cannot be maintained. We, therefore, answer the issue in favour of the revenue and against the assessee. Accordingly, the matter is remanded to the Tribunal for considering the issue on merits and these Civil Miscellaneous Appeals stands disposed of in the above terms.

