

(2010) 09 BOM CK 0150

In the Bombay High Court

Case No : Central Excise Appeal No. 58 of 2009

The Commissioner of Central Excise

APPELLANT

Vs

Valson Dyeing Bleaching and Printing Works

RESPONDENT

Date of Decision : 21-09-2010

Acts Referred:

Central Excises and Salt Act, 1944 — Section 3A
Constitution of India, 1950 — Article 19(1), 215, 226, 227

Citation : (2010) 259 ELT 33

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

Bench : Division Bench

Advocate : R.V. Desai and R.B. Pardeshi, for the Appellant; Manoj Sanklecha and A.M. Sethna, instructed by S.D. Bhosale, for the Respondent

Judgement

V.C. Daga, J.—This appeal is directed against the order passed by the Customs, Excise & Service Tax Appellate Tribunal, West Zonal Bench, Mumbai ("Tribunal" for short) dated 5th March, 2008. This appeal was admitted vide order dated 23rd September, 2009 to consider the following substantial question of law:

Whether the Hon'ble Tribunal erred in holding that Notification No. 42/98 CE (NT) dated 10.12.1998 was ultra vires the provisions of Central Excise Act, 1944, since as contemplated under the statutory proviso in Section 3A of the Central Excise Act, the Notification No. 42/98 CE(NT) contains various factors based on which the annual production capacity is to be determined?

The Facts :

2. The factual background giving rise to the aforesaid question of law is that the respondent is engaged in manufacturing man made fabrics classifiable under Chapters 52, 54, 55 and 60 of the Schedule to Central Excise Tariff Act, 1985 ("CETA Act" for short). The said excisable goods were being manufactured with the aid of hot air stenter machines by the assessee, who is an independent processor and by virtue of notification No. 41/98-CE, dated 10th December,

1998. The said goods were notified goods exigible to excise duty in accordance with the provisions of 3A of the Central Excise Act, 1944 ("Act" for short) with effect from 16th December, 1998.

3. The Commissioner of Central Excise provisionally determined rate of duty as Rs. 2 lakh per chamber per month on the basis of the assessee's declaration. For 4 chambers, the total amount was fixed at Rs. 8 lakh per month.

4. Finally, the Annual Capacity of Production (ACP) was determined by the Commissioner vide his order dated 21st September, 1999. According to the said determination of the ACP, the rate of duty applicable was determined at Rs. 2 lakh per chamber per month and the basic duty liability of the assessee was determined at Rs. 9,14,000/-.

5. The demand raised on the above basis was confirmed by the Joint Commissioner, the adjudicating authority. The duty liability was quantified at Rs. 11,98,839/- vide order dated 23rd February, 2001. The adjudicating authority had also directed payment of interest and imposed penalty on the respondent assessee equal to the amount of duty. The Commissioner (Appeals), vide his order dated 30th May, 2001, upheld the said order of the adjudicating authority.

6. Aggrieved by the aforesaid order-in-appeal, respondent assessee carried appeal to the Tribunal. The respondent during the course of hearing brought to the notice of the Tribunal, a judgment of the Madras High Court in the case of *Beauty Dyers v. Union of India* 2004 (166) ELT 27 (Mad.) with one more judgment in the case of respondent assessee itself reported in *Beauty Dyers Vs. Union of India (UOI)*, . In the case of *Beauty Dyers (supra)*, Madras High Court was pleased to declare the Notification No. 42/98, issued in exercise of powers u/s 3A of the Act, under which ACP was determined, as constitutionally invalid. The said judgment of the Madras High Court was followed by the Tribunal in the case of *Raji Thangam Textiles Ltd. v. C.C.E., Coimbatore* 2006 (205) ELT 631 (Tri.), while setting aside the duty demand issued in terms of ACP determined under the Hot Air Stenter Independent Textile Processors Annual Capacity Determination Rules, 1998. The Tribunal in the impugned order relied upon the aforesaid judgments and set aside the impugned orders of the appellate as well as that of the adjudicating authorities.

7. The aforesaid order has given rise to the present appeal; wherein the question of law extracted in the opening part of the judgment was framed for consideration on merits.

Rival Submissions :

8. Mr. Desai, learned senior counsel appearing for the appellant Revenue urged that it was not open for the Tribunal to rely upon the judgment of the Madras High Court and declare the Notification No. 42/98 as ultra vires the provisions of the Act whereby and whereunder the duty was to be determined.

9. Mr. Desai urged that the question of validity of the notification needs to be

examined by this Court independently bereft of the judgment of the Madras High Court. He placed reliance on the order of the Apex Court in the case of Commissioner of C.Ex., Gujarat v. Roop Textiles Mills Ltd. 2007 (213) ELT 486 (SC) in support of his submission.

10. Per Contra, Mr. Sanklecha, learned Counsel for the respondent urged that the question involved in this case is: whether or not the Tribunal was justified in relying upon the judgment of the Madras High Court. In his submission, the judgment of the Madras High Court in case of Beauty Dyers (supra) was very much binding on the Tribunal. The Tribunal could not have brushed aside the said judgment of the Madras High Court since there was no other judgment of the jurisdictional High Court muchless of any other High Court taking contrary view. He submits that the law on the subject is absolutely clear; wherein various High Courts and Apex Court have ruled from time to time that the Tribunals are bound by the judgment of the High Court in absence of any contrary judgment of the jurisdictional High Court. He, thus, submits that the Tribunal was bound by the judgment of the Madras High Court. In support of his submission, he placed reliance on the Division Bench judgment of this Court in the case of Commissioner of Income Tax Vidarbha Vs. Godavaridevi Saraf, .

11. Mr. Sanklecha submits that so far as the order of the Hon"ble Supreme Court in the case of Roop Textile Mills Ltd. (supra) is concerned, the question of validity of the subject notification was referred by the Tribunal to the Gujarat High Court for the opinion of the High Court in exercise of power of Reference. The Gujarat High Court, while considering the question relating to the determination of duty based on production capacity rejected the subject Reference made at the instance of the Revenue, based on the judgment of the Madras High Court in the case of Beauty Dyers (supra). According to him, the order of the Gujarat High Court was a subject matter of challenge before the Apex Court arising from the Reference. The Hon"ble Supreme Court set aside the said order of the High Court holding that an important question of law was involved requiring resolution at the hands of the Gujarat High Court. According to Mr. Sanklecha, in the circumstances, it was obligatory on the part of the Gujarat High Court to decide the question referred for their opinion bereft of the decision of the Madras High Court, consequently, the matter was rightly remanded to the Gujarat High Court with direction to determine the question of law referred, whereas in the case in hand altogether different question is involved. Mr. Sanklecha, thus, tried to distinguish the order of the Apex Court and contends that it is not applicable to the facts of this case.

Consideration:

12. Having heard rival contentions, the submissions made by Mr. Sanklecha need acceptance. In the case of Smt. Godavaridevi Saraf (supra), the Division Bench of this Court observed as under:

Question then arises what is going to be the effect of a decision of the Madras

High Court holding that Section 140A(3) is unconstitutional as violative of Article 19(1)(f) of the Constitution. A similar question came up for consideration before the Supreme Court in the case of *East India Commercial Co. Ltd., Calcutta and Another Vs. The Collector of Customs, Calcutta*, wherein it was held that an administrative Tribunal cannot ignore the law declared by the highest court in the State. Taking into consideration the provisions of Articles 215, 226 and 227 of the Constitution of India, it would be anomalous to suggest that a Tribunal over which the High Court has superintendence can ignore the law declared by that court and start proceeding in direct violation of it. If a Tribunal can do so, for there is no specific provision, just like in the case of the Supreme Court making the law declared by the High Court binding on subordinate courts. It is implicit in the power of supervision conferred on a superior Tribunal that all the Tribunals subject to its supervision should conform to the law laid down by it. Such obedience would also be conducive to their smooth working; otherwise, there would be confusion in the administration of law and respect for law would irretrievably suffer.

In view of this clear pronouncement of the Supreme Court, it is not controverted by Mr. Joshi on behalf of the revenue that an Income Tax Tribunal sitting at Madras is bound to proceed on the footing that Section 140A(3) of the Act is non-existent in view of the pronouncement of the Madras High Court in the case of *A.M. Sali Maricar and Another Vs. Income Tax Officer and Another*. Actually, the question of authoritative or persuasive decision does not arise in the present case because a Tribunal constituted under the Act has no jurisdiction to go into the question of constitutionality of the provisions of that statute. It should not be overlooked that the Income Tax Act is an All-India statute and if an Income Tax Tribunal in Madras, in view of the decision of the Madras High Court, has no proceed on the footing that Section 140A(3) was nonexistent, the order of penalty thereunder cannot be imposed by the authority under the Act. Until contrary decision is given by any other competent High Court, which is binding on a Tribunal in the State of Bombay, it has to proceed on the footing that the law declared by the High Court, though of another State, is the final law of the land. When the Tribunal set aside the order of penalty it did not go into the question of intra vires or ultra vires. It did not go into the question of constitutionality of Section 140A(3). That section was already declared ultra vires by a competent High Court in the country and an authority like an Income Tax Tribunal acting anywhere in the country has to respect the law laid down by the High Court, though of a different State, so long as there is no contrary decision of any other High Court on that question. It is admitted before us that at the time when the Tribunal decided the question, no other High Court in the country had taken a contrary view on the question of constitutionality of Section 140A(3). That being the position, it is not possible for us to take the view that the Tribunal in Bombay, when it set aside the order of penalty, went into the question of the constitutionality of that section and gave a finding that it is ultra vires following the decision of the Madras High Court. What the Tribunal really did

was that in view of the law pronounced by the Madras High Court it proceeded on the footing that Section 140A(3) was non-existent and so the order of penalty passed thereunder cannot be sustained.

(Emphasis supplied)

13. The the question involved in the present case is: whether the Tribunal was justified in following the judgment of the Madras High Court in the case of Beauty Dyers (supra). The Tribunal in the impugned order did not examine issue relating to the the validity of the Notification No. 42/98 because the Tribunal had no jurisdiction to examine the subject issue. On its independent consideration, it did not come to an independent conclusion that the said notification is ultra vires the provisions of the Act. The Tribunal has merely followed the judgment of the Madras High Court which was binding on the Tribunal in view of the law laid down by the learned Division Bench of this Court in the case of Smt. Godavaridevi Saraf (supra). In our considered view, the Tribunal had no option but to follow the judgment of the Madras High Court.

14. In view of the law laid down by this Court referred above, with which we respectfully agree, the Tribunal was perfectly justified in following the judgment of the Madras High Court in the case of Beauty Dyers (supra). At any rate, the question of validity of the Notification No. 42/98 is neither involved nor raised in the present appeal

15. We, on the above premise, for the reasons recorded, answer the question of law in favour of the assessee and against the Revenue. Appeal stands disposed of in terms of this order with no order as to cost.