

(2011) 04 KAR CK 0071

In the Karnataka High Court

Case No : CEA No. 25 of 2010 and CEA No's. 38-39 of 2010

The Commissioner of Central Excise, Bangalore - II

APPELLANT

Vs

M/s. Ennar Cements Pvt. Ltd. and M/s. Seshashaila Cements
Pvt. Ltd.

RESPONDENT

Date of Decision : 12-04-2011

Acts Referred:

Central Excise Rules, 2002 — Rule 10, 13, 25, 4, 5
Central Excise Tariff Act, 1985 — Section 11 A (1), 35 G, 35 L

Citation : (2011) 04 KAR CK 0071

Hon'ble Judges : Ravi Malimath, J;N. Kumar, J

Bench : Division Bench

Advocate : T.M. Venkata Reddy, for the Appellant; N.S. Srinivasa and Dilip Kumar, for the Respondent

Final Decision : Dismissed

Judgement

N. Kumar, J.—These three appeals are preferred against the order passed by the Tribunal holding that the collective demand by clubbing clearances of two Private Limited Companies is not sustainable and consequentially setting aside the impugned order by allowing the appeals.

2. M/s. Ennar Cements Pvt. Ltd., & M/s. Seshashaila Cements Private Ltd., are holders of Central Excise Registration Certificate. They are two Companies engaged in the manufacture and clearance of "Portland Cement" falling under Chapter heading 25.02.29 of the Central Excise Tariff Act, 1985. Each of these factories are also registered as SSI Units and they were claiming exemption under Notification No. 8/2003 dated 1-3-2003. The adjudicating authority issued a show cause notice alleging that both the factories have contravened the provisions of Rule 4, 5, 6, 8 10, 13 and 12 of the Central Excise Rules, 2002. They also proposed demand of duty/imposition of penalty not only on the units but also on the Managing Director. The respondents assessee entered appearance and filed their objections. However, the adjudicating authority

overruling the objections confirmed the demand collectively against both the units. Aggrieved by the same., the assessee preferred an appeal to the Tribunal. The Tribunal relying on several Judgments held that, clubbing, in the absence of allegation of common funding-or-flow back or one of the units being dummy, is not permissible. The assesses are two Private Ltd., Companies. They have separate existence. The investigation reveals that the clearance of one unit was done with the other and vice-versa at their convenience in order to fraudulently avail the exemption provided to the SSI units, by distributing the value of clearances between the two units to remain within the admissible exemption limit and thereby evading the payment of. Central Excise duty. If that is the case the investigation ought to have decided the real clearance of different Unit and demanded duty accordingly in respect of each unit. However, duty has been demanded collectively from both the units. If the department feels that out of two units one unit is a dummy, then the dummy unit should have been identified. The value of clearance of the dummy unit could have been collected. This has not been done. Therefore relying on a series of Judgments it came to the conclusion that a collective demand by clubbing clearances of two Private Limited., Companies is not sustainable. Aggrieved by the said order the revenue has preferred this appeal.

3. These appeals were admitted on 17-3-2010 to consider the following substantial questions of law:

1. Whether the Hon"ble CESTAT is correct in law by allowing the appeal filed by the assessee who have contravened the provisions of Rule-4, 5, 6, 8, 10, 11 & 12 of the Central Excise Rules, 2002 and liable to the penal action under Rule-25 of the Central Excise Rules, 2002 and Central Excise duty quantified, which is recoverable from them under the provisions to Sec. 11A(1) of the Central Excise Act, 1944 ?

2. Whether the Hon"ble CESTAT is correct in setting aside the Commissioner"s Order-in-Original No. 10/2007 dated 27.8.2007 by accepting assessee"s contentions at face without considering the conditions stipulated in para-3 & 4 of Notification No. 8/2003 dated 1.3.2003 based on which the department has clubbed the turnover for the purpose of demanding the duty ?

As is clear from the substantial questions of law framed, these cases involve interpretation of Notification No. 8/2003 and the question whether the assessees are entitled to SSI exemption under the said Notification It also involves the question that if they are not entitled to exemption then what is the duty payable by the said Units.

4. This appeal is u/s 35-G of the Central Excise Act. The said provision makes it clear that an appeal shall lie to the High Court from any order not being an order "relating to among other things", to the determination of any question having a relation to the rate of duty of excise or to the value of goods for the purpose of assessment. This case falls squarely within the phrase "determination of any

question relating to rate of duty tax" and it is the Apex Court alone which has exclusive jurisdiction to decide the said jurisdiction u/s 35-L of the Act. In that view of the matter, this appeals are not maintainable. The appeals are rejected and liberty is reserved to the revenue to approach the Apex Court against the impugned order.

The High Court Registry is directed to return the certified copy of the order and other particulars to enable the assessee to prefer an appeal to the Supreme Court

The revision passed by the authority is stayed for a period of 90 days.