
(2009) 05 SC CK 0111

In the Supreme Court Of India

Case No : Civil Appeal No's. 3397 of 2003 and 3398-3399 of 2003, 4096 of 2004, 3388 and 5277 of 2006, 675, 1420, 4316 and 4317 of 2007 and 5931 of 2008

Union of India (UOI) and Others

APPELLANT

Vs

Krishna Processors and Another

RESPONDENT

Date of Decision : 05-05-2009

Acts Referred:

Central Excise Rules, 1944 — Rule 96ZQ(5)

Central Excises and Salt Act, 1944 — Section 11AC, 3A, 7(1), 7(2), 7(5)

Income Tax Act, 1961 — Section 271(1), 276C

Citation : (2009) 166 ECR 225 : (2009) 15 SCC 58

Hon'ble Judges : S. H. Kapadia, J;Aftab Alam, J

Bench : Division Bench

Advocate : K. Radhakrishnan, Navin Prakash, C.V. Subba Rao, Ambica Radhakrishnan, P. Parmeswaran and B. Krishna Prasad, for the Appellant; S. K. Bagaria Tarun Gulati, Rony O. John, Praveen Kumar, E.C. Agrawala, K.J. John for K.J. John and Co. in CA.4317/2007, for the Respondent

Final Decision : Disposed Of

Judgement

1. Before the Gujarat High Court, Ambuja Synthetics Mills (assessee) had challenged the validity of Rule 96ZQ(5)(ii), which reads as under:

Rule 96ZQ(5)(ii):

(5) If an independent processor fails to pay the amount of duty by the date specified in Sub-rule (3) he shall be liable to:

(i)...

(ii) a penalty equal to an amount of duty outstanding from him at the end of such month or rupees five thousand, whichever is greater.

2. As can be seen from the above quoted impugned sub-rule, penalty equal to an amount outstanding at the end of the stipulated period was leviable. The

impugned Rule was challenged as ultra vires the Constitution and beyond the legislative competence of the Rule making authority. By judgment in the case of *Ambuja Synthetics Mills v. Union of India* reported in 2004 175 ELT 85, the Gujarat High Court read down the Rule holding that 'it was not mandatory'. We quote hereinbelow Para 9 of the said judgment which reads as under:

In our view, there is no reason as to why same analogy should not be applied in the instant case also. The Apex Court in the above decision has also pointed out that the Section should be read as containing a rebuttable presumption and clarifying the position, the Apex Court observed in paragraph 11 as under:

...This would mean that it will be open to the registered dealer to satisfy the authorities concerned that the non-submission of the statement under Sub-sections (1) and (2) of Section 7 was not with the intention to facilitate the evasion of the entry tax. In other words, Sub-section (5) of Section 7 places the burden of proof on the registered dealer to show that the non-submission of the statement under Sub-sections (1) and (2) of Section 7 was not with a view to facilitate the evasion of entry tax.

The Apex Court pointed out that, "if a registered dealer is unable to satisfy the authorities in this regard then, in the absence of satisfaction, the presumption is that non-submission of statement has facilitated the evasion of entry tax". It is in view of this that the Apex Court held that the Section does not suffer from any vice and the Section is required to be construed to mean that the presumption contained therein is rebuttable and secondly, the penalty stipulated therein is only the maximum amount which would be levied and the assessing authority has the discretion to levy lesser amount depending upon the facts and circumstances of each case. Construing Section 7(5) in this manner, the Apex Court pointed out that the decision of the High Court that Section 7(5) is ultra vires cannot be sustained. Applying this analogy in the instant case also, it is difficult to accept the contention raised by the petitioner that the said Rule is ultra vires. However, at the same time, the authority concerned is required to read the Rule in the manner indicated above.

3. Following the said decision numerous matters came to be disposed of both, by the High Court and the Tribunal.

4. Ultimately, the matter came before this Court in the case of *Union of India v. Dharmendra Textile Processors* on 19th July, 2007, when a Division Bench of this Court, to which one of us (Kapadia, J) was a party, formulated the question and referred the same to the larger Bench for its decision. The reason for passing referral order is given in para 7, which reads as under:

We are of the view that there is a conflict of opinions between the judgments of the Division Bench of this Court in the case of *Dilip N. Shroff v. Joint Commissioner of Income Tax, Mumbai* (supra) on one hand and on the other hand we have another judgment of this Court in the case of *Chairman, SEBI v. Shriram Mutual Fund and Anr.* (supra). Secondly, it may be pointed out that the

object behind enactment of Section 271(1)(c) read with the Explanations quoted above indicates that the said section has been enacted to provide for a remedy for loss of revenue. The penalty under the said section is a civil liability. Wilful concealment is not an essential ingredient for attracting the civil liability as is the case in the matter of prosecution u/s 276C of the Act. While considering an appeal against an order made u/s 271(1)(c) what is required to be examined is the record which the officer imposing the penalty had before him and if that record can sustain the finding there had been concealment, that would be sufficient to sustain the penalty. Keeping in mind these two circumstances, we are of the view that the judgment of the Division Bench in the case of Dilip N. Shroff v. Joint Commissioner of Income Tax, Mumbai (supra) needs consideration. The Explanations added to Section 271(1)(c) in entirety also indicate the element of strict liability on the assessee for concealment or for giving inaccurate particulars while filing returns. The judgment in Dilip N. Shroff's case has also not considered the provisions of Section 276C of the Income Tax Act. Therefore, in our view, the judgment in the case of Dilip N. Shroff v. Joint Commissioner of Income Tax, Mumbai (supra) needs consideration by the larger Bench of this Court particularly when it has ramifications not only regarding provisions of the Income Tax Act but also with regard to the provisions of Sections 3A and 11AC of the Central Excise Act and Rule 96ZQ(5) of the Central Excise Rules.

5. Subsequently, the controversy is put to rest by the judgment of a three Judge Bench of this Court (in which one of us, Brother Alam was a party) in the case of Union of India (UOI) and Others Vs. Dharamendra Textile Processors and Others, . It has been held, inter alia, in the said decision that the impugned Rule 96ZQ is mandatory.

6. The consequence of the said judgment in Dharmendra Textile Processors is that the challenge to the vires of Rule 96ZQ(5)(ii) in the Original Writ Petition before the High Courts stands revived.

7. In the circumstances, we remit this entire batch of Civil Appeals to the respective High Courts for deciding the question of vires of the above sub-rule. Liberty is given to the assesseees to amend the Writ petitions/Appeals, if so advised. Liberty is also granted to both sides to complete their pleadings at the earliest before the High Court(s).

8. The civil appeals are disposed of accordingly.