

SUPREME COURT OF INDIA

Kushal Fertilisers (P) Ltd.

Vs.

Commr.of Customs & Cen.Excise,Meerut

C.A.No.3297 of 2009

(S.B. Sinha J.)

06.05.2009

JUDGEMENT

S.B. Sinha, J.

1. Leave granted.
2. Appellant is a company incorporated and registered under the Indian *Companies Act, 1956*. It is engaged in the manufacturing of M.S. conduit pipes with effect from 29th March, 1990. It is registered as a Small Scale Industrial Unit with the Directorate of Industries of the State of U.P.
3. An investigation was said to have been carried out by the Preventive Unit of Saharanpur Division of the Central Excise Department in regard to the business activities of the appellant in which it was observed that it had neither obtained any Central Excise licence for manufacture of conduit pipes nor filed any declaration with the department for granting them exemption from the licensing provisions. It is, however, now not disputed that the appellant on or about 22nd January, 1991 informed the Section Officer of the Central Excise, Roorkee that it had been manufacturing M.S. conduit pipes and its production is exempt from payment of Excise Duty in terms of Notification No.202/98-CE dated 20th May, 1988. It, furthermore, appears from the letters addressed by the appellant to the Superintendent, Customs and Central Excise, Rishikesh dated 29th April, 1991 and the Superintendent, Preventive and Intelligence Branch, Central Excise Division, Saharanpur dated 6th June, 1991 that the officers of the Central Excise Department had been visiting the appellant's factory for inspection of their factory.
4. Indisputably again the appellant submitted its production and raw material register for inspection. However, by a notice dated 12th August, 1992 the appellant was directed to file a declaration under Rule 174 of the *Central Excise Rules, 1944* (for short 'the Rules') for the purpose of claiming exemption from licensing control.

5. However, a show cause notice was issued on or about 28th March, 1994, proposing demand of Central Excise Duty of Rs.57,80,363/- under Section 11A of the *Central Excise Act, 1944* (for short 'the Act') and also asking the appellant to show cause as to why penalty shall not be levied in terms of Rule 209A of the Rules contending that the appellant was not entitled for exemption as the gate passes covering the inputs described the product as 'bars' and it suppressed the said fact with an intention to evade payment of duty.

6. Appellant filed his reply to the said show cause notice.

7. By reason of an order dated 21st July, 1994 the Commissioner of Central Excise, Merrut opined that the appellant was not entitled for exemption under Notification No.202/88 and that it suppressed the material facts with an intention to evade payment of duty as a result whereof extended period of limitation could be invoked. Appellant, however, was held to be entitled for Modvat credit of duty paid on inputs but restricted the credit to the extent of duty payable on bars.

8. The appeal preferred by the appellant before the Customs, Excise & Gold (Control) Appellate Tribunal was allowed by an order dated 23rd November, 2000 whereby the matter was remanded back to the Commissioner for his consideration afresh. The Commissioner, however, reaffirmed his earlier order by an order dated 19th March, 2004.

9. An appeal preferred by the appellant thereagainst was allowed by the Customs, Excise & Service Tax Appellate Tribunal by its order dated 3rd March, 2005, directing :-

"...However, we observe that in their letter dated 22.01.91 they had requested the department for certificate to the effect that their product is exempt from the levy of duty. The department had thus acquired knowledge, on receipt of the said letter, that the Appellants are manufacturing tubes and pipes and are availing the benefit of exemption under Notification No.202/88. Whether further details were provided by the Appellants or not in the said letter, the department cannot deny the fact that they had come to know about the Appellants manufacturing tubes and pipes and availing benefit of exemption and nothing prevented the department from conducting investigation or seeking further information from the Appellants. In view of this we hold that the suppression of facts stopped from 22.01.91 and the extended period is applicable only prior to 22.01.91."

10. Respondent preferred an appeal thereagainst in terms of Section 35-G of the Act which by reason of the impugned judgment was allowed treating the same to be a Reference in terms of old Section 35-G of the Act.

11. The short questions which arise for our consideration are:- i) Whether the said Reference was maintainable; and ii) Whether in the facts and circumstances of this case the extended period of limitation was applicable.

12. Before, however, advertng to said questions, we may notice that the Commissioner of Central Excise, Meerut sought to make the reference to the High Court stating :-

"The order passed by the Hon'ble Tribunal does not appear to be legal and correct in so far as it relates to holding that the demand w.e.f. 22.01.1991 is time barred in view of the following submissions.

While arriving at above and observation, Hon'ble CESTAT observed that when the party vide their letter 22.01.1991 requested the department for certificate to the effect that their product is exempt from duty, the department had thus acquired the knowledge on receipt of this letter and accordingly charges of suppression of facts stopped w.e.f. 22.01.1991 whereas the total 5 period involved in the SCN is w.e.f. 26.03.1990 to 31.03.1991 and the SCN was issued on 28.03.1994.

It is observed that though the party vide its letter dated 22.01.1991 requested the department for certificate to the effect that their product was exempt from duty, they were directed by the Sector Officer through letter dated 25.01.1991 to provide complete information to the jurisdictional Assistant Commissioner, for which the party willfully abstained themselves. Further, one of the Director of the party Shri Pankaj Gupta in his statement dated 26.05.1992 stated that as he considered their product exempt from excise duty they neither obtained a licence nor filed proper declaration. This clearly showed suppression on the part of party. This submission was also found not enable in as much as even if the conduit pipes (final product) manufactured by the party were considered as exempt, the party was under legal obligation to obtain Central Excise licence under Rule 174 as these rules had nothing to do with the dutiability of the product and it simply laid down that any person engaged in the manufacture of exciseable goods must obtain a Central Excise licence."

13. The High Court although initially treated the same to be an appeal in terms of Section 35-G of the Act, a Division Bench thereof was of the opinion that the same was a reference in terms of Section 35-G of the *Central Excise and Salt Act, 1944*, stating:-

"This reference (wrongly registered as Appeal), made under Section 35-G of the *Central Excise and Salt Act, 1944*, by the Commissioner of Central Excise, Meerut-I, Mangal Pandey Nagar, Meerut, is directed against the order dated 21.03.2005, passed by the Customs Excise and Service Tax Appellate Tribunal, New Delhi (hereinafter referred as CESTAT), in E/Appeal No.3154/2004-NB(B), whereby the appeal of the revenue was partly allowed."

14. Evidently the High Court did not notice the amendments carried out in the said Act. The word `and Salt' was omitted with effect from 28th September, 1996 by Section 70 of the Finance Act, 1996 (Act No.33 of 1996).

Section 35-G of the Act provided for a reference. However, the said provision was also substituted by Section 144 of the *Finance Act, 2003* (Act No.32 of 2003), relevant provisions whereof read as under:-

"35G. Appeal to High Court

(1) An appeal shall lie to the High Court from every order passed in appeal by the Appellate Tribunal on or after the 1st day of July, 2003 (not being an order relating, 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 purposes of assessment), if the High Court is satisfied that the case involves a substantial question of law.

(2) The Commissioner of Central Excise or the other party aggrieved by any order passed by the Appellate Tribunal may file an appeal to the High Court and such appeal under this sub-section shall be-- (a) filed within one hundred and eighty days from the date on which the order appealed against is received by the Commissioner of Central Excise or the other party;

(b) accompanied by a fee of two hundred rupees where such appeal is filed by the other party;

(c) in the form of a memorandum of appeal precisely stating therein the substantial question of law involved."

15. We may also notice the provisions of Section 35-G of the Act, as it prior to its amendment :

"35G. Statement of case to High Court.-- (1) The Commissioner of Central Excise or the other party may, within sixty days of the date upon which he is served with notice of an order under section 35C passed before the 1st day of July, 1999 (not being an order relating, 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 purposes of assessment), by application in the prescribed form, accompanied, where the application is made by the other party, by a fee of two hundred rupees, require the Appellate Tribunal to refer to the High Court any question of law arising out of such order and, subject to the other provisions contained in this section, the Appellate Tribunal shall, within one hundred and twenty days of the receipt of such application, draw up a statement of the case and refer it to the High Court:

Provided that the Appellate Tribunal may, if it is satisfied that the applicant was prevented by sufficient cause from presenting the application within the period herein before specified, allow it to be presented within a further period not exceeding thirty days.

(2) On receipt of notice that an application has been made under sub-section (1), the person against whom such application has been made, may, notwithstanding that he may not have filed such an application, file, within forty-five days of the receipt of the notice, a memorandum of cross-objections verified in the prescribed manner against any part of the order in relation to which an application for reference has been made and such memorandum shall be disposed of by the Appellate Tribunal as if it were an application presented within the time specified in sub-section (1).

(3) If, on an application made under sub-section (1), the Appellate Tribunal refuses to state the case on the ground that no question of law arises, the Commissioner of Central Excise, or, as the case may be, the other party may, within six months from the date on which he is served with notice of such refusal, apply to the High Court and the High Court may, if it is not satisfied with the correctness of the decision of the Appellate Tribunal, require the Appellate Tribunal to state the case and to refer it, and on receipt of any such requisition, the Appellate Tribunal, shall state the case and refer it accordingly.

(4) Where in the exercise of its powers under sub-section (3), the Appellate Tribunal refuses to state a case which it has been required by an applicant to state, the applicant may, within thirty days from the date on which he receives notice of such refusal, withdraw his application and, if he does so, the fee, if any, paid by him, shall be refunded"

16. The order of the Tribunal having been passed on 3rd March, 2005 an appeal was maintainable to the High Court in terms of the substituted provision and not a reference. Whereas a reference could be made on a question of law, Section 35G of the Act, as it stands, provides for an appeal on a substantial question of law. Such a question of law is required to be formulated by the High Court itself. Even otherwise the question of law purported to have been referred to by the learned Commissioner of Central Excise would have been maintainable provided a substantial question of law arose for consideration of the High Court and not otherwise.

17. Whether non furnishing of information was willful and would amount to suppression of material fact in terms whereof the extended period of limitation as provided for in Section 11-A of the Customs Act, 1944 could be invoked or not, in our opinion, was not a substantial question of law. The finding of fact arrived at by the Tribunal should have been treated to be final. It would be binding on the High Court while exercising its appellate jurisdiction. A 'substantial question of law' would mean - of having substance, essential, real, of sound worth, important or considerable. It is to be understood as something in contradistinction with - technical, of no substance or consequence, or academic merely. (See *Boodireddy Chandraiah v. Arigela Laxmi*¹).

18. The High Court has not said that the finding of fact arrived at by the High Court was perverse and/or was based on applying wrong legal principles etc. The High Court proceeded on the basis that the failure on the part of the appellant to submit required declaration or

application for licence for establishment, would amount to concealment of facts from the department. We will assume to be so. But, as we have noticed earlier, requisite information was not only furnished on 22nd January, 1991, indisputably the officers of the Central Excise Department made inspection of the factory and the books maintained by the appellant, including the production register, which must have disclosed the nature of the products from the factory in question. If the requisite information had been given to the authorities on 22nd January, 1991, the question which should have been posed and answered was as to whether despite such knowledge, the Commissioner of Central Excise could have proceeded on the basis that there had been a suppression on the part of the appellant.

19. Section 11-A of the Central Excise Act, 1944 provides for penalty. It, therefore, requires strict consideration. Period of limitation provided for in the Act bars the jurisdiction of the Commissioner to initiate a proceeding for imposition of penalty on the expiry thereof. The proviso appended to Section 11-A(1) of the Act makes an exception to the said Rule, the ingredients whereof are thus required to be established for invoking the extended period of limitation. If on the materials produced by the parties, the Tribunal had arrived at a finding of fact that there had been no suppression on the part of the appellant after 22nd January, 1991, the question of invoking the extended period of jurisdiction did not arise. The show cause notice dated 28th March, 1994 thus having been issued after the expiry of the period prescribed under Section 11A of the Act, was clearly barred by limitation.

20. In any view of the matter, whether a party is guilty of suppression of fact or not is essentially a question of fact. It does not per se give rise to substantial question of law per se. [See *Commissioner of Central Excise, Chandigarh v. Punjab Laminates (P) Ltd.*², and *M/s. Larsen and Toubro Ltd. v. The Commissioner of Central Excise, Pune-II*³].

21. For the reasons aforementioned the impugned judgment cannot be sustained. It is set aside accordingly. The appeal is allowed with costs.
Counsel's fee assessed at Rs.10,000/-.

¹[(2007) 8 SCC 155]

²[(2006) 7 SCC 431]

³[2007 (6) SCALE 524]