SUPREME COURT OF INDIA

The Commissioner of Central Excise, Chandigarh

Vs.

Stesalit Limited

C.A.No.4507 of 2004

(J.Chelameswar and Abhay Manohar Sapre,JJ.,)

15.02.2017

JUDGMENT

Abhay Manohar Sapre,J.,

1. This appeal is filed against the judgment and final order No. 123/2004-B dated 05.11.2003 passed in Appeal No. E/1122 of 2003-B by the Customs, Excise and Service Tax Appellate Tribunal, New Delhi whereby the Tribunal partly allowed the appeal and reduced the amount of penalty from Rs.2,06,000/- to Rs.50,000/-.

2. We herein set out the facts, in brief, to appreciate the issue involved in this appeal.

3. The respondent-a Limited Company is engaged in the manufacture of parts of Railways and Tramways stock classifiable under Chapter 86 including smoothing Reactors falling under Chapter 85.04 of the Schedule to the Central Excise Tariff Act, 1985. The respondent also undertakes the activity of modification/up-gradation of old Smoothing Reactors received from the Railways.

4. During the course of modification, the weight of copper coil in the old smoothing reactors is increased by adding new copper coil to the existing old copper coil.

5. It was, however, observed by the authority concerned that the respondent manufactured copper coils from the copper strips and used them capatively in the up-gradation of smoothing reactors. The respondent, however, neither paid any duty on the copper coil used by them capatively in their modification activity undertaken at the relevant period nor did they submit the requisite declaration under Rule 173-C of the Central Excise Rules, 1944(hereinafter referred to as "the Rules").

6. Since no duty was paid by the respondent on upgraded reactors, they were not eligible for the benefit of exemption provided vide Notification No. 67/95-CE dated 16.03.1995. They

were, therefore, required to pay duty on copper coils as an intermediate product which was meant for captive consumption.

7. This led to issuance of show cause notice dated 17.04.2001 to the respondent by the adjudicating authority proposing therein the demand of unpaid duty payable by the respondent on the aforementioned goods and also penalty. By order dated 25.02.2003, the adjudicating authority confirmed the demand of duty for Rs.2,05,291/- along with interest under Section 11-AB of the Central Excise Act, 1944 (hereinafter referred to as "the Act"). The authority also imposed a penalty of Rs.2,06,000/- under Section 11-AC of the Act read with Rule 173-Q of the Rules.

8. Felt aggrieved by the aforesaid order, the respondent(assessee) filed appeal before the Tribunal. The respondent, however, did not challenge the demand of duty but confined their challenge only to imposition of penalty and, in particular, its quantum. According to the respondent, having regard to the totality of the facts and circumstances of the case, at best, nominal amount of penalty could be levied on the respondent but not the one imposed.

9. By impugned order dated 05.11.2003, the Tribunal partly allowed the respondent's appeal and reduced the amount of penalty from Rs.2,06,000/- to Rs.50,000/-. It is against this order, the Revenue has filed this appeal by way of special leave before this Court.

10. Heard Mr. K. Radhakrishnan, learned senior counsel for the appellant. None appeared for the respondent.

11. Mr. Radhakrishnan, learned senior counsel appearing for the appellant(Revenue) while assailing the legality and correctness of the impugned order contended that keeping in view the law laid down by this Court in *Union of India & Ors. Vs. Dharamendra Textile Processors & Ors.*[1], which unfortunately was not taken note of by the Tribunal though it has direct bearing over the issue in question, the impugned order cannot be said to be legally sustainable and is, therefore, liable to be set aside and that of the adjudicating authority restored.

12. It was his submission that the Tribunal had no jurisdiction to reduce the quantum of amount of the penalty imposed by the adjudicating authority on the respondent under Section 11-AC of the Act read with Rule 173-Q of the Rules in the light of the law laid down in Dharamendra Textile Processors' s case (supra) and, more so, when in principle, neither the respondent questioned the grounds for its imposition and nor the Tribunal found any fault in the imposition. In other words, the submission was that in the light of the law laid down in the case of Dharamendra Textile Processors (supra), there was no discretion left with the Tribunal to reduce the quantum of penalty amount once it held that a case for penalty is made out.

13. Having heard the learned counsel for the appellant and on perusal of the record of the case, we are inclined to accept the submission of the learned counsel for the appellant.

14. As rightly argued by the learned counsel for the appellant, the issue urged herein was examined by three judge Bench of this Court in Union of India & Ors. Vs. Dharamendra Textile Processors & Ors. (supra). It was a reference made to examine the correctness of the two earlier decisions of this Court rendered in *Dilip N. Shroff vs. Joint Commissioner of Income Tax, Mumbai & Anr*[2]*, and Chairman, SEBI vs. Shriram Mutual Fund & Anr*[3]*.*, Their Lordships examined the issue in detail and held that the law laid down in the case of Dilip N. Shroff (supra) is not correct whereas the law laid down in the case of SEBI (supra) is correct. The following observations of Their Lordships are apposite which reads as under:

> "15. The stand of learned counsel for the assessee is that the absence of specific reference to mens rea is a case of casus omissus. If the contention of learned counsel for the assessee is accepted that the use of the expression "assessee shall be liable" proves the existence of discretion, it would lead to a very absurd result. In fact in the same provision there is an expression used i.e. "liability to pay duty". It can by no stretch of imagination be said that the adjudicating authority has even a discretion to levy duty less than what is legally and statutorily leviable"
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> "19. In Union Budget of 1996-1997, Section 11-AC of the Act was introduced. It has made the position clear that there is no scope for any discretion. In Para 136 of the Union Budget reference has been made to the provision stating that the levy of penalty is a mandatory penalty. In the Notes on Clauses also the similar indication has been given.
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> 20. Above being the position, the plea that Rules 96-ZQ and 96-ZO have a concept of discretion inbuilt cannot be sustained. Dilip Shroff case was not correctly decided but SEBI case has analysed the legal position in the correct perspectives. The reference is answered "
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> (emphasis supplied)

15. Applying the aforementioned law to the facts of this case, we are of the considered opinion that the Tribunal erred in reducing the amount of penalty from Rs.2,06,000/- to Rs.50,000/-. Indeed, the Tribunal, in our opinion, failed to take into consideration the law laid down in the case of Dharamendra Textile Processors (supra) which the Tribunal was bound to take while deciding the appeal and instead the Tribunal wrongly placed reliance on its own decision in the case of Escorts JCB Ltd. vs CCE 2000 (118) ELT 650 (Tribunal). We also find that the Tribunal gave no justifiable legal reasons for reducing the penalty amount.

16. In the light of foregoing discussion, we are unable to concur with the reasoning and the conclusion arrived at by the Tribunal. They are not legally sustainable and, therefore, deserve to be set aside.

17. The appeal thus succeeds and is accordingly allowed. Impugned order is set aside and that of the order passed by the adjudicating authority is restored. No costs.

Judgment Referred.

[1]*(2008) 13 SCC 0369*
[2]*(2007) 6 SCC 0329*
[3]*(2006) 5 SCC 0361*