2023 STPL(WEB) 32 SC
SUPREME COURT OF INDIA

(KRISHNA MURARI AND BELA M. TRIVEDI JJ.)

COMMISSIONER, CENTRAL EXCISE AND CUSTOMS AND ANOTHER

Appellants

VERSUS

M/S RELIANCE INDUSTRIES LTD.

Respondent

COMMISSIONER OF CENTRAL EXCISE AND SERVICE TAX

Appellant

VERSUS

M/S RELIANCE INDUSTRIES LTD.

Respondent

Civil appeal no. 6033 of 2009 with civil appeal no. 5714 of 2011-Decided on 4-7-2023

Limitation - Central Excise - Extended Period of Limitation not Applicable – Demand time barred

JUDGMENT

Krishna Murari, J.-The present appeals are directed against the impugned order dated 17.03.2009 passed by the Customs, Excise & Service Tax Appellate Tribunal (CESTAT), Ahmedabad, in C.O No. M/419-21/WZB/AHD/08 whereby, the learned Tribunal allowed the appeal therein. Since the central issues involved in Civil Appeal Nos. 6033/2009 and 5714/2011 are the same, they are being adjudicated upon by this common order.

FACTS

2. For the sake of convenience, we are first taking up the facts of Civil Appeal No. 6033/2009. The order impugned in this appeal is that of Customs, Excise & Service Tax Appellate Tribunal (CESTAT or Tribunal) dated 17.3.2009 which had, by a majority of 2:1, allowed an appeal filed by the Respondent-Assessee against an order of the Commissioner of Central Excise, Rajkot by which a demand for differential duty was confirmed against the assessee by invoking the extended period of limitation available under the proviso to Section 11A (1) of the Central Excise Act, 1944.

3. The demand for differential duty of excise was raised on the allegation that the assessee had incorrectly determined the assessable value of its finished goods by not including therein the monetary value of the duty benefits that it had obtained from its customers as a result of the transfer of the advance licenses.

4. This demand for differential duty was raised for clearances made during the period of September 2000 to March 2004. The Show Cause Notice which was issued on 28.9.2005 relied upon a judgment of this Court on 9.8.2005 in the case of IFGL Refractories Ltd in support of the plea that monetary value of duty benefits obtained through transfer of advance licenses held by the customers constituted additional consideration flowing to the assessee from such customers.

5. Since the demand for differential duty was being raised on 28.9.2005, which was beyond the normal limitation period of one year prescribed in Section 11A(1) of the Act, the show cause notice also alleged that the noticee had deliberately suppressed relevant facts and had made willful misstatements withholding material information and documents from the departmental officers.

6. The allegations in the notice were confirmed by the Commissioner in his order dated 30.10.2006 wherein the assessee's defense on merits as well as on limitation were rejected.

7. The Commissioners' order was challenged by the assessee before CESTAT, which allowed that appeal by a majority order by accepting the assessee's plea that the dispute was revenue neutral having no Revenue implications since the customers of the assessee were eligible to avail cenvat credit of duties actually paid or any differential duty payable on the goods cleared by the assessee. We are not dwelling deeper on the other findings of the Tribunal on the merits of the matter since these appeals are being decided only on the issue of time bar.

8. On the issue of time bar, the CESTAT has held that during the relevant period the Appellant could have entertained a bonafide belief that it had correctly discharged its duty liability in view of the view taken by the Tribunal in the case of IFGL Refractories Ltd. *[2001 (134) ELT 230]* which came to be reversed by this Court only on 9.8.2005. It is relevant to note here that insofar as the decision on time bar is concerned the view of the two learned members who constituted the division bench of CESTAT was unanimous.

9. The difference of opinion, therefore, arose only on the merits of the matter which also came to be decided in favour of the assessee by a 2-1 majority. Since arguments before us are confined to the issue of limitation, it is necessary to take note of the findings of the CESTAT on the same. The finding of the Member (Technical) on the issue of limitation was as under:

> "As regards the submission on time bar, it is noticed that the Commissioner has relied on the Hon'ble Supreme Court's judgement dt. 9.8.2005 in the case of M/s. IFGL Refractories Ltd. cited supra. This decision of the Hon'ble Supreme Court has reversed the decision of the Tribunal in the case of M/s IFGL Refractories Ltd. [2001 (134) ELT 230]. In other words, the Tribunal has taken a view that discounts offered to advance licence holders were not additional consideration which decision has been reversed by the Hon'ble Supreme Court. Under these circumstances, the claim that the appellant was having a bonafide belief that the additional discounts are permissible has to be accepted and demand of duty has to be confined to duty within the normal period of limitation. No penalty will be justified."

10. The corresponding finding of the Member (Judicial) on the issue of limitation were as under:

> "The orders proposed by learned Member (Technical) allowed Appeal No. E/228/07, on point of limitation, by setting aside the confirmation of demand and penalty imposed upon the appellant. I agree with the said order passed by learned Member (Technical) in the said appeal."

ANALYSIS

11. We have heard the contentions of both the parties in great detail.

12. Section 11A of the Central Excise Act, 1944, which deals with the issue of limitation for issuing show cause notices for recovery of duties which have been short paid or short levied, is the governing law in the present case. Sub-section (1)of Section 11(A), which is most relevant to the present case, for the sake of convenience, is being reproduced hereunder:

> "(1) When any duty of excise has not been levied or paid or has been short-levied or short-paid or erroneously refunded, whether or not such non-levy or non-payment, short-levy

> or short payment or erroneous refund, as the case may be, was on the basis of any approval, acceptance or assessment relating to the rate of duty on or valuation of excisable goods under any other provisions of this Act or the rules made thereunder, a Central Excise Officer may, within one year from the relevant date, serve notice on the person chargeable with the duty which has not been levied or paid or which has been short-levied or short paid or to whom the refund has erroneously been made, requiring him to show cause why he should not pay the amount specified in the notice: ”

13. The first proviso to the abovementioned sub-section (1), which is the relevant provision relating to the extended period of limitation, reads as under:

> "Provided that where any duty of excise has not been levied or paid or has been short levied or short-paid or erroneously refunded by reason of fraud, collusion or any wilfull misstatement or suppression of facts, or contravention of any of the provisions of this Act or of the rules made thereunder with intent to evade payment of duty, by such person or his agent, the provisions of this sub-section shall have effect, for the words one year the words five years were substituted."

14. In the case of Pushpam Pharmaceuticals Company Vs. Collector of Central Excise, Bombay*[1995 Sup (3) SCC 462]*, this Court, while dealing with a similar fact circumstance wherein the extended period of limitation under the abovementioned proviso had been invoked, held that since the expression “suppression of facts” is used in the company of terms such as fraud, collusion and willful misstatement, it cannot therefore refer to an act of mere omission, and must be interpreted as referring to a deliberate act of non-disclosure aimed at evading duty, that is to say, an element of intentional action must be present.

15. Similarly, in the case of Collector of Central Excise, Hyderabad Vs. M/s. Chemphar Drugs and Liniments, Hyderabad*[1989 (2) SCC 127]*, this Court, while dealing with a similar situation of invocation of extended period of limitation under Section 11(A) of the Act, this Court held as under:

> “In order to make the demand for duty sustainable beyond a period of six months and up to a period of 5 years in view of the proviso to sub-section 11A of the Act, it has to be established that the duty of excise has not been levied or paid or short-levied or short-paid, or erroneously refunded by reasons of either fraud or collusion or willful misstatement or suppression of facts or contravention of any provision of the Act or Rules made thereunder, with intent to evade payment of duty. Something positive other than mere inaction or failure on the part of the manufacturer or producer or conscious or deliberate withholding of information when the manufacturer knew otherwise, is required before it is saddled with any liability, before the period of six months. Whether in a particular set of facts and circumstances there was any fraud or collusion or willful misstatement or suppression or contravention of any provision of any Act, is a question of fact depending upon the facts and circumstances of a particular case. The Tribunal came to the conclusion that the facts referred to hereinbefore do not warrant any inference of fraud. The assesse declared the goods on the basis of their belief of the interpretation of the provisions of the law that the exempted goods were not required to be included and these did not include the value of the exempted goods which they manufactured at the relevant time. The Tribunal found that the explanation was plausible, and also noted that the Department had full knowledge of the facts about manufacture of all the goods manufactured by the respondent when the declaration was filed by the respondent. The respondent did not include the value of the products other than those falling under Tariff Item 14E manufactured by the respondent and this was in the knowledge, according to the Tribunal, of the authorities. These findings of the Tribunal have not been challenged before us or before the Tribunal itself as being based on no evidence”

16. The main submission of the Learned Counsel appearing on behalf of the assesse was that during the period under reference i.e. September 2000 to March 2004, the practice of valuation followed by

the assessee was strictly in accordance with the view taken by CESTAT in IFGL's case. The CESTAT in that case held that duty benefits received by an assessee under the duty exemption scheme announced by the Government cannot be considered as part of the consideration flowing from the buyer, either directly or indirectly. The Tribunal order refers to several other orders and judgements for coming to the conclusion that subsidies, incentives and duty drawbacks received by an assessee from the Central Government or the State Government cannot be regarded as part of the consideration flowing from the buyer to the seller.

17. After referring to the detailed observations and finding of the CESTAT, in IFGL's case, particularly those in para 9 and 10 thereof, the Ld. Counsel for the assessee submitted that, though the above view of the Tribunal was reversed by this Court on 9.8.2005 while deciding Civil Appeal No.4472 of 2001, it cannot be denied that during the period from 28.7.2000 (the date when the Tribunal decided the IGL's case) till 9.8.2005 (when the Supreme Court reversed it) the view taken by the Tribunal in IFGL's case held the field and thus provided the basis for the assesse to believe that its method and approach of determining the assessable value was in accordance with law. The Ld. Counsel further pointed out that there was otherwise no justification for alleging suppression of facts in the present case as the assessee had submitted to the Revenue authorities copies of their pricing policy from time to time. Our attention was invited to para 2 of the Show Cause Notice dated 28.9.2005 wherein this fact has been recorded in the notice.

18. The Ld. Counsel for the revenue on the other hand submitted that the Tribunal had failed to apply its mind to the allegations and specific finding of the adjudicating authority. It was submitted that the adjudicating authority had specifically found that the subject transactions where additional discounts had been offered to certain customers who had agreed to transfer to the assessee duty benefits flowing from advance licence held by them were wrongly clubbed with domestic clearances with a view to mislead range officer tasked with the responsibility of checking the transactions. The Ld. Counsel for the Revenue accordingly submitted that the assesse was guilty of suppressing material facts from the Revenue authorities and that the Range officer had thus been misled into believing that the duty had been correctly paid. The Ld. Counsel also invited our attention to the fact that during the relevant period the assessee was working under self-assessment procedure were the onus to correctly assess duty vested upon the assesse. The Ld. Counsel for the Revenue also submitted that the finding of the CESTAT about bonafide belief based on the CESTAT's decision on the IGL's case was also unsustainable in view of the specific findings of the adjudicating authority of suppression of material facts by clubbing of the clearances with domestic clearances which mislead the range officer tasked with the responsibility of checking all transactions.

19. Per contra the Ld. Counsel for the assesse submitted that the arguments made on behalf of the Revenue traverse beyond the grounds taken in the appeal and also the allegations in the show cause notice. It was his further submission that there was no wrongful clubbing of deemed export clearances with domestic clearances. It was pointed out that the monthly returns (ER-1/RT-12) that the assessee was required to file does not have any separate column for declaring deemed export clearances. Since the subject clearances on which differential duty has been demanded has been initially been made upon payment of duty, such clearances had correctly been shown as duty paid domestic clearances.

20. We have seen the format of the ER-1/RT-12 return which the assessee was required to file on a monthly basis for intimating to the department the value of clearances effected and the amounts of duties paid thereon. We do not find any separate column or requirement in these forms for declaring the value and other details of clearances effected to the deemed export buyers i.e. holders of advance licenses. Note 4 under Form ER-1 does require separate details to be mentioned for exports under bond. Indisputedly clearance made to domestic buyers even if they are considered deemed exports are not clearances for "exports under bond" for which category of clearances alone requirement existed for separate disclosure in the ER-1/RT-12 returns. In the absence of any specific column or note similar to note 4, requiring separate disclosure of the value of deemed export clearances, we do find any merit in the findings of the adjudicating authority that there was suppression of facts as a consequence of assessee's failure to separately disclose the value of deemed export clearances. An

accusation of non-disclosure can only be made if there is in the first instance a requirement to disclose.

21. We also find that Note 4 to Form ER-1 requires separate details of clearances to be mentioned for exports under Bond. There is no reference in the said notes to deemed exports or supplies made to holders of advance licenses. We therefore agree with the submissions of the counsel for the assessee that the assesse was never required to separately furnish details of clearances made to holders of advance licenses. We also find that neither the show cause notice nor the civil appeal filed by the Revenue before this Court contain any reference to the wrongful clubbing of deemed export clearances under the details meant for domestic clearances. Also the order of the Tribunal does not contain any reference to this particular aspect which was the main thrust of the oral arguments made by the Ld. Counsel for the Revenue before this Court. In our considered view, the Revenue cannot be permitted to argue its matters by going beyond the written pleadings filed by it before this Court. The mere fact that the oral arguments are supported by findings of the adjudicating authority, which is not the order impugned before this Court, does not entitle the Revenue to resurrect a point which though made at the original stage, was never pressed before the Tribunal or even incorporated in the memo of appeal filed before this Court.

22. We also find no merits in the other argument urged by the Ld. Counsel for the Revenue that the Tribunal's order in the case of IFGL Refractories could not have constituted a valid basis for the belief entertained by the assesse in view of the fact that the relevant valuation provisions had undergone amendments in the year 2000. The argument of the Revenue's Counsel was that in view of the amendments to Section 4 and Rule 6 of the Valuation Rules the ratio of the Tribunal's decision in IFGL's case was no longer relevant for the period under consideration in these appeals. We have no hesitation in rejecting this contention for two independent reasons. Firstly, this contention too has not been urged in the Civil Appeal filed by the Revenue and has been urged only during the course of the hearing before this Court. On this count alone the contention deserves to be ignored. Secondly, we also find this contention to be diametrically opposite to what the Revenue itself has been contending on merits right from the Show cause notice till the appeal filed before this Court. On merits, the Revenue's case throughout had been that the issue of valuation is covered against the assessee by the judgement of this Court in the case of IL Refractories. Even in the order of the CESTAT under challenge the Tribunal has proceeded on the basis that the principle of valuation laid down by this Court in the case of IFGL Refractories holds good and remains valid even under the amended valuation provisions for the period post July 2000. We therefore find it strange that for the purposes of justifying its case on limitation, the Revenue wishes to take a position exactly contrary to what it has taken in the Show Cause Notice on merits. We cannot allow the Revenue to blow hot and cold in the same breath by relying upon IL's case on merits while at the same time arguing that the same had no relevance for the purposes of examining the plea for a bonafide belief.

23. We are in full agreement with the finding of the Tribunal that during the period in dispute it was holding a bonafide belief that it was correctly discharging its duty liability. The mere fact that the belief was ultimately found to be wrong by the judgment of this Court does not render such belief of the assessee a malafide belief particularly when such a belief was emanating from the view taken by a division bench of Tribunal. We note that the issue of valuation involved in this particular matter is indeed one were two plausible views could co-exist. In such cases of cases of disputes of interpretation of legal provisions, it would be totally unjustified to invoke the extended period of limitation by considering the assessee's view to be lacking bonafides. In any scheme of self-assessment it becomes the responsibility of the assessee to determine his liability of duty correctly. This determination is required to be made on the basis of his own judgment and in a bonafide manner.

24. The extent of disclosure that an assessee makes is also linked to his belief as to the requirements of law. In the present case the assessee who was required to self-assess his liability determined the assessable value on the basis of an interpretation given by CESTAT in its order dated 28.7.2000. It could not have foreseen that the view taken by CESTAT would be upset and overturned by the

Supreme Court as it happened on 9.8.2005. The assessee's conduct during the material period i.e. between 2000 to 2005 cannot be considered to be malafide when it merely followed the view taken by the Tribunal in IFGL's case. On the question of disclosure of facts, as we have already noticed above the assessee had disclosed to the department its pricing policy by giving separate letters. It is also not disputed that the returns which were required to be filed were indeed filed. In these returns, as we noticed earlier there was no separate column for disclosing details of the deemed export clearances. Separate disclosures were required to be made only for exports under bond and not for deemed exports, which are a class of domestic clearances, entitled to certain benefits available otherwise on exports. There was therefore nothing wrong with the assessee's action of including the value of deemed exports within the value of domestic clearances.

25. We also take note of the fact that in the show cause notice itself it has been accepted by the revenue that the self-assesment procedure did not require an assessee to submit copies of all contracts, agreements and invoices. This being the admitted position in the notice we do not find any basis for agreeing with the findings of the Commissioner that certain relevant documents had not been filed and thereby suppressed from the scrutiny of the revenue officers. An assessee can be accused for suppressing only such facts which it was otherwise required to be disclosed under the law. The counsel for the Revenue has, while pleading that facts was suppressed been unable to show us the provision or rule which required the assessee in this case to make additional disclosures of documents or facts. The assertion that there was suppression of facts is therefore clearly not tenable.

26. Insofar as the appeal No. 5744/2011 is concerned, we find that the same pertains to a different plant of the Assessee-Respondent where clearances were affected during the period January 2001 to November 2003. The Show Cause Notice in this case was issued on 29.12.2005 and sought to invoke the extended period of limitation by making similar allegations as in Civil Appeal No. 6033 of 2009. The order impugned in this appeal, however is an order dated 4.4.2010 of the Gujarat High Court by which the Court had dismissed an appeal filed by the revenue against an order of CESTAT, by holding that no question of law could be stated to arise from the order of CESTAT. Our conclusions with regard to Civil Appeal 6033 of 2009 apply equally to this appeal. In the result both the appeals filed by the Revenue are dismissed on the ground that the demands are time barred. We make it clear that we express no opinion on the merits of the matter including the aspects of revenue neutrality.
