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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Mumbai

Decided On : Sep-15-1994

Reported in : (1995)(75)ELT613Tri(Mum.)bai

Appellant : Collr. of C. Ex.

Respondent : New Great Eastern Spg. and Mfg. Co.

Judgement :

1. Invoking the provisions of Section 35G(1) of the Central Excises and Salt Act, 1944, the Collector of Central Excise, has sought reference to the High Court, on the questions framed by him, claiming them to be the issues of law arising out of Order No. 2676-77/93-WRB, dt.

27-12-1993 of this Bench in Appeals ED (Bom) 149/86 and ED (Bom)150/86 filed by him against Order No. PPM-2351-2352/BI-793/794/85, dated 5-3-1986 of the Collector of Central Excise (Appeals), Bombay.

2. The Collector of Central Excise (Appeals), had, vide the aforesaid order, allowed two appeals filed by the Respondent herein against the demand of duty as confirmed by the adjudicating authority, on the ground that the demands were hit by the limitation prescribed for raising such demand, as the show cause notice, contemplated under Section 11A of the CESA, 1944 was not issued within the period of six months, and that there was no scope for invoking extended period.

Before the Tribunal, in the appeals preferred by the department, it was pleaded that the demand was raised during the scrutiny of RT-12 Returns, and that subsequent show cause notice, though not necessary, was issued as a formality, but the demand had to be deemed to have been made, by way of endorsement on RT-12 returns. This Bench, however, rejected the said contention, by placing reliance on the Supreme Court judgment in Collector of Central Excise v. Kosan Metal Products -1988 (38) E.L.T. 573 (S.C.).

3. The appellant now seeks reference to the High Court, on the question formulated as under :- "Whether the assessment under Rule 173-I pointing out the short payment flowing from the approval of classification list is itself final or is required to be followed by issue of a show cause-cum-demand notice under Section 11 A?".

4. Mr Nair, the Id. SDR, has pleaded that the Supreme Court judgment in Re : Kosan Metal Products (supra) would not stand attracted on the facts and circumstances here, and that the Bombay High Court have, in Swan Mills Ltd. v. Union of India -1989 (44) E.L.T. 601 (Bom.), while distinguishing the ratio of the Supreme Court judgment in Re : Kosan Metals Products, held that notice under Section 11A of the CESA, 1944, is not called for when the assessment is under Rule 173-I of the Rules.

The Id. SDR has also referred to the decision of CEGAT ERB in Rasoi Ltd. v. Collector, 1993 (63) E.L.T. 512 (Tri.) where also considering the ratio of the Supreme Court judgment, a view is taken that endorsement made on RT-12 returns as per the approved classification list, would be enough to raise the demand and notice under Section 11A would not be necessary. In the submission of the Id SDR, these two decisions indicate that the judgment of the Supreme Court is distinguishable, and when there is a scope for an alternate interpretation, reference to the High Court ought to be made.

5. Mr. VS. Sejpal, the Id. C.A. for the Respondents submits that considering the facts and circumstances, the Bench has correctly applied the ratio of the Supreme Court judgment in Re : Kosan Metal Products, and there is no scope for any reference to the High Court.

6. To give a brief resume of the factual position, the Respondents filed RT-12 returns for the month of March, 1983 and May 1983 which were assessed on 30-9-1983 and 30-11-1983, where it was pointed out that they had to pay full yarn duty plus interest as per yarn element duty shown in classification list of M/s. Madhusudan Mills Ltd., and as the said amounts were not paid, show cause notice dt 16-12-1983 and addendum dt 8-3-1984 were issued. Similarly the RT-12 returns of June, July and August, 1983 was assessed on 31-12-1983, 30-1-1984 and 29-2-1984, respectively, where also similar endorsements were made, and show cause notices dt 28-4-1984 were issued. In relation to the classification list filed by M/s. Madhusudan Mills Ltd, some stay order was issued by the competent judicial forum, but the Respondents also had filed classification list No. MMF-8/82, dt. 20-12-1982 which was approved on 13-5-1983 with a remark that the stay order in favour of M/s. Madhusudan Mills was not applicable to them. The Respondents however, in reply to the show cause notices issued, had contended that the approval of their classification list was given without giving them any hearing and had raised an objection to that effect. The show cause notices were duly contested even on issue of limitation but the adjudicating authorities rejected their contention, whereas the Collector of Central Excise (Appeals) held the notices as time-barred.

7. Examining the statutory position, every assessee who has opted for Self Removal Procedure, is, vide Rule 173G(3) of the Central Excise Rules, required to file the RT-12 return, and the proper officer of the Central Excise Department, is required to assess the same as provided for in Rule 173-I of the Rules. Kerala High Court have, in Good Shepherd Rubber Co. Ltd. v. Inspector of Central Excise, 1978 (2) E.L.T. (J 66) (Ker.) held that the said Rule enables the proper officer to assess the duty on the basis of RT-12 returns, but does not empower him to serve a notice of demand for a short levy without issuing a show cause notice and the Tribunal has in Collector v. Indian Iron and Steel Co. Ltd , 1989 (39) E.L.T. 617 (Tri.) has held that even if there is a demand on the RT-12 return, a show cause notice has to be issued within the period provided for under Section 11A of the Act. The Tribunal has, in Ideal Printers (P) Ltd v. Collector, 1990 (49) E.L.T 559 (Tri.) held that even though Rule 173-I provides for recovery of short levy and giving credit in respect of excess payment, the said Rule is subject to the

provisions of Section 11A or 11B of the Act and therefore for refund, by virtue of endorsement on RT-12 return, proper claim for refund has to be filed vide Section 11B of the Act. Collector v. Kosan Metal Products (supra) referred to with approval, the views of the Kerala High Court in Re : Good Shepherd Rubber, Co. Ltd (supra) besides upholding the Tribunal's order on factual aspect.

9. The Bombay High Court had before them, in Swan Mills Ltd v. Union of India (supra) an appeal against some inter locutory order, and the said Court have, in their judgment clearly expressed that the view held by them was only a prima facie view. Further, they were concerned with facts which were entirely different from those here. The subject matter there was the proceedings in relation to challenge of levy of duty, when the assessee and others similarly situated had moved the Court and obtained injunction against such a levy, and under some interlocutory orders from the Court, the Superintendent of Central Excise was.

permitted to assess the differential duty and issue demand notice but not to enforce the same, and it was after the assessee lost the litigation challenging the levy of duty, that they raised a contention that notice vide Section 11A of the Act, ought to be issued, and injunction against the recovery was sought, and it was at the appeal stage, against the interlocutory order passed, that the prima facie view was expressed. This judgment thus, cannot be taken as providing any contrary case law, so as to warrant reference to the High Court, against the decision arrived at by this Bench, by following the ratio of the Supreme Court judgment in Re : Kosan Metal Products, and when, as indicated above, the Kerala High Court as also the Tribunal, have also been holding the same view.

10. The CEGAT, ERB in Rasoi Ltd v. Collector (supra) though ex facie, do seem, to have held a different view, the following observation of the said Bench in para 11 of their order would make the distinguishing features explicit: "In the present case, however, as pointed earlier the duty sought to be demanded is in accordance with the rate declared by the appellants themselves in the RT-12 return. It is not that the authorities approved a lower rate of duty or a higher level of rebate and latter are wanted to apply higher rate of duty or lower rate of rebate revising their earlier decision. Further, the demand was also in line with the

provisions of Rule 173-I(2). Where such assessment by the Superintendent of the RT-12 return is in accordance with the classification list submitted by the assessee themselves and approved by the Department, the adjustment of differential duty involved is governed by Rule 173-I and notice under Section 11A of the Central Excises and Salt Act, is not necessary. All the decisions against RT-12 endorsement are the cases where there was an element of assessment on the part of the Department contrary to the earlier assessment or classification decision and contrary to the assessee's declaration".

The said Bench was at that relevant point considering the effect of the ratio of judgment of the Supreme Court in Re : Kosan Metal Products as also decisions of the Tribunal in Vipul Dyes and Chemicals v. Collector - 1989 (44) E.L.T 724 (T) and Collector v. K.R. Metal Industries - 1990 (48) E.L.T. 276 both of which are the decisions of the West Regional Bench, where following the ratio of the Supreme Court judgment in Re : Kosan Metal Products, this Bench (two Member) have held that whenever assessment on RT-12 involves adjudication on an issue, issuance of show cause notice under Section 11A of the Act is essential and short endorsement on RT-12 return is not enough. With the set of facts and point involved being different, this decision of the ERB does not go contra to the view taken by the Supreme Court duly followed by this Bench in earlier decisions referred to above, and nothing is brought on record to show that the view, same as the one adopted in the impugned order, taken in the earlier decisions has been sought to be referred to any High Court.

11. Facts peculiar to the matter under consideration did indicate that the assessment was not to be in conformity with the declaration made in RT-12 returns. On the contrary, the claim made was sought to be denied and during the said process the classification list of M/s. Madhusudan Mills Ltd., which was subject matter of same Court litigation, was also referred to.

12. The ratio of two decisions referred to by the Ld. SDR, to substantiate the plea for reference to the High Court on the question as formulated, would not lead to indicate that the view expressed by the Supreme Court, in Re : Kosan Metal Products, and followed by this Bench in the impugned order calls for a reference

vide Section 35G(1) of the Central Excises and Salt Act, 1944.

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