(2013) 39 STT 422

Gujarat High Court

Case No: Tax Appeal No. 1545 of 2011

Commissioner of Central Excise, Customs and Service Tax		APPELLANT
	Vs	
Kay Kay Press Metal Corpn.		RESPONDENT

Date of Decision: Aug. 21, 2012

Acts Referred:
Central Excises and Salt Act, 1944 â€" Section 11A, 11AC, 35G

Citation: (2013) 39 STT 422

Hon'ble Judges: V.M. Sahai, J; N.V. Anjaria, J

Bench: Division Bench

Advocate: Naynaben K. Gadhvi, for the Appellant; Paresh M. Dave, for the Respondent

Final Decision: Dismissed

Judgement

N.V. Anjaria, J.
The present appeal u/s 35G of the Central Excise Act, 1944 was preferred by the Department to challenge the order

dated 18.5.2011 passed by the Central Excise and Services Tribunal, West Zonal Bench, Ahmedabad in Appeal No. E/708 of 2005. The appeal

was admitted for consideration of the following substantial question of law formulated by this court.

Whether the Tribunal below committed substantial error of law in allowing the Appeal filed by the assessee on the question of limitation on the

ground of divergence of views at the relevant point of time although according to the law of precedent, even there was divergence of views, it is the

duly of the assessee to follow the one which is binding as a precedent.

1.1 We heard learned advocate Ms. Nayana Gadhavi for the appellant-department and learned advocate Mr. Paritosh Gupta holding brief for

learned advocate Mr. Paresh M. Dave, for the respondent.

1.2 The assessee was engaged in manufacturing of fabricated iron and steel structures. The unit used to undertake processes such as cutting,

bending, punching with the help of machines available in the factory. The Excise Officers visited the factory premises on 31.3.2000 on the basis of

specific information that respondent had been manufacturing the excisable goods without obtaining registration and had thereby indulged into the

evasion of duty. On the basis of material gathered during visit, the Commissioner of Excise issued show-cause notice in March, 2003 calling upon

the respondent as to why the excise duty to the tune of Rs. 41,04,217 should not be levied on the finished goods which were allegedly cleared

during the period 1998-1999 and 1999-2000. The assessee had already paid Rs. 1 lakh which amount was accounted for.

1.3 The assesse was also called upon in the show-cause notice for explaining as to why the penalty and interest should not be levied. The said

show-cause notice culminated into order dated 20.5.2004 by the adjudicating authority who confirmed the demand of excise duty for Rs.

41,04,217/-. It also imposed the penalty of equivalent amount u/s 11AC of the Central Excise Act, 1944 as well as the penalty of Rs. 5,00,000/-

and Rs. 10,000/- and further ordered for payment of interest.

1.4 The assessee preferred an appeal before the Income Tax Appellate Tribunal (Appeals). The Tribunal considered that show-cause notice was

issued in March, 2003, which was for the period 1998-2000 and thus it was time-barred. The department had invoked the extended period as per

the first proviso to section 11A of the Act on the ground that there was suppression and mis-statement by the assessee. The Tribunal did not

approve the action on the part of the department in invoking the extended period.

2. With the following observations, the Tribunal dismissed the appeal of the department.

...the law on the issue is clear, i.e. to the effect that when there are divergent views, many of which are in favour of the assessee holding the field,

no suppression or mis-statement can be attributed to the assessee, to entertain the same belief. As admittedly, in the present case, judgment prior

to Larger Bench in the case of Mahindra & Mahindra Ltd., were lying that the processes allegedly adopted by the appellant did not amount to

manufacture, we are of the view that the demand raised beyond the period of limitation, by invoking extended period, is barred. As such,

irrespective of the fact as to whether the appellants themselves have undertaken the said activity or not, the demand is required to be quashed on

the above issue itself. Ld. SDR appearing for the Revenue have placed on record the written submissions, which we find are mainly dealing with

issues other than limitation.

2.1 The Tribunal was justified in recording the aforesaid findings. In the facts of the case, it was not possible to ascribe any wilful suppression or

mis-statement on the part of the assessee for not paying excise duty because during the period in question, various decisions of the Tribunal were

to the effect that the activity of cutting, bending, bunching of plates or channels in which the assessee was engaged, did not amount to

manufacturing activity. In Continental Foundation Joint Venture Sholding, Nathpa H.P. Vs. Commissioner of Central Excise, Chandigarh-I, , Apex

Court observed that when there was bona fide doubt as to non-excisability of the goods due to divergent views of the Hon''ble Supreme Court,

the extended period of 5 years cannot be invoked. Mere failure or negligence in not taking license or not paying duty, is not sufficient for invoking

extended period.

2.2 In the facts of the present case, it cannot be said that the conduct of the assessee was not bona fide. When the activity undertaken by it was

not treated as manufacture, it would not have been expected to pay the excise duty. In order to show suppression or mis-statement on the part of

the assessee, a positive act has to be established.

3. In view of the above, no error was committed by the Tribunal in dismissing the appeal. It was not possible to countenance the contention of the

learned counsel for the appellant that there was a suppression of facts and payment of duty was intentionally evaded by the assessee. For the

foregoing reasons, the question formulated is accordingly answered in negative in favour of the assessee. The appeal is dismissed being devoid of

any merit as discussed above.