

(2019) 01 RAJ CK 0358

Rajasthan High Court (Jaipur Bench)

Case No: Civil Miscellaneous Application No. 193 Of 2018, Central Excise Appeal No. 53 Of 2017

Commissioner Of
Central Goods And
Service Tax
Commissionerate,
Alwar

APPELLANT

Vs

Fun Foods Pvt. Ltd.

RESPONDENT

Date of Decision: Jan. 21, 2019

Acts Referred:

- Central Excise Act, 1944 - Section 11AC, 35G(1)

Hon'ble Judges: Mohammad Rafiq, J; Goverdhan Bardhar, J

Bench: Division Bench

Advocate: Anuroop Singhi, Yogendra Aldak, Arjun Singh, Sameer Jain

Final Decision: Allowed

Judgement

1. This application has been filed by the applicant-appellant seeking recall of order dated April 11, 2018 passed by this court whereby the appeal filed by the Commissioner of Central Excise, Goods and Service Tax, Alwar was disposed of with the observation that the appeal against the judgment dated September 8, 2016 passed by the Customs, Excise and Service Tax Appellate Tribunal, New Delhi (for short, "the Tribunal") would lie before the Supreme Court in view of the exception carved out under section 35G(1) of the Central Excise Act, 1944 (for short, "the Act"). This court while passing the aforesaid order relied upon the judgment of the Delhi High Court in Commissioner of Service Tax v. Ernst & Young P. Ltd. [2014] 27

GSTR 22 (Delhi) : [2014] 75 VST 51 (Delhi) wherein earlier judgment of Delhi High Court in Commissioner of Service Tax v. Bharti Airtel Limited

[2013] 22 GSTR 54 (Delhi) : [2013] 64 VST 53 (Delhi); [2013] 30 STR 451 (Delhi) was also relied upon.

2. The learned counsel for the applicant-Revenue submitted that the issue involved in the appeal was whether the Tribunal had erred in holding that

the demand is beyond the period of one year from the relevant date and is time-barred and further whether the Tribunal erred in dropping the penalty

under section 11AC of the Act on the assessee. The learned counsel submitted that the question before the Delhi High Court in Commissioner of

Service Tax v. Ernest & Young P. Ltd. [2014] 27 GSTR 22 (Delhi) : [2014] 75 VST 51 (Delhi) was of determination of any question in relation to

rate of duty and therefore, the appeal would have been maintainable before the Supreme Court in that case. Even if the appellant-applicant had filed

an appeal before the Supreme Court, it would not have been maintainable, argued the learned counsel for the applicant.

3. The learned counsel for the respondent-assessee submitted that there were total five issues identified by the Tribunal in para 3 of the judgment.

While the issue with regard to demand being time-barred and penalty being not imposable was decided against the Revenue but other three issues

were decided in favour of the assessee and those issues essentially have relation to the rate of duty of excise and the value of the goods. If the

Department was aggrieved of any part of the order, it has to essentially file appeal against the whole judgment before the Supreme Court.

4. It is not in dispute that neither the assessee nor the Revenue has filed any appeal against that part of the judgment passed by the Tribunal wherein

the first four issues were decided against the Revenue and matter was remanded back. The aforesaid five issues identified by the Tribunal reads as

under:

(i) Classification of milk shake mixes.

(ii) Classification of flavoured syrups/fruit syrups/squashes.

(iii) Goods sold without brand name.--Eligibility to claim benefit of exemption Notification No. 3/2005-CE : dated February 24, 2005 (Sr. No. 9) in

respect of chocolate syrup, butter scotch, blue curacao, grenadine, mint, orange, triple seed, caramel, natural caramel, vanilla, lime (all falling under

Chapter Heading 2108.91/21069040) on the ground that the same do not bear brand name of the assessee/appellant.

(iv) Goods sold without brand name.--Eligibility of exemption benefit under Notification No. 3/2005-CE : (Sr. No. 10) to the item mixed seasoning

Chinese flavour.

(v) Demand is time-barred and penalty not imposable.

5. If the assessee is not dissatisfied with the findings recorded by the Tribunal on first four issues, he cannot be allowed to say that the Department

should be required to file appeal even against the part of the judgment of the Tribunal before the Supreme Court particularly when the Department

itself has accepted finality of that part of the judgment by which the matter has been remanded back to the original adjudicating authority for its fresh

findings. The question of limitation and demand being time-barred will have to be decided independently.

6. We are therefore satisfied that the Department has been able to make out a case for recall of order dated April 11, 2018 passed by this court.

7. In view of above, the application is allowed. Order dated April 11, 2018 is recalled and the appeal is restored to its original number.