THE HON'BLE SRI JUSTICE L.NARASIMHA REDDY

AND

THE HON'BLE SRI JUSTICE CHALLA KODANDA RAM

R.C.No.111 OF 2001 & I.T.T.A No.7 OF 2002

% 22.07.2014

R.C.No.111 of 2001

Commissioner of Income Tax,
A.P. – II, Hyderabad .. Appellant

And

$ M/s. Ampro Products Limited,
Hyderabad .. Respondent

! Counsel for the Appellant : Sri J. V. Prasad

Counsel for Respondent : Sri Y. Ratnakar

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? Citations:

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R.C.No.111 OF 2001 & I.T.T.A No.7 OF 2002

COMMON JUDGMENT: *(per Hon'ble Sri Justice L. Narasimha Reddy)*

The appeal and reference are interrelated and are in relation to the same assessee and for the same period, but covering two different assessment years. Hence, they are disposed of through a common judgment. Both the proceedings are at the instance of the Revenue.

The respondent is a Company, undertaking the activity of manufacturing and marketing of food products. It has a sister concern, by name, M/s. Ampro Industries Private Limited. The respondent used to supply the raw-material to its sister concern and get manufactured certain brands of biscuits. For that purpose, it used to pay conversion charges in terms of the agreement entered into between them on 30.06.1982. The products manufactured by or on behalf of the respondent are subject to excise duty. For the activity undertaken between 27.09.1982 and 30.09.1985, there existed some dispute, as to the extent of excise duty. While according to the Jurisdictional Commissioner of Central Excise, the duty was leviable on the cost of the product, arrived at by taking into account, the value of the raw-material supplied by the respondent, the Conversion Unit insisted that it must be only on the basis of conversion charges paid to it. As provided for under Rule 9-B of the Central Excise Rules, the products were cleared at the relevant period, on payment of the undisputed rate of duty, however, subject to execution of the bond in Form B-13, undertaking to pay the differential duty, as may be determined by the competent authority.

According to the agreement between the respondent and the Conversion Unit, the former is under obligation to compensate or pay the duty component suffered by the latter. In the returns submitted by the respondent, deductions were claimed to the extent of excise duty, actually paid. So far as the differential amount covered by the bonds is concerned, provision was made in the books of account, to the tune of Rs.1,66,62,866/-. After about two rounds of litigation initiated by the Conversion Unit, it ultimately emerged that it is not under obligation to pay any further amount towards excise duty for the corresponding period over and above what was already. On the other hand, it was held to be entitled for refund of Rs.12,70,649/- for Conversion Unit I and Rs.5,03,316/- for Conversion Unit vide, the order, dated 19.05.1993, passed by the Superintendent of Central Excise.

In the returns filed for the assessment year 1992-93, the deduction of Rs.1,66,62,866/- was claimed. For the subsequent years the claim was dropped on the ground that there was neither any cessation nor any accrual on account of the order, dated 19.05.1993, passed by the Superintendent of Excise. The assessing authority, however, took view that there was no cessation on the basis of order passed by the Superintendent of Excise and the corresponding amount being Rs.1,66,62,866/- is liable to be assessed for the assessment year 1992-93. A separate order was passed in respect of the refund of about Rs.18,00,000/-. Since that refund came only in May, 1993, benefit thereof was extended for the assessment year 1994-95.

The respondent carried the matter in appeal before the Commissioner of Income Tax (Appeals). The appellate authority upheld the view taken by the assessing authority. Further appeal in I.T.A.No.63/Hyd/1996 was filed in relation to the assessment year

1992-93 before the Hyderabad Bench 'B' of the Income Tax Appellate Tribunal regarding the benefit under Section 41(1) of the Income Tax Act, 1961 (for short, 'the Act'). Through its order, dated 25.04.1996, the Tribunal took the view that there was no cessation or remission referable to Section 41 of the Act, as a result of the order, dated 19.05.1993, passed by the Superintendent of Excise; and that the corresponding amount is not liable to be brought under income tax. The Revenue filed R.A.No.462/Hyd/1996 under Section 256 (1) of the Act with a prayer to refer certain questions to this Court. The request was not acceded to. Therefore, the Revenue approached this Court by filing the I.T.C.No.27 of 1997. The same was allowed by this Court on 09.08.2001 and accordingly the following questions were referred to this Court by the Tribunal through a detailed statement of case.

> 1. "Whether on the facts and in the circumstances of the case, the Tribunal was correct in law in deleting the addition of Rs.1,66,62,866/- for the assessment year 1992-93."
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> 2. "Whether on the facts and in the circumstances of the case, the Tribunal was correct in holding that a sum of Rs.1,66,62,866/- is a contractual liability in terms of agreement between the assessee company and the conversion unit, even though the liability to assessee company arises only when the conversion unit pays the amount to the Central Excise Department."
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> 3. "Whether on the facts and in the circumstances of the case, Tribunal was right in holding that there was no cessation of liability when in fact the liability as claimed by the assessee ceased by virtue of the order dated 16.07.1992 of the Collector of Central Excise (Appeals) setting aside the demands raised by the lower authorities."

The same is subject matter of R.C.No.111 of 2001.

It has been already mentioned in the preceding paragraphs that the benefit of refund of duty was extended to the Conversion Unit

through an order, dated 19.05.1993. The effect thereof was not shown in the returns filed for the assessment year 1993-94. According to the respondent, it is only in the subsequent assessment year i.e., 1994-95 that the amount can be adjusted or dealt with. In his order of assessment, dated 13.03.1996, the assessing officer took the view that the amount should have been dealt with in the assessment year 1993-94 itself. Aggrieved thereby, the respondent filed an appeal before the Commissioner of Income Tax (Appeals). The appeal was allowed through order, dated 31.07.1998, and the contention of the respondent was accepted. The said order was challenged by the Department in I.T.A.No.1803/Hyd/1996. The appeal was dismissed. The same is challenged in I.T.T.A.No.7 of 2002.

Sri J.V. Prasad, learned counsel for the appellant, submits that the view taken by the Tribunal that there was no remission or cessation of the liability in favour of the respondent, cannot be sustained in law. He contends that the respondent claimed deduction in the preceding years of assessment at a time when the dispute was pending before the authorities under the Central Excise Act, and once the competent authority held that the liability, to that extent, no longer exists, the amount ought to have been brought under the purview of the tax. He further submits that the conclusions recorded in paragraph No.22 of the order of the Tribunal in I.T.A.No.62/Hyd/1996 do not reflect the actual area of controversy nor does it according to law.

Sri Y. Ratnakar, learned counsel for the respondent, submits that though the Assistant Collector passed an order on 19.02.1992, the actual determination of the liability had taken place only on 19.05.1993, when the Superintendent of Excise passed the consequential order. He contends that the cessation of liability could not be reflected in the returns for the assessment year 1993-94 on

account of the fact that the clear picture did not emerge and the respondent was entitled in law, to mention the same in the assessment year 1994-95. He further submits that the refund of the amount of about Rs.18,00,000/- has also taken place in the same assessment order and the Tribunal has taken the same into account. Learned counsel submits that all the questions framed in the order of reference as well as substantial question framed in the appeal deserve to be answered against the Revenue.

Before proceeding further, it becomes necessary to take note of the last paragraph of the order passed by the Tribunal in I.T.A.No.63/Hyd/1996. It reads:

> "22. Considering totality of facts and circumstances of the case and the legal position that emerges from the above discussion, we are of the considered opinion that there was neither cessation nor remission of the assessee's liability under its contract with the Conversion Unit with regard to Central Excise duty payable by the Conversion Unit, and notwithstanding the entries made by the assessee in the books of its account, the lower authorities were not justified in brining to tax the said liability of Rs.1,66,62,866/- under Section 41 (1) of the Income Tax Act. We accordingly delete this addition of Rs.1,66,62,866/- made by the assessing officer and sustained by the CIT (A) in the impugned order."

If this is read in isolation, it gives an impression that the amount of Rs.1,66,62,866/- cannot be brought into the purview of Section 41 (1) of the Act at all. In all fairness, learned counsel for the respondent submitted that the dispute is only about the order of assessment and not the total liability as such.

Both the proceedings arose as a consequence of the determination of the actual quantum of the excise duty, payable on the products manufactured by the Conversion Unit, for and on behalf of the

respondent. Though the liability to pay the excise duty is not directly that of the appellant, it assumed the liability in terms of the agreement, dated 30.06.1982, entered into between itself and the Conversion Unit.

The uncertainty as to the quantum of excise duty payable prevailed in the assessment year 1992-93. It has already been mentioned that pending final adjudication, the manufacturer i.e., the Conversion Unit was permitted to pay the undisputed excise duty for clearance of the goods, subject to the execution of the bond, for the differential amount.

The Assistant Commissioner of Central Excise has, no doubt, passed an order, dated 19.02.1992. That, however, did not result in actual determination of the excise duty. He has only stipulated the broad guidelines, according to which, the excise duty must be determined. The working out part of it was entrusted to the Superintendent of Central Excise. He, in turn, completed that exercise on 19.05.1993.

The effect of the order, dated 19.05.1993, was two fold. The first was that the Conversion Unit, and thereby the respondent were held to be not under obligation to pay any amount covered under bonds, and thereby the bonds stood discharged. The second was that a sum of about Rs.18,00,000/- was to be refunded from out of the excise duty, already paid by the commission unit. The benefit of this has also accrued to the respondent, since it has claimed deduction on account of payment of excise duty.

Notwithstanding the uncertain, nature of the claims that were made before the assessing authority and appellate authority, the actual area of controversy was about the year of assessment, in which both

the components referred to above must be adjusted or reflected. The assessing authority took the view that the date of order passed by the Assistant Commissioner of Central Excise constitutes the basis and accordingly the assessment of those components must be for the assessment year 1992-93. The appellate authority also has taken the same view.

Section 41 (1) of the Act gets attracted in the facts of the present case. The provision reads:

> **Profits chargeable to tax**
>
> "1) Where an allowance or deduction has been made in the assessment for any year in respect of loss, expenditure or trading liability incurred by the assessee (hereinafter referred to as the first-mentioned person) and subsequently during any previous year,–
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> (a) the first-mentioned person has obtained, whether in cash or in any other manner whatsoever, any amount in respect of such loss or expenditure or some benefit in respect of such trading liability by way of remission or cessation thereof, the amount obtained by such person or the value of benefit accruing to him shall be deemed to be profits and gains of business or profession and accordingly chargeable to income-tax as the income of that previous year, whether the business or profession in respect of which the allowance or deduction has been made is in existence in that year or not; or
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> (b) the successor in business has obtained, whether in cash or in any other manner whatsoever, any amount in respect of which loss or expenditure was incurred by the first-mentioned person or some benefit in respect of the trading liability referred to in clause (a) by way of remission or cessation thereof, the amount obtained by the successor in business or the value of benefit accruing to the successor in business shall be deemed to be profits and gains of the business or profession, and accordingly chargeable to income-tax as the income of that previous year.

The gist thereof is that if an assessee has made any deduction towards any liability in the earlier assessment years and such liability has either ceased or any remission was made, the same must be brought under the net of the income tax in the subsequent assessment year.

Part of the discussion undertaken by the Tribunal as well as the Commissioner, gives an impression that the respondent was objecting to the very application of Section 41 of the Act in relation to the benefit that accrued to it on account of the order, dated 19.05.1993, passed by the Superintendent of Excise. However, on a close analysis, it becomes clear that the effort made by the respondent was only to convince the authorities under the Act to permit it to reflect that in the assessment year 1994-95 and the earlier year.

The emphasis of the Income Tax Officer as well as the Commissioner of Income Tax (Appeals) was on the date of the order, passed by the Assistant Collector i.e., 27.04.1992. It may be true that the adjudication, as such, under the Central Excise Act *vis-à-vis* the Conversion Unit has taken place only in the hands of the Assistant Commissioner. Had it been a case where the Assistant Commissioner determined the quantum of excise duty, the view taken by the Income Tax Officer could have been accepted. It has also been mentioned that the Assistant Commissioner, Central Excise, did nothing more than indicating the parameters for determining or reckoning the excise duty. To be precise, he directed that the nearest comparable unit must be taken as the basis for determining the excise duty for the products manufactured by the Conversion Unit. Barring that, he did not undertake any calculation or reckoning. It was only the Superintendent of

Central Excise that had undertaken the entire exercise. He identified M/s. Super Food Products, as the comparable unit and passed order

on 19.02.1995, indicating the exact amount of excise duty payable on the products manufactured by the Conversion Unit. The resultant figures not only lead to waiving of the amount covered by the bonds, but also refund of the amount to a tune of Rs.18,00,000/-.

Once the respondent is relieved of the liability to pay the amount covered by bonds, Section 41 (1) of the Act gets attracted and the liability can be said to have ceased. As a consequence, the respondent had to pay the tax on the amount, regarding which he cleared exemption in the returns for the earlier assessment years. The only difference would be that since the actual determination emerged only in May, 1993, it shall be under obligation to reflect the same in the returns for the year 1994-95. So is the case with the amount of Rs.18,00,000/-, which was ordered to be refunded. Therefore, Question No.1 in R.C.No.111 of 2001 is answered against the Revenue and in favour of the 2nd respondent.

Question No.2 is answered expressing the view that the amount of Rs.1,66,62,866/- is liable to be dealt with under Section 41 (1) of the Act, however, for the assessment year 1994-95. Question No.3 need not be answered in view of the answers given to Question Nos.1 and 2.

For the same reasons mentioned above, I.T.T.A No.7 of 2002 is dismissed, subject, however, to condition that the amount of excise duty refunded through order, dated 19.05.1993, passed by the Superintendent of Central Excise, shall be dealt with in the returns for the assessment year 1994-95. There shall be no order as to costs.

The miscellaneous petitions filed in the reference case and the appeal shall stand disposed of.

L. NARASIMHA REDDY, J

CHALLA KODANDA RAM, J

22.07.2014

Note:- L.R. Copy to be marked.

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