IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

TAX APPEAL No. 222 of 2009
With
TAX APPEAL No. 221 of 2009
With
TAX APPEAL No. 223 of 2009

For Approval and Signature:

HONOURABLE MR.JUSTICE K.A.PUJ
HONOURABLE MR.JUSTICE RAJESH H.SHUKLA

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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COMMISSIONER OF CENTRAL EXCISE & CUSTOMS SURAT-II - Appellant(s)
Versus
S M VIJ - Opponent(s)

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Appearance :
MR RJ OZA for Appellant(s) : 1,
None for Opponent(s) : 1,

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CORAM : HONOURABLE MR.JUSTICE K.A.PUJ

and

HONOURABLE MR.JUSTICE RAJESH H.SHUKLA

Date : 04/02/2010

ORAL JUDGMENT

(Per : HONOURABLE MR.JUSTICE RAJESH H.SHUKLA)

The present tax appeals have been field by the Commissioner of Central Excise & Customs, Surat-II under sec. 35-G of the Central Excise Act, 1944 proposing to raise the following substantial question of law :

> "Whether in the facts and circumstances of the case, the Tribunal has committed a substantial error of law in reducing the penalty on the respondent from Rs. 2 crores to Rs. 20 lakhs?"

2. Learned Sr. Standing Counsel Mr. R.J. Oza referred to the show-cause notice as well as the orders passed by the Commissioner, Central Excise & Customs, Surat-II s and also the CESTAT in Appeal Nos. 309 to 312 of 2006. He referred to the order passed by the Tribunal dated 8.8.2008 which though has confirmed the order passed by the Commissioner imposing interest and penalty against the firm M/s. L.D. Textile Industries Ltd. has also confirmed the imposition of penalty upon the three appellants. However, the penalty on the three appellants who are directors or managers of the firm M/s. L.D. Textile Industries Ltd is modified from Rs. 2 crores to Rs. 20 lakhs, which is sought to be challenged

in the present appeals mainly on the ground that the order passed by the Tribunal is not a speaking order and no reasons are recorded for modifying or reducing the penalty from Rs. 2 crores to Rs. 20 lakhs on the individual appellants. Learned counsel Mr. Oza submitted that it is a loss to the revenue and without any reason or without recording the reasons as to what has weighed with the Tribunal for such modification of the penalty qua the individuals who are the directors or managers of the firm the penalty has been reduced from Rs. 2 crores to Rs. 20 lakhs which is arbitrary and therefore it requires to be considered in light of the orders passed by the Hon'ble Apex Court as well as the High Court.

3. Learned counsel Mr. Oza for that purpose referred to the order passed by this court in Tax Appeal No. 140 of 2008 and emphasising the observations made therein submitted that it was obligatory for the Tribunal to record the reasons. Learned counsel Mr. Oza has also submitted that this court, while deciding Tax Appeal No. 140 of 2008, has considered the judgments of the Hon'ble Apex Court which have been also quoted and which the learned counsel has emphasised. Therefore, emphasising this observation made by this court and also the observations quoted therein it was submitted that the order cannot be said to be in conformity with the aforesaid guidelines or the observations. He also referred to and relied upon the judgment of this court in SCA No. 22931 of 2005 dated 30.11.2005. Learned counsel Mr. Oza

strenuously submitted that without giving any justification the Tribunal has merely observed, “However, keeping in view the facts and circumstances of the case, we reduce the penalties on each of the three appellants from Rs. 2 crores to Rs. 20 lakhs.” He therefore submitted that this is an order without reasons and therefore liable to be set aside.

4. Learned counsel Mr. Oza submitted that how the penalty is attributed to the firm as well as to the individuals like the directors/managers is not discussed and not even one line is written dealing with this aspect. He therefore submitted that the order without reasons cannot be sustained and the present appeals may be allowed.

5. In support of his submissions he has further emphasised that it has been laid down by catena of judicial pronouncements by the Hon'ble Apex Court also that reasons are required to be recorded and any order without reasons is liable to be set aside even if it is with regard to the penalty. He has referred to and relied upon the judgment of the Hon'ble Apex Court in the case of Tata Engineering & Locomotive Co. Ltd. v. Collector of C. Ex., Pune, reported in 2006 (203) ELT 369 (SC). Similarly, he has referred to and relied upon the judgment of the Apex Court in the case of Commissioner of Central Excise, Lucknow v. Wimco Ltd., 2007 (217) ELT 3 (SC) and has emphasised the observations made therein. He has also

referred to the judgment reported in 2008 (228) ELT 505 (SC) in the case of Commissioner of Central Excise, New Delhi v. GTC Industries Ltd., particularly the observations made in para 5. The learned counsel has also referred to and relied upon the judgment of the Hon'ble Apex Court in the case of Commissioner of Central Excise, Bangalore v. Srikumar Agencies, 2008 (232) ELT 577 (SC). He ahs also referred to the judgment of the Bombay High Court in the case of Commissioner of Central Excise v. Seasons Polymers, reported in 2008 (229) ELT 664 (Bom.) as well as in the case of Commissioner of Central Excise, Kolkata-II v. Shree Raghunath Industries, 2009 (240) ELT 528 (Cal.). He has also referred to and relied upon the judgment of this court in the case of Stadfast Paper Mills v. Dr. Kohli, former Collector of Central Excise, Baroda and ors., 1983 (12) ELT 744 (Guj.). Learned counsel Mr. Oza has also referred to and relied upon the judgment of the Hon'ble Apex Court in the case of Coats Viyella India Ltd. v. Commissioner of Central Excise, reported in 2004 (173) ELT 229 (SC) and pointedly emphasised the observations in para 5 as under :

> “The CEGAT, while dealing with the appeals of the revenue did not specifically refer to the conclusions of the first appellate authority and did not indicate any reason as to why it was of the view that the conclusions were not correct. Least that was required to be done was to indicate reasons for differing with the Collector of Central Excise (Appeals)'s order. CEGAT has power to differ from the view expressed by the first appellate authority. But that is not unbridled power. When a different view is taken, reasons to support such view must be indicated clearly expressing as to why the lower authority's view is wrong. That has not been done in the instant case.”

6. In view of the submissions made by learned counsel Mr. Oza, it is required to be considered whether the impugned order passed by the Tribunal can be said to be without reason and liable to be interfered with.

7. Much emphasis given by learned counsel Mr. Oza with regard to the need for recording reasons while passing the order referring to the catena of judicial pronouncements as recorded hereinabove, is well accepted and there cannot be any quarrel on that aspect. However, it is required to be appreciated that in the facts of the present case, the Tribunal has sustained and confirmed the order passed by the lower authority (Commissioner) and has not differed from it. Therefore, normally, when the higher authority is having a different view, reasons are required to be recorded to justify as to why a different view is taken and the order of the lower authority is not accepted as observed in one of the judgments which has been emphasised and quoted hereinabove referring to the order passed by the Tribunal in that particular case. In the facts of the present case, as can be seen, there is a reasoned order passed by the Tribunal on the merits of the case discussing on the issues involved and therefore it cannot be said that the order passed by the Tribunal is without any reason so far as the merits are concerned. Therefore, the reasons are required to be recorded while considering the matter with regard to the merits or issues involved in it.

8. It is well accepted that the reasons are reflecting the decision making process. The Hon'ble Apex Court in a judgment in the case of *Ran Singh and anr. v. State of Haryana and anr.*, reported in (2008) 4 SCC 70 has observed and has also quoted Lord Denning which reads as under:

> "5. ... Reasons introduce clarity in an order. On plainest consideration of justice, the High Court ought to have set forth its reasons, howsoever brief, in its order indicative of an application of its mind, ... The absence of reasons has rendered the [High Court's judgment] not sustainable...
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> 6. ... Even in respect of administrative orders, Lord Denning, M.R. In *Breen v. Amalgamated Engg. Union* ((1971) 2 QB 175 observed: (All ER p. 1154h) 'The giving of reasons is one of the fundamentals of good administration.' In *Alexander Machinery (Daudley) Ltd. v. Crabtree* [1974 ICR 120] it was observed: 'Failure to give reasons amounts to denial of justice. Reasons are live links between the mind of the decision-taker to the controversy in question and the decision or conclusion arrived at.' Reasons substitute subjectivity by objectivity. The emphasis on recording reasons is that if the decision reveals the 'inscrutable face of the sphinx', it can, by its silence, render it virtually impossible for the courts to perform their appellate function or exercise the power of judicial review in adjudging the validity of the decision. Right to reasons is an indispensable part of a sound judicial system, reasons at least sufficient to indicate an application of mind to the matter before court. Another rationale is that the affected party can know why the decision has gone against him. One of the salutary requirements of natural justice is spelling out reasons for the order made, in other words, a speaking-out. The 'inscrutable face of a sphinx' is ordinarily incongruous with a judicial or quasi-judicial performance."

In other words, there cannot be any dispute with regard to the proposition canvassed by learned counsel Mr. Oza for the need to give reasons for arriving at a conclusion or while differing with the order passed by the lower authority.

9. In the facts of the present case, in the order passed by the Tribunal it cannot be said that no reasons are recorded with regard to the merits or the issues involved in the matter. Further, the Tribunal has sustained and confirmed the order passed by the lower authority and therefore merely on the aspect of penalty where it is modified, when there is no elaborate discussion, can it be said that the order passed by the Tribunal is without any reason or application of mind? It is required to be mentioned that the Tribunal is established under the Act and the Tribunal is having discretion under the Act to impose suitable penalty as can be seen from rule 209A. Chapter XII of the Central Excise Rules, 1944 refers to Penalties and Confiscations. Rule 209A provides for 'Penalty for certain offences'. It reads as under:

> "**209A**. "Any person who acquires possession of, or is in any way concerned in transporting, removing, depositing, keeping, concealing, selling or purchasing, or in any other manner deals with, any excisable goods which he knows or has reason to believe are liable to confiscation under the Act or these rules, shall be liable to a penalty not exceeding three times the value of such goods or five thousand rupees, whichever is greater.

Thus, it provides for discretion that penalty not exceeding three times the value of such goods or five thousand rupees, whichever is greater could be imposed. Therefore, once the discretion is vested with the Tribunal and in exercise of such discretion has, while confirming the oder passed by the lower authority, only modified

the penalty qua the individual directors or managers, can it be said that it is an order without reasons or non-application of mind?

10. The judgments which have been referred to and relied upon as stated above by the learned counsel though emphasise on the aspect of the need for recording of reasons where in each case the facts were different. In such cases the either Tribunal had, while differing with the view taken by the lower authority, not recorded the reasons or had not discussed with regard to arriving at a different conclusion on the merits of the case or the issues involved and the observations have been made. Therefore, all these judgments will not be of any assistance to the appellant.

11. Another facet of the argument canvassed by learned counsel Mr. Oza is that the order of the Tribunal has not reflected the finding in the original order or the order passed by the lower authority, i.e. the Commissioner is also misconceived as the Tribunal has sustained and upheld the order passed by the lower authority and has also confirmed the order passed by the Commissioner and in fact has clearly observed,

> “17. We further note that Commissioner has come to a categorical finding that scrutiny of the various seized documents like invoices, LRs, delivery challans etc. clearly revealed that the goods, though on paper were shown as having been sold to various intermediaries and ultimately to

M/s. L.D. Textile Inds. Ltd., the same were removed directly from the factory of M/s. MPPL and arrived in the appellant's factory on the same very date and no processing was done on the goods. The same also arrived in the appellant's factory in the original packing condition and without any loss of weight. This fact also lends support to the Revenue's case that the goods which arrived at the appellant's factory was not waste but good quality fibre. Further the fact of raising of debit note covering the differential price of waste and fibres also strengthens the Revenue's case that such debit notes were, in fact, not for the processes undertaken by the intermediaries (as already observed the goods arrived on the same date and no process was undertaken) but with a purpose to cover the price difference between waste and fibre.

18. As regards limitation, appellants have strongly contended that samples wer5e drawn in 1994 and the show cause notice was issued in 1996 thus invoking the longer period, which was not available to the Revenue. We do not find any merit in the above contention inasmuch as the drawing of samples and getting the same tested was the starting point of investigations and it is as a result of subsequent investigations spread over a long period that the Revenue came across the evidences to support his case. In any case, the good quality fibre having been used by the appellant by describing the same as waste definitely amounts to suppression and mis-statement with an intention to evade duty, thus justifying the invocation of longer period of limitation. We accordingly reject the said plea.

19. In view of the foregoing, we confirm the duty along with confirmation of interest and imposition of penalty of identical amount against M/s. L.D. Textile Industries Ltd. However, the

confiscation of plant and machinery, land and building etc. is set aside."

12. It has confirmed the imposition of the duty and penalty passed by the Commissioner and thereby has confirmed the duty amounting to Rs. 7,90,02,082.65 on the firm M/s. L.D. Textile Industries Ltd. and has also confirmed an equal amount of penalty on the firm. It has further confirmed the order regarding the confiscation of plant and machinery or payment of fine of Rs. 2 crores. However, the latter part, i.e., clause (iv) to (vi) in the order passed by the Commissioner where the penalty of Rs. 2 crores has been imposed upon the Chief Executive Mr. Yogesh Mehra, Mr. S.M. Vij, General Manager (Works) and Mr. S.M. Pareekh, General Manager (Commercial), it is modified to Rs. 20 lakhs each, which is the bone of contention in the present appeal. Penalty on the individuals have been imposed under rule 290A of Central Excise Rules and as discussed above it gives discretion to the authorities and the Tribunal.

13. Therefore, the moot question is whether it can be said that there is any substantial question of law involved, particularly when the order of the Tribunal cannot be said to be non-speaking order when it deals with the merits of the case and the issue involved. Further, it is not in dispute that the discretion is vested in the Tribunal and if it is exercised in a reasonable manner, can it be said to be arbitrary or perverse? Moreover, the Tribunal has not

differed with the order passed by the lower authority and has sustained and confirmed the order of the lower authority. Normally, the reasons are required to be recorded as observed in the judicial pronouncements referred to by learned counsel Mr. Oza for the appellant. When the authority is differing with the views of the lower authority, it is required to record the reasons why it is not accepting or differing with the views of the lower authority which again reflect about the decision making process.

14. It is required to be mentioned that there is no provision in the Rules or even administrative instruction which require the Tribunal to record reasons while imposing the penalty or for modification thereof. It is also required to be noted that while imposing penalty or sentence, as the case may be, in departmental inquiry or in a criminal trial, specific provisions are made and therefore after hearing suitable penalty or sentence is awarded, which again require to mention about the circumstances or the mitigating aspects considered while imposing the penalty or sentence. However, at the same time, the discretion is vested with the presiding officer (judicial) who will impose suitable penalty or the sentence. In the facts of the present case also, as discussed above, the Tribunal established under the Act is having such discretion as referred to hereinabove and therefore while sustaining the order in toto, as regards the penalty on the individuals, who are the officers of the company, is modified considering the fact that they are

salaried employees of the firm and still considering about the role played and their involvement substantial penalty has been imposed to the tune of Rs. 20 lakhs on each individual. It cannot be said that the order is not justified merely because it has modified the penalty on individual from Rs. 2 crores to Rs. 20 lakhs. The mitigating circumstances or a word about this aspect reflected in the order of the Tribunal could be considered as desirable that since the individuals on whom the penalties are imposed are salaried employees may be of higher echelons of the management and still considering their involvement they are imposed with suitable penalty but merely because there is no such thing reflecting in the order it would not make it unjustifiable.

15. Even considering the doctrine of proportionality, though it cannot be strictly applied in such cases, one has to consider that it has to be commensurate with the nature of the offence or the wrong done and imposing the penalty of Rs. 20 lakhs on an individual cannot be said to be erroneous.

16. In the circumstances, there is no merit in the submissions made by learned counsel Mr. Oza and in view of the concurrent finding of facts as discussed above, no substantial question of law can be said to have been raised and the present appeals, therefore, deserve to be dismissed.

The appeals are accordingly dismissed *in limine*.

(K.A. Puj, J.)

(Rajesh H. Shukla, J.)

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