R

IN THE HIGH COURT OF KARNATAKA, BENGALURU

DATED THIS THE 14th DAY OF JUNE 2018

PRESENT

THE HON'BLE Dr.JUSTICE VINEET KOTHARI

AND

THE HON'BLE Mrs.JUSTICE S.SUJATHA

C.E.A. Nos.6/2018 & 7-10/2018

BETWEEN:

1. M/S. TRISHUL ARECANUT GRANUELS
PRIVATE LIMITED
BHEEMASAMUDRA POST
CHITRADURGA DISTRICT-577520
REP. BY THE DIRECTOR
SRI. H.S. NATARAJ
S/O LATE SHRI GURUSHANTHAPPA
AGED ABOUT 52 YEARS.

2. SRI. H.S. NATARAJ
S/O LATE SHRI GURUSHANTHAPPA
AGED ABOUT 52 YEARS
BHEEMASAMUDRA POST
CHITRADURGA DISTRICT-577520.

...APPELLANTS

(By Ms. VANI H, ADV.)

AND:

COMMISSIONER OF CENTRAL TAX
BANGALORE NORTH WEST COMMISSIONERATE
ITMC COMPLEX, SHIVAJINAGAR
BANGALORE-560001
(PREVIOUSLY COMMISSIONER OF
CENTRAL EXCISE, BANGALORE-II
COMMISSIONERATE, BANGALORE)

...RESPONDENT

(By Mr. K.V. ARAVIND, ADV.)

THESE C.E.As. ARE FILED UNDER SECTION 35G OF THE CENTRAL EXCISE ACT, PRAYING TO FORMULATE THE SUBSTANTIAL QUESTION OF LAW STATED ABOVE. ALLOW THE APPEAL AND SET-ASIDE THE IMPUGNED ORDER OF THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL PASSED IN FINAL ORDER No.21927-21931/2017 DATED 30-08-2017 & ETC.

THESE C.E.As. COMING ON FOR ADMISSION, THIS DAY ***Dr. VINEET KOTHARI J***. DELIVERED THE FOLLOWING:-

JUDGMENT

Ms. Vani H, Adv. for Appellants - **Assessees**
Mr. K.V. Aravind, for Respondent - **Revenue**

1. The **Assessee-M/s.Trishul Arecanut Granuels Pvt. Ltd.**, a manufacturer of 'Gutkha' and its Director **Mr.H.S.Nataraj** have filed these appeals in this Court against the Commissioner of Central Excise, Bangalore-II, **u/s.35G** of the **Central Excise Act, 1944,** purportedly raising certain substantial questions of law and being aggrieved by the order passed by the learned **CESTAT** dated **30.08.2017** in pursuance of a remand order passed by this Court in the earlier round of litigation on **25.02.2016** disposing of the earlier appeals filed by the assessee vide ***C.E.A.No.32/2012 & Connected matters (Mr.H.S.Nataraj & M/s.Trishul***

Arecanut Granuels Pvt. Ltd., vs. The Commissioner of Central Excise), by which, the co-ordinate Bench of this Court, in which, one of us **(Hon'ble Mrs.Justice S.Sujatha)** was also a party, remanded the case back of the CESTAT for the limited purpose of looking into two aspects raised before this Court in the earlier round of litigation, namely, availability of **S.3A** of the **Central Excise Act, 1944**, for the period of assessment **2003-04** & **2004-05** which provides for, **"Charge of Excise duty on the basis of capacity of production in respect of notified goods",** since provision of **S.3A** were brought on the Statute Book **w.e.f.10.05.2008** and another aspect relating to whether the goods in question, namely, **"Gutkha**", were notified for the purpose of S.3A or not?.

2. The relevant directions of this Court in the earlier judgment as aforesaid are quoted below for ready reference:-

"13. It is by now well settled that all taxing statutes are to be strictly interpreted. Further in normal circumstance, when there is conscious omission on the part of the Parliament for charging the excise duty based on the production capacity by virtue of Section 3-A, it will have the repercussions for such a course to be made available to the assessing authority. ***Further, even as per Section 3-A, the goods are required to be notified for the purpose of charging excise duty on the basis of production capacity****. As such, it is a pure question of law* ***as to whether the recourse under Section 3-A under these circumstances, is available to the Assessing Authority for levy of Excise duty on the basis of production capacity or not.*** *However, it appears from the order of the Tribunal that,* ***neither said contention was raised nor considered by the Tribunal in the impugned order****. Had it been a mixed question of law and fact, the matter may stand on a different footing and different considerations but, when it is a pure question of law for available recourse under Section 3-A, we find that such a contention is available to the party aggrieved by the order of the Tribunal. Further, as observed by us*

hereinabove, even if Section 3-A is to apply, then also, a further scrutiny may be required to be undertaken as to whether, for the goods in question, the notification was issued or not. It is only after the two aspects of applicability of Section 3-A and the availability of the notification for production of Gutka, the matter can be considered for finalization of excise duty by the Revenue. As, neither there is reference to such contention nor there is discussion by the Tribunal on the aforesaid aspects which are vital aspects for charging of excise duty, we find that it would be just and proper to remand the matter to the Tribunal for appropriate consideration in accordance with law.

14. Apart from the above aspects, the learned counsel appearing for the appellant has raised two contentions that the figure mentioned in the second show cause notice of demand of duty is not backed by the reasons supplied in support of said show-cause notice since the said second show-cause notice dated 31.1.2007 vide para 7(a) itself specified in detail in the statement of facts enclosed to the notice whereas, learned counsel appearing for the Revenue submitted that the said contention was also not raised before the Tribunal nor any specific discussion is found from

the order of the Tribunal. He submitted that if the said contention is not raised before the Tribunal, appellant-assessee cannot be permitted to raise the said contention in the present appeal which is limited to substantial questions of law.

15. As we notice, it is true that such a contention specifically to that extent is unavailable in the order of the Tribunal. However, the contentions so raised is not a mere question of fact but, is a mixed question of law and facts, if the ultimate amount quantified in the show-cause notice goes beyond the reasons recorded or reasons appended to the show-cause notice, and thereafter at the time of confirmation of the demand, the said aspect is not considered. It may fall in the arena of observance of not only the principles of natural justice but, may also fall in the arena of self-contradictory stand resulting into ultimate no sufficient opportunity to meet with the same. When the question arise for observation of the principles of natural justice, it would be a question of law though may be it is based on certain factual premise.

16. We would have considered the matter strictly as to whether such a contention should be examined by this Court, when the contention was not so raised before the Tribunal. However,

considering the peculiar circumstances that, as referred to herein above, ***on the aspects of availability of Section 3-A and on the aspects as to whether goods were so notified for the purpose of charging excise duty,*** *when we have found it proper to remand the matter to the Tribunal, we find that* ***it would be just and proper to allow the party to raise the contention even on the aspects of the show-cause notice*** *as referred to hereinabove before the Tribunal and the Tribunal shall examine the same in accordance with law.*

17. In view of the aforesaid observation and discussion, we find that, ***on the aforesaid two limited aspects, the matter deserves to be remanded to the Tribunal.***

18. Hence, the impugned order passed by the Tribunal is set aside with a further direction that all Appeal Nos. 69, 70, 559, 825 and 826/08 shall stand restored to the Tribunal for its consideration in accordance with law and in the light of the observations made by this Court in the present Judgment.

It is observed that before the Tribunal, ***both the sides shall be at the liberty to raise all contentions as may be available in law and the Tribunal, after hearing both sides, shall***

pass a fresh order *as early as possible preferably within a period of six months from the receipt of certified copy of the order of this Court.*

It is clarified that the Tribunal shall examine both the aspects *which are referred to by this Court in the Judgment but, the Tribunal is at liberty to take independent view of the matter without being influenced by any observations made by this Court in the present Judgment on the aforesaid two aspects.*

The appeals are allowed to the aforesaid extent".

3. Upon remand, the learned CESTAT has passed the impugned order dated **30.08.2017** in ***CEA Nos.69, 70, 554, 825-826/2008 (M/s.Trishul Arecanut Granules Pvt. Ltd., vs. Commissioner of Central Excise, Bangalore)*** and the learned Tribunal on both the aforesaid aspects of the matter, for which the matter was remanded back to the Tribunal held on first aspect that for the period in question, for which, the evasion of excise duty was liable to be determined in the hands of the assessee for the period **2003-04 & 2004-05,** the

provisions of **S.3A** were not available, as it was inserted only on **10.05.2008** and there was neither any reference to the said provisions of **S.3A** in the show-cause notice or adjudication order passed by the authority concerned and therefore, the duty demand was not raised on the basis of **S.3A** for the period in dispute. On second aspect, it found that 'Gutkha' were notified goods.

On the yet third aspect, for which this Court gave liberty to the assessee to raise before **CESTAT** on that aspect of the matter namely, whether the ultimate amount of evaded duty quantified could go beyond the quantification done in the Show Cause Notice issued to the assessee or not, the learned Tribunal held in favour of the assessee, to the effect that such a demand could not go beyond the show cause notice and therefore, the excess demand raised by the Adjudicating Authority beyond the show cause notice was struck off and finally,

the demand as raised to the extent of show cause notice was upheld by the learned Tribunal.

4. The learned Tribunal noted in the impugned order in **para-16** that though the Show Cause Notice was issued to the assessee raising a demand of evaded duty to the extent of **Rs.4,29,95,446/-** computed on the basis of production capacity and unaccounted cotton bags purchased for packing of 'Gutkha', but since the computation of evasion of duty was worked out only to the extent of **Rs.2,82,06,656/-,** in the Show Cause Notice, the demand of evaded duty was finally restricted to the aforesaid amount of **Rs.2,82,06,656/-.**

5. The incidental penalties imposed in the earlier round of litigation was also reiterated by the learned Tribunal in the impugned order.

6. Being aggrieved by the same, the assessees have again preferred this appeal before this Court.

7. The learned counsel for the appellants-assessees Ms.Vani H has raised the following contentions before this Court:-

(i) That while remanding the case back to the learned Tribunal, this Court in the earlier order dated **25.02.2016** for two limited aspects as noted specifically in **para-17** of the order but in **para-18** it has also given liberty to raise the contentions as could be available in law and the learned Tribunal shall pass the fresh order as early as possible within a period of six months.

(ii) The learned counsel urged before us that the liberty was given to raise all contentions and that would entitle to the appellants-assessees to raise other issues also besides the aforesaid two aspects, for which the aforesaid remand was made by the High Court.

8. We are not impressed with the said argument. The said observations made by the earlier Bench, in which, one of us was a party, has to be read contextually and the aforesaid quoted portion of the

order would clearly indicate that the remand to the Tribunal was made for a specific purpose and the limited to the aspects to be examined by the learned Tribunal as quoted above, namely, the availability of **S.3A** of the Act and goods were notified or not and whether the demand could be raised beyond show cause notice or not?

9. The contentions left open for the assessees were required to be raised were with regard to these three aspects only and not all the issues other than the aforesaid three aspects were allowed to be raised again in that remand. The said observation was qualified and classified by this Court in the immediately succeeding sub-para of **para-18** itself, where this Court classified that the learned Tribunal shall examine both the aspects which are remanded by this Court.

10. Therefore, the observation which is sought to be relied upon by the learned counsel for the appellants,

as if all issues were set at large to be argued again by the assessee is a misconceived argument and the same cannot be accepted. The same is liable to be rejected and accordingly it is rejected.

11. That upon remand on the reconsideration by the learned Tribunal, the finding of the learned Tribunal that since the provisions of **S.3A** of the Act which permitted the Central Government to notify certain goods and charge Excise duty on the basis of capacity of production in respect of such notified goods, was brought on the Statute Book only on **10.05.2008** and was therefore not available as such to be invoked for the purpose of demand of allegedly evaded excess duty and therefore, the same was not referred either in the show cause notice or in the adjudication order, is a finding which is without any fault.

12. The fact remains that the said provision was brought on the Statute Book only **w.e.f 10.05.2008** and

therefore, there was no question of the authority concerned referring to the said provision of **S.3A** on an earlier occasion prior to **10.05.2008**. But, nonetheless, to estimate the extent of evasion of duty, there was no prohibition in applying the criteria of either production capacity or other evidence gathered by the Revenue for estimating the said evasion of duty even for such prior period.

13. The facts in the present case would reveal as discussed by the learned Tribunal in the earlier round of litigation as well as again reaffirmed in the second round by the learned Tribunal that the authorities below have not only taken into account the production capacity of the assessee, who manufactures "Gutkha" on basis of clandestine purchase of lime but also they have relied upon the clandestine purchase of cotton bags used as packing material for clandestine removal of the manufactured goods by the assessee. By way of comparison, they have computed evasion of duty both

on the basis of production capacity as well as clandestine purchases of cotton bags used as packing materials on the basis of statements recorded of such supplier of cotton bags namely, **M/s.Divya Enterprises** represented by its Proprietor - **Mr.Nemichand Agarwal.**

14. We do not find any merit in the contention raised by the learned counsel for the appellant-assessee that in the absence of **S.3A** on the Statute Book prior to 10.05.2008, the criteria of production capacity could not have been adopted for the purpose of estimating the evasion of Excise duty by the Adjudicating Authority. Such an estimation of clandestine removal of goods could only be based on an estimated production capacity or clandestine removal of such manufactured goods in the packing materials and both these criteria and yardsticks are usually adopted while making best judgment assessment under Excuse law or Sales Tax laws. The levy of excise duty is based on taxable event of manufacture, therefore estimate of production can be

based on capacity to produce, computed with reference to quantum of power consumption, labour employed, raw material consumed etc., and clandestine removal can be estimated and computed with reference to purchase of packing materials. Once the premise of evading Excise duty is determined and adopted by the Adjudicating Authority and a show cause notice is served upon the assessees in this regard, it essentially remains the exercise of a best judgment of the Adjudicating Authority based on relevant materials and evidence.

15. In the present case, computing such evaded duty on the basis of production capacity and unaccounted purchases of packing material in the form of cotton bags are the two parameters adopted by the Adjudicating Authority in the process of best judgment assessment, which cannot be said to be faulted or without any foundation.

16. As a matter of fact, **S.3A** of the Act was brought on the Statute Book just to crystallize and fortify such assessment procedure for the notified goods, for which such estimation of the evaded duty could not be otherwise made.

17. The principles enumerated in the provision of **S.3A** could not therefore be excluded by necessary implication for the period prior to **10.05.2008** as well and therefore, finding of facts arrived at by the Adjudicating Authority and the learned Tribunal which reduced the demand of evaded duty to fall in line with the extent of evasion of duty as indicated in the show cause notice remains a finding of fact and does not give rise to any substantial question of law for consideration by this Court in terms of **S.35G** of the Act.

18. The said findings of facts on estimated evasion of duty cannot be said to be perverse in any manner, giving rise to any question of law even, much less the

substantial question of law which is the essential requirement of invoking **S.35G** of the Act.

19. We are therefore satisfied that the learned Tribunal, upon remand by this Court has rightly examined the issues remanded to it and has rightly upheld the findings of facts with regard to show cause notice and estimation of the evasion of duty in the hands of the appellants-assessees.

20. The appeals filed by assessees are devoid of merit and are liable to be dismissed and accordingly, they are dismissed. No costs.

Sd/-
JUDGE

Sd/-
JUDGE

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