

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

R/TAX APPEAL NO. 82 of 2016

With

R/TAX APPEAL NO. 78 of 2016

With

R/TAX APPEAL NO. 79 of 2016

With

R/TAX APPEAL NO. 83 of 2016

With

R/TAX APPEAL NO. 84 of 2016

With

R/TAX APPEAL NO. 85 of 2016

With

R/TAX APPEAL NO. 86 of 2016

With

R/TAX APPEAL NO. 87 of 2016

With

R/TAX APPEAL NO. 88 of 2016

With

R/TAX APPEAL NO. 89 of 2016

With

R/TAX APPEAL NO. 90 of 2016

With

R/TAX APPEAL NO. 91 of 2016

With

R/TAX APPEAL NO. 94 of 2016

With

R/TAX APPEAL NO. 95 of 2016

FOR APPROVAL AND SIGNATURE:

HONOURABLE MR.JUSTICE AKIL KURESHI

and

HONOURABLE MR.JUSTICE B.N. KARIA

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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 or any order made thereunder ?	
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THE PRINCIPAL COMMISSIONER OF INCOME TAX RAJKOT-3
Versus
VRUNDAVAN CERAMICS PVT.LTD.

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Appearance:

MRS MAUNA M BHATT(174) for the PETITIONER(s) No. 1
RULE SERVED(64) for the RESPONDENT(s) No. 1

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CORAM: **HONOURABLE MR.JUSTICE AKIL KURESHI**
and
HONOURABLE MR.JUSTICE B.N. KARIA

Date : 25/04/2018

ORAL JUDGMENT

(PER : HONOURABLE MR.JUSTICE AKIL KURESHI)

1. These Tax Appeals involve identical questions of law arising out of similar factual parameters. Tax Appeal No. 78 of 2016 is treated as a lead mater. The respondent-assessee- M/s. Jaysun Ceramics is a partnership firm and is engaged in manufacture of ceramic tiles and other similar products. For the assessment year 2008-09, the assessee had filed the return of income showing total income of Rs. 1.09 crores (rounded off). Large number of ceramic units in the region were subjected to central excise raid which resulted into issuance of show-cause notices by the Adjudicating authorities under the Central Excise Act. These show-cause notices were bulky containing voluminous materials. However, from the record and from the learned advocates appearing for the parties, the gist of the stand of the Central Excise department in such show

cause notices appears to be that this assessee and other similar manufacturing units were clearing their excisable goods on a declared Retail Sale Price ['RSP' for short] on which, after adjusting the drawback at the prescribed rate, they would be required to pay excise duty. However, it was found that ultimately, such goods were sold to the consumer at a much higher price. In the process, there was tampering of printed RSP on the boxes and higher Maximum Retail Price ['MRP' for short] printed. According to the Excise Department, this excess sale price was diverted back to the manufacturer-seller by its dealer after adjustment of cost and may be a small commission. According to the show-cause notice, the pay back was through local aangadias or through bank accounts opened by the shroffs in different fictitious names. In case of the present assessee, according to the excise notice, the value of the suppressed sale came to Rs. 4.45 crores.

2. On the basis of such materials collected by the Excise Department, the Income Tax Authorities initiated steps for taxing the assessee for such unaccounted income. The Assessing Officer took the assessee's return under scrutiny. He supplied the copy of the show-cause notice to the assessee and called upon him to respond to the materials collected therein. The assessee's response in brief was that the contents of the show-cause notice issued by the Excise department were not true and correct. It merely contains statements collected behind the back of the assessee. Such statements are not yet

verified. The makers of the statements have not been offered for cross-examination. It was also pointed out that the show-cause notice is yet to be adjudicated by the Excise Authorities. It was contended that even if the goods are ultimately sold at a price higher than the printed RSP, there cannot be any presumption that the assessee received the marginal price value.

3. The Assessing Officer was not convinced by such explanations. In the order of assessment, he referred to the contents of the show-cause notice at considerable length. He relied on the statements of the witnesses cited in such show cause notices. He noted, the manner of routing the excess cash sale price to the assessee. On such basis, he rejected the assessee's books of accounts. He estimated assessee's profit margin @ 25% of the suppressed sales. He added a sum of Rs. 1.11 crores (rounded off) being $\frac{1}{4}^{\text{th}}$ of Rs. 1.45 crores (rounded off) to the total income of the assessee.
4. The assessee carried the matter in appeal before the CIT(A). CIT(A) substantially backed the Assessing Officer. He did not accept the assessee's contention that no addition at all could have been made. He, however gave partial relief to the assessee by reducing profit margin to 9% as compared to 25% projected by the Assessing Officer. Thereupon, both sides went in appeal. The Revenue as well as the assessee filed cross-appeals before the Tribunal. The Tribunal allowed the

assessee's appeal and rejected that of the Revenue. Thereupon, the Revenue has filed two separate appeals before this Court concerning the present respondent-assessee. This is a scenario in all cases.

5. Earlier, these appeals were admitted on wrong questions and also once disposed of along with other group matters concerning the validity of the reassessment proceedings. Such orders were recalled and appeals were revived. For convenience, we may adopt the following question of law for the purpose of all appeals:

“Whether in the facts and circumstances of case, the Income Tax Appellate Tribunal was right in law in rejecting the Revenue's appeals and allowing the appeals of the assessee's and thereby totally deleting the additions made by the Assessing Officer and partially retained by the CIT(A)?”

6. Having heard learned advocates for the parties at considerable length at the outset, we may straightaway agree with the suggestion of the counsel for the Revenue that the present group of cases do not fall in the same category as the judgement of this Court in case of **Futura Ceramics (petitioner) Ltd v. State of Gujarat** reported in [2013] 40 taxmann.com 404 (Gujarat). It was the case in which, the petitioner before the High Court was a registered dealer under the Gujarat Value Added Tax Act and was liable to pay tax on the basis of its turnover. The petitioner's return for the

financial year 2006-07 was scrutinized by the Assistant Commissioner of Commercial Tax. The assessee was served with the show-cause notice by the said authority indicating that he has reason to believe that taxable turnover was suppressed. This was on the basis of a show-cause notice issued by the Excise department pursuant to the raid indicating that the petitioner had suppressed sales to the tune of Rs. 5.25 crores and thereby evaded tax duty to the extent of 73.55 lacs. The Assistant Commissioner of Commercial Tax therefore, *prima facie* held a belief that the assessee's sale of Rs. 5.97 crores (i.e. the suppressed sale of 5.25 crores coupled with excise duty element of 73.55 lacs) had escaped assessment. He accordingly, framed the assessment after rejecting the petitioner's objections. Such assessment order was challenged by the petitioner before the High Court on the ground that the Assistant Commissioner of Commercial Tax had proceeded merely on the show-cause notice issued by the Excise Department without any further verification. The Court noticed that the entire order of reassessment proceeded on the show-cause notice issued by the Excise department without any further material being brought on record. The Court held that merely because the Excise department issued such a notice, it cannot be a ground to presume that there was evasion of excise duty further implying evasion of value added tax. It was noticed that the show-cause notice issued by the Excise department had not yet culminated into final order against the petitioner and a piquant situation would arise if ultimately,

such show-cause notice were to be dropped in favour of the petitioner. On this ground, the Court quashed the order of reassessment.

7. In the present case, the Assessing Officer has not proceeded on the basis of show-cause notice taking the proposals contained in such show-cause notice as having achieved finality. He has put the assessee to notice with respect to the contents of such show-cause notice issued by the Excise department and also elicited assessee's response to the same. Whether this was sufficient to enable him to frame assessment is a question, which we will answer a while later.
8. Before proceeding further, we may discard the contention of the counsel for the assessee that since the excise proceedings had not yet been finalized, the Assessing Officer could not have passed the final order of assessment. This contention would have multiple objections from us. Firstly, as is well-known, the adjudication proceedings under the Central Excise Act do not come with time barring provisions unlike as in the Income Tax Act. In fact, the Adjudicating authorities, under the Central Excise Act, enjoy much wider time period even for issuance of show-cause notice in case of the alleged non-payment or short payment of duty is for any reason of fraud or collusion or willful misstatement or suppression of facts or contravention of the provisions of the Act with intent to evade payment of duty.

9. Under the circumstances, the Assessing Officer cannot be expected to defer completion of assessment awaiting final order of adjudication in excise proceedings at the risk of his assessment getting time barred. Even otherwise, in a given case, the material that may be brought on record in excise proceedings may be different from that which may form part of the assessment proceedings though the both may, to some extent, be common.

10. Having thus cleared the peripheral issues, we may examine the central question viz. did the Assessing Officer have sufficient material at his command to believe evasion of tax? We have noticed the broad *modus operandi* stated to have been adopted by the assessee as per the excise show-cause notices. Admittedly, these show-cause notices are only at such stage without in any of these cases the final orders of adjudication have been passed by the Excise authorities. These show-cause notices thus merely present the material collected by the Excise department suggesting the view of the department that this is a case of large scale excise evasion. Before final order levying excise duty with interest and penalty can be passed, these facts have to be established through *by parte* proceedings. Till then, it only remains in the realm of the stand of the department which is yet to be tested.

11. In addition to confronting the assessee with the contents of the show-cause notice issued by the Excise department, the

Assessing Officer has done little else. He of course called upon the assessee to respond to the allegations contained in the show-cause notice, to the statements and materials accompanying such show-cause notice. As noted, the assessee gave a brief reply denying the allegations and pointing out that the charges are yet to be proved. If the Assessing Officer thereafter wanted to make additions on the basis of such materials, the same had to be brought on record. By merely producing the copies of the statements of the witnesses accompanying the show-cause notices, such statements and the veracity thereof does not get automatically established. The Assessing Officer merely cosmetically gave an opportunity to the assessee to meet with such allegations, virtually, shifting the burden of proving the evasion of duty that had taken place on the assessee. We have perused the entire order of assessment. There is no independent material brought on record by the Assessing Officer other than those which were already collected by the Excise department and which, as noted earlier, are yet to be verified.

12. Counsel for the assessee drew our attention to a judgement of Customs, Excise and Service Tax Appellate Tribunal in which, the order of adjudication passed in case of one of the ceramic units (not an assessee before us) by the Adjudicating authority came to be set aside. However, for the following reasons we do not wish to place any reliance on this judgement :

Firstly, the excise show-cause notices in case of the present assesseees are yet to be adjudicated. What would be the material on record during such proceedings is not possible for us to foresee.

Secondly, the Tribunal has mainly proceeded on the basis of absence of section 4A of the Central Excise Act at the relevant time which, in the opinion of the Tribunal, alone could have permitted the department to substitute the sale price by the transaction value of the goods. Such is not the case in the present group of cases. We would, therefore, be well advised to clear such controversy.

13. When we find that the Assessing Officer did not have the basis for making additions, the question of percentage of the sales at which stage additions should be made would become redundant.

14. In the result, question is decided against the Revenue. All Tax Appeals are dismissed.

(AKIL KURESHI, J)

(B.N. KARIA, J)

JYOTI V. JANI