

Income-tax additions merely on basis of a show-cause notice issued by Excise dept. was unjustified : HC

Summary – The High Court of Gujarat in a recent case of Vrundavan Ceramics (P.) Ltd., (the Assessee) held that where additions on account of suppressed sales were solely based on information received by Assessing Officer from Central Excise department without bringing any independent material on record to justify same, additions were unjustified

Facts

- The assessee was a partnership firm and was engaged in manufacture of ceramic tiles and other similar products. 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. In such show cause notices it appeared that instant assessee and other similar manufacturing units were clearing their excisable goods on a declared Retail Sale Price 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 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 might 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. According to the excise notice, in case of the instant assessee, the value of the suppressed sale came to Rs. 4.45 crores.
- 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. 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 account. He estimated assessee's profit margin at the rate of 25 per cent of the suppressed sales and he added a sum to the total income of the assessee.
- On appeal, the Commissioner (Appeals) gave partial relief to the assessee by reducing profit margin to 9 per cent as compared to 25 per cent projected by the Assessing Officer.
- On further appeal, the Tribunal deleted the entire additions made by the revenue.
- On revenue's appeal to High Court:

Held

- 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.

- Before proceeding further, one may discard the contention of 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. 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 wilful misstatement or suppression of facts or contravention of the provisions of the Act with intent to evade payment of duty.
- 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.
- Having thus cleared the peripheral issues, one may examine the central question *viz.* did the Assessing Officer have sufficient material at his command to believe evasion of tax? The broad *modus operandi* stated to have been adopted by the assessee as per the excise show cause notices. Admittedly, these show cause notices were 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 was 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.
- 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 ofcourse 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 were 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. One has perused the entire order of assessment. There was 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.

- When it is found 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.