IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 18.12.2015

CORAM:

THE HONOURABLE MR.JUSTICE M.JAICHANDREN
AND
THE HONOURABLE MRS.JUSTICE S.VIMALA

Civil Miscellaneous Appeal Nos.2586 and 2230 of 2015

M/s.Roots Multiclean Ltd.,
Kovilpalayam, Pollachi Taluk,
Coimbatore – 641 016. ... Appellant in both CMAs

Vs.

1. The Customs Excise and
Service Tax Appellate Tribunal,
Shastri Bhavan Annex,
Chennai.
2. The Commissioner of Central
Excise, 6/7, ATD Street,
Race Course Road,
Coimbatore ... Respondents in both CMAs

Civil Miscellaneous Appeal No.2586 of 2015 filed under Section 35G of Central Excise Act, 1944, against the final order No.40382 of 2014,(Appeal No.E/42129/2013) dated 09.07.2014, passed by the first respondent.

Civil Miscellaneous Appeal No.2230 of 2015 filed under Section 35G of Central Excise Act, 1944, against the Miscellaneous Order No.40697 of 2015, in E. No.42129/13 dated 07.05.2015, passed by the first respondent.

For Appellant in both CMAs : Mr. K.Jayachandran
For Respondents in both CMAs : Mr. A.P.Srinivas, Senior Standing Counsel

J U D G M E N T
(Judgment of the Court was delivered by S.Vimala, J.)

Civil Miscellaneous Appeal No.2586 of 2015 has been filed against Final order No.40382 of 2014, dated 09.07.2014, dismissing the appeal under Section 35B (1) of the Central Excise Act, 1944 (hereinafter will be referred to as "the Act"), passed by the first respondent. Civil Miscellaneous Appeal No.2230 of 2015 has been filed against the Miscellaneous Order No.40697 of 2015, dated 07.05.2015, dimissing the Application for Rectification of Mistake, passed by the first respondent.

Facts in brief:-

2. The appellant / assessee is engaged in the manufacture of 'floor cleaning machines and parts thereof', which are excisable commodities, possessing valid Central Excise Registration. The appellant manufactured and cleared their final products, through dual methods, i.e., directly to the customers at factory gate sale or (b) to depot sales, on stock transfer basis, to their depots, situated in various parts of the country.

2.1. While removing the goods to their depots, the appellant adopted a list price, for payment of duty, at the time of removal from the factory to their depots. The appellant, after selling the goods at depots, calculated the differential duty, based on the value of the goods sold in the respective depots and paid the differential duty.

2.2. The appellant, while calculating the differential duty, based on the depot prices, adjusted the excess payment against the short payment made by them at the time of clearance from their factory and paid the differential duty, if any.

2.3. The claim of the Revenue was that the appellant ought to have discharged the duty liability on the goods sold from the depots / branches, in accordance with the provisions of Rule 7 of the Central Excise Valuation (Determination of Price of Excisable Goods) Rules, 2000, read with Section 4 (1) (b) of the Act and that the appellant ought not to have adopted the list price at factory gate sale for the payment of Central Excise duty. Claiming the duty on this basis, the Department issued 17 show cause notices, covering various periods, proposing to demand differential duty. Out of 17 notices, in 15 cases, the adjudicating authority confirmed the proposal and the appeals before the first appellate authority, namely, the Commissioner of Central Excise, were also dismissed.

2.4. On a further appeal, the Tribunal allowed the appeal, but remanded the matter to the original adjudicating authority, by the order, dated 02.03.2011. Based on this order of the Tribunal, (in the remaining two cases) the appeals pending before the first appellate authority were allowed and the appeals were also remanded to the adjudicating authority, in terms of the remand order of the Tribunal, dated 02.03.2011. There were two show cause notices, dated 30.09.2009 and 02.04.2009, pending adjudication before the original authority, viz., the Assistant Commissioner of Central Excise.

2.5. The Assistant Commissioner of Central Excise took up both the remanded cases as well as the show cause notices for adjudication. The original authority, by the denovo order, dated 21.01.2013, demanded a sum of Rs.22,515/- as differential duty, which included the penalty of Rs.5,000/-. The claim of the appellant was that the appellant had paid a sum of Rs.30,58,686/- as excess.

2.6. Therefore, the appellant filed an appeal before the Commissioner of Central Excise and the appeal got rejected. The appellant filed a further appeal before the first respondent / Tribunal and the Tribunal rejected the appeal under Section 35B (1) of the Act, on the ground that the appeal is liable to be rejected when the valuation is below Rupees Two Lakhs and as the demand in this case is only Rs.22,515/-, the appeal is to be dismissed.

2.7. Challenging this final order, (Final Order No.40382 of 2014) dated 09.07.2014, C.M.A.No.2586 of 2015 has been filed, raising the following substantial questions of law:-

> "A. Whether in the facts and circumstances of the case, the Tribunal can reject the appeal under Section 35B of the Central Excise Act, when one of the issue involved in the appeal relate to valuation?
>
> B. Whether the Tribunal is justified in rejecting the ROM application wherein it was specifically pointed out that one of issue arises in the appeal relate to valuation and in such a case, second proviso clause (i) of Sec. 35-B of the Central Excise Act is not attracted?"

2.8. The appellant filed an Application for Rectification of Mistake (ROM) and by the order, dated 07.05.2015, the said ROM got dismissed. Aggrieved over the same, the Assessee has filed C.M.A.No.2230 of 2015, raising the very same substantial questions of law, as stated supra, in para 2.7.

3. Out of the two substantial questions of law raised, the first substantial question of law would arise for consideration in C.M.A.No.2586 of 2015 and the second substantial question of law would arise for consideration in C.M.A.No.2230 of 2015.

3.1. As the substantial questions of law involved in both these cases are inter-linked, common judgment is pronounced.

4. The main contention of the appellant / assessee in C.M.A.No.2586 of 2015 is that, the Tribunal has no jurisdiction to reject the appeal on the ground of monetary limit and that monetary limit is not applicable in cases where the issue involved relates to rate of duty or valuation of goods.

4.1. The answer by the Revenue is that, when the issue relates to valuation or rate of duty, neither this Court nor the Tribunal has got jurisdiction to entertain the appeal and therefore, the order passed by the Tribunal is justified.

4.2. In order to appreciate the contentions raised, it is necessary to look into the applicable portion of the provisions of Section 35B of the Act, which reads thus:-

> "35B. Appeals to the Appellate Tribunal.- (1) Any person aggrieved by any of the following orders may appeal to the Appellate Tribunal against such order-
>
> (a) a decision or order passed by the Collector of Central Excise as an adjudicating authority;
>
> (b) an order passed by the Collector (Appeals) under section 35A;
>
> (c) an order passed by the Central Board of Excise and Customs constituted under the Central Boards of Revenue Act, 1963 (54 of 1963) (hereafter in this Chapter referred to as the Board) or the Appellate Collector of Central Excise under section 35, as it stood immediately before the appointed day;
>
> (d) an order passed by the Board or the Collector of Central Excise, either before or after the appointed day, under section 35A, as it stood immediately before that day:
>
> Provided that no appeal shall lie to the Appellate Tribunal and the Appellate Tribunal shall not have jurisdiction to decide any appeal in respect of any order referred to in clause (b) if such order relates to,-
>
> (a) a case of loss of goods, where the loss occurs in transit from a factory to a warehouse or to another factory, or from one warehouse to another, or during the course of processing of the goods in a warehouse or in storage, whether in a factory or in a warehouse;
>
> (b) a rebate of duty of excise on goods exported to any country or territory outside India or on excisable materials used in the manufacture of goods which are exported to any country or territory outside India;
>
> (c) goods exported outside India (except to Nepal or Bhutan) without payment of duty:
>
> Provided further that the Appellate Tribunal may, in its discretion, refuse, to admit an appeal in respect of an order referred to in clause (b) or clause (c) or clause (d) where-
>
> (i) in any disputed case, other than a case where the determination of any question having a relation to the rate of duty of excise or to the value, of goods for purposes of assessment is in issue or is one of the points in issue, the difference in duty

involved or the duty involved; or
(ii) the amount of fine or penalty determined by such order, does not exceed fifty thousand rupees"

4.3. A perusal of Section 35B of the Act would go to show that sub-section (i) specifies orders against which appeal lies to the appellate Tribunal and the proviso to sub-section (i) stipulates three clauses of cases, which have to be decided by the Central Government, in Revision, under Section 35EE of the Act. Under the second proviso to Section 35B of the Act, the appellate Tribunal is vested with discretion to refuse to admit an appeal, in respect of the order referred to in clause (b) or clause (c) or clause (d), where,

(i) in any disputed case, other than a case, where the determination of any question having a relation to the rate of duty of the excise or to the value of goods for the purpose of assessment is in issue or is one of the points in issue, the difference in duty involved or the duty involved or
(ii) the amount of fine or penalty determined by such order does not exceed two lakhs rupees.

4.4. The CESTAT may, at its discretion, refuse to admit an appeal, if the (a) duty involed or (b) difference of duty involved or (c) penalty involved is less than Rupees Two lakhs. However, such appeal cannot be refused if the issue pertains to valuation or rate of duty. Originally the limit was rupees fifty thousand which has been enhanced to Rupees Two Lakhs, by Finance Act (No.2), 2014, with effect from 06.08.2014.

4.5. Further, in the case of J.K.Sharma v. Government of India, 1993 (66) E.L.T. 66 (Mad.), it has been held that the minimum monetary limit prescribed under Section 131 B of the Customs Act, 1962, as per the proviso applies to each clause separately and not cummulatively and that under each clause, referring duty, differential duty, penalty or fine, the limit will be separately applicable (Analogus to Second Proviso to Section 35B(i) of the Customs Act, 1962).

4.6. The Tribunal has a power to refuse to admit an appeal, at its discretion, if the amount involved (duty or fine or penalty) is not more than rupees two lakhs. But, this would not be applicable, if the dispute is pertaining to cases other than duty or rate of duty or valuation of goods. Whether the disputed issue before the Tribunal was pertaining to cases other than duty, rate of duty or valuation of goods, and if that be so, whether the Tribunal is justified in dismissing the appeal under Section 35B of the Act is the issue to be decided.

4.7. Admittedly, in the case on hand, the dispute before the Tribunal is, with reference to valuation of the goods. When the dispute is with reference to the valuation of the goods, even though the amount of duty involved is not more than Rupees Two Lakhs, the Tribunal has no discretion to refuse to admit the appeal. So far as this Court is concerned, when the issue relates to valuation, this Court has no jurisdiction to entertain the appeal. So far as the Tribunal is concerned, the Tribunal has no jurisdiction to refuse to admit the appeal, if one of the issues involved is with reference to valuation of goods. Without understanding the provisions of Section 35B of the Act, the Tribunal has chosen to dismiss the appeal and therefore, it is liable to be dismissed.

5. The learned counsel for the respondents has submitted that the issue to be decided by this Court pertains to questions relating to valuation or rate of duty and therefore, these appeals are not maintainable before this Court. The residuary contention of the learned counsel for the respondents is that, in case, this Court upholding the jurisdiction, the matters have to be remanded back to the Tribunal, in order to decide the maintainability of the appeals before the Tribunal itself.

5.1. At this juncture, it would be appropriate to quote the provisions of Section 35G of the Act, which reads as under:-

> "35G.Section 35G. Appeal to High Court. -
> (1) An appeal shall lie to the High Court from every order passed in appeal by the Appellate Tribunal on or after the 1st day of July, 2003 (not being an order relating, among other things, to the determination of any question having a relation to the rate of duty of excise or to the value of goods for purposes of assessment), if the High Court is satisfied that the case involves a substantial question of law......"

5.2. Therefore, the issue to be decided is whether the issue raised before this Court is with reference to valuation of the goods, and therefore, it is not maintainable or the issue is pertaining to issues which are not barred under Section 35G of the Act.

5.3. So far as the appeals before this Court are concerned, they are not upon the question relating to valuation of the goods or duty to be paid, but with reference to the nature and validity of the orders passed by the Tribunal. It is pointed out that the orders passed by the Tribunal are against the second proviso to Section 35B of the Act. Therefore, the issue to be decided by this Court is not with reference to valuation per se, but with reference to validity of the orders passed by the Tribunal in which the issue raised before the Tribunal was with reference to valuation. Just because, valuation is an issue to be decided by the Tribunal, the issue relating to validity of the order passed, in which valuation was an issue, it cannot be said that the issue before this Court is regarding valuation.

5.4. Under Section 35G of the Act, the reference to the jurisdiction is not only with regard to valuation but also with reference to questions in relation to valuation. The phrase "in relation to" are words of comprehensiveness, which might both have a direct significance as well as indirect significance depending upon the context. But, the phrase has to be read not in isoloation, but along with the pleadings in the case. The pleadings are pertaining to the non-application of mind by the Tribunal, while interpreting the provisions of Section 35B of the Act. Therefore, the contention that this Court has no jurisdiction cannot be accepted. Therefore, this Court holds that this Court has jurisdiction to entertain these Appeals.

6. Coming back to the orders passed by the Tribunal, it is clear that when the dispute raised is touching the valuation of the property, the Tribunal has no discretion to refuse to admit the appeal. After admitting the appeal, it is open to the Tribunal to decide the issues raised on merits.

7. This view is fortified by the decision of the Delhi High Court rendered in the case of 2013 (30) S.T.R. 451 (Del.) (Commissioner of Service Tax, Delhi v. Bharti Airtel Ltd.,), in which, it has been held that it is not the content of the appeal, that is determinative of whether the appeal would be maintainable before the High Court or not, but rather the nature of the order, which is impugned in the appeal, which determines the issue. Therefore, when the order under challenge is with reference to the nature of the order passed by the Tribunal, we hold that the appeals are maintainable before this Court.

8. In the Application seeking ROM, the appellant has very clearly stated that, as per the second proviso to Section 35B (i) of the Act, the appeal cannot be dismissed, even if one of the issues involved in the appeal is determination of rate of duty or value of the goods. This is so, according to the second proviso to Section 35B of the Act. In other words, it is apparent on the face of the provision of Section 35B of the Act that the order passed suffers from the mistake apparent on the face of the record.

9. The Tribunal has no power to review its own order. However, the Tribunal can pass order for rectifying a mistake apparent from the records within six months from the passing of the order, as contemplated under Section 35C (2) of of the Act. As per the decision reported in the case of Honda Siel Power Products Ltd., v. CIT (9 STR 117 (SC), the purpose of Rectification of Mistake is based upon the fundamental principle that no party appearing before the Tribunal should suffer on account of any mistake committed by the Tribunal and

that when prejudice results from an order attributable to the Tribunal's mistake, error or omission, then it is duty of the Tribunal to set it right. It is settled law that, when the mistakes are on account of: (a) palpable mistakes, (b) orders passed on inapplicable statutory provisions (c) points raised in appeal, but not considered and (d) wrong application of the judgment of the high court, are mistakes that could be rectified by the Tribunal (as mistakes being apparent on the face of the record). The facts of these cases and the orders passed by the CESTAT would clearly go to show that the orders have been passed, without understanding the provisions of Section 35B of the Act.

10. At least, after the mistakes being pointing out, the Tribunal below ought to have rectified the same. Instead, the Tribunal has passed a cryptic order without assigning any reason. On the simple ground that it is a non-speaking order, the order is liable to be set-aside and it is set-aside accordingly. As the order in the appeal is set-aside, automatically, the order passed in the Application for Rectification of Mistake becomes non-est in law.

11. In the result:

(i) C.M.A.No.2586 of 2015, challenging the Final Order No.40382 of 2014 is allowed, but, however, remanded back to the Tribunal, with a direction to decide the same on merits and in accordance with the law, within a period of one month from the date of receipt of a copy of this Judgment.

(ii) C.M.A.No.2530 of 2015 challenging the Miscellaneous Order No.40697 of 2015 is allowed. As the appeal in C.M.A.No.2586 of 2015 having been allowed, as a consequence, the Application for Rectification of Mistake stands dismissed as infructuous.

Sd/-
Assistant Registrar(V)

//True Copy//

Sub Assistant Registrar

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To

1. The Customs Excise and Service Tax
   Appellate Tribunal,
   Shastri Bhavan Annex, Chennai.

2. The Commissioner of Central Excise,
   6/7, ATD Street, Race Course Road,
   Coimbatore

+1cc to Mr.K. Jayachandran, Advocate, S.R.No.68472
+1cc to Mr.A.P. Srinivas, Advocate, S.R.No.69130

JSV(CO)
EU(28/01/2015)