IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATE : 27.02.2015

CORAM

THE HONOURABLE MR. JUSTICE R.SUDHAKAR
AND
THE HONOURABLE MR. JUSTICE R.KARUPPIAH

C.M.A. NO. 30 OF 2011

Commissioner of Central Excise
Chennai I Commissionerate
26/1 (Old No.121), M.G.Road,
Chennai - 600 034. .. Appellant

- Vs -

M/s.Modi Pipes,
Plot No.22, Block No.7, Phase II
Kodungaiyur Industrial Estate
Chennai - 600 118. .. Respondent

Appeal filed under Section 35-G of the Central Excise Act against the order dated 15.06.2010 passed by the Customs, Excise and Service Tax Appellate Tribunal, South Zonal Bench, Chennai, made in Final Order No.644 of 2010.

For Appellant : Mr. Rajinish Pathiyil

For Respondent : No appearance

JUDGMENT

(DELIVERED BY R.SUDHAKAR, J.)

Aggrieved by the order of the Appellate Tribunal in allowing the appeal filed by the Revenue, the assessee is before this Court challenging the said order by filing the present appeal.

2. The appeal was admitted by this Court on the following substantial questions of law:

> "(1) Whether on the facts and circumstances of the case the Appellate Tribunal is right in allowing the SSI exemption when para 4 of the Notification No.8 of 2010 clearly debars the exemption, when Brand name of another person is used?
>
> (2) Whether on the facts and circumstances of the case, the Appellate Tribunal is right in rejecting the

department appeal without taking into consideration of the decision rendered by the Hon'ble Apex Court in the case of Commissioner of Central Excise Chandigarh -II v. Bhalla Enterprises reported in 2004 (173) ELT 225 (SC) which is a common order including the case of M/s.Fine Industries allowing the Revenue appeal?

(3) Whether on the facts and circumstances of the case, the Appellate Tribunal is right in granting the SSI exemption relying on section 25 of the Trade and Merchandise Act, 1958 which only deals on registration or otherwise of a brand name or trade name, which is not an essential ingredient to allow the exemption under Notification No.8/2000 dated 1.3.2000 as amended?"

3. The brief facts of the case are as follows:

The respondent is engaged in the manufacture of PVC plastic piping and casing falling under Chapter Heading 39.26 of the First Schedule to the CETA' 85. Based upon the intelligence that the assessee was clearing goods affixed with the brand name, which did not belong to them, without payment of duty to avail SSI exemption under Notification No.8/2000-CE dated 1.3.2000 show cause notice was issued proposing to deny the benefit of SSI notification, recovery of duty and imposition of penalty. Accordingly, the Adjudicating Authority confirmed the demand and imposed penalty. On appeal at the instance of the assessee, the Commissioner (Appeals) set aside the demand and penalty. Hence, the Department pursued the matter before the Tribunal. The Tribunal, after hearing both sides, dismissed the appeal holding as follows:

"We have heard both sides. We find that undisputedly Modi Industries was a proprietary concern, that its proprietor Dinesh Modi had expired in 1999, that the period of dispute in the present case is 1.4.2000 to 31.8.2000. Ld. counsel for the respondents has drawn our attention to the relevant provisions of the Trade and Merchandise Marks Act, 1958 wherein Section 25 sets out that registration of a trade mark shall be for a period of seven years, but may be renewed from time to time in accordance with the provisions of the Section. The brand name "MODI" was registered in March'91 in favour of Late Dinesh Modi and with the efflux of time it came to an end in 1998. Therefore, the respondents are correct in their submission that after 1998, namely after the period of seven years from the registration of the brand name "MODI", the brand name cannot be said to belong to any other person so as to disentitle the respondents from the benefit of the SSI notification. In this view of the matter, we uphold the impugned order and reject the appeal."

4. Aggrieved by the said order of the Tribunal, the Revenue is before this Court by filing the present appeal raising the above-mentioned substantial questions of law.

5. Heard the learned standing counsel appearing for the appellant/Revenue and perused the materials placed before this Court. Even though notice has been served, none appears for the respondent/assessee.

6. The present appeal is filed under Section 35G of the Central Excise Act, 1944 and it is apposite to refer to Section 35G(1) of the Central Excise Act, 1944, which reads as under:

> "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 the purposes of assessment), if the High Court is satisfied that the case involves a substantial question of law."
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> (emphasis supplied)

7. Section 35G of the Central Excise Act, 1944 provides that an appeal on the issue relating to rate of duty of excise or value of goods for purposes of assessment would not lie before this Court. The Supreme Court in the case of Navin Chemicals Manufacturing and Trading Co. Ltd. v. Collector of Customs, 1993 (68) ELT 3 (SC), held as under:

> "11. It will be seen that sub-section (5) uses the said expression determination of any question having a relation to the rate of duty or to the value of goods for the purposes of assessment and the Explanation thereto provides a definition of it for the purposes of this sub-section. The Explanation says that the expression includes the determination of a question relating to the rate of duty; to the valuation of goods for purposes of assessment; to the classification of goods under the Tariff and whether or not they are covered by an exemption notification; and whether the value of goods for purposes of assessment should be enhanced or reduced having regard to certain matters that the said Act provides for. Although this Explanation expressly confines the definition of the said expression to sub-section (5) of Section 129-D, it is proper that the said expression used in the other parts of the said Act should be interpreted similarly.

The statutory definition accords with the meaning we have given to the said expression above. Questions relating to the rate of duty and to the value of goods for purposes of assessment are questions that squarely fall within the meaning of the said expression. A dispute as to the classification of goods and as to whether or not they are covered by an exemption notification relates directly and proximately to the rate of duty applicable thereto for purposes of assessment. Whether the value of goods for purposes of assessment is required to be increased or decreased is a question that relates directly and proximately to the value of goods for purposes of assessment. The statutory definition of the said expression indicates that it has to be read to limit its application to cases where, for the purposes of assessment, questions arise directly and proximately as to the rate of duty or the value of the goods.

12. This, then, is the test for the purposes of determining whether or not an appeal should be heard by a Special Bench of CEGAT, whether or not a reference by CEGAT lies to the High Court and whether or not an appeal lies directly to the Supreme Court from a decision of CEGAT: does the question that requires determination have a direct and proximate relation, for the purposes of assessment, to the rate of duty applicable to the goods or to the value of the goods."

(emphasis supplied)

8. In an identical circumstance, this Court in the case of The Commissioner of Central Excise, Chennai - II V. Vadapalani Press and another reported in 2014-TIOL-2208-HC-Mad-CX, while dealing with the objection raised by the assessee as to the maintainability of the appeal, after following the above-said decision of the Supreme Court in Navin Chemicals Manufacturing & Trading Co. Ltd. - Vs – Collector of Customs (1993 (68) ELT 3 (SC)), and that of the Gujarat High Court in the case of in Commissioner of Central Excise v. JBF Industries Ltd., 2011 (264) ELT 162 (Guj.), held that appeal is not maintainable.

9. In such circumstances, while this Court is not inclined to deal with the matter, while disposing off the present appeal as not maintainable, is inclined to grant liberty to the appellant/Revenue to pursue the matter in accordance with law, if so advised.

10. For the foregoing reasons, we hold that this appeal is not maintainable and accordingly, the same is dismissed. However, liberty is granted to the Revenue/appellant to move before the

appropriate forum, if so advised. However, there shall be no order as to costs.

Sd/-
Assistant Registrar

//True Copy//

Sub Assistant Registrar

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To

1. The Commissioner of Central Excise
Chennai I Commissionerate
Chennai 600 034.

2. Customs, Excise & Service
Tax Appellate Tribunal
South Zonal Bench
Shastri Bhavan Annexe 1st Floor
26, Haddows Road, Chennai 600 006.

1 cc to Mr.Rajinish Pathiyil ,Advocate, SR.No.10971

C.M.A. NO. 30 OF 2011

vsn(co)
pmk.17.3.2015