IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATE : 10.07.2015

CORAM

THE HONOURABLE MR. JUSTICE R.SUDHAKAR
AND
THE HONOURABLE MS. JUSTICE K.B.K.VASUKI

C.M.A. NO. 2008 OF 2007

Commissioner of Central Excise
Pondicherry Commissionerate
Goubert Avenue
Beach Road
Pondicherry 605 001. .. Appellant

- Vs -

1. Customs, Excise & Service
   Tax Appellate Tribunal
   Chennai, South Regional Bench
   Chennai 600 006.

2. M/s.Cholamandal Marine Fibres
   No.1, Industrial Estate
   Mettupalayam,
   Pondicherry 605 009. .. Respondents

Appeal filed under Section 35-G of the Central Excise Tax Act against the order dated 18.12.2006 passed by the Customs, Excise & Service Tax Appellate Tribunal, South Zonal Bench, Chennai, made in Final Order No.1307/06(P).

For Appellant : Mr. K.Mohanamurali

For Respondents : Mr. Raghavan
for M/s.Lakshmi Kumaran for R-2
R1-Tribunal

JUDGMENT

(DELIVERED BY R.SUDHAKAR, J.)

Aggrieved by the order of the Tribunal in allowing the appeal filed by the assessee, the appellant/Department is before this Court by filing the present appeal. This Court, vide order dated 6.09.07, while admitting the appeal, framed the following substantial questions of law for consideration :-

"i) Whether the Tribunal is right in following the decision dated 28.9.2006 vide Final Order No.923-

944/06 in the case of M/s.Gothi Thermoforming Industries & Ors. when the facts and issues of the instant case is entirely different from the facts and circumstances of the case dealt in the CESTAT earlier order dated 28.9.2006?

ii) Whether the Tribunal is correct in interpreting the provisions of the explanation II & VI of the Notification No.1/93 CE dated 1.3.93 and extending the SSI benefit to the impugned goods, which are captively consumed even after crossing the exemption limit of Rs.30 Lakhs where the notification intended to extend such benefit only upto the exemption limit of Rs.30 Lakhs and to collect duty beyond that limit?"

2. The facts, in a nutshell, are as hereunder :-

The second respondent is a manufacturer of Monafilament yarn and HDPE twine falling under Chapter sub-heading 5406.11 and 5607.90 of the Central Excise Tariff Act. The second respondent also holds a permanent SSI certificate. The products manufactured by the second respondent is captively consumed by it in the manufacture of finished goods, which are cleared from the factory. During the period in dispute, viz., 21.10.1994 to 12.01.1995, the assessee calculated their aggregate value of clearances of specified goods without taking into account the value of the Monofilament yarn cleared for captive consumption, which calculation enabled them to clear the final products within the SSI exemption limits. The Department, not satisfied with the above, issued a show cause notice demanding differential duty and proposed to impose penalty, which after adjudication, was confirmed by the original authority and sustained by the Commissioner (Appeals) on appeal by the assessee. On further appeal, the Tribunal set aside the order allowing the appeal in favour of the assessee against which the Department is before this Court by filing the present appeal.

3. Heard the learned standing counsel appearing for the appellant/Revenue and the learned counsel appearing for the second respondent and perused the materials available on record.

4. A preliminary objection has been raised by the learned counsel appearing for the second respondent as to the maintainability of the appeal before this Court on the above questions of law raised by the department. It is the plea of the learned counsel for the second respondent that Section 35G of the Central Excise Act, 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. He placed strong reliance on the decision of the Supreme Court in Navin Chemicals Manufacturing and Trading Co. Ltd. - Vs - Collector of Customs, 1993 (68) ELT 3 (SC). It is therefore prayed that this appeal deserves to be dismissed on the question of maintainability.

5. The main issue considered by the Tribunal relates to the question of whether captive clearance of intermediate products, which are exempt from payment of duty under exemption notification is includible in the aggregate value of clearance of specified goods for the purpose of determining duty liability. for better clarity, the relevant portion of the order of the Tribunal is extracted hereinbelow :-

> "3. After considering the submissions of both sides, we find that the question whether captive clearance of intermediate products, which are exempt from payment of duty under general exemption Notification (No. 4/97-C.E., dated 1-3-1997 equivalent to No. 62/87-C.E., dated 1-3-1987 involved in the instant case), is includible in the aggregate value of clearances of specified goods for the purpose of determining duty liability in terms of SSI exemption Notification (No. 175/86-C.E. dated 1-3-1986 and No. 1/93-C.E., dated 28-2-1993) has already been decided by this Bench in favour of the assessees in a batch of appeals vide Final Order No. 923-944/2006, dated 28-9-2006 [2007 (211) E.L.T. 97 (Tri.-Chennai)] in the case of Gothi Thermoforming Industries and others v. Commissioner of Central Excise, Chennai & Pondicherry. It was held that the captive clearance value was not includible in the aggregate value of clearances of specified goods. Accordingly, we do not find any fault with the action of the appellants, who excluded captive clearance value from the aggregate value of clearances of specified goods, during the period of dispute for the purpose of claiming SSI benefit under Notification No. 1/93-C.E. ibid."

6. The Supreme Court in Navin Chemicals Manufacturing and Trading Co. Ltd. - Vs - Collector of Customs, 1993 (68) ELT 3 (SC), considering the scope of the High Courts to entertain appeal where the rate of duty is under challenge, 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)

7. Section 35-G of the Act deals with appeal to the High Court against the order of the Tribunal. Section 35G (1) explicitly exempts appeal in respect of determination of any question in relation to rate of duty. For better clarity, the relevant provision of the Act is extracted hereunder :-

"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 customs 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."

(emphasis supplied)

8. The power of the High Courts to entertain an appeal under Section 35-G of the Central Excise Act in a case of dispute on the rate of duty fell for consideration before the Karnataka High Court in the case of CCE, Mangalore - Vs - Mangalore Refineries Ltd. (2011 (270 ELT) 49 (Kar.)). The Karnataka High Court, after considering the various legal provisions on the said subject as also the various case laws, including the decision of the Supreme Court in Navin Chemicals case (supra), held as under :-

> 12. In order to appreciate the aforesaid contention, firstly it is necessary to see the statutory provisions as contained in Sections 35G and 35L which reads as under :
>
> "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.
>
> 35L. Appeal to the Supreme Court - An appeal shall lie to the Supreme Court from -
>
> (a) any judgment of the High Court delivered -
> (i) in an appeal made under Section 35G; or
> (ii) on a reference made under Section 35G by the Appellate Tribunal before the 1st day of July, 2003;
> (iii) on a reference made under section 35H, in any case which, on its own motion or on an oral application made by or on behalf of the party aggrieved, immediately after passing of the judgment, the High Court certifies to be a fit one for appeal to the Supreme Court; or
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> (b) any order passed before the establishment of the National Tax Tribunal by the Appellate Tribunal having a relation to the rate of duty of excise or to the value of goods for purposes of assessment."
>
> A bare reading of the aforesaid provisions makes it clear what are the matters which are cognisable by the High Court and as well as by the Supreme Court. Any order passed by the Appellate Tribunal other than the determination of any question having a relation to the rate of duty of excise or to the value of duty

of goods for the purpose of assessment falls within the jurisdiction of the High Court in appeal under Section 35G. If the matter pertains to determination of any question having a relation to the rate of duty of excise or to the value of the goods for the purpose of assessment, the same falls within the jurisdiction of the Supreme Court under Section 35L (b). In other words, the determination of any question relating to the rate of duty of excise or to the value of goods for the purpose of assessment, cannot be agitated in both the forums. Expressly the statute has excluded the jurisdiction of the High Court in appeal under Section 35G and exclusive jurisdiction is conferred on the Supreme Court in these matters. The language employed in these two sections read together is clear and there is no scope for any doubt or confusion in this regard.

* * * * * * * * *

42. Broadly the following disputes do not fall within the jurisdiction of High Court under Section 35(g) of the Act :-

(a) Dispute relating to the duty of excise payable on any goods.

(b) The value of the goods for the purposes of assessment.

(c) A dispute as to the classification of goods.

(d) Whether those goods are covered by an exemption notification or not.

(e) Whether the value of goods for the purposes of assessment is required to be increased or decreased.

(f) The question of whether any goods are excisable goods or not.

(g) Whether a process is a manufacturing process or not, so as to attract levy of excise duty.

(h) Whether a particular goods fall within which heading, sub-heading or tariff item or the description of goods as mentioned in column No. 3 of the Central Excise Tariff Act, 1985.

43. From the aforesaid discussion, it is clear that an order passed by the Appellate Tribunal relating to the determination of any question having relation to the rate of duty of excise or to the value of goods

for the purposes assessment lies to the Supreme Court under Section 35L(b) the Act and not to the High Court under Section 35(G).

44. The intention behind this bifurcation of jurisdiction between the Apex Court and the High Court seems to be that more often than not, any decision on these aforesaid aspects not only affects the interest of the manufacturers who are parties thereto, but also to the manufacturers of those products throughout the country. In a country governed by Parliamentary legislation because of the territorial bifurcation in forming states and because of the divergent opinion which is possible, the excise duty payable would vary from place to place. In order to, bring uniformity in the levy of excise duty throughout the country and consequently to see that the country's finance is not affected, the Parliament has vested the jurisdiction to decide the disputes with the Apex Court. Therefore, we see a duty policy underlining this bifurcation of the jurisdiction between the Apex Court and the High Courts. All other matters other than what is set out above, which relates to the individual manufacturers and all disputes based on assessment orders which have attained finality, such as the benefits to which they are entitled to, refunds, duty drawbacks, rebates, etc., which relate to a particular manufacturer falls within the jurisdiction of the High Courts."

9. Keeping the above principles enunciated by the Supreme Court as also the disputes that fall within the jurisdiction of the High Court, as culled out by the Karnataka High Court in its decision in Mangalore Refineries case (supra) in mind, a look at the facts of the case clearly establish that the issue pertains to rate of duty that is payable by the respondent. In such a scenario, in view of the above position of law, which exempts appeal to be entertained by the High Court in relation to rate of duty, the the objection as raised by the respondent is liable to be sustained in view of the decision of the Supreme Court in Navin Chemicals case (supra), as also the judgment of the Karnataka High Court in Mangalore Refineries case (supra). The abovesaid view has also been followed by this Court in Commissioner of Central Excise - Vs - Vadapalani Press (2014-TIOL-2208-HC-MAD-CX).

10. In the above 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/assessee to pursue the matter before the Supreme Court, if so advised.

11. Accordingly, this appeal is disposed of with liberty to the appellant/assessee to move before the Supreme Court, if so advised. However, there shall be no order as to costs.

Sd/-
Assistant Registrar

True Copy

Sub Assistant Registrar

GLN
To
1. Commissioner of Central Excise
Pondicherry Commissionerate
Goubert Avenue
Beach Road
Pondicherry 605 001.

2. Customs, Excise & Service
Tax Appellate Tribunal
Chennai, South Regional Bench
Chennai 600 006.

1 cc to Mr. K.Mohanamurali, Advocate Sr.No.35065

C.M.A. NO. 2008 OF 2007

kji(co)
pmk.1.10.2015