

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 05.03.2015

CORAM

THE HON'BLE MR.JUSTICE R.SUDHAKAR
AND
THE HON'BLE MR.JUSTICE R.KARUPPIAH

C.M.A.No.2223 of 2008

Commissioner of Cusomts (EXPORTS)
Customs House,
No.60, Rajaji Salai,
Chennai - 600 001.

.. Appellant

Vs.

1. M/s.D.S.Metal (P) Ltd.,
Room No.12, II Floor,
Prince Plaza,
No.46, Pantheon Road,
Egmore, Chennai - 600 008.

2. Customs, Excise and Service
Tax Appellate Tribunal
Southern Zonal Bench,
Sasthri Bhavan Annexe 1st floor,
No.26, Haddows Road,
Chennai - 600 006.

.. Respondents

Prayer: Appeal filed under Section 130 of the Customs Act, 1962 against the Final Order No.83 of 2008, dated 06.02.2008 passed by the Customs, Excise and Service Tax Appellate Tribunal, South Zonal Bench at Chennai.

For Appellant : Mr.E.Vijay Anand
Standing Counsel

For Respondents : Mr.S.Venkatachalam
for 1st respondent

J U D G M E N T
(Delivered by R.SUDHAKAR,J.)

This appeal is filed by the Department challenging the Final Order No.83 of 2008, dated 06.02.2008 passed by the Customs, Excise and Service Tax Appellate Tribunal, South Zonal Bench at Chennai, by raising the following questions of law:

"1. Whether "end use" certificates issued in terms of notification 21/02-Cus would have any relevance to decide the duty liability when admittedly 15% of the material are not "melting scraps" and do not qualify for duty exemption as per the said notification?

2. Whether an assessment to duty is based on the condition and nature of the goods found at the time of import and not upon the end use of the product? Whether or not the direction of the Tribunal to the lower authority, that he should accept the end use certificate if produced under Notification No.21/02 and extend the benefit of notification, is against the findings of the Hon'ble High Court in the case of Mehta Paint Works Vs. Deputy Superintendent of Central Excise, Madras reported in 2000 (126) ELT 8 (MAD) wherein it is held that "exemption cannot be claimed except at the time of clearance of goods, as liability to pay duty arise only at the time of clearance?"

3. Whether the direction of the Tribunal to extend duty concession on 15% of the goods not covered by the exemption notification by accepting the end use certificate is against the conditions of the Test bond executed by the first respondent on the basis of which the goods were provisionally released and therefore not admissible in law?"

2.1. The first respondent had filed bill of entry dated 14.5.2002 for clearance of 150 MTS of goods described as Non Alloy Steel Melting scrap. The goods were examined with the help of National Metallurgical Laboratory (NML), who certified that 50%-60% of the cargo could be considered as scrap suitable for melting and the remaining material consisting of box spanner components could not be considered as melting scrap and should be treated as second grade re-usable spanner components. Aggrieved by the said opinion, the importer sought for an second opinion. Hence, second opinion was sought for from IIT, Chennai, after releasing the goods provisionally. The IIT, Chennai gave a report stating that 85% of the material consisted of rusted components and could be considered as non-alloy melting scrap. However, 15% of the material could be considered as second grade spanner component, which were not re-usable. Hence, the case was adjudicated and the Adjudicating Authority passed an order demanding duty for the 15% of the goods, which were treated as re-usable components.

2.2 Aggrieved by such an order, the assessee filed an appeal before the Commissioner (Appeals), who dismissed the appeal, thereby upheld the order of the Adjudicating Authority. As against the same, the assessee preferred further appeal before the Tribunal.

2.3. The Tribunal, after hearing both sides, held that the relevant condition for the benefit of Notification No.21 of 2002 was that the importer should produce a certificate stating that the goods had been so used vide condition No.20 attached to Sl.No.200 for use in or supply to a unit for the purpose of melting. The Tribunal further held that the assessee had produced the certificate in terms of Customs Notification No.17 of 2001 dated 1.3.2001. The Tribunal allowed the appeal by way of remand directing the Adjudicating Authority to adjudicate the case afresh since Notification No.17 of 2001 is *pari materia* to Notification No.21 of 2002.

2.4. Aggrieved by the said order, the department has filed the present appeal on the questions of law, referred *supra*.

3. We have heard the learned Standing Counsel appearing for the department and the learned counsel appearing for the first respondent and perused the order passed by the Tribunal and other documents.

4. At the outset, learned counsel for the first respondent objected 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 first respondent that Section 130(1) of the Customs 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. v. Collector of Customs*, 1993 (68) ELT 3 (SC), wherein it is 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)

5. The present appeal is filed under Section 130 of the Customs Act and it is apposite to refer to Section 130(1) of the Customs Act, which reads as under:

"130. 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 purpose of assessment), if the High Court is satisfied that the case involves a substantial question of law."

(emphasis supplied)

6. In the present case, the issue that arises for consideration is what will be the rate of duty that is payable by the first respondent, but for the notification in question. Therefore, the objection of the learned counsel for the first respondent is sustained.

7. The above said view of this Court is fortified by a decision of the Gujarat High Court in Commissioner of Central Excise v. JBF Industries Ltd., 2011 (264) ELT 162 (Guj.), wherein it is held as under:

"10. In the light of the aforesaid judicial pronouncements, it is apparent that the question as to the applicability of a notification or a circular which has a bearing on the determination of the rate of duty is a question which has a direct and proximate relationship to the rate of duty and to the value of goods for purposes of assessment. In the circumstances, the present appeal which relates to the applicability of the above referred circular, relates directly to the determination of rate of duty for the purpose of assessment and as such, in the light of the provisions of Section 35G read with Section 35L of the Act, this Court has no jurisdiction to entertain the appeal."

(emphasis supplied)

For the foregoing reasons, we hold that this appeal is not maintainable and accordingly, the same is dismissed giving liberty to the appellant to pursue the matter before the appropriate forum. Since the appeal is held not maintainable, we do not propose to go into the merits of the questions of law raised for consideration. No costs.

Sd/-

Assistant Registrar

//True Copy//

Sub Assistant Registrar

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To

The Assistant Registrar
Customs, Excise and Service Tax Appellate Tribunal
South Zone Bench, Sasthri Bhavan Avenue
1st Floor, Haddows Road, Chennai - 600 006.

+ 1 cc to Mr.E.Vijay, Advocate SR.12400

TEJ(CO)

EU 20.03.2015

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