IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATE : 09.07.2015

CORAM

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

C.M.A. NO. 2832 OF 2007

Commissioner of Customs (Exports)
Custom House, Chennai 600 001. .. Appellant

- Vs -

M/s.PPN Power Generating Co. Ltd.
Jhaver Plaza, 3rd Floor
Nungambakkam High Road
Chennai 600 034. .. Respondent

Appeal filed under Section 130 of the Customs Act against the order dated 25.08.2006 passed by the Customs, Excise & Service Tax Appellate Tribunal, South Zonal Bench, Chennai, made in Final Order No.782/2006.

For Appellant : Mr. K.Mohanamurali

For Respondents: Mr. Hari Radhakrishnan

JUDGMENT

(DELIVERED BY R.SUDHAKAR, J.)

Aggrieved by the order of the Tribunal in allowing the appeal filed by the assessee, the appellant/Revenue is before this Court by filing the present appeal. This Court, vide order dated 7.11.2007, while admitting the appeal, framed the following substantial questions of law for consideration :-

> "i) Whether the Appellate Tribunal is right in allowing the refund claim when the assessment order was not challenged and was not set aside by the competent authority?
> ii) Whether the Appellate Tribunal is right in allowing the refund claim when the respondent has not fulfilled substantially the conditions specified in the Notification No.80/70?"

2. The facts, in a nutshell, are as hereunder :-
The respondent/assessee imported 'canisters' and cleared the

same for home consumption on duty. As the goods were found defective, the supplier had agreed for replacement and, accordingly, replacement was furnished under invoice dated 27.11.03. The respondent cleared these goods on payment of duty. Later, the respondent found that they were not liable to pay duty for the second clearance by virtue of exemption under Notification No.80/70 dated 29.08.1970 and, therefore, filed refund claim for duty paid. However, the said claim was rejected by the Deputy Commissioner (Refunds) as inadmissible and unsustainable and also on account of non-compliance of procedural aspects. Aggrieved against the same, an appeal was filed, which was also rejected against which the respondent/assessee preferred appeal to the Tribunal. The Tribunal, vide order dated 19.9.06, allowed the appeal against which the present appeal has been filed by the Revenue.

3. Learned counsel appearing for the 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 respondent that Section 130 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. - 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.

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

5. Out of the two questions of law that has been admitted, the 2nd question of law has been addressed by the Tribunal at para-5 of its order, which, for better clarity, is extracted hereinbelow :- :-

> "5. The question is now whether the refund claim ought to have been rejected on merits. We have already found compliance with conditions (i), (ii) & (iii) of the Notification. Condition (iv) reads thus :
>
> > "(iv) the defective articles or component parts thereof if not re-exported, are destroyed, or surrendered to the Customs"
>
> According to the above condition, the importer was liable to destroy the defective goods or surrender the same to the Customs. We have perused the letter dated 15-6-2004 of the Asst. Commissioner, Nagapattinam, addressed to the Commissioner of Customs, Tiruchirapalli (copies supplied by counsel). This letter indicates that the party requested the Commissioner to issue a Surrender

Certificate in respect of the defective goods lying in their unit so as to enable them to claim refund of the duty amount. It, further, indicates that the Superintendent of Customs and two Inspectors of Customs, Nagapattinam, visited the site and found the goods to have been kept in the factory premises. It, thus, appears that the party has made an attempt to surrender the goods to the department. As a matter of fact, in the above letter, the Asst. Commissioner has recommended that the surrendered goods be accepted and auction-sold for revenue. It appears to us from the above condition of the Notification that the party themselves could have destroyed the goods to the satisfaction of the Customs authorities. However, they opted to surrender the same to the authorities. Apparently, the option is for the importer. When they exercised the option in terms of the above condition of the Notification, it was incumbent on the Customs authorities to take appropriate action to ensure that the condition of the Notification is duly complied with. This has not happened in this regard. If the importer was entitled to fulfil a condition through reciprocal action of the Customs authorities, it will not be correct to say that the party did not fulfil such condition. In the facts of this case, we are inclined to hold that condition (iv) of the Notification will stand complied with upon the surrendered goods being taken over by the Customs authorities under a Surrender Certificate as recommended by the Asst. Commissioner. We direct the authorities concerned to do the needful in this regard within a reasonable time not exceeding 3 months and thereafter to sanction the refund claimed by the party.

6. The core issue that is sought to be advanced before this Court is whether the assessee has complied with the condition of notification for availing the benefit of notification and consequently what will be the rate of duty that will be payable by the assessee.

7. 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)

8. Section 130 of the Customs Act deals with appeal to the High Court against the order of the Tribunal. Section 130 (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 :-

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

(emphasis supplied)

9. The power of the High Courts to entertain an appeal under Section 35-G of the Central Excise Act, which is pari materia to Section 130 of the Customs 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

(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."

10. 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 Courts 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).

11. 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/department to pursue the matter before the Supreme Court, if so advised.

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

Sd/-
Asst.Registrar (CS IV)

/true copy/

Sub Asst. Registrar

GLN

To

1. Commissioner of Customs (Exports)
Custom House
Chennai 600 001.

2. The Customs, Excise & Service
Tax Appellate Tribunal
South Zonal Bench
Chennai.

1 cc to Mr.K. Mohanamurali, Advocate, Sr. 34676
1 cc to Mr.Hari Radhakrishnan, Advocate, sr. 34845

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SVI (CO)
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