

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATE : 18.06.2015

CORAM

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

C.M.A. NO. 3485 OF 2009

The Commissioner of Central Excise
No.1, Foulk's Compound
Anaimeadu
Salem 636 001.

... Appellant

- Vs -

1. M/s.Thriveni Earth Movers Pvt. Ltd.
22/110, Freenways Road
Salem 636 016.
2. Customs, Excise & Service
Tax Appellate Tribunal
South Zonal Bench
Shastri Bhavan Annexe-I
1st Floor, 26, Haddows Road
Chennai 600 006.

... Respondent

Appeal filed under Section 35-G of the Central Excise Act of 1944 against the order dated 20.04.09 passed by the Customs, Excise & Service Tax Appellate Tribunal, South Zonal Bench, Chennai, made in Final Order No.404/2009.

For Appellant : Mr. N.Senthilkumar

For Respondents : Mr. S.Jaikumar for R-1

JUDGMENT

(DELIVERED BY R.SUDHAKAR, J.)

Aggrieved by the order of the Tribunal in allowing the appeal filed by the Revenue, the appellant/assessee is before this Court by filing the present appeal. Vide order dated 22.01.10, while admitting the appeal, this Court framed the following substantial questions of law for consideration :-

"1) Whether every service rendered in mining area would have to be classified under "Mining Service" or it has to be classified according to its scope and nature of the work?

2) Whether the service as defined in the scope of the contract could be more appropriately classifiable under "Cargo Handling Services"?

3) Whether the Tribunal was right in holding that the limestone and rejects are not goods?"

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

The assessee was engaged in the activity of loading, unloading and transportation of limestone from the mines of M/s.Chettinad Cement Corporation on contract basis. According to the Department, the said activities are covered under the category of "Cargo Handling Services" under sub-clause (zr) of Clause 105 of Section 65 of the Finance Act, 1994 and, hence, liable for service tax. Though the assessee is registered as a provider of service under the category of mining of mineral, oil and gas, since the service tax was not paid, a show cause notice was issued to the assessee by the Department proposing to recover service tax on the activity of loading and transportation of limestone and rejects. After adjudication, the adjudicating authority demanded an amount of Rs.1,20,26,027/= towards service tax and education cess as well as applicable interest. Further, penalty was also levied on the assessee. A further penalty of an amount equal to the total service tax demanded was imposed under Section 78 and an amount of Rs.1,000/= was imposed under Section 77 of the Central Excise Act. Aggrieved by the said order, the assessee preferred appeal to the Tribunal.

3. The Tribunal, on consideration of the entire facts on record and relying upon various decisions, held that the movement of limestone and rejects in the mining area undertaken by the assessee are covered by entry 'mining of mineral, oil, gas' and that the said activity cannot be taxed under 'cargo handling service' and, accordingly, allowed the appeal. The present appeal is directed against the said order by the appellant/Revenue.

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

5. 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 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. 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)), 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)

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.”
(emphasis supplied)

7. The view expressed by the Supreme Court in Navin Chemicals case (supra) has been followed by the Gujarat High Court in the case of 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.”
सत्यमेव जयते (emphasis supplied)

8. In the present case, the issue raised relates to whether the handling of limestone from the quarry would be an activity in relation to mining or cargo handling services. The Department contends that the said activity is cargo handling services and, therefore, liable to service tax in terms of sub-clause 22 (zr) of the Finance Act, 1994, which is disputed by the assessee claiming that the activity would fall under mining of mineral, oil and gas. Since the issue relates to classification of goods as well as rate of duty, the decision in Navin Chemicals case (supra) is squarely applicable to the case on hand.

9. 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.

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

Sd/-
Assistant Registrar(CO)

//True Copy//

Sub Assistant Registrar

GLN

To

1. The Commissioner of Central Excise
No.1, Foulk's Compound
Anaimeedu, Salem 636 001.
2. Customs, Excise & Service
Tax Appellate Tribunal
South Zonal Bench
Shastri Bhavan Annexe-I
1st Floor, 26, Haddows Road
Chennai 600 006.

Copy To

The Section Officer,
V.R.Section, (Records if any)
High Court, Madras.

+1cc to M/s.N.Senthil Kumar, Advocate, S.R.No.29893
+1cc to M/s.S.Jai Kumar, Advocate, S.R.No.29965

C.M.A. NO. 3485 OF 2009

RSI (CO)
CA(27/07/2015)