THE HON'BLE SRI JUSTICE DILIP B.BHOSALE

AND

THE HON'BLE SRI JUSTICE A.RAMALINGESWARA RAO

C.E.A.No. 46 of 2004

JUDGMENT: (per the Hon'ble Sri Justice Dilip B.Bhosale)

This Central Excise Appeal under Section 35G of the Central Excise Act, 1944 (for short 'the Act') is directed against the concurrent judgments passed by the Customs, Excise and Service Tax Appellate Tribunal, South Zonal Bench, Bangalore (CESTAT), the Commissioner of Customs and Central Excise (appeals); and the Deputy Commissioner, Central Excise, dated 28.05.2004, 20.08.2001 and 06.10.1997 respectively.

The order of the Deputy Commissioner arises from a show cause notice issued under Section 11A (1) (1A) of the Act, whereby the appellant-assessee was called upon to show cause as to why;

a. an amount of Rs.1,00,812/- being the differential duty at the rate of 10% adv. Payable in excess of clearances made during 1995-96 should not be demanded under rule 9 (2) of C Ex Rules, 1944, read with Section 11A of CESA 1944,

b. an amount of Rs.3,41,032/- being the differential duty at the rate of 10% adv. Payable for the clearances made during the year 1996-97 (upto 31.05.96) should not be demanded under rule 9 (2) of the C Ex Rules 1944 read with Section 11 A of CESA 1944,

c. Bonding gum/repair gum should not be classified under Chapter sub-heading No.4006.10 instead of 4006.90 as claimed by the assessee and also an amount of Rs.1,76,853/- being the duty payable on bonding gum for the clearances made during the financial year 1995-96 and in the year 1996-97 (upto 31.05.96) should not be demanded under the C Ex Rules 1944 read with Section 11A of CESA

1944 and

d. A penalty should not be imposed on them under Rule 173Q and 226 of C Ex Rules 1944 for contravention of Rule 9 (I), 52A, 173B, 173C, 173F, 173G and 226 of C Ex Rules, 1944.

Pursuant to the said show cause notice, the assessee submitted the explanation followed by a written brief on 11.09.1997. After considering the said written brief and the oral arguments, the Deputy Commissioner passed the following order:

> "Under Rule 9(2) of CEx Rules, I confirm the duty demand of Rs.4,41,844/- being the differential duty payable on the clearances made during the years 1995-96, 1996-97 (upto 31.05.96) for which concessional rate of duty is not applicable.
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> I classify Bonding gum/Repair gum under Chapter sub-heading No.4006.10 of CETA 1985, and confirm the duty demand of Rs.1,76,853/- payable for the clearances during the years 1995-96, 1996-97 (upto 31.05.96).
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> However, as the above said amounts were already paid by M/s.Vamshi Rubber Ltd., I hereby order that the said amount shall be adjusted towards duty confirmed."

Against the said order, an appeal was preferred to the Commissioner of Customs & Central Excise (Appeals), Hyderabad, who confirmed the order of the Deputy Commissioner of Central Excise, Hyderabad, by his order dated 20.08.2001. The assessee preferred an appeal to the Customs, Excise & Service Tax Appellate Tribunal, South Zonal Bench at Bangalore, and the Tribunal modified the order of the Commissioner to the extent that Bonding Gum/Repair Gum holding that it would be properly classifiable under sub-heading 4006.90 and the appellants were eligible for SSI exemption under Notification No.1/93 on the said product, and consequently, set aside the demand for Rs.1,76,853/- and confirmed the order of the Commissioner (Appeals) so far as the demand for an amount of Rs.4,41,844/- is concerned, by order dated 28.05.2004. Hence, the present appeal is filed against the order of demand for an amount of Rs.4,41,844/- only.

It is not in dispute that the assessee had filed returns under Rule 173-G of the Central Excise Rules, 1944 (for short 'the Rules') and the correctness of a duty assessed by the assessee on the goods removed was scrutinized by the

Proper Officer, contemplated by Rule 173-I of the Rules. It is also not in dispute that in the returns, the appellant-assessee had declared the value of the goods removed from the factory gate and the depot. The order of the Proper Officer under Rule 173-I of the Rules attained finality. In other words, the appellant did not challenge the order passed by the Proper Officer under Rule 173-I of the Rules.

Against this backdrop, we have heard learned counsel for the appellant-assessee and learned counsel for the Revenue and with their assistance, gone through the entire material placed before us.

Though, the appellant raised several questions, as substantial questions of law, in the memorandum of appeal, this Court while admitting the appeal, framed the following question for consideration:

> "Whether the Tribunal is justified in upholding the order of the lower authority despite the fact that there is no estoppel against the statutes and it is always open to the appellant or an assessee to adopt the correct assessable value in terms of Section 4 (1) (a) of the Central Excise Act, 1944 for the purpose of computing the clearances in terms of above said notification, notwithstanding the fact that duty was paid incorrectly at higher value by mistake or otherwise?"

In our opinion, though the above question was framed at the time of admitting the appeal, on the facts and in the circumstances of the case, in our opinion, it does not arise for our consideration in view of the order under Rule 173-I of the Rules, whereby the value of clearance for the products was determined and in the absence of challenge to the order, the question of its re-determination does not arise. It is also pertinent to note that the instant proceedings are only in the nature of consequential proceedings and not the main proceedings arising from the order of assessment.

It would be relevant to mention few facts that are relevant for taking such view. Appellant is the manufacturer of rubber products falling under Chapter 40 and vulcanizing solution falling under Chapter 35 of the Central Excise Tariff Act

1985 (for short 'the Tariff Act'). They opted for concessional rate of duty under Notification No.19/95-CE, dated 16.03.1995 (for short 'the 1995 notification') during the relevant period 1995-96 and 1996-97. It was found that during the year 1995-96, the appellant had cleared the goods valued at Rs.1,60,08,122.60 ps. i.e. more than exemption value limit of Rs.150 lakhs as provided for in the 1995 notification. In view thereof, according to the respondents, the appellant was not eligible for concessional rate of duty during the year 1995-96 for the clearance in excess of Rs.150 lakhs and that they are liable to pay differential duty of Rs.1,00,812/-.

Further, according to the respondent, the appellant is not eligible for concessional rate of duty under the 1995 Notification during 1996-97. Thus, it was ultimately held that they are liable to pay differential duty of Rs.3,41,032/- upto 31.05.1996. It is not in dispute that the appellant was liable to pay 25% duty out of which they had deposited 15% of the duty and for the remaining 10%, a show-cause notice was issued demanding the differential duty and also proposing to impose penalty. After receiving the reply and granting an opportunity of being heard, the Deputy Commissioner of Central Excise confirmed the demand of the duty of Rs.4,41,844/-. In other words, the Deputy Commissioner disallowed the concessional rate of duty under 1995 Notification. The order of Deputy Commissioner was then confirmed by the Commissioner of Customs & Central Excise (Appeals) vide order dated 20.08.2001 and then by the Tribunal vide order dated 28.05.2004. The Tribunal while dealing with the appeal in paragraph 13 observed thus:

> "The second issue in this appeal is regarding the determination of aggregate value of the clearance under Notification No.19/95-CE dated 16.03.95. The appellants have claimed that the assessable value of the clearance from depot and factory gate may be re-determined and the value of the clearance of the bonding Gum/Repair Gum should be excluded for determining the aggregate value of the clearances under Notification No.19/95 dated 16.3.95. We find that the assessable value of the clearance for the products cannot be re-determined at this stage. The assessable value was declared by the appellants themselves and they have paid the duty on the said value without any dispute and the assessments were finalized. Therefore at this stage they cannot come up for re-opening an issue which is already settled. The Commissioner (Appeals) in his order has rightly given the findings which are as under:

“9. I have considered the submissions made by the appellants. I find that the assessable value of all the goods have been arrived at by the appellants themselves before hand and the Central Excise duty was paid by them accordingly. The assessments have also been finalized on the basis of the assessable values declared by the appellants. The appellants have never disputed the assessable values at the time of finalization of the assessments. If the appellants had any grievance, they should have taken up the matter with the proper officer at the appropriate time for reconsideration citing the case laws and other relevant factors, who would have considered the same and would have passed appropriate orders in accordance with law. This, the appellants failed to do. It is now too late in the day for the appellants to turn around and dispute the assessable values which were declared only by themselves and on which the duty was paid by them voluntarily and the RT 12 returns have also been finalized accordingly by the Department. Therefore, for all practical and legal purposes, the issue for re-determination of assessable values is closed and cannot be reopened now. There cannot be a situation where one value is adopted for the purpose of computation of the aggregate value of the clearances. Legally, this untenable and impermissible besides being absurd. Therefore, the assessable values arrived at by the appellants under the provisions of Section 4 of the Central Excise Act, 1944, on which the duty has been paid by the appellants are the correct values for the purpose of computation of the aggregate value of clearances of the goods. By adding the values of all the clearances as per explanation II of the Notification No.19/95 CE dated 16.3.95, the appellants have crossed Rs.150 lakhs in the year 1995-96. Hence, the appellants are liable to pay the differential duty amounting to (Rs.1,00,812/- + Rs.3,41,032.00) Rs.4,41,844/- for the financial year 1995-96 and 1996-97 (upto 31.5.96). I uphold the Deputy Commissioner’s order in this regard.”

We are in full agreement with the findings of the Commissioner (Appeals) which are correct in law. We find that the value of the clearance of Bonding Gum/Repaid Gum has been correctly included in the aggregate value of the clearances under Notification No.19/95-CE dated 16.3.95 as per explanation II to the said Notification. Therefore, the findings of the Commissioner (Appeals) as stated above are correct and duty of Rs.4,41,844/- has been correctly demanded from the appellants. Once assessable value was accepted and declared by the appellants and was not disputed and assessments were finalized, now they cannot claim that additional demand on that value may be taken as cum duty price. Therefore the decisions relied upon by them for taking

> the sale price as cum duty price are not applicable on the facts and circumstances of the present case."

In this connection, we would like to refer to the judgment of the Supreme Court in ***Collector of Central Excise, Kanpur, vs. Flock (India) Pvt. Ltd.*** wherein the Supreme Court was considering the question that in a case where the Assistant Collector of Central Excise passes an order classifying a product under a particular tariff item and the said order, though appealable, is not challenged by the assessee in appeal, whether, in the application for refund of the duty paid, the assessee is entitled to question the order of the Assistant Collector as erroneous. Relevant observations made by the Supreme Court in paragraph 10 read thus:

> "10. Coming to the question that is raised there is little scope for doubt that in a case where an adjudicating authority has passed an order which is appelable under the statute and the party aggrieved did not choose to exercise the statutory right of filing an appeal, it is not open to the party to question the correctness of the order of the adjudicating authority subsequently by filing a claim for refund on the ground that the adjudicating authority had committed an error in passing his order. If this position is accepted then the provisions for adjudication in the Act and the Rules, the provision for appeal in the Act and the Rules will lose their relevance and the entire exercise will be rendered redundant. This position in our view, will run counter to the scheme of the Act and will introduce an element of uncertainty in the entire process of levy and collection of excise duty. Such a position cannot, be countenanced. The view taken by us also gain support from the provision in sub-rule (3) of Rule 11 wherein it is laid down that where as a result of any order passed in appeal or revision under the Act, refund of any duty becomes due to any person, the proper officer, may refund, the amount to such person without his having to make any claim in that behalf. The provision indicates the importance attached to an order of the appellate or revisional authority under the Act therefore, an order which is appealable under the Act is not challenged then the order is not liable to be questioned and the matter is not to be reopened in a proceeding for refund which if we may term it so is in the nature of execution of a decree/order. In the case at hand it was specifically mentioned in the order of the Assistant Collector that the assessee may file appeal against the order before the Collector (Appeals) if so advised."

In the present case, admittedly, no statutory appeal was preferred against the order under Rule 173-I of the Rules. The appellant, though did not challenge the order of assessment under Rule 173-I of the Rules, in the instant proceedings, in effect, has challenged the said order contending that they were not liable to pay the duty as determined by the Adjudicating Officer under Rule 173-I of the Rules. This, in our opinion, is not permissible in law. It is not in dispute that the show-cause notice was issued on the basis of the order under Rule 173-I of the Rules passed by the Adjudicating Authority and therefore it is not open to the appellant, in the proceedings arising from a show-cause notice, such as one in the present case, to contend that more duty was recovered from them based on the provisions of Section 4 (1), as it stood at the relevant time, of the Act.

We find no question of law arises for our consideration as the entire case is based on facts leading to the finalization of assessment and its consequential effect.

In the circumstances, the appeal is dismissed. There shall be no order as to costs.

Miscellaneous petitions pending in the appeal, if any, also stand disposed of.

Dilip B.Bhosale, J

A.Ramalingeswara Rao, J

8th April, 2015.

kdl / sur /vs