IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

CENTRAL EXCISE APPEAL NO.13 OF 2015
WITH
CUSTOMS APPEAL NO.16 OF 2015

...

A.N.Impex ...Appellant
v/s.
The Commissioner of Service Tax,
Thane-I ...Respondent

...

Mr.Prakash Shah with Mr.Jas Sanghavi i/b M/s.PDS Legal for the Appellant.
Mr.Pradeep S.Jetly with Mr.Jitendra B. Mishra for the Respondent.

...

CORAM : S.C.DHARMADHIKARI &
A.A. SAYED, JJ.

DATED : 14 MARCH 2016

P.C.:

By these Appeals the Assessee challenges the order passed by the Customs, Excise and Service Tax Appellate Tribunal, Mumbai dated 27 March 2014. By the order impugned the Tribunal has proceeded to dismiss the Assessee's Appeal.

2. That Appeal was directed against the order passed by the Commissioner of Central Excise (Appeals), Mumbai dated 21 July 2010.

3. In a common order delivered in some stay Applications and two Appeals, the Tribunal concluded that the Notifications which are subject matter of inquiry and adjudication do not enable the

Appellant/Asseseee to manufacture plastic bags, but they have to manufacture the garbage bags of plastic, plastic Rolls and recycled granules of plastic.

4. Having noted this conclusion of the Tribunal, we find that the Appeals raise substantial questions of law. They are admitted on the following substantial questions of law:-

> *(a) Whether in the facts and circumstances of the case, the Appellate Tribunal was justified in holding that the "garbage bags of plastic" manufactured by the Appellant is not covered by the LOP dated 19 November 1997 issued by the Secretariat of Industrial Approval, Ministry of Industry, Government of India?*
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> *(b) Whether in the facts and circumstances of the case, the Appellate Tribunal erred in not considering the submission of the Appellant that the amendment dated 25 August 2003 to LOP dated 19 November 1997 is clarificatory and retrospective?*
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> *(c) Whether in the facts and circumstances of the case, the Appellate Tribunal erred in holding that the Appellants did not fulfill the condition of Notification No.53/97-Cus dated 3 June 1997 and Notification 1/95-CE dated 4 January 1995 without specifying the conditions which were not fulfilled?*
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> *(d) Whether in the facts and circumstances of the case, the Appellate Tribunal erred in not considering the various submissions of the Appellant and confirming the demand by passing a cryptic and non-speaking order in violation of principles of natural justice?*

5. Mr.Shah learned Counsel appearing for the Assessee has invited our attention to the finding of the Tribunal. He would submit that the Tribunal has misdirected itself in law inasmuch as even if the Assessee is not disputing that it manufactures plastic bags, which can be used as a packaging material, that is no violation or breach of the relevant Notifications.

6. Our attention is invited to the Reply to the Show Cause Notice and the letter dated 9 December 2005 issued by the Government of India, Office of the Development Commissioner, SEEPZ, Ministry of Commerce & Industry.

7. It is stated that the Superintendent of Central Excise was informed by the Asst.Development Commissioner, SEEPZ that the Unit falls in `No Action Category' and consequently what has been clarified is that clearance of plastic bags from the Unit be treated as clearance from normal DTA Unit for which central excise is not leviable. However, Mr.Shah would submit that a query was raised that which plastic bag is to be termed/treated as garbage bag and the plastic bag manufactured by the Assessee is different from the garbage bag has not been clarified. There was a specific explanation given even by the Asst.Commissioner of Central Excise with regard to the Audit objection.

8. Our attention is also invited by Mr.Shah to page 77 of the Paper Book, which is a true copy of the letter dated 7 April 2006 again addressed by the Asstt.Development Commissioner, SEEPZ informing the Superintendent of Central Excise, Range IV, Kalyan-I Division, Bhiwandi that the Assessee's Unit by letter dated 6 March 2006 furnished a clarification pertaining to garbage bags and plastic bags from `All India Plastics Manufacturers Association', who have clarified that there would be no difference between the garbage bags of plastic and plastic bags. Both are covered under Heading 3923 and falls under the same ITC HS Code.

9. Our attention is also invited by Mr.Shah to the allegations in the Show Cause Notice and where it is stated that the Assessee was permitted to carry out manufacturing activities in Bond for the manufacture of recycled granules, garbage bags of plastics and plastic sheets in rolls.

10. Mr.Shah would, thus, submit that the Tribunal has not discussed in details as to how the demand on the Assessee can be confirmed. The Assessee relied upon the Letter of Permission and it came to be amended and by which the Assessee was allowed to manufacture plastic bags also. The demand is for the period from 25 August 2003. The contention of Mr.Shah is that the finding of fact reached in para 8 of the Tribunal's order is incorrect. In that regard he would rely upon the Notification No.53/97 Cus dated 3 June 1997 and Notification No.1/95 CE dated 4 January 1995.

11. Mr.Shah, therefore, submits that an opportunity be given to the Appellant-Assessee to satisfy the Tribunal that the conditions of the Notifications have been complied with.

12. Mr.Shah would submit that the order impugned in the Appeals be, therefore, set aside and the matter be restored to the file of the Tribunal.

13. On the other hand, Mr.Jetly, learned Counsel for the Revenue would submit that what the Appellant is now indulging in is a mere play of words. What the Appellant represented to the

Revenue was that it indeed desires to make bags and which are utilized for collection of garbage, they may be of plastic. But there is a distinction and as rightly held by the Tribunal between garbage bag of plastic and a plastic bag. Therefore, no clarification from any authority, much less any Association can bind the Tribunal. In the circumstances, Mr.Jetly would submit that the Appeal be dismissed.

14. With the consent of both sides, we have have taken up the Appeals for final disposal.

15. The Assessee has not disputed that the Assessee was granted a Letter of Permission on 19 November 1997 by the Secretariat of Industrial Approval namely Ministry of Industry, Government of India to set up 100% export oriented unit for manufacture and export, amongst others, garbage bags of plastic. The License was issued in the prescribed form and it is further undisputed that the Appellant imported and indigenously procured raw materials. In respect of imported goods, duty free procurements were undertaken by relying upon the Notification No.53/97 and in respect of indigenous raw material, duty free procurements were undertaken by relying on the Notification No.1/95. Copies of which are at Annexures D & E. A perusal of these Notifications would reveal that first Notification pertains to exemption to specified goods meant for manufacture and packaging of articles in 100% EOU or manufacture or development of electronic hardware and software in EHTP or STP.

16. That is the Notification issued by the Central Excise. The materials which have been brought in connection with the manufacture and packaging of articles in 100% EOU referred therein as user industry was subjected to the exemption. The excisable goods specified in Annexure-1 to the Notification and brought in connection with the above are exempted by this Notification. There are conditions set out but we do not see any material referred in the Tribunal's order, which would indicate specific terms and conditions of this Notification being violated.

17. The second Notification is to exempt specified goods imported for production of goods for export or for use in 100% Export Oriented Undertaking.

18. If these were indeed Notifications, terms and conditions of which have been referred so also of the license in favour of the Assessee, then we do not see how the Tribunal could have dismissed the argument of the Assessee in the manner done by it and in a single paragraph. If the Letter of Permission dated 19 November 1997, under which permission to set up 100% export oriented unit for manufacture and export of garbage bags of plastic, enables the Appellant/Assessee to import plastic waste/scrap without payment of duty and to use the same in manufacture of specified goods as per the Letter of Permission, then, demand of duty on the ground that the Appellant has not manufactured garbage bags of plastic but plastic bags which are used for packaging textile materials must be clarified and with proper reasoning.

19. The Assessee relied upon the modification or amendment to the Letter of Permission on 21 August 2003, whereby it was allowed to manufacture plastic bags. The contention was that upon this amendment the above referred demand cannot be sustained. If the amendment is to be treated as retrospective in nature as per the Assessee, then we expected the Tribunal as last fact finding Authority to discuss as to whether that argument of the Assessee has any merit. It should have been clarified whether the Letter of Permission would govern the acts and transactions or deals in the present case or the substantial Notifications. We do not find in para 8 of the Tribunal's order any reference made to the relevant and germane material including terms and conditions of the Notifications, the Letter of Permission, its amendment and thereafter the effect of the same, inasmuch as, whether it can be termed as retrospective or otherwise. We are, therefore, not assisted in any manner by such a short and cryptic order of the Tribunal.

20. In view of the above discussion, we find that the Tribunal's order impugned in these Appeals cannot be sustained. Instead of we going into all the contentions and deciding the Appeal before the Tribunal ourselves, it would be better if the impugned order is set aside and the matter is restored to the file of the Tribunal for a decision afresh on merits and in accordance with law. It is this course which will enable the parties to avail of the right of Appeal in the event of any adverse order. This would not cause any breach or failure of justice. Accordingly, we set aside the impugned order. We express no opinion on the rival contentions, but restore the Appeal

of the Assessee to the file of the Tribunal for being deciding afresh uninfluenced by any conclusion and particularly in para 8 of the impugned order. We clarify that this Court has not expressed any opinion or concluded the matter either way.

21. Appeals are allowed in the above terms. No order as to costs.

(A.A. SAYED, J.) **(S.C.DHARMADHIKARI,J.)**