IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED :: 02-12-2016

CORAM

THE HONOURABLE MR.JUSTICE NOOTY.RAMAMOHANA RAO

AND

THE HONOURABLE MR.JUSTICE M.S.RAMESH

C.M.A.No.3180 of 2009

M/s.Sheth Impex Vivo Solutions Pvt.Ltd.,
formerly Sheth Impex,
represented by its Managing Director,
No.1, Ayyanar Koil Street,
Thattanchavady,
Pondicherry-605 009. ... Appellant

-vs-

1.Commissioner of Customs (Imports),
Custom House, No.60, Rajaji Salai,
Chennai-600 001.

2.Customs, Excise and Service Tax
Appellate Tribunal, South Zonal Bench,
Shastri Bhavan, Annexe, 1st Floor,
26, Haddows Road,
Chennai-600 006. ... Respondents

(Cause title Accepted vide order
of court dated 10.11.09 made in
MP.No.1/09)

Appeal under Section 130 of the Customs Act,1962, against the Final Order, dated 04.02.2009, passed in Final Order No.139 of 2009, on the file of Customs, Excise and Service Tax Appellate Tribunal, South Zonal Bench Chennai.

For appellant : Mr.G.Derrick Sam,
for M/s.Hari Radhakrishnan.

For respondent 1 : Mr.A.P.Srinivas,
Standing Counsel.

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JUDGMENT

(Judgment of the Court was delivered by Nooty.Ramamohana Rao,J.)

This Appeal is preferred by the importer under Section 130 of the Customs Act,1962, in short, "the Act", raising the following two substantial questions of law for our consideration :

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(1) Whether the adjudicating authority has refused to admit evidence which ought to have been admitted ?

(2) Whether the appellant was prevented by sufficient cause from producing before the authority any evidence which is relevant to any ground of appeal ?

2. The appellant-importer had filed Bill of Entry No.627594, dated 12.05.2004, and declared 84 items covered under two invoices. Subsequently, on 28.05.2004, he requested for permission to amend the Bill of Entry to include two more items covered under a third invoice. The adjudicating authority did not accept the explanation offered by the importer and confiscated the goods under Section 111 of the Act. The differential amount of duty was so insignificant, as it involved only Rs.6.650/-. Taking into consideration the fact that the importer on his own has requested for amending the Bill of Entry and that too before the clearance of the goods, there was, in fact, no necessity for confiscating the goods. Hence, agreeing with the contention of the importer, the Commissioner of Customs (Appeals) passed an order on 20.07.2004, allowing the appeal and setting aside the order in original, dated 10.06.2004. On 01.02.2005, the importer has filed a claim for refund under Section 27 of the Act, claiming refund of the duty paid in excess, in terms of Customs notification No.21/2002, dated 01.03.2002. During the course of the proceedings, a certificate of the Chartered Accountant that the duty paid is not passed on to his customers has also been enclosed. However, the Deputy Commissioner of Customs (Refunds), in his order, dated 28.06.2006, has rejected the claim essentially for the following reasons found therein :

> "The CA certificate merely states the verification of certain invoices during the course of their audit. A few sales invoices are placed on record. Neither the certificate of the Chartered Accountant nor the documentary evidence submitted is conclusive enough to rule out the possibility of unjust enrichment. There has not been any mention of their books of accounts like Balance Sheet, Profit and Loss Account, Ledger Account etc., and how the duty to be refunded has been accounted for in these documents."

An appeal was preferred against the said order before the Commissioner of Customs (Appeals), Customs House, Chennai, who, by his order, dated 20.11.2006, rejected the appeal and confirmed the order of the original authority, declining the claim for refund. In paragraph 3 of the Order-in- Appeal, the Commissioner of Appeals has noted that the Chartered Accountant's Certificate that the incidence of duty had not been

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passed on to the customers was furnished and that costing of accessories to the extendable breathing system and Mapleson clearly indicated that only 5% of duty was charged and the sales invoices for the period from August,2004, to January,2006, have been produced to show that there is no variation in the price, thus, evidencing that the incidence of duty has not been truly passed on to their customers. In spite of such quality evidence, what the Appellate Commissioner did was to reject the appeal on the ground that Rule 5 of the Customs (Appeals) Rules,1982, does not permit him to look into any such additional evidence and he also drew inspiration from the judgment of the Tribunal in Shree Ram Industries v. Commissioner of Central Excise, 1999 (113) E.L.T.267 (Tribunal), wherein, dealing with additional evidence, the Tribunal held that the said evidence should be produced earlier by placing the books of accounts before the original authority, but not before the appellate authority.

3. In view of the above fact situation, we need to answer the first question, by taking into account and consideration Rule 5 of the Customs (Appeals) Rules,1982, which reads as under :

"5. Production of additional evidence before the [Commissioner] (Appeals).-

(1) The appellant shall not be entitled to produce before the [Commissioner] (Appeals) any evidence, whether oral or documentary, other than the evidence produced by him during the course of proceedings before the adjudicating authority, except in the following circumstances, namely :-

(a) where the adjudicating authority has refused to admit evidence which ought to have been admitted; or

(b) where the appellant was prevented by sufficient cause from producing the evidence which he was called upon to produce by that authority; or

(c) where the appellant was prevented by sufficient cause from producing before the authority any evidence which is relevant to any ground of appeal; or

(d) where the adjudicating authority has made the order appealed against without giving sufficient opportunity to the appellant to adduce evidence relevant to any ground of appeal.

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(2) No evidence shall be admitted under sub-rule (1) unless the [Commissioner] (Appeals) records in writing the reasons for its admission.

(3) The [Commissioner] (Appeals) shall not take any evidence produced under sub-rule (1) unless the adjudicating authority or an officer authorised in this behalf by the said authority has been allowed a reasonable opportunity -

(a) to examine the evidence or documents or to cross-examine any witness produced by the appellant; or

(b) to produce any evidence or any witness in rebuttal of the evidence produced by the appellant under sub-rule (1).

(4) Nothing contained in this rule shall affect the powers of the [Commissioner] (Appeals) to direct the production of any document, or the examination of any witness, to enable him to dispose of the appeal."

4. From a reading of the above Rules, it is hardly in doubt that the appellant was not entitled to produce before the Commissioner of Appeals any new evidence other than the evidence already produced by him before the adjudicating authority. But, however, clear-cut exceptions have been carved out in the following circumstances to the aforementioned normal rule:

(i) where the adjudicating authority has refused to admit evidence which ought to have been admitted ;

(ii) where the appellant was prevented by sufficient cause from producing the evidence which he was called upon to produce by that authority ;

(iii) where the appellant was prevented by sufficient cause from producing before the authority any evidence which is relevant to any ground of appeal ;

(iv) where the adjudicating authority has made the order appealed against without giving sufficient opportunity to the appellant to adduce evidence relevant to any ground of appeal.

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5. Thus, it is clear that certain amount of discretion in the matter of admitting additional evidence before the Commissioner (Appeals) was built into the Rule. The appellate authority is, therefore, required to apply his mind as to whether the plea of the appellant to admit additional evidence falls within the aforementioned four exceptions or not and then

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admit the additional/fresh evidence. Whereas, the Commissioner (Appeals) has proceeded as if there is an absolute bar contained in Rule 5 from entertaining any such additional evidence. Clearly, the approach adopted by the Commissioner of Appeals is erroneous.

6. Far from laying down a bar in absolute terms, Rule 5 has clearly attempted to regulate the discretion liable to be exercised by the Appellate Commissioner, by providing for four different kinds of exceptions. In the instant case, the importer has been urging that because of a technical snag, he could not retrieve in time necessary information from the computer system to enable him place it before the adjudicating authority. This apart, when sales invoices over a long period of time have been placed before the Appellate Commissioner to demonstrate that the incidence of duty paid has, in fact, not been passed on to its customers, such a piece of evidence is a relevant one for adjudicating the claim for refund, made by the importer. There appears to be sufficient cause that prevented the importer from placing the necessary material before the Appellate Commissioner.

7. In that view of the matter, we are of the opinion that the approach adopted by the Commissioner of Appeals in rejecting to take into consideration the material evidence produced by the importer cannot be sustained. In addition, though the Appellate Commissioner viewed the same as a relevant piece of evidence and which would sustain the claim for refund, yet, he declined to consider the same, which is a matter for concern.

8. When it comes to the order of the Tribunal, the Tribunal has adopted a very rigid approach. It is appropriate to notice that under Section 129-A, any aggrieved person is entitled to prefer an appeal to the Appellate Tribunal, whereas, under Section 129-B, the Appellate Tribunal has been conferred with the power to pass such orders, as it thinks fit, either confirming, modifying or annuling the decision or the order appealed against or may refer the case back to the authority, which passed such decision or order with such directions, as the Appellate Tribunal may think fit, for fresh adjudication or order, as the case may be, after taking into consideration additional evidence, if necessary. Thus, the jurisdiction conferred upon the Appellate Tribunal in terms of Section 129-B is fairly wide. Obviously, it is intended to secure a proper adjudication of the lis, both involving questions of fact and law as well.

9. In this context, it would only be appropriate to recall the principle enunciated by the Supreme Court in Jute Corporation of India Liamited v. Commissioner of Income Tax, (1991) 187 ITR 688. Again, dealing with Section 254 of the Income Tax Act, the Supreme Court, in National Thermal Power Co. Ltd. v. Commissioner of Income Tax, reported in (1998) 229 ITR

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383, has held as under :

> "Under Section 254 of the Income-tax Act, the Appellate Tribunal may, after giving both the parties to the appeal an opportunity of being heard, pass such orders thereon as it thinks fit. The power of the Tribunal in dealing with appeals is thus expressed in the widest possible terms. The purpose of the assessment proceedings before the taxing authorities is to assess correctly the tax liability of an assessee in accordance with law. If, for example, as a result of a judicial decision given while the appeal is pending before the Tribunal, it is found that a non-taxable item is taxed or a permissible deduction is denied, we do not see any reason why the assessee should be prevented from raising that question before the Tribunal for the first time, so long as the relevant facts are on record in respect of that item. We do not see any reason to restrict the power of the Tribunal under Section 254 only to decide the grounds which arise from the order of the Commissioner of Income-tax (Appeals). Both the assessee as well as the Department have a right to file an appeal/cross-objections before the Tribunal. We fail to see why the Tribunal should be prevented from considering questions of law arising in assessment proceedings although not raised earlier."

10. Thus, the anxiety is to confine the authorities concerned strictly to the requirements contained in the statute while making assessments of taxes/duties while at the same time allow the person concerned to press home such plea/material available, which would mitigate his liability.

11. We are, therefore, clearly of the view that the Commissioner of Appeals and also the Tribunal have both grossly erred in not looking into the additional evidence, which has been produced before the Appellate Commissioner. Accordingly, we hold that the additional evidence produced before the Commissioner of Appeals is liable to be acted upon, as the exceptions carved out in Rule 5 are satisfied. Hence, we answer the two questions raised in this appeal in favour of the appellant-importer and against the revenue; set aside the Order in Appeal, passed by the Commissioner of Appeals, as well as the impugned order passed by the Tribunal, and remit the matter back for fresh consideration by the Commissioner of Appeals.

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12. C.M.A. stands allowed in the above terms. No costs.

-s/d-
Assistant Registrar

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Sub-Assistant Registrar

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To

1.Commissioner of Customs (Imports),
Custom House, No.60, Rajaji Salai,
Chennai-600 001.

2.Customs, Excise and Service Tax
Appellate Tribunal, South Zonal Bench,
Shastri Bhavan, Annexe, 1st Floor,
26, Haddows Road,
Chennai-600 006.

3. The Commissioner of Customs Appeals
No.60 Rajaji Salai Customs House Chennai-1

+1 cc to Mr.A.P.Srinivas Advocate sr 71602

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