

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on: 07.10.2016

Pronounced on: 08.08.2017

Coram:

The Hon'ble Mr. Justice NOOTY. RAMAMOHANA RAO
AND

The Hon'ble Dr. Justice ANITA SUMANTH

CIVIL MISCELLANEOUS APPEAL No.813 of 2016

Commissioner of Customs,
Customs Commissionerate VII,
(AIR CARGO), Chennai,
Integrated Air Cargo Complex,
Meenambakkam, Chennai-600 027. ... Appellant/Respondent

Versus

M/s.Sri Vasavi Gold and Bullion Pvt. Ltd.,
No.137, NSC Bose Road,
Sowcarpet, Chennai-600 079. ... Respondent/Appellant

Appeal under Section 130 of the Customs Act, 1962 to set aside the Final Order No.41448 of 2015 dated 15.10.2015 passed by the Hon'ble CESTAT, Chennai and to uphold the assessment of Bill of Entry No.6358966 dated 26.03.2012.

For Appellant .. Mr.V.Sundareswaran

For Respondent .. Mr.N.Prasad for
Mr.N.Inbarajan

JUDGMENT

(Judgment of this Court was delivered by ANITA SUMANTH, J.)

This Civil Miscellaneous Appeal is filed at the instance of the Revenue challenging the final order of the Customs, Central Excise and Service Tax Appellate Tribunal (hereinafter referred to as 'CESTAT') dated 15.10.2015.

2. The assessee-respondent is engaged in the activity of import of, and trading in unbranded gold jewellery. Imports were

effected from Bangkok, Thailand. Pursuant to invoice dated 19-03-2012, a bill of entry for home consumption dated 26-03-2012 was filed and assessment completed on 09.04.2012 based on which clearances of gold jewellery were effected. The assessee-respondent had declared the assessable value at a figure of Rs.2,95,69,876.13 computing the CVD at 6% at a figure of Rs.17,74,192.60 along with cess at 2% and 1% and additional duty at 1%.

3. On the date of clearance, 09.04.2012, there were two Notifications prevailing, Notification 12/2012 (CE) dated 17.03.2012 that imposed duty at an effective rate of 1% upon condition that no credit had been availed under Rule 3 or Rule 13 of the CENVAT Rules 2004 in respect of inputs or inputs services used in the manufacture of the goods and Notification 2/2011 as amended by Notification 23/2012 which imposed a duty of 6% on branded as well as unbranded jewellery.

4. In the present case, the assessment on the basis of bill of entry computes the liability of duty at the rate of 6% arriving at the duty payable of an amount of Rs.21,41,391/-. The assessee, assailing the assessment in appeal, sought to avail the benefit of Notification 12/2012 which prescribed duty at the rate of 1%. In the present case, the assessee being an importer had not availed of credit and consequently not passed on the same and was thus, according to it, eligible for the benefit of Notification 12/2012.

5. Before the first Appellate Authority, the Commissioner of Customs (Appeals), the assessee contended that in the light of two prevailing Notifications prescribing two different rates, the one more beneficial to it was liable to be adopted and applied. The appeal was however rejected on the ground that the assessee was ineligible to claim the benefit of reduced rate of 1% prescribed in terms of Notification 12/2012 since the goods in issue were imports in respect of which there could be no claim of CENVAT credit.

6. The assessment was thus confirmed as was the liability of duty at the rate of 6% viz-a-viz 1% as claimed by the assessee. In appeal before the CESTAT, the issue framed at para 4 by the CESTAT is as follows:

"....4.After hearing both sides, we find that the issue falls on a narrow compass involving CVD payable on the imported goods whether chargeable @ 6% under Notification No.19/2012-CE dated 17.03.2012 or @ 1% in terms of Notification 12/2012-CE dated 17-03-2012."

7. After extracting the gist of the two notifications

prescribing two different rates, the Bench proceeds to decide the issue in favour of the assessee holding that the assessee is eligible for the concessional rate of 1% duty in terms of Notification 12/2012-CE dated 17.03.2012.

8. Reliance was placed on the judgments of the Hon'ble Supreme Court in the case of SRF Ltd. Vs. CC Chennai (318 ELT 607) and ITC Ltd. Vs CC New Delhi (2015-TIOL-74-SC-CUS). The aforesaid judgments address the basis of rejection of the assessee's claim by the Commissioner (Appeals) namely that the non-satisfaction of the conditions set out in Notification 12/2012 relating to the availment or otherwise or CENVAT credit would not be fatal to the assessee's claim. The Bench finds that in a case where the availment of CENVAT credit would itself not arise, the question of fulfilling the same would not be relevant. Thus, for the purpose of attracting additional duty on the import of an article, actual manufacture or production in India was not necessary.

9. The Bombay High Court in the case of Thermax Private Limited Vs. Collector of Customs [1992 (4) SCC 440] affirmed by the Constitution Bench of the Supreme Court in the case of Hyderabad Industries Limited vs. Union of India ([1999 (5) SCC 15] as well as AIDEK Tourism Services Private Limited vs. Commissioner of Customs, New Delhi, (Civil Appeal No. 2616 of 2001) (2015-TIOL-23-SC-CU) have now settled the position that in the quantification of additional duty in the case of imports, it could be imagined or deemed that the article imported has been manufactured or produced in India and to consequently quantify the amount of excise duty leviable thereon.

10. Applying the aforesaid decisions to the present case, the CESTAT allowed the assessee's appeal accepting the claim of the assessee in terms of Notification 12/2012 and granting the benefit of concessional rate of 1% set out thereunder. The only contention of the Revenue before the CESTAT was to the effect that the judgment of the Supreme Court in the matter of SRF (cited supra) was pending in review. It is against the aforesaid order of the CESTAT dated 15.10.2015 that the present Civil Miscellaneous Appeal has been filed by the Revenue.

11. We have heard the submissions of Mr.V.Sundareswaran, learned Standing Counsel appearing on behalf of the appellant Commissioner of Customs and Mr.N.Prasad for Mr.N.Inbarajan learned Counsel appearing for the respondent assessee.

12. A preliminary objection has been raised by Mr.Prasad, as to the maintainability of the present appeal. The learned counsel would argue that this Court does not possess the requisite statutory jurisdiction to adjudicate upon the

substantial questions of law raised by the Revenue in the light of the provisions of section 130 of the Customs Act. Section 130 (1) of the Act reads as follows:

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

(Emphasis supplied)

He would emphasise that the issue in the present case directly impinges on the determination of a question having a relation to the rate of duty of excise and thus cannot be considered by this Court.

13. Reliance was placed upon the judgments of the Supreme Court in the case of Navin Chemicals Manufacturing and Trading Company Ltd. Vs. Collector of Customs (1993) (4 SCC 320) and Commissioner of Central Excise Vs. Harichand Sri Gopal (260 ELT 3).

14. We extract below the questions of law raised for determination of this court:

1. Whether the Tribunal was justified in allowing the appeal without any discussion or reasoning objectively or subjectively on facts and on law?

2. Whether the Tribunal has committed an error of law in not appreciating that failure to satisfy the condition No.25 envisaged under the Notification Not.No.12/2012-CE dated 17-03-2012 (Sl.No.199) would disentitle the respondent from claiming the concessional duty?

3. Whether the Tribunal committed an error of law in following the decision of the Apex Court in 2015 (318) ELT 607 (SRF Ltd. Vs.CC) instead of following the decision of the Constitutional Bench of the Apex Court in 2010 (260) ELT 3 (Hari Chand Sri Gopal)?

15. Sub-section (1) of section 130 uses the expression 'determination of any question having a relation to the rate of duty or to the value of goods for the purposes of assessment'.

In the present case, the issue for consideration is, simply put, whether the assessee is to be called upon to pay 6% or 1% duty. The satisfaction of conditions for eligibility to claim the concessional rate is a mere factor relevant to determine the actual liability.

16. A phrase identical to the one in section 130(1) i.e. 'determination of any question having a relation to the rate of duty or to the value of goods for the purposes of assessment' is used in section 129 D of the Customs Act which additionally contains an Explanation providing a definition of the phrases utilized in that provision. The Explanation reads as follows:

'(5) The provisions of this section shall not apply to any decision or order in which the determination of any question having a relation to the rate of duty or to the value of goods for the purposes of assessment of any duty is in issue or is one of the points in issue.

Explanation.-For the purposes of this sub-section, the determination of a rate of duty in relation to any goods or valuation of any goods or valuation of any goods for the purposes of assessment of duty includes the determination of a question-

(a) Relating to the rate of duty for the time being in force, whether under the Customs Tariff Act, 1975 (51 of 1975), or under any other Central Act providing for the levy and collection of any duty of customs, in relation to any goods on or after the 28th day of February, 1986; or

(b) relating to the value of goods for the purposes of assessment of any duty in cases where the assessment is made on or after the 28th day of February, 1986; or

(c) whether any goods fall under a particular heading or sub-heading of the First Schedule or the Second Schedule to the Customs Tariff Act, 1975 (51 of 1975), or that any goods are or not covered by a particular notification or order issued by the Central Government granting total or partial exemption from duty; or

(d) whether the value of any goods for the purposes of assessment of duty shall be enhanced or reduced by the addition or reduction of the amounts in respect of such matters as are specifically provided in this Act.'

Thus, 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.

17. The Supreme Court holds, in Navin Chemicals, (supra), that although the application of the Explanation is confined to the use of the phrase in sub-section (5) of Section 129-D, there is no reason why the same expression used in other provisions of the Act should not be interpreted similarly.

18. Mr.Srinivas would however emphasize on the observation of the Supreme Court in Navin Chemicals (supra) to the effect that '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. The questions raised by the Revenue in appeal would, at first blush, indicate otherwise. However, on a deeper consideration, it is apparent that the direct and in fact, only issue that arises for consideration is the rate of duty applicable to the transaction, however much the Revenue attempts to project otherwise. A wolf, in sheep's clothing, remains a wolf nevertheless!

Mr.Srinivas would also refer to other judgments that we believe are inapplicable for the following reasons:

(i) In Commissioner of Customs Vs Edhayam Frozen Foods (2008 (230) ELT 225, this Court considered the issue as to whether prawn/shrimps are fish, liable to the levy of agricultural cess. The issue involved herein is different.

(ii) This Court, in Commissioner of Customs, Chennai vs. Ashok Enterprises (302 ELT 191) rejected the contention of the assessee challenging maintainability of the appeal filed by the Revenue on the ground that the rate of duty was not in dispute. The facts of that case are distinguishable from the present one and the conclusion of the Court turned on the factual finding of the Court therein that the rate of duty in that case was not in dispute.

(iii) The Gujarat High Court in Anil Products Ltd Vs.

Commissioner of Central excise, Ahmedabad 2014 (307) ELT 692 relates to a case where the classification of goods was in dispute and hence the appeal was held to be not maintainable. It is nobody's case here that the dispute relates to classification. The question is only whether the rate of duty applicable to the transaction would be 1% or 6%. As such this decision thus does not advance the case of the Revenue.

(iv) The following paragraph was relied upon in Ruchi Soya Industries Vs. Union of India 2014(307) ELT 852 decided by the Gujarat High Court:

'11.2 . It is required to be noted that as such there is no dispute that if total carotenoid oil (as beta carotene) is found to be in the range of 500-2500 mg/kg in the very Palm Oil it attracts concessional rate of basic custom duty of 65% and if the above requirement is not met, the Crude Palm Oil would be classified under Heading 151190.90 of the Customs Tariff Act attracting higher rate of customs duty of 75%. Thus, as such there is no dispute with respect to rate of duty at all. At the cost of repetition, it is to be observed that the question involved is whether in the Crude Palm Oil content of carotenoid (as beta carotene) is less than 500 as contended on behalf of department or above 500 as contended on behalf of importer. Under the circumstances, as such it cannot be said that in the appeals any question arise in relation to the rate of duty of custom or to the value of the goods for the purpose of assessment. Considering the aforesaid facts and circumstance of the case, it cannot be said that the question involved in the appeals has a direct and proximate relationship to the rate of duty and to the value of goods for the purpose of assessment. Section 130 of the Customs Act which makes provision for "appeal to High Court" lays down that an appeal shall lie to the High Court from every order passed in appeal by the Appellate Tribunal (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 purpose of assessment), if the High Court is satisfied that the case involves a substantial question of law. Section 130E of the Customs Act which provides for "Appeal to Supreme Court" inter alia lays down that an appeal shall lie to the Supreme Court from any order passed by the Appellate Tribunal relating, amongst

other things, to the determination of any question having a relation to the rate of duty of customs or at the value of the goods for the purpose of assessment.'

Relying on the above observations, Mr.Srinivas would argue that the direct and proximate cause of action in the present case does not concern the rate of duty but a claim of exemption. The Supreme Court in the case of New India Assurance Company Limited Vs.M/s.Zuari Industries Limited (2009) 9 SCC 70, had thus to say in the context of what constitutes proximate cause.

'22. Apparently there is no direct decision of this Court on this point as to the meaning of proximate cause

but there are decisions of foreign Courts and the predominant view appears to be that the proximate cause is not the cause which is nearest in time or place but the active and efficient cause that sets in motion a train or chain of events which brings about the ultimate result without the intervention of any other force working from an independent source.'

In the present case, the issue that was formulated as the 'lis' between the parties was the applicable rate of duty to the transaction at issue. In fact as we have noted earlier, the CESTAT had framed the issue before it as falling within a narrow compass involving the question of whether CVD was chargeable at 6% or 1%. This then is the direct and proximate cause.

19. In the upshot, we are of the view that the appeal is liable to dismissed as non-maintainable and do so. No costs.

Sd/-
Assistant Registrar(CS VI)

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Sub Assistant Registrar

vga/msr

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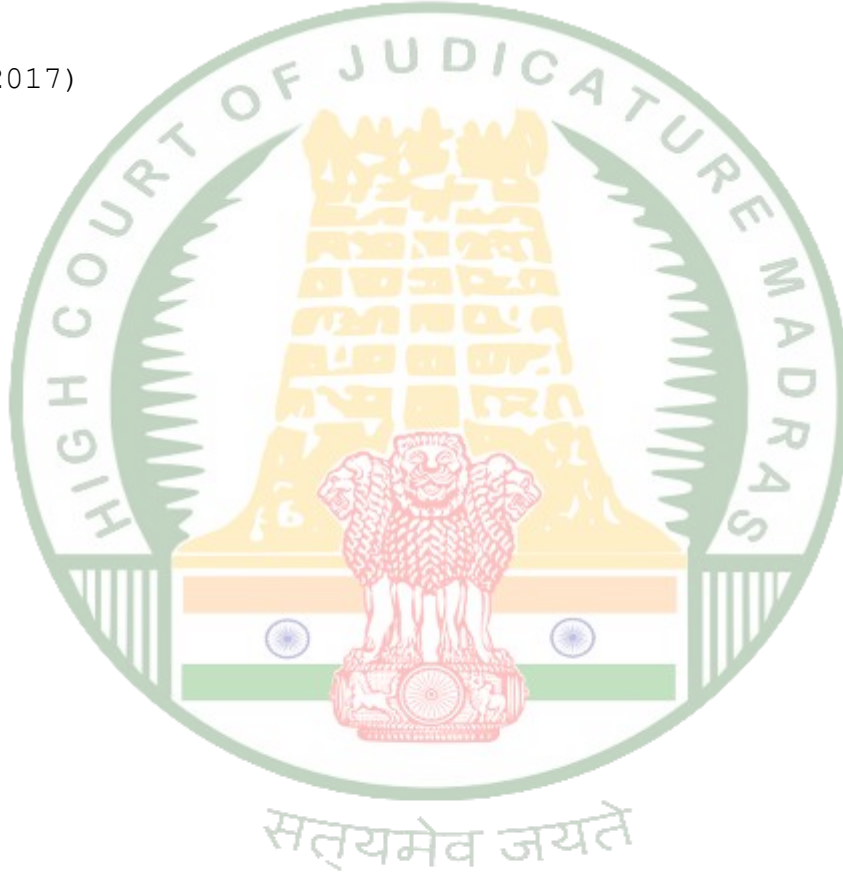
The customs excise and service Tax appellate,
Chennai.

+1cc to Mr.N.Inbarajan, Advocate, S.R.No.57261

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C.M.A. No.813 of 2016

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