IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 12.01.2017
PRONOUNCED ON: 27.04.2017

CORAM

THE HON'BLE MR.JUSTICE HULUVADI G. RAMESH
AND
THE HON'BLE DR.JUSTICE ANITA SUMANTH

C.M.A.Nos.2030 of 2007, 3147 of 2007,
2918 of 2008 & 181 of 2009

Commissioner of Central Excise,
Chennai II Commissionerate,
No.692, Anna Salai, MHU Complex,
Nandanam, Chennai - 600 035. ... Appellant in CMA.2030 of 2007

The Commissioner of Central Excise,
Chennai II Commissionerate,
No.692, MHU Complex,
Anna Salai, Nandanam,
Chennai - 600 035. ... Appellant in CMA.3147 of 2007

Commissioner of Central Excise,
Pondicherry Commissionerate,
Goubert Avenue, Beach Road,
Pondicherry-605 001. ... Appellant in CMA.2918 of 2008

The Commissioner of Central Excise,
Chennai IV Commissionerate,
692, MHU Complex, Nandanam,
Chennai - 600 035 ... Appellant in CMA.181 of 2009

Vs.

1.M/s. Ruchi Health Foods Ltd.,
No.90, Ellapuram Bloc.
Kannigaper Village, Periyapalayam Road,
Uthukkottai Taluk,
Thiruvallur District - 601 102.

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

... Respondents in CMA.2030 of 2007

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1.M/s. CCS Infotech Ltd.,
No.14, Periyar Road,
T.Nagar, Chennai - 600 017.

2.H.Ratnakumar, Director
M/s.CCS Infotech Ltd.

3.M.A.Hassan Abdul Kader,
Director,
M/s.CCS Infotech Ltd.

4.The Customs, Excise and Service
Tax Appellate Tribunal,
South Zonal Bench,
Shastri Bhavan Annexe,
1st Floor, No.26, Haddows Road,
Chennai-600 006.

... Respondents in CMA.3147 of 2007

1.Customs, Excise and Service
Tax Appellate Tribunal,
Chennai, Southern Regional Bench,
Chennai - 600 006.

2.M/s.Karur KCP Packaging Ltd.,
R.S.No. 112, Thiruvandar Koil (P.O.),
Mnnadiper Commune,
Pondicherry - 605 112.

3.V.Sudharson ... Respondents in CMA.2918 of 2008

1.M/s.Conybio Healthcare (India) Pvt. Ltd.,
A-2 Ground Floor, Arcot Terrace,
N.S.K.Salai, Vadapalani,
Chennai - 600 026.

2.The Customs Excise and Service
Tax Appellate Tribunal,
South Zonal Bench,
Shastri Bhawan, Haddows Road,
Chennai - 600 006. ... Respondents in CMA.181of 2008

Prayer in CMA. No.2030 of 2007 : Appeal filed under Section 35G of the Central Excise Act, 1944 against the judgment dated 25.10.2006 passed by the Customs, Excise and Service Tax Appellate Tribunal, South Regional Bench, Chennai in Final Order Nos.994 to 996/2006.

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Prayer in CMA. No.3147 of 2007: Appeal filed under Section 35G of the Central Excise Act, 1944 against the Final Order Nos. 782 to 784/2007 dated 26.06.2007 passed by the Customs, Excise and Service Tax Appellate Tribunal, South Zonal Bench, Shastri Bhawan Annexe, Chennai - 600 006.

Prayer in CMA.No. 2918 of 2008: Appeal filed under Section 35G of the Central Excise Act, 1944 against the Final Order No.385 & 386/2007 dated 05.04.2007 passed by the Customs, Central Excise and Service Tax Appellate Tribunal, South Regional Bench, Chennai in Appeal Nos. 193 & 194/2005.

Prayer in CMA.No. 181 of 2009: Appeal filed under Section 35G of the Central Excise Act, 1944 against the judgment dated 10.08.2007 passed by the Customs, Excise and Service Tax Appellate Tribunal, Chennai Bench in Final Order Nos. 1011 and 1012/2007.

For Appellant in CMA.2030 of 2007 : Mr.A.P.Srinivas
For respondents in CMA.2030 of 2007 : Mr.Raghavan Ramabadran for Mr.Lakshmi Kumaran for R1
R2 - Tribunal

For Appellant in CMA.3147 of 2007 : Mr.T.R.Senthil Kumar
For respondents in CMA.3147 of 2007: Mr.G.Natarajan for R1 to R3
R4-Tribunal

For Appellant in CMA.2918 of 2008 : Mr.A.P.Srinivas
For respondents in CMA.2918 of 2008: Ms.Cynduja Crishnan for Mr.G.Rm.Palaniappan for R2
R1-Tribunal
R3-No appearance

For Appellant in CMA.181 of 2009 : Mr.A.P.Srinivas
For Respondents in CMA.181 of 2009 : Mr.G.Natarajan for R1
R2-Tribunal

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JUDGMENT

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

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These Departmental Appeals come to us challenging various orders of the Customs, Excise and Service Tax Appellate Tribunal (in short 'CESTAT'). A common objection has been raised by all counsel appearing for the assessee/respondent relating to the maintainability of the appeals before this Court. Mr.Raghavan Ramabadran in CMA No.2030 of 2007, Mr.G.Natarajan in CMA Nos.3147 of 2007 and 181 of 2009 and Ms.Cynduja Crishnan in CMA.No.2918 of 2008 appearing for the assessees would cite the provisions of Section 35-G of the Central Excise Act reading thus:

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'S.35-G. 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 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.'

2. The question of whether the issue challenged in appeal before us is one which relates 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 that is addressed in this order. The facts of each appeal are set out in seriatim prior to the discussion and conclusion.

C.M.A.No. 2030/2007:

3. This CMA challenges an order of the CESTAT dated 25.10.2006 and raises the following two substantial questions of law that have been admitted for consideration:

'1.Whether the Customs, Excise and Service Tax Appellate Tribunal is correct in deciding that the process of repacking and labelling of goods (falling under Chapter 15 of CETA 85) does not amount to manufacture?

2. In case the above is in affirmative, then whether the debit made by the assessee vide their DEPB scrip/licence tantamount to payment under the spirit of the Notification No.6/2002 CE dated 11.03.2002 as amended from time to time?'

4.The facts in brief, are as follows:

The Assessee/respondent was availing the benefit of Sl.No.244/C to Notification 6/2002 CE 01.03.2002 as amended, in regard to RBD Palmoline Oil received, packed/re-packed and cleared. The Notification, as a pre-condition to availment of Nil rate of duty, required the refined edible oil to be manufactured out of oils that have suffered appropriate excise duty or additional customs duty, as the case may be. The Assessee submitted that the payment of CVD on the RBD Palmoline oil by the customers from whom they received the goods on job work basis for packing/re-packing would satisfy the conditions set out in the Notification.

5. Accordingly, clearances were effected availing the benefit of the Notification. The Revenue was of the view that the conditions set out in the Notification had not been satisfied in

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so far as the clearances of the inputs, RBD Palmoline was under DEPB Scheme, which itself constituted an exemption. The benefit of Notification was thus refused and RBD Palmoline Oil of a quantity of 17354.814 mt. cleared for the period September 2004 to February 2005, brought under the levy of duty. An amount of Rs.177,01,910/- was demanded along with Education Cess, Interest and Penalty.

6. In appeal before the Tribunal, two issues were raised. Firstly, whether the activity of packing and labeling amounts to 'manufacture' in terms of Note 4 to Chapter 15 of the 1st Schedule to the Central Excise and Tariff Act 1985 (in short 'CETA') and secondly, if the answer to the aforesaid question was in the positive whether such goods were eligible for exemption in terms of Notification 6/02-CE dated 01.03.2002, if the inputs had been cleared under DEPB Scheme.

7.The CESTAT answered the first question in the negative and in favour of the Assessee holding that packing of bulk RBD Palmoline Oil in printed pouches does not amount to manufacture. The Appeal, thus, stood allowed. Against the aforesaid order of the CESTAT dated 25.10.06, the Revenue has filed the present appeal.

8. Mr.Raghavan, appearing for the assessee/respondent would support the objection on maintainability of the appeal relying on the judgment of the Supreme Court in Navin Chemicals Mfg. & Trading Co. Ltd. V. CC (1993 (68) E.L.T. 3 (S.C.)

9. In response to the objection on maintainability, reliance is placed by Mr.Srinivas, appearing for the Revenue, on the decisions of this Court in Commissioner of Customs, Chennai Vs. Ashok Enterprises (2014 (302) E.L.T. 191 (Mad.), Commissioner of Customs, Tuticorin Vs.Edhyam Frozen Foods (2008 (230) E.L.T.225(Mad.) and Commissioner of Central Excise, Chennai-I Vs. Indian Additives Ltd. (2014 (302) E.L.T. 544 (Mad.).

C.M.A.No.3147/2007:

10. The following Substantial Questions of Law have been raised for our consideration by the Revenue:-

'1.Whether in the facts and circumstances of the case, the pleadings on record and the un-rebutted findings of the Commissioner of Central Excise, the Tribunal was correct in holding that the activity of the respondent asesee did not constitute manufacture, within the inclusive definition under Section 2(f) of the Central Excise Act,1944?

2.Has not the Tribunal acted wrongly in purporting to rely upon Circular No.454/20/99-CX, dated 12.04.1999 which dealt with not upgrading and ca-

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pacity of old and used computer systems at the premises of the Customs, whereas the facts on record and these admitted by the assessee, the case was one of purchases of individual bought out computer to make computer systems in the factory of the assessee for which job cards were maintained to deliver finished goods with distinct brand 'space'?

3.Has not the Tribunal acted in serious error of law jurisdiction in overlooking that the Tax Authority has plenary jurisdiction to determine the taxable person and the taxable activity as well as the ownership of the business and format purpose, ignore the corporate veil, whereas that power was negatived on the erroneous and non-existent ground on non-service of show cause notice on the partnership form of CCS and untenable premise that the alleged Arbitral Award dated 28.08.2003 to which the revenue was not a party, was not duly set aside?'

11. The Assessee, CCS Infotech limited (in short 'CCSIL') was engaged in the manufacture of computers, computer parts and peripherals. Consolidated Computer Services (in short 'CCS'), a Partnership firm, also managed by the same two individuals who were directors of CCSIL, was also engaged in the same line of business. Inspections and investigations by the Department in the course of which seizures of records and central processing units of computer systems were effected, revealed, according to Mr.Senthil Kumar appearing for the Revenue, that the products manufactured by CCSIL were being cleared through CCS.

12. An Order-in-original came to be passed by the Commissioner of Central Excise, Chennai - II to the effect that the activity carried on by CCSIL amounted to manufacture and as such the clearances for the period August 1998 to 19.07.2001 in the hands of CCS, August 1998 to March 2000 in the hands of CCSIL and for the period December 1999 - 19.07.2001 in the hands of CCSIL would liable to be brought to tax along with interest and penalty.

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13. In appeal by the assessee, the CESTAT vide, order dated 26.06.2007 allowed the appeals against which the present CMA has been filed.

14. Mr. G.Natarajan, learned counsel for the assessee would submit that the issue involving the incidence of manufacture is essentially one that falls within the meaning of the expression 'determination of the duty of excise on the value of the goods

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for the purpose of assessment of duty' as used in Section 35G of the Act and as such the appeal was not maintainable.

15. Mr.Senthil Kumar would object relying on the decisions of the Gujarat, Delhi & Andhra Pradesh High Courts in Commissioner of C.Ex. & Customs Vs. Swiss Glass Coat Equipments Ltd. (2011 (273) E.L.T. 364 (Guj.), Commissioner of Central Excise. Delhi - II Vs. Pawan Kumar Bansal (2015 (315) E.L.T. 529 (Del.), Commr. Of C.Ex., Hyderabad-IV Vs. Shriram Refrigeration Industries (2009 (240) E.L.T. 201 (A.P.), Commr. Of C.Ex., Hyderabad-IV Vs. Shriram Refrigeration Industries (2009 (240(E.L.T. 201 (A.P.), Commissioner of C.Ex. & Customs Vs. Swiss Glass Coat Equipments Ltd. (2011(273) E.L.T. 364 (Guj.), Commissioner of Central Excise, Delhi - II Vs. Pawan Kumar Bansal (2015 (315) E.L.T.529 (Del.), respectively in support of his submission that the appeal is maintainable. He would also point out that this was a case involving related parties and the show cause notice as well as order-in-original had carried serious allegations relating to the transactions as being colourable.

C.M.A.No.2918 of 2008:

16. The substantial questions raised in this Departmental Appeal and admitted for our consideration are as follows:

> 'Whether the Tribunal is right in holding that the demand is hit by time limit by over-looking the facts that
>
> (a) the declaration of the second respondent dated 07.04.2000 suppressed that the second respondent and M/s.KCP & Co., having mutuality of business interest, are related persons in terms of Section 4(3)(b)(i) of the Central Excise Act 1944 read with Section 2(g)(iv) of Monopolies and Restrictive Trade Practices Act, 1969 and the latter's loan advancement to the second respondent.
>
> (b) the Appellate Authority got convinced that the Department established the relationship of the inter-connection between the second respondent and M/s.KCP & Co. and arrived at the correct Assessable Value and
>
> (c)approval of Price List/Declaration was required only in respect of the cases prior to 01.04.1994.
>
> ii. Whether the Tribunal is right in holding that the issue is revenue neutral based incorrectly on the duty payment pattern of the buyer M/s.KCP & Co., instead of the second respondent.
>
> iii.Whether the finding of the Tribunal that the issue is revenue neutral is correct when the Depart-

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ment has found that the two entities are related persons and having mutuality of business interest.

iv.Whether the Tribunal is right in discharging the third respondent of personal penalty under Section 209(A), when the Department established wilful misdeclaration and suppression of fact by the third respondent and when the High Court of Bombay, in a similar case concerned with M/s.Haim Aghajan Jero Manor, (AIR [1968] Bombay 366) held that the declaration can have but one meaning which is that it is a 'true declaration' punishable under the provisions of Central Excise Rules, 1994.'

17. The brief facts as stated by Mr.Srinivas are as follows: The assessee/respondent is engaged in the manufacture of Paper and Paper Products falling under Heading 48.04 of the Central Excise Tariff Act. In the course of investigation by the officers of the Central Excise Intelligence, it was noticed that the transactions of sale of the goods manufactured was between related parties. Clearance of almost the entire goods was to and through, K.C.Palanisamy & Co. a sole proprietory, whose proprietor Mr.K.C.Palanisamy was also the Chairman and Managing Director of the assessee company holding majority shareholding therein.

18. Further, interest free advances had been made to the company by the individual and there was inter-lacing of management and control of the related parties. The aforesaid factors would, according to Mr.Srinivas, impact and have a definite hearing on the valuation of the goods. The conclusion by the Assessing Authority was of one of under valuation based on the fact that the entities were inter-connected and hence related parties.An order-in-original was passed raising a demand of duty invoking the extended period of limitation along with penalty.

19. In appeal before the Tribunal, various grounds were raised. The Tribunal, however, concluded the issue holding that the entire exercise was revenue neutral. The Tribunal noticed that the Appellant had made a declaration of the sale price and the cost of components supported by a cost certificate that had been accepted by the Department. Accordingly, the Appeal stood allowed.

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20. Mr.Cynduja Crishnan, learned counsel for the respondent/assessee would raise a preliminary objection to the maintainability of the appeal that is objected to by Mr.Srinivas stating that the questions of law raised would have to be seen in the light of the fact that the transactions were between related parties and in the background of the serious allegations raised relating to deliberate under valuation.

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C.M.A.No.181 of 2009:

21. This Departmental Appeal raises the following substantial question of Law:

> 'Whether the Hon'ble Tribunal was right in law in deciding the activity carried on by the respondent/assessee by placing equal numbers of cartons and products specially rendering the product marketable to the consumer through marketing network comes under the definition of Section 2(f) of the Central Excise Act,1944 or not?"

22. The facts in brief are as follows:

The assessee/respondent was engaged in the business of Multi Level Marketing of a variety of products imported from Malaysia. Investigations carried out in the premises of the assessee based on intelligence revealed that the assessee was engaging in the activity of labeling and re-packing of sale of the imported goods without payment of duty. Based on the results of the investigation, the Commissioner of Central Excise, the original adjudicating authority concluded that the activities carried out by the assessee amount to manufacture, liable to duty under the CETA along with interest and penalty.

23. Two separate orders were passed by the Commissioner for the period 2000-01 and 2001-02 both dated 31.03.2006.The basic premise of the orders-in-original were that the assessee, in fact, was in control of the transaction at all stages. The packaged and labeled boxes were supplied to agents/stockists/distributors upon whom restrictions were placed on effecting any modification to either the goods supplied or their packing. In this light of the matter, the Commissioner was of the view that all efforts to render the product marketable to the customer directly were taken only by the assessee. Thus, applying the judgment of the Supreme Court in CCE Vs. Johnson & Johnson Ltd (188 ELT 467) the assessee was held to have engaged in the activity of manufacture.

24. Appeals were filed before the CESTAT by the assessee which allowed the same reversing the findings of the lower authorities. Interestingly, the Tribunal also relies on the same judgment of the Supreme Court as the Commissioner did in Johnson & Johnson Ltd (supra), except to arrive at a diametrically opposite conclusion.

25. To the objection on maintainability by Mr.Raghavan Rambadran, learned counsel for the assessee, Mr.Srinivas would rely on the decisions of the Madras High Court in Commissioner of Customs, Chennai Vs. Ashok Enterprises (2014 (302) E.L.T. 191 (Mad.), Commissioner of Customs, Tuticorin Vs.Edhyam Frozen Foods

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(2008 (230) E.L.T.225(Mad.), Commissioner of Central Excise, Chennai-I Vs. Indian Additives Ltd. (2014 (302) E.L.T. 544 (Mad.).

26. Heard the learned standing counsel appearing for the Revenue as well as the learned counsel appearing for the assessee in all appeals on the question of maintainability.

27. Mr.Srinivas, learned counsel for the Department would refer to the provisions of Section 35G, extracted earlier, to say that the bar therein would apply only to a case where a specific question has been raised relating to the rate of duty or to the valuation of goods. In the present case, none of the questions of law raised for determination refer directly to either the rate of duty or the valuation of goods and as such, there is no bar for this Court to hear the matters on merits.

28. Both sides would refer to the judgment of the Supreme Court in the case of Navin Chemicals NFG and Manufacture and Trading Company Limited Vs Collector of Customs, (68 ELT 3) with equal vehemence.

8. The Supreme Court, in the afore cited case states thus:

> '7. The controversy, therefore, relates to the meaning to be given to the expression 'determination of any question having a relation to the rate of duty of customs or to the value of goods for purposes of assessment'. It seems to us that the key lies in the words 'for purposes of assessment' therein. Where the appeal involves the determination of any question that has a relation to the rate of customs duty for the purposes of assessment that appeal must be heard by a Special Bench. Similarly, where the appeal involves the determination of any question that has a relation to the value of goods for the purposes of assessment, that appeal must be heard by a Special Bench. Cases that relate to the rate of customs duty for the purposes of assessment and which relate to the value of goods for the purposes of assessment are advisedly treated separately and placed before Special Benches for decision because they, more often than not, are of importance not only to the importers who are parties thereto but also to many other importers who import or propose to import the same or similar goods. Since the decisions of CEGAT in such matters would have wide application they are, by the terms of the statute, to be rendered by Special Benches. The phrase “relation to” is, ordinarily, of wide import but, in the context of its use in the said expression in Section 129C, it must be read as meaning a direct

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and proximate relationship to the rate of duty and to the value of goods for the purposes of assessment.'

29. In the present batch of appeals, the show cause notices in three out of four matters indicate possible suppression and mis-declaration by the assessee. In C.M.A. Nos.3147 of 2007 and 2918 of 2008, allegations have been made by the Revenue in relation to transactions inter se related parties. In C.M.A. No.181 of 2009, the allegation made is to the effect that the agreement between the assessee and the agents/stockists/ distributors was merely to design the transaction as being one not involving manufacture, which in effect it was.

30. We are of the opinion that on the facts of these cases, the objection against maintainability invoking the provisions of Section 35-G of the Act is not tenable. A preliminary objection based on the exclusions set out in Section 35G will have to relate to and can be applied only in those matters where the facts are undisputed by both parties and not in cases where allegations of mis-declaration or colourable transactions are made by the Revenue at the first instance, unless those allegations have been addressed and effectively set at naught by the appellate authorities. In the alternative, the Court will be inclined, in such cases to examine the matter on merits in order to determine whether the allegations made have any basis in law and on facts.

31. C.M.A.No.3147 of 2007, C.M.A.No.2918 of 2008 and C.M.A.No.181 of 2009 are held to be maintainable.

32. On the basis of the undisputed facts in CMA.No.2030 of 2007, and applying the rationale of the Supreme Court in Navin Chemicals (supra) the appeal is held not to be maintainable as the question raised relates directly to the determination of duty. The appeal stands dismissed in limine.

In conclusion,

1. CMA. No.2030 of 2007 is held not maintainable.
2. CMA. No.3147 of 2007 is held to be maintainable.
3. CMA. No.2918 of 2008 is held to be maintainable.
4. CMA. No.181 of 2009 is held to be maintainable.

The Registry is directed to list the matters held to be maintainable before the Bench for hearing on merits.

Sd/-
Assistant Registrar(CS VIII)

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Sub Assistant Registrar

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To

1.Customs Excise and Service
Tax Appellate Tribunal,
Southern Regional Bench,
1st Floor, Shastri Bhavan Annexe,
Haddows Road,
Chennai - 600 006.

2.The Commissioner of Central Excise,
Chennai II Commissionerate,
No.692, MHU Complex,
Anna Salai, Nandanam,
Chennai - 600 035.

3.The Commissioner of Central Excise,
Pondicherry Commissionerate,
Goubert Avenue, Beach Road,
Pondicherry-605 001.

4.The Section Officer,
A.E.Section,
High Court, Madras.

+3cc's to M/s.A.P.Srinivas, Advocate, S.R.Nos.36372 to 36374

C.M.A.Nos.2030 of 2007, 3147 of 2007,
2918 of 2008 & 181 of 2009

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