

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

CENTRAL EXCISE APPEAL NO. 124 OF 2017

APM Terminals India Pvt. Ltd.

.. Appellant

v/s.

Commissioner of Central Excise,
Navi Mumbai & Anr.

..Respondents

Mr. Vipinkumar Jain a/w Mr. Nikhil Rungta a/w Prabhakar Shetty for
the appellant

Ms. P.S. Cardozo for the respondents.

CORAM : M.S. SANKLECHA &

RIYAZ I. CHAGLA, J.J.

DATED : 6th SEPTEMBER, 2018.

P.C.

1. This appeal under Section 83 of the Finance Act, 1994 read with Section 35G of the Central Excise Act, 1944 (the Act) challenges the order dated 9th July, 2014 passed by the Customs, Excise and Service Tax Appellate Tribunal (the Tribunal).

2. The appeal as filed *inter alia* raised the following question of law for our consideration :-

(a) Whether in the facts and circumstances of the case, the Tribunal was correct in overlooking the fact that the head “cargo handling services” specifically covers services rendered by a “container Freight Station”, which the appellant was and still sought to tax its services under “storage and warehousing

services” ?

3. At the hearing, Mr. Jain, learned Counsel appearing in support of the appeal submitted the following re-framed questions of law, as under for our consideration :-

(a) Whether in the facts and circumstances of the case, the Tribunal was correct in holding that the activity of providing an earmarked space within the container Freight Station to some customers for the specific purpose of stuffing export Cargo into containers was a Taxable or not covered under the head “Storage and Warehousing Services” ?

(b) Whether in the facts and circumstances of the case, the legislative intent of not taxing services in relation to export cargo could be frustrated by seeking to tax one of the legs of the transaction of exporting goods, contrary to the statutory intention?

(c) Whether in the facts and circumstances of the case, a partial extended period of limitation could have been invoked (from February 2005 onwards) when otherwise the Tribunal dropped penalty proceedings under Section 78 and also concluded that facts had been declared?

4. The appellant is registered under the Finance Act, 1994 and rendering services under the 'cargo handling' service and paying service tax. The appellant has set up a “Container Freight Station” (CFS) at

Dronagiri Warehousing Complex, Uran, Navi Mumbai. The appellant had entered into a contract with M/s. Maersk Logistics India Ltd. (hereinafter referred to as “MLIL” for short) to provides various services. As per the contract, MLIL was provided space in its CFS for keeping, storing, stuffing and consolidation of export cargo for specific consideration during the period 2002 to 2004.

5. However, for the period beginning w.e.f. 1st April, 2005, although the Appellant was providing the services for keeping, storing, stuffing of cargo at its CFS to MLIL and to others along with its service of '*cargo handling*' no separate consideration was charged in respect of the keeping, storing service provided to MLIL and the others. At the same time, the charges for '*cargo handling*' was substantially increased and the charges attributable to storage etc. were claimed as exempt being export cargo. The Revenue was of the view that the provision of service of keeping, storing etc. in the CFS by the appellant is a separate and distinct service under the category of “Storage and Warehousing” services, not classifiable under the head “Cargo Handling” services. Thus, a show cause-cum-demand notice was issued. The respondent resisted the same. The Commissioner of Central Excise by order dated 5th September, 2007 adjudicated the show cause notice, confirming the

classification of the service of keeping, storing etc. at the CFS under the head 'storage and warehousing'.

6. Being aggrieved, the Appellant preferred an appeal to the Tribunal. The impugned order dated 9th July, 2014 has held that the services rendered by the appellant at the CFS would fall under the head “Storage and Warehousing” services and not be covered under the head “Cargo Handling” services. This after negating the appellant's contention that the services rendered by it to the MLIL and others at the CFS was in the nature of “Cargo Handling” services and excluded from tax as it was in the course of export.

7. Ms. Cardozo, the learned Counsel, raised a preliminary objection that the impugned order revolves on issue of classification of the services either as “Cargo Handling” services or “Storage and Warehousing” services. Thus, an appeal in view of Section 35G(1) of the Act would not be maintainable before this Court. In particular, our attention is invited to the impugned order (para 5.6) which rejects the claim of the appellant that the services rendered by it of storing etc. come under “Cargo Handling” services and not under “Storage and Warehousing” services. Our attention is also drawn to the decision of

this Court in ***Bajaj Auto Lt. Vs. Union of India, 2016 (4) STR 384*** where the Court held that the disputes relating to classification of goods would be outside of the jurisdiction of this Court.

8. In response, Mr. Jain, learned Counsel appearing for the appellant strongly contended that the issue arising herein is not one with regard to the appropriate classification of services under the head “Cargo Handling” services or “Storage and Warehousing” services”. The issue according to him is that the services rendered at CFS being in nature of export of services, is excludable from the head “Cargo Handling” services. This is evident from the re-framed questions proposed. Thus, it is submitted on behalf of the appellant that the issue here is with regard to the taxability of the services rendered at the CFS of storage etc. in respect of goods exported. Our attention was drawn to decision of this Court in the case of ***Global Vectra Helicorp Ltd. Vs. C.S.T. Mumbai***, (CEA No.66 of 2014 decided on 23rd March, 2015) wherein this Court entertained the issue with regard to the taxability of the services even after the introduction of the amendment made to Section 35L of the Act by inserting sub-Section 2 therein w.e.f. 6th August, 2014 in respect of orders of the Tribunal prior to the insertion of sub-section (2) of Section 35L of the Act. Therefore, this

Court should entertain the present appeal.

9. Besides, the Appellant also made the following further submissions in the alternative;

(a) The amendment made in Section 35L of the Act by insertion of sub-section (2) thereof in 2014 would not apply to cases where lis has arisen prior to its introduction. This is because, the amendment is prospective w.e.f. 6th August, 2014. Otherwise, it takes away vested right of the appellant and in support reliance was placed upon the decision of the Supreme Court in *Videocon Internation Ltd. Vs. SEBI, 2004 SC 433*;

(b) Reliance was placed upon the decision of the Uttarakhand High Court in the case of *Commissioner of C.Ex. & S.T. Pune Vs. Tirupati Lpg Industries Ltd. 2017 (351) E.L.T. 149* to contend that the decision of the Apex Court in *Navin Chemicals Mfg. & Trading Co. Ltd. Vs. Collector of Customs 1993 (68) E.L.T. 3* which has set out the issues which would be outside the jurisdiction of the High Court to entertain and subject to the jurisdiction of the Supreme Court was on the basis of Section 129D(5) of the Customs Act which has not been brought into force and, therefore, could have no application; and

(c) When the Finance Act, 1994 was introduced, it made reference to

various sections of the Act. However, it specifically omitted to make reference to Section 35E(5) of the Act (similar to Section 129D(5) of the Customs Act). Thus, the legislature had taken a conscious decision in case of service tax under the Finance Act, 1994 to depart from the issues which would be subject matter of jurisdiction before this Court as provided under the Act. For all the above further reasons, it was submitted that this Court should entertain the present appeal.

10. It was also urged on behalf of the appellant that the question whether this Court has jurisdiction to entertain an appeal would have to be decided on the basis of the questions of law proposed by the appellant before it. In the above context, it was submitted that the questions as proposed would not make it a classification issue. This submission cannot be accepted in view of the clear language of Section 35G(1) of the Act which says an appeal shall lie to the High Court from every order passed in appeal by the Tribunal on or after the 1st day of July, 2003 except when the order of the Tribunal relates 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. Thus, the jurisdiction to entertain an appeal would depend/ be determined by the nature of the order passed by the Tribunal. The ingenuity of the

advocate in framing the question, cannot change the nature/basis of the order of the Tribunal. In fact, whatever the nature of question proposed by the appellant, it is for the Court to formulate the substantial question of law in the context of the order being impugned. Therefore, if the order of the Tribunal is an order relating to a question having relation to the rate of duty or value of goods for the purposes of assessment, the jurisdiction of this Court is barred by virtue of Section 35G of the Act. In fact, the Punjab and Haryana High Court in ***Principal Commissioner of C.Ex.& S.T. Vs. Raja Dyeing, 2017(5) G.S.T.L. 231*** has observed that the issue whether the appeal is maintainable or not has to be decided on the basis of the nature of order passed by the Tribunal i.e. whether it is an order that determines any question having relation to the rate of duty of excise or value of goods for the purposes of assessment. We are in respectful agreement with the view of the Punjab and Haryana High Court in Raja Dyeing (supra) on the above issue. Thus, we do not accept the above submission that the jurisdiction to entertain an appeal is determined by the question proposed by the Appellant. It is only determined by the nature of the order passed by the Tribunal and if not within the exclusion clause of Section 35G(1) of the Act, an appeal to this Court will be entertained.

11. On perusal of the impugned order, we find that the issue which arise in this appeal is whether the consideration which is received under the head “Cargo Handling” services is in fact consideration received for services classifiable under “Storage and Warehousing” services as contended by the Revenue. According to the Revenue, a part of the consideration received is for services rendered under the head “Storage and Warehousing” services while according to the appellant, the entire services are classifiable under the head “Cargo Handling” services. Thus, the dispute is with regard to classification of services. It is only after the service is classified into its appropriate head would the question of exclusion of export services from service tax, if classifiable under the head “Cargo Handling Services” would arise. Thus, the primary issue which would arise is classification of the Services of giving space for storage to MLIL and others for consideration. In fact, the Apex Court in Navin Chemicals Mfg. (supra) has made a reference to Sub-section 5 of Section 129D of the Customs Act which defines the meaning of the word “rate of duty” or “value of goods” for the purposes of assessment and *inter alia* the classification of goods under one heading or the other of the Customs Tariff Act, would be a question relating to the “rate of duty” or “value of goods” in relation to goods for the purposes of assessment. The Apex Court after having made a

reference to Section 129D(5) of the Customs Act, 1962 records in paragraph 11 thereof that the statutory definition as provided therein accords with the meaning given by it to the expression 'rate of duty' or "valuation of goods" for the purposes of assessment. Thus, the Hon'ble Supreme Court in Navin Chemicals Mfg. (supra) has independently come to the conclusion that classification issue would be a "rate of duty" issue. Therefore, in terms of Section 35G(1) of the Act, this Court would have no jurisdiction to entertain such an appeal. In the above facts, reliance upon the decision of the Uttarakhand High Court in the case of Tirupati Lpg Industries Ltd. (supra) does not assist the appellant for it proceeded on the basis that the decision of the Supreme Court in Navin Chemicals Mfg.(supra) would not apply as the foundation of that judgment was a statutory provision which had not been brought into force. This in our respectful view, is not the correct reading of the decision of the Supreme Court in Navin Chemicals Mfg. (supra) wherein, it has specifically stated in paragraph 11 as under :-

11. It will be seen that sub-section (5) uses the said expression 'determination of any question having a relation to the rate of duty or to the value of goods for the purposes of assessment and the Explanation thereto provides a definition of it for the purposes of this sub-section'. The Explanation says that 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. Although this Explanation expressly confines the definition of the said expression to sub-section (5) of Section 129D, it is proper that the said expression used in the other parts of the said Act should be interpreted similarly. The statutory definition accords with the meaning we have given to the said expression above. Questions relating to the rate of duty and to the value of goods for purposes of assessment are questions that squarely fall within the meaning of the said expression. A dispute as to the classification of goods and as to whether or not they are covered by an exemption notification relates directly and proximately to the rate of duty applicable thereto for purposes of assessment. Whether the value of goods for purposes of assessment is required to be increased or decreased is a question that relates directly and proximately to the value of goods for purposes of assessment. 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.”

(emphasis supplied)

12. Thus, the Apex Court having decided that the classification issue in Navin Chemicals Mfg. (supra) is an issue of rate of duty and / or value of goods for the purposes of assessment, the same is binding upon us. Therefore, in view of Section 35G(1) of the Act which specifically prohibits an appeal being entertained by this Court, if it is an order of the Tribunal relating amongst other things to the determination of any question having arisen on account of “rate duty” or the “value of goods” for the purposes of assessment.

13. The decision of this Court in Global Vectra Helicorp Ltd. (supra) and also the amendment introduced on 6th August, 2014 by insertion of Sub-section 2 to Section 35L of the Act, would not in the facts of the present case arise for determination. The decision of this Court in Global Vectra Helicorp Ltd. (supra) was rendered in the context of whether a particular service was taxable under the specific entry of the Finance Act, 1994 namely Section 65 (105)(zzzz) of the Act i.e. supply of tangible goods without loss of possession / control of the same or not at all. Thus, the issue was whether the service was rendered or not. If no service is rendered then it is outside the scope of Finance Act, 1994 as existing at the relevant time. Therefore, in the above case, there was no dispute that the issue is one of taxability. Thus, in the above context, the appeal was entertained. In the present facts, the issue is one with regard to classification of the services, rendered at its CFS of keeping and storing of goods by the appellant to MLIL and others between the competing heads viz. “Cargo Handling” services or as “Storage and Warehousing” services. There is no dispute between the parties that service is rendered. In fact, the very bench of this Court which rendered the decision in Global Vectra Helicorp Ltd. (supra) on 23rd March, 2015 on the very next day in ***Greatship (India) Ltd. Vs. Commissioner of Service Tax, Mumbai-I***, (C.Ex.Appeal(L) No.20 of

2015, decided on 24th March, 2015) had after relying upon the decision of the Supreme Court in Navin Chemicals Mfg.(supra) entertained the appeal on the ground that the issue before it does not involve classification of goods nor valuation of goods for the purposes of assessment. In passing it, it is mentioned that the appeal before it does not raise issue regarding taxability and excisability of the goods. In the above circumstances, in the present facts no occasion to apply the provisions of Section 35L (2) of the Act arises. Consequently, whether its prospective or retrospective also would have no bearing on the issue arising in the present appeal from the impugned order of the Tribunal dated 9th July, 2014. Therefore, in the above view, there is no occasion in the present facts to examine whether the amendment made by the insertion of sub-section (2) and Section 35L of the Act is retrospective or prospective. This as the amended provision has no application to the present facts.

14. The contention of the Appellant that Section 35G of the Act, has no application to the Finance Act, 1994 is on the basis of Section 35E of the Act is not referred to in Section 83 of the Act. This is so as Section 83 of the Finance Act, 1994 only makes reference to such provisions of the statute, which are in force. In fact, it specifically refers to Section

35G of the Act. Thus, we find no merit in the above submission.

15. It is also contended that the scope of an appeal to the Supreme Court under Section 35L of the Act is limited and, therefore, this Court should entertain this appeal. Reliance was placed upon the decision of the Supreme Court in *Steel Authority of India Ltd. v/s. Designated Authority D.G. 349 ELT 193*. In the above case, the Apex Court had while dealing with an appeal under the Customs Act, 1962 held that the statutory provision namely Section 130E(b) of the Customs Act (similar to Section 35L(I) (b) of the Act except that the amendment of 2014 by insertion of sub-section (2) in Section 35L of the Act, is not done under the Customs Act, 1962) had held that the *sine qua non* to entertain an appeal under Section 130E(b) of the Customs Act, 1962 must be in respect of an order of the Tribunal dealing with “rate of duty” or “valuation of goods”. It must also give rise to a substantial question of law as the provisions of Civil Procedure Code by virtue of Section 130F of the Customs Act, 1962 was applicable. In the above view, it is submitted that it would leave an assessee without an appropriate relief as the appellant would not be able to challenge an order in the Supreme Court in case an order of the Tribunal relating to rate of duty or value of goods, if it does not give rise to any substantial question of law nor

would the litigant be able to file an appeal to this Court. These are statutory requirement and the Parliament only wanted such appeals to be entertained by the Supreme Court in respect of the issues relating to the rate of duty or valuation of goods for the purposes of assessment which also gives rise to substantial question of law. It is accepted position that the right of appeal is a statutory right and no party has an inherent right to file an appeal (please See – *Vijay Mehta v/s. Collection of Customs 1989 (39) ELT 178*). It must also gave rise to a substantial question of law before it can be admitted.

16. In the above view, this appeal is not maintainable before this Court and the remedy, if any, to the appellant is to file an appeal before the Hon'ble Supreme Court under Section 35L(1)(b) of the Act.

17. The Appeal is disposed of in the above terms.

(RIYAZ I. CHAGLA, J.)

(M.S. SANKLECHA, J.)