Sharayu Khot.

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

CENTRAL EXCISE APPEAL NO. 6 OF 2018

The Commissioner of CGST & CX, Thane ...Appellant

Versus

M/s. Mahindra & Mahindra Ltd. ...Respondent

Mr. Pradeep S. Jetly with Mr. Sham V. Walve, for the Appellant.

Mr. Prakash Shah with Ms. Divyesha Mathur & Mr. Viraaj Bhate i/by PDS Legal, for the Respondent.

CORAM : M.S. SANKLECHA & RIYAZ I. CHAGLA, JJ.

DATE : 19 September 2018

ORDER :

1. This Appeal under Section 35G of the Central Excise Act, 1944 (the Act) challenges the order dated 13th January

2017 passed by the Customs, Excise and Service Tax Appellate Tribunal (for short "***the Tribunal***").

2. The Appeal as filed by the Revenue urges the following three questions of law :-

(a) Whether in the facts and circumstances of the case and in law was the Tribunal right in deciding the issue merely on the ground of revenue neutrality when in its earlier order No. A/903-904/WZB/2004/C II dated 7.10.2004, a direction was given to the adjudicating authority to do the valuation of captively consumed goods according to cost Accounting Standard 4r(CAS-4) developed by the Institute of Cost of Work Accountants of India read with Board's Circular No. 692/8/2003-CX dated 13.02.2003?

(b) Whether in the facts and circumstances of the case and in law was the Tribunal correct in upholding that there were revenue neutrality and if it was, then are the statutory provisions of law to be ignored on that ground, even in cases where extended period of limitation was attracted?

(c) Whether in the facts and circumstances of the case and in law was the Tribunal right in upholding that the case was revenue neutral without considering the facts of the case where there was larger question of evasion of duty through undervaluation and imposition of penalty and interest thereof?

3. However, at the hearing of this Appeal, Shri. Jetly, the learned Counsel appearing in support of the Appeal restricts the Appeal only to the question No. (c) above.

4. The impugned order dated 13 January 2013 of the Tribunal is a common order allowing the Respondents two Appeals. One filed by its Auto Division and the other by its Tractor Division. This Appeal of the Revenue is only against the order relating to Tractor Division of the Respondent.

5. The Respondent is a manufacturer of I.C. Engines and parts at its factory in Mumbai. These engines are being cleared to their units located in Nagpur and Rudrapur for use in the manufacture of tractors. At all times relevant to this Appeal i.e. November 1996 to March 2001, tractors are chargeable to excise duty.

6. The dispute in the present case is with regard to the appropriate valuation of the IC Engines and parts thereof which are captively consumed in terms of Valuation Rule 6(b)(ii) of the erstwhile Central Excise (Valuation) Rules 1975 ("***Valuation Rule***").

7. The Respondent arrived at the valuation of its I.C. Engines and parts thereof by adoption of cost construction method as provided in Rule 6(b)(ii) of the Valuation Rules. The Revenue objected to the valuation arrived at by the Respondent. This on the ground that Rule 6(b)(ii) of the Valuation Rules has not been properly applied, as various expenses which need to be included are not included to arrive at the cost of production of I.C. Engines and parts thereof. Thus, the demand by the Revenue for the differential duty payable on the I.C. Engines and parts thereof, cleared for captive consumption to manufacture tractors at Nagpur and Rudrapur.

8. The impugned order dated 13 January 2017 of the Tribunal allowed the Respondent's Appeal. This by *inter alia* holding that the entire exercise of determining the correct costs of the I.C. Engines and parts thereof for payment of duty would be academic. This for the reason that the entire differential amount of the duty paid on I.C. Engines and parts thereof would be available as credit to the Respondent's tractor divisions at

Nagpur and Rudrapur and utilized in payment of duty on tractors. Thus, the impugned order also records the fact that as it decides the Appeal on Revenue neutrality, the issue of valuation is not being visited by it.

9. On the aforesaid facts, we enquired of Shri. Jetly, the learned Counsel appearing for the Revenue as to whether this Appeal would at all be maintainable before this Court in view of Section 35G of the Act. This for the reason that the grievance of the Revenue in this Appeal is that the impugned order has not decided the issue of valuation, when the issue for its consideration was valuation of IC Engines and parts thereof. We also invited his attention to the decision of the Hon'ble Supreme Court in ***Steel Authority of India Ltd. Vs. Designated Authority, Directorate General of Anti-Dumping & Allied Duties***[1] in particular to paragraph 19 thereof which reads under:

> *"19. On the basis of the discussion that have preceded, it*

1 ***2017 (349) E.L.T. 193 (S.C.)***

must therefore be held that before admitting an appeal under Section 130E(b) of the Customs Act, the following conditions must be satisfied:

(i) The question raised or arising must have a direct and/or proximate nexus to the question of determination of the applicable rate of duty or to the determination of the value of the goods for the purposes of assessment of duty. This is a sine qua non for the admission of the appeal before this Court under Section 130E(b) of the Act.

(ii) The question raised must involve a substantial question of law which has not been answered or, on which, there is a conflict of decisions necessitating a resolution.

(iii) If the Tribunal, on consideration of the material and relevant facts, had arrived at a conclusion which is a possible conclusion, the same must be allowed to rest even if this Court is inclined to take another view of the matter.

> *(iv) The Tribunal had acted in gross violation of the procedure or principles of natural justice occasioning a failure of justice*."

10. In response, Shri. Jetly the learned Counsel submits as under:-

(a) The impugned order of the Tribunal does not deal with the issue of valuation as it has only allowed the Respondent's Appeal on the issue of Revenue neutrality. The grievance of the Revenue is only to the extent that the order is in breach of principle of natural justice as the Tribunal has not dealt with the issue of valuation urged by the Revenue;

(b) In case this Court concludes that there has been a breach of principle of natural justice in not deciding the issue of valuation, it would only restore/remand the issue of valuation to the

Tribunal. It is only thereafter, when the Tribunal passes an order on remand that the question of valuation would arise ousting the jurisdiction of this Court, under Section 35G of the Act;

(c) Attention is drawn to paragraph 19 of ***Steel Authority of India Ltd.*** (supra) to submit that it deals with regard to admission of the Appeal and not with regard to the maintainability of an Appeal; and

(d) The immense hardship which will be caused to the general body of litigants, if they have to move the Apex Court, even when the grievance is only on account of breach of natural justice. This even in matters relating to Valuation and/or rate of duty.

11. From reading of the impugned order of the Tribunal, we find that the question of valuation though raised in the Appeal before it, was not examined by the Tribunal. This as the Appeal was allowed on account of Revenue neutrality making the question of appropriate valuation academic in the present facts. However, the grievance of the Revenue before us is to the extent that the Tribunal has not dealt with the issue of valuation though it arose before the Tribunal. Therefore, in our view, the impugned order does relate to the valuation of goods for the purposes of assessment. This view of ours also finds support from paragraph 19 of the Hon'ble Supreme Court decision in ***Steel Authority of India Ltd.*** (supra) in the above case, it has been held that where an issue relating to valuation for purpose of assessment arises and the order is passed in breach of natural justice, then the Apex Court will admit the Appeal.

12. The submission that if this Appeal is admitted today then at the final hearing, if this Court holds that the issue of valuation has to be gone into it, the only order would be to remand the appeal to the Tribunal to decide the issue of valuation. This submission proceeds on the basis that the Appellate Authority while disposing of an Appeal which is in breach of principle of natural justice is only required to set aside the order and restore it to the Lower Authority for passing a fresh order. This submission is not based on provision which restricts the power of an Appellate Authority. Needless to state when there is any breach of natural justice is alleged, the Appellate Authority would have to examine the underlying dispute and find out whether on facts any prejudice is caused to the party or is the remand going to be an empty formality in the facts of this case. It is open to the Appellate Authority to decide the issue of valuation itself rather than restore it before the Tribunal. Moreover, one cannot loose sight of the fact that Section 35G of the Act under which the Appeal is filed, does not bestow jurisdiction on us, to entertain an Appeal relating to rate of duty and/or valuation for the purposes of assessment, in cases of grievance only of breach of natural justice.

13. The submissions of the Revenue that paragraph 19 of the Apex Court decision in ***Steel Authority of India Ltd.*** (supra) only sets out parameters for admission and not maintainability is to our mind hair splitting. There is no dispute in view of the self evident position in law i.e. Section 130 and 130E of the Customs Act, 1962 that an Appeal relating to rate of duty and/or value of goods for purposes of assessment would only be before the Apex Court. In such circumstances, the Apex Court after recording that the *sine qua non* for the admission of Appeal before it is that the impugned order must relate to the rate of duty or determination of the value of goods for the purposes of assessment of duty. Therefore, not dealing with and/or deciding the issue of rate of duty and/or valuation for purposes of assessment would also be an order relating to rate of duty and/or valuation of goods. This finds support by its recording that an order in respect of valuation and/or rate of duty issues is passed in breach of natural justice, the same would be examined by the Hon'ble Supreme Court in an Appeal before it. In fact, the above decision supports the view that this

Appeal is not maintainable before the High Court. An Appeal, if any, would lie before the Hon'ble Apex Court under Section 130E(b) of the Act.

14. The last submission on behalf of the Revenue viz. Undue hardship to the general body of litigants under the Act, to move the Apex Court even when the orders have been passed by the Tribunal in breach of the natural justice and the party seeks only remand to the Tribunal for fresh consideration. The jurisdiction of this Court in a statutory Appeal is determined by the terms of the statute. We do not exercise jurisdiction in equity. Therefore, when we exercise jurisdiction under Section 35G of the Act, we are bound by its provisions and cannot travel outside it. Therefore, when Section 35G of the Act very clearly excludes our jurisdiction in respect of the orders of the Tribunal relating to the rates of duty and the value of goods for the purposes of assessment, among other things, we cannot entertain an Appeal on the above issue on ground of perceived hardship. Thus, this submission on the part of the Revenue also does not merit acceptance.

15. In the above view, the Appeal as filed is not maintainable before us in view of Section 35G of the Act. The remedy, if any, to the Revenue is to approach to the Hon'ble Supreme Court. Thus, Appeal dismissed as not maintainable.

[RIYAZ I. CHAGLA J.] **[M.S. SANKLECHA, J.]**