

In the High Court of Judicature at Madras
Dated : 25.4.2019

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The Honourable Mr.Justice T.S.SIVAGNANAM
and

The Honourable Mrs.Justice V.BHAVANI SUBBAROYAN
Civil Miscellaneous Appeal No.2043 of 2019

The Commissioner of Customs,
Chennai II Commissionerate,
Custom House, No.60,
Rajaji Salai, Chennai-1.

... Appellant/Respondent

Vs

M/s.BMW India Private Ltd.,
Kanchipuram-603002.

... Respondent/Appellant

APPEAL under Section 130 of the Customs Act, 1962 against the order dated 17.9.2018 made in Final Order No.42430 of 2018 on the file of the Customs, Excise and Service Tax Appellate Tribunal, South Zonal Bench, Chennai in Appeal No.C/40966/2015-DB.

For Appellant : Mr.G.Rajagopalan, Additional Solicitor
General of India assisted by
Mr.V.Sundareswaran, SSC

For Respondent: Mr.Rohan Shah assisted by
Mr.Archit Gupta for Mr.Karthik Sundaram

Judgment was delivered by T.S.SIVAGNANAM,J

We have heard Mr.G.Rajagopalan, learned Additional Solicitor General assisted by Mr.V.Sundareswaran, learned Senior Standing Counsel for the appellant, and Mr.Rohan Shah assisted by Mr.Archit Gupta, learned counsel appearing on behalf of Mr.Karthik Sundaram, learned counsel on record for the respondent.

2. This appeal filed by the Revenue under Section 130 of the Customs Act, 1962 (for short, the Act) is directed against the order dated 17.9.2018 in Final Order No.42430 of 2018 passed by the Customs, Excise and Service Tax Appellate Tribunal, South Zonal Bench, Chennai (for brevity, the Tribunal),

3. This appeal has been filed by raising the following substantial questions of law :

"1. Whether the order of the Tribunal

in rejecting the invocation of extended period of limitation for short levy under the self assessment scheme (i.e.) 'accredited client programme' scheme under Section 28(4) of the Customs Act, 1962 is perverse, arbitrary, illegal and unreasonable with regard to the incriminating records, statement and admitted facts (recorded at para 22 and from para 31 to 39 and 42 of its order) ?

2. Whether the Tribunal was correct in ignoring the law that the events and causes to invoke the extended period of limitation enumerated under Clauses (a), (b) and © of Section 28(4) of the Customs Act, 1962 are distinct, different and separate for recovery of duty short levied or short paid ?

3. Whether the Tribunal was justified in rejecting the invocation of extended period of limitation, when the respondent was undisputedly not entitled for the concessional rate of duty on import since 01.3.2011?

4. Whether the Tribunal ignored the law that the limitation for reckoning the 'relevant date' i.e. 'five years' is attracted only upon the satisfaction of ingredients envisaged under Sub-Section 28 (4) and not from the date of knowledge by an officer of the Department ?

5. Whether the order of the Tribunal in reading into the enabling provision for recovery of duty short paid or short levied with regard to the knowledge of the Departmental Authority under Section 28(4) of the Customs Act, 1962 tantamount to rewriting the statutory provision in view of the law that the very Customs Act, 1962 defines and fixes the period of limitation ?

6. Whether the conclusion of the Tribunal upon sustaining the findings of the Adjudicating Authority would be denuded by the concept of knowledge amounting to rendering the defined term 'relevant date' nugatory ?

7. Whether the Tribunal was justified in reducing the penalty imposed under Section 112(a) of the Customs Act, 1962 without any valid reasons more so in the

light of the factual admitted findings at para 31 to 39 and 42 of its own order ? And

8. Whether the Tribunal was justified in reducing the redemption fine on the confiscated mis-declared goods without any reasoning when no redemption fine was imposed on goods, which were cleared already ?”

4. The first issue to be decided is as to whether this appeal is maintainable before us in the given facts and circumstances.

5. The respondent - assessee availed the customs duty benefit under Sub-Clause (1)(a) to S.No.437 of Notification No.12/2012-Cus dated 17.3.2012 for import of their consignments of motor cars in completely knocked down (CKD) condition. The Officers of the Special Intelligence and Investigation Branch (SIIB) of the Customs House, Chennai took up for verification the import of consignments covered under a few of the Bills of Entry, to be precise, 20 Bills of Entry as against 712 Bills of Entry from 2012 onwards.

6. It is stated that on verification, it was found that the relevant details and description of individual part/sub-assemblies, which were imported, were not furnished among other things. Therefore, the Revenue, after noticing that the importer did not have complete details/description/particulars of imported goods, called for a detailed container-wise packing list from the Customs House Agent (CHA). It appears that the CHA submitted unsigned copies of the details sought for. The consignments were examined by the Officers on 08.3.2013 in the presence of the representative of the importer/assessee and it was found that the goods, which are imported, were single independent complete pre-assembled engines and pre-assembled gear boxes with unique identification numbers engraved on each.

7. Therefore, the Revenue took a stand that the assessee was not eligible to avail the concessional rate of duty prescribed under Notification No.12/2012 dated 17.3.2012 and on the reasonable belief that the consignment was liable to confiscation under Section 111(o) of the Act, the respective Bills of Entry were seized under Section 110 of the Act. Subsequently, the other Bills of Entry were also subjected to such examination and the matter was investigated further. A statement was recorded under Section 108 of the Act. The result of the investigation culminated in a show cause notice dated 26.8.2013.

8. The respondent - assessee filed their reply and contested the proposal made in the said show cause notice.

9. The Commissioner of Customs, by Order-in-Original dated 13.2.2015, held that the motor cars declared as “BMW cars in CKD....” in different Bills of Entry imported during the period from 01.3.2011 to 11.4.2013 by M/s.BMW India Private Limited,

Chennai for manufacturing various models of BMW motor cars at their Chennai Plant as imports of 'motor car in CKD kit with engine and gearbox in pre-assembled condition.' Further, the assessee was denied the benefit of Notification No.21/2002-Cus dated 01.3.2002 as amended. The Adjudicating Authority confirmed the demand of differential customs duty of Rs.6,96,44,66,115/- in respect of 706 Bills of Entry from 01.3.2011 to 11.4.2013 (excluding six seized consignments) filed with the Customs, Chennai under Section 28(8) of the Act along with applicable interest under Section 28AA of the Act and ordered confiscation of the goods imported under the subject 706 Bills of Entry and cleared through Chennai Customs totally valued at Rs.24,99,31,14,405/- under Section 111(m) and (o) of the Act. Since the goods were physically not available, the Commissioner refrained from levying redemption fine against the said goods under Section 125(1) of the Act. A penalty of Rs.6,96,44,66,115/- was imposed along with applicable interest under Section 114A of the Act. There was an order of finalisation of provisional assessment in respect of six Bills of Entry under Section 18(2) of the Act. There was an order for enforcement of bank guarantee of Rs.8,19,04,067/- furnished by the respondent herein - assessee and confiscation of the goods imported under provisionally assessed Bills of Entry valued at Rs.29,42,38,781/- under Section 111(m) and (o) of the Act with an option to the respondent herein - assessee to redeem the same on payment of fine of Rs.3 Crores under Section 125(1) of the Act. There was also imposition of penalty of Rs.3 Crores on the respondent herein - assessee under Section 112(a) of the Act.

10. Being aggrieved by the said Order-in-Original dated 13.2.2015, the respondent herein - assessee preferred an appeal before the Tribunal, which framed the following issues for consideration :

"I. Whether imports made by the appellant

(i). are CKD imports for the period 01.3.2011 to 23.3.2011, entitled to a rate of customs duty at 10% (as claimed by the appellant) or a rate of customs duty at 60% (as claimed by the Department) ?

(ii). are CKD imports for the period 24.3.2011 to 11.4.2013, entitled to a rate of customs duty at 10% (as claimed by the appellant) or a rate of customs duty at 30% (as claimed by the Department) ?

II. Whether, in the facts and circumstances of the present case, the longer period of limitation under Section 28 (4) of the Customs Act, 1962 could be involved ? And

III. Whether, in the facts and

circumstances of the present case, the imposition of penalty under Sections 114A and 112(a) of the Customs Act, 1962 as well as the imposition of redemption fine in lieu of confiscation under Section 125 of the Customs Act, 1962 is justified ? ”

11. So far as issue I (i) and (ii) is concerned, it was decided against the respondent herein - assessee. Further, issues II and III were decided against the Revenue - appellant herein. Consequently, the Tribunal, while upholding the demand, restricted it to the normal period of limitation and only for the purpose of re-quantification of the demand for the normal period with interest liability as applicable, the matter was remanded to the Adjudicating Authority. The penalty imposed under Section 114A of the Act was set aside. The confiscation of the goods under Section 111(m) and (o) of the Act was upheld. The redemption fine, which was imposed, was upheld. However, the redemption fine was reduced to Rs.1 Crore. The imposition of penalty under Section 112(a) of the Act was upheld. However, the penalty was reduced to Rs.1 Crore.

12. Being aggrieved by that portion of the order of the Tribunal, the respondent herein - assessee preferred an appeal before the Hon'ble Supreme Court in Civil Appeal No.12233 of 2018. The Hon'ble Supreme Court, vide order dated 09.1.2019, issued notice in the appeal as well as in the stay application returnable in four weeks. On 29.3.2019, when the matter was again listed before the Hon'ble Supreme Court, the counsel on record for the Revenue circulated a letter seeking adjournment for filing a counter affidavit. Hence, the matter was directed to be put up after four weeks. We are informed that the appeal is listed on 29.4.2019.

13. The Revenue has preferred this appeal against that portion of the order, by which, the Tribunal decided issue II and with regard to reduction of penalty while answering issue III.

14. At the very inception of hearing of this appeal, this Court has posed a question to the learned Additional Solicitor General as to whether the appeal filed by the Revenue is maintainable before this Court, when the order impugned before us is a subject matter of challenge before the Hon'ble Supreme Court in Civil Appeal No.12233 of 2018.

15. Mr.G.Rajagopalan, learned Additional Solicitor General, assisted by Mr.V.Sundareswaran, learned Senior Standing Counsel for the Revenue submits that this appeal is restricted only in respect of the issues as to whether the Revenue was justified in invoking the extended period of limitation and as to whether the deletion of penalty under Section 114A of the Act and the reduction of redemption fine and penalty imposed in the said Order-in-Original was proper. Therefore, it is submitted that the appeal is maintainable before this Court on the issues,

which are canvassed by the Revenue and raised in the memorandum of grounds of appeal and the substantial questions of law framed for consideration.

16. Per contra, Mr.Rohan Shah, learned counsel assisted by Mr.Archit Gupta, learned counsel appearing behalf of Mr.Karthik Sundaram, learned counsel on record for the respondent herein - assessee has drawn the attention of this Court to Sections 130 and 130E(b) of the Act and submitted that the present appeal before this Court by the Revenue challenging a portion of the order passed by the Tribunal is not maintainable.

17. To support his contention, Mr.Rohan Shah, learned counsel has placed reliance on

(i) the decision of the Division Bench of the Karnataka High Court in the case of Commissioner of Central Excise, Customs & Service Tax Vs. Jindal South West Steel Ltd. [reported in (2011) 273 ELT 165];

(ii) the decision of the Division Bench of the Punjab and Haryana High Court in the case of Principal Commissioner of Central Excise & Service Tax Vs. Raja Dyeing [reported in 2015 (5) GSTL 231]; and

(iii) the decision of the Hon'ble Supreme Court in the case of Navin Chemicals Manufacturing & Trading Co. Ltd. Vs. Collector of Customs [reported in (1993) 68 ELT 3].

18. It is further submitted by the learned counsel for the respondent - herein - assessee that it would be well open to the appellant - Revenue to file an appeal before the Hon'ble Supreme Court, but yet the appellant - Revenue has to satisfy the Hon'ble Supreme Court that there exists a substantial question of law for consideration. In this regard, the learned counsel has referred to the decision of the Hon'ble Supreme Court in the case of Steel Authority of India Ltd. Vs. Designated Authority, Directorate General of Anti Dumping and Allied Duties [reported in (2017) 349 ELT 193].

19. We have carefully considered the contentions raised by both the parties and perused the materials on record.

20. Section 130 of the Act deals with appeals to High Court. In terms of Sub-Section (1) of Section 130 of the Act, an appeal shall lie to the High Court from every order passed in appeal by the Appellate Tribunal on or after the 01.7.2003 (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.

21. Mr.Rohan Shah, learned counsel is right in his submission that there are two limbs to Section 130(1) of the

Act, the first of which being that it should be an eligible order in the sense that it should not be an order relating to determination of any question having a relation to the rate of duty of customs or to the value of goods for purposes of assessment. The second limb is that if the order passed by the Appellate Tribunal is found to be an eligible order i.e. an order, which does not relate to determination as to the rate of duty or value of the goods, then an appeal can be entertained if the High Court is satisfied that the case involves a substantial question of law. Admittedly, the order impugned before us is an order relating to rate of duty of customs and therefore, against the order passed by the Tribunal, an appeal is not maintainable before this Court under Section 130 of the Act.

22. The argument of Mr.G.Rajagopalan, learned Additional Solicitor General is that so far as the rate of duty of customs is concerned, the finding of the Tribunal is against the respondent herein - assessee and that they have already filed an appeal before the Hon'ble Supreme Court. However, the other issues namely as to whether the extended period of limitation can be invoked, whether imposition of penalty under Section 114A of the Act was justified and whether the Tribunal was justified in reducing the redemption fine and penalty do not relate to the rate of duty of customs or the value of the goods and therefore, it is contended that the appeal is maintainable.

23. Section 130E of the Act deals with appeal to Hon'ble Supreme Court. Clause (b) of Section 130E of the Act would be relevant for the purpose of this case and it states that any order passed by the Appellate Tribunal 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 shall lie to the Hon'ble Supreme Court.

24. Thus, the question would be as to whether the order passed by the Tribunal can be truncated and decided by two different courts at two different levels ?

25. The answer to the said question should be in the negative in the sense that an order passed by the Tribunal cannot be truncated and two courts cannot test the correctness of that order.

26. We support such a conclusion by referring to the decision cited before us by Mr.Rohan Shah, learned counsel appearing on behalf of the respondent herein - assessee. An identical question arose for consideration in the decision in the case of Jindal South West Steel Ltd. The assessee therein approached the Hon'ble Supreme Court under Section 35L of the Central Excise Act, as the question was relating to the rate of duty and the civil appeal was numbered and was pending before the Hon'ble Supreme Court. The Revenue preferred an appeal to the High Court challenging that portion of the order of the Tribunal, which disallowed the case of the Revenue on the ground of limitation and it was argued that the appeal was maintainable

before the High Court. However, the Division Bench of the High Court of Karnataka held that the question of bar of limitation as well as setting aside penalty is dependent on the leviability of excise duty on the impugned product and this amount should be decided by the Apex Court, as the matter was already seized of and pending. It was further held that the since findings on that issue would have a direct bearing in deciding the issues arisen in those appeals before the High Court of Karnataka and as all those issues arose out of the very same order, it is settled law that those issues could not be bifurcated and decided by the High Court. It was also held that order of the Tribunal was a composite order, that the issue before the High Court also had to be decided by the Hon'ble Apex Court and that the Revenue had to file an appeal under Section 35L of the Central Excise Act before the Apex Court, as the High Court had no jurisdiction to entertain the appeals. Accordingly, the appeals were rejected as not maintainable reserving liberty to the Revenue to approach the Hon'ble Supreme Court under Section 35L of the Central Excise Act.

27. Similar issue arose in Raja Dyeing, which was also a case under the Central Excise Act. While the Court was deciding the maintainability of the appeal, it took note of the words 'among other things' in Section 35L of the Central Excise Act and on the question of maintainability, it has been held as follows :

"14. Whether an appeal lies to the High Court under Section 35G or to the Supreme Court under Section 35L cannot possibly depend upon the nature or scope of the appeal that the party intends filing. A party may seek to challenge only that part of the order of the Tribunal which relates to questions other than those relating to the rate of duty of excise or the value of the goods for the purposes of assessment. Such an appeal would, absent any other questions, lie to the High Court. Once it is held that an appeal against the order of the Tribunal which deals with questions that fall within the ambit of Section 35L as well as other questions lies to the Supreme Court under Section 35L, the mere fact that the party chooses to challenge only that part of the order that falls within the ambit of Section 35G would make no difference. In other words, it cannot be said that the party that chooses to challenge the order of the Tribunal only so far as it relates to the determination of questions falling within the ambit of Section 35G must file

the appeal before the High Court even though the order also deals with questions that fall within the ambit of Section 35L. In that event, if the other party files an appeal against the order of the Tribunal on issues that fall within the ambit of Section 35L in the Supreme Court, the very purpose of Section 35G of bringing the appeals either before the Supreme Court or before the High Court would be defeated. It can hardly be suggested that in that case, the appeal filed under Section 35G before the High Court ought to stand transferred to the Supreme Court. The scheme of the Act in general and Sections 35G and 35L in particular do not indicate such a mechanism."

28. In the decision in the case of Navin Chemicals Manufacturing & Trading Co. Ltd., while deciding the question as to whether a Member of the Customs, Excises and Gold (Control) Appellate Tribunal (CEGAT), sitting singly, could, in law, have heard the appeal before it, after referring to Section 129C of the Act and the Explanation contained therein, it was held that although the 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 and that the statutory definition accords with the meaning given to the said expression. It was further held that the questions relating to the rate of duty and to the value of the goods for the purpose of assessment were questions that squarely fall within the meaning of the said expression. It was also held that the dispute as to the classification of the goods and as to whether or not they are covered by exemption notification relates directly and proximately to the rate of duty applicable thereto for purposes of assessment and 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. It was further held that the test was for the purposes of determining whether or not an appeal should be heard by a Special Bench of the CEGAT, whether or not a reference by the CEGAT lies to the High Court and whether or not an appeal lies directly to the Supreme Court from a decision of CEGAT and does the question that requires determination have a direct and proximate relation, for the purposes of assessment, to the rate of duty applicable to the goods or to the value of the goods.

29. Thus, a proper reading of the statutory provisions would make the position clear that the Revenue, if aggrieved by the order passed by the Tribunal, has to file an appeal before the

Hon'ble Supreme Court under Section 130E of the Act and not before this Court, as, already, the order impugned before us is the subject matter of appeal before the Hon'ble Supreme Court at the instance of the respondent herein - assessee. Therefore, we hold that this appeal is not maintainable reserving liberty to the appellant - Revenue to approach the Hon'ble Supreme Court under Section 130E of the Act.

30. Mr.Rohan Shah, learned counsel appearing on behalf of the respondent, by referring to the decision of the Hon'ble Supreme Court in the case of Steel Authority of India Ltd., has contended that even before the Supreme Court, the Revenue has to establish that there is a substantial question of law involved in the matter and the question, which fell for consideration before the Hon'ble Supreme Court in the said case was to ascertain the true sweep and purport of the appellate power of the Apex Court under Section 130E(b) of the Act and while answering the said question, the Hon'ble Supreme Court pointed out that while construing the extent of the appellate jurisdiction to be exercised by the Supreme Court under a statutory enactment, the role of the Supreme Court as envisaged by The Constitution cannot altogether be lost sight of, particularly when different statutes like the Electricity Act, 2003; the Companies Act, 2013, the National Green Tribunal Act, 2010, etc., expressly limit the appellate power of the Supreme Court to determination of substantial questions of law. Therefore, it was held that the position should be no different in construing the provisions of Section 130E(b) of the Act though it omits to specifically mention any such limitation.

31. In our considered view, having held that the appeal is not maintainable before us, we are not justified in making any observation on the arguments advanced by Mr.Rohan Shah, learned counsel appearing on behalf of the respondent herein - assessee by placing reliance on the decision of the Hon'ble Supreme Court in the case of Steel Authority of India Ltd., and we leave it open to the respondent herein - assessee to canvass all issues before the Hon'ble Supreme Court.

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32. In the result, the appeal is held to be not maintainable and is accordingly dismissed reserving liberty to the appellant - Revenue to approach the Hon'ble Supreme Court under Section 130E of the Act. No costs.

Sd/-
Assistant Registrar(CS III)

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Sub Assistant Registrar

To

1. The Customs,
Excise and Service Tax Appellate Tribunal,
South Zonal Bench, Chennai.

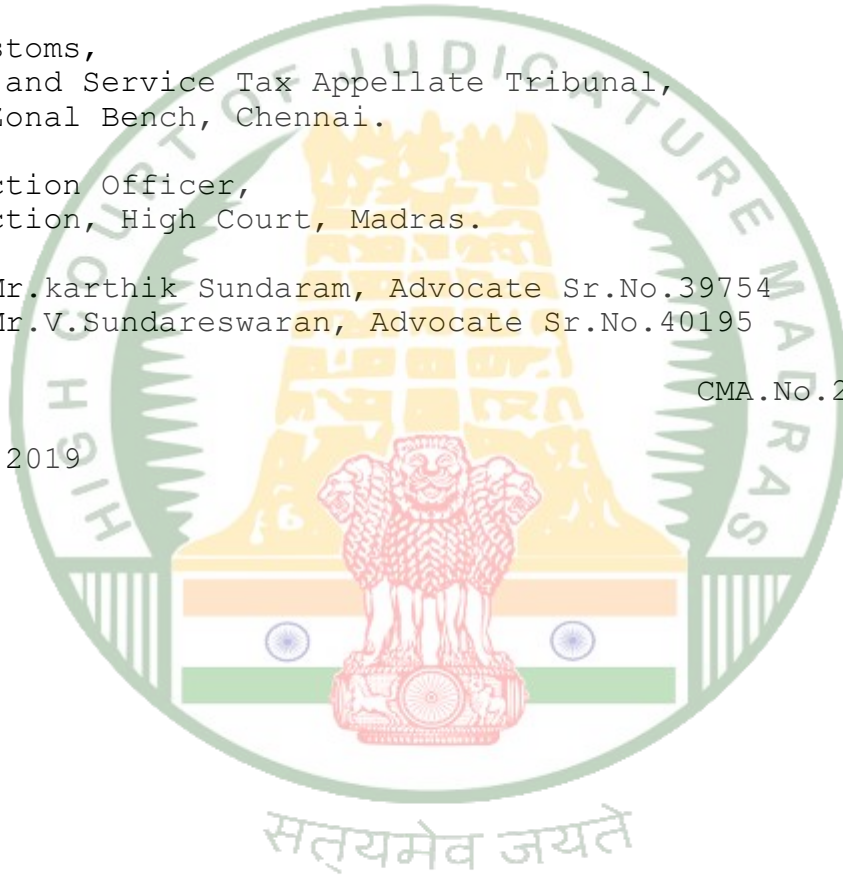
2. The Section Officer,
V.R.Section, High Court, Madras.

+1 cc to Mr.karthik Sundaram, Advocate Sr.No.39754

+1 cc to Mr.V.Sundareswaran, Advocate Sr.No.40195

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