

IN THE HIGH COURT OF ORISSA AT CUTTACK

OTAPL Nos.10, 12 & 19 of 2010

The Commissioner of Central Excise, Appellant
Customs & Service Tax,
Bhubaneswar-I Commissionerate,
Bhubaneswar

Mr. Choudhary Satyajit Misra,
Senior Standing Counsel
(GST, Custom and Central Excise)

-versus-

M/s. Tata Iron & Steel Company Ltd. Respondent
(TISCO)

None

CORAM:
THE CHIEF JUSTICE
JUSTICE M. S. RAMAN

ORDER
29.11.2022

Order No.

M.S. Raman, J.

02. 1. Challenging the Order dated 13th April, 2010 passed by the learned Customs, Excise and Service Tax Appellate Tribunal (in short “CESTAT”), Eastern Zonal Bench, Kolkata in Order No.A-259-269/KOL/2010 relating to Customs Appeal Nos.176-186/2006 directed against Order dated 31st March, 2005 passed by the Commissioner of Central Excise & Customs, Bhubaneswar-I, the Appellant has preferred the Appeals before this Court under Section 130 of the Customs Act by raising the following substantial questions of law:-

“i. Whether, in the facts and circumstances of the case, the Hon’ble CESTAT is correct in taking divergent stands on the same issue, i.e., fulfillment of the condition relating to CaO content under the Advance License provisions and consequently to the Exemption Notification?”

ii. Whether, in the facts and circumstances of the case, the Hon’ble CESTAT, Kolkata is correct in holding that the eligibility to the exemption from Custom Duty is still admissible without fulfilling the condition stipulated in the Advance License/Exemption Notification?”

Fact of the Case

2. M/s. Tata Iron & Steel Company Limited, Paradeep (Respondent in the present appeal) imported Low Silica Limestone (LSL) in bulk and being covered by Value-based Duty Exemption Entitlement Certificate (in short, “DEEC”) issued by the Licensing Authority in the form specified in the Schedule annexed to Notification No.79/95-Cus, dated 31st March, 1995 (as amended) in respect of the value, description, quality and technical characteristics availed the benefit of exemption from payment of duty of customs as the said product was certified by M/s. SK Mitra, Kolkata contained Calcium Oxide (CaO) content of more than 53%. The said company submitted the Bills of Entry for clearance. On scrutiny, the Department alleged to have found less than 53% CaO, which in view of the Department, is not eligible for allowance of exemption under the DEEC Scheme. Therefore, sample of the product, i.e., Low Silica Limestone was drawn and sent for test to the Chemical Laboratory at Customs House, Kolkata, wherein less than 53% CaO was found in the said product. Therefore, the Department having disputed with regard to

claim of benefit under the aforesaid notification, sought to raise the demands.

2.1. The said demands being challenged before the Commissioner of Central Excise & Customs, Bhubaneswar-I, the same got confirmed by Order dated 07.04.2000.

2.2. Being aggrieved, the Company-Respondent preferred Appeals before the CESTAT, which were disposed of on 26th June, 2002 with the following observation:

“8. It is observed that the Commissioner has not recorded any finding on the above contentions of the appellants. We are of the view that the appellants cannot be held to have violated the provisions of advance license, DEEC Book Scheme and exemption notification on the ground of non-compliance with only one of the conditions of the license and consequently, on that ground alone the demand of customs duty cannot be made on them. If they are held to have observed all the other conditions of the license, DEEC Scheme and exemption notification, they should be entitled to the exemption. For want of specific findings of the original authority, however, on the other submissions of the party, we find ourselves handicapped to pronounce upon their duty liability, if any, on the supposed violation of the condition of exemption notification. In this view of the matter, we are of the view that the case calls for going back to the original authority for reconsidering the matter and for passing a de novo order on the other submissions of the party. Consequently, we set aside the impugned order of the Commissioner and remand the matter to him for de novo consideration and passing a fresh speaking order in the matter. The Appellants shall be afforded a reasonable opportunity of making further written submissions and oral representation. The appeal is thus allowed by remand in the above terms.”

2.3. Consequent upon the order of remit, the Commissioner of Central Excise & Customs, Bhubaneswar-I took up the proceeding *de novo* and after hearing, came to observe as follows:

“6.1. Hon’ble CESTAT has given me the warrant to examine if the other conditions were fulfilled and, if yes, to grant the Customs duty exemption. I have discussed relevant facts to show that TISCO have fulfilled the other conditions of the License, D.E.E.C. Scheme and the exemption notification No.79/95-Cus dated 31st March, 1995 as amended and hence was eligible for the exemption.

Sample Issue revisited:

*7.0. ****

iv) The Samples were taken by M/s. S.K. Mitra exactly at the time of loading/unloading which was not the case for samples drawn by Paradeep Customs (of IS:2109-1982). Difference of time/place could bring some divergence in CaO% contents.

v) Less than 53% CaO would have been unprofitable to TISCO themselves, for it would have meant higher cost; implying that had it been so they would have taken up the matter with the suppliers. In support of this contention, they drew attention to the certificate issued by the National Metallurgical Laboratory, Council of Scientific and Industrial Research, Govt. of India Jamshedpur.

vi) Regarding reliability of the tests done by M/s. S.K. Mitra, they contended that this was an independent and Government recognized inspection agency. They referred to the recognition given to the said firm by the Ministry of Commerce, and also the accreditation given to them by the Ministry of Science & Technology for Chemical Tests. It also appears from records that the firm is represented in the Sectional Committee for Methods of Sampling of IS:2109-1982 (reaffirmed 1991).

7.1. Apparently, M/s. TISCO have gone by the test report of M/s. S.K. Mitra which showed a CaO content of over 54% both at load/unload ports (a reading which was also confirmed by their own laboratory test). It further appears that Haldia (Kolkata) Customs had also gone by the report from M/s. S.K. Mitra, for though part quantity of the same consignment of Low Silica Limestone was unloaded by the same vessel at Haldia Port, the Customs there had not raised any objections/demands on them.

7.2. It is also perhaps pertinent to note here that Section 144 of the Customs Act, 1962 only empower Customs officer to draw samples, but it lays down absolutely nothing regarding where & how the samples should be tested.

7.3. Admittedly, there is considerable force as well as good logic behind all the above arguments of the notice. However, since Hon'ble CESTAT has already pronounced its verdict on this (sample) issue, thereby rendering this issue res-judicata, I am prevented by the principle of judicial discipline from recording any judgment on this issue, and I refrain from doing so."

2.4. After recording the findings that there was no contravention of other conditions laid in the Exemption Notification vis-à-vis the Advance License issued under the DEEC Scheme and holding that there was no scope for revisiting the issue with regard to percentage of CaO in Low Silica Limestone, the Commissioner had nullified the impugned demands of customs duty.

2.5. Against the said order of the Commissioner, the present Appellant preferred the Customs Appeals before the CESTAT. The learned CESTAT after having heard the parties dismissed the Appeals with the following observation:

"7. Undisputedly, the Department has not filed any Appeal against the above findings in relation to violation

of the conditions relating to CaO content. Under these circumstances, the Commissioner who considered the matter afresh, was not required to and was not competent to go into the satisfaction of otherwise of the said condition. The Commissioner by the impugned order, has held that the Respondents have complied with the other conditions of the licence under DEEC Scheme and exemption notification. The Department is not questioning the findings of the compliance relating to other conditions, as held by the Commissioner. The Department submits that the condition relating to CaO content has not been fulfilled by the Respondents and therefore, they are not eligible for the benefit of the Notification No.79/95-CE dated 31st March, 1995 and therefore, the Orders of the Commissioner are not legal and proper. Any discussion or ruling on this issue, in our considered opinion, will amount to reviewing the Order of the Tribunal dated 26th June, 2002. As we do not have powers of review, the prayer of the Department cannot be accepted. The Commissioner's finding regarding the compliance with the other conditions, as directed by the Tribunal vide Order dated 26th June, 2002, is not in dispute. As we cannot review the earlier decision of the Tribunal relating to availability of exemption in spite of not fulfilling the condition relating to CaO content, we do not find any reason to interfere with the impugned Orders of the Commissioner."

Arguments of the counsel for the Appellant

3. Mr. Choudhary Satyajit Misra, learned Senior Standing Counsel appearing for the Department would urge that the learned CESTAT should have entertained the Appeals and decided the issued as to whether all the conditions stipulated in the Exemption Notification No.79/95-Cus (as amended) were fulfilled. Though there was no dispute raised by the Department with regard to fulfillment of "other conditions" as determined by the Commissioner in *de novo* consideration of Appeals after remand, the learned CESTAT should

not have treated itself powerless to consider the aspect which was not gone into by the Commissioner with the issue of percentage of CaO in Low Silica Limestone, which is subject-commodity imported from abroad. The learned CESTAT should have believed the report of the Chemical Laboratory of Kolkata which found presence of CaO at less than 53% in preference to the test report submitted by M/s. S.K. Mitra.

3.1. Mr. Misra, learned counsel further went on to submit that even though the Department has not questioned the observation and direction contained in Order dated 26th June, 2002 passed by the learned CESTAT while remanding the matter to the Original Authority, it was not incompetent to delve into the matter by undertaking the re-appreciation of its earlier order.

Decision & Conclusion

4. By pressing into service, the substantial questions of law as extracted hereinabove, the learned counsel for the Appellant submitted that the CESTAT could be asked to revisit the issue of percentage of CaO so as to disqualify the Respondent from availing the benefit of Exemption Notification being No.79/95-Cus, dated 31.03.1995.

4.1. Perusal of order dated 26th June, 2002 passed by the learned CESTAT, it is manifest that there is no ambiguity. The learned CESTAT had directed to have relook into the matter and if all other conditions are found to be fulfilled, the Respondent cannot be denied to avail exemption from payment of duty of customs merely on the ground of less percentage of CaO in Low Silica

Limestone. In the earlier Order dated 26.06.2002, the learned CESTAT has clearly set forth as follows:

“We are of the view that the appellants cannot be held to have violated the provisions of advance license, DEEC Book Scheme and exemption notification on the ground of non-compliance with only one of the conditions of the license and consequently, on that ground alone the demand of customs duty cannot be made on them. If they are held to have observed all the other conditions of the license, DEEC Scheme and exemption notification, they should be entitled to the exemption.”

4.2. On perusal of record, it is seen that the Commissioner in his *de novo* Order dated 31.03.2005 has come to the conclusion that there was no other violations and has placed reliance on the test done by M/s. S.K. Mitra, which is an independent and Government recognized inspection agency. It has been stated that the Department having not questioned the findings of the Commissioner with regard to “other conditions” there was no scope for it to examine the issue of percentage of CaO in Low Silica Limestone.

4.3. Whereas, the Department has accepted the Order dated 26th June, 2002 of the learned CESTAT, by virtue of which the matters were remanded for passing *de novo* order by the Commissioner, it is, thus, held that neither the Original Authority nor the CESTAT could travel beyond what was observed and directed in the Order dated 26th June, 2002. Therefore, the learned CESTAT is correct in its approach by holding that it cannot entrench upon the sample issue particularly when there is no dispute with regard to “other conditions” stipulated in the Exemption Notification issued in connection with the DEEC Scheme.

4.4. It may be apposite to say that directing the CESTAT to decide the issue of percentage of CaO at this stage would tantamount to directing the CESTAT to review its decision, which in the opinion of this Court is impermissible. It is trite that “review” is a creature of statute and cannot be entertained in absence of a provision thereof. In the case of *Gopinath Deb Vrs. Budhia Swain*, 54 (1982) CLT 515 (which is affirmed by the Hon’ble Supreme Court in the case of *Budhia Swain Vrs. Gopinath Deb*, (1999) 4 SCC 396) that the power of review is not inherent in Court or Tribunal; it is a creature of statute. A Court or a Tribunal cannot review its own decision and it is permitted to do so by statute. The Court having general jurisdiction like Civil Court has inherent power; nonetheless, the Court or the Tribunal of limited jurisdiction created under special statute have no inherent power. It is unequivocally stated in the cases of *Patel Chunibhai Dajibha Vrs. Narayanrao Khanderao Jambhekar*, AIR 1965 SC 1457 and *Harbhajan Singh Vrs. Karan Singh*, AIR 1966 SC 641 that in absence of any power of review, the Tribunal could not have subsequently reconsidered its previous decision and the subsequent order reopening the matter is held to be the illegal, *ultra vires* and without jurisdiction. The same principle is also reiterated in the case of *Naresh Kumar Vrs. Government of NCT, Delhi*, 2019 (II) OLR (SC) 1020.

4.5. Such being the legal position, this Court is of the considered opinion that the questions of law as posed in the present appeals do not fall for consideration, especially when the department having accepted the order of remand passed by the learned CESTAT on 26th June, 2002, the Original authority has rendered his findings.

In the aforesaid premises, it is held that the learned CESTAT has committed no error while rejecting the appeals of the Appellant *vide* Order dated 13th April, 2010.

4.6. The OTAPLs are, therefore, dismissed.

(Dr. S. Muralidhar)
Chief Justice

(M. S. Raman)
Judge

Laxmikant

