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

CUSTOM APPEAL NO. 13 OF 2021

The Commissioner of Customs II
JNPT

....Appellant

V/s.

Axiom Cordages Ltd.

...Respondent

Mr. Jitendra B. Mishra a/w Mr. Ashutosh Mishra and Ms. Maya Majumdar
for Appellant.

Dr. Sujay Kantawala a/w Mr. Brijesh Pathak, Mr. Sujit Sahoo, Mr. Mahadev
Lomde and Mr. Aditya Talpade i/b Mr. Sujit Sahoo for Respondent.

**CORAM : K.R. SHRIRAM &
N. R. BORKAR, JJ.
DATED : 6th APRIL, 2022**

P.C. :

1. Appellant is aggrieved by an order dated 11th September, 2020
passed in Customs Appeal No. 85078 of 2019 by the Customs, Excise &
Service Tax Appellate Tribunal, West Zonal Branch, Mumbai (CESTAT). In
the appeal filed, following three substantial questions of law were proposed.

QUESTION OF LAW

*a. Whether Hon'ble CESTAT is right in holding that the
issue of classification and other facets concerning
exportation of subject goods had attained finality at the
time of passing of the Order-in-Original?*

*b. Whether Hon'ble CESTAT is right in setting aside the
Order-in-Original in so far it changed the classification of
exported goods from CTH 56079090 to CTH 56074900?*

*c. Whether Hon'ble CESTAT is right in concluding that the
charges of collusion, wilful misstatement, suppression of
facts cannot be levelled against the applicant under section
28AAA of the Customs Act, 1962?*

2. Today when the appeal was called out Mr. Mishra submitted re-framed substantial questions of law which read as under :

RE-FRAMED QUESTION OF LAW

a. Whether the Tribunal was right in holding that the order of assessment on which no appeal was preferred, cannot be re-opened by issue of Show Cause Notice under Section 124 read with Section 28 of the Customs Act?

b. Whether the Tribunal was right in holding that as no penalty is imposed on the Directors/CEO of the Respondent Company, no penalty can be imposed on the Respondent Company as well?

c. Whether the Tribunal was justified in limiting the scope of de-novo adjudication while remanding back the matter to the adjudicating authority?

3. Mr. Mishra states at the outset that appellant is abandoning the first two substantial questions of law proposed in the appeal memo (quoted in paragraph 1 above) and would request this court to include the re-framed substantial questions of law in addition to third question of law proposed (quoted in paragraph 1 above) in the appeal memo.

4. At the outset Dr. Kantawala raised a preliminary objection on the issue of jurisdiction of this court. Dr. Kantawala submitted that under Section 130(1) of the Customs Act, 1962 (the Act) an appeal shall lie to the High Court from every order passed in appeal by the Appellate Tribunal 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 the purposes of assessment, if the High Court is satisfied that the

case involves a substantial question of law. Dr. Kantawala submitted that where any order passed is against the order passed by the Tribunal relating, among other things, to the determination of any question having a relation to the rate of duty or customs or to the value of goods for the purposes of assessment as provided under Section 130(E) of the Act, appeal shall lie to the Hon'ble Supreme Court of India. Dr. Kantawala submitted that the substantial questions of law originally proposed and the re-framed substantial questions of law indicate that the appeal is against the question relating to classification of goods which would mean determination of question in relation to the rate of customs duty of goods and therefore the appeal should be filed before the Hon'ble Supreme Court of India and not before this court.

5. Dr. Kantawala relied upon *Sterlite Optical Technologies Ltd. vs. Commr. Of C. Ex. Aurangabad* ¹, *Commr. Of Cus., C. Ex. & Service Tax vs. Jubilant Life Sciences Ltd.*² and *Commr. Of C. Ex., Cus & Service Tax, Daman vs. Gandhi Fibres*³, *Commissioner Central Excise, Mumbai-V vs. Reliance Media Works Ltd.*⁴ and *APM Terminals India Pvt. Ltd. vs. Commissioner of C. Ex., Navi Mumbai* ⁵. Dr. Kantawala submitted that bare reading of the proposed questions, the impugned order of CESTAT and the appeal memo clearly indicates that the main controversy which arises for

1 2007 (213) E.L.T. 658 (Bom.)

2 2014 (306) E.L.T. 212 (All.)

3 2011 (268) E.L.T. 354 (Guj)

4 2020 (372) E.L.T. 220 (Bom.)

5 2019 (21) G.S.T.L. 26 (Bom.)

determination is in the nature of classification dispute, which relates directly and proximately to the rate of duty applicable for the purpose of assessment and therefore the appeal would lie only before the Hon'ble Supreme Court of India.

6. Dr. Kantawala further submitted that against the impugned order of CESTAT, respondent has preferred Civil Appeal No. 3804 of 2020 with Interlocutory Application No.121188 of 2020 before the Hon'ble Supreme Court of India challenging the higher duty claim under MEIS, i.e., the order on classification passed by CESTAT which appeal is pending. Dr.Kantawala states that the said appeal is restricted to the order of CESTAT with regard to the original order passed by CESTAT with respect to two shipping bills and not of classification?

7. Mr. Mishra submitted that appellant's grievance is relating, primarily to the grounds 5.1 and 5.2 raised in the appeal which read as under :

5.1 Hon'ble CESTAT is wrong in holding that the issue with regard to the effect of non-filing of an appeal against the assessment order and denial/claim of benefit arising out of such assessment at a subsequent stage is no more open for any debate as per the well settled principle of law laid down by Hon'ble Supreme Court in the case of Collector of Central Excise, Kanpur Vs. Flock (India) Pvt. Ltd. reported in 2000 (120) ELT 285 (S.C.).

5.2 Hon'ble CESTAT in pronouncing its above judgment has overlooked its own judgment in Rajesh G. Gandhi vs CC (Import) Mumbai pronounced on 25.02.2019 and Hon'ble High Court Judgment in case of Venus Enterprises vs. Commissioner – 2006 199 E.L.T. 405 (Mad.).

8. Mr. Mishra states that therefore the appeal filed has nothing to do with any grievance relating to classification of goods and therefore this court is entitled to exercise jurisdiction under Sub Section (1) of Section 130 of the Act.

9. We have considered the appeal memo and the affidavit in reply filed. Also heard Mr. Mishra and Dr. Kantawala on the preliminary issue of jurisdiction. We are inclined to hold that appellant should prefer this appeal before the Hon'ble Supreme Court of India under Section 130(E) of the Act. The reason why we say this is because if one reads the memo of appeal containing the statement of facts and the grounds raised holistically, the main controversy is in the nature of classification dispute. Even the show cause notice issued under Section 124 of the Act read with Section 28 of the Act reads *"..... has been exporting ropes made of PP (Polypropylene) and PP Polyester declaring them under RITC 56079090, availing MEIS benefits of 5%, whereas as per the ITC (HS) Code given by DGFT, the Ropes made of Polyethylene or Polypropylene should be classified under RITC 56074900 attracting MEIS benefit of 2%".* Paragraph no. 43 (I) of the show cause notice which is the basis of the main controversy called upon respondent to show cause as to *"why the ropes which were exported during the period of April 2015 to December 2017 should not be classified under heading 56074900 instead of 56079090".* The order passed by the Commissioner of Customs also states at paragraph no.12 *"..... The ropes*

of various types which were exported during the period of April, 2015 to Dec. 2017, are to be classified under sub-heading 56074900 of the customs tariff, as opposed to the sub-heading 56079090 adopted by the exporter”.

Even the concluding paragraph of the tribunal’s order impugned in this petition, paragraph no.17 states *“In view of the foregoing discussions and analysis, we set aside the impugned order and allow the appeal, in so far as it has changed the classification of exported goods from CTH 56079090 to CTH 56074900, resulting in confirmation of duty demand along with interest and imposition of penalty on the appellant”.*

10. Therefore, the entire controversy arises due to classification dispute. Mr. Mishra submitted that the first question of law undertakes issues relating to Section 28 of the Act and therefore, does not constitute controversy relating to classification. We are afraid we cannot agree with Mr. Mishra because Section 28 of the Act provides for recovery of duty not levied or has been short-levied or erroneously refunded, or when any interest payable has not been paid, part paid or erroneously refunded. Mr. Mishra submitted that the issue here is of the levy or payment of duty. But to determine whether there has been short levy of duty, certainly, without deciding on the classification of goods how can be the department decide what was the duty to be levied and whether it has been properly paid or there has been a short payment. Mr. Mishra relied upon judgment of

Venus Enterprises vs. Commissioner of Customs, Chennai⁶ and submitted that the law is well with the show cause notice under the provisions of Section 28 of the Act for payment of customs duty not levied or short levied or erroneously refunded can be issued subsequent to the clearance of the goods under Section 47 of the Act. Certainly we do not have any quarrel on this proposition suggested by Mr. Mishra. That is not the issue in the case at hand. To decide whether there is short levy, certainly there has to be a determination on the classification of goods. In fact, in ***Venus Enterprises*** (supra) relied upon by Mr. Mishra in paragraph no. 6 it is observed “*In view of the clear finding with regard to the mis-declaration and suppression of value, which led to the under-valuation and proposed short-levy of duty*”. That also indicates that to decide whether there has been a short levy of duty, classification is required.

11. As regards the second re-framed substantial question of law, that would also arise only if Revenue succeeds in proving that there was erroneous classification by respondent and by virtue thereof there has been short levy or short payment of custom duty and hence penalty is payable.

12. As regards third re-framed substantial question of law that is already the subject matter of appeal in the appeal filed by respondent before the Hon’ble Supreme Court of India.

6 2006 (199) E.L.T. 405 (Mad.)

13. On the third substantial question of law originally proposed in this appeal whether there was collusion, wilful misstatement, suppression of facts and such charges to be levelled against respondent under Section 28AAA of the Act, first of all the issue which is to be decided is whether the ropes were wrongly classified by respondent and only if Revenue succeeds in that, the tribunal or this court will have to determine this proposed substantial question of law.

14. Therefore, to sum up, the entire controversy or the origin of the entire controversy is classification dispute which relates primarily to the determination of question of levy of duty applicable.

15. Therefore, we hold that appellant may prefer an appeal before the Hon'ble Supreme Court of India and this court will have no jurisdiction.

16. Appeal dismissed.

(N. R. BORKAR, J.)

(K.R. SHRIRAM, J.)