IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 04.01.2024

CORAM

THE HONOURABLE MR.JUSTICE R.MAHADEVAN
AND
THE HONOURABLE MR.JUSTICE MOHAMMED SHAFFIQ

C.M.A.Nos. 2505 of 2019 and 54, 55, 58, 59, 60, 62, 91, 92, 94, 95, 165, 170, 171, 172, 174, 175, 176, 179, 180, 182, 185, 186, 193, 207, 209, 413, 414, 417, 420, 421, 422, 424, 426, 432, 494, 495, 1205, 1206, 1207, 1208, 1209, 1210, 1211, 1212, 1213 1214 of 2020 and 3022, 3023, 3025, 3026, 3027, 3028, 3029, 3030, 3032, 3033, 3037, 3038, 3039, 3043, 3044 of 2021 and C.M.P.No.11881 of 2019

The Commissioner of Customs Sea,
Commissioner of Customs (II),
Customs House,
60, Rajaji Salai,
Chennai 600 001. .. Appellant in all the appeals

Vs.

M/s.Tinna Rubber Infrastructure Limited,
Tinna House,
No.6, Sultanpur, (Mandi Road)
Mehrauli, New Delhi - 110 030. .. Respondent in all the appeals

Common Prayer: Appeals filed under Section 35G of the Central Excise Act, 1944, praying to set aside the common Order dated 21.05.2018 passed by the Customs, Excise & Service Tax Appellate Tribunal, Chennai, in Final Order Nos.41559 - 41623 / 2018.

For Appellant : Mr. V. Sundareswaran
in all Appeals Senior Panel Counsel

For Respondent : Mr. Raghavan Ramabadran
in all Appeals for M/s. Lakshmi Kumaran
and Sridharan

COMMON JUDGMENT

Heard both sides and perused the records.

2.All these appeals arise from a common order dated 21.05.2018 passed by the Customs, Excise & Service Tax Appellate Tribunal, Chennai, raising the following substantial questions of law:

(A)Whether in the facts and circumstances of the case, the Tribunal is right and justified in allowing the appeal of the assessee when the rubber scrap imported by the respondent herein is liable to CVD?

(B)Whether the Tribunal is right in not deciding the issue on merits and simply following the judgment of the Delhi High Court reported in 2017 (353) ELT 161 and the said judgment of the Delhi High Court has now been set aside by the Supreme Court in CA No.6874-6875 of 2018 dated 23.07.2018?

(C)Whether the Tribunal is right in not considering that rubber scrap imported by the respondent herein is a different commercial commodity that has emerges as a result of manufacture / processing of old tyres and just because the respondent terms the process as cutting of old tyres into three pieces, it does not go out of ambit of manufacture?

(D)Whether the Tribunal is right in not considering that the twin test of manufacture and marketability are complied in the present case and therefore, the rubber scrap imported by the respondent herein is liable to CVD?

3.The common facts involved in all these appeals are that the respondent herein had, from time to time, imported Tyre scrap cut into two or three pieces. These goods were intended to be used in the manufacture of Crumb Rubber Powder or Crumb Rubber Modified Bitumen used in road laying. At the time of import, the respondent represented that Countervailing Duty (CVD) i.e., Additional Duty of Customs equal to excise duty, is not required to be paid on these imported consignments and hence, they claimed 'Nil' CVD rate. In view of the same, they were unable to process the Bills of Entry in the EDI. Hence, the respondent paid CVD duty under protest and preferred appeals against the assessments. The first Appellate Authority viz., the Commissioner (Appeals-II) dismissed the appeals filed by the respondent herein, upholding the orders-inoriginal. Aggrieved by the same, the respondent went on further appeals, which were allowed by the Appellate Tribunal, by final order dated 21.05.2018. The said order of the Appellate Tribunal is questioned in the present batch of appeals by the Revenue.

4.It is relevant to point out at this juncture that the Respondent herein was faced with identical issues in various other ports, including Delhi. In a writ petition filed by them before the Delhi High Court, *vide* Order dated 02.12.2014, a direction was issued to CBEC to consider the representation of the respondent herein keeping in view the decision of the Hon'ble Supreme Court in *Hyderabad Industries Ltd v. UOI [1999 (108) ELT 321 (SC) and CCE & Customs Bhubaneshwar v. Tata Iron and Steel Co. Ltd [2003 (154) ELT 343(SC)*. Pursuant thereto, the Tax Research Unit (TRU), CBEC *vide* letter dated 02.01.2015 clarified that Tyre Scrap cut into two or three pieces are chargeable to CVD. The respondent challenged the said circular / clarification before the High Court of Delhi. The said Circular was set aside by Full Bench of the Delhi High Court *vide* order dated 03.05.2017 *[Tinna Rubber & Infrastructure Ltd v. Union of India, 2017 (353)ELT 161 (Del)]* and it was held that imposition of 12% CVD on cut pieces of used tyres and tubes is *ultra vires* the Customs Tariff Act (CTA). The operative portion of the said order is extracted below for ready reference:

> *"27. In view of the clear legal position, the stand of the TRU of the Department of Revenue in its clarification dated 2nd January, 2015 that there was no exemption from payment of excise duty in respect of tyre scrap cut into two to three pieces produced from used and old tyres and that, therefore, the said goods are chargeable to additional customs duty or CVD under Section 3(1) of the CTA, is unsustainable in law. The said decision/clarification is hereby set aside. It is declared that the imposition of 12% CVD under Section 3(1) of the CTA on cut pieces of used tyres and used tubes is unlawful and ultra vires the CTA.*
>
> *28. The writ petition is accordingly allowed but, in the facts and circumstances of the case, with no orders as to costs. The application is disposed of."*

5.The order impugned in the present batch of appeals has been passed by the Appellate Tribunal, following the above order of the Delhi High Court, while setting aside the common order of the Commissioner (Appeals-II). The following portions of the impugned order of the Appellate Tribunal are relevant in this regard:

> *“5. Heard both sides and have gone through the facts. The issue has now been laid to rest by the Hon'ble High Court in their own order dt. 3.5.2017, reported in the case of Tinna Rubber & Infrastructure Ltd. Vs Union of India - 2017 (353) ELT 161 (Del.). The relevant part of that judgement is reproduced as under:*
>
>> *"27. In view of the clear legal position, the stand of the TRU of the Department of Revenue in its clarification dated 2nd January, 2015 that there was no exemption from payment of excise duty in respect of tyre scrap cut into two to three pieces produced from used and old tyres and that, therefore, the said goods are chargeable to additional customs duty or CVD under Section 3(1) of the CTA, is unsustainable in law. The said decision/clarification is hereby set aside, It is declared that the imposition of 12% CVD under Section 3(1) of the CTA on cut pieces of used tyres and used tubes is unlawful and ultra vires the CTA.*

> *28. The writ petition is accordingly allowed but, in the facts and circumstances of the case, with no orders as to costs. The application is disposed of."*

> *It is also noted that, in all these cases, the claim amounts have verily been paid up the appellants under protest. Viewed in this light and in particular following the ratio laid down by the High Court of Delhi in their own case (supra), we find in favour of the appellant. Impugned orders cannot then be sustained and will have to be set aside in toto which hereby do. Appeals are therefore allowed with consequential relief, if any, as per law."*

6.In the meanwhile, aggrieved by the order of the Delhi High Court, the Revenue carried the matter to the Hon'ble Supreme Court by filing appeals in Civil Appeal No(s). 5874 - 6875 of 2018 and *vide* order dated 23rd July 2018, the Hon'ble Supreme Court was pleased to set aside the order of the Delhi High Court, finding that it was a case of incomplete adjudication by the High Court of Delhi, inasmuch as Chapter 40 of the Customs Tariff Act, 1975 read with Chapter Note 6 was not considered. The relevant portion of the said order of the Hon'ble Supreme Court is extracted hereunder :

> *"5. Having perused the order of the High Court of Delhi which decided the matter in favour of the respondent Assessee, relying upon the decision of the Delhi High Court in the case of Modi Rubber Limited vs. Union of India and also the decision of this Court in the case of Union of India vs. M/s Ahmedabad Electricity Company Limited we are of the view that the present is a case where the High Court ought to have decided the matter taking into account the provisions of Chapter 40 of the Customs Tariff Act, 1975 read with Chapter Note 6. The present, therefore, appears to be a case of incomplete adjudication and, therefore, would require a fresh adjudication in the light of the directions contained herein above.*

> *6. Consequently and in the light of the above, the order of the High Court is set aside and the appeals are allowed in the above terms."*

7.In the light of the subsequent development viz., the order of the Hon'ble Supreme Court, whereby the Order of the Delhi High Court was set aside as incomplete adjudication, the very foundation on the basis of which the impugned order of the Tribunal was made, no longer survives and thus, the same is liable to be set aside. In view of the same, we are inclined to set aside the impugned order of the Appellate Tribunal and remand the matters to it for fresh consideration on merits and in accordance with law, after affording reasonable opportunity of being heard to the respondent herein.

8.All these Civil Miscellaneous Appeals are disposed of on the above terms. Accordingly, all the substantial questions of law are answered in favour of the Revenue. No Costs. Consequently, connected miscellaneous petition is closed.

[R.M.D.,J.]   [M.S.Q.,J.]
04.01.2024

Speaking (or) Non Speaking Order
Index:Yes/No
Neutral Citation: Yes/No
spp

To

1. The Customs, Excise & Service Tax Appellate Tribunal,
   Chennai

2. The Commissioner (Appeals -II)
   60 Rajaji Salai, Custom House,
   Chennai -600 001

3. The Commissioner of Customs Sea,
   Commissioner of Customs (II),
   Customs House,
   60, Rajaji Salai,
   Chennai 600 001.

R.MAHADEVAN, J.
AND
MOHAMMED SHAFFIQ, J.

spp

C.M.A.Nos. 2505 of 2019 etc. batch

04.01.2024