
(2014) 11 MAD CK 0338

In the Madras High Court

Case No : Civil Miscellaneous Appeal No. 2379 of 2006

CCL Products (India) Ltd.

APPELLANT

Vs

Customs, Excise and Service Tax Appellate Tribunal

RESPONDENT

Date of Decision : 07-11-2014

Acts Referred:

Customs Act, 1962 — Section 111(m), 112, 112(a), 114A, 14

Citation : (2015) 316 ELT 625

Hon'ble Judges : R. Sudhakar, J; R. Karuppiah, J

Bench : Division Bench

Judgement

R. Sudhakar, J.

1. This appeal is filed by the assessee against the Final Order No. 950 of 2005, dated 7.7.2005 passed by the Customs, Excise and Service Tax

Appellate Tribunal, South Zonal Bench at Chennai, raising the following substantial questions of law:

(a) Whether the Tribunal can go beyond the scope of the show cause notice and the Order-in-Original No. 61/2001-CAU, dated 16.3.2001 of

the second respondent to hold that there had been provisional assessment in this case?

(b) Whether the Tribunal can suo motu (after hearing has been completed) come to a conclusion that there had been provisional assessment of the

impugned goods, even while such an averment did not appear in the show cause notice or in the Order-in-Original or at the time of hearing?

(c) Whether the Tribunal was correct in rejecting the application for rectification of mistake (relating to the issue at (ii) above) apparent on the face

of its final order No. 950/2005, dated 11.7.2005?

(d) Whether the Tribunal can be heard to say that if the plea of the appellant regarding the provisional assessment is accepted, the demand will be

barred by limitation and therefore, such a plea cannot be entertained?

2.1. The facts in a nutshell are as under: The appellant imported capital goods under Export Promotion Capital Goods (EPCG) Licence No.

1232940, dated 16.5.1994. They cleared the capital goods vide 17 Bills of Entry, of which 13 consignments were cleared through Chennai Port

and 4 consignments were cleared through Mumbai Port. The consignments at Mumbai were cleared against release advices issued by Chennai

Customs by debiting the EPCG Licence registered at Chennai. The EPCG license comes with a corresponding export obligation, of which we are

not concerned for the present.

2.2. The assessee entered into a technical collaboration agreement dated 6.3.1994 with M/s.Brazilian Food Project, Brazil. The Directorate of

Revenue Intelligence, on receipt of intelligence to the effect that the assessee evaded payment of customs duty on the imported machinery,

investigated the imports made by the assessee.

2.3. In the course of the investigation, statements were recorded and documents were seized. On that basis, the Directorate of Revenue

Intelligence issued a show cause notice proposing to:

(i) add technical know-how fees of US\$ 2,88,000/- under Rule 9(1)(b)(iv) and Rule 9(1)(c) of the Customs Valuation Rules, 1988;

(ii) demand duty of Rs. 36,23,372/- under proviso to Section 28(1) of the Customs Act with interest under Section 28AB for alleged willful

misstatement and suppression of facts; and

(iii) confiscate the goods under Section 111(m) of the Customs Act for non-inclusion of the value which led to mis-declaration, besides penalty

under Section 112(a)/ 114A of the Customs Act.

2.4. The appellant replied to the show cause notice and inter alia contended that: (i) they have fulfilled the export obligation and achieved exports

much beyond the requirement of the EPCG license; (ii) the technical know-how fees is not to be included in the assessable value; and (iii) there is

no element of suppression or mis-statement.

2.5. The defence taken by the assessee was rejected and the Original Authority

came to the conclusion that the technical know-how fee charges paid by the appellant to M/s.Brazilian Food Project, Brazil should be included in the assessable value. On the quantum of technical know-how fees includable in the assessable value, partial relief was granted in favour of the appellant. The Commissioner held that there was no suppression of fact, but only willful mis-statement. While adverting to proviso to Section 28(1) of the Customs Act, the Original Authority gave a finding as follows:

37. The notice alleged that neither the fact of technical know-how nor collaboration agreement, nor the equity participation, nor the relationship, nor the payment of US\$ 2,88,000 was brought to the notice of the Customs authorities at the time of import. Therefore, the notice alleged of wilful suppression of facts and mis-statement, thereby demanding duty under Sec. 28(1) Proviso thereof of the Customs Act, 1962 along with interest under Section 28AB.

38. I find, for the invocation of the proviso to 28(1) of the Customs Act one of the three ingredients have to be let in by the department, these three ingredients are collusion, suppression of facts and wilful mis-statement. If find in the instant case the firm M/s.CCL have remitted the know-how fees of US\$ 2,88,000 with the approval of SIA and with the permission of Reserve Bank of India. Officials of Ministry of Finance also formed a committee approving such collaboration. Therefore, I hold that there is no suppression in the instant case. I also find that there is no collusion in the instant case nor the show cause notice had let in any evidence in this regard.

39. The importers have cleared the equipment under 17 Bills of Entry, 13 consignments were cleared through Chennai port and 4 consignments were cleared through Mumbai port. I find that the importers have not intimated to the Customs authority that they have a foreign collaboration agreement. They have also not indicated that an amount of US\$ 2,88,000 was remitted as know-how fees to M/s.BFP, the foreign collaborators.

When any payment is made, whether it is addable to assessable value or not, has to be decided by the Customs Department and importer cannot presume by themselves that the said amount is not includable in the assessable value and thereby not declaring the same. In the subject case, I find that they have not informed the Customs about the know-how fee payment, nor

declared in the Bills of Entry, therefore, said non-declaration led to non-inclusion to whatever extent it is includable, and such non-inclusion led to the offence, which offence led to extra duty liability therefore I have every reason to doubt the credentials of the firm. In as much as non-declaration, non-inclusion led to offence and duty liability, I hold that this is a case of willful mis-statement thereby proviso to Section 28(1) is invokable. Therefore, I hold that US\$ 1,30,000 is addable to the declared value under Rule 9(1)(b)(iv) and 9(1)(c) to bring it as the correct transaction value under Rule 4. Therefore, the duty demandable on this account works out to Rs. 15,38,062/- (Rupees Fifteen lakhs thirty eight thousand and sixty two only). To this extent I hold that there is mis-declaration of value and hence the imported equipment covered by the Bills of Entry is liable to confiscation under Section 111(m) of the Customs Act 1962. In view of the fact that the duty is being demanded on account of willful mis-statement of value stemming out non-declaration and mis-declaration thereof, I hold that the importer is also liable to penalty under Section 114A to the extent of duty sought to be evaded.

As a result, a duty demand was made under proviso to Section 28(1) of the Customs Act in the following manner:

41. I find that the duty determined as demandable under Section 28(1) proviso thereof is Rs. 15,38,062/-. The said amount may be collected against the last bill of entry cleared through this port i.e., B/E No. 23810/18.5.95. I am also endorsing a copy of this order to the Commissioner of Customs, Mumbai so that there will be no need to initiate similar proceedings against four bills of entry cleared through Mumbai Customs on this issue.

On the basis of the above finding, the Original Authority passed the following order:

43.1. I hold that US\$ 1,30,000 being part of lump-sum know-how payment is addable to the value of the imported equipment under Rule 9(1)(b) (iv) and 9(1)(c) of Customs Valuation Rule, 1988 read with Rule 4 ibid and Section 14 of the Customs Act, 1962.

43.2. I demand a duty of Rs. 15,38,062/- (Rupees Fifteen lakhs thirty eight thousand and sixty two only) in terms of proviso to Section 28(1) of the Customs Act, 1962 and I impose a penalty of Rs. 15,38,062/- (Rupees

Fifteen lakhs thirty eight thousand and sixty two only) under Section 114A of the Customs Act, 1962.

43.3. I hold that the goods cleared are liable to confiscation under sec. 111(m) of the Customs Act, 1962 and as the goods are not available for confiscation, and as the importer has cleared at that stage against bond, I impose a redemption fine of Rs. 1,00,000/- (Rupees one lakh only) in lieu of the confiscability under sec. 111(m) of the Customs Act, 1962, as the offence is limited only to the extent of know-how fees of US\$ 1,30,000 and the importers fulfilled the whole export obligation.

43.4. In view of the specific provision under Section 114A which lays that when any penalty has been levied under Section 114A no penalty shall be levied under Section 112. Therefore I am refrained from invoking 112(a).

43.5. The above duty and penalty and fine shall be collected against Bill of Entry No. 23810 dated 18.5.95, the last Bill of Entry cleared through Chennai Port.

2.6. Assailing the said order, the assessee filed an appeal to the Tribunal. On the issue of adding the technical know-how fee in the assessable value, the Tribunal held against the appellant in paragraphs (3) to (6) of the order, which read as under:

3. In order that the technical know-how fee may be held to be includible in the assessable value of the equipments imported from M/s. BFP, two conditions have to be cumulatively satisfied. First, it has to be found that the know-how fee was related to the imported goods. Secondly, it was to be established that the fee was required to be paid, directly or indirectly, as a condition of sale of the said goods. It has been argued by Ld.

Counsel for the appellants that the know-how fee was related only to the final product (soluble instant coffee) and was not in any way related to

the imported equipments. It has also been submitted that the payment of the know-how fee was not directly or indirectly a condition of sale of

equipments by M/s. BFP to the appellants. Therefore, according to the Counsel, the know-how fee is not addable to the transaction value for

determination of the assessable value. Ld. Counsel has also relied on a line of decisions of the Tribunal, some of which are listed below.

1. M/s. S.D. Technical Services v. CC, New Delhi, 2003 (155) ELT 274 (T-LB) = 2003 (56) RLT 962 (CEGAT-LB).

2. M/s Polar Marino Agglomerators Ltd. v. CC, 2003 (155) ELT 283 (T-LB) = 2003 (56) RLT 967 (CEGAT-LB).

3. M/s. Panafa Dongwon India Ltd. v. CC, 2003 (155) ELT 287 (T-LB) = 2003 (56) RLT 962 (CEGAT-LB).

4. M/s. Hoerbiger India Pvt. Ltd. v. CC, Mumbai, 2003 (156) ELT 62 (T-LB) = 2003 (56) RLT 965 (CEGAT-LB).

Ld. DR has argued that it would appear from Clause-II of the Technical know-how Agreement that there is a connection between the imported

goods and the know-how fee in this case. He has also relied on the Supreme Court's judgment rendered in the case of Collector of Customs

(Preventive), Ahmedabad Vs. Essar Gujarat Ltd., Surat, .

4. It was submitted by Counsel that the capital goods and the technical know-how had been supplied by BFP under separate invoices against

separate orders placed by CCL and, therefore, the import of capital goods and the acquisition of technology should be seen as two separate and

independent transactions with no interrelation. In the wake of this submission, we, upon completion of hearing, called upon the counsel to produce

within one week copies of the purchase order and invoice pertaining to technical know-how. These have not been produced till date. The available

evidence which we have already examined is in support of Ld. Chief Commissioner's finding that the import of capital goods and acquisition of

technical know-how by CCL from BFP constituted a single package. We have also found relation between the capital goods and the know-how

fee. We have also noticed that M/s. CCL through their letter dated 2.3.2001 furnished a split-up of the know-how fee to the adjudicating authority

showing the following parts as relatable to the erection of the plant and manufacture of Instant Coffee therein:

Ld. Chief Commissioner accepted these figures and held that know-how fee to the extent of US\$ 1,30,000 was relatable to the capital goods in

question. We are in agreement with this finding of the adjudicating authority. The first condition under Rule 9(1)(c) stood satisfied as far as this

amount of US\$ 1,30,000 was concerned. Coming to the second condition, we find that, though it was not expressly stipulated in the Agreement

that sale of capital goods by BFP to CCL was subject to purchase, by CCL from BFP, of technical know-how for erection and operation of

Instant Coffee plant, such a condition was implicit in the Agreement, which, as we have already noted, is discernible from CLAUSES IV AND VI

read with sub-clauses (2.1), (2.2) and (2.3) of CLAUSE- II. Accordingly, it must be held that the know-how fee was required to be paid, directly

or indirectly, as a condition of sale of the capital goods in question. Thus, the second condition under Rule 9(1)(c) was also satisfied in this case.

5. Facts of the cases cited by Ld. Counsel are distinguishable from those of this case. In the case of S.D. Technical Services (*supra*), it was found

from the terms of the collaboration agreement that the technical know-how transferred thereunder was related to the capital goods imported by the

assessee from the supplier of know-how. In Polar Marmo Agglomerates (*supra*), the terms of the relevant agreement were examined and it "was

found that payment of know-how fee was not a condition of sale of the plant and machinery imported by the assessee. In Panalfa Dongzvon India

(*supra*), a lump sum royalty which, was payable by the assessee to their technical collaborator who supplied a capital equipment was found to have

no connection with the import of the equipment. This finding was recorded after a study of the relevant agreement. In Hoerbiger India case, no

payment of lump sum royalty or know-how fee was involved. The subject matter of dispute was a ""running royalty"" which was payable by the

assessee (to their collaborator) as a percentage of the net selling price of their product manufactured and sold in India, and this was held to have no

relation to the imported goods. None of these decisions is of any aid to the present appellant, in whose case both the conditions for invoking Rule

9(1)(c) to include USD 1,30,000 in the assessable value of the capital goods imported from M/s. BFP were satisfied in terms of the Technical

Know-how Agreement. On the other hand, the Apex Court's judgment in the case of Essar Gujarat Limited (*supra*) cited by Ld. DR seems to

support the Revenue's case. The Tribunal's Larger Bench considered this judgment while dealing with the case of Polar Marmo Agglomerates

(*supra*) and observed as under:

In CC (Prev.) Ahmedabad v. Essar Gujarat Ltd., the Supreme Court, interpreting the terms of the agreement took the view that fee payable for

obtaining transfer of operational licence from a third party is to be added to the value of the plant purchased by Essar Gujarat from a foreign seller.

It was found that without the licence from Midrex, Essar Gujarat will not be able to operate the plant in terms of the agreement of sale between

Essar Gujarat and foreign seller M/s. Teviot Investment Ltd. It was therefore held that obtaining a licence from Midrex was a pre-condition of sale.

The plant would be of no value if it could not be made functional. To make the plant operational licence and technical know-how had to be

obtained. It was under these circumstances the Apex Court took the view that the fee for licence and know-how had to be added to the value of

the plant imported.

In the instant case, the Instant Coffee plant was erected in terms of the Technical Know-how Agreement. It was erected out of capital equipments

imported from M/s BFP and those procured from other sources. M/s. BFP had an obligation, under the above agreement, to ensure that all such

equipments were compatible with the know-how supplied by them and also to ensure that the plant was operational to yield 500 Kgs of Instant

Coffee per hour as guaranteed under the agreement. Without the know-how, the plant could not have been erected, nor made operational at the

guaranteed level. On these facts, the Revenue can legitimately claim support from the Apex Court's judgment.

6. For the reasons already noted, we uphold the Chief Commissioner's view that the amount of USD 1,30,000 is liable to be included in the

assessable value of the capital goods in question.

2.7. The next question the Tribunal dealt with was whether the extended period of limitation under the proviso to Section 28(1) of the Customs

Act is invocable to demand duty on the value addition in this case. For this, the Tribunal takes a new plea in paragraphs (7) to (9) of the impugned

order, which we extract as such for better clarity:

7. We observe that the capital goods under EPCG scheme were imported through Chennai Customs House and through Sahar Air Cargo

Complex, Mumbai. The importers filed 17 bills of entry seeking clearance of the goods, 13 of them at Chennai and 4 at Mumbai. The triplicate

copies of the bills of entry filed by the appellants indicate that the assessments were provisional. The appellants have not averred that these bills of

entry were finally assessed. The learned DR also does not aver that the goods were finally assessed. In the light of these facts as they emerged

from the records of the case, we hold that the assessments were provisional. As the assessments were provisional, the limitation under Section 28

does not arise. In fact a notice under Section 28 could not have been issued when the assessments were provisional.

8. In view of our observations above, the question of limitation does not arise. We have however dealt with the aspect of additional of US\$

1,30,000 to the assessable value as this amount was paid as a technical know-how fee. We accordingly direct the lower authorities to finalise the

assessments keeping our finding that the technical know-how fee is addable to the assessable value under Rule 9 of the Customs Valuation Rules.

9. The issue involved here is whether expenses incurred towards payment of technical know-how fee is addable to the assessable value. In other

words, the issue involved is in regard to valuation of goods. The charge of deliberate suppression or misdeclaration of value cannot be pressed

when the issue itself is debatable. We, therefore, hold that no suppression or misdeclaration is involved in this case. Consequently, the goods are not

liable to confiscation nor the importers are liable to any penalty. We set aside the fine and penalty imposed by the Chief Commissioner.

A reading of the above portion of the impugned order would make it clear that, for the first time, the Tribunal has proceeded to hold that the

assessment on the bills of entry is provisional in nature and, therefore, limitation does not arise.

2.8. Since a new finding of fact, which was not pleaded by the Department in the original proceedings, namely, the show cause notice or in the

order of the Original Authority, was rendered by the Tribunal, the assessee has chosen to pursue the matter before this Court on the substantial

questions of law, referred supra.

3. We have heard Mr.P.R.Renganath, learned counsel for the appellant and Mr.E.Vijay Anand, learned Standing Counsel appearing for the

second respondent and perused the orders passed by the Tribunal and the Original Authority.

4. We have perused the show cause notice dated 22.9.1999, which is issued in terms of proviso to Section 28(1) of the Customs Act, 1962. The

specific case of the department was that it was a clear case of suppression and misstatement of fact at the time of clearance of the goods and,

therefore, the proviso to Section 28(1) of the Customs Act is liable to be invoked. The Original Authority, in the order-in-original, rendered a categoric finding that it is a case of willful misstatement and thereby proviso to Section 28(1) of the Customs Act is invocable. In the light of the stand taken by the Department and the finding rendered by the Original Authority, we fail to understand as to how the Tribunal could have taken a new plea to decide the issue that the assessment was provisional and as a consequence, hold the question of limitation does not arise. As to whether the assessment was provisional or final is a pure question of fact which the Tribunal ought not to have raised, at the first instance, before it and it was neither the importer's plea nor department's plea.

5. The rectification petition filed by the appellant on this issue of assessment also came to be dismissed by the Tribunal holding that in a case which involves assessments of bills of entry and in which demand of duty is contested on limitation, it is open to the Tribunal to find out whether the assessments were provisional or not, even if it is not adverted to in the show cause notice. Paragraph (2) of the rectification order is also extracted hereunder for better clarity:

2. Admittedly, the case was one involving assessment of several bills of entry covering import of machinery and also one in which the demand of duty assessed was raised beyond the normal period prescribed under Section 28 of the Customs Act. One of the main grounds raised by the appellant against the demand was limitation. In the circumstances, it was well within the realm of the Tribunal to examine the question whether the assessments were provisional or not, irrespective of whether or not the provisional nature of assessments was adverted to in the relevant show-cause notice. In our view, it was imperative to find out whether the assessments were provisional or not in the wake of the serious plea of limitation raised by the assessee. For the sake of argument, we would, for a moment, visualize a situation in which we hold the entire demand of duty as time-barred after accepting the relevant arguments of the assessee, regardless of the provisional nature or otherwise of the assessments. If, in fact, the assessments were provisional, such a view, if taken by us, would have been glaringly erroneous inasmuch as, where assessments are provisional, there is no question of limitation. It is, therefore, obvious that in a

case which involves assessments of bills of entry and in which demand of duty is contested on limitation, it is open to the Tribunal to find out whether the assessments were provisional or not. Hence, we think, we have not committed any mistake in para 7 of our final order, let alone "mistake apparent from the record". In the result, the application gets dismissed.

(emphasis supplied)

6. In the above factual matrix, it is apposite to refer to a decision of the Supreme Court in SACI Allied Products Ltd., U.P. Vs. Commissioner of

Central Excise, Meerut, , in a case relating to excise, wherein the Supreme Court held that the Tribunal ought not to go beyond the show cause

notice and the order of the Original Authority. In paragraphs (16) to (18), the Supreme Court held as under:

16. It is thus seen that the Tribunal has gone totally beyond the show-cause notice and the order of the Collector, which is impermissible. The

Appellate Tribunal cannot sustain the case of the Revenue against the appellants on a ground not raised by the Revenue either in the show-cause

notice or in the order.

17. In this context, we may usefully refer to the judgment of this Court in the case of Reckitt and Colman of India Ltd. Vs. Collector of Central

Excise, . This Court held that it is beyond the competence of the Tribunal to make out in favour of the Revenue a case which the Revenue had

never canvassed and which the appellants had never been required to meet.

18. The impugned order of the Tribunal which had gone beyond the show-cause notice and the order of the respondent Collector is, therefore,

liable to be set aside.

(emphasis supplied)

For coming to the above said conclusion, the Supreme Court relied upon an earlier decision of the Supreme Court in Reckitt and Colman of India

Ltd. Vs. Collector of Central Excise, , in which decision also it has been clearly held that it is beyond the competence of the Tribunal to make out a

case in favour of the Revenue which the Revenue had never canvassed and which the assessee had never been required to meet.

7. Similar view was taken by the Supreme Court in Sanghvi Reconditioners Pvt.

Ltd. Vs. Union of India (UOI) and Others, , where the Court held that even though an additional ground/new ground on admitted facts can be entertained, if such additional ground/new ground involves any investigation into facts, then it cannot be permitted to be raised.

8. In the present case, as to whether the assessment is provisional or final is a pure question of fact. That was not the issue raised in the show cause notice or in the Order-in-Original of the Commissioner. The Tribunal states that learned Department representative does not aver that the goods were finally assessed. This cannot be correct as the show cause notice issued under Section 28(1) of the Act invoking extended period goes on the premise that assessment is final and the importer does not deny it to plead a case of no suppression or misstatement. We, therefore, find that the Tribunal has misdirected itself to consider the issue on a total new plea, which was not canvassed by the Revenue in the show cause notice. That apart, the Commissioner was not called upon to adjudicate on that issue as to whether the assessment is provisional or otherwise. We find that the Tribunal erred in considering such new plea and coming to the conclusion that there was no case of misstatement or suppression. The order of the Tribunal, in the light of the law laid down in the decisions of the Supreme Court, referred supra, requires to be rectified. In such view of the matter, the substantial questions of law raised are answered in favour of the assessee. For the foregoing reasons, this appeal is allowed by way of remand. The Tribunal will reconsider the issues on merits, without reference to the issue relating to provisional assessment. The assessee will be entitled to canvass all the issues on merits. No costs. Consequently, M.P.No. 2 of 2006 is closed.