(2013) 09 GUJ CK 0026

In the Gujarat High Court

Case No : Special Civil Application No. 3022 of 2013

Claris Lifesciences Ltd. APPELLANT

Vs

Union of India RESPONDENT

Date of Decision : 05-09-2013

Acts Referred:

Citation : (2013) 42 GST 180

Hon'ble Judges : Sonia Gokani, J;Mukesh R. Shah, J

Bench : Division Bench

Advocate : Paresh M. Dave, for the Appellant; Amee Yajnik, for the Respondent

Judgement

Sonia Gokani, J.—This petition under Article 226 of the Constitution of India is preferred by the petitioner, which is a Public Limited Company engaged in the business of manufacture of patent or proprietary medicines. The petitioner company operates as 10096 export oriented unit ("EOU" for short), where P.P. Medicines are manufactured. The company exports the goods manufactured in EOU. Certain percentage of production is allowed to be sold in Domestic Tariff Area ("DTA" for short) under the EXIM policy and thus the company acquires certain quantities of P.P. Medicines in DTA in accordance with the permission issued by the Development Commissioner, being the officer incharge of the EOU. Section 3(1) of the Central Excise Act levies and collects the Central Excise duty on goods produced or manufactured in India. For goods manufactured by 100% EOU and brought to another place in India, rate of excise duty is applicable as per Clause-II of the proviso to section 3(1) of the Central Excise Act. The company has been paying the excise duty on the sum total of duties of customs and also education cess as well as secondary and higher education cess on customs duty leviable on similar medicines imported into India. Dispute was raised as calculations of excise duties were made leviable on DTA clearances made by EOU on the ground that the education cess as well as secondary and higher education cess were leviable on sum total of custom duties.

2. Customs Excise & Service Tax Appellate Tribunal ("CESTAT" for short)

considered the similar dispute in case of 2010 (253) ELT 203 and held that the method suggested by the Revenue for levying above cess for second or third time was incorrect and not in accordance with the scheme of section 3 of the Central Excise Act.

3. The petitioner also raised this very dispute before the Revenue authorities and appeal was preferred before the appellate Tribunal. The Tribunal held that the issue involved was covered by the decision rendered in the case of Sarla Performance Fibers Ltd. (supra), where it was held that once the measure of Custom Duty equivalent to Central Excise Duty leviable on the like goods had been worked out, the question of levying the education cess separately in respect of clearance by 100% EOU to DTA would not arise.

4. The decision of Sarla Performance Fibers Ltd. (supra) was challenged by the Revenue by way of Tax Appeals before this Court and after a bipartite hearing, Tax Appeals were dismissed on 19.1.2012 CCE, C & ST v. Sarla Performance Fibers Ltd. [Tax Appeal No. 2012 of 2010] holding that appeal before the Supreme Court was maintainable u/s 35L of the Act and not u/s 35G was maintainable as the issue raised had a direct bearing on the rate at which manufacturers'' pay excise duty on clearances made from EOU to DTA. According to the appellants, the order of the appellate Tribunal rendered in the petitioner''s appeal has become final and binding qua the parties and also to the adjudicating authority and the first appellate authority. Grievance thereafter was made by the petitioner that show cause notice dated 8.7.2011 came to be issued demanding sum of Rs. 3,93,003/- and amount of cess on domestic clearances made by the petitioner''s EOU from the period from July, 2010 to December, 2010 and yet another show cause notice for the period from January, 2011 to July, 2011 came to be served upon the petitioner company on 24.1.2012 demanding the sum of Rs. 3,64,510/- as a short payment of education cess as well as secondary and higher education cess for DTA clearances made by the petitioner''s EOU.

5. When challenged the order in original, the Tribunal confirmed the demand of Cess with interest and also imposed the penalty ignoring the final order of appellate Tribunal and thus the petitioner approached before this Court.

6. The petitioner filed a writ petition being Special Civil Application No. 12686 of 2012 before this Court and by an order dated 6.12.2012 the Court allowed such petition and struck down the order dated 13.7.2012 passed by the respondent in order in original.

7. The grievance of the petitioner further subsisted as two show cause notices demanding cess from petitioner company on DTA clearances raising the very same issue have been issued and show cause notice dated 22.1.2013 is issued after this Court struck down the adjudication order passed by the second respondent in the petitioner''s previous petition i.e. Special Civil Application No. 12686 of 2012 dated 6.12.2012.

8. Therefore challenging such arbitrary actions of the respondents, present

petition is preferred seeking following reliefs:

(A) That Your Lordships may be pleased to issue a Writ of Prohibition or any other appropriate writ, direction or order, completely and permanently prohibiting the respondents, their servants and agents from taking any action against the Petitioner Company pursuant to Show Cause Notices F. Nos. V.30/374/D/12 dated 21.8.2012 and V.30/34/D/2013 dated 22.1.2013 (Annexure "G") and thereby completely and permanently prohibiting the respondents, their servants and agents from recovering and collecting Education Cess as well as Secondary and Higher Education Cess on the Excise duty calculated as an amount equal to the Custom duties leviable on similar goods if imported in India;

(B) That Your Lordships may be pleased to issue a Writ of Mandamus or a Writ of Certiorari or any other appropriate writ, direction or order, quashing and setting aside Show Cause Notices F. Nos. V.30/374/D/12 dated 21.8.2012 and V.30/34/D/2013 dated 22.1.2013 (Annexure" G") passed by the second Respondent with consequential reliefs and benefits to the petitioners;

(C) Pending hearing and final disposal of the present petition, Your Lordships may be pleased to stay adjudication of Show Cause Notices F. Nos. V.30/374/D/12 dated 21.8.2012 and V.30/34/D/2013 dated 22.1.2013 (Annexure" G") and be further pleased to restrain the Respondents, their servants and agents from raising any demand of Education Cess as well as Secondary and Higher Education Cess for DTA clearances made by the petitioner company;

(D) An ex parte ad interim relief in terms of Para 19(C) above may kindly be granted;

(E) Any other further relief that may be deemed fit in the facts and circumstances of the case may also please be granted.

9. On issuance of the notice, the affidavit in reply is filed by respondent No. 2 wherein it has contended inter alia that the Revenue''s actions of issuance of show cause notice, demanding the cess with interest and penalty is not illegal nor without jurisdiction as the issue has not reached its finality.

10. It is further contended that the petitioner should exhaust the alternative remedy and respond to the show cause notices instead of straightaway rushing to the High Court by way of this petition.

11. Heard learned advocates for the parties for the final disposal of the petition.

12. The petitioner herein has challenged both the show cause notices issued by the Deputy Commissioner, Central Excise, Division-IV, Ahmedabad (2) respectively on 21.8.2012 and 22.1.2013.

13. Raising demand of education cess and secondary and higher education cess for the goods cleared in DTA under the provisions of section 11A of the Central Excise Act along with interest and penalty under Rule 25 of the Central Excise Rules, 2002, such show cause notices came to be issued u/s 38 of the Central

Excise Act reiterating all the contentions raised in the earlier show cause notices.

14. Only issue that is subsisting on merit between the parties is whether the petitioner herein is liable to pay education cess on the amount worked out by calculating the custom duty payable on the goods in respect of clearance made by 10096 EOU to DTA.

15. According to the adjudicating authority even after arriving at the measure of Custom Duty for working out Central Excise duty payable, the Education Cess once again requires to be levied. However, the Tribunal has in no uncertain terms held in Sarla Performance Fibers Ltd. (supra), that once the measure of Customs Duty equivalent to Central Excise Duty leviable on the like goods has been worked out, there could not arise any question of levying Education Cess separately for the clearances made by 100% EOU to DTA.

16. As can be noted that the petitioner has been paying Excise Duty on the sum total of duties of customs and Education Cess as well as secondary and higher Education Cess on the basic customs duty leviable on similar medicines imported into India.

17. When such issue was raised against the petitioner by the Department, the adjudicating authority had ruled against the petitioner, CESTAT held in favour of the petitioner by an order dated 21.6.2010 (sic) following the judgment of Sarla Performance Fibers Ltd. (supra).

18. Various appeals as mentioned hereinabove were challenged before the Division Bench of this Court which in a lead matter of Tax Appeal No. 2012 of 2010 and connected appeals held that such appeals were not maintainable before the High Court and the same would lie before the Supreme Court only. This was not challenged before the Apex Court on the ground of smallness of the claims and, therefore, the decision of the Tribunal continue to hold the field.

19. When once again, show cause notices were issued to the present petitioner, it challenged the same by way of Special Civil Application No. 12686 of 2012 and this Court disapproved the act of adjudicating authority in no uncertain terms, quoting the decision of the Apex Court rendered in the case of Union of India and others Vs. Kamlakshi Finance Corporation Ltd., , it would be profitable to reproduce such findings:

7. Having heard learned Counsel for the parties, we are of the opinion that the approach adopted by the Adjudicating Authority was wholly impermissible in law. At the outset, we may record that we are conscious that such order is appealable in terms of statutory appeals provided under Central Excise Act, 1944. However, we find that the Adjudicating Authority committed serious error in disregarding binding precedent and that there are absolutely no disputed facts. We would, therefore, not insist that the petitioners once again follow the same gamut of taking the appeal route. To revert back to the issue at hand, we may recall that the question of computation of education cess and secondary and higher

education cess was decided finally by the Tribunal in favour of the petitioners. As of now, such decision of the Tribunal holds the field. Such decision of the Tribunal would be binding on the Adjudicating Authority. Even if the Department is of the opinion that the issue is not free from doubt, it is not open for the Adjudicating Authority to ignore the binding precedent. We may notice that under the Central Excise Act, 1944 and the Customs Act, the Department has the right to appeal even against the order-in-original passed by the Adjudicating Authority. This is in contrast to the provisions contained in the Income Tax Act, 1961 where against an order passed by the Assessing Officer, the Department has no right to appeal. Only remedy available to the Revenue is by way of a revision against the order of the Assessing Officer that too only if it is found that such order is erroneous and prejudicial to the interest of the Revenue. Such rigours, however, are not applicable in so far as the Department''s right to appeal against the order of the Adjudicating Authority is concerned under the Central Excise Act, 1944.

8. The Adjudicating Officer acts as a quasi-judicial authority. He is bound by the law of precedent and binding effect of the order passed by the higher authority or Tribunal of superior jurisdiction. If his order is thought to be erroneous by the Department, the Department can as well prefer appeal in terms of the statutory provisions contained in the Central Excise Act, 1944.

9. Counsel for the petitioners brought to our notice the decision of the Apex Court in the case of Union of India and others Vs. Kamlakshi Finance Corporation Ltd., in which while approving the criticism of the High Court of the Revenue Authorities not following the binding precedent, the Apex Court observed that:

6. ...It cannot be too vehemently emphasized that it is of utmost importance that, in disposing of the quasi-judicial issues before them, revenue officers are bound by the decisions of the appellate authorities. The order of the Appellate Collector is binding on the Assistant Collectors working within his jurisdiction and the order of the Tribunal is binding upon the Assistant Collectors and the Appellate Collectors who function under the jurisdiction of the Tribunal. The principles of judicial discipline require that the orders of the higher appellate authorities should be followed unreservedly by the subordinate authorities. The mere fact that the order of the appellate authority is not "acceptable" to the department in itself an objectionable phrase and is the subject matter of an appeal can furnish no ground for not following it unless its operation has been suspended by a competent Court. If this healthy rule is not followed, the result wilt only be undue harassment to assessees and chaos in administration of tax laws.

7. The impression or anxiety of the Assistant Collector that, if he accepted the assessee''s contention, the department would lose revenue and would also have no remedy to have the matter rectified is also incorrect. Section 35D confers adequate powers on the department in this regard. Under sub-section (1), where the Central Board of Excise and Customs [Direct Taxes] comes across any order passed by the Collector of Central Excise with the legality or propriety of which it

is not satisfied, it can direct the Collector to apply to the Appellate Tribunal for the determination of such points arising out of the decision or order as may be specified by the Board in its order. Under sub-section (2) the Collector of Central Excise, when he comes across any order passed by an authority subordinate to him, if not satisfied with its legality or propriety, may direct such authority to apply to the Collector (Appeals) for the determination of such points arising out of the decision or order as may be specified by the Collector of Central Excise in his order and there is a further right of appeal to the department. The position now, therefore, is that, if any order passed by an Assistant Collector or Collector is adverse to the interests of the Revenue, the immediately higher administrative authority has the power to have the matter satisfactorily resolved by taking up the issue to the Appellate Collector or the Appellate Tribunal as the case may be. In the light of these amended provisions, there can be no justification for any Assistant Collector or Collector refusing to follow the order of the Appellate Collector or the Appellate Tribunal, as the case may be, even where he may have some reservations on its correctness. He has to follow the order of the higher appellate authority. This may instantly cause some prejudice to the Revenue but the remedy is also in the hands of the same officer. He has only to bring the matter to the notice of the Board or the Collector so as to enable appropriate proceedings being taken under S. 35E(1) or (2) to keep the interests of the department alive. If the officer''s view is the correct one, it will no doubt be finally upheld and the Revenue will get the duty, though after some delay which such procedure would entail.

10. Under the circumstances, we have no hesitation in striking down the impugned order dated 13.7.2012. We clarify that this should not be seen as any indication of our view of upholding the view of the Tribunal contained in its decision dated 21.6.2010. It would be open for the Department to call in question such a view in appropriate proceedings as in the manner permissible to the Department. Petition is disposed of accordingly.

20. It needs to be noted with strong disapproval that the repeated acts of the adjudicating authority of ignoring the decision of this Court is impermissible although till date the Revenue has deemed it fit not to challenge the order passed by the higher authority or Tribunal of superior jurisdiction.

21. The submission of Revenue is that the group of appeals decided by the Court in Sarla Performance Fibers Ltd. (supra) does not conform to the monetary limits set by the said Tribunal nor do the question falls under the exception clause and hence, are not carried to the Apex Court. Be that as it may, it is an undisputed position that such decision of the Tribunal remains unchallenged.

22. Previously, when the decision of Sarla Performance Fibers Ltd. (supra) was challenged by way of Tax Appeals by the Revenue, this Court decided the issue on 19.1.2012 in Tax Appeal No. 2012 of 2010 - Sarla Performance Fibers Ltd. (supra) and connected appeals and upheld preliminary objections of the respondent assessee that the question could be litigated before the Apex Court

only by holding thus:

With above discussion, if we revert back to the facts of the case, as already noted, the dispute between the parties and which came to be settled by the Tribunal by the impugned order is with respect to the question whether the manufacturers are required to pay education cess on the computation of the customs duty and the CVD on which, once they have already paid such education cess. The Tribunal ruled in favour of the manufacturers and rejected the Revenue''s case that such education cess was required to be paid once again. To our mind, such decision of the Tribunal would certainly be covered under the expression "the order determining a question having relation to the rate of duty of excise". If the Department is correct in its stand, the manufacturers would have to pay excise duty at a rate higher than what they have been paying. In other words, computation of excise duty would have to include component of education cess. On the other hand, if the manufacturers are correct in their stand, such education cess would be excluded. In any case, it would have a direct bearing on the rate at which manufacturers should pay the excise duty on their clearances in the DTA from EOU Units. In that view of the matter, we are of the opinion that the respondents'' preliminary objection is required to be upheld.

21. All Tax Appeals are dismissed.

23. Instruction dated 17.8.2011 of the Central Board of Excise and Customs ("CBEC" for short), in a move to reduce Government litigation, provides for monitory limits for filing appeals by the Department before the CESTAT/High Court and Supreme Court, which is Rs. 25 lakhs before the Supreme Court. This instruction, however, provides that the adverse judgments relating to the constitutional validity of the provision of the Act or Rule is to be decided irrespective of the amount involved or where the Notification/Instruction/Order or Circular is held illegal or ultra vires.

24. Thereafter, as mentioned hereinabove in Special Civil Application No. 12686 of 2012, once again order of adjudicating authority was struck down by a clarification that it would not be seen as a stamp on the part of the High Court of upholding the view of the Tribunal contained in its decision dated 21.6.2010 and it would be open for the Department to call in question such a view in appropriate proceedings as permissible under the law. While so holding the adjudicating officer was reminded that he acts a quasi-judicial authority and is bound by the law of precedence and regarding the binding effect of the order of the higher authority which is the Tribunal in the instant case. It was held that if such order is found to be erroneous by the Department, it needs to prefer an appeal as per the statutory provisions contained in the Central Excise Act. The decision of the Apex Court rendered in Kamalakshi Finance Corpn. Ltd. (supra) holds in unambiguous terms that the Revenue officers are bound by the decision of the appellate authorities.

25. Despite such clear and specific directions and authoritative pronouncements,

act of issuance of show cause notice by the Deputy Commissioner is wholly impermissible and unpalatable and deserves to be quashed and struck down with a specific note of strong disapproval. The respondents simply could not have exercised the powers contained under the statute in such arbitrary exercise and in complete disregard to the pronouncement of this Court particularly reminding the Revenue authorities of the binding effect of decision of Tribunal on the identical question of law. This not only led to multiplicity of proceedings but also speaks of disregard to the direction of this Court rendered in the earlier petition of this very petitioner. Resultantly, petition stands allowed. Both the show cause notices dated 21.8.2012 and 22.1.2013 are quashed and struck down.

26. Although, we have clarified in the earlier petition of the very assessee, being Special Civil Application No. 12686/2012 that striking down of the order which was impugned there should not be seen as any indication of our view of upholding the view of the Tribunal contained in its decision dated 21/6/2010 and it would be for the Department to call in question such a view in appropriate proceeding; as is permissible to the Department. We also reiterate the same in the present petition, while striking down the impugned notices issued by the Assessing Officer. This surely is not to be construed as putting a final stamp on the decision of the Tribunal dated 21st June 2010 although the Department has chosen not to challenge such decision before the Apex Court after this Court upheld preliminary objections of jurisdiction in Tax Appeal No. 2012 of 2010 and allied Appeals noting exclusion clause in sub-clause (1) of Sec. 35G of the Central Excise Act. However, till that is done, Tribunal''s order dated 21st June 2010 shall continue to hold the field. Rule is made absolute to the extent above.

