
(2018) 07 MP CK 0034

In the Madhya Pradesh High Court

Case No : Central Excise Appeal No.23 Of 2017

Commissioner, Customs & Central Excise, Commissionerate,
Indore

APPELLANT

Vs

Kanoria Sugar & General Manufacturing Co. Ltd

RESPONDENT

Date of Decision : 05-07-2018

Acts Referred:

Central Excise Rules, 2002 — Rule 25
Customs Act, 1962 — Section 130E(b)
Central Excise Act, 1944 — Section 11AC, 35G, 35L, 35G(2)

Citation : (2018) 07 MP CK 0034

Hon'ble Judges : Pankaj Kumar Jaiswal, J; Sunil Kumar Awasthi, J

Bench : Division Bench

Advocate : Prasanna Prasad, Reena Khair

Final Decision : Dismissed

Judgement

P.K. Jaiswal, J.

This appeal has been filed by the revenue against the final order dated 17.10.2016 passed by the Appellate Tribunal, New Delhi in Excise Appeal

No.1091 of 2010-EX(D.B.) by which the learned Commissioner (Appeals) -I, Indore allowed the appeal of the assessee and set aside the order

passed by the adjudicating authority on 9.9.2009.

2. The respondent is holder of Central Excise Registration and engaged in manufacturing of A.C. Pressure Pipes falling under Chapter Sub-heading

No.6811 30 10 and A.C. Coupling falling under Chapter Sub-heading No.6811 30 90 of the schedule to the Central Excise Tariff Act, 1985. They

have been clearing A.C. Pressure Pipes and A.C. Couplings at Nil rate of duty under notification No.06/2006 dated 1.3.2006 as mended vide

notification No.06/2007 dated 1.3.2007.

Notification 6/2006-CE, exempts:-

â??(2) Pipes needed for delivery of water from its source to the plant and from there to the storage facilityâ??.

3. The notification covers products of chapter 84, or any other chapter of the First Schedule subject to the condition that :-

â?? If, a certificate issued by the Collector/District Magistrate/Deputy Commissioner of the District in which the plant is located, is produced to the

Deputy Commissioner of Central Excise, as the case may be, having jurisdiction, to the effect that, such goods are cleared for the intended use

specified in column (3) of the Tableâ??.

4. The respondent produced the requisite certificate for the pipe and couplings, and cleared the same without payment of duty under the provisions of

the said notification.

5. A show cause notice was issued and the respondent was asked to submit value of Couplings removed without payment of Central Excise Duty

under the notification since beginning (2006 to 2009). Detailed reply has been filed by the respondent stating therein that there is no price mentioned

for the coupling in the purchase order as the same is an integral part of the pipe being supplied for ready use. He further intimated that as per trade

practice and in accordance with the purchase order received from customer, the value of A.C. Coupling is included in the rate of A.C. Pressure Pipe.

Subsequently, he submitted the quantity of Couplings cleared under the said notification during 2005-06, 2006-07 and 2007-08.

6. The case of the revenue before the adjudicating authority was that they have cleared couplings along with pipes without payment of Central Excise

Duty and taken the benefit of exemption available to couplings under the Notification 6/2006-CE dated 1.3.2006. The adjudicating authority rejected

the aforesaid stand taken by the respondent and confirmed the demand of Central Excise Duty of Rs.24,56,207/-, Education Cess Rs.49,125/- and

Higher Education Cess Rs.21,466/- and imposed a penalty of Rs.25,26,798/- under Rule 25 of the Central Excise Rules, 2002 read with Section 11AC

of Central Excise Act, 1944 (for short, â??the Act of 1944â??) with interest under the provision of Section 11AB of the Act of 1944.

7. The order of the adjudicating authority has been based on the Circular

No.891/11/09-Cx. dated 15.6.2009, wherein it has been clarified that the exemption at Serial No.7 of the notification is not available to pipe fittings. The respondent is engaged in the manufacture of asbestos cement pipes falling under heading 681183. The sub heading covering such pipes reads as under:-

â??.....tubes, pipes and tube or pipe fittingsâ??.

8. The heading 6811.83 covers both pipes and fittings thereof. There is no separate classification of pipe fitting, as stated in the circular for asbestos cement pipes. The circular would not be applicable to the subject goods and its applicability would be confined to those pipes, in respect of which the fittings are classified in a separate heading.

9. Relevant part of circular dated 15.6.2009 and Serial No.7 are reads as under:-

â??It has brought to the notice of the Board that the manufacturers of pipe fittings (joints, sleeves, elbow, couplings, etc.) are claiming the benefit of

SI No.7 of the Notification No.6/06-CE. It is also reported that some units are manufacturing pipes and pipe fittings and claiming benefit of notification

for pipe fittings which are cleared alongwith pipes. The issue is whether the 'pipe fittings' in the water supply network are also exempted.

2.0 The matter has been examined. It has been argued that in view of decision of the Supreme Court in the case of M/s Bharat Forge, the pipe and

pipe fittings should be considered same. Therefore, the benefit of the notification No.6/2006-CE would also be available to pipe fittings. However, a

careful reading of the said judgment revealed that it was delivered in the context of item No.26AA(iv) of the erstwhile Tariff, and in the said judgment,

it was also observed that as the entries in the erstwhile Tariff and present Tariff are different, the entries in the present tariff cannot be used to

interpret the entries in the old tariff. Therefore, the said judgment is not applicable to the present tariff, where pipes and pipe fittings are classified

under different Tariff items.

3.0 Secondly, the intention behind the notification is to provide exemption only to pipes as understood in the common parlance and not to fittings which

is a separate commodity and known differently in the market.

4.0 Further, even though the tariff heading in which the pipes fall is not specified in the notification but they are covered under the description given in

the notification in column 3. the description only specifies 'Pipes needed....'. There is no mention of any pipe fittings. Further, pipe fittings are a separate commodity and cannot be subsumed under the generic terms 'Pipes'. A glance at the Tariff shows that the pipe fittings are classified separately from pipes. This clearly implies that the two commodities are different. Even the HSN classifies them separately.

5.0 Therefore, Board is of the view that exemption at SI No.7 of the Notification No.6/06-CE is not available to 'pipe fittings' used in the pipe network for supply of drinking water.

Â 7. 84 or any other Chapter

Â The following goods, namely:-

(1) All items of machinery, including instruments, apparatus and appliances, auxiliary equipment and their components/parts required for setting up of water treatment plants;

(2) Pipes needed for delivery of water from its source to the plant and from there to the storage facility.Â Â Explanation- For the purposes of this

exemption, water treatment plants includes a plant for desalination, demineralization or purification of water or for carrying out any similar process or processes intended to make the water fit for human or animal consumption, but does not include a plant supplying water for industrial purposes.â??

10. In the case of Bharat Forge & Press Industries (P.) Limited Versus Collector of Central Excise, reported in 1990 (1) SCC 532, the Hon'ble

Supreme Court held that :

â??It is also clear that it is of no consequence whether the pipes and tubes are manufactured by rolling, forging, spinning, casting, drawing, annealing,

welding or extruding. It is true that initially pipes and tubes may be obtained from sheets, billets or bars by various processes, but the process of

manufacture of pipes and tubes does not end there. In order to achieve fully the purpose for which the pipes and tubes are manufactured, it is

necessary to manufacture smaller pieces of pipes and tubes and also to manufacture them in such a shape that they may be able to conduct liquids

and gases, passing them through and across angles, turnings, corners and curves or regulating their flow in the manner required. Smaller pieces of

pipes and tubes differently shaped are manufactured for this purpose. They are

merely intended as accessories or supplements to the larger pipes and tubes. They are pipes and tubes made out of pipes and tubes. There is no change in their basic physical properties and there is no change in their end use. There is no reason why these smaller articles cannot also be described as pipes and tubes.â??

11. In Bharat Forge & Press Industries Private Limited's (supra) the Apex Court has held that merely because goods after processing become different commercial commodity or have a distinctive name does not change the excise classification if they continue to be goods of same species.

Pipe fittings made out of pipes and tubes continue to be pipes and tubes. Therefore, it is not a different article for excise classification but only a

smaller article within the same classification provided that there is no change in basic physical property and possible end use. The stand of the

respondents before the adjudicating authority that the certificate issued by the competent authority (Deputy Commissioner, Kaithal) covered both pipes

and couplings and thus, exemption is admissible to both pipes and couplings.

12. Apex Court in the case of CC Versus Tullow Indian Operation Limited, reported in 2005 (189) ELT 401 (Supreme Court) has held that production

of the certificate must be treated as proof of the fact that the conditions enabling them to obtain the benefit under the exemption have been fulfilled.

The appellate authority after appreciating the grounds taken by the parties came to the conclusion that the exemption contained in notification

No.6/2006-C.E. is available to product pipes and couplings of the respondents, which are covered under the heading 6811.83 â??....tubes , pipes and

tube or pipe fittingsâ? and allowed the appeal by setting aside the order passed by the adjudicating authority. Para 5 of the order is relevant which

reads as under:-

â??I have gone through the case records available before me as well as the appeal memo and oral submission made at the time of PH. The issue to

be decided before me is that whether the exemption contained in notification no.06/2006-CE is available to couplings of chapter heading no.6811.83

which covers both pipes and fittings for deliveryÂ of water from its source to the plant and from there to the storage facility.

I observed that Water has been on the high priority of the government's pronounced programs. It is evidence from the Speeches of Finance Ministers

during the Annual budgets. In 2004 he said "The poor want drinking water: we shall ensure that every habitation has an assured source of drinking

water. In the 2005 Budget he said, "The UPA Government's goals are: ... to provide drinking water to the remaining 74,000 habitations that are

uncovered. In the 2008 Budget he said, "Our Children should have good, clean drinking water."

The government to fulfill the above aim, in public interest issued exemption notification 06/2006-CE. the notification exempts (2) Pipes needed for

delivery of water from its source to the plant and from there to the storage facility.

Clearly the intention of the government is to exempt pipes including joints and couplings. Without joints and couplings the delivery of water from its

source to plant and from there to storage facility is not possible and thus denial of exemption to coupling falling under the chapter will defeat the

purpose of the Public Interest. Exemption is for the specific purpose of supply of water from its source to storage and the notification exempts the

pipes needed for the purpose of delivery of water from its source to the plant and from there to the storage facility.

Denial of exemption to coupling in the instant case will be denial of what the government wants to give them in public interest. It is only a master brain

that can think of giving exemption to pipes but not to the pipe fittings/couplings. How on earth are the pipes going to be fitted? Was the idea to deny

exemption to the pipe fittings or to exempt the goods used in water treatment plants? If the pipe fittings were not legally eligible for the exemption, the

Board should have amended the notification and issued a Section HC Notification for the past period instead of communicating to the nation that this

Board is against the very policy of the Government to provide water. Clearly the intention of the government is to exempt pipes including couplings

for the amended public interest.

It has been held by the Hon'ble Supreme Court that wordings in Exemption notification have to be construed keeping in view the object and purpose of

the exemption- Oblum Electrical Industries P. Ltd. Vs. C.C. 94 ELT 449 (SC)=AIR 1997 SC 3467. The object of the exemption notification in the

instant case is to exempt pipes needed for delivery of water from its source to the plant and from there to the storage facility. Clearly the exemption

includes the coupling also.

It has been held by the Apex Court that Operation of an enactment of a notification has to be judged by the words which have been employed to

effectuate the legislative intent--(Innamuri Gopalan V. State of A.P. 1963 (2) SCR 898.). In the instant case the legislative intent clearly is to exempt

the pipes needed for delivery of water from its source to the plant and from there to the storage facility.

Further in items of para 2.2 of the clarification issued by the department vide F.No.167/38/2007CX.4 â??the decision of the Supreme Court in case of

M/s Bharat Forge is not applicable to the present Tariff, where pipes and pipe fittings are classified under different Tariff items.â? Para 2.2 of the

above is reproduced below:-

â??The matter has been examined. It has been argued that in view of decision of the Supreme Court in the case of M/s Bharat Forge, the pipe and

pipe fittings should be considered same. Therefore, the benefit of the notification No.6/2006-CE would also be available to pipe fittings. However, a

careful reading of the said judgment revealed that it was delivered in the context of item No.26AA(iv) of the erstwhile Tariff, and in the said judgment,

it was also observed that as the entries in the erstwhile Tariff and present Tariff are different, the entries in the present tariff cannot be used to

interpret the entries in the old tariff. Therefore, the said judgment is not applicable to the present tariff, where pipes and pipe fittings are classified

under different Tariff items.â??

The product pipes and coupling of the appellant are covered under the headings 6811.83 â??----tubes, pipes and tube or pipe fittingâ?. The heading

6811.83 covers both pipes and fittings/couplings there is no separate classification of pipe fitting, as stated in the circular for asbestos cement pipes.

The circular is not applicableÂ in the case of appellant. Its applicability is limited to those pipes, in respect of which the fitting are classified in a

separate heading. In terms of above clarification also the case of appellant is squarely covered by the above decision and thus exemption is available

to the couplings.

Further the Clarification issued by the board is neither an act nor rule framed under the law and thus cannot take away the benefit provided in the

public interest by the Government.

I further observed that Appellant, as per condition of the notification, has produced the certificate from the prescribed authority and genuineness of certificate has not been challenged by the department. Department cannot go behind the certificates and hold that the same is not acceptable. It has been held in so many cases by the CESTAT that production of the certificate must be treated as proof of the fact that the conditions enabling them to obtain the benefit under the exemption have been fulfilled.

I find that the appellant for the purpose of the exemption was producing certificates to the department from the prescribed authority and all the facts were in the knowledge of the department therefore there is no suppression.

In the light of above facts and circumstances of the case I find that the exemption contained in Notification No.6/2006-CE is available to product pipes and coupling of the appellant, which are covered under the heading 6811.83. â??-----tubes, pipes and tube or pipe fittingâ??.

13. The appellantâ?"revenue challenged the order of the Commissioner (Appeals) -I, IndoreÂ by filing appeal before the Appellate Tribunal. The

learned Appellate Tribunal has examined the scope and implication of the decisions of the Apex Court in the case Bharat Forge and Press Industries

(P.) Limited (supra) as well as subsequent clarification issued by the Board on 15.6.2009 and upheld the finding of the Commissioner and dismissed

the appeal by giving following reasons in paras 8 and 9 of the order:-

â??8. We find that in the present appeal the Revenue has simply relied on the Board's clarification mentioned above and reiterated that only the pipes

and nothing else will be allowed exemption. We find such construction of the entry in the notification will be too literal and against the intended scope

therein. In the present case, the essentiality certificate has been produced from the competent authority and the impugned goods were cleared for the

intended purposes. There is no separate billing or clearance document for the couplings.

9. Considering the overall scope of exemption and the reasoning followed by the impugned order, we find no ground to interfere with the findings of

the lower authority. Accordingly, we reject the appeal filed by the Revenue.â??

14. The present appeal has been filed by the revenue under Sub-section (2) of Section 35-G of the Act of 1944 on the ground that the interpretation of

exemption notification No.6/2006 dated 1.3.2006 and circular dated 15.6.2009

made by the Appellate Tribunal as well as by the Appellate Authority is not correct because the Pipes and Couplings falls under different heads at the relevant point of time. The $\hat{A}$ judgment of the Bharat Forge and Press Industries (P.) Limited (supra) is distinguishable on facts. The product of pipes and couplings of the respondent are covered under heading 68118300 $\hat{A}$ ---Tubes, pipe and tube or pipe fittings $\hat{A}$. The heading 68118300 covers both pipes and fittings/couplings. There is no separate classification of pipe fittings, as stated in the circular for asbestos cement pipes. The Appellate Authority as well as the Appellate Tribunal had held that the circular is not applicable in the case of respondent. Its applicability is limited to those pipes, in respect of which the findings are classified in a separate heading.

15. Learned Counsel for the appellant has submitted that the only substantial question of law which is arising in this appeal is $\hat{A}$ Whether the pipes and couplings falls under different heads at the relevant point of time? $\hat{A}$ and prayed that the appeal be admitted for final hearing.

16. A preliminary objection has been raised by the respondent $\hat{A}$ "assessee regarding maintainability of the appeal and submitted that the appeal under Section 35-G of the Act of 1944 will lie to this Court in respect of an order, not being an order relating to among other things to the determination of any question having a relation to the rate of duty of excise or to the value of goods for purposes of assessment. Section 35-G of the Act of 1944 excludes appeals involving the issue of valuation of goods and determination of their rate of duty, for purposes of assessment before this Court. Such appeals lie to the Apex Court, as per Section 35-L of the Act of 1944. She submitted that Section 35-L gives the power to the Hon'ble Supreme Court to entertain the appeals made under Section 35 (G) i.e., the case involving the issue of valuation and determination of rate of duty. She has drawn our attention to the proposed substantial questions of law and submitted that the issue that arises for consideration is, therefore, $\hat{A}$ Whether duty was liable to be paid at the rate specified in the First Schedule to the Central Excise Tariff Act, 1985 or at the concessional rate of duty in terms of notification No.6/2006-CE. She submitted that no appeal lies against the impugned Appellate Tribunal order before this Court, as the issue before the Tribunal was relating to the rate of duty. She submitted that the view on the maintainability of appeal is settled by this Court in the case of Union of

India versus Modella Steels & Alloys Ltd. reported in 2007 (207) ELT 175 (M.P.) stating:

“5. That apart, in our view, the Tribunal, while dismissing the application was right in holding that no application can be filed for making reference

because the issue involved in this case was relating to rate of duty. In a case where the issue relates to determination of duty based on some

notification then, the remedy lies in filing appeal to Supreme Court and not in claiming reference to High Court. On facts involved in this case, we are

inclined to uphold this reasoning of the Tribunal as well. As a consequence, the application filed by the Commissioner in calling for the reference on

the question proposed is found to be devoid of any merit. It fails and is accordingly, dismissed.”

17. She has further submitted that this issue has also been dealt with the Apex Court in the case of Naveen Chemical Manufacturing Trading

Company Ltd. Versus Collector of Customs reported in 1993 (68) ELT 3 (S.C.) and recent decision of the Apex Court in the case of Steel Authority

of India Limited Versus DGAD reported in 2017 (349) ELT 193 (S.C.). To appreciate the contention of learned Counsel for the respondent, we

reproduce paras 11 of Naveen Chemical Manufacturing Trading Company Limited (supra) and para 19 of Steel Authority of India Limited (supra),

which reads as under:-

11. It will be seen that Sub-section 5 uses the said expression 'determination of any question having a relation to the rate of duty or to the value of

goods for the purposes of assessment' and the Explanation thereto provides a definition of it 'for the purposes of this sub-section'. The Explanation

says that the expression includes the determination of a question relating to the rate of duty; to the valuation of goods for purposes of assessment; to

the classification of goods under the Tariff and whether or not they are covered by an exemption notification; and whether the value of goods for

purposes/of assessment should be enhanced or reduced having regard to certain matters that the said Act provides for. Although this Explanation

expressly confines the definition of the said expression to Sub-section 5 of Section 129-D, it is proper that the said expression used in the other parts of

the said Act should be interpreted similarly. The statutory definition accords with the meaning we have, given to the said expression above. Questions

relating to the rate of duty and to the value of goods for purposes of assessment are questions that squarely fall within the meaning of the said

expression. A dispute as to the classification of goods and as to whether or not they are covered by an exemption notification relates directly and

proximately to the rate of duty applicable thereto for purposes of assessment. Whether the value of goods for purposes of assessment is required to be

increased or decreased is a question that relates directly and proximately to the value of goods for purposes of assessment. The statutory definition of

the said expression indicates that it has to be read to limit its application to cases where, for the purposes of assessment, questions arise directly and

proximately as to the rate of duty or the value of the goods.

19. On the basis of the discussion that have preceded, it must therefore be held that before admitting an appeal under Section 130E(b) of the Customs

Act, the following conditions must be satisfied:

(i) The question raised or arising must have a direct and/or proximate nexus to the question of determination of the applicable rate of duty or to the

determination of the value of the goods for the purposes of assessment of duty. This is a sine qua non for the admission of the appeal before this Court

under Section 130E(b) of the Act.

(ii) The question raised must involve a substantial question of law which has not been answered or, on which, there is a conflict of decisions

necessitating a resolution.

(iii) If the tribunal, on consideration of the material and relevant facts, had arrived at a conclusion which is a possible conclusion, the same must be

allowed to rest even if this Court is inclined to take another view of the matter.

(iv) The tribunal had acted in gross violation of the procedure or principles of natural justice occasioning a failure of justice.

18. In the case of Steel Authority of India Limited (supra), the Hon'ble Supreme Court has held that a direct appeal lies to the Supreme Court

against an order passed by the Appellate Tribunal relating to the question of duty or classification of goods. The question of maintainability of appeal

under Section 35-G was also considered by the Punjab and Haryana High Court in the case of Principal Commissioner of Central Excise and Service

Tax Versus M/s. Raja Dyeing reported in 2017 11 TIOL 552 HC-P&H-CX, paras 11 and 14 are relevant which reads as under:-

11. The words among other things in Section 35 G are of singular importance in determining the ambit of Section 35 G. These words indicate that an appeal is maintainable under Section 35 G to the High Court only if the order passed in appeal by the Tribunal is not one relating to the determination of any question having a relation to the rate of duty of excise or to the value of goods^Â for the purposes of assessment, an appeal against that order would lie only to the Supreme Court under Section 35 L and not to the High Court under Section 35 G. This would be so even if the appeal is only in respect of questions other than the rate of duty or the value of the goods for the purpose of assessment. It is the nature of the order of the Tribunal and not the scope of the appeal that determines the maintainability of the appeal under Section 35 G.

14. Whether an appeal lies to the High Court under Section 35 G or to the Supreme Court under Section 35 L cannot possibly depend upon the nature or scope of the appeal that the party intends filing. A party may seek to challenge only that part of the order of the Tribunal which relates to questions other than those relating to the rate of duty of excise or the value of the goods for the purposes of assessment. Such an appeal would, absent any other questions, lie to the High Court. Once it is held that an appeal against the order of the Tribunal which deals with questions that fall within the ambit of Section 35 L as well as other questions lies to the Supreme Court under Section 35 L the mere fact that the party chooses to challenge only that part of the order that falls within the ambit of Section 32 G would make no difference. In other words, it cannot be said that the party that chooses to challenge the order of the Tribunal only so far as it relates to the determination of questions falling within the ambit of 35 G must file the appeal before the High Court even though the order also deals with questions that fall within the ambit of Section 32 L. In that event, if the other party files an appeal against the order of the Tribunal on issues that fall within the ambit of Section 32 L in the Supreme Court, the very purpose of Section 32 G of bringing the appeals either before the Supreme Court or before the High Court would be defeated. It can hardly be suggested that in that case, the appeal filed under Section 32 G before the High Court ought to stand transferred to the Supreme Court. The scheme of the Act in general and Sections 32 G and 32 L in particular do not indicate such a mechanism.

19. Para 12 in the case of Naveen Chemical Manufacturing Trading Company Limited (supra) is relevant which reads as under:-

“12. This, then, is the test for the purposes of determining whether or not an appeal should be heard by a Special Bench of CEGAT, whether or not

a reference by CEGAT lies to the High Court and whether or not an appeal lies directly to the Supreme Court from a decision of CEGAT : does the

question that requires determination have a direct and proximate relation, for the purposes of assessment, to the rate of duty applicable to the goods or

to the value of the goods.”

20. For the above narration of facts as well as reasoning assigned by the Appellate Tribunal which clearly disclose that the finding recorded by the

adjudicating authority on the basis of which the appeal of the present appellant has been dismissed are findings of fact arrived at on due consideration

of all relevant materials on record. The issue involved in this appeal is covered by the decision of the Apex Court in the case of Bharat Forge and

Press Industries (P.) Ltd. (supra) and requisite certificate issued by the authority in which the plant is located and law laid down by the Apex Court in

the case of CC Versus Tullow Indian Operation Limited, (supra).

21. The appeal, consequently, is dismissed by refusing admission.