(2010) 06 GUJ CK 0019

In the Gujarat High Court

Case No : Tax Appeal No. 540 of 2009

Commissioner of Central Excise and Customs APPELLANT

Vs

Jagat Texturising RESPONDENT

Date of Decision : 17-06-2010

Acts Referred:

Central Excises and Salt Act, 1944 — Section 35D(1), 35G
Customs Act, 1962 — Section 129C, 129C(1), 129C(4), 129C(5)

Citation : (2010) 20 STR 564

Hon'ble Judges : H.N. Devani, J;D.A. Mehta, J

Bench : Division Bench

Advocate : Gaurang H. Bhatt, for the Appellant; Paresh M. Dave, for the Respondent

Final Decision : Allowed

Judgement

H.N. Devani, J.—In this appeal u/s 35G of the Central Excise Act, 1944 (the Act), Commissioner of Central Excise & Customs, Surat II

has challenged the order dated 17th September [2009 (237) E.L.T. 162 made by the Customs, Excise & Service Tax Appellate Tribunal (the

Tribunal), proposing the following three questions:

(i) Whether the Learned third member of the Tribunal is right in law in presuming that the Learned Member (Technical), concurred with the

Learned Member (Judicial) as the issue of limitation even while Member (Technical) did not specifically state his findings as such on issue of

limitation and indirectly disagree with the Member (Judicial) on both the aspects in as much as concurrence on the point of limitation would have

rendered the matter in favour of the Assessees at such stage and there was no need to refer the matter to Learned third (Member) per se?

(ii) Whether the Learned third member of the Tribunal ought not to have stated his own findings specifically on the issue of limitation also, having

identified the issue of limitation, rather than presuming that was never intended by the earlier Member (Technical)?

(iii) Does the order of Learned third Member of the Tribunal not suffer from fatal defect in law in as much as the same is based on presumption by

one Learned Member as to the intent of another Learned Member and failure of presuming Learned Member to give his own specific findings on

the issue?

2. On 15th April 2010, this Court passed an order in the following terms:

Having gone through the orders passed by the Member Judicial), Member (Technical) as well as the Third Member, NOTICE for final disposal

returnable on 6-5-2010. Direct service is permitted.

3. In response to the notice the Respondents have put in appearance through their learned advocate.

4. The facts stated briefly are that vide order dated 6th December, 2001, duty came to be confirmed against the Respondent herein along with

penalty and interest on the ground that the Respondent was not entitled to the benefit of Small Scale Exemption Notification No. 1/93 on the

ground that the Respondent who was engaged in texturising of yarn had used the brand name of other persons who had sent them POY for

texturising. Being aggrieved, the Respondent carried the matter in appeal before Commissioner (Appeals). Commissioner (Appeals) vide order

dated 22nd December 2004, dismissed the appeal and confirmed the order made by the adjudicating authority. The Respondent carried the matter

in further appeal before the Tribunal. The appeal was heard by a Division Bench of the Tribunal comprised of Member (Judicial) and Member

(Technical). Before the Tribunal, the Respondent had assailed the order of the Tribunal on merits as well as on the ground of limitation. The learned

Member Judicial) held that the benefit of small scale exemption could not be denied to the Respondent and also held that the demand was hit by

limitation and accordingly, allowed the appeal with consequential relief. The Member (Technical) recorded a dissenting view by a separate order

and held that the Respondent had no case and accordingly, dismissed the appeal. In the light of the difference in opinion, the Division Bench directed that the matter be placed before the President for referring the matter to Third Member by recording as follows:

Difference Of Opinion

Whether the appeals of M/s. Jagat Texturising and one other in Appeal No. E/941 and E/942/05 are to be allowed with consequential relief to the

Appellants as held by Member (Judicial) or rejected as held by Member (Technical).

In view of the above difference of opinion, Registry is directed to place the paper before Hon''ble President for referring the matter to Third

Member.

5. The Third Member, after hearing the learned advocates for the parties, concurred with the findings recorded by the Member (Technical) on the

merits of the case, but noted that the Member (Technical) had not expressed any divergent opinion so far as the limitation aspect is concerned and

consequently, held that the demand is hit by the bar of limitation and sent the matter back to the Referral Bench for passing appropriate orders.

6. Vide order dated 19th September 2008 made by the Tribunal, the order impugned before it was set aside and the appeal was allowed with

consequential relief.

7. Mr. Gaurang Bhatt, learned Standing Counsel for the Appellant submitted that the learned Third Member while agreeing with the view of the

learned Member (Technical) has observed that in view of the fact that no dissent has been recorded on the point of limitation, the Appellant (the

Respondent herein) should succeed on that point. It is submitted that the observation made by the Third Member does not appear to be correct,

inasmuch as had the Member (Technical) agreed with the Member (Judicial) on the count of limitation, he would have allowed the appeal on that

ground in which case there would have been no occasion to refer the matter for the opinion of the third member, whereas, in fact, he has dismissed

the appeal. It is urged that such a situation has arisen mainly for the reason that the Division Bench did not draw up a statement setting out the point

or points of difference for referring the matter.

8. Learned Standing Counsel for the Appellant-Revenue has invited attention to the question which was referred to the Third Member for his

opinion, to submit that the same was not in consonance with the principles enunciated by this Court in the case of Colourtex and Another Vs.

Union of India (UOI) and Others, (Guj.) wherein the Court while construing the provisions of Section 129C of the Customs Act, 1962, has laid

down that members who expressed dissenting opinions are bound by the statute to state the point or points of difference and make reference after

making such a statement. The entire appeal cannot be referred instead of referring the point or points of difference between the members. In

absence of such a statement, any reference would be invalid and cannot be termed to be a mere procedural irregularity.

9. In the light of the aforesaid, ADMIT. The following substantial question of law arises for consideration:

Whether Members of the Customs, Excise and Service Tax Appellate Tribunal who had expressed dissenting opinions were justified in referring

the entire appeal instead of making a statement referring the point or points of difference?

10. Taking into consideration the controversy and necessity of finally disposing of the question brought before the Court, the appeal is taken up for

hearing and final disposal.

11. Heard the learned advocates for the respective parties.

12. Considering the view that the Court is inclined to take in the matter, it is not necessary to set out the facts and contentions in details.

13. From the facts noted hereinabove, it is apparent that the Division Bench comprised of the Member (Judicial) and Member (Technical) heard

the appeal and expressed differing opinions. The Member (Judicial) allowed the appeal preferred by the Respondent whereas, the Member

(Technical) dismissed the appeal. In the light of the difference in opinion, the Division Bench made a reference presumably under the provisions of

Section 35D(1) of the Act read with Section 129C(5) of the Customs Act, 1962. A perusal of the order of reference, which has been reproduced

hereinabove, clearly shows that the Members instead of stating the point or points of difference have practically referred the entire appeal.

14. It may therefore, be germane to refer to the decision of this Court in Colourtex v. Union of India (supra) wherein it has been held thus:

(16) Section 129C(5) of the Act requires that where Members of Tribunal differ in opinion on any point, in the first instance, the point shall be

decided according to the opinion of the majority; only in the event where the Members are equally divided, the Members are obliged to state the

point or points on which they differ and make a reference to the President who shall either hear the point or points himself or refer the case for

hearing on such point or points by one or more of the other Members of the Tribunal, and such referred point or points shall be decided according

to the opinion of the majority of these members who have heard the case, including those who first heard it.

(17) The provision is therefore comprised of two parts. In a case where the Bench consists of two or more than two members and there is

difference of opinion amongst the members who constitute the Bench, the point of difference has to be decided according to the opinion of the

majority, where there is a majority. While the latter part of the provision stipulates that where the Bench consists of two members or more than that

but of even number, and the members are equally divided, it is incumbent upon such members to set out the point or points on which they differ.

Upon such point or points of difference being stated a reference is required to be made to the President who, on the administrative side, is required

to pass an order for placing the case for hearing either before himself or before any other member or other members, as the facts and

circumstances of the case may require, but the case, upon such a reference being made, can be heard by the President or the Member or

Members only on the point or points of difference stated by the original Bench which heard the appeal. The President or the Third Member does

not derive any independent jurisdiction and has no powers to decide the appeal in entirety.

(18) The legislative intent discernible from a plain reading of the provision is to ensure that the appeal or appeals are to be disposed of only by the

Bench originally assigned the appeal or appeals as ordered by the President on the administrative side. This becomes clear from a conjoint reading

of Sub-sections (1) and (4) of Section 129C of the Act. Sub-section (5) of Section 129C of the Act stands out in contrast and does not permit

disposal of the appeal. In fact, after the President or the Third Member, who is assigned the case for hearing on the point or points of difference,

renders his opinion the appeal goes back to the Bench which originally heard the appeal and has to be decided in accordance with the majority opinion. This becomes absolutely clear when the concluding portion of the provision is read which talks of deciding according to the opinion of the

majority of the members who have heard the case, including those who first heard it.

(19) Therefore, the members who expressed dissenting opinions are bound by the statute to state the point or points of difference and make

reference after making such a statement. To use the words of the learned President ""an omnibus order"" cannot take place of the statement on point

or points of difference between the members. The entire appeal(s) cannot be referred.

15. Applying the aforesaid decision to the facts of the present case, it is apparent that the two members who recorded dissenting opinions having

referred the entire appeal instead of making a statement referring the point or points of difference between the members, in the circumstances, the

reference itself is invalid and as such deserves to be set aside. Accordingly, in the light of decision of this Court in the case of Colourtex v. Union of

India (supra), the question is answered in the negative. It is held that the Members of the Customs, Excise and Service Tax Appellate Tribunal who

had expressed dissenting opinions were not justified in referring the entire appeal instead of making a statement referring the point or points of

difference.

16. In the light of the aforesaid, the appeal is allowed. The impugned order dated 17th September, 2008 made by the Tribunal as well as so called

Difference of opinion"" recorded on 24-6-2008 are hereby quashed and set aside. As a corollary, the view expressed by the Third Member also

would not survive. Appeal No. E941 of 2005 preferred by the Respondent M/s. Jagat Texturising, is restored to the file of the Tribunal. The

Tribunal shall hear the appeal and decide the same in accordance with law.

