(2015) 02 MAD CK 0322

In the Madras High Court

Case No : C.M.A. No. 3777 of 2008

Commissioner of Central Excise APPELLANT

Vs

Heera Electronics RESPONDENT

Date of Decision : 26-02-2015

Acts Referred:
Central Excises and Salt Act, 1944 — Section 35G, 35G(1), 4, 4(1)(a), 4(4)(4c)

Citation : (2015) 02 MAD CK 0322

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

Bench : Division Bench

Advocate : Vijay Anand, for the Appellant; Mohana Sundaram, Advocates for the Respondent

Judgement

R. Sudhakar, J.—Aggrieved by the order of the Appellate Tribunal in allowing the appeals filed by the assessee, the Revenue is before this Court challenging the said order by filing the present appeal.

2. The appeal was admitted by this Court on the following substantial questions of law:

"1. Whether the transaction existing between a proprietor concern where wife is the proprietrix and the marketing concern where the husband was Manager Partner/ Managing Director, who actually controls the sale price of the manufacturing unit, could be considered as a transaction within the meaning of the proviso (iii) to Section 4(1)(a) reads with explanation to ''related person'' as envisaged under Section 4(4)(4c) of the Central Excise Act, 1944?

2. Whether the Tribunal is right to single out the show cause notices to hold that the Appellate Authority has traversed beyond the confines of the notices, when the doctrine of merger is applicable as the orders-in-original merged with the order-in-appeal as held by Apex Court in the decision reported in 2005(185) ELT 199?

3. Whether the Tribunal is right in rejecting the order-in- appeal when the

findings that were not challenged by the respondent either before the original authority or before the Appellate Authority could not be agitated before the Appellate Authority for the first time as held by the Apex Court reported in 1998(104) ELT 198(SC)?"

3. The brief facts of the case are as follows:

The respondent is engaged in the manufacture of electronic fluorescent lamps falling under Heading 84.13 of the CETA Schedule. The respondent unit is a Proprietary concern of Smt.G.R. Rani, W/o Shri G.Radhakrishnan. The entire quantity of the said electronic fluorescent lanterns manufactured by the unit was sold to M/s. Rolls Marketing Agency, partnership concern and the partners were Mr.G.Radhakrishnan, husband of Smt.G.R. Rani and Shri.Raja Chakravarty, brother of Smt. Rani. Subsequently, from August, 1995 onwards, the marketing firm was converted into a private limited company in the name of M/s. Rolls Appliances (P) Ltd. with Shri G.Radhakrishnan as the Managing Director and Shri.Raja Charavarty as Director. Thereafter, another marketing concern by name M/s. Emergency Power and Electronics Ltd. was created. The respondent sold the major quantity of the goods manufactured by them to the said marketing concern at the rate of Rs. 860/- per lamp, whereas the marketing firms were selling the same to the dealer at Rs. 1,280/- per lamp. Therefore, the Revenue proceeded against the respondent with regard to the value of the goods cleared by them to the marketing firm. The original authority held that the wholesale price of the electric fluorescent lamp prevailing at 2 marketing firms should be considered as normal price of the goods manufactured and cleared by the respondent and demanded the differential duty of Rs. 46,598/- in Order-in-Original No. 412/96 dated 04.12.1996. The adjudicating authority authority demanded a differential duty of Rs. 1,05,850/- in Order-in-Original dated 30.09.1997. On appeal by the assessee, the Commissioner (Appeals) confirmed the orders of the Adjudicating Authority, holding that the respondent and the two marketing units are related person in terms of Clause (c) of sub-section (4) of Section 4 of the Central Excise Act, 1994.

4. Aggrieved by the order of the Commissioner (Appeal), the assessee once again pursued the matter before the Tribunal. The Tribunal, after hearing both sides, allowed the appeals holding as follows:

"5. We have gone through the records of the case carefully. Even though the Commissioner (Appeals) has held that the appellants'' firm and the other two units are related persons, there is nothing in the show-cause notice which indicates the same. In fact, the show cause notice states that the appellants are clearing the goods to their sister concerns. Prima facie we find that the impugned order is beyond the scope of the show-cause notice. In the case of CCE Vs Electro Services (P) Ltd. (2001 (127) ELT 828(Tri.Del)) it was held that assessee should not be treated as related person merely because partners of the assessee are the Directors of the buyer company. Nothing on record to substantiate that there was mutuality of interest of money or money flow back in between the two concerns. Buyers cannot be said to be sole selling gent, in absence of any allegation in the show cause notice or in the impugned order. In the case of Mineral Wool Mfg. (I) Pvt.Ltd. Vs CCE, Patna (1999 (109) ELT 228(T)) it is held that a private limited company and its buyer a partnership firm whose partners were sons of two of the Directors of the manufacturer company. Company does not consist of only the Directors. It has a distinct identity. No financial involvement or profit flow back or any special arrangement between the buyer and the seller. Selling price to the buyer is not low, after making allowance for excise duty and normal trading profit and in fact found to be comparable to sale price of other manufacturers. Buyer is not a related person of manufacturer. (Section 4(4)(c) of Central Excise Act, 1944.. In Cooper Pharma Vs CCE, New Delhi (2004 (174) ELt 143 (Tri.Del)), it is held that manufacturer and limited Company cannot be treated as ''related persons'' as having interest in business of each other since share-holders/directors of limited company were blood relations of manufacturing partnership firm. No evidence brought on record that an artificial legal arrangement was created in order to evade duty. Limited Company is a juridical person separate from its share- holders and directors. Such a juridical person cannot be treated as a related person. Penalty set aside. In another case Weikfield Products Co. (India) vs. Collector of Central1990 (29) ECR 351 it is held that when goods are sold to two buyers only viz. Canteen stores department (CSD) and Weikfield central Marketing Organisation (CMO) and price is same in both cases, partners of CMO although close relatives of Directors of appellant company can be considered neither related person nor favoured buyer, one being a corporate concern and other being a partnership concern section 4(4)(c) of Central Excise Act, 1944.

6. In view of the above decisions, we are inclined to allow the appeals."

5. Aggrieved by the said order of the Tribunal, the Revenue is before this Court by filing the present appeal raising the above-mentioned substantial questions of law.

6. At the outset, the learned counsel for the respondent objected to the maintainability of the appeal before this Court on the above questions of law raised by the department. It is the plea of the learned counsel for the respondent that Section 35G of the Central Excise Act, 1944 provides that an appeal on the issue relating to rate of duty of excise or value of goods for purposes of assessment would not lie before this Court. He placed strong reliance on the decision of the Supreme Court in Navin Chemicals Mfg. and Trading Co. Ltd. Vs. Collector of Customs, (1993) 49 ECR 1 : (1993) 68 ELT 3 : (1993) 5 JT 362 : (1993) 3 SCALE 776 : (1993) 4 SCC 320 : (1993) 2 SCR 326 Supp .

7. Heard the learned standing counsel appearing for the appellant/Revenue and the learned counsel appearing for the respondent and perused the materials placed before this Court.

8. Section 35G of the Central Excise Act, 1944 provides that an appeal on the

issue relating to rate of duty of excise or value of goods for purposes of assessment would not lie before this Court and it is apposite to refer to Section 35G(1) of the Central Excise Act, 1944, which reads as under:

"Section 35G. Appeal to High Court."(1) An appeal shall lie to the High Court from every order passed in appeal by the Appellate Tribunal on or after the 1st day of July, 2003 (not being an order relating, 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 the purposes of assessment), if the High Court is satisfied that the case involves a substantial question of law."

(emphasis supplied)

9. In the case of Navin Chemicals Mfg. and Trading Co. Ltd. Vs. Collector of Customs, (1993) 49 ECR 1 : (1993) 68 ELT 3 : (1993) 5 JT 362 : (1993) 3 SCALE 776 : (1993) 4 SCC 320 : (1993) 2 SCR 326 Supp , the Supreme Court while dealing with the maintainability of the appeal, held 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.

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."

(emphasis supplied)

10. In an identical circumstance, this Court in the case of The Commissioner of Central Excise Vs. Vadapalani Press , while dealing with the objection raised by the assessee as to the maintainability of the appeal, after following the above-said decision of the Supreme Court in Navin Chemicals Mfg. and Trading Co. Ltd. Vs. Collector of Customs, (1993) 49 ECR 1 : (1993) 68 ELT 3 : (1993) 5 JT 362 : (1993) 3 SCALE 776 : (1993) 4 SCC 320 : (1993) 2 SCR 326 Supp , and that of the Gujarat High Court in the case of in Commissioner of Central Excise Vs. JBF Industries Ltd., (2011) 264 ELT 162 , held that appeal is not maintainable.

11. In such circumstances, while this Court is not inclined to deal with the matter, while disposing off the present appeal as not maintainable, is inclined to grant liberty to the appellant/Revenue to pursue the matter in accordance with law, if so advised.

12. For the foregoing reasons, we hold that this appeal is not maintainable and accordingly, the same is dismissed. However, liberty is granted to the Revenue/ appellant to move before the appropriate forum, if so advised. However, there shall be no order as to costs.

