

(2008) 05 AP CK 0003

In the Andhra Pradesh High Court

Case No : CE Appeal No's. 57 to 67 of 2005 and CEAMP No's. 27, 28 and 30 to 35 of 2008

Commissioner of Central Excise

APPELLANT

Vs

Shriram Refrigeration Industries [Presently known as
Tecumseh Products India Ltd.]

RESPONDENT

Date of Decision : 02-05-2008

Acts Referred:

Central Excises and Salt Act, 1944 — Section 35E, 35G, 35G(1), 35L
Customs Act, 1962 — Section 129, 130

Citation : (2009) 240 ELT 201

Hon'ble Judges : C.Y. Somayajulu, J;B. Prakash Rao, J

Bench : Division Bench

Advocate : A. Rajashekar Reddy, Assistant Solicitor General in CEA and G. Shivadas, for M.S. Ramchandra Rao, in CEAMP, for the Appellant; G. Shivadas, for M.S. Ramchandra Rao in CEA and A. Rajashekar Reddy, Assistant Solicitor General in CEAMP, for the Respondent

Final Decision : Dismissed

Judgement

C.Y. Somayajulu, J.—As common question of law arises in all these appeals, they respondent being disposed of by a common order.

2. Shriram Refrigeration Industries Limited (SIL), which later changed its name as Shriram Industrial Enterprises Limited with effect from 20.05.1992 and then to Siel Limited from 10.05.1995, had, through a scheme of arrangement with the approval of the High Court of Delhi, transferred its compressor business, along with its all assets, to Siel Compressors Limited. Later its name was changed to M/s Tecumseh Products India Limited i.e. The respondent SIL was undertaking repairs to damaged and defective compressors at its service center, which is separate from the main factory but adjacent thereto. On the ground that SIL was manufacturing stators, Central Excise officials issued show cause notice dated 17.01.1991 demanding excise duty from 1.1.1987 to 31.7.1990 and another notice dated 25.3.1991 demanding duty for the period 1.8.1990 to April 1992 to

SIL. After replies were sent to those show cause notices by SIL, the Collector, Central Excise, through his order dated 25.11.1991, dropped further proceedings on the said show cause notices dated 17.01.1991 and 25.03.1991 holding that staters received by SIL from the job workers had all the essential characteristics of fully manufactured goods and that no new product emerged from the service center of SIL. Questioning the said order of the Commissioner, the Excise Department preferred an appeal to the Appellate Tribunal, which after hearing the said appeal along with another appeal preferred by the Commissioner, through a common order dated 24.11.1997 held that the process undertaken by SIL amounted to manufacture of staters and so it is liable to pay excise duty and penalty. Aggrieved thereby the respondent preferred appeals to the Supreme Court u/s 35L(b) of the Act. During the pendency of the appeals before the appellate Tribunal and the Supreme Court, Central Excise officials periodically issued eleven show cause notices to SIL, SIEL Limited etc, between 31.11.1992 to 27.5.1998 alleging that the process of shaping, varnishing and baking of staters undertaken by it in its premises amounts to manufacture of the staters and so it is liable to pay excise duty, penalty etc., for which replies were sent contending that after the Central Excise Department issued show cause notice dated 17.01.1991, claiming excise duty, it stopped the process of repairing or manufacturing staters in its premises and gave that work to job workers under various agreements and so it is not liable to pay any excise duty etc., as claimed in the show cause notices. After the Supreme Court upheld the order of the Appellate Tribunal and dismissed the appeals of the respondent the Collector, after considering the replies to the show cause notices sent by the respondent and its predecessor in interest and the material on record, did not agree with the contention of the respondent that the activities that were being carried out by its predecessors in the service center do not amount to "manufacture" even though it might have discontinued the activities of varnishing and baking the staters and entrusted that part of the work to job workers, and confirmed the demand made by the Central Excise officials. Questioning the said orders of the Commissioner, the respondent preferred an appeal to the Customs Excise and Service Tax Appellate Tribunal, South Zone, Bangalore (CESTAT), which, by the orders impugned, by accepting the contention of the respondent that no process of manufacture is taking place in the service center, held that inasmuch as supply to and receipt of materials from the job workers is not disputed by the department and as the records produced i.e. purchase orders, bills etc prove the transfer of process from service center to job workers, allowed the appeals of the respondent and set aside the demands made by the Excise officials. Hence these appeals by the Revenue.

3. At the time of hearing of these appeals, the learned Counsel for the respondent took a preliminary objection relating to the maintainability of the appeals in this Court. By relying on Section 35G(1) and Section 35L of the Central Excise Act, 1944 (the Act) he contended that the appeals against the orders impugned in these appeals can lie only to the Supreme Court but not to

this Court, and even otherwise also as no question of law much less substantial question of law arises for consideration in these appeals, and as the finding of fact recorded by the Tribunal on the basis of the material on record cannot be interfered with or disturbed by this Court as held in *O.R.G. Systems, Baroda Vs. Collector of Central Excise, Vadodara*, and *Rallis India Limited Vs. The State of Tamil Nadu*, these appeals are liable to be dismissed as not maintainable in this Court. He also relied on *Navin Chemicals Mfg. and Trading Co. Ltd. Vs. Collector of Customs*, ; *Sterlite Optical Technologies Ltd. v. Commissioner of Central Excise 2007 (213) ELT 658 (Bom)* ; *Commr. of Cus. and C. Ex. Vs. Primella Sanitary Products (P) Ltd.*, ; *Ujagar Prints Vs. Union of India (UOI)*, ; *Collector of Central Excise, Baroda Vs. M/s. M.M. Khambhatwala*, (Supreme Court); *M/s. Pawan Biscuits Co. Private Ltd. Vs. Collector of Central Excise Patna*, and *Ashok Leyland Ltd. Vs. Collector of Central Excise*, Finally he also relied on *Commissioner of Central Excise, Bangalore v. Aquamall Water Solutions Ltd. Civil Petition No. 1103 of 2003 dated 19.11.2003* rendered by the Karnataka High Court refusing to entertain an appeal against, an order of the Tribunal. He stated that the appeal preferred by the Revenue to the Supreme Court in SLP (C) 5073 of 2004 against the said order of the Karnataka High Court was dismissed as withdrawn as per the order dated 13.07.2004, granting liberty to the Revenue to file an appeal in the Supreme Court against the order of the Tribunal.

4. The contention of the learned Assistant Solicitor General is that inasmuch as the factum of "manufacture" of stators by the respondents is admitted and as the respondents did not produce the agreements between it and the job workers to show that it entrusted the job of "manufacture" of stators to job workers and that it is the job workers that are actually "manufacturing" the stators and are supplying those stators to it for being marketed, and as the Tribunal failed to take into consideration the various contentions raised before it by the Revenue and did not properly understand the purport of the ratio in *Ujagar Prints case* (Supreme Court) and *M/s. Pawan Biscuits Co. Private Ltd. Vs. Collector of Central Excise Patna*, this Court is competent to decide these appeals.

5. In the replies sent to the show cause notices given to the respondent and its predecessors in interest by the Central Excise officials between 1992 to 1998 during the pendency of the appeal proceedings before the Appellate Tribunal and the apex Court, they clearly stated that the activity being carried on in its service centers does not amount to manufacture, as it is the job workers that are undertaking the process of shaping, varnishing and baking the stators, and enclosed the purchase orders placed by them with the job workers, to show that they were paying higher amount than that was being paid by them earlier, for the extra work entrusted to the job workers. After discussing the rival contentions and basing on the material available on record CESTAT came to a conclusion that it is the job workers but not the appellant that manufactured the stators.

6. The purchase orders, enclosed to the replies to the show cause notices, show

that the job workers have to do winding of outer lamination bundles to specified sizes to form finished stator wounds and also have to do the varnishing and baking of the finished stators, from out of the Copper wire, outer lamination bundles, cable assembly, insulation material polyester thread supplied to them by the predecessors in interest of the respondent and that it is for the job workers to procure Oxygen gas, Acetylene Gas, Welding rods. The Annexures appended to the purchase orders contain the following note:

The contract is on a principal basis. There is no financial relationship between the company and the job worker what so ever. The company has no interest in the business/manufacturing activity of the job worker except to the extent of the present job work given under this order. The job worker is at liberty to carry on any manufacturing activity for any other company or individual.

The company will not undertake any supervision of the manufacturing activity of the job worker and shall not have any control over the working of the manufacturing activity of the job worker. The job worker will himself enjoy the profit or loss arising as a result of the job work undertaken. The goods rejected by the company as defective may be disposed off by the job worker if the same is not repairable. The company does not provide any financial assistance to the job worker for carrying on his activities. The company and the job worker do not have any relationship of principal and agent.

We do not wish to go into detailed discussion of the facts in this case, because the point for consideration in these appeals would be whether the respondent is manufacturing any excisable goods in its premises.

7. As the case of the Revenue is that the respondent, which is manufacturing stators is liable to pay excise duty, and as it is the case of the respondent that it is placing orders on the job workers to manufacture and deliver stators to it on principal to principal basis and so the excise duty, if any is payable only by the job workers but not by it, the point for consideration in these appeals is whether these appeals against the order of CESTAT maintainable in this Court.

8. In the earlier round of litigation between the predecessor in interest of the respondent and the Central Excise department relating to the same question i.e. whether it is the predecessor in interest of the respondent or if it is the job workers that are the manufactures of the stators, after the Appellate Tribunal allowed the appeals preferred by the department questioning the order of the Commissioner that respondent is not the manufacturer of the stators, respondent preferred appeals to the apex Court in Civil Appeal No. 1477 and 1513 of 1998 questioning the orders of the Appellate Tribunal, which were dismissed vide *Tecumseh Products India Limited v. Commissioner of Central Excise, Hyderabad* 2004 (167) ELT 498 (S.C) This fact clearly shows and establishes that in cases where the dispute relates to the question whether the noticee is the manufacturer of the excisable goods or not, an appeal against such an order passed by the CESTAT would lie only to the apex Court but not to this Court in

view of Section 35L of the Act.

9. The meaning of the expression "determination of the rate of duty of the excise or value of the goods for the purpose of assessment of any duty" used in Section 35G and 35L of the Act is not found in any other sections of the Act except in the explanation to Section 35E of the Act, which reads:

Explanation: For the purposes of this sub-section, the determination of a rate of duty in relation to any goods or valuation of any goods for the purposes of assessment of duty includes the determination of a question-

a) relating to the rate of duty of excise for the time being in force, whether under the Central Excise Tariff Act, 1985 (5 of 1986), or under any other Central Act providing for the levy and collection of any duty of excise, in relation to any goods on or after the 28th day of February, 1986; or

b) relating to the value of goods for the purposes of assessment of any duty of excise in cases where the assessment is made on or after the 28th day of February 1986; or

c) Whether any goods are excisable goods or whether the rate of duty of excise on any goods is nil; or

d) Whether any goods fall under a particular heading or subheading of (the First Schedule and the Second Schedule) to the Central Excise Tariff Act, 1985 (5 of 1986), or the Additional Duties of Excise (Goods of Special Importance) Act, 1957 (58 of 1957), or the Additional Duties of Excise (Textiles and Textile Articles) Act, 1978 (40 of 1978), or that any goods are or not covered by a particular notification or order issued by the Central Government or the Board, as the case may be, granting total or partial exemption from duty; or

e) Whether the value of any goods for the purposes of assessment of duty of excise shall be enhanced or reduced by the addition or reduction of the amounts in respect of such matters as are specifically provided in this Act.

In Navin Chemicals Mfg. and Trading Co. Ltd. case 1993 (68) ELT (SC) relied on by the learned Counsel for the respondent, the apex Court, while considering the provisions relating to appeal in Chapter XV of the Customs Act, 1962 which are in pari materia with the provisions relating to the appeals in the Act, held that the explanation in Section 129 of the Customs Act relating to "determination of rate of duty in relation to the goods or value of the goods for the purposes of assessment or duty" can be applied in case of appeals u/s 130 of the Customs Act also relating to the appeals to the High Court. Following the said decision a Division Bench of this Court in Crane Betel Nut Powder Works v. Commissioner of Customs and Central Excise 2006 (5) ALD (Noc 104) held that determination of the rate of duty in relation to any goods includes the determination of a question whether any goods are excisable goods or not. So question whether the process if any undertaken in the service center of the respondent amounts to manufacture of stators by the respondent or not, and if the goods produced

during that process are excisable goods or not would fall within the meaning of the expression "determination of the rate of duty of excise or the value of the goods for purposes of assessment of duty" used in Sections 35G(1) and Section 35L(b) of the Act. In view thereof and in view of the decision in Aquamall Water Solutions Ltd. case Civil Petition No. 1103 of 2003 dated 19.11 2003 relied on by the learned Counsel for the respondents, appeals against the orders of CESTAT impugned in these appeals would lie only to the apex Court but not to this Court and so these appeals filed in this Court are not entertainable by this court, more so because the grounds of appeal read

(a) The Hon"ble CESTAT in their final order failed to consider the records of statements given by job workers nor has contradicted the same in their Final Order.

(b) The Tribunal's Final Order is not correct in law to rely on the Ujagar Prints case or on the Pawan Biscuits case, basically that winding is done at Service Centre on the majority of the goods in question and winding amounts to manufacture since there is no difference between the stator wounds manufactured in the main factory on which duly is being paid and those re-wound in the service center.

Which have a direct connection to the question whether the goods if any manufactured by the respondent are excisable goods or not.

10. In view of the conclusion reached by us that the appeals are not maintainable in this Court and we do not wish either to discuss or to give any finding on the other contentions raised before us by the learned Assistant Solicitor General and the learned Counsel for the respondents. for the above reasons these appeals are dismissed with costs as not maintainable.