
(2011) 08 GAU CK 0080

In the Gauhati High Court

Case No : Central Excise Reference No. 1 of 2009

Commissioner of Cus. and C. Ex., Shillong

APPELLANT

Vs

Dharampal Satyapal Ltd.

RESPONDENT

Date of Decision : 19-08-2011

Acts Referred:

Additional Duties of Excise (Goods of Special Importance) Act, 1957 — Section 3(3)
Central Excises and Salt Act, 1944 — Section 35G, 35L
Customs Act, 1962 — Section 129C, 129D(5)
Finance Act, 2001 — Section 136
Finance Act, 2004 — Section 91, 93

Citation : (2012) 275 ELT 71 : (2012) 1 GLD 233

Hon'ble Judges : Madan B. Lokur, C.J.; Arup Kumar Goswami, J

Bench : Division Bench

Advocate : K Paul, for the Appellant; A.K. Bhattacharyya, Sr Advocate, S.K. Medhi, R. Dubey, A Roy and Ms. A. Deka, for the Respondent

Judgement

Madan B. Lokur, C.J.—This appeal u/s 35G of the Central Excise Act, 1944 is directed against the judgment and Order No. A-28/Kol./07, dated 20-1-2007 passed by the Customs, Excise and Service Tax Appellate Tribunal, East Zone Bench, Kolkata in Central Excise Appeal No. EDM-409/05.

2. The appeal was admitted on 16-7-2009 when the following substantial question of law was framed for consideration :-

Whether Education Cess or (on) goods is a duty exempted under Notification No. 32/99-C.E., dated 8-7-1999 and, if not, whether CENVAT Credit under the CENVAT Credit Rules, 2004 can be utilized, towards payment of such duty, which is not exempted under the said Notification.

3. At the time of final hearing, a preliminary objection was raised by learned counsel for the assessee to the effect that the appeal is not maintainable and in fact the appropriate remedy for the Revenue would be to approach the Supreme Court u/s 35-L of the Central Excise Act, 1944.

4. It was contended that the question involves duty exemption on goods, which in turn concerns the rate of duty on the goods. In such a case, Section 35-G of the Central Excise Act, 1944 excludes the jurisdiction of the High Court to entertain an appeal. In our opinion, the preliminary objection has no merit.

5. The relevant portions of Section 35-G of the Central Excise Act, 1944 read as follows :-

35-G. 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.

(2).....

(2-A).....

(3) Where the High Court is satisfied that a substantial question of law is involved in any case, it shall formulate that question.

(4) The appeal shall be heard only on the question so formulated, and the respondents shall, at the hearing of the appeal, be allowed to argue that the case does not involve such question :

Provided that nothing in this sub-section shall be deemed to take away or abridge the power of the Court to hear, for reasons to be recorded, the appeal on any other substantial question of law not formulated by it, if it is satisfied that the case involves such question.

(5).....

(6).....

(7).....

(8).....

(9).....

6. Learned counsel for the assessee placed reliance on Navin Chemicals Mfg. and Trading Co. Ltd. Vs. Collector of Customs, where the Supreme Court considered a similar provision of law (though in a different context) under the Customs Act, 1962. The Supreme Court emphasized that the key words were "for the purposes of assessment". This is what the Supreme Court had to say in paragraph 7 of the Report:

7. The controversy, therefore, relates to the meaning to be given to the expression "determination of any question having a relation to the rate of duty of customs or to the value of goods for purposes of assessment". It seems to us

that the key lies in the words "for purposes of assessment" therein. Where the appeal involves the determination of any question that has a relation to the rate of customs duty for the purposes of assessment that appeal must be heard by a Special Bench. Similarly, where the appeal involves the determination of any question that has a relation to the value of goods for the purposes of assessment, that appeal must be heard by a Special Bench.....The phrase "relation to" is, ordinarily, of wide import but, in the context of its use in the said expression in Section 129-C, it must be read as meaning a direct and proximate relationship to the rate of duty and to the value of goods for the purposes of assessment.

7. In this context, the Supreme Court referred, in paragraph 11 of the Report to the Explanation to Section 129-D(5) of the Customs Act, 1962. The Section deals with the powers of the Central Board of Excise and Customs and the Collector of Customs to call for and examine the record of any proceedings before an authority subordinate thereto and to examine the legality or propriety thereof. The Explanation says that the words "determination of a rate of duty in relation to any goods.....for the purposes of assessment" 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 the purposes of assessment should be enhanced or reduced having regard to certain matters that the Customs Act provides for.

8. In paragraphs 11 and 12 of the Report, the Supreme Court held :

11. 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 given)

9. The question that we need to ask ourselves is this: Does the determination of the substantial question of law framed on 16-7-2009 have a direct and proximate relation, for the purposes of assessment, to the rate of duty applicable to the goods? The answer to this is in the negative.

10. What is the "Education Cess" and the basis of its levy? The Education Cess was introduced by the Finance (No. 2) Act, 2004 through Section 91 thereof. It is a surcharge over and above the duty of excise levied on the manufacture of goods. How it is to be calculated is given in Section 93 of the Finance (No. 2) Act, 2004. Basically, it is calculated @ 2% on the aggregate of all duties of excise levied and collected by the Central Government.

11. Section 91 and Section 93 of the Finance (No. 2) Act, 2004 are given below :

91. Education Cess. - (1) Without prejudice to the provisions of sub-section (11) of section 2, there shall be levied and collected, in accordance with the provisions of this Chapter as surcharge for purposes of the Union, a cess to be called the Education Cess, to fulfil the commitment of the Government to provide and finance universalised quality basic education.

(2) The Central Government may, after due appropriation made by Parliament by law in this behalf, utilise, such sums of money of the Education Cess levied under sub-section (11) of section 2 and this Chapter for the purposes specified in sub-section (1), as it may consider necessary.

92.....

93. Education Cess on excisable goods.- (1) The Education Cess levied u/s 91, in the case of goods specified in the First Schedule to the Central Excise Tariff Act, 1985 (5 of 1986), being goods manufactured or produced, shall be a duty of excise (in this section referred to as the Education Cess on excisable goods), at the rate of two percent, calculated on the aggregate of all duties of excise (including special duty of excise or any other duty of excise but excluding Education Cess on excisable goods) which are levied and collected by the Central Government in the Ministry of Finance (Department of Revenue), under the provisions of the Central Excise Act, 1944 (1 of 1944) or under any other law for the time being in force.

(2) The Education Cess on excisable goods shall be in addition to any other duties of excise chargeable on such goods, under the Central Excise Act, 1944 (1 of 1944) or any other law for the time being in force.

(3) The provisions of the Central Excise Act, 1944 (1 of 1944) and the rules made thereunder, including those relating to refunds and exemptions from duties and imposition of penalty shall, as far as may be, apply in relation to the levy

and collection of the Education Cess on excisable goods as they apply in relation to the levy and collection of the duties of excise on such goods under the Central Excise Act, 1944 or the rules, as the case may be.

12. It is, therefore, quite clear that the Education Cess is nothing but a surcharge and its levy is completely independent of the levy of excise duty. Its calculation is also independent of the quantum of excise duty, since it is a flat rate of 2% of the aggregate of all duties of excise levied and collected by the Central Government. The Education Cess has a relation to the quantum of duty, since it is calculated on that basis. It has no connection, direct and proximate, or otherwise to the rate of duty payable on the manufacture of goods. Similarly, the rate of duty on the manufacture of goods, for the purposes of assessment, is not at all dependent on the levy or non-levy of the Education Cess.

13. Learned counsel for the assessee referred to and relied on Commissioner of Customs & Central Excise, Jammu v. Bharat Box Factory Ltd., 2008 (231) E.L.T. 416 (J & K). The question raised in that case was similar (though more elaborately framed) to the question raised in this appeal. The substantial question of law framed therein was :

Whether Education Cess levied and collected u/s 91 of the Finance Act, 2004 can be considered as a duty of excise for the purpose of grant of refund in cash or by way of self credit under Notification No. 56/2002-C.E., dated November 14, 2002 (as amended) as the said notification grants exemption only to specified goods from (a) basic excise duty, (b) additional duties of excise leviable under sub-section (3) of Section 3 of the Additional Duties of Excise (Goods of Special Importance) Act, 1957 (58 of 1957); and (c) the Additional Duties of Excise (Textiles and Textile Articles) Act, 1978 leviable under sub-section (3) of Section 3 of the said Act mentioned in the said notification?

14. The Jammu & Kashmir High Court took the view that the question posed would not fall within the parameters of Section 35-G of the Central Excise Act but within the parameters of Section 35-L thereof. This is what the Jammu & Kashmir High Court had to say in paragraphs 7 to 9 of the Report :-

7. The aforesaid judgment [Navin Chemicals] is followed by Bombay High Court in Commr. of Cus. and C. Ex. Vs. Primella Sanitary Products (P) Ltd., . The Punjab and Haryana High Court has also considered the scope of Section 35L(b) of the Act in Commissioner of Central Excise Vs. Suraj Udyog Ltd., . Reference may also be made to the Rajasthan High Court decision in Laxmi Udyog Vs. Commissioner of Central Excise, . The Delhi High Court also had the occasion to consider the scope of Section 35L of the Central Excise Act, 1944 in Perfect Electric Concern Pvt. Ltd. Vs. Assistant Collector/Commissioner, Central Excise, .

8. The Bombay High Court in Sterlite Optical Technologies Ltd. v. Commissioner of C. Ex, Aurangabad - 2007 (213) E.L.T. 658 (Bom.) also considered the scope of Section 35G of the Central Excise Act, 1944, Placing reliance on Navin Chemicals Mfg. & Trading Co. Ltd. v. Collector of Customs (supra) the Court

observed that the word "assessment" is used as meaning sometimes the computation of rate of duty, sometimes the assessable value of goods and sometimes the whole procedure laid down under the Act for imposing duty liability upon the manufacturer or importer. The Court held that the word "assessment" is, thus, capable of bearing a very comprehensive meaning, in the context, it can comprehend the whole procedure for ascertaining and imposing duty liability.

9. We are inclined to apply the principles laid down in the above decisions of the Apex Court and other High Courts. The question posed would not fall u/s 35G of the Act but u/s 35L. Whether education cess levied and collected u/s 91 of the Finance Act, 2004 can be considered as a duty of excise for the grant or refund in the cases or by way of self credit under notification dated November 14, 2001, is definitely related to rate of duty of excise for the purpose of assessment. We have, therefore, no hesitation to say that the point raised is directly related to the rate of duty of excise and that being so, the only remedy open to the Commissioner is to move the Supreme Court and this Court cannot entertain these applications u/s 35G of the Act, since appeal shall lie to the High Court only against those orders not being orders related 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.

15. With respect, we are unable to agree. The question is not about the interpretation of Section 35-L of the Central Excise Act, 1944 nor is it about the interpretation of the word "assessment". The question is whether the levy or non-levy of the Education Cess has any impact on the rate of duty on the manufacture of goods. If it does not have any direct and proximate impact, then an appeal u/s 35-G of the Central Excise Act, 1944 is maintainable. If it does have a direct and proximate impact, then an appeal would lie to the Supreme Court u/s 35-L of the Central Excise Act, 1944. In our opinion, with respect, this issue has been lost sight of in Bharat Box and that is why we are unable to agree with the Jammu & Kashmir High Court. Moreover, on our reading of Navin Chemicals and the statute levying the Education Cess, we are of the opinion that its levy has no direct and proximate relationship with the rate of excise duty on the manufacture of goods.

16. Under the circumstances, while disagreeing with the view expressed by the Jammu & Kashmir High Court, we reject the preliminary objection raised by learned counsel for the assessee.

17. We may mention that, on merits, a similar issue had arisen before us with regard to the National Calamity Contingency Duty leviable u/s 136 of the Finance Act, 2001. That duty was a also surcharge as in the present case. In Commissioner of Central Excise, Dihrugarh v. Prag Bosimi Synthetics Ltd, Central Excise Reference No. 2 of 2008 decided on 29-6-2011 we had taken the view that the National Calamity Contingency Duty is not exempted under Notification No. 32/99-C.E., dated 8-7-1999 and that CENVAT credit of National Calamity

Contingency Duty can be utilized under the CENVAT Credit Rules, 2004 only towards payment of such National Calamity Contingency Duty.

18. On the merits of this appeal, learned counsel for the assesseees had frankly and fairly stated before us that the decision rendered in Prag Bosimi Synthetics Ltd. would govern this appeal also. Therefore, on merits, for the reasons given in Prag Bosimi Synthetics Ltd. we answer the substantial question of law in this appeal by holding that the Education Cess is not exempted under Notification No. 32/99-C.E., dated 8-7-1999 and that CENVAT credit of the Education Cess can be utilized under the CENVAT Credit Rules, 2004 only towards payment of such Education Cess.

19. The appeal is disposed of accordingly. No costs.