

(2019) 12 P&H CK 0140
In the Punjab And Haryana At Chandigarh
Case No : Custom Appeal No. 5 Of 2017(O&M)

Commissioner Of Customs, Custom
Commissionerate, Ludhiana

APPELLANT

Vs

M/S Krishna Cargo Movers Pvt. Ltd.

RESPONDENT

Date of Decision : 19-12-2019

Acts Referred:

Customs Act, 1962 — Section 130
Finance Act, 2006 — Section 67
Central Sales Tax Act, 1956 — Section 9(2), 13(3)
Income tax Act, 1961 — Section 189(1)

Citation : (2019) 12 P&H CK 0140

Hon'ble Judges : Jaswant Singh, J; Sant Parkash, J

Bench : Division Bench

Advocate : Amit Goyal, Jagmohan Bansal

Final Decision : Dismissed

Judgement

Jaswant Singh, J

1. Appellant-Commissioner of Customs through instant Appeal under Section 130 of Customs Act, 1962 is seeking quashing of order dated 27.9.2016 (Annexure A-3) whereby Customs Excise and Service Tax Appellate Tribunal, Chandigarh (for short 'Tribunal') has allowed appeal of the Respondent.

2. The Appellant has raised following questions of law for the consideration of this court:

i) Whether the Instructions/Circulars of the Ministry laying down the rate and manner of payment of cost recovery charges issued prior to coming into effect of HCCAR, 2009 are inapplicable after the coming into effect of HCCAR, 2009?

(ii) Whether CESTAT is justified in holding that cost recovery charges cannot be collected after coming into operation of HCCAR, 2009 as Instructions issued prior to it are inapplicable yet holding that CFS had achieved benchmark performance

for exemption from payment of CRC based on one such Instruction?

(iii) Whether CESTAT is justified in its findings that once the bench mark performance has been achieved by the Respondent in terms of Ministry's letter F. No. 434/17/2004-Cus IV dated 12.09.2005, there is no need to pay CRC afterwards automatically, even though the said Instruction specifically laid down certain conditions/procedure to be fulfilled/followed before exemption is granted which the Respondent did not fulfil or follow?

(iv) Whether CESTAT is justified in holding that the waiver of CRC shall apply even when no specific order for waiver of CRC has been issued by the competent authority as required under CBEC's Circular No. 13/2009-Cus dated 23.03.2009 read with Ministry's letter dated 12.09.2005?

3. Mr. Amit Goyal, counsel for the Appellant contended that even after introduction of Handling of Cargo in Customs Area Regulations, 2009 (for short '2009 Regulations') earlier instructions directing payment of cost recovery charges continued to remain in operation and Respondent being Container Freight Station (for short 'CFS') was bound to pay cost of Customs Officers posted at its container freight station. He further contended that as per instructions dated 12.09.2005, waiver from cost recovery charges is available if benchmark performance is achieved and no cost recovery charges are under dispute or pending. The Respondent did not pay cost recovery charges of 2008-2010 and no application seeking waiver was filed, thus Respondent was bound to pay cost recovery charges for the period 01.03.2010 to 31.03.2012.

4. Mr. Jagmohan Bansal, counsel for the Respondent contended that after introduction of 2009 Regulations, the Government was bound to specify 'Rates and Manner' of cost recovery charges and in the absence of any notification specifying rate and manner of cost recovery charges, demand is not sustainable, thus Tribunal relying upon judgment of Hon'ble Supreme Court in the case of Commissioner of Central Excise and Customs, Kerala Vs. Larsen and Toubro Ltd. 2015 (39) STR 913 (SC) has rightly allowed appeal of the present Respondent. The Appellant-Customs has demanded charges for the period March' 2010 to March' 2012 which shows charges for the period 2008-2010 stood paid prior to passing of order dated 04.12.2012. The Respondent had undisputedly achieved benchmark during 2008-2010 and delay in payment of charges for the period 2008-2010 took place on account of delayed calculation and demand by Appellant-Department.

5. The counsel for the Appellant-Customs placed reliance upon instructions dated 12.09.2005 (Annexure A-5) whereby benchmark performance has been prescribed. For claiming waiver, a CFS is required to achieve benchmark in terms of minimum number of containers as well bill of entries or shipping bills and must be in existence for two consecutive years. No cost recovery charges should be under dispute or pending as on 31.08.2005. The exemption would be prospective with no claim for past period.

6. The conceded position as emerges from record is that the Respondent got approval and established its CFS w.e.f. 01.03.2008 and achieved benchmark in terms of clearance of minimum containers, filing of bill of entry/shipping bills and continuing its operation two consecutive years. The Respondent did not pay cost recovery charges during 2008-2010 and Appellant issued notice dated 04.06.2012 (Annexure A-1) raising demand. The Respondent though deposited charges of 2008-2010 late i.e. during 2010-2012, yet prior to demand notice. The instructions dated 12.09.2005 relied upon by Appellant nowhere require filing of an application by CFS. The instructions further direct that no charges should be pending on 31.08.2005. Instructions dated 23.03.2009 require that CFS should be in existence for two consecutive years and achieve norms in terms of number of import or export containers.

7. The Tribunal has allowed Appeal of Respondent-CFS relying upon judgment of Hon'ble Supreme Court in the case of Commissioner of Central Excise and Customs, Kerala Vs. Larsen and Toubro Ltd. 2015 (39) STR 913 (SC) and holding that CFS achieved minimum benchmark, thus was entitled to waiver of cost recovery charges in future. The relevant extracts of impugned order are reproduced here under:

6. On careful consideration of the submissions made by both sides, we find that short issue involved before us:

(a) Whether the appellant is entitled for exemption from payment of cost recovery charges for March, 2010 or not? And

(b) Whether the appellant can be held responsible for non-payment of cost recovery charges when no calculation was made by the Revenue?

7. We find that the appellant started working as CFS with effect from 1-3-2008 and as per instruction dated 14-12-1995 read with Circular No. 52/97-Cus., dated 17-10-1997, a CFS is required to deposit in advance the cost recovery charges. It is fact on record that cost recovery charges are to be calculated by the Revenue, the appellant cannot pay cost recovery charges without calculation of demand of cost recovery charges payable by the appellant. Therefore, we hold that in the absence of any calculation of the demand made by the Revenue, the appellant cannot be responsible for non-payment of cost recovery charges. We find that as per C.B.E. & C. circular dated 12-9-2005, if CFS achieved benchmark performance during the previous years, it is entitled for waiver of charges. Admittedly, in this case the appellant has achieved the benchmark performance within the initial two years. As the appellant has achieved the benchmark performance, in that circumstance, the Revenue is duty bound to examine the issue and disposed of the claim of waiver failing which the Revenue cannot continue to demand of cost recovery charges from the appellant.

8. We further take note of the fact that the Regulation 2009 has been introduced with effect from 07.03.2009 clause (o) of Regulation 6(1) deals the case in hand which is reproduced as under :

" shall bear the cost of the customs officer posted by the Principal Commissioner of Customs or Commissioner of Customs, as the case may be on cost recovery basis and shall make payments at such rates and in the manner specified by the Government of India in the Ministry of Finance unless specifically exempted by an order of the said Ministry "

8. On perusal of the said provision, we find that the CFS is required to pay the cost recovery charges at rate and manner specified by the Ministry. As, no manner or rate has been prescribed under the regulation or any other way subsequent to the regulation, in that circumstance, we are of the view that cost recovery charges cannot be demanded from the appellant.

The same view has been taken by the Apex Court in the case of Larsen & Toubro Ltd. (supra):

25. In fact, by way of contrast, Section 67 post amendment (by the Finance Act, 2006) for the first time prescribes, in cases like the present, where the provision of service is for a consideration which is not ascertainable, to be the amount as may be determined in the prescribed manner.

26. We have already seen that Rule 2A framed pursuant to this power has followed the second Gannon Dunkerley case in segregating the 'service' component of a works contract from the 'goods' component. It begins by working downwards from the gross amount charged for the entire works contract and misusing from it the value of the property in goods transferred in the execution of such works contract. This is done by adopting the value that is adopted for the purpose of payment of VAT. The rule goes on to say that the service component of the works contract is to include the eight elements laid down in the second Gannon Dunkerley case including apportionment of the cost of establishment, other expenses and profit earned by the service provider as is relatable only to supply of labour and services. And, where value is not determined having regard to the aforesaid parameters, (namely, in those cases where the books of account of the contractor are not looked into for any reason) by determining in different works contracts how much shall be the percentage of the total amount charged for the works contract, attributable to the service element in such contracts. It is this scheme and this scheme alone which complies with constitutional requirements in that it bifurcates a composite indivisible works contract and takes care to see that no element attributable to the property in goods transferred pursuant to such contract, enters into computation of service tax.

33. Section 13(3) of the Central Sales Tax Act says:-

"The State Government may make rules, not inconsistent with the provisions of this Act and the rules made under sub-section (1), to carry out the purposes of this Act."

34. In the aforesaid judgment it was found that Section 9(2) of the Central Sales Tax Act conferred powers on officers of the various States to utilize the

machinery provisions of the States' sales tax statutes for purposes of levy and assessment of central sales tax under the Central Act. It was also noticed that the State Government itself had been given power to make rules to carry out the purposes of the Central Act so long as the said rules were not inconsistent with the provisions of the Central Act. It was found that, in fact, the State of Uttar Pradesh had framed such rules in exercise of powers under Section 13(3) of the Central Act as a result of which the necessary machinery for the assessment of central sales tax was found to be there. The Delhi High Court judgment unfortunately misread the aforesaid judgment of this Court to arrive at the conclusion that it was an authority for the proposition that a tax is leviable even if no rules are framed for assessment of such tax, which is wholly incorrect. The extracted passage from Mahim Patram's case only referred to rules not being framed under the Central Act and not to rules not being framed at all. The conclusion therefore in Paragraph 36(2) of the Delhi High Court judgment is wholly incorrect. Para 36(2) reads as follows:-

"(2) Service tax can be levied on the service component of any contract involving service with sale of goods etc. Computation of service component is a matter of detail and not a matter relating to validity of imposition of service tax. It is procedural and a matter of calculation. Merely because no rules are framed for computation, it does not follow that no tax is leviable." [at Para 36]

36. In a recent judgment by one of us, namely, *Shabina Abraham & Ors. v. Collector of Central Excise & Customs*, judgment dated 29th July, 2015, in Civil Appeal No. 5802 of 2005 = 2015 (322) E.L.T. 372 (S.C.), this Court held :-

" It is clear on a reading of the aforesaid paragraph that what Revenue is asking us to do is to stretch the machinery provisions of the Central Excises and Salt Act, 1944 on the basis of surmises and conjectures. This we are afraid is not possible. Before leaving the judgment in *Murarilal's case* (supra), we wish to add that so far as partnership firms are concerned, the Income Tax Act contains a specific provision in Section 189(1) which introduces a fiction qua dissolved firms. It states that where a firm is dissolved, the Assessing Officer shall make an assessment of the total income of the firm as if no such dissolution had taken place and all the provisions of the Income Tax Act would apply to assessment of such dissolved firm. Interestingly enough, this provision is referred to only in the minority judgment in *M/s. Murarilal's case* (supra).

The impugned judgment in the present case has referred to *Ellis C. Reid's case* but has not extracted the real ratio contained therein. It then goes on to say that this is a case of short levy which has been noticed during the lifetime of the deceased and then goes on to state that equally therefore legal representatives of a manufacturer who had paid excess duty would not by the self-same reasoning be able to claim such excess amount paid by the deceased. Neither of these reasons are reasons which refer to any provision of law. Apart from this, the High Court went into morality and said that the moral principle of unlawful enrichment would also apply and since the law will not permit this, the Act needs

to be interpreted accordingly. We wholly disapprove of the approach of the High Court. It flies in the face of first principle when it comes to taxing statutes. It is therefore necessary to reiterate the law as it stands. In *Partington v. A.G.*, (1869) LR 4 HL 100 at 122, Lord Cairns stated:

9. xxxxx

10. In view of the above discussion, we hold that as the appellant has already achieved the bench mark performance within the initial two years and there is no provision as per Regulation, 2009, therefore, to recover the cost of charges from the appellant the demand cannot be made against the appellant for the cost recovery charges with effect from 01.03.2010.

11. In view of the above discussion, the impugned order deserves no merit and hence the same is set aside. "

9. We are not oblivious of the fact that Tribunal is final fact finding authority and in matters such as present, an appeal lies from the final order of the CESTAT to this Court, only on substantial questions of law. Matters ordinarily involving appreciation of evidence would not involve substantial question of law. This court in exercise of its power conferred by Section 130 of the Customs Act, 1962 is not empowered to re-appreciate evidence, which has already been appreciated by the CESTAT. This court can interfere only where the appreciation of evidence by the CESTAT is perverse, to the extent that no reasonable man conversant with the law would arrive at the said conclusion.

10. From the perusal of record, we find that Respondent during 2008-2010 achieved benchmark performance and instructions of 2005 as well 2009 nowhere require filing of application by CFS seeking waiver of cost recovery charges. As per instructions no dues should be pending on 31.8.2005 and it is not case of Appellant that anything was pending against Respondent on 31.8.2005. Even otherwise, the Respondent cleared dues of 2008-10 prior to notice dated 04.06.2012(Annexure A-1) issued by Appellant. We further find that prior to 2009 only instructions were holding the field and Respondent-CFS cannot be asked to pay cost recovery charges when it had already achieved benchmark performance which is the paramount requirement. The Respondent has not claimed exemption for the period 2008-2010, thus there seems no reason to charge cost of officers when benchmark performance stood achieved.

11. Tribunal has relied upon judgment of Hon'ble Supreme Court *Larsen and Toubro Ltd.* (supra) while holding that 'rates and manner' was not specified as required by 2009 Regulations. Clause (o) of Regulation 6(1) of Regulations casts obligation upon CFS to bear cost of officers posted by Commissioner. The same clause further provides that Government of India would specify rates and manner of charges and concededly, post 2009 Regulations, rates and manner of cost recovery charges are not specified. It was duty of Government of India to specify rate and manner and it is axiomatic in taxation law that in the absence of mechanism, no recovery can be made. Thus, we find substance in the findings

recorded by Tribunal that no demand of cost of officers can be made in the absence of specified rates and manner.

12. In view of the above findings, we do not find any reason to interfere and set aside findings recorded by Tribunal, accordingly, present appeal being bereft of merits is hereby dismissed.