(2013) 04 GUJ CK 0034

In the Gujarat High Court

Case No : Tax Appeal No. 259 of 2013 with Civil Application No. 205 of 2013

Commissioner of Customs (Preventive) APPELLANT

Vs

Palvi Power Tech Sales P. Ltd. RESPONDENT

Date of Decision : 17-04-2013

Acts Referred:
Customs Act, 1962 — Section 128, 128A, 129A, 129A(1), 129B

Citation : (2014) 299 ELT 180 : (2013) 20 GSTR 332 : (2013) 40 STT 148

Hon'ble Judges : S.G. Gokani, J;Akil Abdul Hamid Kureshi, J

Bench : Division Bench

Advocate : R.J. Oza, for the Appellant; Dhaval Shah, for the Respondent

Judgement

Akil Kureshi, J.—In response to the notice for final disposal issued by us on March 20, 2013, the learned advocate Shri Dhaval Shah appeared for the respondent-assessee. We have, therefore, taken up this tax appeal for final disposal at the admission stage. This appeal is filed by the Department challenging an order dated September 7, 2012 passed by the Customs, Excise and Service Tax Appellate Tribunal, West Zonal Bench, Ahmedabad ("Tribunal" for short). The order is short and reads as under:

When this stay petition was called out, on perusal of the records and after hearing both the sides, we find that the issue involved in this case is regarding rejection of drawback claim filed by the appellant before the lower authorities.

2. As per the provisions of section 129A of the Customs Act, 1962, the appeal arising out of the first appellate authority in rejection of drawback claim, does not lie before us but lies before the Joint Secretary, Government of India. Accordingly, the stay petition as well as the appeal is transferred to the office of the Joint Secretary, Government of India for further action.

3. The stay petition and appeal disposed of as indicated hereinabove.

2. From the order of the Tribunal, it emerges that the appeal before the Tribunal

filed by the respondent since it involved the question of duty drawback, the Tribunal was of the opinion that such appeal was not maintainable u/s 129A(1) of the Customs Act, 1962 ("Act" for short). The Tribunal thereupon transferred the appeal along with the stay petition to the Joint Secretary, Government of India for further action.

3. The stand of the Revenue is that the Tribunal had no authority to pass such an order. It is contended that in terms of section 129A(1) read with section 129B, the Tribunal could not have transferred the proceedings which were not maintainable before itself.

4. For the purpose of this appeal, we frame the following substantial question of law for our consideration:

Whether the CESTAT was in the facts and circumstances of the case right in ordering transfer of the respondent''s appeal to the Joint Secretary, Government of India when it was found that such appeal was not maintainable before the Tribunal?

5. Learned counsel Shri Oza appearing for the Revenue contended that admittedly, the appeal before the Tribunal filed by the respondent was not maintainable. Any such proceeding, which was not competent before the Tribunal, the Tribunal had no powers to order its transfer before some other authority. He placed reliance on the provisions contained in section 129A and section 129B of the Act. He also relied on the decision of the Madras High Court in the case of India Pistons Limited Vs. Assistant Collector of Central Excise, Madras and Others, wherein the learned single judge of the High Court held that when the appeal was not maintainable by the Tribunal, the same could not have been transferred in terms of the provisions contained in the Central Excise Act.

6. On the other hand, learned counsel Shri Dhaval Shah appearing for the respondent opposed the appeal contending that the Tribunal has not decided the appeal on merits. Only direction is to transfer the proceedings before the revisional authority. Such powers are vested in the Tribunal by virtue of rule 41 of the Customs, Excise and Service Tax Appellate Tribunal (Procedure) Rules, 1982.

7. Having heard learned counsel for the parties and having perused the record, it emerges that the appeal filed by the respondent before the Tribunal was not maintainable. In fact, this part of the Tribunal''s order is also accepted by the respondent. Additionally, as pointed out by the learned counsel for the Revenue, section 129A of the Act though permits an aggrieved person to appeal to the Tribunal against an order of the Commissioner (Appeals) u/s 129A(1) of the Act, the proviso to subsection (1) thereof provides that no appeal shall lie to the Appellate Tribunal and the Appellate Tribunal shall not have jurisdiction to decide any appeal in respect of any order referred to in clause (c), i.e., an order passed by the Commissioner (Appeals) u/s 128A, if such order relates, inter alia, to payment of drawback as provided in Chapter X and the rules made thereunder.

8. This court in a decision in the case of Commissioner of C. Ex. and Customs Vs. Imtiyaz Traders, had held that an order of the Commissioner (Appeals) which relates to rebate of excise duty on goods would not be maintainable before the Tribunal. Even the respondent has not questioned the Tribunal''s finding that the appeal was not maintainable before the Tribunal. We have, therefore, proceeded on that basis.

9. A short question therefore is when the appeal itself was not maintainable, could the Tribunal have provided for its transfer before the competent forum. We are afraid, the Tribunal had no such powers. An appeal before the Tribunal is provided under the Act u/s 129A. In terms of clause (c) to the proviso to sub-section (1) of section 129A, the appeal of the respondent was not maintainable and the Tribunal had no jurisdiction to decide such an appeal. Section 129B of the Act pertains to orders of the Appellate Tribunal and read as under:

129A. Appeals to the Appellate Tribunal--(1) Any person aggrieved by any of the following orders may appeal to the Appellate Tribunal against such order--

(a) a decision or order passed by the Commissioner of Customs as an adjudicating authority;

(b) an order passed by the Commissioner (Appeals) u/s 128A;

(c) an order passed by the Board or the Appellate Commissioner of Customs u/s 128, as it stood immediately before the appointed day;

(d) an order passed by the Board or the Commissioner of Customs, either before or after the appointed day, u/s 130, as it stood immediately before that day.

10. Under sub-section (1) of section 129B of the Act, the Appellate Tribunal may, after giving opportunity of hearing to the parties to the appeal, pass such orders as it thinks fit, confirming, modifying or annulling the decision or order appealed against or may refer the case back to the authority which passed such decision or order with such directions as the Appellate Tribunal may think fit, for a fresh adjudication or decision, as the case may be, after taking additional evidence, if necessary.

11. Thus, the powers of the Appellate Tribunal in an appeal before itself are quite wide. In addition to confirming, modifying or annulling the decision under appeal, the Tribunal may even remand the proceedings before the lower authority for fresh adjudication; with or without liberty to taking additional evidence on record. Such powers can be exercised by the Tribunal only in an appeal which is maintainable. In other words, no such powers for obvious reasons can be exercised by the Tribunal in proceeding which is not competent before the Tribunal. In other words, when in terms of clause (c) to the proviso to sub-section (1) of section 129A of the Act, the Tribunal had no jurisdiction to entertain the appeal of the respondent, the Tribunal could not have exercised any of the powers specified in sub-section (1) of section 129B of the Act. The only option the Tribunal had was to reject such an appeal as being not maintainable or

return the papers back to the appellant for presentation before appropriate forum.

12. Reliance of learned counsel for the respondent on rule 41 of the Customs, Excise and Service Tax Appellate Tribunal (Procedure) Rules, 1982 is also of no avail. Such rule reads as under:

41. Orders and directions in certain cases.--The Tribunal may make such orders or give such directions as may be necessary or expedient to give effect or in relation to its orders or to prevent abuse of its process or to secure the ends of justice.

13. Rule 41 noted above does give the Tribunal, powers to make orders or to issue directions as may be found necessary or expedient in order to give effect to or in relation to its order or to prevent abuse of the process, or to secure the ends of justice. Such powers, however, which are ancillary in nature, must be seen in the light of the Tribunal''s power u/s 129B of the Act. Such powers, when found necessary to be exercised, would be available only in the proceedings which are competent before the Tribunal. In other words, no powers under rule 41 could be exercised by the Tribunal in the proceedings which are not maintainable. Thus, in an appeal which the Tribunal had no jurisdiction to entertain, no orders could be passed, relying on rule 41. This was also the view of the Madras High Court in the case of India Pistons Limited Vs. Assistant Collector of Central Excise, Madras and Others, .

14. Merely because, as pointed out by the learned counsel for the respondent that there is practice before the Tribunal to transfer such proceedings when found not maintainable, would not permit us to take a different view. A certain trend or practice howsoever old would not change the legal position. Such convention, unless backed up by statutory provisions and powers available with the Tribunal, cannot be saved only on the ground that the same has lasted sufficiently long. Even otherwise, we find that the special Bench of the Delhi High Court in the case of 1993 (66) ELT 97 , taking note of the decision of the Madras High Court in the case of India Pistons Limited Vs. Assistant Collector of Central Excise, Madras and Others, , held that when an appeal is found not maintainable with the Tribunal, proper course would be to return the papers and not to direct its transfer. In the result, the question is answered in favour of the Revenue and against the respondent. The impugned decision of the Tribunal is set aside.