

(2014) 05 AHC CK 0242

In the Allahabad High Court

Case No : Central Excise Appeal Defective No. 37 of 2014

Commr. of Cus., C. EX. and Service Tax

APPELLANT

Vs

Jubilant Life Sciences Ltd.

RESPONDENT

Date of Decision : 12-05-2014

Acts Referred:

Central Excises and Salt Act, 1944 — Section 3(1), 35G(1), 35L, 35L(b)
Customs Act, 1962 — Section 129D, 14

Citation : (2014) 7 ADJ 417 : (2014) 306 ELT 212 : (2014) 27 GSTR 95

Hon'ble Judges : Dhananjaya Yashwant Chandrachud, C.J.; Dilip Gupta, J

Bench : Division Bench

Advocate : Ramesh Chandra Shukla, Advocate for the Appellant; Nikhil Agrawal, Advocate for the Respondent

Judgement

1. The appeal by the revenue arises from a decision of the Customs, Excise and Service Tax Appellate Tribunal dated 5 September, 2014 (301) ELT 649. A preliminary objection has been taken to the maintainability of the appeal on behalf of the assessee that within the meaning of Section 35G(1) of the Central Excise Act, 1944, an appeal shall not lie before this Court against 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 purpose of assessment. Hence, it has been urged that the appeal is not maintainable. In order to determine the correctness of the preliminary objection, a brief reference to the factual conspectus would be in order.

2. The respondent which was a 100% Export Oriented Unit (EOU) was engaged in the manufacture and export of excisable goods covered under Chapter 29, "Organic Chemicals", of the Central Excise Tariff Act, 1985. From 26 March, 2007 the respondent claims to have been operating as a 100% EOU under the Foreign Trade Policy. On 15 March, 2011 the respondent applied for de-bonding of its EOU so as to permit it to operate as a DTA unit. On 25 March, 2011 an "in-principle exit order" was issued by the Assistant Development Commissioner. On

31 March, 2011 stock was taken of the inputs, capital goods, work-in progress and finished goods. On 1 April, 2011 the respondent submitted a duty calculation sheet to the Superintendent of Central Excise for approval. On 12 April, 2011 and 14 April, 2011 excise duties on inputs and capital goods were paid on the basis of clause (ii) of the proviso to Section 3(1) of the Central Excise Act, 1944. The respondent also paid duties, as determined by the department, on finished goods. The total amount of duty paid was Rs. 29,17,195/- On 30 April, 2011 and 16 May, 2011 the finished goods were exported against a claim for advance authorisation. A final letter of de-bonding was issued by the Development Commissioner on 10 June, 2011.

3. The respondent submitted a claim for refund on 30 September, 2011 quantifying the claim as Rs. 22,85,835/-. This represented the difference between the duty paid (Rs. 29,17,195/-) and the duty, according to the respondent, which was liable to be paid (Rs. 6,31,360/-).

4. The adjudicating authority rejected the claim for refund on 29 June, 2012. The order of the adjudicating authority was upheld by the Commissioner (Appeals) on 18 September, 2012. The Tribunal by its order dated 5 September, 2013 allowed the appeal of the respondent. The Tribunal held that during the intervening period between the date when the No Objection Certificate was granted by the central excise authorities and the date of issue of the final de-bonding order by the Development Commissioner, it was open to an EOU to export the finished goods under a claim for advance authorisation and no excise duty could be charged on such goods as they had not been cleared under the DTA. This decision of the Tribunal is in question at the behest of the Revenue.

5. Section 35G(1) of the Central Excise Act, 1944 provides as follows:-

"Section 35G(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 purposes of assessment), if the High Court is satisfied that the case involves a substantial question of law.

....."

6. u/s 35L(b), an appeal lies to the Supreme Court against an order of the Tribunal 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 purposes of assessment.

7. The issue before the Court on the preliminary objection is whether the order of the Tribunal relates, among other things, to the determination of any question having a relation to the rate of the duty of excise or to the value of goods for the purpose of assessment. The issue which arose before the adjudicating authority on the refund application has been stated to be thus in the order passed by the

Assistant Commissioner, Central Excise on 29 June, 2012:

"As such, I find that the moot question before me to decide is whether the duty payable on the finished goods lying in stock at the party's premises, at the time of its de-bonding and exit from an EOU scheme but continuance to exist as DTA, would be subjected to duty under main Section 3(1) of Central Excise Act, 1944 or under proviso to section 3(1) of the Act."

8. The Commissioner (Appeals) in his order dated 18 August, 2012 similarly stated that the issue before him was as follows:

"I find that the issue involved in this appeal is whether at the time of de-bonding, the duty is required to be paid in respect of the finished goods in stock in accordance with the proviso to Section 3(1) of the Central Excise Act, 1944."

9. According to the assessee, the answer to the aforesaid issue requires an adjudication of the following, amongst other things:

"(a) Determination of the status of the unit as to whether it is a EOU or a DTA as on 31-3-2011, when the duty was demanded on finished goods lying in stock;

(b) Determination of rate of duty whether duty applicable as per Section 3(1) of the Central Excise Act, the determination of duty is in accordance with the Central Excise Tariff Act, 1985,

Whereas

Under proviso clause (ii), the determination has to be in accordance with Customs Tariff Act, 1975 and Excise Tariff Act, 1985.

(c) Determination of valuation for the purposes of assessment, Section 4 read with Rules 4, 5 and 8 at the time of removal of excisable goods.

Whereas

in case of EOU, the Valuation of goods has to be done as per Section 14 of the Customs Act, 1962

(d) Determination of Exemption from payment of duty in respect of excisable goods produced or manufactured in an Export Oriented Undertaking, EOU, till the final exit order dated 10th June, 2011 was liable for payment of duty on finished goods as on 31-3-2011, which were earmarked and exported subsequently on 30-4-2011 and 16-5-2011 before the passing of the final exit order dated 10-6-2011."

10. All these issues, according to the assessee, are intrinsically linked and connected to the adjudication of an issue falling within the scope of Section 35L under which an appeal would lie only before the Supreme Court.

11. The Supreme Court has had an occasion to deal with a similar provision contained in Section 129D of the Customs Act in Navin Chemicals Manufacturing

& Trading Company Limited v. Collector of Customs, 1993(68) E.L.T. 3 (S.C.). The Supreme Court has held as follows:

"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 subsection (5) of Section 129D, 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."

12. This decision of the Supreme Court has been followed by a Division Bench of the Karnataka High Court in The Commissioner of Central Excise Vs. Mangalore Refineries and Petrochemicals Ltd.,

13. In a judgment of the Division Bench of the Bombay High Court in Sterlite Optical Technologies Ltd. v. Commissioner of Central Excise, Aurangabad, 2007(213) E.L.T. 658 (Bom.), it was held that the determination of the status of a unit would be one of the steps in the process of assessment:

"23. Considered on the above backdrops, the question of determination of status of the subject Unit will be one of the steps in the process of assessment. This

exercise would be an exercise; which can be said to be part of the assessment. In this view of the matter, in our view, the dispute involved in the appeal and the substance thereof is: what should be rate of duty on the goods cleared to the Domestic Tariff Area (D.T.A.). We have, thus, no hesitation to hold that the direct and proximate issues involved in the appeal for the purposes of assessment relate to the rate of duty applicable to the goods and the value thereof and the issue requiring determination of the status of the subject Unit would be one of the incidental issues. The contentions raised by the appellants, catalogued in Para (19) supra, also revolve around the rate of duty and valuation of goods for the purposes of assessment."

14. In the present case, in our view, the preliminary objection to the maintainability of the appeal would have to be accepted. Among the issues, the issue which was considered by both the first adjudicating authority as well as by the appellate authority, was whether the duty which was payable on the finished goods which were lying in the stock at the time of de-bonding, was liable to be paid in accordance with the proviso (ii) to Section 3(1) of the Central Excise Act, 1944. The issues which arose before both the adjudicating authority as well as the appellate authority included a determination of the status of the unit - as an EOU as claimed by the assessee or as a DTA unit as claimed by the revenue. Whether the rate of duty would have to be computed under proviso (ii) to Section 3(1) was again a matter which was intrinsically connected to the decision. The claim of the assessee includes a determination of whether an exemption from payment of duty would be available under the exemption notification dated 31 March, 2003 which applies to an EOU. Finally, a determination was necessary on whether the unit would continue to be an EOU till the final exit order was passed on 10 June, 2011 and whether the assessee would be liable to pay duty on the finished goods as on 31 March, 2011 which were exported on 30 April, 2011 and 16 May, 2011 before the passing of the final exit order. These issues would be intrinsically connected with the rate of the duty for the purpose of assessment.

15. Hence, in our considered view and having due regard to the law laid down by the Supreme Court and as followed by the judgments noted above, the appeal before this Court would not be maintainable. We, therefore, uphold the preliminary objection to the maintainability of the appeal.

16. However, we clarify that we have not made any observation on the merits or the correctness of the order passed by the Tribunal and the observations in the present proceedings shall only be confined to the determination of the preliminary objection before the Court. The revenue is, accordingly, at liberty to pursue independently the appellate remedy available against the order of the Tribunal. The appeal is, accordingly, dismissed.