

(2008) 04 J&K CK 0035
In the Jammu And Kashmir High Court

Commr. of Customs and C.E.	Vs	APPELLANT
Bharat Box Factory		RESPONDENT

Date of Decision : 03-04-2008

Acts Referred:

Central Excises and Salt Act, 1944 — Section 35G
Finance Act, 2004 — Section 91

Citation : (2008) 2 JKJ 459

Hon'ble Judges : K.S. Radhakrishnan, C.J.; Nisar Ahmad Kakru, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

K.S. Radhakrishnan, C.J.—These petitions have been preferred by the Commissioner of Customs and Central Excise u/s 35G of the

Central Excise Act, 1944, aggrieved by the orders passed by the Customs, Excise and Service Tax Appellate Tribunal, Circuit Bench, Srinagar

which ordered that the exempted amount of duty was required to be refunded for operationalising the exemption; education cess which was in the

nature of piggy back duty on the excise duties under the Central Excise Act, 1944, Additional Duties of Excise (Goods of Special Importance)

Act, 1957 and Additional Duties of Excise (Textile and Textile Articles) Act, 1978, was also required to be refunded because it was not at all

leviable in view of the entitlement to exemption worked out under paragraph 2 of the Notification. The Tribunal set-aside the orders passed by the

Commissioner of Appeals and allowed the appeals accordingly. Aggrieved by the same, the Commissioner of Customs and Central Excise has

preferred these applications raising the following question of law:

Whether Education cess levied and collected u/s 91 of the Finance Act, 2004 can

be considered as a duty of excise for the propose of grant of refund in cash or by way of self credit under Notification N0.56/2002-CE 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 Duty of Excise (Goods of Special Importance) Act, 1957 (58 of 1957); and (c) the Additional Duties of Excise Textile and Textile Articles) Act, 1978 leviable under Sub-section (3) of Section 3 of the said Act, mentioned in the said notification?

2. In support of the applicant's contention, various grounds were urged in these applications. When the matter came up for admission, preliminary

objection was raised by learned Counsel for the respondents, contending that an application u/s 35G of the Act was not maintainable before this

Court and the remedy, if any available to the Commissioner, is to approach the Apex Court u/s 35L of the Act. In support of his contention,

learned Counsel appearing for the respondents placed heavy reliance on the judgment of the Apex Court in Navin Chemicals Mfg. and Trading

Co. Ltd. Vs. Collector of Customs, and Commr. of Cus. and C. Ex. Vs. Primella Sanitary Products (P) Ltd., , Union of India (UOI) Vs. Auto

Ignation Ltd., and Colour-chem. Ltd. Vs. Union Of India, ; Punjab and Haryana High Court judgment in Commissioner of Central Excise,

Chandigarh v. Suraj Udyog Ltd. 2008 (158) ELT 684 (P & H); Laxmi Udyog Vs. Commissioner of Central Excise, ; Perfect Electric Concern

Pvt. Ltd. Vs. Assistant Collector/Commissioner, Central Excise, , M/s. Raipur Grinding Industries Corporation Vs. Union of India and Others, and

Shalimar Rubber Industries Vs. Union of India, .

3. Mr. Magoo, learned Counsel for the Commissioner, Customs and Central Excise, submitted that an appeal would lie to the High Court against

every order passed in appeal by the Appellate Tribunal, 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.

4. Before examining the preliminary objection raised by learned Counsel for the respondents, we may refer to the brief facts of the case. Questions

involved in all these cases are identical, hence, we refer to the facts of the first

appeal, CEREf No. 01/2008 and decide the question accordingly.

5. M/s Bharat Box Factory Ltd. is holding central excise registration in respect of their units which are engaged in the manufacture of printed

corrugated cartons, printed duplex cartons and mosquito repellent coils. These items fall under tariff items 4819.12; 4819.19 and 3808.10 of the

first schedule to the Central Excise Tariff Act, 1985. However, the Company is also availing the CENVAT credit facility under Rule 3 of the

Cenvat Credit Rules, 2004 on duty paid inputs as well as on capital goods. They are also availing benefits of Notification No. 56/2002-CE dated

November 14, 2002, as amended. In respect of their Unit-1, the respondent-company had filed a refund claim by way of self credit for Rs.

32,00,562 on account of Central Excise duty and for Rs. 53,936 on account of education cess paid through Permanent Ledger Account for the

month of August 2005. Similarly, in respect of their Unit-II, the respondent-Company had filed a refund claim for Rs. 40,68,392 on account of

Central Excise duty and for Rs. 31,368 on account of education cess paid through Permanent Ledger Account for the month of August 2005. The

Assistant Commissioner, Central Excise, vide his orders dated September 27, 2005 and October 3, 2005, sanctioned the refund claims of Rs.

32,00,562 and Rs. 40,68,392 and rejected the refund claims of Rs. 63,936 and Rs. 813.68 on account of education cess on the reasoning that

education cess was not exempted under notification dated November 14, 2002. Aggrieved by the same, the respondent filed appeal before the

Commissioner (Appeals), Central Excise, Jalandhar. The Commissioner (Appeals), vide his order dated December 7, 2005, upheld the order of

the Adjudication Authority and rejected the respondent's appeal. The respondent then filed appeal before the Appellate Tribunal. The Tribunal

vide order dated June 12, 2006 set aside the orders of the Commissioner (Appeals) and allowed the appeals with consequential relief to the

respondent holding that education cess was also required to be refunded on the reasoning that it was in the nature of piggy back duty on the excise

duties under Central Excise Act, 1944; Additional Duties of Excise (Goods of Special Importance) Act, 1957 and Additional Duties of Excise

(Textiles and Textiles Articles) Act, 1978 and, therefore, was not at all leviable in view of entitlement to exemption worked out under paragraph 2

of the notification.

6. From a perusal of the provisions of the aforementioned Acts as well as the claims made by the respondent is, it is clear that the orders impugned related to the rate of duty of excise.

7. The Apex Court in *Navin Chemicals Mfg & Trading Co. Ltd. v. Collector of Customs (supra)* had the occasion to consider the scope of

Section 129C(4), 129D(5), 130(1) and 130E(b) of the Customs Act, 1962 and Sections 35D(3), 35E(5), 35G(1) and 35L(b) of the Central

Excise and Salt Act, 1944. The Apex Court examined the scope of words ""determination of any question having a relation to the rate of duty of

customs to the value of goods for purposes of assessment"". The provisions of Section 129C of the Customs Act, 1962 are *pari materia* with the

provisions of Section 35G of the Central Excise Act, 1944. Interpreting this provision, the Apex Court held as follows:

It will be seen that Sub-section (5) uses the said expression 'determination of any question saving 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 Sub-section (5) of Section 12.9D, 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.

8. The aforesaid judgment 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, .

9. The Bombay High Court in *Sterlite Optical Technologies Ltd. v. Commissioner of C. Ex, Aurangabad 2007 (213) ELT 658 (Bom.)* also

considered the scope of Section 35G of the Central Excise Act, 1944, Placing reliance on *Navin Chemicals Mfg & Trading Co. Ltd. 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.

10. 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.

11. 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.

12. We, therefore, uphold the preliminary objection raised by the respondents in all these cases and dismiss all these applications.