

(2017) 08 AP CK 0039
In the Andhra Pradesh High Court
Case No : 18147 of 2017

M/s. Aveco Technologies Pvt. Ltd. Secunderab	APPELLANT
Vs	
Union of India, rep. by its Secretary	RESPONDENT

Date of Decision : 24-08-2017

Acts Referred:

Constitution of India, Article 226 -
Power of High Courts to Issue certain writs
Customs Act, 1962, Section 129A (1) -
Appeals to the Appellate Tribunal

Citation : (2017) 08 AP CK 0039

Hon'ble Judges : V.Ramasubramanian, T. Rajani

Bench : DIVISON BENCH

Advocate : S. Ravi, B. Narasimha Sarma

Judgement

1. The petitioner has come up with the above writ petition challenging an Order-in-Original passed by the 2nd respondent, classifying the projectors imported by the petitioner under Tariff Item No.85286900 and not under Tariff Item No.85286100, resulting in the denial of the benefit of exemption under notification dated 01.03.2005.
2. Heard Mr. S. Ravi, learned Senior Counsel appearing for the petitioner and Mr. B. Narasimha Sarma, learned Senior Standing Counsel appearing for the respondents.
3. By a notification bearing No.24/2005, dated 01.03.2005, the Central Government exempted certain goods from the whole of the duty of customs. The goods falling under Tariff Item No.85286100 were included as one of the items in the table under Notification No.24/2005, by an amendment issued under Notification No.132/2006, dated 30.12.2006.
4. The petitioner has been importing Multi-Media Projectors of various brands including Sanyo, Panasonic, Hitachi, etc., and selling them in the domestic market by clearing the goods on the basis of the classification under Tariff sub-

heading 85286100. But in respect of one of the earliest consignments that the petitioner imported, the Deputy Commissioner of Customs, Air Cargo, passed an order on 27.11.2007 rejecting the claim of the petitioner for classification under Tariff Item No.85286100 and classifying the goods imported by the petitioner under Tariff Item No.85286900.

5. The said Order-in-Original was set aside by the Commissioner Appeals-II and the matter remanded back to the original authority on the sole ground that the technological features of the imported items were not considered by the original authority and that the question as to whether the projectors imported by the petitioner were used solely or principally with ADPS, had to be determined with reference to the technical parameters.

6. After remand, the original authority passed a fresh order on 06.06.2008, after considering the technical parameters that the classification of the projectors imported by the petitioner under the Bill of Entry No.1848, dated 24.09.2007, should be restored to CTH 85286100. This order of the original authority was challenged by the Revenue in an appeal. But by an order dated 31.10.2008, the appeal filed by the Revenue was dismissed by the Commissioner Appeals.

7. The Revenue filed a further appeal before CESTAT. The CESTAT dismissed the appeal by an order dated 01.09.2010. As a consequence, a finality reached, to the finding of the original authority that the goods imported under the Bill of Entry dated 24-09-2007 had to be classified under CTH 85286100.

8. More than six years of the culmination of those proceedings, the Additional Director General of Revenue (Intelligence) issued a show cause notice dated 08.11.2016 calling upon the petitioner to show cause why the goods should not be reclassified under Tariff Item No.85286900. Challenging the said show cause notice, the petitioner filed a writ petition in W.P.No.5712 of 2017. But the said writ petition was dismissed by a Bench of this Court by an order dated 17.02.2017.

9. Therefore, the petitioner submitted a reply to the show cause notice and participated in the hearing. Thereafter, the 2nd respondent passed an Order-in-Original dated 28.03.2017 rejecting the claim of the petitioner for classifying the goods under Tariff Item No.85286100 and reclassifying the same under Tariff Item No.85286900. It is against the said order that the petitioner has come up with the above writ petition.

10. Admittedly the petitioner has a statutory alternative remedy of appeal to the CESTAT under Section 129A (1) of the Customs Act, 1962. But the petitioner has chosen to bypass the alternative remedy of appeal on the ground that the issue raised before the original authority was already covered by a quasi judicial order passed by the jurisdictional Tribunal and that an attempt by a subordinate authority to over reach the order of a superior Tribunal can be nipped in the bud. Reliance is placed in this regard by Mr. S. Ravi, learned Senior Counsel appearing for the petitioner, on the decision of the Constitution Bench of the Supreme Court

in Bhopal Sugar Industries Limited v. Income Tax Officer.

11. We have carefully considered the above submissions.

12. If what the petitioner contends is correct, viz., that the impugned order is nothing but an attempt at over reaching the order of the Tribunal, which is a superior authority, then it is not necessary for this Court exercising jurisdiction under Article 226, to drive the petitioner to the appellate authority for availing the alternative remedy. Therefore we may have to first see (1) what was the dispute that went before CESTAT in the year 2010; (2) what was decided by CESTAT in its order dated 01.09.2010; and (3) what is the nature of the dispute now on hand and whether there are any distinctive features.

13. In order to find an answer to the above questions, we shall go back to the dispute raised in the year 2007, which became the subject matter of a decision of the Tribunal in the year 2010. Before we shall do that, let us first take note of the description of the Chapter Heading and sub-heading of the Tariff Item in question. It reads as follows: 8528 Monitors and projectors, not incorporating television reception apparatus, reception apparatus for television whether or not incorporating radio- broadcast receivers or sound or video recording or reproducing apparatus.

Projectors:

85286100 -- Of a kind solely or principally used in an Automatic Data Processing system of heading 8471 85286900 -- Other.

14. In the first round of litigation between the petitioner and the department, the petitioner filed a Bill of Entry dated 24.09.2007 for the clearance of 50 sets of VT49G SVGA projector and one number of VT70 LAMP, as per two import invoices dated 19.09.2007.

15. The petitioner claimed in the year 2007 vide letter dated

16. 10.2007 that the projectors imported by them were multi-functional in operation and were principally used in education, business, conference rooms, large ventures, training and seminars and that those projectors were of SVGA to UXGA resolutions, having an analog or DVI inputs. The petitioner claimed that 98 to 99% of these projectors were principally used in computer applications. The petitioner also produced before the original authority, at the time of adjudication in November 2007, a comparative chart between computer multi-media projectors used in business and education and home theatre projectors. The original authority, who passed the order of adjudication on 27.11.2007 (in the first round of litigation), found on facts that the projectors imported by the petitioner can be connected not only to an Automatic Data Processing System (ADPS), but can also be connected to a DVD player, video camera, LCD player, audio player and even play-station for playing games. The original authority also took note of the fact that the projectors in question could actually function without being connected to ADPS or Central Processing Unit and that therefore,

the essential requirement, viz., solely and principally used in ADPS, for availing the benefit of classification under Tariff Item No.85286100 was not satisfied. 16. But the appellate authority (in the first round of litigation) was convinced by the importer to think that all the technological factors were not taken into consideration by the original authority. Therefore, the appellate authority remanded the matter back to the original authority.

17. The original authority, after remand, took note of the very same comparison chart recorded in its order before remand (passed in the first instance), came to the conclusion that there are adaptors available in the market, which would facilitate even those not having AV port to be put to domestic use, and that therefore, the mere fact that these projectors can be connected to Laptop and used as entertainment devices, would not take the goods out of the classification.

18. After the said order of the original authority passed in favour of the petitioner after remand, was confirmed by the appellate authority, the matter reached the Tribunal at the instance of the revenue. The Tribunal took note of the decision of the Supreme Court in *M/s. Mauri Yeast India Pvt. Ltd. v. State of U.P.*, and confirmed the orders of the original and appellate authorities on the short ground that no evidence was produced before the lower authorities to indicate the usage of the goods for any other purposes, so as to disqualify them from being classified under Tariff Item No.85286100. In order to appreciate as to how the Tribunal arrived at a conclusion in favour of the assessee, it may be necessary to extract the findings of the CESTAT in paragraphs 8.4 and 8.5 of its order dated 01.09.2010, as follows: 8.4. It is undisputed that the goods imported by the assessee are Projectors. It is also undisputed that the said projectors have to be used in conjunction with ADPS. The only question is whether these projectors can be used solely or principally with the ADPS. We find that the Adjudicating Authority has clearly recorded a categorical finding in his OIO, that the words solely or principally should mean that the projectors should be predominantly used with ADPS though the possibility of other usage is not ruled out. It is seen from the records that no evidence was produced before the lower authorities to indicate that usage of such goods for any other purpose would disqualify them from being classified under the specific chapter heading No.i.e.85286100. It is also seen that the lower authorities have clearly held that for the goods imported by the assessee, to be classified under Heading 85286900, it needs to be demonstrated that the said goods are not compatible with Automatic Data Processing Systems and otherwise serve the desired purpose. In the absence of any evidence before them. The lower authorities were correct in holding that the assessee have amply demonstrated before them that the goods imported would be and can be used in conjunction with ADPS only. We find that the Revenue authorities, in their appeal before us, have also not adduced any evidence contrary to the findings of both the lower authorities. In the absence of any evidence, which is contrary to the findings of the lower authorities, we find that the ratio of the judgment of the Honble Supreme Court in the case of *Mauri Yeast India Pvt. Ltd.* (supra) would clearly cover the issue in favour of the assessee.

We may reproduce the same.

30. It is now a well settled principle of law that in interpreting different entries, attempts shall be made to find out as to whether the same answers the description of the contents of the basic entry and only in the event it is not possible to do so, recourse to the residuary entry should be taken by way of last resort.

40. It is now a well settled principle of law that when two views are possible, one which favours the assessee would be adopted. (See: Bihar State Electricity Board and another v. M/s. Usha Martin Industries and it is not a case where application of a commercial meaning or trade nomenclature runs contrary to the context in which the word was used as was the case in Akbar Badrudin Giwani v. Collector of Customs: (1990) 2 SCC 203.

8.5. We find that the Honble Supreme Court, in the case of Hindustan Poles Corporation (supra) has held that the residuary entry is meant only for those categories of goods which clearly fall outside the ambit of specified entries. Unless the Department can establish that the goods in question can by no conceivable process of welding be brought under any of the tariff items, resort cannot be had to the residuary item. We find that in the case before us, the Revenue has not established that the goods imported by the assessee were of a category, which cannot be used along with ADPS and nor there is any evidence to indicate that the said goods were and can be used without ADPS. Revenue has failed to produce any evidence before the lower authorities and before us also to indicate that the product merits classification under the residuary sub heading 85286900.

19. From the analytical portion of the order of the CESTAT extracted above, it is clear that the Tribunal was convinced to think (a) that no evidence was produced by the Revenue to come to the conclusion that the goods will come under the residuary classification; (b) that to come within the residuary classification, the goods should be demonstrated to be not compatible with ADPS; and (c) that there was no evidence to indicate that the goods could be used without ADPS.

20. Though the aforesaid order of the CESTAT dated 01.09.2010 had attained finality, as the CBDT decided not to appeal against the said order, we could not resist the temptation to point out one fallacy in the reasoning given by the CESTAT in its order dated 01.09.2010. The Tribunal accepted the findings of the original and first appellate authorities that the goods should be demonstrated to be not compatible with ADPS, so as to come under the residuary class. In other words, the Tribunal placed the burden upon the Department to prove that the goods imported would fall under residuary class. What the Tribunal appears to have over looked is the fact that the initial burden was cast upon the assessee to establish that the goods would come within the classification under Tariff Item No.85286100, especially when the description given to the said Tariff Item was qualified by the use of words of a kind solely or principally used in an ADPS.

Therefore, it was actually up to the assessee to establish that the projectors in question were of a kind solely or principally used in an Automatic Data Processing System. While we say so, we are conscious of a fine distinction between meant to be used and actually used. This distinction has to be kept in mind in view of the fact that it is settled law that the classification of a particular good cannot depend upon the actual use to which it is put to, by the end-user. The goods intended or meant to be used for a particular purpose, may be actually used for a completely different purpose by some end-users. The importer cannot be made to suffer a different classification on the basis of what the end-user does with the product.

21. But when the very description under a particular Tariff Item lays emphasis on sole use or principal use, it is the duty of the importer to demonstrate that the goods were meant or intended to be used solely or principally in an ADPS. When the very description of a particular Tariff Item lays emphasis on the sole or principal use of the goods in question, the Tribunal could not have said that the Revenue authorities were bound to establish that the goods were not compatible with ADPS, so as to fall under the residuary classification.

22. As we have pointed out earlier, we are not sitting in appeal over the judgment of CESTAT dated 01.09.2010. The revenue has chosen to accept the said decision and hence it is not up to us to subject the decision to a forensic autopsy. Yet we have recorded the above observations, just for the purpose of showing how far the decision of the Tribunal should be taken to be an intellectual milestone for the adjudicating authority to follow, whenever import of projectors take place. We reiterate that we have made the observations as aforesaid, with respect to the order of the CESTAT dated 01.09.2010, only for the limited purpose of deciding the level of the benchmark that it sets for the adjudicating authorities in respect of future imports.

23. Having done the above exercise, we shall now turn to the current dispute. Insofar as the current dispute is concerned, it is seen from the impugned order that the subject matter of the impugned order was the import of projectors made by the petitioner during the period from November 2011 to September 2016. During this period from November 2011 to September 2016, the petitioner had imported various models of projectors of Hitachi, Panasonic, Sanyo etc., classifying them as goods coming under Tariff Item No.85286100. But on specific intelligence that there was misclassification by the petitioner, an investigation was undertaken by the directorate of Revenue Intelligence. The investigation team visited the office of the petitioner at Hyderabad and Visakhapatnam on 06.01.2016, inspected the records, recorded the submissions of the officers of Hitachi India Private Limited, Panasonic India Private Limited, which happened to be the Indian Division of the respective manufacturers, and thereafter, issued a show cause notice dated 08.11.2016. Therefore, there are two distinguishing features in the case on hand, and they are 1. The order of CESTAT dated 01.09.2010, which had attained finality, related to the imports made in the year

2007 under two specific invoices, but the subject matter of the present controversy are the imports made during the period from 2011-2016. It is nobodys case and it can never be anybodys case that technology remains static. Some times law may remain static, by people celebrating it as a settled position of law, but technology never remains static. Therefore, the petitioner, in order to be entitled to the benefit of the decision of CESTAT, dated 01.09.2010, should positively demonstrate that the specifications of the projectors imported under the two invoices of the year 2007 were exactly the same as the specifications of the projectors imported during the period from 2011 to 2016. Otherwise the petitioner will not be eligible to plead finality to the order of CESTAT. The order of CESTAT dated 01.09.2010 has attained finality insofar as goods of the description covered by the bill of entry dated 24.09.2007.

2. The second distinguishing feature is that in the first round of litigation, the Tribunal recorded a categorical finding that the revenue failed to produce evidence with regard to the technological features. In other words, the decision of the CESTAT in the first round of litigation was purportedly due to the failure of the department to produce evidence, but now the department has taken note of the specifications provided by the Indian counterparts of the manufacturers themselves, through statements recorded from the representatives of the Hitachi and Panasonic. Therefore, it is not possible for us to accept the contention that all future imports of all types of projectors by the petitioner are protected by the findings recorded by the CESTAT in its order dated 01.09.2010.

24. We must keep in mind the essential difference between a generic term and descriptive term. If description of Tariff Item No.85286100 is just projectors, then it is generic. But the moment the description qualifies the generic term projectors with certain attributes depending upon their use, then the entry ceases to be generic but becomes descriptive. What is included as Tariff Item No.85286100 are only projectors of a kind solely or principally used in an ADPS. The use of the words of a kind qualifies the goods that would come within the entry. In other words, the entry under Tariff Item No.85286100 is applicable only to those genre of projectors that fall within the description of a kind solely or principally used in an Automatic Data Processing System.

25. Therefore, the question as to whether the projectors imported under the bill of entry dated 24.09.2007, about which the adjudication reached finality before the CESTAT, are exactly the same as the projectors imported during the period from 2011-2016, which form the subject matter of the present dispute, is a question of fact. This question of fact cannot be decided solely or principally on the basis of the decision of the CESTAT, dated 01.09.2010. In other words, the impugned order cannot be attacked solely on the ground that it did not simply follow the decision of the CESTAT dated 01.09.2010. The decision of the CESTAT dated 01.09.2010 was based upon the evidence available on record that the projectors imported under the bill of entry dated 24.09.2007 fulfilled the description given in Entry No.85286100. Therefore, the decision has no universal

application to import all types of projectors for all times to come.

26. Once this is clear, it is not possible for us to allow the petitioner to bypass the alternative remedy of appeal.

27. As a matter of fact, the 2nd respondent herein has recorded a clear finding in paragraph 37.3 and 37.4 to the following effect: 37.3 I find that in the case before me the goods are very different from the ones in the earlier case before the Honble CESTAT, and these differences have been amply discussed in para 36 coolly, hereinbefore. Besides, in the present case, there is clear evidence about the trade understanding of these goods backed by how the others are classifying these goods, a factor which makes it materially different from the earlier case. Thirdly, some of the factual findings on which the decision of the Honble CESTAT had turned in the earlier case are clearly not applicable in the present case for example, it was found by the Honble CESTAT in that case (para 8.4) that it is also undisputed that the said projectors have to be used in conjunction with ADPS, whereas in the case before me the notices have themselves admitted otherwise as can be seen from para 7(xiv) hereinbefore where it is mentioned that in reply to the question, Does not the provision of various input terminals in the projectors as discussed above an affirmation that they can be used independently without the ADPS?, Shri Jain replied as yes, they can be used independently without the ADPS. It is further seen from para 8.4 of the Honble CESTATs Order in the earlier case that the revenue authorities have not adduced any evidence contrary to the findings of both the lower authorities (which were that the goods imported would be and can be used in conjunction with ADPS ONLY. This finding also is clearly not applicable in the case before me, as here there is ample evidence in the form of trade opinion and practice in favour of CTH 85286900.

37.4 Thus, clearly, the earlier decision by the Honble CESTAT in the assessee's case is distinguishable, - not just in terms of the differences in goods but also in terms of the nature of evidence (about the goods being of a kind equally usable with ADPS and non-ADPS) and the fact of the goods in the present case being (unlike in the earlier case as found by Honble CESTAT) very much usable without ADPS. Therefore, applying the ratio laid down by the Honble Supreme Court in the Alnoori case cited supra, I hold that the said earlier CESTAT decision is not applicable to the case before me.

28. When the very nature of the entry under Chapter Heading and sub-heading warrants an enquiry in respect of every import, due to the use of the words of a kind solely or principally used in ADPS, the petitioner cannot cite the CESTAT order as a precedent, except in cases where the specification of the goods imported every time are of the same specification as the goods imported in 2007 that became the subject matter of the order of the CESTAT dated 01.09.2010.

29. Therefore, we are of the considered view that the impugned order can be attacked on findings of fact by the petitioner only before the regular appellate

authority and that this is not a case warranting the bypassing of the alternative remedy of appeal, on the ground that the issue is already clinched in favour of the assessee. Therefore, the writ petition is liable to be dismissed.

30. The impugned order is actually dated 28.03.2017 and the date of issue of the order is indicated to be 18.04.2017. The petitioner filed the writ petition on 06.06.2017 and a Bench of this Court admitted the writ petition on 07.06.2017 and granted an interim stay. Therefore, the period during which a stay was in operation, viz., 07.06.2017 till the date of disposal of the writ petition should be excluded from the period of limitation for filing an appeal before the CESTAT.

31. We were actually tempted to record our appreciation for the manner in which the 2nd respondent had dealt with the technical as well as legal aspects in his original order, in a lucid manner, but we refrain from doing so, lest the Tribunal may be carried away by the same. We make it clear that when an appeal is filed by the petitioner, the Tribunal shall independently deal with the grounds of appeal without being influenced by any of our observations.

32. Hence the writ petition is dismissed with liberty to the petitioner to file a regular statutory appeal and upon an appeal being filed, the Tribunal shall exclude the period from 07.06.2017 up to the date of issue of this order, for computing the period of limitation. The Registry is directed to return the original impugned order to the petitioner to enable the petitioner to file a statutory appeal. As a sequel, the miscellaneous petitions pending, if any, shall stand closed.

33. After we pronounced the orders, the learned Senior Counsel for the petitioner requested an interim protection to enable the petitioner to file an appeal. Therefore, the impugned order shall stand suspended for a period of two weeks from the date of receipt of a copy of this order, to enable the petitioner to move a statutory appeal.