

(1989) 12 GUJ CK 0012
In the Gujarat High Court

Case No : Special Civil Application No. 2419 of 1989

Sarabhai Electronics Ltd.

APPELLANT

Vs

Union of India

RESPONDENT

Date of Decision : 28-12-1989

Acts Referred:

Central Excise Rules, 1944 — Rule 173, 173B, 173F, 173G(2), 173G(4)
Central Excises and Salt Act, 1944 — Section 35D, 6
Customs Act, 1962 — Section 129C(1), 129C(2), 129C(5), 129C(6)

Citation : (1990) 53 ELT 549

Hon'ble Judges : K.J. Vaidya, J;A.P. Ravani, J

Bench : Division Bench

Advocate : J.M. Thakore, A.G. and K.S. Nanavati, for the Appellant; J.D. Ajmera, for the Respondent

Judgement

Ravani, J.—The petitioner manufactured "Computers" which fall under Tariff Item 33DD of the First Schedule to the Central Excises and Salt Act, 1944, under a Central Excise Licence dated May 14, 1984. Petitioners got the computers manufactured by supplying raw materials from two independent manufacturers, namely (1) M/s. Digital Systems International, Baroda and (2) M/s. Orbit Electronics Baroda. These computers were sold through M/s. Adprint Services Ltd., Baroda. According to the department, the assessable value on which duty was paid by the manufacturers of computers was considerably low in comparison to the value ultimately collected from the customers to whom the computers were sold by M/s. ORG Systems, a Division of Ambalal Sarabhai Enterprises Ltd., the petitioner herein.

2. On March 22, 1984 the officers of the Central Excise Department visited the factory premises of Orbit Electronics and obtained records of the unit for scrutiny and examination. Preliminary scrutiny of the records revealed that "Orbit" was manufacturing computers exclusively for and on behalf of Adprint Services on job work basis. On March 26, 1984 the Officers also visited the factory and office premises of M/s. Digital System International, Baroda and collected records from

the unit for further scrutiny and examination. Officers of the Central Excise found that M/s. Digital System International, Baroda, were also manufacturing the computers for and on behalf of "Adprint" on job work basis, besides manufacturing the computers of their own. Thereafter, on June 20, 1984 the officers of the Central Excise Department visited the office premises of "Adprint" situated at Chhani, District Baroda. The Officers found that "Adprint" was not carrying out any manufacturing activity but was only located in one of the rooms of the building belonging to ORG Systems wherein one unit in the name and style of Research and Development Centre of ORG was situated and was engaged in the preparation of softwares as well specifications and designs of computers. The Officers further found that the computers manufactured by "DSI" and "Orbit" for and on behalf of "Adprint" were manufactured as per designs and specifications developed by Research and Development Centre from May, 1982.

3. During the course of enquiry the Officers of Central Excise visited the factory of M/s. ORG Systems situated at Vadi Vadi, Baroda. On scrutiny of further records it was found that "Adprint" had supplied components/materials to "DSI" and "Orbit" of the value mentioned below during the period from May, 1979 to May, 1984 :

Rs. 1,32,03,870.00 : Components and materials supplied by DSI.

Rs. 28,64,019.00 : Components and materials supplied by "Orbit".

Out of the above materials, "DSI" and "Orbit" had manufactured and removed computers on payment of duty to "Adprint " of the value mentioned below from 1979 to May, 1984 :

Rs. 2,21,86,199.00 : DSI

RS. 38,29,008.00 : "Orbit"

The Officers also observed that after having received the computers data-entry systems and data-processing systems of the models as aforementioned from "DSI" and "Orbit", "Adprint" was affixing the name plate of "ORG" by removing the trade mark "DSI" and "DES" and "DPS", and the name plate of "ORG" got manufactured by "Adprint" from M/s. Excel Graphics Pvt. Ltd., Bombay. It was further noticed that after adding certain peripherals in the computers and after converting the trade mark as above, "Adprint" has sold computers to different independent customers from the years 1979 to May, 1984 of the value of Rs. 10,71,58,210.00. It was further found that service charges for the installation of computers and also supply of softwares by "ORG" were collected by "ORG" as an approved party of "Adprint" in respect of the computers got manufactured from "DSI" and "Orbit" and supplied through "Adprint" to various customer during the years 1979 to May, 1984 at Rs. 8,80,49,778.28.

4. In view of the facts found by the Officers of the Central Excise as stated above, notice dated October 22, 1984 was issued to the petitioners alleging contravention of the provisions of Rule 174 read with section 6 of the Central

Excises and Salt Act, 1944, Rule 173F read with Rule 9(1), Rule 173B, Rule 173O, Rule 173G(2) read with Rule 52A and Rule 173G(4) read with Rule 53 of the Central Excise Rules, 1944. The petitioners were called upon to show cause against the recovery of duty on the goods i.e., computers, falling under Tariff Item 33DD at Rs. 19,50,07,989.08 ps. manufactured and removed by them during the period from 1979 to May, 1984 less duty already paid on the said goods by (i) M/s. Digital Systems International, Baroda and (ii) M/s. Orbit Electronics, Baroda and by themselves. Relevant provisions of the Act and the rules were also mentioned in the show cause notice and the petitioners were also called upon to show cause against imposition of penalty under the provisions of Rule 173Q(1) of the Central Excise Rules, 1944.

5. In response to the show cause notice the petitioners filed reply dated December 20, 1984 and further reply dated April 19, 1985. After following necessary procedure and after hearing the parties the Collector, by his order dated June 29, 1985 (Ann."B" to the petition) held that the charges levelled in the show cause notice dated October 22, 1984 were proved, and he ordered payment of duty of excise at the appropriate leviable rate amounting to Rs. 3,32,96,010.58 (Rs. 3,20,56,260.43 basic duty + Rs. 12,39,750.15 special excise duty) on the goods, i.e. computers falling under Tariff Item 33DD manufactured and removed by the petitioners during the period from 1979 to May, 1984. The Collector also imposed penalty of Rs. 25,00,000/-.

6. The petitioners preferred appeal before the Customs, Excise and Gold (Control) Appellate Tribunal, New Delhi. In appeal, by way of amendment a preliminary objection was raised as regards jurisdiction and competence of the adjudicating officer, i.e. the Collector of Central Excise, Baroda. According to the petitioners, the Collector had no jurisdiction to adjudicate the disputes, but the Assistant Collector was the only authority who could adjudicate the matter. The Tribunal by its order dated January 24, 1989 held that the Collector had the jurisdiction to decide the matter, and decided the preliminary objection against the petitioners. The Tribunal further directed that since the arguments were advanced by both the sides on the preliminary point, the Registry shall list the appeal for hearing on merits in the last week of March, 1989.

7. On March 27, 1989 the petition challenging the legality and validity of the order passed by the Tribunal has been filed in this High Court. This High Court has admitted the petition by order dated April 5, 1989 and has made the Rule returnable on July 7, 1989. Thereafter on May 1, 1989 the court has granted ad-interim relief staying further proceedings of appeal pending before CEGAT.

8. Respondents have appeared in the petition and affidavit-in-reply which is sworn on May 16, 1989 has been filed some time in June, 1989 for limited purpose of opposing the interim relief, wherein inter alia contention is raised as regards maintainability of petition at this stage.

9. The petitioners have kept their appeal before the Tribunal pending. As

indicated hereinabove, the appeal is yet to be decided on merits. The petitioner have also inter alia prayed in this petition that the order dated June 29, 1985 passed by the Collector confirming the show cause notice be quashed and set aside. Thus, it is obvious that the petitioners are pursuing two parallel proceedings in respect of the same subject matter. After having failed to obtain a favourable order on preliminary objection raised in appeal, the petitioners have approached this Court and the petitioners request this Court to decide the preliminary objection raised by them in appeal. Therefore, the question arise : "Has the appellate Tribunal followed the correct procedure and if not, should this High Court also follow the same erroneous path and permit the petitioners to challenge the decision on preliminary objection while keeping the appeal filed before the appellate Tribunal pending and awaiting decision thereon, on merits ?"

10. Section 35D of the Act provides for the procedure to be adopted by the appellate Tribunal. As provided in this section, in respect of the procedure before the appellate Tribunal, the provisions of Section 129C (1), (2), (5) and (6) of Customs Act, 1962 shall be applicable. Section 129C(6) of the Customs Act, 1962 provides that subject to the provisions of this Act (i.e. Customs Act, 1962) the Appellate Tribunal shall have power to regulate its own procedure and the procedure of the Benches thereof in all matters arising out of the exercise of its powers or of the discharge of its function, including the place at which the Benches shall hold their sittings. Thus, it is clear that as far as the procedure to be adopted for hearing of appeals is concerned, the Tribunal has very wide powers. But wider the powers, greater the need to exercise restraint and circumspection. Why hearing of appeal should be piecemeal ? Why, in appeal, wherein entire record is available for examination, the matter be not heard on all the points and all the points be not decided together simultaneously ? Therefore, the question is : Is it just and proper that such a course be adopted by the appellate Tribunal ?

11. Ordinarily it may happen, and one can very well visualize also, that before the original forum the issues purely of law may be required to be decided as preliminary issues. But we fail to understand why at the appellate stage the Appellate Tribunal should have adopted such a course. Even in respect of the original forum, when there is a specific provision in Order 14, Rule 2 of the CPC for deciding preliminary issues separately, the settled legal position is that such course should normally be not adopted by lower courts. Way back in 1943 a Division Bench of the Bombay High Court in the case of Shivshankar Chhaganlal Shukla v. Laxman Chimanlal Soni and Others AIR (30) 1943 Bombay 83 , has inter alia observed that the learned trial court Judge had "ignored the direction so often repeated by the Privy Council that in all cases open to appeal the trying Judge should determine and give findings on all the issues, so that the appellate Court might have the benefit of the view of the evidence taken by the trying Judge and need not remand the case". The Supreme Court in the case of Major S.S. Khanna Vs. Brig. F.J. Dillon, , observed that "normally all the issues in a suit should be tried by the Court : not to do so, especially when the decision on

issues even of law depends upon the decision of issues of fact, would result in a lop-sided trial of the suit."

12. The aforesaid decisions are based on the provision of Civil Procedure Code. But in our view the aforesaid principles laid down by the Bombay High Court and the Supreme Court should surely be borne in mind by the Appellate Tribunal while deciding the appeal. It may be that in original proceedings the preliminary issues may be required to be decided separately. But we see no reason whatsoever why in appeal the preliminary issues or preliminary objections raised should be decided first and the decisions on merits should be deferred. Adopting such course would result into waste of public time and money and would also keep the assessee under tension. The assessee would not be in a position to know his position one way or the other. Some time it may help the assessee to delay the final decision. But in that case the community at large suffers. At any rate the appellate forum should as far as possible avoid deciding the preliminary points or preliminary issues objections separately. It would be just, proper and fair to decide all points together, much more so in appeal. In this view of the matter we are of the considered opinion that the course adopted by the appellate Tribunal is not just and proper. The appellate Tribunal ought to have decided all the points simultaneously together. Before the appellate Tribunal the entire record would be available. There is no need of recording evidence on preliminary points/issues and on other points/issues. Therefore, to avoid delay in final adjudication of appeal and also to avoid possible injury to the community at large, the Tribunal ought to have decided all the points together.

13. In above view of the matter, if we decide the petition challenging the decision of Appellate Tribunal on preliminary objection/issue only, we would be perpetuating the same error committed by the Tribunal. Not only that, it may be said that we are putting our imprimatur on the erroneous course adopted by the Tribunal, which we would never like to do, on the contrary we disapprove of such piecemeal hearing of appeal.

14. In the instant case the Collector of Central Excise and Customs, Baroda decided the entire matter on merits. The appeal preferred against the order of the Collector is still pending before the appellate Tribunal and it is yet to be decided on merits. In the facts of the case and particularly in view of the fact that the decision on merits is still awaited and in our opinion the appellate Tribunal has committed an error in deciding the preliminary objection separately, we would not like to follow the same erroneous path and decide the petition challenging the legality and validity of the decision of the appellate Tribunal on preliminary objection only. After the appeal is heard and finally decided by the appellate Tribunal, the petitioners may challenge the legality and validity of the order passed and that may be passed by the appellate Tribunal.

15. In the result the following order is required to be passed in this petition :

16. The petition is rejected. The petitioners may proceed further with the appeal

pending before the appellate tribunal. The Appellate Tribunal shall take decision on merits of the appeal in accordance with law. It is clarified that if the petitioners feel aggrieved by the final decision of the appellate Tribunal, the petitioners may challenge the legality and validity of the same before the appropriate forum as it may be available to the petitioners. In that case rejection of this petition at this stage shall not be treated as a ground debarring the petitioner from raising all available contentions including the contentions raised in this petition against the decision of appellate Tribunal on preliminary objection/issue. Subject to the aforesaid observation, the petition stands rejected. Rule discharged. Interim relief granted earlier stands vacated.