(2010) 01 BOM CK 0100

In the Bombay High Court

Case No : Customs Appeal No. 53 of 2007

Shiv-Vani Oil and Gas Exploration Services Ltd. APPELLANT

Vs

C.C. (I) RESPONDENT

Date of Decision : 27-01-2010

Acts Referred:

Citation : (2010) 254 ELT 42

Hon'ble Judges : V.C. Daga, J;K.K. Tated, J

Bench : Division Bench

Advocate : P.S. Jately, for the Appellant; V. Sridharan and Prakash Shah, instructed by PDS Legal, for the Respondent

Judgement

V.C. Daga, J.—This appeal at the instance of the Revenue is directed against the order dated 12th April, 2007 [2007 (219) E.L.T. 714 (Tri. - Mumbai)] passed by the Customs, Excise & Service Tax Appellate Tribunal, West Zonal Bench, Mumbai ("CESTAT" for short), wherein the Tribunal has taken a view contrary to the view taken in the case of Shiv Vani Oil and Gas Exploration Services Ltd. v. Commissioner of Customs, Mumbai 2007 (219) E.L.T. 714 to hold that the heavy duty engine used for drilling purpose was capital goods. The above appeal was admitted by this Court for consideration vide order dated 26th April, 2007 on following substantial questions of law:

(a) Whether in the facts and circumstances of the case, the CESTAT was right in holding that the imported engines are not capital goods for the purpose of para 9.12 of the Policy and therefore liable to confiscation?

(b) Whether in the facts and circumstances of the case, the CESTAT was right in not considering and applying the decisions of Supreme Court in Commissioner of Income Tax, Andhra Pradesh Vs. Taj Mahal Hotel, Secunderabad, and Scientific Engineering House (P) Ltd. Vs. Commissioner of Income Tax, Andhra Pradesh, , on the ground that the term capital goods is defined in para 9.12 of the Policy, when the term ''plant'' is not defined in the Foreign Trade Policy 2004-09?

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(c) Whether in the facts and circumstances of the case, the Tribunal was right in not following the decisions in 2004 (177) ELT 431 and La Grande Projects v. CC 2005 (192) E.L.T. 874 when these decisions themselves are incorrect in law?

Submission:

2. Mr. Sridharan, learned Counsel for the petitioner submits that the CESTAT was not justified in holding that the imported engines are not capital goods for the purpose of para 9.12 of the Policy and as such it was liable for confiscation. He, further submits that the respondent Revenue did not dispute that the present appellant was engaged in the oil and gas exploration services as well as also undertaking manufacturing activity. According to him, the definition of capital goods given in paragraph 9.12 of Foreign Trade Policy 2004-2009, capital goods includes, plant, machine, machinery equipment or accessories required for manufacture. Secondly, engines in question are either machinery or plant or equipment. He placed into service the judgments of Adjudicating Officer to contend that the engine is a machine. According to him, as per the judgment of the Supreme Court in the case of Commissioner of Income Tax, Andhra Pradesh Vs. Taj Mahal Hotel, Secunderabad, and Scientific Engineering House (P) Ltd. Vs. Commissioner of Income Tax, Andhra Pradesh, , the engines are to be treated as a plant. He further submits that the engines in question here, are used in producing goods either directly or indirectly. Hence, the goods were well without the definition of capital goods contained in the policy. Therefore, no licence was required from the DGFT.

3. Mr. Sridharan, alternatively, submits that at any rate engine does not cease to be a machine or plant or equipment. The engines in question are used for producing oil or gas or either directly or indirectly. He, thus, submits that the engines are capital goods.

4. Mr. Sridharan urged that in the case of 2004 (177) ELT 431 , the importer was a Trader and not actual user. It was'' a case of second hand engine and not type of engine which was imported by the appellant in the present appeal. That is how, he tried to distinguish the said judgment. He, thus, submits that the impugned order is bad and illegal. Mr. Sridharan also urged that the view taken by the Tribunal is running counter to the view taken by the Apex Court in the case of Mir Mohamad Ali, Bus Owner, Vellore Vs. Commissioner of Income Tax, Madras, , wherein, the Apex Court has held that the diesel engine is clearly machinery. He also tried to place reliance on the judgment of the Apex Court in the case of Vikram Cements v. Commissioner of Central Excise 2005 (87) E.L.T. 145 , in support of his submission.

Per Contra

5. Mr. Jately, learned Counsel appearing on behalf of the respondent-Revenue tried to support the view taken by the Tribunal contending that, the view taken by the Tribunal is in consonance with the judgment of the Apex Court in the case of Khurana Exports (supra). That is how he tried to support the impugned order.

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According to him, the Apex Court judgment in the case of Mir Mohd. Ali (supra) or in the case of Vikram Cements (supra) does not deal with the subject goods. He tried to distinguish the said judgments.

Consideration

6. Having heard both the parties, from the impugned order, it is clear that earlier, the judgment of the Tribunal in the case of 2005 (190) ELT 100 , was relied upon by the importer in support of its submission, wherein the Tribunal had taken a view that the diesel engine would be well within the sweep of the capital goods. The said judgment was side-tracked by the Tribunal observing that this judgment related to the assembled engine as such it was not comparable. In our considered view, the said judgment could not have been distinguished by the Tribunal on this slender ground. It was expected on the part of the Tribunal either to deal with the contentions of the parties in detail or to refer it to a Larger Bench if contrary view was to be taken.

7. The very judgment of the Tribunal in the case of Wartsila India (supra) has been set aside by us vide our judgment dated 27th January, 2010 for the reasons recorded therein and the matter is remanded back to the Tribunal, for consideration afresh. Since, the identical issue is involved in this case, and for the reasons recorded therein, we deem it fit to set aside this order without expressing any opinion on the merits or demerits of the controversy involved and direct the Tribunal to hear this appeal along with remanded appeal in the case of Wartsila India Ltd. (supra)(Appeal No. C/471/2005 Mum filed before the Tribunal) and directed the Tribunal to decide the same on its own merits by a reasoned order following principles of natural justice, If the Tribunal decides to take a view contrary to the view already holding the filed, it is expected on the part of the Tribunal to make appropriate order of reference in that behalf.

8. According to Mr. Jately the Apex Court judgment in the case of Mohd. Ali (supra) does not deal with the subject goods. He tried to distinguish the same. In his submission each of import is required to be considered on its own merits. Since, we are remanding matter to the Tribunal for consideration afresh, we do not propose to dwell on the merits of the issue any further. We think it fit to leave the said question for the consideration of the Tribunal on its own merits since we are remitting this matter to the Tribunal for consideration afresh.

9. In the aforesaid view of the matter, the impugned order is quashed and set aside and the matter is remanded back to the Tribunal for consideration afresh. The appeal is restored to the file of the Tribunal for being heard with Appeal No. C/471/2005-Mum filed before the Tribunal. Order accordingly.

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