

(2010) 09 KAR CK 0066
In the Karnataka High Court
Case No : CEA No. 6 of 2007

The Commissioner of Central Excise

APPELLANT

Vs

Mangalore Refineries and Petrochemicals Ltd.

RESPONDENT

Date of Decision : 01-09-2010

Acts Referred:

Central Excise Tariff Act, 1985 — Section 11 AB, 11 AC, 35 G, 35 L

Citation : (2011) 185 ECR 145 : (2011) 270 ELT 49 : (2011) 2 KCCR 119 SN

Hon'ble Judges : N. Kumar, J;H.S. Kempanna, J

Bench : Division Bench

Advocate : Veena Jadhav, for the Appellant; Rajesh Chander Kumar and Yovini Rajesh for Chander Kumar and Associates, for the Respondent

Final Decision : Dismissed

Judgement

N. Kumar, J.—This appeal is by the Revenue challenging the order passed by the Customs. Excise and Service Tax Appellate Tribunal (for short hereinafter referred to as CESTAT) holding that the impugned product is not excisable and therefore, there is no liability to pay duty.

2. The Assessee-M/s. Mangalore Refinery and Petrochemicals Ltd. is a holder of Central Excise Registration Certificate. It is engaged in the manufacture of various petroleum products including Lower Sulphur Heavy Stock (LSHS) falling under heading 27 of the schedule to the Central Excise Tariff Act, 1985 (for short hereinafter referred to as "the Act"). The LSHS was captively consumed for the generation of steam. The steam so generated was utilized for the generation of electricity. The Assessee filed classification declaration for claiming exemption from payment of duty under notification No. 67/95 CX dated 16.3.1995 for captive consumption of LSHS.

3. Intelligence gathered by the department indicated that the electricity so generated was being diverted for purposes other than the use in or in relation to the manufacture of petroleum products i.e. for construction purpose within the

factory premises, lighting MRPL residential colony and sale to M/s. Hindustan Gas Industries Ltd. (HGIL). It was found that the exemption under the Notification supra was not admissible to LSHS captively manufactured for generating such electricity for other purposes. Such use of LSHS was not declared in their classification declarations and it resulted in contravention of the provisions of Rule 173B(2)(b). Accordingly, a show cause notice was issued demanding duty of Rs. 33,12,928/- on the proportionate quantity of LSHS used in the generation of electricity, which in turn was not used in or in relation to the manufacture of final products during the period from April, 1996 to September, 1997. Proposal was also made to impose penalty u/s 11AC of the Act and the Rules and also to demand interest u/s 11AB of the Act.

4. The Commissioner of Central Excise Bangalore III vide in Original order No. 10/98 dated 28.10.1998 confirmed the demand of duty as proposed in the three show-cause notices. He also demanded interest and imposed penalty of 33,12,928/-. Aggrieved by the said order, the Assessee appealed to CEGAT. The Tribunal by its final order No. 423 to 425/02 dated 14.3.2002 remanded the matter for denova adjudication. After such remand while adjudicating the denova order, apart from three show cause notices which was subject matter earlier, three more show cause notices for subsequent period were also taken up for consideration. The Commissioner of Central Excise, Mangalore, vide order in original No. 4/03 dated 26.2.2004 confirming the demand and duty, imposed penalty under Rule 173Q of the Rules r/w. Section 11AC of the Act. Interest u/s 11AB of the Act was also demanded. Aggrieved by the said orders, the Assessee preferred an appeal to CESAT. In a similar case in respect of the order in original No. 11/2001 dated 27.4.2001 duty of Rs. 52,21,049/- was confirmed and penalty of Rs. 5,00,000 was imposed on the Assessee by the Assessing Authority against which the Assessee filed an appeal before the Commissioner of Appeals. The appeal was dismissed upholding the demand. Therefore, the Assessee preferred appeal to the CESTAT both against the appellate order as well as the original order.

5. The specific case pleaded by the Assessee was, LSHS manufactured in their refinery was captively consumed as fuel in the refinery operations and also used in steaming operations. The steam so developed was used captively in the manufacture of electricity within the refinery and that no portion of the LSHS has been moved outside the refinery. Their specific stand was LSHS was only an intermediate product intended only for captive consumption for use as fuel in the refinery operations and the Captive Power Plant; that LSHS was only a residue obtained while processing low Sulphur crude oil which was burnt in the refinery boilers and heaters in order to meet environmental stipulations imposed by the Central and State Governments; that the internal fuel oil (LSHS) did not meet the rigid specifications for LSHS specified by ISI. Therefore, the LSHS was merely an internal fuel oil used for consumption being neither marketed nor marketable. It was not an excisable product and therefore, no duty could be levied on the impugned quantity of LSHS.

6. Secondly, they contended in the alternative that the authorities did not go into the question, whether the disputed goods is excisable or not. The lower authorities rejected the said contention of the Assessee and held the disputed goods are excisable. They also held though the exemption notification is attracted, it. is not attracted to that portion of the goods which are not utilized in the manufacture of the petroleum products by the Assessee. In other words, to the extent the final product was used in lighting residential layout, used for construction activity and supply to their sister concern, they held the duty is liable to be paid and therefore, they affirmed the demand. Aggrieved by these two orders the Assessee preferred an appeal to the Tribunal.

7. In the appeal, the Tribunal after going through the records carefully, going through the process by which these lower sulphur crude is obtained, taking into consideration the percentage of sulphur in the said product and the temperature at which it is used and also looking into the flow diagram were of the view that the impugned product as such is not marketable even though it is loosely termed as LSHS. Since the impugned product is not marketable, the same is not excisable. If the impugned product is not excisable, there is no merit in the demand of duties. Therefore, the orders passed by the authorities as well as the demands were set aside by allowing the appeal. Aggrieved by the said order, the Revenue is in appeal.

8. The learned Counsel for the Revenue assailing the order of the Tribunal contended that, it. is not in dispute that the impugned product satisfies the requirement of LSHS which is excisable. Therefore, the finding of the Tribunal that it is not excisable on the ground that it is not marketable is erroneous and requires to be set aside. Secondly, it was contended that the material on record clearly establishes a portion of the final product was utilized for construction activity, lighting a residential layout and also sold to M/s. Hindustan Gas Industries Ltd., a Public Ltd. Co. and therefore, it was not used for captive generation. The demand raised is only to that extent and the exemption notification is not attracted to the said portion of the demand and therefore, she contends the impugned order requires to be set aside.

9. Per contra, the learned Counsel appearing for the Assessee raised a preliminary objection regarding the maintainability of the appeal before this Court. He contended that this appeal is filed u/s 35G of the Act. It is clear from the aforesaid facts that the question involved in this appeal is, whether the impugned goods is excisable or not and even it is held excisable, whether the duty payable thereon is completely exempted from payment by virtue of the notification relied on. Therefore, the determination of any question having a relation to the rate of excise duty or the value of the goods for assessment, no appeal lies to the High Court. As is clear from Section 35L of the Act, such questions ought to be determined by the Supreme Court and therefore, he submits that the appeal is not maintainable and it is liable to be dismissed on the short ground. Even on merits he contended though the impugned goods are

manufactured, it is not marketable and therefore, there is no liability to pay tax. Even if it is held that duty is payable, the notification issued in this regard completely exempts from the payment of duty and therefore, the Tribunal was justified in holding that no duty is payable on the ground that it is not excisable at all.

10. In reply, the learned Counsel for the Revenue submitted once the tariff is stipulated in the schedule it is correctly applied and when the Supreme Court has already ruled on the matter and any decision rendered by the Tribunal in consonance with the law declared by the Apex Court, if it has to be challenged it could be challenged in the High Court where the High Court is only expected to follow the law declared by the Supreme Court and decide the case. In such cases, the question of determination of the rate of tax would not arise as it is not in doubt or dispute. The Supreme Court jurisdiction is attracted only when there is a dispute of duty, regarding the classification or the rate of duty payable and therefore, he submitted the contention that all matters relating to the rate of duty of excise or the value of the goods ought to be determined by the Apex Court u/s 35L and not by the High Court u/s 35G is without any substance.

11. Unless the maintainability of the appeal is decided one way or the other, the question of going into the merits of the appeal does not arise. Therefore, the preliminary point that arise for consideration in this appeal is as under:

whether the appeal preferred by the Revenue against the impugned order is maintainable u/s 35G of the Act before the High Court.

12. In order to appreciate the aforesaid contention, firstly it is necessary to see the statutory provisions as contained in Sections 35G and 35L which reads as under:

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

35L. Appeal to the Supreme Court - An appeal shall lie to the Supreme Court from -

(a) any judgment of the High Court delivered-

(i) in an appeal made u/s 35G; or

(ii) on a reference made u/s 35G by the Appellate Tribunal before the 1st day of July, 2003;

(iii) on a reference made u/s 35H, in any case which, on its own motion or on an oral application made by or on behalf of the party aggrieved, immediately after passing of the judgment, the High Court certifies to be a fit one for appeal to the

Supreme Court; or

(b) any order passed before the establishment of the National Tax Tribunal by the Appellate Tribunal having a relation to the rate of duty of excise or to the value of goods for purposes of assessment.

A bare reading of the aforesaid provisions makes it clear what are the matters which are cognizable by the High Court and as well as by the Supreme Court. Any order passed by the Appellate Tribunal other than the determination of any question having a relation to the rate of duty of excise or to the value of duty of goods for the purpose of assessment falls within the jurisdiction of the High Court in appeal u/s 35G. If the matter pertains to determination of any question having a relation to the rate of duty of excise or to the value of the goods for the purpose of assessment, the same falls within the jurisdiction of the Supreme Court u/s 35L(b). In other words, the determination of any question relating to the rate of duty of excise or to the value of goods for the purpose of assessment, cannot be agitated in both the forums. Expressly the statute has excluded the jurisdiction of the High Court in appeal u/s 35G and exclusive jurisdiction is conferred on the Supreme Court in these matters. The language employed in these two sections read together is clear and there is no scope for any doubt or confusion in this regard.

13. It is argued as the wordings of the section stands, it is only in respect of the two types of cases the jurisdiction of the High Court is denuded. They are:

- 1) Where the assessment relates to the determination of the rate of duty;
- 2) The question relates to the determination of the value of the goods.

Any question relating to or in relation to these two aspects alone, the High Court has no jurisdiction and in respect of other things it has jurisdiction.

14. In order to appreciate this contention, we have to carefully see the wordings employed by the legislature. The relevant words are as under:

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 the purposes of assessment.

The key word in the said provision is "for the purpose of assessment". That means the order referred to therein is an order passed in the course of assessment. Therefore, all orders passed in the course of assessment involving the determination of any question having a relation to the rate of duty of excise or to the value of goods, cannot be the subject matter of appeal before the High Court. By the use of the word "among other things" it is made clear, even order which may not be directly related to the rate of duty or the value of goods, however which are intermingled with those matters are also excluded. In other words those are not the only orders contemplated by the legislation. In order to understand the width and depth of the orders covered under these words, it is

necessary to know the meaning of "assessment".

WHAT IS ASSESSMENT?

15. 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 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.

16. The Privy Council in the case of Commissioner Of Income Tax v. Khemchand Ramdas has observed as under:

One of the peculiarities of most income tax Acts is that the word "assessment" is used as meaning sometimes the computation of income, sometimes the determination of the amount of tax payable and sometimes the whole procedure laid down in the Act for imposing liability upon the taxpayer. The Indian income tax Act is no exception in this respect.....

17. In HIRJIBHAI Vs. Income Tax OFFICER, RAJNANDGAON, AND ANOTHER., it was held as under:

In the normal sense "to assess" means "to fix "the amount of tax due or to determine such amount". The process of re-assessment is to the same purpose and would thus be included in the connotation of the term "assessment."

The words levy, assessment and collection as we understand them include all the processes by which the tax is ascertained, demanded and realised and "re-assessment" being one of those process comes within the ambit of the phraseology employed.

It will be observed that Section 34 of the income tax Act contemplates four different cases in which the power to assess escaped income has been given. Where there has been no assessment at all the term "assessment" would be appropriate and where there was an assessment at too low a rate or with unjustified exemptions, the term "reassessment" would be appropriate. It was thus necessary to resort to the use of two different terms to cover with clarity the different cases dealt with in that section. This does not mean that the terms should be treated as mutually exclusive.

In interpreting the term "assessment" as used in Section 7 of the Taxation Laws Act, it should be given its plain meaning. It should not be understood in any restricted or special sense in which it may have been used in the Indian income tax Act in a particular context.

18. The Apex Court in the case of Income Tax Officer, Bangalore v. K.N. Guruswamy [1958 ITR 34 601] explaining the meaning the word assessment arising under the Income Tax Act has held as under:

Total income means the total amount of income, profits and gains computed in the manner laid down in the Act and there are no good reasons why the word "assessment" occurring in the saving provisions should be restricted in the manner suggested so as to exclude proceedings for assessment of escaped income or under-assessed income..... In its normal sense, "to assess" means "to fix the amount of tax or to determine such amount". The process of re-assessment is to the same purpose and is included in the connotation of the term "assessment". The reasons which led us to give a comprehensive meaning to the word "assessment" in Section 13(I) of the Finance Act, 1950, operate equally with regard to the saving provisions under present consideration.

19. The Supreme court in the case of C.A. Abraham v. Income - Tax Officer, Kottayam, and Anr. explaining the meaning of the word assessment in the context of the Income Tax Act held as under:

A review of the provisions of Chapter IV of the Act sufficiently discloses that the word "assessment" has been used in its widest connotation in that chapter. The title of the chapter is "Deductions and Assessment" The section which deals with assessment merely as computation of income is Section 23; but several sections deal not with computation of income, but determination of liability, machinery for imposing liability and the procedure in that behalf. Section 18A deals with advance payment of tax and imposition of penalties for failure to carry out the provisions therein. Section 23A deals with power to assess individual members of certain companies on the income deemed to have been distributed as dividend, Section 23B deals with assessment in case of departure from taxable territories, Section 23B deals with collection of tax out of the estate of deceased persons, Section 25 deals with assessment in case of discontinued business, Section 25A with assessment after partition of Hindu undivided families and Sections 29, 31, 33 and 35 deal with the issue of demand notices and the filing of appeals and for reviewing assessment and Section 34 deals with assessment of incomes which have escaped assessment.

The expression "assessment" used in these sections is not used merely in the sense of computation of income and there is in our judgment no ground for holding that when by Section 44, it is declared that the partners or members of the association shall be jointly and severally liable to assessment, it is only intended to declare the liability to computation of income u/s 23 and not to the application of the procedure for declaration and imposition of tax liability and the machinery for enforcement thereof.

Nor has the expression, "all the provisions of Chapter IV shall so far as may be apply to such assessment"" a restricted content: in terms it says that all the provisions of Chapter IV shall apply so far as may be to assessment of firms which have discontinued their business.

DETERMINATION - MEANING;

20. Similarly the meaning of the word "determination"" also has to be kept in

mind.

In *Jaswant Sugar Mills Ltd., Meerut Vs. Lakshmichand and Others*, , it is held as under:

10. The expression "determination" in the context in which it occurs in Article 136 signifies an effective expression of opinion which ends a controversy or a dispute by some authority to whom it is submitted under a valid law for disposal. The expression "order" must have also a similar meaning, except that it need not operate to end the dispute. Determination or order must be judicial or quasi-judicial: purely administrative or executive direction is not contemplated to be made the subject-matter of appeal to this Court. The essence of the authority of this Court being judicial, this Court does not exercise administrative or executive powers i.e. character of the power conferred upon this Court original or appellate, by its constitution being judicial, the determination or order sought to be appealed from must have the character of a judicial adjudication.

GOODS:

21. Yet another word which also assumes importance is the meaning of the word "Goods".

In the case of *Union of India (UOI) Vs. Delhi Cloth and General Mills*, the Constitution Bench of the Supreme Court while construing the word "goods" held as under:

Moreover, the definitions of "goods" make it clear that to become "goods" an article must be something which can ordinarily come to the market to be bought and sold.

22. In *South Bihar Sugar Mills Ltd., etc. Vs. Union of India (UOI) and Others*, has held as under:

The Act charges duty on the manufacture of goods. The word "manufacture" implies a change but every change in the raw material is not manufacture. There must be such a transformation that a new and different article must emerge having a distinctive name, character or use.

As the Act does not define goods, the legislature must be taken to have used that word in its ordinary dictionary meaning. The dictionary meaning is that to become goods it must be something which can ordinarily come to the market to be bought and sold and is known to the market.

23. In *Bhor Industries Ltd., Bombay Vs. Collector of Central Excise, Bombay*, The Apex Court held as under:

It appears to us that under the Central Excise Act as it stood at the relevant time, in order to be goods as specified in the entry the first condition was that as a result of manufacture goods must come into existence.

For Articles to be goods these must be known in the market as such or these

must be capable of being sold in the market as goods. Actual sale in the market is not necessary, user in the captive consumption is not determinative but the Articles must be capable of being sold in the market or known in the market as goods.

24. In the case of Moti Laminates Pvt. Ltd. and Others Vs. Collector of Central Excise, Ahmedabad, THE APEX COURT held as under:

9. Although the duty of excise is on manufacture or production of the goods, but the entire concept of bringing out new commodity etc. is linked with marketability. An article does not become goods in the common parlance unless by production or manufacture something new and different is brought out which can be bought and sold.

Therefore, any goods to attract excise duty must satisfy the test of marketability. The tariff schedule by placing the goods in specific and general category does not alter the basic character of leviability. The duty is attracted not because an article is covered in any of the items or it falls in residuary category but it must further have been produced or manufactured and it is capable of being bought and sold.

25. The Apex Court in the case of Moti Laminates Pvt. Ltd. and Others Vs. Collector of Central Excise, Ahmedabad, interpreting Section 3 of the Central Excise and Salt Act, 1944 has held as under:

Section 3 levies duty on all excisable goods mentioned in the schedule, provided, they are produced or manufactured. Therefore, when the goods are specified in the schedule, they are excisable goods, but whether the said goods can be subjected to duty depends on whether they are produced or manufactured by the person on whom duty is sought to be levied. The expression production or manufacture has further been explained by this Court to mean that the goods so produced must satisfy the test of marketability. Consequently, it is always open to the Assessee to prove that even though goods in which he was carrying on business were excisable goods being mentioned in the schedule, but they could not be subjected to duty as they were not goods either because they were not produced or manufactured by it or if they had been produced or manufactured, they were not marketed or capable of being marketed.

MEANING OF "RATE OF DUTY"

26. It is in this background we have to interpret the word rate of duty.

The question is, what is the meaning attached to the "rate of duty" as mentioned under these provisions. In order to understand the word "rate of duty" and the dispute relating to that, it is useful to refer to the meaning assigned to the said word by the Parliament by way of an explanation to Sub-section (5) by amendment Act 29/1988. The said amendment was intended to be brought into force from the date to be notified. However, it was not brought into force at all. Notwithstanding the same, in order to understand the meaning assigned to the word "rate of duty" by the Parliament as per the aforesaid intended amendment,

the same could be looked into in order to appreciate the phrase "rate of duty" used in Sections 35G and 35L of the Act which reads as under:

Explanation: For the purposes of this Sub-section, the determination of a rate of duty in relation to any goods or valuation of any goods for the purposes of assessment of duty includes the determination of a question-

a) relating to the rate of duty of excise for the being in force, whether under the Central Excise Tariff Act, 1985 or under any other Central Act providing for the levy and collection of any duty of excise, in relation to any goods on or after the 28th day of February, 1986; or b) relating to the value of goods for the purposes of assessment of any duty in cases where the assessment is made on or after the 28th day of February, 1986. or c) whether any goods are excisable goods or whether the rate of duty of excise on any goods is nil: or d) whether any goods fall under a particular heading or sub-heading of the Schedule to the Central Excise Tariff Act, 1985, or the Additional Duties of Excise (Goods of Special Importance) Act, 1957 or the Additional Duties of Excise (Textiles and Textile Articles) Act, 1978, or that any goods are or not covered by a particular notification or order issued by the Central Government or the Board, as the case may be, granting total or partial exemption from duty; or e) whether the value of any goods for the purposes of assessment of duty of excise shall be enhanced or reduced by the addition or reduction of the amounts in respect of such matters as are specifically provided in this Act.

A perusal of the explanation makes it clear that determination of the rate of duty means whether any goods are excisable goods and whether the rate of duty of excise on any goods is nil, whether the said goods are or are not covered under a particular notification or order issued by the Central Government or the Board, as the case may be, granting total or partial exemption from duty and whether the value of any goods for the purpose of assessment of duty of excise shall be enhanced or reduced by addition or reduction of the amounts in respect of such matters as are specifically provided under the Act. Though the determination of the word duty may not include all those questions, the explanation makes it clear the aforesaid expanded meaning is to be attributed to the aforesaid phrase for the purpose of this section only. It is because the said explanation is added to Section 35E which deals with the power of revision of Board or Commissioner of Central Excise in certain case. In other words what is sought to be conveyed by the explanation is that the authorities while exercising the revisional jurisdiction shall not go into those questions. That in no way comes in the way of understanding the meaning of the phrases "rate of duty". On the contrary it clearly sets out the intention of the legislature in so far as the meaning to be attributed to the said phrase. Therefore, the said meaning could be read into the phrase wherever it is used in the other parts of the statute, as held by the Apex Court in Navin Chemicals case. It also would be in conformity with the interpretation placed on the said phrase by the Apex Court as well as the High Court, as is clear from the following decisions.

27. The Supreme Court had an occasion to consider the meaning of the word "rate" in *Sundaram and Company (P.) Ltd., Madurai Vs. Commissioner of Income Tax, Madras*, where it was held as under:

The assumption that the expression "rate" has been used in Section 34(1) as meaning a fraction of total income is, in our judgment not warranted. By the use of the expression "rate" in the context in which it occurs, undoubtedly a relation between the taxable income and the tax charged is intended, but the relation need not be of the nature of proportion or fraction. The expression "rate" is often used in the sense of a standard or measure. Provided the tax is computable by the application of a prescribed standard or measure, though not directly related to taxable income, it may be called tax computed at a certain rate. We agree with the High Court that the rebate of tax and the reduction of such rebate are essentially matters of measure or standards of rate.

28. A Division Bench of the Andhra Pradesh High Court in the case of *Crane Betel Nut Powder Works v. Commissioner* reported in 2006 (5) ALD (104) held that the determination of the rate of duty in relation to any goods includes determination of a question whether any goods are excisable or not. Again, a Division Bench of the Andhra Pradesh High Court in the case of *Commissioner of Central Excise Vs. Shriram Refrigeration Industries [Presently known as Tecumseh Products India Ltd.]*, held that the question whether the process if any undertaken in the service centre of the Respondent amounts to manufacture of starters by the Respondent or not, and if the goods produced during that process are excisable goods or not would fall within the meaning of the expression "determination of the rate of duty of excise or the value of the goods for the purposes of assessment of duty" used in Section 35G(1) and Section 35L(b) of the Act.

29. Following the said judgment a Division Bench of the Delhi High Court in the case of *Commissioner of Service Tax Vs. Delhi Gymkhana Club Ltd.*, held that if the question of determination relates to the rate of duty of excise or the value of goods for the purposes of assessment, appeal lies to the Supreme Court.

30. The Bombay High Court in the case of *Commr. Of C.EX., Nagpur v. Universal Ferro and Allied Chemicals Ltd.* reported in 2009 (234) ELT 220 (Bom.) at para 6 held as under:

We have considered the rival contentions made on behalf of parties and also perused the provisions of Sections 35G and 35L(b) of the Act of 1944, an appeal against the order passed by the Appellate Tribunal would lie to the High Court except 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. Section 35L(b) provides that an appeal against an order passed by the Appellate 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 would lie to the Supreme Court. It is, thus, clear from the aforesaid proviso that an appeal against an order passed

by the Appellate 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 would lie to the Supreme Court and not the High Court.

31. The Apex Court in the case of ITC Ltd. Vs. Collector of Central Excise, Patna, dealing with Section 35L(b) of the Central Excise Act, 1944 has held as under:

A perusal of the said clause shows that an appeal lies to this Court against an order passed by the Tribunal relating to the determination of any question relating to the rate of duty of excise or to the value of goods for the purposes of assessment. Sri. Ravinder Narain has submitted that the impugned order passed by the tribunal relates to the value of goods. The said question relating to value of goods has however, arisen on the claims for refund of excise duty submitted by the Appellant before the Assistant Collector. In our opinion the question of valuation of goods in the context of a refund cannot be regarded as a question having relation to the value of the goods for the purposes of assessment. The assessment had been completed in the present case and the assessment orders had already been passed. It is only when the goods were returned, the question of refund arose. We are therefore, unable to accept the contention of Sri. Ravinder Narain that the appeals are maintainable under Clause (B) of the Section 35L of the Act and the appeals are liable to be dismissed.

32. The Division Bench of this Court in the case of Premier Irrigation Equipment Ltd. v. UOI reported in 1998 (100) ELT (Kar) interpreting Section 35L of the Act held as under:

From the reading of the above provisions contained in Section 35L of the Act, it seems clear to us that even if one of the questions raised before the Tribunal for determination relate to a rate of duty of excise or to the value of goods for the purposes of assessment, then the remedy by way of appeal against the order of the Tribunal can be only before the Supreme Court and such question cannot be subjected to the Advisory jurisdiction of the High Court. Keeping in view the specific bar contained in Section 35G of the Act which specifically provides that on the said questions pertaining to rate of duty and value of goods neither any reference can be made by the Tribunal nor can be called for by the High Court.

CUSTOMS ACT

33. Section 35G(1) and 35L(b) of the Act are in pari materia with Section 129D and 130E of the Customs Act. The Supreme Court had an occasion to interpret the said Section 129D and 130E in a number of decisions. However, though not in an identical matter, but almost near to the said matter, interpreting the powers of the Appellate Tribunal, with reference to the jurisdiction of a special Bench and an ordinary Bench, the Supreme Court had an occasion to consider the very same words used in both the sections in the case of Navin Chemicals Mfg. and Trading Co. Ltd. Vs. Collector of Customs, under the Customs Act. The Apex Court held as under:

The controversy, therefore, relates to the meaning to be given to the expression "determination of any question having a relation to the rate of duty of customs or to the value of the goods for purposes of assessment". It seems to us that the key lies in the words for the purpose of assessment" therein. Where the appeal involves the determination of any question that has a relation to the rate of customs duty for the purposes of assessment that appeal must be heard by a Special Bench. Similarly, where the appeal involves the determination of any question that has a relation to the value of goods for the purposes of assessment, that appeal must be heard by a Special Bench. Cases that relate to the rate of customs duty for the purposes of assessment and which relate to the value of goods for the purposes of assessment are advisedly treated separately and placed before Special Benches for decision because they, more often than not are of importance not only to the importers who are parties thereto but also to many other importers who import or propose to import the same or similar goods. In the decisions of CEGAT in such matters would have wide application they are, by the terms of the statute, to be rendered by Special Benches. The phrase "relation to" is, ordinarily, of wide import but, in the context of its use in the said expression in Section 129C, it must be read as meaning a direct and proximate relationship to the rate of duty and to the value of goods for the purpose of assessment.

Further at para 11 they held as under:

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 purpose 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 value of goods for the 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 the 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 said definition of the said expression to Sub-section (5) of Section 129D, it is proper that the 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.

2. At para 12 they concluded as under:

"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 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.

34. In the case of Commissioner of Customs, Chennai Vs. Jayathi Krishna and Co., , the question involved was whether the Assessee is liable to pay interest u/s 61(2) of the Customs Act. When the imposition of interest under the aforesaid provision was challenged before the Tribunal, the Tribunal held that DEEC Scheme having been made applicable to the goods in question, the question of payment of interest would not arise at all. Against the said order, the revenue preferred an appeal to the Supreme Court u/s 130E of the Act, which came to be dismissed.

35. In the case of Commissioner Of Customs (EX), Mumbai v. Nicco Batteries Limited, reported in 2001(129) ELT 292 (SC), the benefit of exemption notification was granted to earlier four consignments and at the stage of clearance of the fifth consignment, the said benefit was denied under the orders of the superior officer without assigning reasons. The Tribunal found fault with the said action and extended the benefit to the fifth consignment also. Aggrieved by the said order of the Tribunal, the revenue preferred an appeal to the Supreme Court u/s 130E of the Act.

36. In the case of Commissioner of Customs, New Delhi Vs. M/s. Punjab Stainless Steel Industries, , the allegation against the Assessee was that the goods exported under the export obligation were mis-declared. In as much as he used the material of inferior grade to the one required in the manufacture of utensils. The said charge was held to be proved on the basis of the report of the expert and therefore the goods were confiscated. The said order was challenged by the Assessee before the Tribunal. The Tribunal set aside the said order. Aggrieved by the same, the revenue preferred an appeal u/s 130E of the Act before the Supreme Court and the Supreme Court set aside the order of the Tribunal and restored the order of the Commissioner of Customs.

37. In the case of Jindal Dye Intermediate Looted v. Colelctor Of Customs, Mumbai Reported In 2006 (197) ELT 471(SC), the Tribunal had upheld the order of the authorities and denied the exemptions. The Assessee preferred an appeal u/s 130E of the Act to the Supreme Court. The Supreme Court set aside the order of the Tribunal and held that the Assessee is entitled to the benefit of exemption.

38. In the case of Commissioner of Customs, New Delhi Vs. Phoenix International Ltd. and Another, , the question involved was whether the Assessee has imported in violation of the Exim Policy and consequently liable to pay customs duty. The Tribunal held that there is violation of Exim Policy. In an appeal preferred against the order of the Tribunal u/s 130E of the Act, the Supreme Court reversed the finding of the Tribunal by holding that Assessee is guilty of violating Para 156(A) of the Exim Policy 1992-97 and therefore, they are liable to be assessed under Tariff Heading 64.04 and accordingly, they were liable to pay duty of customs at 50% + CVD at 15% ad valorem and the Assessee was not entitled to concessional rate of duty under Notification No. 45/94-Cus. dated 1.3.1994 and the department was right in invoking Rule 8 of the Customs Valuation Rules.

39. In Commissioner of Customs Vs. Edhayam Frozen Foods and CESTAT, South Zonal Bench, , objection was taken regarding the maintainability of the appeal before the High Court u/s 130 of the Customs Act. It was held that the determination of question involved in this case does not have a relation to the rate of duty or the value of the goods for the purpose of assessment and therefore, the appeal was maintainable. The question involved therein was whether Prawn/Shrimp is also fish and liable to export cess under Agricultural Produce Cess Act, 1940. In coming to the conclusion they relied on the judgment of the apex Court in NAVIN CHEMICALS case wherein an observation was made that the case did not have a direct or proximate relation for the purpose of assessment either to the rate of duty applicable to the said goods or to the value thereof. All that the Additional Collector's order did was to confiscate the said goods allowing the Assessee option of redeeming them upon payment of a fine of Rs. 10,000/-. That the Assessee might avail of the option, pay the fine and clear the said goods. When question as to the rate of duty and value for the purpose of assessment might possibly arise is far too remote a contingency to satisfy the test that is laid down. Therefore it was held that the principle laid down in the said case squarely apply to the facts of this case, where question involved as stated earlier, was whether fish includes Molluscs and Crustaceans and as such the Crustaceans would otherwise mean and include Prawns/ shrimps and hence Prawns and Shrimps should be regarded as a fish for the purpose of assessment and such meaning should be given to the expression "fish" incorporated as Item No. 7 to the Schedule to the Act.

40. In the case of Commissioner of Customs, New Delhi Vs. Sony India Ltd., , the question involved was whether the Assessee had committed breach of Exim Policy. Ultimately, the Tribunal held that there is no breach of Exim Policy and consequently, no duty was paid. The revenue aggrieved by the said judgment preferred an appeal to the Supreme Court u/s 130E of the Act. The Supreme Court upheld the order of the Tribunal.

CONCLUSION

41. Therefore, the expression "rate" is often used in the sense of a standard or measure. "Rate" generally is an impost, usually for current or recurrent

expenditure, spread over a district or other local area and is distinct from an amount payable for work done upon or in respect of particular premises. "Rate" is defined by Webster to be the price or amount stated or fixed for anything. The word "rate" includes any toll, due, rent, rate or charge. It means the scale or amount of any other charges. The word "rate" is used with reference both to a percentage or proportion of taxes, and to a valuation of property. "Rate" is used in an Act declaring that the Legislative Assembly shall provide by law for a uniform and equal rate of taxation and assessment, applies to the percentage of fixation, as used in connection with "taxation" and to the valuation of the property, as used in connection with assessment". It is a valuation of every man's estate or setting down how every one shall pay, or be charged with, to any tax. By the use of the expression "rate" a relation between the taxable income and the tax charged is intended, but the relation need not be of the nature of proportion or fraction. The Explanation to Sub-section (5) of Section 35E of the Central Excise Act, the expression includes the determination of a question relating to the rate of duty, to the value of goods for the 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 the purposes of assessment should be enhanced or reduced having regard to certain matters that the said Act provides for. 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. Determination of rate of duty in relation to any goods include determination of a question whether any goods or not, whether the process if any undertaken in the service centre amounts to manufacture or not, and if the goods produced during that process are excisable goods or not would fall within the meaning of the expression "determination of the rate of duty of excise or the value of the goods for the purposes of assessment of duty" used in Section 35G(1) and Section 35L(b) of the Act. Therefore, the phrase "rate of tax" does not mean fraction of tax payable because what is the tax payable i.e., fraction payable is decided by the legislature. Once that is prescribed by the legislature in the Act, the Court cannot sit in judgment and alter or modify the said rate of tax. The Court has no jurisdiction to go into the correctness or otherwise of the rate of tax payable in the sense the rate prescribed by the legislature. Therefore, the argument that the rate of tax means only the rate at which tax is payable or a fraction is unsustainable.

42. Broadly the following disputes do not fall within the jurisdiction of High Court u/s 35G of the Act:

(a) Dispute relating to the duty of excise payable on any goods.

- (b) The value of the goods for the purposes of assessment.
- (c) A dispute as to the classification of goods.
- (d) Whether those goods are covered by an exemption notification or not.
- (e) Whether the value of goods for the purposes of assessment is required to be increased or decreased.
- (f) The question of whether any goods are excisable goods or not.
- (g) Whether a process is a manufacturing process or not, so as to attract levy of excise duty.
- (h) Whether a particular goods fall within which heading, sub-heading or tariff item or the description of goods as mentioned in column No. 3 of the Central Excise Tariff Act, 1985.

43. From the aforesaid discussion, it is clear that an order passed by the Appellate Tribunal relating to the determination of any question having relation to the rate of duty of excise or to the value of goods for the purposes of assessment lies to the Supreme Court u/s 35L(b) of the Act and not to the High Court u/s 35G.

44. The intention behind this bifurcation of jurisdiction between the Apex Court and the High Court seems to be that more often than not, any decision on these aforesaid aspects not only affects the interest of the manufacturers who are parties thereto, but also to the manufacturers of those products throughout the country. In a country governed by Parliamentary legislation because of the territorial bifurcation in forming states and because of the divergent opinion which is possible, the excise duty payable would vary from place to place. In order to bring uniformity in the levy of excise duty throughout the country and consequently to see that the country's finance is not affected, the Parliament has vested the jurisdiction to decide the disputes with the Apex Court. Therefore, we see a duty policy underlining this bifurcation of the jurisdiction between the Apex Court and the High Courts. All other matters other than what is set out above, which relates to the individual manufacturers and all disputes based on assessment orders which have attained finality, such as the benefits to which they are entitled to, refunds, duty drawbacks, rebates, etc., which relate to a particular manufacturer falls within the jurisdiction of the High Courts.

45. In so far as the contention that once the law is declared by the Apex Court, in the schedule there is a specific mention of the item, the duty payable, the description of goods and interpreting those entries while the Apex Court has already laid down the law, the question of again the courts determining the said dispute would not arise in this case and in respect of cases which are already before the Court and pending for years, there is no necessity to approach the Apex Court even in such matters. It is a case of applying the law declared by the Apex Court which is binding on all Courts under Article 141 of the Constitution of

India. We do not see any merit in the said contention. It is now well settled that no one has a right of appeal. Right of an appeal is a creature of a statute. Therefore, the right of appeal has to be worked out under a statute within the parameters prescribed expressly under the Statute. If under a statute appeal is provided and then in some matters the jurisdiction of one Appellate Court is ousted and the same is conferred in yet another Appellate Court, the party who wants to exercise the right of appeal can only exercise the same in accordance with the statute. The question of applying the law of the land with reference to the decisions rendered by the Apex Court or the entries in the schedule would not arise. The question is, an aggrieved person should approach which Court. Once that forum is specified under the statute, it is only that forum which can entertain the appeal. In that view of the matter, either the pendency of the appeal before this Court for considerable time or that the questions involved in these appeals are already concluded by the judgment of the Apex Court would not render the appeals maintainable, if it is not maintainable in terms of the statute. Therefore, we do not see any substance in this contention.

46. The learned Counsel for the Revenue relied upon the judgment of this Court in the case of Commissioner of Central Excise v. Pushpadeep Enterprises decided on 1.4.10 in CEA 17/2007 and contended that this Court has decided the case on merits as if it has jurisdiction notwithstanding the objection taken by the Assessee that such an appeal is not maintainable u/s 35G of the Act. A careful perusal of the said order discloses that the issue regarding jurisdiction was raised in para 2 of the order. The learned Judge of this Court has observed as under:

When the matter was taken up for hearing the learned Counsel for the Respondent has raised a preliminary objection with regard to the maintainability of the appeal by stating that even if the question as to whether the activity of the Respondent-Assessee is held to be a manufacturing activity even then the rate of duty applicable for such a manufacturing activity has to be decided only by the Supreme Court in view of the express provisions in Section 35G r/w. Section 35L of the Central Excise Act.

47. It is not disputed by the learned Counsel for the Revenue that, though such a contention raised by the Assessee was recorded, as set out above, the learned Judge did not decide the question of maintainability at all. Without deciding the jurisdictional aspect the case was "decided on merits as if they have got jurisdiction. Therefore, the learned Counsel for the Revenue submits that the said judgment is an authority for the proposition that such an appeal is maintainable as by implication this Court in the said judgment has held the said issue against the Assessee. We are afraid that such an inference is not possible. When a jurisdictional question is raised before a court or any authority, it is settled law that such authority has the jurisdiction to decide whether it has jurisdiction or not to decide a matter which is before it. Unless a finding is recorded on the said question, the question of such an order passed on merits without deciding the question of jurisdiction would neither operate as a binding precedent or by

implication the said jurisdictional issue has been held against the Assessee. Even if such construction is to be placed, it is only in respect of the said Assessee is concerned and it is open for the Assessee to approach the superior court contending firstly that, the court which passed the order has no jurisdiction and in which event, the Appellate Authority has to decide whether the court has jurisdiction to pass order or not. Therefore, the said judgment is of no assistance in deciding the controversy in this case.

ON FACTS

48. The Assessee contends though the impugned goods are manufactured, it is not marketable and therefore, they are consuming the said manufactured goods for the purpose of manufacturing steam. From the steam so manufactured, they are producing electricity. The said electricity so produced is used in-house in running the industry which again makes it not excisable. Further, they have also contended because the final product is utilized by them in-house the Notification No. 67/1995 grants complete exemption from the payment of excise duty. It is the contention of the Revenue that a portion of the final product is used for construction activity, for lighting a residential layout and sold to HGIL a public sector undertaking and to that extent the Assessee is liable to pay excise duty.

49. Learned Counsel for the Revenue relying upon the decision in Commissioner Of C.EX. Chennai-I v. Chennai Petroleum Corporation Ltd. reported in 2007 (211) ELT 193 (SC) where it is held the electricity generated was RFO which was actively consumed by the Corporation was not liable to duty to that extent. Demand made in the show cause notice dated 17.08.1999 fails. However, as stated above, a part of the electricity produced from RFO was sold to TNEB during the period August 1998 to January 1999, to that extent alone the Assessee would be liable for payment of duty. This requires recalculation. Accordingly, to that extent alone the matter is being remitted to the adjudicating authority for fresh determination of the duty payable by the Assessee for the period August 1998 to January 1999. Relying on the said judgment it was contended, to the extent the final product is used for construction activity and not a residential layout and sold to another public sector undertaking, the duty payable cannot be disputed and that question can be gone into by the High Court.

50. It was also contended that the Apex Court in the Case of Commnr. of Central Excise Vs. Gujarat Narmada Fertilizers Co. Ltd., held where they were dealing with Low Sulphur Heavy Stock (LSHS) which is the impugned goods in this appeal also. That was a case where the CENVAT credit by the Assessee was assailed. Aggrieved by the same, the Assessee preferred an appeal before the CESTAT. The said appeals were referred to a larger Bench which by the impugned decision held that credit was admissible on LSHS used as fuel. Aggrieved by the said order, the Revenue preferred an appeal to the Apex Court u/s 35L(b) of the Act in which the Apex Court held that the CENVAT for duty paid on individual cases in the manufacture of exempted final products is not liable. Sub-rule (1) was applied in respect of goods used as fuel and on such application, the credit

will not be permissible on such quantity of fuel which is used in the manufacture of exempted goods. Here again when the Tribunal held the Assessee is entitled to the CENVAT credit, which in substance amounts to saying the impugned goods is not excisable and no duty is leviable against such an order, the appeal is preferred by the Revenue u/s 35L(b) to the Apex Court and not to the High Court. Therefore, the said judgment instead of supporting the case of the Revenue supports the case of the Assessee.

51. All these questions relate to determination of rate of duty payable, the value of goods manufactured and entitlement of exemption under notification. They have to be decided by the Apex Court in an appeal preferred u/s 35L(b) of the Act and not by the High Court in an appeal preferred u/s 35G of the Act. The learned Counsel for the Assessee is justified in contending that this appeal preferred by the Revenue challenging the order passed by the Appellate Tribunal holding that the impugned goods are not excisable and accordingly, setting aside the levy of duty and the demand notice issued by the department is not maintainable before the High Court.

52. Therefore, we are of the considered opinion that the present appeal preferred u/s 35G of the Act is not maintainable before this Court. The appeal is to be preferred to the Supreme Court u/s 35L(b) of the Act. Accordingly, the appeal is dismissed. No costs.