
(2011) 04 KAR CK 0013
In the Karnataka High Court
Case No : CSTA No. 2 of 2007

The Commissioner of Customs

APPELLANT

Vs

Motorola India Limited

RESPONDENT

Date of Decision : 21-04-2011

Acts Referred:

Customs Act, 1962 — Section 129 D, 130
Income Tax Act, 1961 — Section 23, 25, 29, 30, 31

Citation : (2011) 3 KCCR 355 SN : (2011) 3 KCCR 353

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

Bench : Division Bench

Advocate : B. Pramod, for the Appellant; K.S. Ravishankar, for the Respondent

Final Decision : Dismissed

Judgement

N. Kumar, J.—This appeal is by the Revenue challenging the order passed by the CESTAT holding that the Assessee is entitled to the benefit of DEEC Scheme in terms of Notification No. 30/97-Cus dated 1.4.1997 read with para 7.4, of the EXIM policy 1997-2002 and as such he is not liable to pay any custom duty.

2. The Assessee is a leading manufacturer of pagers. A specific intelligence received by the Directorate of Revenue Intelligence to the effect that the Respondent had stopped manufacturing of pagers and hence a certain portion of the duty-free material imported under DEEC Scheme (with Actual User Condition) had been written off in their books of accounts. As the goods imported under Actual User Condition should only be used for manufacturing of the declared final product as no more manufacturing is being done, the officers of the DRI took up further investigation in the matter. The Assessee was called upon to submit the list of such unutilised items which are imported under Customs Notification No. 30/97-CUS dated 1.4.1997 and lying unutilised in the manufacture of pagers. The Assessee submitted a list of such unutilised items along with details of the part number, their quantity and their value and sought for further time to link unutilised items to the bill of entry and the relevant

assessable value. On 23.5.2001 they submitted a complete list of all unutilised items totally identified at American dollars. The Assessee also submitted that they have ceased manufacturing pagers and the said materials have become obsolete as far as they are concerned.

3. After the enquiry a show-cause notice was issued to the Assessee requiring them to show-cause as to why customs duty amounting to Rs. 96,17,498/- should not be demanded from them in terms of the notification No. 30/97-Cust dt. 1.4.97; why the said imported raw materials under the notification and not utilised in terms of the conditions of the said notification should not be confiscated; why interest at the rate of 24% p.a. on the duty should not be demanded and also why penalty should not be imposed on them.

4. After detailed enquiry, the Commissioner of Customs came to the conclusion that the customs duty amounting to Rs. 96,17,498/- is demandable along with the interest on 24% p.a. on the duty in terms of notification dated 1.4.1997 from the Assessee and the materials imported duty free and which are not utilised are liable for confiscation and consequently, held that the Assessee is also liable to pay penalty. An order in original came to be passed on 30.4.2002. Aggrieved by the said order, the Assessee preferred an appeal before the CESTAT. The Tribunal after careful consideration of the material on record held that the Assessee has not diverted the imported material or sold them. In fact, all the materials imported were put to use. However, the facts remains that in respect of certain components, they were allowed to import 2% in excess of their actual requirement to provide for wastage. There is no compulsion that there should necessarily be 2% wastage. In an efficient utilisation of raw materials the wastage may be less. Under such circumstances, the excess material obviously would not go into the manufacture of the pagers. Everything should be viewed realistically. Just because some quantities of components were in excess and became obsolete, one cannot come to the conclusion that the above condition of the Notification has been violated. The authorities must be aware of the fact that in the Electronic and Communication Industry, there is rapid advancement and obsolescence is very fast. A component in few months' time may be rendered obsolete. It will have no further use at all. In such a changing scenario of technology, there are compulsions to write off certain components which have been imported. Viewed in this angle, it cannot be said there is deliberate violation of the condition of the Notification. In the circumstances like these, when the export obligation is completely fulfilled, the Assessee should be deemed to have been fulfilled the conditions of the notification. The case would be different if the Appellants had not fulfilled the export obligations. Therefore, the Tribunal set aside the order passed in original and set aside the demand. It also set aside the consequential order of penalty. Aggrieved by the said order, the Revenue is in appeal.

5. This appeal is preferred u/s 130 of the Customs Act, for short hereinafter referred to as "the Act". The appeal was admitted on 20.6.2007 to consider the

three substantial questions of law as set out in the order sheet.

1. Whether "writing off the imported Duty-free materials form the Books of Accounts of the importer is permissible in law and whether the same amounts to "dispose of within the meaning of Customs Notification No. 30/97-Cus dated 1-4-1997 under which the goods/materials are imported?

2. Whether, without paying the Duty, it is permissible for an importer to "write off from the Books of Accounts the Dutyfree imported materials when he violates the norms of "Actual User Condition", "export obligation" and the prohibition "not to dispose of or utilize in any manner except for utilization in discharge of export obligation or for replenishment" prescribed under Customs Notification No. 30/97-Cus dated 1-4-1997?

3. Whether the confiscation of goods by the Department u/s 11(o) of the Customs Act, 1962, on failure of the importer to pay the Duty etc. consequent on his failure to comply with all the conditions of the Customs Notification No. 30/97-Cus dated 1-4-1997 totally absolves the importer from payment of Duty, penalty and interest?

6. Today, when the case is taken up for final hearing the learned Counsel for the Assessee raised a preliminary objection. He contended that, as the order passed by the Appellate Tribunal, which is impugned in this appeal, is an order relating among other things, to the rate of duty of customs for the purpose of assessment. Section 130 of the Act is not attracted and therefore, this appeal is not maintainable before the High Court.

7. Per contra, the learned Counsel appearing for the Appellant-Revenue contended that there is no dispute regarding rate of duty payable on the said goods or the value of goods imported. The only question is, whether the Assessee is entitled to the benefit of the notification No. 30/97 dated 1.4.1997 when he has not complied with the terms of the said notification and the licencing conditions to be eligible to get the exemption, from payment of duty. Therefore, he contends that the impugned order do not have any relation to the rate of duty of customs or to the value of goods for the purposes of assessment and the appeal filed before the High Court is maintainable u/s 130 of the Act.

8. From the aforesaid facts and the rival contentions, what emerges is that, the dispute is with reference to the eligibility of the Assessee to claim exemption under the aforesaid notification and whether for non-compliance of the terms of the notification and the licensing conditions the Assessee rendered himself ineligible for exemption under the notification. Whether such a question falls within the phrase "determination of any question having a relation to the rate of duty of customs or to the value of goods for the purposes of assessment?"

9. 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 130 of the Act before the High Court.

10. In order to appreciate this contention it is necessary to look into the appeal provisions as contained in Section 130 as well as Section 130E of the Act which reads as under:

130. 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 customs or to the value of goods for purposes of assessment), if the High Court is satisfied that the case involves a substantial question of law.

130E Appeal to 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 130; or

(ii) on a reference made u/s 130 by the Appellate Tribunal before the 1st day of July, 2003;

(iii) on a reference made u/s 130A,

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 relating, among other things, to the determination of any question having a relation to the rate of duty of customs 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 cognisable 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 customs 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 130. If the matter pertains to determination of any question having a relation to the rate of duty of customs or to the value of the goods for the purpose of assessment, the same falls within the jurisdiction of the Supreme Court u/s 130E. In other words, the determination of any question relating to the rate of duty of customs 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 130 of Customs Act 1962 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.

11. 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.

12. 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 customs 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 customs 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?

13. 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 exporter 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.

14. 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,...

15. 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 "reassessment" 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.

16. 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(1) of the Finance Act, 1950, operate equally with regard to the saving provisions under present consideration.

17. 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 24B 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:

18. 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 widen-

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:

19. 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 articles must be something which can ordinarily come to the market to be bought and sold

20. 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.

21. In Bhore Industries Ltd. v. Collector of Central Excise 1989 (40) E.L.T) 280 (S.C.) The Apex Court held as under:

It appears to us that under the Central Excise Act as is 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.

22. 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 levability. 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.

23. 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"

24. 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) to Section 129D 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 130 and 130E 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 for the time being in force, whether under the Customs Tariff Act, 1975 (51 of 1975) or under any other Central Act providing for the levy and collection of any duty of customs, 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 fall under particular heading or sub-heading of the First Schedule or the Second Schedule to the Customs Tariff Act, 1975 (51 of 1975) or that any goods are or not covered by a particular notification or order issued by the Central Government granting total or partial exemption from duty; or

d) whether the values of any goods for the purposes of assessment of duty 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 dutiable goods and whether the rate of duty of customs 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 customs 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 "rate of 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 129D 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 where ever 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.

25. The Supreme Court had an occasion to interpret the said Section 130 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 head 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 15) 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.

26. 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 directly to the Supreme Court u/s 130E of the Act, which came to be dismissed.

27. In the case of Commissioner of Customs (Ex), Mumbai v. NICCO Batteries Limited, 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 directly to the Supreme Court u/s 130E of the Act.

28. In the case of Commissioner of Customs, New Delhi v. Punjab Stainless Steel Industries, 2001 (132 JELT 10 (SC), the allegation against the Assessee was that the goods exported under the export obligation were misdeclared. 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 directly 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.

29. In the case of Jindal Dye Intermediate Limited v. Colelctor of Customs, Mumbai 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.

30. 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.

31. 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.

32. 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.

33. 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 of 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.

EXCISE ACT:

Section 130 and 130E of the Act are in paramateria with Section 35G(1) and 35L(b) of the Excise Act, 1944. The Supreme Court and High Courts had an occasion to interpret the said Section 35G and 35E in number of cases.

34. A Division Bench of the Andhra Pradesh High Court in the case of Crane Betel Nut Powder Works v. Commissioner 2006 (5) ALD (NOC 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.

35. Following the said judgment a Division Bench of the Delhi High Court in the case of Commissioner of Service Tax v. Delhi Gymkhana Club 2009 (16) STR 129 (Del.) 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.

36. The Bombay High Court in the case of Commr. of C. Ex., Nagpur v. Universal Ferro and Allied Chemicals Ltd. 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.

37. The Apex Court in the case of I.T.C. Ltd. v. Collector of Central Excise, Patna 1997 (94) E.L.T. 456 (S.C.) 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 as 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 Sri. Ravindren Narain that the appeals are maintainable under Clause (B) of the Section 35L of the Act and the appeals are liable to be dismissed.

38. The Division Bench of This Court in *The Case of Premier Irrigation Equipment Ltd. v. UOI* 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.

39. 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

40. 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 129D of the Customs Act 1962, 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 there is an import or not the process if any undertaken in the service centre amounts to manufacture or not, whether there is an "export" or not and if the goods imported or exported during are dutiable goods or not would fall within the meaning of the expression "determination of the rate of duty of Customs or the value of the goods for the purposes of assessment of duty" used in Section 130 and Section 130E 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.

41. Broadly the following disputes do not fall within the jurisdiction of High Court u/s 130 of the Act:

- (a) Dispute relating to the duty of customs 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) Whether what is imported or exported is goods which attracts customs duty.

42. 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 customs or to the value of goods for the purposes of assessment lies to the Supreme Court u/s 130 of the Act and not to the High Court u/s 130.

43. 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 customs duty payable would vary from place to place. In order to bring uniformity in the levy of customs 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 importers or exporters 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.

ON FACTS

44. The Assessee has imported duty free material under DEEC Scheme (with Actual User Condition). It is not in dispute that the Assessee has fulfilled the export obligation completely. The Assessee has not diverted the imported material or sold them. All the material imported were put to use. They were allowed to import 2% in excess of their actual requirement to provide for wastage. The excess material in fact had not been utilized completely because of efficient utilization of the raw material. The wastage was less. They ceased manufacturing the pagers and the said material became obsolete. Therefore the said unused material had been written off in their books of accounts. They had complied with the conditions stipulated in notification 30/97-Cust dated 01-04-1997. It is under these circumstances through the adjudicating authority and the first appellate authority have held that the Assessee has to pay customs duty amounting to Rs. 96,17,498-00 with interest and that order had been upheld by the Commissioner of Customs, the Tribunal held that the Assessee has not violated the terms and conditions of the notification, they had completely discharged their obligation and therefore there is no liability on the part of the Assessee to pay any customs duty, interest and penalty. It is that order which is challenged in this appeal.

45. As is clear from the questions of law framed at the time of admission, this

Court is called upon to decide whether the terms and conditions of the notification No. 30/09-Cust dated 10-04-1997 has been complied with by the Assessee or not and whether the levy of duty interest and penalty is legal or not and whether the Tribunal was justified in setting aside the levy of duty, interest and penalty?

46. All these questions relate to determination of rate of duty payable, entitlement of exemption under notification. They have to be decided by the Apex Court in an appeal to be preferred u/s 130-E and not by the High Court in an appeal preferred u/s 130 of the Act. Therefore 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 Assessee is not liable to pay Customs duty, interest and penalty and setting aside the levy of duty and demand notice issued by the Department is not maintainable before this Court.

47. Therefore, we are of the considered opinion that the present appeal preferred u/s 130 of the Act is not maintainable before this Court. The appeal is to be preferred to the Supreme Court u/s 130-E of the Act. Accordingly, the appeal is dismissed. No costs.