

(2015) 02 MAD CK 0493
In the Madras High Court
Case No : C.M.A. No. 2682 of 2007

The Commissioner of Customs

APPELLANT

Vs

Universal Cold Storage Ltd.

RESPONDENT

Date of Decision : 26-02-2015

Acts Referred:

Customs Act, 1962 — Section 130

Citation : (2015) 322 ELT 608

Hon'ble Judges : R. Sudhakar, J; R. Karuppiyah, J

Bench : Division Bench

Advocate : T.R. Senthil Kumar, for the Appellant

Judgement

R. Sudhakar, J—Aggrieved by the order of the Tribunal in dismissing the appeal filed by it, the appellant/Revenue is before this Court by filing the present appeal. This Court, vide order dated 26.10.2007, admitted the appeal on the following substantial questions of law:--

"i) Whether the Commissioner (Appeals) is right in holding that the refund claim made by the respondent is not barred by limitation when the respondent has not paid the duty under protest?

ii) Whether the Commissioner (Appeals) is right in holding that the claim for refund cannot be rejected for the non-production of original documents, viz., original shipping bills and original cess paid challans?

iii) Whether the Appellate Tribunal is right in dismissing the appeal filed by the appellant relying upon the decision reported in 2005 (190) ELT 72 , which is the subject matter of appeal before this Hon'ble Court?"

2. The respondent is engaged in the business of exporting marine products, more specifically prawns/shrimps. The appellant/Revenue was collecting cess at the rate of 0.5% on the ground that prawns/shrimps are fish. The said collection of cess was challenged by the respondent/assessee before the Commissioner of

Customs (Appeals), who allowed the appeals and held that prawns/shrimps are different form of fish and not liable for cess. Therefore, a refund claim was filed by the respondent, which was rejected by the Deputy Commissioner of Customs stating that the claims were hit by limitation as the respondent has not produced the original documents, viz., the original shipping bills and original cess paid challans. Against the said order, the respondent filed an appeal before the Commissioner of Customs (Appeals), who remanded the matter back to the Dy. Commissioner of Customs (Refund) with a direction to re-examine the matter after giving sufficient opportunity to the respondent. Aggrieved by the said order, the appellant/Revenue pursued the matter before the Tribunal by filing an appeal, which was dismissed by the Tribunal holding that cess was not leviable on export of prawns/shrimps under Agricultural Produce Cess Act, 1940. Aggrieved by the said order of the Tribunal, the appellant/Revenue is before this Court by filing the present appeal.

3. Though the appeal has been admitted on the above three questions of law, at the present point of time, it is seen that the 3rd substantial question of law alone survives for consideration, and, therefore, the Court heard the learned counsel on the said question of law. Insofar as substantial questions of law Nos. 1 and 2 are concerned, they are academic and, therefore, are not dealt with.

4. Heard the learned standing counsel appearing for the appellant and perused the materials available in the typed set of documents. In spite of notice, there is no representation for the respondent.

5. It is fairly brought to the notice of this Court by the learned standing counsel for the appellant/Revenue that similar issue has been considered in the case of Commissioner of Customs v. Edhayam Frozen Foods (CMA Nos. 212 to 223/07, etc. batch - Dated 4.7.08), and has been answered in favour of the assessee and against the Revenue. Accordingly, it is submitted that similar order may be passed in this matter as well.

6. In Edhayam Frozen Food's case (supra), the questions of law initially framed were reformulated at the time of hearing and one of the questions that arose for consideration before the Bench was:--

"Whether on the facts and circumstances of the case, the expression "fish" stated as item No. 7 to the schedule to the Act, 1940 would include within itself prawns/shrimps?"

7. Considering the above question, this Court held as under:--

"35. From the whole lot of materials available, the one and only conclusion that can be arrived at is that the expression fish found as item No. 7 in the Schedule to the Agricultural Produce Cess Act, 1940, does not include within itself prawns and shrimps.

36. We can also take support from the decision of the Orissa High Court in the case of State of Orissa Vs. Cifoods Limited, (1982) 50 STC 152 , wherein a

Division Bench has found that biologically, fish and prawn are two different classifications, and qualitatively, fish and prawn are two different commodities and on the evidence placed, even in the common parlance, they were understood as two different items. There was no scope for one item to pass for the other. The said decision of the Orissa High Court was followed by another Division Bench of the same High Court in the case of the same assessee, reported in C.I. Foods Limited Vs. State of Orissa, (1988) 68 STC 284 .

37. The Kerala High Court while answering the question as to whether cuttlefish is a variety of fish, or not, after referring to various technical meanings, in the case of Sunbay Food Corporation Vs. State of Kerala, (1986) 63 STC 270 , has observed as under:

"Thus, the poignant feature of cuttlefish is that it is a non-vertebrate. Prawns and lobsters are also non-vertebrates. Even the Act does not include prawns and lobsters in the category of fish, as they have been made taxable items. There is no dispute about it. The conclusion to be drawn from the above discussion is that cuttlefish cannot be treated as a fish variety. It is hence not an exempted item."

38. The finding of the above case is also yet another support to the conclusion we arrived at. The ultimate conclusion arrived at by the Division Bench was cuttlefish is a non-vertebrate and hence not a fish. In this case, prawns/shrimps are also non vertebrates and hence, they are different from fish, which is a vertebrate.

39. The Andhra Pradesh High Court in the case of T.B.R. Exports (Madras) v. State of Andhra Pradesh, (116 STC 257), after referring to the decisions of the Orissa High Court in the cases of C.I. Foods cited supra, has held as follows:

"Having given our anxious considerations to the rival contentions, we have reached the conclusion that it is not possible to agree with the contentions canvassed by the learned counsel for the petitioner assessee, for obvious reasons while applying a common parlance test it cannot be seriously contended that fish and prawns are one and the same commodity. If a lay man were to ask for fish in the market and if prawn is provided he would promptly refuse it and vice versa. Fish and prawns are separate commodities as understood in commercial world."

40. Hence, the second substantial question of law is answered in favour of the assessee by holding that the expression fish contained in Schedule 7 to the Agricultural Produce Cess Act, 1940 would not include within itself prawns and shrimps.

41. Mr. Joseph Vellapally, sought to take assistance from the judgment of the Supreme Court in the case of Collector of Customs, Bombay v. Swastic Woolens (P) Ltd., (1988 (Supp) SCC 796) to contend that the question as to whether fish would include prawns/shrimps, is a question of fact, when the Tribunal and the authorities below have held that they are two different commodities under

section 130 of the Customs Act, an appeal which involves a substantial question of law, can alone be entertained and the issue being question of fact, the Court need not interfere with the finding arrived at by the ultimate fact finding authority.

42. In that case before the Apex Court, an importer who imported consignment of wool materials, claimed that it as wool waste and hence not liable for customs duty as per a Notification. The department was of the opinion that what was imported was not wool waste, but wool sleeve and imposed duty. The experts gave a report that it was not possible to give an opinion by visual observations of the material and that there was no specification laid down for the same by the ISI or International Standard Organization. In those circumstances of the case, the Tribunal noted that the question would have to be understood on the basis of the trade understanding. Thus, the question involved in that case was whether the goods imported is woollen waste or woollen sleeve, that is a question of fact. But in the present case, the question whether the expression fish includes prawns/shrimps cannot be regarded as question of fact, but can only be regarded as an issue involving interpretation of an entry, which can be regarded as a question of law.

43. For the discussion above made, the appeals are dismissed. However, there is no order as to costs. The connected miscellaneous petitions are consequently dismissed."

8. The abovesaid view enunciated by this Court is squarely applicable to the case on hand. Following the abovesaid decision, the 3rd substantial question of law is answered in favour of the assessee and against the Revenue.

9. In the result, this appeal filed by the Revenue/appellant is dismissed. However, in the circumstances of the case, there shall be no order as to costs.