

(2013) 10 KL CK 0084

In the High Court Of Kerala

Case No : Customs A. No. 4 of 2010 (Arising against the Order Nos. 676 & 677 of 2009 dated 28/05/2009 in A. Nos. 18, 19 of 2006 of Customs, Excises & Service Tax App. Tribunal, South Zonal Bench, Bangalore dated 09/07/2009.)

Thir Ven Steels Pvt. Ltd. (M/s.), Andhra Pradesh

APPELLANT

Vs

Commissioner of Customs, Kochi

RESPONDENT

Date of Decision : 29-10-2013

Acts Referred:

Citation : (2014) 1 KHC 69

Hon'ble Judges : Mr. K.M. Joseph and Mr. A. Hariprasad, JJ.

Bench : Division Bench

Advocate : John Varghese (Standing Counsel, Central Board of Excise), Thomas Mathew Nellimoottil (Standing Counsel, Central Board of Excise), for the Respondent; E.K. Nandakumar (Senior Advocate), A.K. Jayasankar Nambiar (Senior Advocate), K. John Mathai, P. Benny Thomas and P. Gopinath, Advocates, for the Appellant

Final Decision : Dismissed

Judgement

Mr. K.M. Joseph, J. - The appellant purports to call in question the Annexure-A5 (mistakenly shown as Annexure-A3 in the prayer portion of the appeal memorandum) order of the Customs, Excise & Service Tax Appellate Tribunal, South Zonal Bench, Bangalore. The said order is the culmination apparently of the second round of litigation. The appellant had imported what is stated to be scrap on 22/01/2001 through the Cochin Port. The appellant came to be served with Annexure-A1 show-cause notice on the basis that, according to the Department, goods actually imported are pipes. Under the show-cause, the appellant was railed upon to show-cause why the goods should not be classified as pipes and the duty short paid should not be demanded, interest on the duty short paid should not be levied, the goods should not be confiscated and further that the penalty should not be imposed under the provisions of the Customs Act. The appellant submitted Annexure-A2 reply. The adjudicating authority accepted

the contention of the appellant that the goods are liable to be classified as scrap. However, the other findings of the authority were not in favour of the appellant. Hence, the appellant preferred an appeal before the Appellate Tribunal and vide Ext. A3 order of the Tribunal the matter was remitted back to the adjudicating authority. On re-adjudication, the adjudicating authority purported to pass Annexure-A4 order classifying the goods as "pipes". It is found that differential duty was payable, as the exemption under Customs Notification 16/2000 was not available, that interest is payable under Section 28AB of the Customs Act, that the goods imported under bill entry No. 340 are liable for confiscation and that penalties are to be imposed. It is the said order, which is challenged before the Tribunal. The Tribunal upheld that portion of the order. Following substantial question of law are projected before us in the appeal memorandum:

"a) Ought not the Appellate Tribunal to have found that the adjudicating authority could not have, while passing orders after the remand made by the Tribunal, vide final order Nos. 1241 and 1242 of 2002, classified the goods as pipes coming under Customs Tariff Heading 7304.39 in view of the fact that the Tribunal had accepted the earlier classification made by the adjudicating authority classifying the items as HMS Scrap under Tariff Heading 7203.49?

b) Whether the Tribunal, being the ultimate fact finding authority, was right in holding that the goods covered under bill of entry No. 340 are properly classifiable as pipes under Customs Tariff Heading 7304.39, when the same was accepted to be classified under Chapter Heading 7204.49 by the adjudicating authority and the same has not been appealed against by the department?

c) Whether the Tribunal, being the ultimate fact finding authority, was right in holding that the goods covered under bill of entry No. 340 are properly classifiable as pipes under Customs Tariff Heading 7304.39, when the examination of the goods was done at the back of the appellants and when the cross-examination of the surveyor was rejected by the adjudicating authority?

d) Whether the Tribunal was right in coming to the conclusion that the appellant was not entitled to benefit of exemption Notification No. 16/2000 dated 01/03/2000?

e) Whether the Tribunal was right in blindly accepting the assessable value fixed by the adjudicating authority?

f) Whether the Tribunal is right in accepting the end - use certificate issued by the Assistant Commissioner for the goods imported under Bills of Entry Nos. 79 and 177, and reject the goods imported under Bill of Entry No. 340, under identical circumstances.

2. When the matter was taken up for consideration, the preliminary objection raised by the learned counsel for the respondents was that the appeal itself is not maintainable in view of the following provisions contained in Section 130 of the Customs Act:

"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."

According to the learned counsel for the respondents, the question involved in this case relates directly to determination of rate of duty, as contemplated under Section 130 of the Act.

3. The learned counsel for the appellant, faced with the above stand taken by the respondents, would point out that the appeal was indeed maintainable. In support of his contention, the learned counsel drew our attention to the decision of the Supreme Court in Navin Chemicals Mfg. & Trading Co. Ltd. 1993 KHC 1249 : 1993 (68) ELT 3 (SC) : 1993 (4) SCC 320. Paragraphs 11, 12 and 13 of the above decision reads as follows:

"11. 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 purposes 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 valuation of goods for 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 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 definition of the said expression to subsection (5) of Section 129D, it is proper that the said 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.

12. 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 that 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.

13. The order of the Additional Collector under appeal before CEGAT in the present case did not have any direct or proximate relation, for the purposes 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 to the appellant the option of redeeming them upon payment of a fine of Rs. 10,000/-. That the appellant might avail of the option, pay the fine and clear the said, goods, when question as to the rate of duty and value for purposes of assessment might possibly arise, is far too remote a contingency to satisfy the test that is laid down."

The learned counsel for the appellant also draws our attention to the decision in Commissioner of Customs, C.G.O. v. Sonam International 2012 (275) ELT 326 (All.). According to the learned counsel, though the words of limitation found under Section 130 of the Act barring appeal to the High Court in view of the interpretation raised by the Apex Court in Navin Chemicals Mfg. (cited supra), unless it be a question which requires to be dealt with at the national level, in view of the importance of the matter, it can be dealt with by the Tribunal and therefore, the question which involves substantial question of law which has raised in this case, will not fall within the ambit of the words which take the matter out of jurisdiction of the High Court under Section 130. The learned counsel would submit that unless the matter directly and approximately impinges in relation to the rate of duty or value of the goods in question, it cannot be said to be a matter relating to the rate of duty as contemplated under Section 130. Still furthermore, drawing our attention to Section 129D(5) of the Act, as it stood the learned counsel contended that interpretation under that Section may not have a bearing on the words used under Section 130 of the Act. The learned counsel would submit that the matter was concluded by Annexure-A3 order of the Tribunal. In that order the Tribunal has found that the goods is liable to be classified as scrap and when the matter is remitted back, the Appellate Authority is bound by the order of remand.

4. Per contra, the learned counsel for the respondents would also seek to draw support from the declaration of law contained in paragraph 11 of the decision in Navin Chemicals Mfg. case (cited supra) which we have already extracted. It is submitted that, in paragraph 11, the Apex Court has held a decision as to the classification of the 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 the purpose of assessment. In this case, the precise question is as to whether the goods in question is liable to be classified as scrap or pipe. If that be so, it would amount to a dispute directly and proximately relates to the rate of duty applicable thereto for the purpose of assessment. In view of the interpretation placed by the Apex Court in Navin Chemicals Mfg. case

(cited supra), we are of the view that the appeal cannot lie to the High Court under Section 130 of the Act.

5. We are of the opinion that the aforesaid exposition of law by the Apex Court, no doubt rendered under the auspicious of Section 129D(5), also applicable to the similar words found under Section 130 of the Act. It may be true that the said provision has been repealed. But, we would think that, that repealing would not have been the effect of taking away of the efficacy of the pronouncement of law interpreting similar words as done by the Apex Court in Navin Chemicals Mfg. case (cited supra). In the light of the above decision, we see no merit in the appeal. Accordingly, the appeal is dismissed as not maintainable.