

(2012) 08 GUJ CK 0093
In the Gujarat High Court

Case No : Special Civil Application No. 7536 of 2008 with S.C.A. No. 13096 of 2008 and Civil Application No. 6775 of 2008

U.M. Cables Ltd.

APPELLANT

Vs

Union of India

RESPONDENT

Date of Decision : 22-08-2012

Acts Referred:

Citation : (2017) 347 ELT 78

Hon'ble Judges : Akil Kureshi and Harsha Devani, JJ.

Bench : Division Bench

Advocate : Shri Arun Mehta with P.R. Nanavati, Counsels, for the Petitioner; Ms. Manisha Lavkumar, Counsel, for the Respondent

Final Decision : Disposed Off

Judgement

Akil Kureshi, J. (Oral)—The petitions have chequered history. We would attempt to simplify the facts.

2. Special Civil Application No. 7536/2008 arises in the following background :

2.1 The Petitioner No. 1 M/s. U.M. Cables Ltd. is a company registered under the Companies Act, 1956. Rest of the petitioners are its office bearers. The Petitioner No. 1 company is engaged in the business of manufacturing of Optical Fibre Cable. According to the petitioner such final product is classifiable under Central Excise Tariff Sub-Heading No. 8544.10, subsequently renumbered as 8544.70. For the purpose of its manufacturing activity, the petitioners imported various raw materials and claimed exemption from payment of customs duty for some of the items in terms of Notification No. 24/2005, dated 1-3-2005. Some of the items imported by the petitioners attracted concessional rate of duty.

2.2 On 13-8-2005, a team of Director General of Anti Evasion, Preventive Wing visited the factory premises of the petitioner company, seized documents and recorded statements of persons present. This was on the premise that according to the Revenue authorities, the final product manufactured by the petitioners was

classifiable under Sub-Heading 9001.1000 and therefore, petitioners were not entitled to benefit of exemption Notification No. 24/2005. Communications in this respect were issued by the respondents dated 25-8-2005 and 26-9-2005. Against such communications, the petitioners approached this Court by filing Special Civil Application No. 19506/2005. Said petition was disposed of by order dated 27-10-2005. The Court allowed the petition, quashed the impugned communications primarily on the ground that such communications were issued in breach of principles of natural justice without hearing the petitioners.

2.3 The Deputy Commissioner of Central Excise, Silvassa issued a show cause notice on 15-2-2006 calling upon the Petitioner No. 1 company why the product manufactured by it should not be classified under Chapter Sub-Heading No. 9001.1000 under the Central Excise Tariff Act and further why the application made by the company for import of certain raw materials at concessional rate of duty under Notification No. 24/2005 be not rejected. The company appeared before the Deputy Commissioner and filed a detailed reply opposing show cause notice proceedings. The Deputy Commissioner carried on the proceedings and collected certain materials including the test reports from various institutions. Eventually, he passed order-in-original dated 1-8-2006 and confirmed the classification under Sub-Heading No. 9001.1000. The petitioners challenged the order of the Deputy Commissioner before the Commissioner (Appeals) who by his order dated 29-12-2006 quashed the order-in-original dated 1-8-2006 and directed de novo consideration and decision.

2.4 When such proceedings after remand were pending before the Deputy Commissioner, the petitioners received a fresh show cause notice dated 21-9-2006 issued by the Additional Director General of DRI, Ahmedabad, calling upon the petitioner company why differential customs duty as per Annexure-A to the notice amounting to Rs. 2,80,84,430/- equivalent to duty forgone on the goods imported on concessional rate of duty under Notification No. 24/2005 be not recovered with interest and penalties.

2.5 The petitioners opposed any such proposal by filing a detailed reply dated 18/20-12-2006. The petitioners also filed written statements contending inter alia that said authority has no jurisdiction to issue any such show cause notice or to levy any duty or penalty.

2.6 The petitioners received an order dated 31-3-2008 passed by the Commissioner of Central Excise confirming the duty demand of Rs. 1,88,90,000/- on the raw materials imported on concessional rate of duty under Notification No. 24/2005. He also ordered confiscation of goods valued at Rs. 28,44,64,318/-. In view of confiscation, he imposed redemption fine of Rs. 1,00,00,000/- on the company. He also imposed penalty of Rs. 1,88,90,000/- on the company under Section 114A of the Customs Act. He issued certain consequential directions.

2.7 The petitioners thereupon filed Special Civil Application No. 7536/2008 and challenged the order-in-original dated 31-3-2008 passed by the Commissioner of

Central Excise.

2.8 It is the case of the petitioners that in such order the Commissioner also decided the question of classification of final product though same was never part of the show cause notice proceedings. Since the very issue of appropriate classification of goods in question was pending before the Deputy Commissioner, a Division Bench of this Court by an interim order dated 15-5-2008 while issuing notice desired that the Deputy Commissioner should take a final decision thereon preferably one month from the date of order. The Division Bench thereafter, passed yet another order on 16-5-2008 in Civil Application No. 6314/2008 and stated thus :

"Heard Mr. P.R. Nanavati for the petitioners and Mr. R.M. Chhaya, learned Standing Counsel for the Central Government.

The Deputy Commissioner, Central Excise, Division-III, Silvassa shall adjudicate the show cause notice dated 15-2-2006 after giving the petitioners an opportunity of being heard, in accordance with law and without being influenced by the order dated 31-3-2008 passed by the Additional Director General of Revenue Intelligence, Ahmedabad. The order shall be passed as expeditiously as possible and preferably within one month from the date of receipt of the order.

The application stands disposed of accordingly."

2.9 Before the Deputy Commissioner, the petitioners prayed for cross-examination of the experts whose opinions were collected by the Deputy Commissioner. Such request was however, rejected by the said authority by his order dated 12-6-2008 on various grounds including that High Court in the present case had directed to finalise the classification within one month from 16-5-2008. He therefore, recorded that "circumstances compel me to deny your request for cross-examination as there is no sufficient time left with me."

2.10 Be that as it may, what is of importance at this stage is that the Deputy Commissioner passed his order-in-original on 17-6-2008 and held that the product in question is classifiable under Chapter Sub-Heading No. 9001.1000. This order the petitioners have challenged in this very petition by making necessary amendments.

3. During the period when such proceedings were going on the petitioners imported a fresh consignment of raw materials for the manufacture of their final product. In Special Civil Application No. 13096/2008, we are concerned with the controversy related to such import. As per the petitioners such imports were required to be permitted on concessional rate of duty under Notification No. 24/2005. Since the department did not issue Concession Certificate, the petitioners filed Special Civil Application No. 13096/2008 praying for a direction to the respondents to issue such Concession Certificate in terms of Notification No. 24/2005.

4. Division Bench of this Court by order dated 23-10-2008 while issuing notice,

by way of ad interim relief directed the respondents to issue necessary Concession Certificate in respect of consignment in question subject to the petitioners depositing a sum of Rs. 7,50,000/- before the Court towards the possible duty that may become payable.

5. It is not in dispute that such directions were carried out and the petitioners cleared the goods upon depositing the said sum with the Registry of the Court. We notice that subsequently yet another consignment arrived. Under order dated 3-12-2008 passed in Civil Application No. 12827/2008, the same was also allowed to be cleared upon the petitioners depositing a sum of Rs. 1,67,814/- before the Registry of the Court.

6. Appearing for the petitioners, learned counsel Shri Arun Mehta vehemently contended that order dated 31-3-2008 passed by the Commissioner is without authority of law. He assailed the order on following grounds :

(1) That in the impugned order the Commissioner decided the question of classification of goods which was not part of the show cause notice at all. The Commissioner thus travelled beyond the scope of the show cause notice itself. His order was therefore, without jurisdiction and also in breach of principles of natural justice.

(2) In the impugned order the Commissioner has noted that he is deciding the question of classification for guidance of the Deputy Commissioner before whom such issue was pending. The Commissioner could not have taken for consideration any issue which was otherwise pending before the Deputy Commissioner in exercise of his statutory powers.

(3) The show cause notice was issued by the Additional Director General of DRI, Ahmedabad whereas the final decision was taken by the Commissioner of Central Excise and Customs which also could not have been done.

6.1 With respect to order passed by the Deputy Commissioner dated 17-6-2008 confirming classification of goods under Chapter Sub-Heading No. 9001.1000, following contentions were raised :

(1) Such order was passed without following principles of natural justice.

(2) Cross-examination of experts though demanded was not granted.

(3) The Deputy Commissioner was required to decide the issue without being influenced by the observations made by the Commissioner in his order dated 31-3-2008 as directed by this Court in order dated 16-5-2008, despite which, the Deputy Commissioner passed the order mainly relying on the observations made by the Commissioner. In fact the Deputy Commissioner has not taken any independent decision and the entire order of the Deputy Commissioner is virtual reproduction of the discussion found in the order of the Commissioner. In short, such order of the Deputy Commissioner suffered from total non-application of mind.

6.2 With respect to Special Civil Application No. 13096/2008, counsel submitted that when the question of classification of goods is yet not finalised, the Customs authorities could not have denied the benefits of exemption notification. In the present case, the petitioners' goods were being classified under Chapter Sub-Heading No. 8544.70 since years. Such classification could not have been disturbed abruptly. Without any adjudication, the authorities could not have discontinued the facility of concessional rate of duty on the raw material being imported by the petitioner for manufacture of its final product.

7. On the other hand, learned counsel Ms. Manisha Lavkumar appeared for the Department and opposed the petition. With respect to the order passed by the Commissioner, she submitted that the question of classification is severable and the rest of the order should be sustained leaving it open to the petitioners to challenge the same in accordance with law.

7.1 With respect to the order of Deputy Commissioner dated 17-6-2008, counsel submitted that he had examined the matter independently and given his verdict on the issues arising. The order is appealable. Statutorily first appeal would lie before the Commissioner and thereafter, before the Tribunal. The issue involved is one of classification and therefore, any further appeal would lie exclusively to the Supreme Court and not before this Court. She, therefore, contended that writ petition should not be entertained leaving it open to the petitioners to avail all statutory remedies.

8. Having thus heard learned counsel for the parties, we may first examine the legality of the order dated 31-3-2008 passed by the Commissioner of Central Excise and Customs, Vapi. By such order he confirmed part of the duty, penalty and interest demand raised under the show cause notice dated 21-9-2006. Such show cause notice was issued calling upon the petitioners why differential customs duty of Rs. 2,80,84,430/- equivalent to the duty forgone on the goods imported under concessional rate of duty under Notification No. 24/2005 be not recovered with consequential effects such as charging of interest, penalties and confiscation. A perusal of the show cause notice itself suggests that the petitioners were to be denied such concessional rate of duty since according to the respondents the final product was classifiable under Chapter Sub-Heading No. 9001.1000. In the show cause notice itself detailed tentative grounds were indicated for such purpose. The show cause notice also refers to certain materials collected by the department to indicate that the correct classification would be under Chapter Sub-Heading No. 9001.1000. It is therefore, inescapable conclusion that the very foundation of the show cause notice was that the final product would be classifiable under Chapter Sub-Heading No. 9001.1000 and that therefore, the petitioners were not entitled to concessional rate of duty under Notification No. 24/2005. We are not at this stage commenting on the validity or otherwise of the department's stand in this regard. Suffice to record that the entire show cause notice was founded on department's tentative opinion that the product in question is classifiable under Chapter Sub-Heading No.

9001.1000.

9. The Commissioner of Central Excise and Customs vide his order dated 31-3-2008 proceeded to examine this very question and after detailed discussion concluded that the product in question is classifiable under Chapter Sub-Heading No. 9001.1000. The order runs into 66 printed pages. There is elaborate discussion on why the Commissioner holds a belief that such classification is appropriate. From the order itself it can be gathered that he was conscious that question of classification was pending before the Deputy Commissioner. Neither the Commissioner nor the department before us have raised any doubt that statutorily it was the Deputy Commissioner who was authorised to decide such a issue. We have, therefore, proceeded on the basis that the Deputy Commissioner was competent to decide said issue who was in seisin of the matter. To arrive at proper classification on the final product, he had issued a show cause notice to the petitioners and such proceedings were pending when the Commissioner passed his order dated 31-3-2008. In fact acutely conscious of such pending proceeding, Commissioner himself recorded that for proper guidance of the Deputy Commissioner, he would proceed to decide the question of classification.

10. To our mind, the procedure adopted by the Commissioner was wholly illegal. The Deputy Commissioner under statutory powers was vested with certain quasi-judicial functions. He was, therefore, required to exercise such function uninfluenced by any external agency including the higher authorities. It is by now well settled that in discharge of statutorily entrusted quasi-judicial functions, even the higher authorities cannot guide or interfere with the competent authority. In case of *Mahadaya Premchandra v. Commercial Tax Officer, Calcutta*, reported in AIR 1958 SC 667, Constitution Bench of the Supreme Court quashed an assessment order by the Commercial Tax Officer when it was found that he had acted under the instructions of the higher authority. It was observed as under :

"18. From the detailed narration of the facts regarding this particular assessment it is quite clear that the first respondent did not exercise his own judgment in the matter of the assessment in question. Even though he was convinced to the contrary, he asked for the instructions of the Assistant Commissioner (C.S.) and followed the same and assessed the appellants to sales-tax in respect of the disputed transactions. The order which he ultimately passed on January 15, 1955, further showed that he was merely voicing the opinion of the Assistant Commissioner (C.S.) without any conviction of his own and the only thing he had to say in regard to the various grounds mentioned in the letters dated November 21, 1953, and June 19, 1954, was that they appeared to him to be "not at all satisfactory". This was hardly a satisfactory way of dealing with the matter. If the Assistant Commissioner (C.S.) had been dealing with the same he could have by all means given in the assessment order which he made his reasons for doing so and these reasons would have been open to scrutiny in further proceedings taken by the appellants either by way of appeal or otherwise. The Assistant

Commissioner (C.S.) however, had delegated this work of assessment to the first respondent and then it was the duty of the first respondent to make the assessment order giving his own reasons for doing so. The file of the assessee, however, shows that even though the 1st respondent was satisfied on the materials placed by the appellants and their representative before him that the appellants were not liable to pay sales-tax in regard to these transactions, he referred the matter first for instructions and then for obtaining the "valued opinion" of his superior, the Assistant Commissioner (C.S.) and the latter expressed his opinion that the appellants were liable in respect of these transactions. All this was done behind the back of the appellants and the appellants had no opportunity of meeting the point of view which had been adopted by the Assistant Commissioner (C.S.) and the first respondent quietly followed these instructions and advice of the Assistant Commissioner (C.S.).

19. We are really surprised at the manner in which the first respondent dealt with the matter of this assessment. It is clear that he did not exercise his own judgment in the matter and faithfully followed the instructions conveyed to him by the Assistant Commissioner (C.S.) without giving the appellants an opportunity to meet the points urged against them. The whole procedure was contrary to the principles of natural justice. The procedure adopted was, to say the least, unfair and was calculated to undermine the confidence of the public in the impartial and fair administration of the sales-tax Department concerned. We would, have, simply on this ground, set aside the assessment order made by the first respondent and remanded the matter back to him for his due consideration in accordance with law; but as the matter is old and a remand would lead to unnecessary harassment of the appellants, we have preferred to deal with the appeal on merits."

11. In case of *Orient Paper Mills Ltd. v. Union of India* reported in AIR 1970 Supreme Court 1498 = 1978 (2) E.L.T. (J 382) (S.C.), the Apex Court observed that the assessing authorities under the Central Excise Act exercise quasi-judicial functions and they have to act in independent manner. Collector cannot control such powers. It was observed :

"4. Now it is common ground, it being admitted in the statement of case filed on behalf of the respondent that "the paper was assessed to duty in accordance with the instructions from the Collector. The main question is whether an assessment made by a subordinate officer in accordance with the instructions issued by the Collector to whom an appeal lay against the order of that subordinate officer can be called a valid assessment in the eye of law. As has been pointed out in *Orient Paper Mills Ltd. v. Union of India*, (1969) 1 SCR 245 = (AIR 1969 SC 48) in which the parties were the same as before us now no authority, however high, can control the decision of a judicial or a quasi-judicial authority that being the essence of our judicial system. In the present case, when the assessment is to be made by the Deputy Superintendent or the Assistant Collector, the Collector, to whom an appeal lies against his order of

assessment, cannot control or fetter his judgment in the matter of assessment. If the Collector issues directions by which the Deputy Superintendent or the Assistant Collector is bound no room is left for the exercise of his own independent judgment."

12. In case of *Sirpur Paper Mills Ltd. v. Commissioner of Wealth Tax, Hyderabad* reported in AIR 1970 Supreme Court 1520, the Apex Court held that the revisional power conferred on the Commissioner under the Wealth Tax Act is quasi-judicial. In exercise of such powers the Board of Revenue cannot give instructions or directions. It was observed :

"3. Section 25 of the Wealth Tax Act provides insofar as it is, material "(1) The Commissioner may, either of his own notion or on application made by an assessee in this behalf, call for the record of any proceeding under this Act in which an order has been passed by any authority subordinate to him, and may make such inquiry, or cause such inquiry to be made, and, subject to the provisions of this Act, pass such order thereon, not being order prejudicial to the assessee, as the Commissioner thinks fit.

xxx

The power conferred by Section 25 is not administrative it is quasi-judicial. The expression "may make such inquiry and pass such order thereon" does not confer any absolute discretion on the Commissioner. In exercise of the power the Commissioner must bring to bear an unbiased mind, consider impartially the objections raised by the aggrieved party, and decide the dispute according to procedure consistent with the principles of natural justice : he cannot permit his judgment to be influenced by matters not disclosed to the assessee, nor by dictation of another authority. Section 13 of the Wealth Tax Act provides that all officers and other persons employed in the execution of this Act shall observe and follow the orders, instructions and directions of the Board. These instructions may control the exercise of the power of the officers of the Department in matters of administrative but not quasi-judicial. The proviso to section 13 is somewhat obscure in its import. It enacts that no orders, instructions or directions shall be given by the Board so as to interfere with the discretion of the Appellate Assistant Commissioner of Wealth Tax in the exercise of his appellate functions. It does not, however, imply that the Board may give any directions or instructions to the Wealth Tax Officer or to the Commissioner in exercise of his quasi-judicial function. Such an interpretation would be plainly contrary to the scheme of the Act and the nature of the power conferred upon the authorities "invested with quasi-judicial power."

13. In case of *Gujarat Gas Co. Ltd. v. Joint Commissioner of Income-tax (Assessment)* reported in 2000 (245) ITR 84, this Court observed as under :

"In our opinion, the view which we are taking is also fortified by the proviso to Section 119 which specifically provides that CBDT cannot issue instructions to the Income Tax authority to make a particular assessment or to dispose of a

particular case in a particular manner as well as not to interfere with the discretion of the Commissioner in exercise of his appellate functions."

14. When the question of classification of goods was pending before the Deputy Commissioner, in our opinion, therefore, it was wholly inappropriate on part of the Commissioner to proceed to decide the question through elaborate discussion. It was precisely for this reason that this Court by order dated 16-5-2008 directed the Deputy Commissioner to take a decision on the question of classification without being influenced by the observations made by the Commissioner. In any case, the Commissioner in our opinion proceeded to decide the classification which the Deputy Commissioner was competent to do and for which proceedings were pending before him. Order of the Commissioner therefore, cannot be sustained under any circumstances.

15. Coming to the question of Deputy Commissioner's order dated 17-6-2008, we are conscious that he had decided the issue of classification. We are also conscious that ultimately if the petitioners had taken the departmental appeal route, the ultimate decision of the Tribunal would be appealable at the hands of aggrieved party whosoever it may have been before the Supreme Court and not before this Court. Ordinarily therefore, availability of statutory appeal and further appeal being maintainable before the Supreme Court and not before this Court, were strong enough reasons for us to desist from entertaining the writ petition.

16. In case of *Union of India v. Guwahati Carbon Ltd.* reported in 2012 (278) E.L.T. 26 (S.C.), the Apex Court noticed statutory provisions contained in the Central Excise Act, 1944 and maintainability of appeal under certain circumstances against the decision of Tribunal and observed as under :

"18. In our opinion, the assessee ought not to have filed a writ petition before the High Court questioning the correctness or otherwise of the orders passed by the Tribunal. The Excise Law is a complete code in order to seek redress in excise matters and hence may not be appropriate for the writ court to entertain a petition under Article 226 of the Constitution. Therefore, the learned Single Judge was justified in observing that since the assessee has a remedy in the form of a right of appeal under the statute, that remedy must be exhausted first, the order passed by the learned Single Judge, in our opinion, ought not to have been interfered with by the Division Bench of the High Court in the appeal filed by the respondent/assessee."

17. It is however, not disputable that availability of alternative [remedy] by itself is not a complete bar on entertaining a writ petition. So much is well settled by series of decisions of the Apex Court as well as this Court. Despite availability of alternative remedy, a writ petition may still be entertained at the discretion of the Court on certain well recognised exceptions such as, such remedy being not efficacious, onerous or that the order passed by the authority is wholly without jurisdiction or against the principles of natural justice or against the statutory provisions. We do not intend to take exhaustive stock of such grounds. Suffice it

to record that maintainability of writ petition itself is not in question. What is to be decided is whether such writ petition should be entertained in facts of a given case. In other words, it is not the jurisdiction but the question of propriety of entertaining a writ petition which is in question in the present case. Facts are rather gross. We would therefore, not like to relegate the petitioner to appellate remedy. We say so for following reasons :

(1) As already noted, the Commissioner had already taken a decision on what he thought was appropriate classification of the product in question. He classified the product under Chapter Sub-Heading No. 9001.1000. This was at a stage when the question of classification was pointedly at issue before the Deputy Commissioner in the pending show cause notice proceedings. Conscious of such pendency he still went ahead to decide the issue on the pretext that such decision would guide the Deputy Commissioner in the pending proceedings.

(2) When this Court noticed such dichotomy, directed the Deputy Commissioner to decide the show cause notice unmindful of the observations made by the Commissioner. The Court also required that petitioner be given opportunity of hearing. Despite such observations, the Deputy Commissioner proceeded to decide the issue without virtually any input from his side. We have perused the order passed by the Deputy Commissioner on 17-6-2008 and that by Commissioner on 31-3-2008. We find that the Deputy Commissioner has extensively reproduced verbatim detailed paragraphs and discussions of the Commissioner without even referring to the Commissioner's order as if such discussions and conclusions are of his own. In order not to make our order too long and boring to read, we do not intend to reproduce the entire portion of the Deputy Commissioner's order which is nothing but verbatim reproduction of Commissioner's conclusion barring some cosmetic changes in the paragraph numbers and here and there jumbling of the sequence of points noted by the Commissioner. Insofar as substance of the order is concerned, the whole order of the Deputy Commissioner is nothing but repetition and reproduction of Commissioner's order. It is true that the later portion of the Deputy Commissioner's order, does refer to some other orders of the Tribunal. However, such half hearted attempt and cosmetic additions would not convince us that the Deputy Commissioner applied his mind independently or that ultimate conclusions were of his own. We are perturbed that despite a clear direction of the Court to the Deputy Commissioner to decide the issue uninfluenced by the decision of the Commissioner, he not only relied upon the discussions and conclusions of the Commissioner, extensively reproduced the entire order in substance claiming it to be his own discussion.

18. Under the circumstances, we are of the opinion that this is a fit case where even discarding the availability of statutory appellate remedy, we would like to entertain the writ petition in view of peculiar and extraordinary circumstances. In the process, we are not finally deciding ourselves any question of classification of goods.

19. In the ultimate result, order dated 31-3-2008 passed by the Commissioner is quashed. Proceedings of course shall be placed back for fresh consideration and disposal in accordance with law. Considering the inevitable overlap in the question of recovery of the duty waived which issue is pending before the Commissioner and the question of classification, which can be decided only by the Deputy Commissioner, in the present case we provide that the Commissioner shall not take a fresh decision till the Deputy Commissioner decides the issue of classification in the remand proceedings which we intend to provide in this order itself.

20. Order of the Deputy commissioner dated 17-6-2008 is also set aside. He shall decide the entire issue of classification arising out of show cause notice dated 21-9-2006 afresh. Order of Commissioner under which detailed observations were made with respect to appropriate classification has already been quashed. The Deputy Commissioner shall not take recourse to any portion of the order which in any case now stands annulled. He shall take a fresh decision in accordance with law.

21. The above directions would dispose of Special Civil Application No. 7536/2008.

22. Insofar as Special Civil Application No. 13096/2008 is concerned, amount of Rs. 7,50,000/- and Rs. 1,67,814/- deposited before the Registry of this Court shall be released in favour of Respondent No. 2 along with accrued interest, if any. Such amount shall be received by way of deposit to be adjusted towards final duty liability of the petitioners, if any.

23. With these directions, both the petitions are disposed of.

24 In view of order passed in the main matters, Civil Application does not survive. Disposed of accordingly.