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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

Decided On : Jan-31-1997

Reported in : (1997)(92)ELT379TriDel

Appellant : Kamal Auto Engineering

Respondent : Collector of Customs

Judgement :

1. This is an application for rectification of an error apparent, on the face of the questions framed by the two members who had heard the Appeal No. C/328/87-B2 when making a reference to the Third Member for settlement of the difference of opinion between them. For ease of reference, the questions framed are reproduced below :- "In view of difference of opinion, the following questions arise for determination by Third Member on reference, by Hon'ble President.

Whether the appellants are entitled for registration of contract under Project Import Regulations, and entitled for the benefit of concessional rate under Customs Heading 84.66 and the benefit of Notification No. 116/79-Cus., dated 1-6-1979 as held by Member (Judicial) (Shri S. L. Peeran).

The appellants are not entitled to the benefit of Project Import and to the benefit of the Notification as held by Member (Technical) (Shri J.H. Joglekar)." 2. It has been claimed by the learned Advocate on behalf of the appellants that the reference to Notification No. 116/79-Cus., dated 1-6-1979 is not relevant to the issue before the original Bench. It is submitted that the mentioning of the Notification in the

questions framed is redundant.

3. We have heard Shri A.K. Jain, the Learned Advocate and Ms. R. Pant, the Learned SDR.4. Section 129B of the Customs Act relates to the orders of the Appellate Tribunal. Sub-section (1) thereof prescribes the scope of the Appellate orders. Sub-section (2) prescribes that where the Appellate Tribunal has made an order under Sub-section (1) and where there is a mistake apparent from the records thereof, it may rectify such an apparent mistake, on the plea advanced by the either of the parties to the appeal. In the present case, the reference made to the Third Member cannot be termed to be an order as described under Sub-section (2) of Section 129B. It would be an order only when the Third Member agrees with one of the two referring members. On this count, we find that this application for rectification of mistake has no validity and need not be considered by us.

5. Even if we have held so, it is necessary to make some observations as to be placed in the discussions of Notification No. 116/79-Cus. and its inclusion in the reference made to the Third Member. The Member (Judicial) in his order has dealt exhaustively with the application of the said Notification in paragraph 5 of his order. He has also in the concluding portion referred to the said Notification and has opined that the lower authorities were required to have granted the benefit under the said Notification. The learned Member has taken a view taking into account this Notification as also other provisions of law discussed in his order. It is not for the parties in dispute to comment upon the relevance or otherwise of any provisions of law discussed in an order made by the member of the Tribunal. That right can be exercised only by an authority sitting in appeal over the order passed by the member, where such a point is contested before the Appellate Authority. In fact, even that Member to whom the reference is made, is not empowered to (sic) framed the questioned reference. It has been held by the Tribunal in the case of Jainsons Clothing Corporation v.Collector of Central Excise, 1995 (76) E.L.T. 76, that the powers of the Third Member of the Tribunal are very limited. He has to agree either with Member (Judicial) or Member (Technical). The same view has been expressed by the Calcutta High Court in their decision in the case of Govind Ram Agarwal v. C.C. - 1993 (67) E.L.T. 215 (Cal.). In this case the Third Member

on receiving the reference did not hear the case but referred the matter back to the President to constitute the Larger Bench to hear the case. In their decision, the High Court observed that it was incumbent upon the Third Member to hear the point or points on which the members of the Bench in the Tribunal as originally constituted differed and to decide the matter in accordance with law.

6. It is also necessary to go into the issue as to whether the framing or phrasing of a reference made to Third Member is so important as to give rise to such a dispute as is before us.

7. Section 129C(5) of the Customs Act provides for a reference to be made to the Third Member in case of dispute between the two members.

These provisions are akin to those of Section 255 (4) of the Income Tax Act. A similar provision exists in Section 98 of CPC, where there is a difference between two Judges hearing the case. In such an event, an expressly recorded difference is referred to the Third Judge. The Patna High Court in their judgment in the case of Jaywanti Devi, AIR 1994 Patna 296 has dwelt on the need and extent of such a reference. Citing the Clause 28 of the Letter Patent of the Court, the Hon'ble High Court held that :- "That the judges should record expressly in a joint order what their differences are, maybe desirable. But here is no imperative prescription that difference of opinion has to be formulated by a joint order. If such difference or differences is expressly enumerated in a joint order, it may serve better and the Third Judge hearing the appeal may not be required to investigate into their respective judgments to discover the difference or differences of opinion. Still absence of a joint order specifying the difference as envisaged under proviso to Sub-section (2) of Section 98 of the Court cannot be taken to vitiate the reference on the hearing of the appeal by a Third Member." 8. This view is based on a judgment in the case of Rulia Devi v.Raghunath Pmsad - AIR 1979 Patna 115.

9. We must however, take note of another judgment of Patna High Court in the case of Hanutram Chandanmul v. Commissioner of Income Tax, 1953 ITR 505, which deals with Section 5A(7) of the Indian Income Tax Act, 1922 which covers the law relating to reference to the Third Member. In this judgment the Patna High Court has held that it is the duty of the members who heard the appeal for the first

instance to formulate clearly the point on which they differed. In the present case, it is our opinion that the points have been stated clearly. The reference to the Notification has come into the reference because it was an integral component in the discussion made in his order by the learned Member (Judicial). The coverage and the applicability of the Notification has been discussed in the order of the Member (Technical) also. It is, therefore, difficult to accept that the terms of reference are not cleared or that some of them are not relevant or redundant as claimed in the application for rectification of mistake.

10. It is our considered opinion that the questions framed by the original Bench are clearly and correctly framed. The registry is directed to place the papers before the Third Member for decision.

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