Commissioner of Central Excise Vs. Sonatapes Pvt. Ltd.

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SooperKanoon Citation : sooperkanoon.com/358033

Court : Mumbai

Decided On : May-05-2008

Reported in : 2008(3)BomCR709; 2008(132)ECC302; 2008(158)LC302(Bombay); 2008(229)ELT167(Bom); 2009[16]STR667

Judge : Bobde S.A. and; Britto N.A., JJ.

Acts : Central Excise Act, 1944 - Sections 35, 35A and 35B(2); Central Excise Rules, 1944 - Rule 57(O)

Appeal No. : Misc. Civil Application No. 514 of 2000

Appellant : Commissioner of Central Excise

Respondent : Sonatapes Pvt. Ltd.

Advocate for Pet/Ap. : Joseph Vaz, C.G.A. Standing Counsel

Disposition : Appeal dismissed

Judgement :

1. The Customs Excise Gold (Control) Appellate Tribunal, Western Revision Bench at Mumbai has dismissed an appeal solely on the ground that the Commissioner of Customs and Central Excise, Goa has failed to use the words 'not legal or proper' used in Section 35B(2) of the Central Excise and Salt Act which regulates the filing of appeals.

2. The Commissioner (Appeals), Mumbai allowed Modvat credit to the respondent. The Commissioner Customs & Central Excise, Goa perused the order and found that the Commissioner Appeals had allowed Modvat credit on certain items which were not included in the list of capital goods described in the explanation below Rule 57(O) of Central Excise Rules, 1944. He came to the conclusion that the retrospective application of the notification and giving benefit of Modvat credit on inadmissible capital goods was 'bad in law'. He, therefore, directed the Assistant Commissioner of Central Excise to file an appeal with CEGAT.

3. The CEGAT dismissed the appeal. According to the CEGAT the section authorises the Commissioner to appeal against the judgment of the Commissioner (Appeals) only if he is of view that the judgment in appeal is not legal or proper' and not if he is of the opinion that 'the judgment is bad in law.

4. We have given our anxious consideration to the matter and are unable to uphold the CEGATs view. Section 35(B)(2) of the Act reads as follows:

The [Commissioner of Central Excise] may, if he is of opinion that an order passed by the [Appellate Commissioner of Central Excise] under Section 35, as it stood immediately before the appointed day, or the [Commissioner (Appeals)] under Section 35A, is not legal or proper, direct any Central Excise Officer authorised by him in this behalf (hereafter in this Chapter referred to as the authorised officer) to appeal on his behalf to the Appellate Tribunal against such order.

5. In short, the section provides that if the Commissioner of Central Excise is of the opinion that an order passed by Appeal Commissioner of Central Excise is not legal or proper, he may direct a Central Excise Officer to file an appeal to the Appellate Tribunal. What the section requires the Commissioner of Appeal to do is to apply his mind to the order and if he is of opinion that the order is not legal or proper, to direct any Central Excise Officer to file an appeal. According to us the purpose of the provision is absolutely clear and the purpose is to require the Commissioner of appeal to form an opinion that the order is not legal or proper and only thereupon to direct the filing of such an appeal. Such opinion may be expressed in words which are not used by the Statute itself as has been done in this case. Here, the Commissioner of appeals formed an opinion that the order

was bad in law' and, therefore, directed an appeal to be filed. The Tribunal seems to have insisted on a psittacine incantation of the words of the statute.

6. Mr. Vaz, the learned Counsel for the petitioner referred to the Oxford Dictionary which states that the meaning of the term 'bad law' is one that cannot be sustained or held to be valid. He also referred to law lexicon which described the word 'bad' as false.

7. We find from the said dictionary that the phrase 'bad in law' really means something which may be inapt or which cannot be sustained or held to be valid. Surely, this term is interchangeable with the words of the Statute not legal or proper. It would have been an entirely different matter if the order of the Commissioner directing an appeal to be filed would have been passed without any application of mind and had merely said that the order is bad in law or for that matter not legal or proper. But we find that the Commissioner has clearly given his reasons for directing that an appeal be filed and that in his opinion, the Commissioner (Appeals) has wrongly allowed the benefit of Modvat credit on inadmissible items by applying a notification retrospectively. No fault could have been found with the Commissioner for describing the finding of the Commissioner (Appeals) as bad in law for the purpose of Section 35(B)(2) of the Central Excise Act.

8. It appears that the CEGAT has relied on the judgment of the Supreme Court in the case of (Collector of Central Excise, Vadodara v. Rohit Pulp Paper Mills) reported in : 1998ECR257(SC) where the Supreme Court held that the formation of the opinion by the Collector that the order appealed against is not legal or proper is a pre-requisite. In that case, their Lordships observed that the authorities had failed to produce any noting by the Collector to the effect that the order proposed to be appealed was not legal and proper. In the circumstances, Their Lordships upheld the order dismissing the appeal as not maintainable since the authorisation was not legal or proper and was made without applying the mind.

9. The circumstances of the case before us are different. The order directing the appeal to be filed clearly discloses the reasons why the Commissioner formed an opinion that an appeal should be filed. Merely be cause he said that the order

against which the appeal is proposed to be filed was bad in law instead of not legal or proper it could not have been held that the appeal was not maintainable and was liable to dismissed. We, therefore, set aside the order of the CEGAT dated 28.12.1999 and direct the Tribunal to decide the appeal on merits.