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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

Decided On : Aug-02-2005

Reported in : (2005)(190)ELT47TriDel

Judge : R Abichandani, M T K.C.

Appellant : Tik-lig Ltd.

Respondent : Commissioner of Customs

Judgement :

1. The reference made in these appeals earlier to the Larger Bench has been returned by order dated 1-9-2003 to the regular Bench for being heard in the light of the order passed by the Hon'ble Supreme Court in dismissing the appeal filed by the Revenue against the decision of the Tribunal in a group of other matters against which that appeal was preferred to the Supreme Court and later not pressed. It is brought to our notice by the learned Counsel appearing for the appellants that the Supreme Court in Civil Appeal No. D19381/2002 filed by the Commissioner of Customs, Chennai against the CEGAT order No. 1761/01, dated 29-11-2001 (Commissioner of Customs, Chennai v. Vikrant Tyres Ltd.) passed the following order on 17-2-2003 : - "Learned Counsel for the appellant states that she has instructions not to press this appeal. It is dismissed as such".

This order is pointed out from 2003 (157) E.L.T. A134. It is also pointed out by the learned Counsel for the appellants that an application was made for modification of the said order dated 17-2-2003 by the Commissioner of Customs, Chennai in

the said group of appeals which was dismissed on 13-10-2003 by observing that there was no reason to modify/clarify the order dated 17-2-2003. It appears that the application for clarification of the said order was made, as per the copy placed on record, for modifying the order of dismissal on the ground that it was submitted before the Hon'ble Supreme Court that there was delay of 357 days in filing the appeal and as no satisfactory ground was explained in the application for condonation of delay, the Court was pleased to dismiss the appeal on the ground of delay (para 4 of the application). It is stated in paragraph 2 of the application that the appeal raised an important question of law regarding the leviability of additional duty of Customs on the imported rubber under Section 3 of the Customs Tariff Act equal to the cess collected as excise duty under Section 12 of the Rubber Act on similar goods produced in India.

2. We may note here that on 17-2-2003, when the Hon'ble Supreme Court made the above order dismissing appeals as not pressed, a reference that had arisen from the present appeals was already pending before the Tribunal. The question that was referred in the order of reference made on 12-7-2003 in Customs Appeal No. 228/98 (TTK LIG Ltd. v. Commissioner of Customs, Chennai) reads as under :- "Whether Additional Duty of Customs under Section 3 of the Customs Tariff Act, 1975 was leviable on the imported rubber (as on the date of importation) to an extent equal to the amount of CESS leviable under Section 12 of the Rubber Act, 1947 on natural rubber manufactured produced in India (as on the said date)".

The other two matters came to be tagged along with the said appeal in which reference was made, since identical questions were involved. One of the appeals is of the appellant Vikrant Tyres Ltd. (C/421/98). We are told by the learned Counsel that the appeals which were not pressed before the Supreme Court by the Revenue and therefore, dismissed, were all against the orders made by the Tribunal in favour of the said appellant.

3. In the above background, the learned Counsel for the appellants has strongly contended before us that when the Revenue has accepted the legal position in several cases by not challenging those decisions, then it was not open to the Revenue to raise a contrary contention in the case of another assessee. It was

submitted that the Revenue cannot pick and choose the assessee for refund of duty and that there has to be some certainty in the matter of levy and collection of duties. It was also argued that having accepted the judgment of the Tribunal and the legal position by not pressing the appeals, upon instructions, before the Supreme Court, the Revenue cannot be permitted to raise a contrary contention in these appeals whether before this regular Bench or even before the Larger Bench. The learned Counsel placed reliance on the following decisions in support of his contentions: -Union of India and Ors. v. Kaumudini Narayan Dalai and Anr. reported in 2001 (10) Supreme Court Cases 231, was cited for the proposition that it was not open to the Revenue to accept the judgment in the case of one assessee and challenge its correctness in the case of other assessees without just cause.Commissioner of Central Excise, Calcutta v. Suntrack Electronics (P) Ltd., Tribunal had relied on its earlier order which the Revenue had not chosen to challenge, the Supreme Court has held that it was not inclined to entertain the appeal.Vikrant Tyres v. Commissioner of Customs rendered in Appeal No. C/1137 to 1150/98 on 29-11-2001, was cited to point out that the very issue that was involved in the present case was decided in favour of the assessee by following the ear Her decision of the Tribunal in TIK Ltd. v. CC, Chennai reported in 1999(111) E.L.T. 52.CEAT Ltd. v. Commissioner of Customs, CochinVikrant Tyres Ltd. v. CC, Madras - 2000 (36) RLT 577, were also cited to point out that this very issue was decided in favour of the assessee by following the earlier decision in MRF Ltd. v. Commissioner of Customs, Madras reported in 1997 (96) E.L.T. 198 and TTK Ltd., supra.Collector of Central Excise, Pune v. Tata Engineering & Locomotives Co. Ltd. , was cited to point out from para 7 of the judgment that it was held that when Tribunal's interpretation was accepted by the Revenue, they were precluded from taking inconsistent stand.Birla Corporation v. Commissioner of Central Excise (Civil Appeal No. 5118 of 2003, dated 26-7-2005) - 2004 (163) E.L.T. A 40 (S.C.), was cited to point out that in a case where the earlier appeal involving identical issue was not pressed by the learned Attorney General and was, therefore, dismissed, the Supreme Court held in this appeal that the respondent having taken a conscious decision to accept the principles laid down in Pepsico India Holdings Ltd. (which was the earlier appeal) cannot be permitted to take the opposite stand in this case. It was observed that, if this was permitted, the

law will be in a state of confusion and will place the authority as well as the assessees in a quandary. We may note here that when the earlier appeal in Pepsico India Holdings Ltd. was withdrawn, that was done on the basis of a letter of the department dated 5-6-2003, as reproduced by Hon'ble the Supreme Court in the said judgment. In that communication, it was specifically stated that the decision in the case of CCE, Chennai v. Pepsico Holdings Ltd. reported in 2001 (42) RLT 800-Final Order No. 1581/2003, dated 27-10-2000 (CEGAT) [2001 (130) E.L.T. 193 (T)] had been a accepted as reported by the Chief Commissioner.

4. We have heard the learned counsel and the Authorized Representative (DR) at length. We are fully conscious of the fact that the certain amount of certainty should prevail in the field of taxation law and therefore, once the Revenue has accepted the decision of the Tribunal and the Tribunal has in several cases taken a similar view, the position should not get disturbed by taking a contrary view.

5. In our opinion, the order of Hon'ble Supreme Court dismissing the appeal on the ground that, it was not pressed against the decision in which a similar question was decided by the Tribunal, cannot be taken to be the law declared by the Hon'ble Supreme Court in the terms of the decision of the Tribunal. The fact that the appeal was not pressed and therefore, was dismissed, would clearly indicate that there was no decision of Hon'ble the Supreme Court on the merits of the issue involved. The dismissal of that appeal did not take away the jurisdiction of this Tribunal to decide the issue which was referred and was pending before the Larger Bench.

6. There is a serious question involved in these matters as to whether the earlier decision of the Tribunal in MRF Ltd. v. Commissioner of Customs reported in 1997 (96) E.L.T. 198 on the basis of which all subsequent decisions were rendered, laid down the correct legal position. In MRF Ltd., the Tribunal on the basis of the clarification as given by the Ministry of Finance on the Ministry of Commerce letter, came to the conclusion that the cess demanded (under Section 3 of the Tariff Act by way of additional duty payable with reference to cess under Section 12 of the Rubber Act, 1947) should not have been levied on the imported rubber. The Division Bench of this Tribunal which had referred the above question to the

Larger Bench, had given the following reasons for the reference : - "8. The impugned demand of the Revenue is one of additional duty of customs (CVD) on imported rubber, which is purportedly to the quantitative extent of the CESS leviable on like goods manufactured/produced in India. The demand is under Section 3 of the Customs Tariff Act, 1975. The case of the appellants is that no CESS is leviable on imported under Section 12 of the Rubber Act, 1947 and, therefore, the CESS would not attract Section 3 of the Customs Tariff Act. On the other hand, the argument put forth on behalf of the Revenue is that natural rubber produced in India is 'like goods' insofar as the imported rubber is concerned and therefore, under Section 3 of the CTA, 1975, additional duty of customs (CVD) is leviable on the imported rubber, which will be equal to the duty of excise leviable on rubber produced in India. Revenue submits that the CESS leviable on rubber produced in India is a duty of excise as expressly laid down under Section 12 of the Rubber Act. Therefore when rubber is imported, CVD equal to CESS (duty of excise) leviable on indigenously manufactured rubber at the material time under the Rubber Act is lawfully leviable under Section 3 of the CTA, 1975.

According to the Revenue, precisely, it was that duty which was demanded on assessment of the Bill of Entry.

9. We have perused the decisions cited before us. In Final Order dated 6-5-2002, this Bench was seized of the question whether additional duty of customs under Section 3 of the CTA, 1975, equal to CESS leviable on like, goods (manufactured in India) under the Textile Commodity Act, 1963 + additional excise duty leviable on like goods (manufactured in India) under the Goods of Special Importance Act, 1957 could be levied on certain textile fabrics imported by M/s. Vikrant Tyres. The Bench held that the CESS leviable on textile fabric under Section 3 of the Textile Commodity Act was a duty of excise and therefore additional duty of customs (CVD) could be levied under Section 3 of the CTA, 1975 on the imported textile fabrics. In other words, the CESS on indigenously manufactured textile fabrics was treated as a duty of excise for the purpose of quantifying CVD on like goods imported under Section 3 of the CTA. We have now, before us two other decisions of this Bench, rendered in the cases of MRF Ltd. (supra), Vikrant Tyres Ltd. (supra) cited by the Counsel. Both these decisions are to the effect that CESS is

not leviable on imported rubber. In MRF case, the Bench considered the Ministry of Finance Circular issued to all Customs/Central Excise Commissionerates in the country, wherein it was clarified that CESS was not to be levied under Section 12 of the Rubber Act on imported rubber. The Bench held the circular to be binding on Customs authorities and directed that no CESS be levied on imported rubber. We are at a loss to understand as to why such a clarification by Government was called for under Section 12 of the Rubber Act, 1947 to the Customs authorities and also, with great respect, as to why the clarification was held to be binding on Customs authorities. The authority to levy, assess and collect CESS on rubber produced in India is, exclusively, the Rubber Board under Section 12 of the Rubber Act.

10. Should the Governmental clarification and the orders of the Bench based on it be construed to mean that, as no CESS is leviable on imported rubber, no CVD will be leviable on it? Our doubt gets strengthened in the instant case on account of the fact that the demand is not one of CESS simplicitor but 'CESS as additional duty of customs' vide the Assistant Commissioner's order-in-original. Ld.

DR has eloquently argued before us today that this is a demand of additional duty of customs (CVD) under Section 3 of the Customs Tariff Act, 1975 and that the quantum of the demand is that of the CESS (taken as a duty of excise) leviable on like goods, namely, natural rubber (produced in India) under Section 12 of the Rubber Act, 1947. We tend to agree with DR as his interpretation appears to be in keeping with the Government's policy of mitigating the hardships of India's domestic rubber-producers by imposing a countervailing duty on rubber importers.

11. Nevertheless, in view of the apparently conflicting views taken by this Bench in the different cases cited by the two sides, we think that the principle of judicial consistency requires that the issue should be examined by a Larger Bench. Accordingly, we refer the issue framed below, to Larger Bench.

'Whether Additional Duty of Customs under Section 3 of the Customs Tariff Act, 1975 was leviable on the imported rubber (as on the date of importation) to an extent equal to the amount of CESS leviable under Section 12 of the Rubber Act, 1947 on natural rubber manufactured/produced in India (as on the said date)'." 7.

Under Section 3(1) of the Customs Tariff Act, 1975, "any article which is imported into India, shall, in addition, be liable to a duty (referred to as the additional duty) equal to the excise duty for the time being leviable on a like article if produced or manufactured in India...". Under Section 12 of the Rubber Act, 1947, it is provided that "with effect from the appointed date there shall be levied as cess for purposes of this Act, a duty of excise on all rubber produced in India at such rate, not exceeding (two rupees) per kilogram of rubber so produced, as the Central Government may fix". The cess imposed under the said provision was clearly stated to be in the nature of a duty of excise. Under Sub-section (5) and Sub-section (7) of Section 12, the said levy is described as duty of excise. Such cess under the Act which is in nature of duty of excise was leviable in case of the rubber produced in India, as stated in Section 12 of the said Act. It appears that the letter dated 30-6-97 issued by the Ministry of Commerce on the basis of which the decision in MRF Ltd. (supra) was rendered by the Tribunal, was issued to emphasise that the cess under Section 12 of the Rubber Act, 1947, was to be levied on the rubber produced in India and that it could not be levied on imported rubber, under that provision.

There was no reference to additional duty payable under Section 3 of the Customs Tariff Act, 1975. The letter dated 30-6-97 was issued to clarify that only rubber produced in India would be subjected to the cess under Section 12 of the Rubber Act, 1947. The Ministry of Finance letter dated 22-7-97 also refers in paragraph 2, to the fact that the matter was taken up with the Ministry of Commerce, that had clarified that under Section 12 of the Rubber Act, 1947 cess was levied on rubber produced in India and not on rubber imported. These two clarifications cannot be construed to mean that no additional duty was payable in respect of the imported rubber under Section 3 of the Tariff Act. These orders had nothing to do with any additional duty payable under Section 3 of the Tariff Act on the imported rubber. If at all, these clarifications would show that the like product i.e. rubber produced in India was subjected to excise duty in India, and therefore, additional duty would be payable on the imported rubber under Section 3 of the Tariff Act. It, therefore, appears to us that the earlier reference was fully justified and mere dismissal of an appeal, as not pressed before the Supreme Court, cannot operate as an embargo on reconsideration of the ratio of a decision which appears also to us to be

erroneous on an important issue of law and would perpetuate illegality for all times to come if not reconsidered. Under the guise of consistency on the ground that the department had accepted the earlier decision of the Tribunal by not pressing the appeal, a gross illegality cannot be allowed to perpetuate. In our opinion, the order dismissing the appeal, as not pressed made by the Hon'ble Supreme Court, did not preclude the Tribunal from reconsidering the ratio of its earlier decisions. Having considered the effect of dismissal of the Revenue's appeal which was dismissed, as not pressed before the Supreme Court, we ourselves, for the reasoning indicated above, are of the opinion that the said question arises for being considered by a Larger Bench in view of our inability to agree with the earlier decisions. We, therefore, refer the following question to the Larger Bench for the above reasons :- 'Whether Additional Duty of Customs was leviable under Section 3 of the Customs Tariff Act, 1975 on the imported rubber, as on the date of importation, to the extent equal to the duty of excise levied as cess under Section 12 of the Rubber Act, 1947 on rubber produced/manufactured in India as on the said date ?" 8. The Registry will obtain necessary orders for placing the appeal before a Larger Bench.

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