Commissioner of Customs Vs. Colourtex

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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Mumbai

Decided On : Dec-06-2005

Reported in : (2008)9STR234

Judge : J Balasundaram, Vice, A M Moheb

Appellant : Commissioner of Customs

Respondent : Colourtex

Judgement :

1. The brief facts leading up to the filing of the above applications are that the Commissioner of Customs, Kandla, passed an order dated 26.12.2003 which was challenged by way of filing appeals under Section 129A of the Customs Act. The appeals were heard by the West Zonal Bench of the Tribunal at Mumbai and two opinions were expressed by the Members of the bench who heard the appeals - while the Member (Technical) held that the appeals were required to be rejected, the Vice President held that the appeals were required to be allowed. Due to the difference of opinion, the following question was formulated and placed before the Hon'ble President of the Tribunal for reference to third Member for resolving the difference: Whether the appeals are required to be rejected as held by Member (Technical) OR whether the appeals are required to be allowed as held by Vice President.

2. Pursuant to the above, the Hon'ble President referred the matter to a third Member. The hearing scheduled for 20th October, 2005 before the third Member

was adjourned to 10th & 11th of November, 2005. The applicants filed Special Leave Application before the Hon'ble Gujarat High Court for a direction to the bench of the Tribunal to state the point or points on which there is a difference of opinion, in accordance with Section 129C(5) of the Customs Act, and by an order dated 24th October, 2005 the High Court permitted the applicants to withdraw the Special Leave Application to enable them to approach the bench with the same prayer. This has caused the filing of MA/2981/05.

MA/3100.05 has been filed by the Revenue seeking rejection of MA/2981/05.

If the members of a Bench differ in opinion on any point, the point shall be decided according to the opinion of the majority, if there is a majority: but if the members are equally divided, they shall state the point or points on which they differ and make a reference to the President who shall either hear the point or points himself or refer the case for hearing on such point or points by one or more of the other members of the Appellate Tribunal and such point or points shall be decided according to the opinion of the majority of these members of the Appellate Tribunal who have heard the case, including those who first heard it.

According to the applicants, the point/points of a difference between the Members of the bench who heard the appeal has/have not been clearly enumerated as required under the Section. They cited the following decisions in support of their contention that only the point of difference or points of difference can be referred to a third Member and not the entire case: 5. Learned Senior Counsel for the applicants submits that third Member can only decide the point or points which has or have been referred to him, but has no power either to formulate a new point or to re-decide a particular point, or to direct the Members of the original bench to act in a particular manner. He submits that since the point or points of difference has or have not been stated clearly, prejudice is caused to the applicants inasmuch as they are not in a position to effectively present their case before the third Member. He therefore prays that the order of reference to the third Member be recalled and the matter referred back to the Members of the bench which heard the appeals, to state the point or points on which they differed, and thereafter refer the matter to the third Member.

6. The prayer is vehemently opposed by the learned Consultant for the Revenue who contends that the points of difference as formulated are very clear and it is not the applicants' contention that the point of difference as formulated is the first of its kind as there are several instances where similar points of difference were framed by the bench and referred to third Member by the Hon'ble President. In this connection, he relies upon the Tribunal's orders in CC, Ahmedabad v.Shipping Corporation of India Ltd. and R.K. Motors (India), Bombay v. CC, Bombay 1988 (22) ELT 727. He therefore prays that the application of the assessees be rejected.

7. While the proposition that the third Member can only decide the point or points which have been referred to and can neither formulate a new point or direct the Members of the referring bench to act in a particular manner or to re-decide the particular point is a settled position of law, in the present case it is to be noted that a clear finding has been recorded on every issue arising for determination in the appeals of which the present applicant was one of the appellants), in paragraph 25 of the order recorded by Member (Technical). He has held that - (b) therefore, they are liable to confiscation under Section 113(d) of the Customs Act; (c) as a consequence thereof, penalties on all the appellants are required to be upheld; On each of these issues, the Vice President has expressed a diametrically opposite view. Therefore, the difference as framed has a bearing only on these issues. It is, therefore, very clear that the third Member is only required to concur with the findings either of the Member (Technical) or of the Vice President on all the above issues. An occasion to reframe the question may arise in a case where there is ambiguity in the question referred. However, in the present case the difference as framed is clear, unambiguous and unequivocal, and therefore occasion for reframing the same does not arise.

8. We shall now analyse the case law cited before us by the learned Senior Counsel.

In the decision of the Allahabad High Court in Birendra Kumar Rai v.UOI the single Judge opined that a reference does not lie to a third Member when the bench which heard the case already pronounced different verdicts in the court. The learned single Judge held that once a judgment is pronounced, the members constituting the bench should not sit to form the question for reference. Any points of difference should be formulated only before the judgment is pronounced. The leaned single Judge, therefore, returned the matter under reference without answering the question stating that the matter be referred to a larger bench rather than to a third member for resolution.

The decision of the Hon'ble Patna High Court in Hanutram Chandanmul v.CIT Bihar and Orissa cited by the learned Senior Counsel, is also distinguishable on facts. In that case, the Judicial Member of the ITAT was of the opinion that the Income-tax Officer was right in applying proviso to Section 13 of the Income-tax Act and adding a sum of Rs. 12,800/- to the income of the assessee as disclosed by the books, while the Accountant Member was of the opinion that an addition of Rs. 2,800/- would more than adequately cover the requirements of the case. This is how the case was referred to the President of the Tribunal: As there is a difference of opinion between us on the only contention in this appeal, we hereby refer the appeal to the President under Section 5A(7) of the Income-tax Act.

The President heard the appeal, but however directed an amount of Rs. 8,143/- to be added to the assessee's income as disclosed by the books.

The following questions were referred to the High Court: (1) Whether the order of the President of the Tribunal is in accordance with the law? (2) Whether the assessment can be legally completed in accordance with the direction contained in the order of the President of the Tribunal? The High Court agreed with the assessee, as regards the first question, that the President to whom the case was referred by the two Members of the Tribunal, had no jurisdiction to hear the reference for the reason that the entire appeal was referred to him and not only the point or points of difference between the two Members of the Tribunal who heard the appeal initially. As regards the second question, the High Court held that the President or the third Member to whom the case is referred, is legally bound to agree with the figures of assessment either according to the Judicial Member or the Accountant Member and it is not open to the President or the third Member to take a different view as to the quantum of assessment. However in the case before us it is not the appeal or appeals which have been referred to third Member, but only the point of difference as to whether the appeals merited rejection in the light of the view recorded by Member (Technical) or the appeals merited acceptance in the order recorded by Vice President.

In the case of Amar Pal Singh v. Election Commission of India , the Writ Petition was originally heard by a Division Bench. The presiding Judge held that the objection was maintainable and also decided the case on merits whereas the other Judge held that the objection was not maintainable and consequently there was no occasion for him to decide the case on merits. After pronouncement of the judgments, the following order was passed by the bench: In view of the difference of opinion between us, we direct that the papers be laid before the Hon'ble Chief Justice who may designate a third Judge to hear the matter.

The objection raised before the third Judge was that the Judges had not stated the point upon which they have differed and as such the reference was not in accordance with law, in the light of the judgment of the Allahabad High Court in Birendra Kumar Rai cited supra where in similar circumstances, it was held that when a division of opinion occurs between the Judges and the decision is yet to be given, then that is the stage when the Judges may formulate points of difference and lay them before the Chief Justice for being referred to one or more of the other Judges so nominated and on the points referred, the decision would be by majority. The submission was that only the question of maintainability of the Writ Petition ought to be referred to the third Judge for his decision since no difference was expressed on the merits of the case. The High Court upheld the objection of the Attorney General, holding that the hearing by another Judge is confined to a specific point stated and cannot cover the whole case again and that the Bench which heard the matter originally, ought to have stated explicitly as to what was to be decided by a third Judge. The High Court hold that the expression "matter" used in the reference has not been clarified as to the points to be decided by the third Judge, and then returned the reference unanswered and without any finding. In the present case, however, the different opinion was formulated even before the pronouncement of the order and different views were expressed by the Members of the original bench on every single issue arising in the appeals and, therefore, the ratio of the Delhi High Court's judgment cited supra as well as the Allahabad High Court's judgment in Birendra Kumar Rai is not applicable.

9. In the light of the above, we hold that there is no merit in the application filed by M/s. Colourtex and accordingly reject the same.

The application filed by the Revenue for rejection of M/s. Colourtex's application is accordingly allowed.