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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

Decided On : Nov-26-1991

Reported in : (1992)(38)ECC377

Appellant : iol Ltd.

Respondent : Collector of Customs

Judgement :

1. This is an appeal preferred against the proceedings in S 37C(Misc.)-31/91A(6) dated 25-3-1991 passed by the Assistant Collector of Customs, Apprg. Group, Calcutta.

2. At the outset the doubt has arisen whether the proceedings can be construed as an adjudication proceedings and if so, whether appeal lies to the Tribunal. The contents and form of the proceedings in question are relevant to decide the issues and, accordingly, it is reproduced as under:- Sub : Registration of contract case of P.O. No. Imp/PD/455 dt.

30-71990 - Isolation valves & Control Valves.

You are hereby informed that Isolation Valves and Control Valves may not be acceptable for project benefit in view of stipulation 4(a) of PN 461/86-Cus of this Custom House, read with PIR '86 since the licence is not specifically issued in the name of the importer covering the project Angle and Collector has specifically directed that contract benefit is not available for the goods, imported under cover

of REP Licence.

3. Shri N. Singh, learned Consultant, appearing for the appellants, submitted that this is not mere letter but an adjudication proceedings and in view of the clear finding that contract benefit is not available for the goods imported and in pursuance of this order the goods were not released denying the Project benefit in respect of imported goods, viz., Isolation Valves and Control Valves. Since denial of benefit amounts to a decision and any decision or order passed by the Adjudicating authority under the provisions of the Act is an appealable order, this appeal is to be accepted. He referred to the following decisions in support of his contention:-Mahindra and Mahindra Ltd., Bombay v. Collector of Central Excise, BombayWimco Limited v. Collector of Central Excise, Shitlong - 1986 (26) E.L.T. 877 (Tribunal).Collector of Customs v. Metro Exporters Pvt. Ltd. - 1988 (37) E.L.T. 610 (Tribunal).Bachhittar Singh v. State of Punjab and Anr.- AIR 1963 Supreme Court 395.D. C. W. Limited v. Collector of Central Excise, Madurai - 1988 (35) E.L.T. 167 (Tribunal).Brakes India Limited and Others v. Collector of Central Excise, Madras & Others He contended that since the order refers that the Collector has specifically directed that contract benefit is not available for the goods imported and the order was merely communicated by the Assistant Collector, this order has to be construed as one which was passed by the Collector. He said that though the order bears the signatures of the Assistant Collector it was only for the limited purpose of communication and the authority who passed an order is Collector and, accordingly, the appeal lies to the Tribunal. He also requested for early disposal of the matter as the goods are still lying with the Customs.

4. Shri S.K. Roy, learned SDR while countering the arguments submitted that this is neither an adjudication proceedings nor an appealable order. It is only a letter of communication observing that the goods in question may not be acceptable for Project benefit. In the absence of the clear finding, discussions or a decision it cannot be said to be an appealable order passed by the Adjudicating Authority. He said that the decisions cited by the Appellant's counsel are not applicable to this case as they were held in different facts and circumstances of the case. In fact, in the case of Collector of Customs v. Metro Exporters Pvt. Ltd., cited by the

appellants' counsel it was held that an administrative order/instructions or communications cannot be treated as an Adjudication order and, as such, it is not an appealable order to the Tribunal. He said that even if the Tribunal comes to the conclusion that this is an appealable order, appeal lies to the Collector (Appeals) and not to the Tribunal as the order was passed and duly signed by the Assistant Collector. Mere referring the directions in the said letter cannot be said to be an order passed by the Collector and nor the general instructions, if any, given by the Collector is the subject matter of appeal. He said that what type of directions were given by the Collector with reference to the imported goods is also not clear in this case and in view of the ambiguity and non-speaking order passed by the Assistant Collector, the right course would have open to the party to file an appeal before the Collector (Appeals) to get set aside the impugned order and to have a direction to pass speaking order.

5. We have carefully considered the submission made by both sides and perused the records. On going through the impugned order, we find that though it is difficult to say that it is an adjudication proceedings in the sense we have understood the meaning of adjudication, but in view of the effective expression of opinion 'that contract benefit is not available for the goods imported under cover of REP Licence', it cannot be said that it is mere a letter and not an adjudication proceedings.

This amounts to determination and in view of this clear finding it is a decision against which the appeal lies. In this communication, Assistant Collector referred to the nature of the claim and declined to grant the relief giving the reason for the said conclusion. It was also brought to our notice that the goods were not released in pursuance of this order. Therefore, this communication letter is to be treated as a decision or an appealable order. This view was strengthened by the earlier decisions of the Tribunal wherein it was observed that a broader view has to be taken that any order or decision passed under the Act as well as the Rules is an order passed by the Authority as an Adjudicating Authority and hence, such order is appealable.

6. When once we come to the conclusion that this is an appealable order, next question arises whether the appeal lies to the Collector (Appeals) or to the Appellate Tribunal. Section 128 of the Act provides that any person aggrieved by any decision or order passed under this Act by an officer of Customs lower in rank than a Collector of Customs may appeal to the Collector (Appeals) within the prescribed period.

Section 129A deals with the provision for filing appeals to the Tribunal. Any aggrieved person may file an appeal either against a decision or order passed by the Collector of Customs as an Adjudicating Authority or an order passed by the Collector (Appeals). It means in the case of an order of the Collector, it must have been passed by the Collector as an Adjudicating Authority or Appellate Authority to file appeal before the Tribunal. The contention of the appellants is that since the impugned order was passed as directed by the Collector this order has to be construed as an order passed by the Collector. This plea cannot be accepted because of the fact that the Authority who passes an Adjudication Order has to apply his mind. It is settled law that a quasi-judicial authority, while passing an adjudication order has to apply his/her own mind and the administrative order/instruction cannot be treated as an adjudication proceedings. Hence, any general administrative directions given by the Collector in the capacity of Executive Collector cannot be said to be an order of adjudication. A right of appeal is not a natural or an inherent right but only a statutory right. That right of appeal must be specifically given under a Statute and that should be exercised in the manner prescribed under the very Statute. Section 128 specifically provides to file an appeal before the Collector (Appeals) against the order of the Assistant Collector, the appellants are not supposed to by-pass this provision and to file appeal directly before the Tribunal. Mere mentioning in the order that contract benefit was not available as directed by the Collector cannot be said to be the decision contained therein was that of the Collector. Since the order was passed and duly signed by the Assistant Collector it is to be proceeded with on the basis that the decision was of the Assistant Collector; We concur with the arguments advanced by the learned D.R. on this issue that the right course would have open to the Assessee to file an appeal before the concerned Collector (Appeals) to get it set aside and to have a direction to pass speaking order. Since we are dismissing

the appeal on maintainability we do not feel it necessary to go into the other issues raised during the course of the arguments.

I have perused the order passed by my learned brother, Shri G.A, Brahma Deva but I regret that I am unable to agree with him so far as the second issue is concerned.

8.1 On the first issue whether the letter dated 25-3-1991 signed by the Assistant Collector of Customs, Appraising Group 'C is an appealable order/decision, I agree with the learned brother that it is an appealable order. However, I do not agree with him that the appeal against the said order lies to the Collector of Customs (Appeals). From a perusal of the said order which is reproduced in para 2 of Shri Brahma Deva's order I find that the matter has been referred to the Collector and the Collector has taken a decision regarding the non-availability of the project contract benefit to the goods in question. This is apparent from the following clause in the letter (Order) signed by the Collector:- "... and the Collector has specifically directed that contract benefit is not available/or the goods imported under cover of REP licence." It is, therefore, clear that the Assistant Collector is merely communicating the decision/order of the Collector of Customs. The order/decision that the importer is not entitled to the benefit of the project contract is that of the Collector. This is ex facie clear from the body of the impugned order (letter). Hence the appeal would lie to the Tribunal and not to the Collector (Appeals). Since the order of the Collector, as communicated by the Assistant Collector is not a speaking one inasmuch as it does not give reasons as to why the benefit is not available to the appellants herein and secondly because this decision has been taken by the Collector at the back of the appellants without affording them an opportunity for hearing, the impugned order is also vitiated for violation of principles of natural justice. Accordingly, I am of the view that the appeal should be allowed by remand and the matter be decided de novo by the Collector in accordance with law by observing the principles of natural justice.

"Whether in the facts and circumstances of the case the impugned order/decision is treated as passed by the Assistant Collector entailing filing of appeal before the Collector of Customs (Appeals) or it is to be treated as one passed by the

Collector of Customs entailing filing of the appeal before the Tribunal." Making his submissions on the point of difference the learned Consultant Shri N. Singh pointed out that the very wording of the Assistant Collector's order indicates that the Assistant Collector was following a specific direction given by the Collector in the matter of eligibility for project import concession, as has been highighted in the order proposed by learned Member (Technical). The learned consultant relying on case law urged that when two views are possible, the one in favour of the assessee should be adopted. On the other hand, Shri S.K. Roy learned Senior Departmental Representative more or less reiterated his submissions earlier made before the Bench and urged that the communication of Assistant Collector herein impugned does not have the attributes of an order of Collector as an adjudicating authority and also there has been no proceedings in the nature of adjudicating proceedings. He also produced the Custom House record relating to the issue of the impugned communication.

2. On a careful consideration of the submissions made and on perusal of the Custom House records now produced, it is evident that the Assistant Collector had discussed the issue with the Collector in the context of conditions to be fulfilled for granting project import concession and had taken the decision in this case by adopting the Collector's instructions in the matter. Viewed in this context, the way in which the Assistant Collector's impugned communication had been worded, as emphasised by the Hon'ble Member (Technical), it would be reasonable to conclude that the order denying the project import concession in this case is in effect that of the Collector. It is also relevant to note in this context that besides the specific direction of the Collector referred to in the Assistant Collector's communication, the other grounds consist of citing of certain Custom House Public Notice and not on any independent reasoning. Hence it is possible to hold, on the facts of the present case, that the Assistant Collector's communication is in effect only the order of Collector, as held by Member (Technical), and when once this is so, it follows that an appeal against such an order would lie to the Tribunal, and the appeal, for the reasons recorded in Member (Technical's) Order has to be remanded to Collector.

3. The views expressed by Member (Technical) are concurred with, and the papers forwarded to the Registry (B-2) for placing the matter before the Bench for final order.

In view of the majority opinion the impugned order is set aside and the matter is remanded to the Collector of Customs, Calcutta who will decide the matter de novo in accordance with law after observing the principles of natural justice.

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