

Collector of Customs Vs. Diplomatic Foundations

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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Tamil Nadu

Decided On : Nov-30-1994

Reported in : (1995)(78)ELT305Tri(Chennai)

Appellant : Collector of Customs

Respondent : Diplomatic Foundations

Judgement :

1. The learned Senior Central Government Standing Counsel appearing for the applicant-Collector arguing on the stay petition in the reference application at the outset submitted as under: "The only question he would like to canvass for reference in the matter would be relating to the jurisdiction. The learned Counsel at the outset fairly conceded that the issue relating to jurisdiction was neither pleaded nor canvassed by the applicant or the Department and therefore, the same has not been considered in the impugned order. The learned counsel also fairly conceded that in respect of an issue not argued or canvassed and, therefore, not considered in the impugned order, could not be argued for the purpose of reference Under Section 130 of the Customs Act, 1962. The learned Counsel however, submitted that he would endeavour to put forth a plea that even though the issue relating to jurisdiction was not canvassed or argued the same would arise on the face of the order to entitle the applicant to canvass it as a question of law for reference within the meaning of Section 130 of the Customs Act. Shri Sundaram further submitted that since the whole issue lies in a short compass, instead of stay application the Dept. would prefer to argue the reference

application itself." 3. In view of the submissions made by the learned Central Government Standing Counsel for the applicant with the consent of the parties, the reference application itself was taken up and the order dismissing the stay application pending reference application was passed.

4. The learned Central Government Standing Counsel pleaded that while he would concede that in the order passed by the Tribunal substantial justice has been done to the Department inasmuch as sufficient safeguard has been provided in the order to ensure that the goods which have been ordered to be released are utilised for the purpose for which these have been imported and referred to the Bank guarantee ordered to be given by the Respondents as also the intimation to be given to the authorities before the goods are taken by the Respondents for distribution charitable purposes. He pleaded that he is not going into the question on the fact as to whether the Respondents can be considered as a charitable institution or not. He pleaded that he is confining his plea only for consideration as to whether in the context of consideration of the benefit of Notification 85/82 considered by the Tribunal, the Bench could have jurisdiction to decide the matter. He pleaded that no doubt the question of valuation has also been dealt with, but since the issue of valuation has not been decided his plea would be only in the context of consideration of the benefit of Notification cited supra in the order of the Tribunal. He pleaded that the issues that arose for consideration were : (a) Whether the import can be allowed in terms of para 98(v) of Hand-book of Procedures, Vol. 1,92-97 (b) Whether the goods should be allowed clearance free of duty in terms of Notification 85/82 CN He pleaded that since the question of benefit of Notification 85/82 fell for consideration, only the Special Bench of the Tribunal in terms of Section 129C(3) can decide the matter. This Section for the purpose of convenience is reproduced below: "Every appeal against a decision or order relating, among other things, to the determination of any question having a relation to the rate of duty of customs or to the value of goods for purpose of assessment shall be heard by a Special Bench constituted by the President for hearing such appeals and such Bench shall consist of not less than two members and shall include at least one judicial member and one technical member." He pleaded that the wording of this Section is Dearly wide enough to cover any matter where consideration of rate of duty may arise.

Inasmuch as in the present case the benefit of Notification 85/82 fell for consideration the rate of duty issue could be stated to have been fallen for consideration. He pleaded that the Tribunal first dealing with the question as to whether import can be allowed in terms of para 98(v) of the Handbook of Procedures 1992-97 and after analysing in this regard including the valuation issue, and the evidence including the certificate issued by the Income tax authorities, has held that the Respondents are a Charitable Organisation and therefore, eligible for importation of the goods under para 98(v) of the Handbook of Procedures. The question that arises is when after having held that the Respondents were eligible for importation of the goods as a Charitable Organisation for the import trade control purposes, the Tribunal could have proceeded to consider the benefit of Notification 85/82 wherein no doubt consideration for giving benefit of the Notification is again whether the Respondents are a Charitable Institution or not. He pleaded that in the Notification there are certain conditions which are to be fulfilled before the benefit of the Notification can be allowed. In this view of the matter he pleaded that the matter can be taken to fall within the jurisdiction of the Special Bench. He clarified that he is not urging that this Bench of the Tribunal could not have considered the issue as to whether the Respondents can be considered as a Charitable Institution or not as such. He pleaded that for the reasons stated by him so far as the point of jurisdiction is concerned, the question of law as to whether the Regional Bench has the jurisdiction to deal with the matter arises and should be referred to.

5. Shri R. Raghavan, the learned Counsel for the Respondents at the outset submitted that reference can be only allowed on the question which arises out of the order of the Tribunal. He pleaded that the question of jurisdiction was not contested by the Department when the matter was taken up by the Tribunal nor raised in this regard and cited the judgment of the Hon'ble Supreme Court in the case of Commissioner of Income Tax v. Scindia Steam Navigation (1961 ITR 589). He pleaded that it has been held by the Hon'ble Supreme Court that question that would arise for reference would be (i) points raised and discussed in the order (ii) points raised and not discussed and (iii) points not raised but discussed and it has been clearly held that points not raised and not discussed could not be raised for reference. He further pleaded that the Tribunal also in their order Thiru Arooran

Sugars Ltd. v. CCE, Madras reported in 1984 (17) E.L.T. 163 has held that no new points can be raised for reference in the reference application. He pleaded that in view of the ratio of the ruling cited by him and also the learned Central Government Counsel's own plea that the issue regarding jurisdiction was neither raised nor discussed, nor dealt with in the Tribunal's order, no reference lies against the order of the Tribunal. He pleaded that the first question that was required to be considered by the Tribunal was whether the Respondents can import the goods under OGL under the import and export policy 1992-97. He pleaded that the conditions under which the Respondents have imported the goods under para 98(v) of the Handbook of Procedures 1992-97 under which the Respondents have claimed the import under OGL, are in pari materia with the conditions of the Notification 85/82. He pleaded that the finding given from the licencing angle under para 98(v) is binding for the purpose of benefit to be given under the said Notification. He pleaded that once it is held for the purpose of licencing issue which falls within the jurisdiction of the Regional Bench that the Respondents are a Charitable Organisation they have to be considered so for the purpose of benefit of Notification in question. He pleaded that the learned Central Government Standing Counsel during the course of the arguments fairly conceded that so far as the licensing angle is concerned the Regional Bench has clear jurisdiction and that the only objection was that the Regional Bench could not proceed to consider the benefit of Notification in question. He pleaded that once the Respondents have shown that they have satisfied the requirements for the purpose of import under para 98(v) of the Handbook of Procedures, then the natural irresistible corollary that follows is that the Respondents will be automatically eligible for the benefit of Notification cited supra inasmuch as they are held to be a Charitable Organisation in terms of para 98(v) *ibid*.

He pleaded that as it is, in the order of the lower authority action has been taken only for the reason that the Respondents could not be considered as a Charitable Organisation and in regard to the nature of the goods, it will be seen from the order of the Tribunal that the lower authority has not entered any adverse finding for the purpose of benefit of the Notification in question and the Tribunal also in the order dealt with the issue from the angle of the Respondents being Charitable Organisation. He further pleaded that the plea taken that the Respondents could

not be eligible for the benefit of Notification has also been dealt with by the Tribunal that the Respondents cannot be held to be ineligible for the benefit of Notification on account of the previous consignments cleared by them. He pleaded that as it is, in law as held by the Hon'ble Supreme Court in the case of Union of India v. Sampat Raj Dugar 1992 (58) E.L.T. 163 (S.C.), past conduct is not relevant for deciding the issue before the lower authority. He further pleaded that the learned Counsel for the Department made a passing reference in regard to the income tax exemption certificate which has been taken note of by the Tribunal under which the Respondents have been registered as a charitable organisation, was not placed before the lower authority is not correct. He pleaded that this certificate, has been placed before the lower authority and he showed the endorsement for the receipt of the same by the learned lower authority's office.

The learned Central Government Standing Counsel also saw the certificate and he therefore, did not press this point. He pleaded that the Hon'ble Supreme Court in a recent judgment in the case of Navin Chemicals Mfg. & Trading Co. Ltd. v. CC, reported in 1993 (68) E.L.T. 3 (S.C.) held in regard to the controversy that unless the issue relating to rate of duty and valuation as used in Section 129 C of Customs Act, 1962 is such that it has a direct and proximate relationship to the rate of duty and the value of goods, for the purpose of assessment, the matter would fall within the jurisdiction of the Regional Bench. He pleaded that the issue before the Hon'ble Supreme Court related to the grant of exemption under duty exemption scheme (DEEC) in the context of advance import licence granted. In that case the importation under the DEEC scheme envisaged duty free clearance of the goods if importation was as per the licence and the plea was that the matter should have been heard by the Special Bench. In that case the goods were held to be covered by the licence and the party was therefore, allowed release of the goods on payment of redemption fine holding the goods to be confiscable and duty demanded to be paid in respect of the same. The Hon'ble Supreme Court in para 12 of their judgment has held as under : "This then is the test for the purpose of determining whether or not an appeal should be heard by a Special Bench of CEGAT, whether or not a reference by CEGAT lies to the High Court and whether or not an appeal lies directly to the Supreme Court from a decision of CEGAT : does the question that requires determination have a direct and proximate relation,

for the purpose of assessment, to the rate of duty applicable to the goods or to the value of the goods." as to the scope of the controversy and have answered the same as under in para 11 of their judgment as under : The statutory definition of the said expression indicates that it has to be read to limit its application to cases where, for the purpose of assessment, questions arise directly and proximately as to the rate of duty or the value of the goods".

He pleaded that what follows from the above judgment is that once it is decided that import can be allowed to the Respondents holding them as a Charitable Organisation from the licensing angle, the benefit of Notification 85/82 follows as a natural corollary. He pleaded that as held by the Hon'ble Supreme Court the issue relating to the benefit of Notification does not arise directly and proximately to the rate of duty. He pleaded that in this view of the matter, question of law on jurisdiction does not arise for reference.

6. We observe that the only point that survives for reference as pleaded by the learned Senior Central Government Standing Counsel for the department is in regard to jurisdiction. The learned Central Government Standing Counsel fairly conceded that this question along with the other questions of law formulated in the reference application were neither raised nor discussed in the order of the Tribunal. In such a situation a view can be taken that reference on any question of law would not arise. He pleaded that however the issue of jurisdiction goes to the root of the matter and can be read into the issues decided by the Tribunal. We observe that the plea is that inasmuch as the issue relating to the benefit of Notification 85/82 is also considered in addition to the question relating to the benefit under OGL under para 98(v) of the Handbook of Procedures 1992-1997, the matter in terms of Section 129C(3) of the Customs Act, 1962 falls within the jurisdiction of the Special Bench. We observe that so far as the reference application is concerned, the scope is limited and reference is provided for against the order of the Tribunal under Section 130 of the Customs Act, 1962. Under this section the Collector of Customs, or the other party by reference application may require the Appellate Tribunal to refer to the High Court any question of law arising out of such order. The expression any question of law arising out of such order has been decided by the Supreme Court in the case of Commissioner of Income-

tax, *Bombay v. Scindia Steam Navigation Co. Ltd.* reported in 1961 ITR 589, wherein the Hon'ble Supreme Court has held as under: "There were also some arguments as to the position under Section 66(I) when the tribunal decides an appeal on a question of law not raised before it. That would undoubtedly be a question arising out of the order, and not the less so because it was not argued before it, and this conclusion does not militate against the construction which we have put on the language of Section 66(I).

(1) When a question is raised before the Tribunal and is dealt with by it, it is clearly one arising out of its order' (2) When a question of law is raised before the Tribunal, but the Tribunal fails to deal with it, and is therefore, one arising out of its order.

(3) When a question is not raised before the Tribunal but the Tribunal deals with it, that will also be a question arising out of its order (4) When a question of law is neither raised before the Tribunal nor considered by it, it will not be a question arising out of its order notwithstanding that it may arise on the finding given by it.

Stating the position compendiously, it is only a question that has been raised before or decided by the Tribunal that could be held to arise out of its order".

This Tribunal in the case of *Thiru Arooran Sugars Ltd. v. CCE, Madras*, reported in 1984 (17) E.L.T. 163 has held as under : "As rightly pointed out by the Senior Departmental Representative, the appellant cannot raise new points neither pleaded in the appeal grounds nor argued before the Tribunal as they do not [form] part of the order of the Tribunal. The scope of a reference application is restricted only to question or questions of law arising out of the order passed by the Tribunal. The applicant cannot supplement new points neither pleaded nor [argued] and seek reference of the same to the High Court." We observe that admittedly in the present case the question of jurisdiction was neither raised nor canvassed nor discussed. The points raised in the application have to be taken to be raised for the first time in the reference application and therefore, the same cannot be taken to have been arisen out of the order of the Tribunal. In terms of Section 129C(3), of the Customs Act, 1962, only such of those points of law can be raised as arise out of the order of the Tribunal. The Supreme Court in the order

referred to supra has clearly held as to the scope of the reference application and the points of law that can be raised. As held by the Hon'ble Supreme Court, in the present case the points raised in the reference application cannot be taken to have arisen out of the order of the Tribunal. Even otherwise we find that in the order impugned before the Tribunal, the original authority has confiscated the goods under Section 111(d) of the Customs Act, 1962 read with Section 3(3) of the Foreign Trade (Development and Regulation) Act, 1992 and Section 111(m) of the Customs Act, 1962 has been invoked as the goods have been held by the Original authority to have been under-valued. The learned original authority in para 8.0 of the finding has observed as under: "In the light of the above discussions, it is clear that the charges of mis-declaration of value as also misdeclaration for the purpose of availing benefit of Customs Notification 85/82, dated 15-3-1982 and as well as for the benefit of import without a valid licence are clearly established. The subject goods became liable to confiscation under Section 111(d) and (m) of the Customs Act, 1962 read with Section 3(3) of Foreign Trade (Development & Regulation Act), 1992.

By their act of rendering the subject goods liable to confiscation the importers have rendered themselves to penalty under Section 112(a) of the Customs Act, 1962 apart from any other action that may be contemplated against the importer for the production of fabricated documents. However, as already observed by me above, the charge of liability to confiscation of the subject goods under Section 111(o) is premature and unwarranted at this stage and I drop proceedings in this regard." The Tribunal has not passed any order on the valuation aspect and has left the issue open for consideration by the authorities at the appropriate time and samples of the goods have been ordered to be drawn for action to be taken later. The primary issue therefore before the Tribunal related to whether the goods can be allowed importation under the relevant import and export policy in terms of para 98(v) thereto.

The learned Original authority had also touched upon the misdeclaration for the purpose of availing of the benefit of Notification 85/82, dated 15-3-1982 as reproduced above. The learned lower authority has also referred to the certificate produced by the Respondents in para 6.0 of his finding for the purpose of availing

of the benefit of the Notification cited supra. We observe that the Tribunal dealt with the issue in the context of the confiscation which has been done and the acceptability or otherwise of the certificate for the purpose of holding that the Respondents are Charitable Organisation and therefore eligible for the benefit of Notification No. 85/82. It is observed that for the purpose of consideration whether the Respondents are a charitable organisation or not, the evidence including certificate issued by the Income Tax authorities in this regard have been shown to have been produced before the lower authority which weighed for the purpose of holding that the Respondents are a charitable organisation for the purpose of importation under OGL in terms of para 98(5) *ibid*.

As pleaded by the Respondents, once the Respondents are held to be a charitable organisation for the importation the natural corollary or the same would be that they are a charitable organisation for the purpose of availing the benefit of Notification 85/82. The ratio of the ruling of the Hon'ble Supreme Court in the case of Navin Chemicals Mfg.

& Trading Co. v. CC reported in 1993 (68) E.L.T. 3 is equally applicable to the facts of the present case. Dealing with the expression determination of any question having a relationship to the rate of duty or value of the goods for the purpose of assessment, the Supreme Court has held as under : "The statutory definition of the said expression indicates that it has to be read to limit its application to cases where, for the purpose of assessment; questions arise directly and proximately as to the rate of duty or the value of the goods." We observe that the Hon'ble Madras High Court in the case of jeypore Sugar Co. Ltd. v. Union of India reported in 1994 (71) E.L.T. 653 (Mad.) while considering the issue regarding jurisdiction of Regional Benches vis-a-vis Special Benches in the context of duty demand under levy sugar scheme in terms of Notification 4/72 has held as under : 'The only objection taken by Mr. Jayachandran, the learned counsel for the Revenue is to the effect that the Customs, Excise & Gold (Control) Appellate Tribunal, functioning at Madras will have no jurisdiction to go into the question when the dispute relates to the rate of duty of excise or to the value of goods for the purpose of assessment. Such question shall be heard by Special Bench constituted by the President.

But in this case it is clear on going through the records that the question that has to be decided is whether the petitioner has supplied levy sugar at the disposal of the Government or not. If the answer to the question is in the affirmative the petitioner is entitled to concessional rate of levy of excise duty. Otherwise the petitioner is liable to pay at the full rate. The question whether the petitioner has placed at the disposal of the Government the levy sugar depends only upon facts and it does not depend upon the interpretation of the Notification. Therefore, the objection raised by the learned counsel for the Revenue is not sustainable ."

Further, in the present case once the issue from the licensing angle has been decided, the Respondents necessarily have to be considered a Charitable Organisation for the purpose of the benefit of Notification 85/82 as set out in condition No. 1 of the Notification. The only observation in regard to second condition made by the lower authority of the Notification in the order impugned before the Tribunal was that the Respondents made importations in quick succession and the Tribunal in this regard has observed as under : "We observe that the lower authority has merely given a finding in this context that the appellants had imported in quick succession consignments of used clothings. We observe that apart from taking into consideration the quantum of goods, the learned lower authority has not entered any finding in regard to the activities and the bona fides of the organisation or in regard to their financial status, the nature and the value of the goods, the sartorial habits of the people. In fact he has entered a finding in favour of the appellants by stating that while the show cause notice appears to conclude that the goods are also not bona fide gifts on the ground that the importer has been importing large quantities of such huge clothings in quick succession, that such clothings on examination are found to be of saleable capacity and they are also seen to be imported with price tags and other tags in many cases, it may be true that individually each of these facts may not be determinative of the goods being not bona fide gifts and the appellants have no control over the goods sent by the donors as gifts, and therefore, may consist of only one set of items and the goods may also look new though used because of generosity of the donor and also just because, they have ready market in India, it may not mean that such goods are not gifted from the donors abroad and further presence of price tags on many of the articles may also be accounted

for by the fact of donations of unsold stocks by the Deptl. stores'. Having said this, the lower authority has not laid any basis for holding that the goods are not bonafide gifts and that the bonafide nature of the organisation is not acceptable. We hold that just because larger quantity in quick succession had been received over a short period merely for this reason the authorities cannot hold that the goods cannot be considered bonafide gifts allowable for import." The Tribunal has only noted the factual aspects involved. In the light of the above discussion, therefore, we hold that no question of law arises for reference on the point of jurisdiction the only point urged before us for this purpose. The reference application is, therefore, dismissed.

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