

Commissioner of Customs and Excise Vs. Alu Bond Enterprises

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Court : Jammu and Kashmir

Decided On : Mar-26-2008

Reported in : 2008(2)JKJ499

Judge : K.S. Radhakrishnan, C.J. and; Nisar Ahmad Kakru, J.

Appellant : Commissioner of Customs and Excise

Respondent : Alu Bond Enterprises

Judgement :

K.S. Radhakrishnan, C.J.

1. This. Appeal has been preferred by the Commissioner of Customs and Excise, J&K; Jammu under Section 35G of the Central Excise Act, 1944. (for short the Act) The following substantial question of law was framed for reference by the appellant:

Whether in the absence of any specific mention in Notification No. 79/2003-CE dated 22.12.2003, the Hon'ble court is correct in granting retrospective effect to the said Notification and remanding the case for grant of benefit based on such retrospective effect.

2. Respondent preferred a caveat and raised a preliminary objection regarding the maintainability of appeal stating that the exemption notification has direct nexus with the rate of duty and hence under Section 35G of the Act no appeal would lie

to the High Court but only before the Supreme Court under Section 35-L of the Act.

3. Mr. V.K. Magoo, learned ASGI appearing for Union of India submitted that the appeal is maintainable, since the question framed is not having any relation to rate of duty or value of goods for the purposes of assessment but with regard to the location of the respondent's unit that is whether it is situated under Industrial Area Export Promotion (EPIP) or in SIDCO Industrial Complex, Bari Brahamana. Learned Counsel submitted that Notification takes in Khasra No. 394 under Industrial Area EPIP Kartholi, Bari Brahamana, Jammu and the respondent's Unit does not fall in the above location but falls under SIDCO Industrial Complex Bari Brahamana. Learned Counsel submitted that dispute revolves around the location of the Unit and not relates to the rate of duty of excise or to the value of goods for the purposes of assessment.

4. Shri A.V. Gupta, learned Senior Counsel appearing for the respondent submitted that the issue raised is whether respondent's unit is entitled to get the benefit of exemption under the Notification, which has got direct relation with the rate of duty of excise, and hence the appeal is not maintainable under Section 35G of the Act. In support of his contention, learned Counsel placed reliance on the judgments of Bombay High Court reported in Union of India v. Auto Ignition Ltd. : 2002(142)ELT292(Bom) and Commissioner of Customs & C. Excise Goa v. Primella Sanitary Products (P) Ltd. : 2002(145)ELT515(Bom) . Reference was also made to the decision of the Apex Court in the case of Navin Chemicals v. Collector : 1993ECR1(SC) .

5. Appeal was admittedly filed under Section 35G of the Central Excise Act, 1944. Reference may be made to Section 35G as well as Section 35L for easy reference which are extracted hereunder.:

Section 35G

(1) An appeal shall lie to the High Court from every order passed in appeal by the Appellate Tribunal on or after the 1st day of July, 2003 (not being an order relating, among other things, to the determination of any question having a relation to the

duty of excise or to the value of goods for the purposes of assessment), if the High Court is satisfied that the case involves a substantial question of law,

(2) The Commissioner of central Excise or the other party aggrieved by any order passed by the Appellate tribunal may file an appeal to the High court and such appeal under this sub-section shall be:

(emphasis added)

(a) filed within one hundred and eighty days from the date on which the order appealed against is received by the Commissioner of Central Excise or the other party;

(b) accompanied by a fee of two hundred rupees where such appeal is filed by the other party;

(c) in the form of a memorandum of appeal precisely stating therein the substantial question of law involved,

(3) Where the High Court is satisfied that a substantial question of law is involved in any case, it shall formulate that question.

(4) The appeal shall be heard only on the question so formulated, and the respondents shall, at the hearing of the appeal, be allowed to argue that the case does not involve such question.

Provided that nothing in this sub-section shall be deemed to take away or abridge the power of the Court to hear, for reasons to be recorded, the appeal on any other substantial question of law not formulated by it, if it is satisfied that the case involves such question.

(5) The High Court shall decide the question of law so formulated and deliver such judgment thereon containing the grounds on which such decision is founded and may award such cost as it deems fit.

(6) The High court may determine any issue which:

(a) has not been determined by the Appellate Tribunal; or

(b) has not wrongly determined by the Appellate tribunal, by reason of a decision on such question of law as is referred to in Sub-section (1).

(7) When an appeal has been filed by the High Court, it shall be heard by a bench of not less than two Judges of the High Court, and shall be decided in accordance with the opinion of such Judges or of the majority, if any, of such Judges.

(8) Where there is no such majority, the Judges shall state the point of law upon which they differ and the case shall, then, be heard upon that point only by one or more of the other Judges of the High court and such point shall be decided according to the opinion of the majority of the Judges who have heard the case including those who first heard it.

(9) Save as otherwise provided in this Act, the provisions of the code of civil procedure, 1908 (5 of 1908), relating to appeals to the High Court shall, as far as may be, apply in the case of appeals under this section.

Section 35L of the Act provides appeal to the Supreme Court. The operative portion of the same is extracted herein as under:

35-L. Appeal to Supreme Court. - An appeal shall lie to the Supreme Court from:

(a) any judgment of the High Court delivered:

(i) in an appeal made under Section 35G; or

(ii) on a reference made under Section 35G by the Appellate Tribunal before the 1st day of July, 2003;

(iii) on a reference made under Section 35H, in any case which, on its own motion or on an oral application made by or on behalf of the party aggrieved, immediately after passing of the judgment, the High court certifies to be a fit one for appeal to the Supreme Court; or

(b) any order passed by the Appellate Tribunal relating, among other things, to the determination of any question having a relation to the rate of duty of excise or to the value of goods for purposes of assessment.

6. Before examining the scope and ambit of the above provisions, we may briefly refer to the facts of this case.

7. Respondent's Unit had claimed the benefit of exemption from central excise duty as a new Unit in terms of para (3) (a) of the provisions of the Notification No. 56/2002-CE dated 14.11.2002 whereby exemption from central excise duty to industrial units was extended to State of Jammu and Kashmir. The Unit claiming benefits of refund of Central Excise duty as a new unit has to inter-alia satisfy certain conditions of the Notification that is the unit should have started commercial production on or after 14.6.2002 and location of unit should be notified in terms of Annexure-II to the Notification No. 1,56/2002-CE dated 14.11.2002. Respondent claimed the benefit of central excise duty exemption as a new unit and submitted refund claims for the months of June, August and September, 2003 amounting to Rs. 69,03,193. In support of their claim, a certificate from Directorate of Industries Jammu regarding date of commencement of commercial production and certificate of Naib Tehsildar, Bari Brahmna relating to location of the Unit were produced. On scrutiny of this documents, it was found that the unit of the respondent situated under Khasra No. 394 in the area of Kartholi. Relevant portion of the Annexure to the notification No. 56/2002-CE dated 14.11.2002 stipulates that Khasra No. i.e. 394 falls under the Industrial Area Export Promotion Industrial Park (EPIP), Kartholi Bari brahmna, Jammu, but the respondent's Unit is located in SIDCO Industrial Complex Bari Brahmna and not in EPIP Kartholi. The Tribunal therefore, took the view that Unit is not entitled to the exemption of Excise duty as the same did not fall within the Industrial Area Export Promotion Industrial Park (EPIP) Kartholi, Bari Brahmna, but under the SIDCO Industrial Complex Bari Brahmna and hence the claim for exemption from excise duty was denied due to locational ineligibility.

8. Apex Court in the case of Navin Chemicals Mfg. & Trading Co. Ltd. v. Collector of Customs : 1993ECR1(SC) examined the scope of Section 35G, 35L and other

related provisions. In this case appellant was granted an advance import license for the import of crude emetine under a duty exemption scheme which required the appellant to export the goods after processing them. The goods that were imported by the appellants were found on chemical analysis performed at the request of the Customs authorities, to contain emetine hydro-chloride, moisture and other impurities. The Additional Collector of Customs held that the goods imported being emetine hydrochloride, the licence was not valid for the same. In as much as the importation had been made without the cover of a valid licence, it was noticed that an offence under Section 111 (d) of the Customs Act, 1962 was made out. Contention was raised by the Unit that the question involved had a direct relation to the rate of custom duty. Provision which came up for interpretation was Section 129D of the Central Excise and Salt Act 1944, which is *pari materia* with Section 35G(1). Dismissing the appeal, the Apex Court held that the order of adjudicating court did not have any direct or proximate relation with either to the rate of duty or to the value of goods thereof.

9. Principle laid down by the Apex Court in the above decision could be applied to the facts of the present case and hence two other decisions cited by the learned Counsel for the respondents are inapplicable in the facts and circumstances of the case. In *Union of India v. Auto Ignition Ltd.* : 2002(142)ELT292(Bom) , the Bombay High Court has held that the eligibility to exemption directly relates to rate of duty and hence the only remedy available to the Union of India was to invoke Section 35L of the Act.

10. The question involved in the case on hand is whether the Unit has satisfied the locational eligibility, which in our view has no relation with the rate of duty or value of goods for the purposes of assessment. That being the factual and legal position, we hold that the appeal filed by the Union of India is maintainable in this Court under Section 35G of the Act. Preliminary objection possession of a house comprising of two rooms, one kitchen, one bath room on the ground floor and two rooms on the first floor of House No. 497, raised by respondent is rejected. The appeal is admitted. Issue notice.