

(2013) 06 KL CK 0070

High Court Of Kerala

Case No: C.E. Appeal No's. 28, 29, 30, 31, 32, 33 and 34 of 2011

The Commissioner, Central
Excise, Customs and Service Tax

APPELLANT

Vs

M/s. Kerala State Beverages
(Manufacturing and Marketing)
Corporation Ltd.

RESPONDENT

Date of Decision: June 18, 2013

Citation: (2014) 300 ELT 217 : (2014) 26 GSTR 57 : (2014) 33 STR 484

Hon'ble Judges: Thottathil B. Radhakrishnan, J; Babu Mathew P. Joseph, J

Bench: Division Bench

Advocate: Thomas Mathew Nellimoottil, SC, CB EX, for the Appellant; Arshad Hidayatullah, Senior Advocate and Sri. C.S. Ajith Prakash, SC, Beverages Corporation, for the Respondent

Judgement

Thottathil B. Radhakrishnan, J.

Respondent has raised a preliminary objection as to the maintainability of these appeals filed against the order of the Appellate Tribunal under the Central Excise Act, 1944; for short, "Act". We, therefore, heard the learned Senior Counsel for the respondent and the learned Senior Standing Counsel for Central Board of Excise and Customs on the preliminary objection. The objection raised, and the arguments of the learned Senior Counsel for the respondent, on the issue of maintainability, are that the substance of all these appeals, as reflected by the questions of law sought to be raised, would fall within the exclusion carved out in Sub-section 1 of Section 35G of the Act, as it stood at the relevant point of time. The argument is that the orders of the Tribunal which are impugned in these appeals are those relating to determination of questions having a relation to the rate of duty of excise and therefore, would get excluded from the purview of an appeal to this Court u/s 35G. The learned Senior Counsel for the respondent referred to the pronouncements of the Apex Court in [Commissioner of Service Tax Vs. Scott Wilson Kirkpatrick \(India\) Pvt. Limited](#), [Commr. of S.T., Bangalore Vs. Karnataka State Beverages Corpn. Ltd.](#),

and [The Commissioner of Central Excise Vs. Mangalore Refineries and Petrochemicals Ltd.,](#) . Reference was also made to the decision of the Gujarat High Court in Commissioner of C.Ex. & Customs v. Swiss Glass Coat Equipments Ltd. [2011 (273) E.L.T. 364].

2. The learned counsel for the appellant argued that the order of the Tribunal is perverse and amounts to overreaching the findings in the judgment rendered by the Division Bench of this Court on 7-3-2003 in O.P. No. 6075 of 2002 and connected cases, which judgment stands affirmed by the Apex Court as per orders on Civil Appeal No. 1174 of 2004 and connections on the ground that there is no reason to interfere in exercise of jurisdiction under Article 136 of the Constitution. He further pointed out that Section 35G provides for a comprehensive appeal except in matters relating to rate of duty of excise or to the value of goods for the purpose of assessment. He, thus, canvassed for the position that the question as to whether a particular transaction or bundle of facts gives rise to a situation which could be brought as excisable under the Act is not a matter that gets excluded u/s 35G.

3. The ratio of the precedents cited in support of the objection as to maintainability is that the question as to whether any goods are excisable or not, would also fall within the exclusion in terms of Sub-section 1 of Section 35G and that the bifurcation of jurisdiction between the Supreme Court and the High Courts seems to be clearly intended, also to exclude conflict of opinions between the different High Courts on matters which relate to issues having national impact in the fiscal scenario. We see abundant substance and support for this view in the manner in which the provisions of Section 35G relating to exclusion of jurisdiction of the High Court need to be understood. Section 35G(1) provides, among other things, that an appeal shall lie to the High Court from every order passed in appeal by the Appellate Tribunal (not being an order 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 the purpose of assessment). The precedents noted above are rendered dilating on the concept of the term "rate". The question whether any particular transaction or goods is excisable is an issue directly linked to the question as to what would be the rate of duty of excise. If it is not liable for levy of excise duty, then it would be a case of 0% or "nil". The question of coverage is, thus, a matter intrinsically linked with the determination of questions having a relation to the rate of duty of excise. Not only that, the phrase "any question having a relation to the rate of duty of excise" is part of the exclusionary clause in Section 35G(1). Reverting to Section 35L, we notice that clause (b) thereof provides for an appeal to the Supreme Court from 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. This means that anything attendant to the determination of any question having a relation to the rate of duty of excise would also fall within the trappings of the exclusion, thus, taking the jurisdiction away from the High Court; to be agitated before the Supreme Court in terms of Section 35L.

4. Thinking a little deeper, if we were to understand the classification on jurisdiction to be that what would fall before the Apex Court are only appeals either as to the rate of duty or as to the value of goods for the purpose of assessment, we may immediately note that rate of tax is a prescription of the Parliament and it is not part of judicial function to tinker with the rate of tax. This has also been noticed in Karnataka State Beverages Corpn. Ltd. (supra). Secondly and more importantly, if we were to find jurisdiction with the High Courts to decide as to whether there could be levy of duty of excise in relation to a particular situation, incidence or goods, that would be conceding to the position that what would be left to the Supreme Court is only to determine the rate of tax and the value of goods for the purpose of assessment which matters would get confined to issues which are fundamentally inferior in jurisprudential content vis-a-vis questions relating to the coverage itself. We do not see that the Act envisages that the High Courts would have the power of such nature that they decide the question of coverage; leaving to the Supreme Court only issues relating to the rates, sans the issue of coverage. We say this in furtherance of the reasoning that led to the precedents cited on behalf of the respondent. Learned counsel for the appellant further argued that since the rate of duty is uniform throughout India, there will be no situation of conflict of opinions between the different High Courts on any issue referable to the question of coverage. In the nature of the conclusion that we have arrived at, we are unable to accept this submission.

In the result, these appeals are rejected as not maintainable, reserving liberty to the appellant to approach the Hon"ble Supreme Court of India u/s 35L of the Act.