

(2001) 07 AP CK 0040

Andhra Pradesh High Court

Case No: Writ Petition No. 12877 of 2001

Sanghi Spinners Limited

APPELLANT

Vs

Dy. Commissioner of C. Ex.

RESPONDENT

Date of Decision: July 10, 2001

Acts Referred:

- Central Excises and Salt Act, 1944 - Section 35B, 35B(1), 35EE
- Constitution of India, 1950 - Article 227

Citation: (2001) 132 ELT 565

Hon'ble Judges: S.R. Nayak, J; S. Ananda Reddy, J

Bench: Division Bench

Advocate: G. Mohan Rao, for the Appellant; L. Narasimha Reddy, C.G.S.C., for the Respondent

Final Decision: Allowed

Judgement

@JUDGMENTTAG-ORDER

S. Ananda Reddy, J.

The Writ Petitioner, a Company registered under the Companies Act, placed in a peculiar position of denial of jurisdiction both by the appellate authority u/s 35B and by the revisional authority u/s 35EE of the Central Excise Act, 1944 (hereinafter referred to "the Act"), approached this Court, initially praying for the issue of writ of mandamus declaring the Order No. 125/99 (H.III), dated 6-12-1999 of the Commissioner of Customs & Central Excise (Appeals) Hyderabad, [hereinafter referred to "the Commissioner (Appeals)"], confirming the duty demanded in respect of seven AR4s mentioned in its order and also imposing the penalty of Rs. 2,000 as illegal, arbitrary and unconstitutional. Later with the permission of this Court, the relief sought for was amended praying for the issue of Certiorari and to quash the order of Customs, Excise and Gold (Control) Appellate Tribunal (hereinafter referred to "the CEGAT" or "the Appellate Tribunal"), South Zone Bench

at Chennai in Final Order No. 1163/2000, dated 16-8-2000 as illegal and arbitrary.

2. The brief facts leading to filing of this writ petition are as under :-

The Petitioner Company is a 100% Export Oriented Unit (for short "EOU"), engaged in the manufacture of cotton yarn and blended yarns. The manufactured goods by the EOU are to be exported without payment of duty and a certain percentage of the goods manufactured by the EOU, as fixed by the Government from time to time, are allowed to be sold in the domestic tariff area on payment of appropriate duty of excise. The Petitioner Company during the period August, 1996 to March, 1997 has cleared certain goods from their factory for export under a bond. As the petitioner has not furnished the number of shipping particulars for the AR4s, specified by the Assistant Commissioner of Central Excise, a show cause notice was issued proposing to levy basic excise duty, additional excise duty as well as penalty. The Petitioner Company produced certain AR4s, but failed to produce 11 AR4s and therefore, the Assistant Commissioner of Central Excise by his proceedings dated 30-6-1998 passed orders demanding a duty of Rs. 31,45,757.79 and also imposed a penalty of Rs. 2,000/-. Aggrieved by the said order of adjudication, the Petitioner Company filed an appeal before the Commissioner (Appeals). The Commissioner (Appeals) remanded the matter in respect of four AR4s, but insofar as seven AR4s are concerned, the Commissioner (Appeals) confirmed the order of demand of duty, observing that the Petitioner Company failed to submit copies of AR4s showing proof of export of the goods. Against the said order, the petitioner carried the matter in further appeal before the Appellate Tribunal. The Appellate Tribunal on a preliminary issue held that the appeal is not maintainable in terms of the proviso to Section 35B(1), as according to the Appellate Tribunal the dispute relates to the goods exported outside India without payment of duty, therefore, the Tribunal has no jurisdiction. Thereafter the petitioner preferred a revision to the Central Government, as provided u/s 35EE. The revisional authority also, after going into the contentions of the Petitioner, found that the revisional authority has no jurisdiction, as the goods cleared were not exported by the Petitioner Company out were sold to various advance licence holders within the country and according to the revisional authority only the Appellate Tribunal has got jurisdiction to decide the issue. Placed in this peculiar situation, the Petitioner Company is before this Court.

3. The learned Counsel for the Petitioner contended that though the goods have been cleared under AR4s, which were intended for exports, but in fact they were cleared for sales to the advance licence holders within the country. Therefore, those clearances could not be considered as exports. The learned Counsel contended that, as there were no separate forms for such clearance to effect the sales to the advance licence holders, the Department has used the same AR4s. Therefore, there was no justification for the Department as well as for the Appellate Tribunal to treat the goods in question as exports. The learned Counsel also contended, relying upon the grounds of the appeal before the Commissioner (Appeals), that though the

Petitioner Company had contended that the clearances were for sales within the country to the advance licence holders, which are treated as deemed exports, the Commissioner (Appeals) did not consider the claim of the Petitioner. Therefore, there was absolute failure on the part of the first appellate authority, the Commissioner (Appeals), to adjudicate the issue raised by the Petitioner Company, which had resulted in the denial of both the remedies of appeal as well as revision before the Appellate Tribunal and the Central Government respectively to the Petitioner.

Under the above circumstances, the learned Counsel sought for either to remit the matter to the Commissioner (Appeals) so as to consider and decide the issue whether there were, in fact, sales within the country to the advance licence holders, which could be treated as deemed exports, which would decide the jurisdiction of either the appellate or the revisional authority to adjudicate the issue, after the same is decided by the first appellate authority, the Commissioner (Appeals). The learned Counsel alternatively contended that the revisional authority gave a categorical finding that the sales were affected within India to the advance licence holders. Therefore, an appeal lies to the Appellate Tribunal. Hence, the appellate authority may be directed to restore the appeal and decide the same on merits.

4. Opposing the contentions, the learned Senior Standing Counsel stated that under the provisions of the Central Excise Act and the Rules made thereunder, the Petitioner Company is obligated to file proof of exports within a period of six months and as the Petitioner Company failed to file any proof of such exports, the Petitioner Company is liable to the basic excise duty, as provided under the provisions of the Act and the Rules made thereunder. According to the learned Counsel, the Petitioner Company failed to produce any evidence either before the original authority, the Assistant Commissioner of Central Excise and even before the first appellate authority the Commissioner (Appeals). Therefore, both the authorities negated the claim of the Petitioner Company and raised a demand of duty. Therefore there is no provision under which the Petitioner can avoid the liability of the duty in question. The learned Counsel also contended that the Petitioner Company is liable to pay more than Rs. 30 lakhs towards the duty, and therefore, it has to pay the demanded duty. The learned Counsel, however, was not able to justify either the order of the Appellate Tribunal or the revisional authority.

5. Heard both sides and considered the material on record.

6. The issue in dispute in this writ petition is whether an appeal lies to the Appellate Tribunal u/s 35B or a revision lies u/s 35EE of the Act against the order of the Commissioner (Appeals).

7. The issue depends upon whether the sale of goods in question, in respect of which the duty is demanded, is export sale outside India or sold within India. It is not in dispute that the Petitioner Company is 100% EOU and in terms of the

provisions of the Act and the Rules the Petitioner Company has to export 100% of its production, however, subject to the relaxations provided under the Act and the rules. It is also not in dispute that the Petitioner is at liberty to effect sales to the holders of advance licences, which are treated as deemed exports for the purpose of the provisions of the Act and the Rules. It is also not in dispute that the goods in question were cleared from the factory of the Petitioner for export under bond. It is also a fact that the Petitioner did not produce required evidence showing that the said goods were exported outside India. On such failure the Assistant Commissioner of Central Excise raised a demand of duty in respect of eleven AR4s. When an appeal was filed before the Commissioner (Appeals), the Commissioner (Appeals) remitted the claim of the Petitioner Company in respect of four AR4s, while confirming the duty of demand in respect of seven AR4s. The specific case of the Petitioner Company is that before the Commissioner (Appeals), it had raised the issue that the goods were not exported to outside India by the Petitioner Company, but they were sold to the advance licence holders within India, which could be treated as deemed exports. Therefore, they are sales affected within India, which are permitted under the provisions of the Act and the Rules. The Commissioner (Appeals), however, did not decide the said issue, instead proceeded on the ground that the Petitioner Company failed to produce the evidence of exports, hence, confirmed the duty levied. The peculiar situation is neither the original authority nor the appellate authority recorded a finding that the sale of goods in question was an export sale or sale within India, as claimed by the Petitioner Company. In the absence of such a finding the Appellate Tribunal felt that the sales were export sales, therefore, it has no jurisdiction. When the Petitioner approached the revisional authority, the revisional authority referred to the said claim that sales were affected within the country and preceded as if it is an admitted fact. The revisional authority also did not refer to any material placed before it for recording such a finding. On the other hand, the finding is "That out of the 7 AR4s of deemed exports 6 were clearance against Advance Licence and one was clearance to an EOU; that proof of receipt of goods in these cases and their warehousing are available with the applicant." Therefore, there is no clear finding whether the goods were exported to outside India by the Petitioner Company or sold within India.

8. Under the above circumstances, in the interest of justice, we deem it fit to quash the order of the Commissioner (Appeals) as well as the order of the Appellate Tribunal and remit the matter to the Commissioner (Appeals) to decide the issue whether the goods in question relating to 7 AR4s were exported to outside India or sold within India, as claimed by the Petitioner Company to the advance licence holders, which could be treated as exports for the exemption of duty liability. The revisional authority, though recorded a finding that the sale of goods in question was affected within the country to the advance licence holders, as we have remitted the matter to the Commissioner (Appeals) to decide the issue, whether the goods were exported to outside India or sold within India, and in order to avoid being

carried away by the findings of the revisional authority, exercising the powers vested in this Court under Article 227 of the Constitution, we quash the order of the revisional authority in Proceedings in F.No. 195/84/2000-RA. Order No. 25/2001, dated 26-2-2001.

9. Now the matter shall go back to the Commissioner (Appeals), who shall decide the issue regarding the nature of the sale in respect of the goods in question, that is in respect of 7 AR4s basing on the material placed by the Petitioner. Such adjudication is directed to be completed as early as possible within a period of two months from the date of receipt of this order.

10. In the result the writ petition is accordingly allowed to the extent indicated above. No costs.