

(2016) 08 AP CK 0029

Andhra Pradesh High Court

Case No: Central Excise Appeal No. 115 of 2015

Shyam Ferro Alloys Ltd.

APPELLANT

Vs

Asstt. C.C. (APPG),
Visakhapatnam

RESPONDENT

Date of Decision: Aug. 1, 2016

Citation: (2017) 2 ALT 403 : (2016) 340 ELT 488

Hon'ble Judges: V. Ramasubramanian and Anis, JJ.

Bench: Division Bench

Advocate: S/Shri Mohd. Shafiq representing T. Vinod Kumar, Counsel, for the Petitioner;
Shri M.V.J.K. Kumar, SSC, for the Respondent

Final Decision: Dismissed

Judgement

1. This appeal by the assessee under Section 130 of the Customs Act, 1962, raises the following substantial questions of law :

- (1) Whether the impugned order failed to see the fact that "speed post" is not one of the authorised mode of services u/s. 153 and thus the impugned order is a nullity?
- (2) Whether proper service of order under Section 153 of the Customs Act is condition precedent for order to be considered a valid order?
- (3) Whether the period of limitation starts from the date of proper/valid service of the order-in-original?
- (4) Whether both the authorities, including CESTAT-Bangalore, are justified in their conclusion that the appeal is barred by limitation overlooking, the fact that the appeal was filed within the prescribed period of limitation if one reckons from the date of knowledge of the order? And
- (5) Whether the order-in-original levying duty does not suffer vice of illegality and gross violation of principle of natural justice, inasmuch as the same suffers from the vice of pre-determination?

2. Heard Mr. Mohd. Shafiq, representing Sri T. Vinod Kumar, learned counsel for the appellant and Sri M.V.J.K. Kumar, learned Senior Standing Counsel for the respondents.

3. The appellant imported about 7480 metric tonnes of Manganese Ore from Australia under a Bill of Entry dated 10-10-2011 through Visakhapatnam Port. The material was provisionally assessed under Section 18(1) of the Customs Act, 1962. The appellant claimed the benefit of exemption under Notification No. 4/2006-C.E., dated 1-3-2006. The said Notification exempted "Ores" from payment of Countervailing Duty (CVD), provided the imported material fell under Chapter Heads 2601 to 2617 of the Customs Tariff Act, 1975.

4. On 14-8-2012, a notice was issued to the appellant calling upon them to show cause as to why a demand to the tune of Rs. 1,07,50,083/- should not be made towards differential duty, on the ground that what was imported by the appellant was a "Manganese Concentrate" and not "Manganese Ore". In other words, the Adjudicating Authority took a stand that the material imported was not covered by the exemption notification.

5. The appellant filed their objections to the show cause notice, on 22-8-2012. It appears that after considering the objections, an Order-in-Original was passed on 22-12-2012. It appears that the same was also sent by Speed Post and the same was received by the appellant on 25-12-2012.

6. However, claiming that they acquired knowledge of the passing of the order of adjudication only on 12-12-2013, when they received a mail from Clearing House Agent, about a demand made on them, the appellant filed a statutory appeal before the Commissioner (Appeals). By an Order-in-Appeal dated 15-4-2014, the Commissioner dismissed the appeal on the ground that the appeal was barred by time. As against the said order, the appellant filed an appeal before the Customs, Excise and Service Tax Appellate Tribunal (CESTAT), South Zonal Bench, Bangalore. The Tribunal dismissed the appeal on the ground that the Commissioner (Appeals) had no power to condone the delay beyond 30 days and that the service of the copy of the Order-in-Original, by speed post was a valid mode of service under Section 153 of the Customs Act, 1962. Therefore, the appellant is before us.

7. Despite the fact that the appellant has raised about five questions of law, which we have extracted above, the only question of law that arises for consideration is as follows :

"Whether the service of a copy of the order by Speed Post, would constitute valid service under Section 153(a) of the Customs Act, 1962, or not?

8. Section 153 of the Customs Act, 1962, reads as follows :

"153. Service of order, decision, etc.

- Any order or decision passed or any summons or notice issued under this Act, shall be served, -

(a) by tendering the order, decision, summons or notice or sending it by registered post or by such courier as may be approved by the Commissioner of Customs;

(b) if the order, decision, summons or notice cannot be served in the manner provided in clause (a), by affixing it on the notice board of the customs house."

9. It appears that four different High Courts have taken the view that so long as the words "Speed Post" are not used in Section 153(a) of the Customs Act, 1962, when a similar enactment uses the expression "Speed Post" under Section 37C of the Central Excise Act, 1944, the service of any notice or order through Speed Post under the Customs Act, 1962, cannot be construed as a valid service.

10. It is true that Section 37C(1)(a) of the Central Excise Act, 1944, uses the expression "Speed Post". This provision in the Central Excise Act recognises three different modes of service, namely, (a) registered post with acknowledgement due, (b) speed post with proof of delivery and (c) service through courier approved by the Central Board.

11. In comparison, Section 153(a) of the Customs Act, 1962, makes a mention only about two different methods of service, namely, (1) registered post and (2) such courier as may be approved by the Commissioner of Customs.

12. Therefore, on the basis of the difference in the language employed between Section 37C(1)(a) of the Central Excise Act, 1944 and Section 153(a) of the Customs Act, 1962, a learned Judge of Allahabad High Court held in **Super House Ltd. v. Union of India - 2015 (322) E.L.T. 63 (All.)** that there was a failure on the part of the Department to comply with the requirements of Section 153 of the Customs Act, 1962, when they sent the order only by Speed Post. A similar view was taken by a Division Bench of the Madras High Court in **Premier Garment Processing v. CESTAT, Chennai - 2015 (39) S.T.R. 812 (Mad.)**, holding that the service of order through Speed Post, is not one of the recognised modes under Section 153(a) of the Customs Act, though the same is recognised by the Central Excise Act. A Division Bench of the Bombay High Court also took a similar view in **Amidev Agro Care Pvt. Ltd. v. Union of India - 2012 (279) E.L.T. 353 (Bom.) : 2012 (26) S.T.R. 299 (Bom.)**, where they distinguished a judgment of the Punjab and Haryana High Court in **Commissioner of Central Excise v. Mohan Bottling Company (P) Ltd. [2010 (255) E.L.T. 321 (P & H)]**, which was a case that arose under Section 37C of the Central Excise Act, 1944.

13. Another Bench of the Bombay High Court, in **New Drug & Chemical Co. v. Union of India - 2015 (325) E.L.T. 313 (Bom.)**, followed the ratio laid down in **Amidev Agro Care Pvt. Ltd. - 2012 (279) E.L.T. 353 (Bom.) : 2012 (26) S.T.R. 299 (Bom.)** (supra). Even the Punjab and Haryana High Court took a similar view in

Commissioner of C. Ex., Ludhiana v. Best Dyeing - 2011 (271) E.L.T. 518 (P&H) : 2012 (27) S.T.R. 97 (P&H), while considering a case arising under Section 35C of the Central Excise Act, 1944. However, one Division Bench of the Allahabad High Court, in **Mirzapur Electrical Industries Ltd. v. Commr. of C. Ex., Allahabad - 2014 (300) E.L.T. 496 (All.)**, took the view that registered post and speed post are the same methods of service and that the object of sending the post by registered post is to keep a record. The same object is served by sending an article by speed post through the same agency. Therefore, the Division Bench of the Allahabad High Court struck a different note in the said decision.

14. The learned Senior Standing Counsel for the Department brought to our notice, a decision of the High Court of Orissa in **Jay Balaji Jyoti Steels Ltd. v. CESTAT, Kolkata - 2015 (37) S.T.R. 673 (Ori.)**, wherein the Division Bench of the Orissa High Court expressed its inability to follow the decision of the Bombay High Court in **Amidev Agro Care Pvt. Ltd. - 2012 (279) E.L.T. 353 (Bom.) : 2012 (26) S.T.R. 299 (Bom.)** (supra) and held that the service of an order or notice through speed post serves the very same purpose. This judgment of the Orissa High Court, was taken on appeal by the assessee to the Supreme Court in SLP (Civil) No. 16516/2015. But the Supreme Court refused to interfere with the order and dismissed the Special Leave Petition on 14-9-2015.

15. We have carefully considered every one of the decisions relied on by the learned counsel for the appellant. In the decision of the learned single Judge of the Allahabad High Court in **Super House Ltd. - 2015 (322) E.L.T. 63 (All.)** (supra), there is no discussion as to how the speed post is different from a registered post. In any case, the decision of the Division Bench of the Allahabad High Court, in **Mirzapur Electrical Industries Ltd. - 2014 (300) E.L.T. 496 (All.)** (supra) should be taken to have overruled impliedly, decision of the single Judge in **Super House Ltd. - 2015 (322) E.L.T. 63 (All.)** (supra). Therefore, the same is not of any assistance to the appellant.

16. Insofar as the decision of the Madras High Court in **Premier Garment Processing - 2015 (39) S.T.R. 812 (Mad.)** (supra) is concerned, it is seen from Paragraph 11 of the order that the Court was carried away by one important fact, namely, that there was no proof filed by the Department to support the delivery of the order upon the assessee. There was proof for having dispatched the order by speed post, but the Court found no proof having been filed to support delivery. Therefore, the decision rendered by the Madras High Court, appears to have turned partly on facts and partly on law and hence it cannot be taken to be an authoritative pronouncement of the law on the point.

17. **Amidev Agro Care Pvt. Ltd. - 2012 (279) E.L.T. 353 (Bom.) : 2012 (26) S.T.R. 299 (Bom.)** (supra), which is a decision of the Bombay High Court, arose under Section 37C of the Central Excise Act, 1944. In that case, the provisions of Section 37C(1)(a) did not contain the words "Speed Post" before the amendment. After the

amendment, the words were specifically incorporated. Therefore, the Bombay High Court was compelled to come to the conclusion that when the Parliament sought to make an amendment to the existing law on the realisation that there was something missing, any interpretation given by the Court should also be in tune with such change of law.

18. The decision of the Bombay High Court in **New Drug & Chemical Co. - 2015 (325) E.L.T. 313 (Bom.)** (supra) simply followed the decision in **Amidev Agro Care Pvt. Ltd. - 2012 (279) E.L.T. 353 (Bom.) : 2012 (26) S.T.R. 299 (Bom.)** (supra) and hence it cannot be accepted for the very same reason as we have stated in respect of **Amidev Agro Care Pvt. Ltd. - 2012 (279) E.L.T. 353 (Bom.) : 2012 (26) S.T.R. 299 (Bom.)** (supra).

19. Similarly, the decision of the Punjab and Haryana High Court in **Best Dyeing - 2011 (271) E.L.T. 518 (P&H) = 2012 (27) S.T.R. 97 (P&H)** (supra) cannot go to the rescue of the appellant inasmuch as it arose under Section 35C of the Central Excise Act, 1944. Since Section 37C contained a different tune than the one found in Section 35C, the Punjab and Haryana High Court took the view that it did in **Best Dyeing - 2011 (271) E.L.T. 518 (P&H) : 2012 (27) S.T.R. 97 (P&H)** (supra).

20. As a matter of fact, the Orissa High Court alone appears to have gone into the question as to what the words "Registered Post" appearing in Section 153(a) of the Customs Act, 1962 would connote. The Orissa High Court had referred to Section 28 of the Indian Post Office Act, 1898, which provides for registration of postal articles. The Orissa High Court further pointed out that Speed Post service was introduced, by way of an amendment to the Indian Post Office Rules, 1933, by a Gazette Notification issued by the Ministry of Communications (Department of Posts), Government of India, dated 24-7-1986. After taking into account Section 28 of the Indian Post Office Act, 1898 and Rule 66B of the Indian Post Office Rules, 1933, the Orissa High Court came to the conclusion that the Speed Post is nothing but another method of registering an article through the Postal Department under Section 28 of the Indian Post Office Act, 1898. Therefore, the only decision out of all the decisions which we have referred to above, which can be said to have laid down a ratio decidendi is that of Orissa High Court. With respect, we agree with the views expressed by the Orissa High Court.

21. As rightly pointed out by the Orissa High Court, a person who seeks to send an article by Speed Post, does the same thing as a person who seeks to register an article does. But the transmission of the article is to be on a fast track in speed post services. There is also a tracking system provided by speed post. In other words, a registered post can be compared to an economy travel while a service through speed post can be compared to business class. Other than that, there is no distinction between two. In our considered view, the expression "registered post" appearing in Section 153(a) of the Customs Act, 1962, have to be construed as including within its purview, the method of registering an article, to be taken by

speed post. Therefore, the question of law is answered against the appellant and the appeal is dismissed. The miscellaneous petitions, if any, pending in this appeal shall stand closed. No costs.