Commissioner of Central Excise Vs Jayshree Insulators

Court: Calcutta High Court

Date of Decision: Oct. 8, 2004

Acts Referred: Central Excise Rules, 1944 â€" Rule 22, 57A, 57Q
Central Excises and Salt Act, 1944 â€" Section 35G, 35G(1), 35G(3)
Income Tax Act, 1922 â€" Section 66(1), 66(2), 66(5)
Income Tax Act, 1961 â€" Section 256

Citation: (2005) 129 ECR 126 : (2005) 185 ELT 9

Hon'ble Judges: R.N. Sinha, J; D.K. Seth, J

Bench: Division Bench

Advocate: D.P. Mukherjee and I.P. Mukherjee, for the Appellant;J.P. Khaitan and Partha Banerjee, for the Respondent

Final Decision: Dismissed

Judgement

D.K. Seth, J.
The questions raised : In this application u/s 35G(3) of the Central Excises and Salt Act, 1944 before it was amended in

1999, two points have been raised namely :

(i) Whether the Tribunal was justified in allowing the credit of Modvat of Refractory bricks and Silicon Carbide Tiles under Rule 57A of the

Central Excise Rules 1944 relying on the affidavit filed by the assessee describing the manufacturing process of Electrical insulator and the usage of

the impugned items therein. The Tribunal has not considered the very fact that even by the assessee''s own account the impugned items were used

to cover the Kiln Trolleys which are inserted into the Kiln for the purpose of firing of the insulator in the Kiln. They are, therefore, very much parts

of the Trolleys, which are in turn, parts of the Kiln itself. In other words, the impugned items are not inputs as defined under Rule 57A of Central

Excise Rules, 1944, but only part of the Kiln.

(ii) Whether the Tribunal has overlooked the fact that ''Refractory bricks and Silicon Tiles'' had been subsequently defined as Capital goods under

Rule 57Q of Central Excise Rules, 1944 with effect from 16-3-95, which clearly establishes the fact that they were not inputs as defined under

Rules 57A of Central Excise Rules, 1944. Therefore, the impugned items were not eligible for Modvat Credit during the material period.

Applicant''s contention :

2. Learned Counsel for the applicant points out that these are questions of law in respect of which there was no decision by the High Court though

there are decisions of the Larger Bench of the Tribunal. Therefore, it raises substantial questions of law to be stated before the High Court.

Respondent''s contention :

3. Mr. J.P. Khaitan, learned Counsel for the respondent, on the other hand, takes a preliminary objection relying on the decision in Commissioner

of Income Tax, Bombay Vs. Scindia Steam Navigation Co. Ltd., on two propositions. First, that these points were never raised before the learned

Tribunal nor the learned Tribunal had dealt with the same and that one of the points is based on the subsequent amendment. Second, he points out

from the questions sought to be referred to that it was never asserted by the appellant that these were not inputs but were treated to be part of the

apparatus or equipments, which they are now seeking to bring within the exclusion clause to exclude the same from the Modvat benefit allowed to

the respondents by the learned Tribunal. Mr. Khaitan has led us through the decision of the learned Tribunal.

Applicant''s reply :

4. Learned Counsel for the applicant in his usual fairness, has submitted that the point in the form was not raised but it was very much raised in the

form of being excluded from the inputs as he points out referring to the decision of the learned Tribunal.

Scindia Steam Navigation (supra): The principles :

5. We have heard the learned Counsel for the respective parties. In the decision in Scindia Steam Navigation (supra), the Apex Court had laid

down after discussing various decisions, the grounds on which a reference can be made which are as follows :

The result of the above discussion may thus be summed up :

(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, it must be deemed to have been dealt with by 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, then it 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 findings 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 of its

order.

5.1 The law is already settled. Mr. Khaitan further points out that there are subsequent decisions following this decision. This proposition is also

not disputed by the learned Counsel for the appellant. In fact, we also find that the form in which the question has been sought to be referred to

were not raised before the learned Tribunal and as such this comes within the confine of clause (4) of the guidelines laid down in Scindia Steam

Navigation (supra).

The form of the question involved :

6. But following the said ratio, it appears that the point involved is different in form, which we propose to formulate as hereinafter viz.:

Whether the Refractory bricks and Silicon Carbider Tiles used, in the process arising or in relation to the manufacture of the insulated final article,

in the Trolleys not being parts of the Trolleys but parts of the process could be excluded within the exclusion clause of the Modvat under the

Modvat Scheme from the Modvat benefit. On account of its not being inputs but being parts of equipment or apparatus, in the facts and

circumstances of the case?

6.1 So far as the second question with regard to the capitalization is concerned, it appears that this point was also not mentioned in the application

for reference. From the order of the Tribunal it also does not appear that this was so raised. If it was raised on the basis of the subsequent

amendment which has not been given retrospective effect and was effective from 1995, then the same cannot be applied until it is held to be

retrospective in operation in respect of the period prior to 1995. This question, therefore, having not been raised before the learned Tribunal,

cannot be raised in view of the decision in Scindia Steam Navigation (supra).

Admission of the reference u/s 35G :

7. In the circumstances, we propose to admit the reference and direct the learned Tribunal to furnish the statement of case.

7.1 Mr. Khaitan had also taken a preliminary objection that the Court cannot, in exercise of jurisdiction u/s 35G(3), ask for a question, which was

not asked for in the application or reference by the applicant. The High Court cannot reframe the question. All the preliminary objections, which

were asked before this Court by Mr. Khaitan shall remain open to be agitated at the time of hearing of the reference after the statement of case is

made.

28th September 2004.

Hearing of the preliminary objection :

8. Immediately, after the above order was passed, Mr. Khaitan pointed out that his preliminary objection can be decided without the statement of

case and insisted that the preliminary objection be decided first. In the circumstances, on 23rd September 2004, we directed the matter to appear

''for orders'' in the list and requested the counsel for the respective parties to come prepared to address the Court on the said point. We, therefore,

did not sign the order dated 23rd September 2004.

8.1 The matter appeared in the list on this day. By consent of the parties the matter is treated as on day''s list for hearing on the said preliminary

objection of Mr. Khaitan and is taken up for hearing.

8.2 Accordingly, we have heard the learned counsel for the respective parties at length. After having heard the learned counsel for the respective

parties, the judgment was reserved.

8th October 2004.

Whether the High Court can reframe the question u/s 35G :

9. Learned counsel for the applicant submitted that the finding of the Supreme Court in Commissioner of Income Tax, Bombay Vs. Scindia Steam

Navigation Co. Ltd., with regard to treating reference as a mandamus is an obiter. Secondly, he contended that sub-section (3) of Section 35G is

wider than sub-section (1). When the Tribunal refused on the ground that no question of law is involved, then it is not confined to the question

referred to it, but to the question of law involved which the High Court can reframe.

9.1 Mr. Khaitan contended that if there is any obscurity then surely the High Court can reframe the question. But if it is not argued or raised at all in

the form it is now sought to be raised, in that event, framing of a question in different form is impermissible u/s 35G of the Central Excise and Salt

Act, 1944. He points out that it is already found by the learned Tribunal that the Department had never attempted to treat the same as inputs and

as such this was not a question, which can be argued in view of the subsequent amendments and as such this cannot be treated to be an obscurity

but a question which was never raised. As such this cannot be allowed.

The answer:

9.2 The question has to be answered in the context of Section 35G of the Central excise and Salt Act, 1944 as it stood at the relevant point of

time which runs as follows :

Section 35G. Statement of case to High Court. - (1) The Commissioner of Central Excise or the other party may, within sixty days of the date

upon which he is served with notice of an order u/s 35G (not being an order relating, amount 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), by application in the prescribed form,

accompanied, where the application is made by the other party, by a fee of two hundred rupees, require the Appellate Tribunal to refer to the High

Court any question of law arising out of such order and, subject to the other provisions contained in this section, the Appellate Tribunal shall, within

one hundred and twenty days of the receipt of such application, draw up a statement of the case and refer it to the High Court.

(3) If, on an application made under sub-section (1), the Appellate Tribunal refused to state the case on the ground that no question of law arises,

the Commissioner of Central Excise, or, as the case may be, the other party may, within six months from the date on which he is served with notice

of such refusal, apply to the High Court and the High Court may, if it is not satisfied with the correctness of the decision of the Appellate Tribunal,

require the Appellate Tribunal to state the case and to refer it, and on receipt of any such requisition, the Appellate Tribunal shall state the case and

refer it accordingly.

9.3 The provisions of Section 35G of the Central Excise and Salt Act, 1944 and those of Section 256 of the Income Tax Act, 1961 are identical

in nature. In this case, the High Court exercises advisory jurisdiction. It does neither exercise original nor appellate jurisdiction. The scope of this

advisory jurisdiction of the High Court is limited to the confines of the question of law referred to it, seeking its opinion. It neither disposes of the

appeal pending before the learned Tribunal nor decides the question on the merit. It only gives its opinion in respect of a question of law referred to

it. On the basis of such opinion, it is the learned Tribunal, which disposes of the appeal pending before it. This proposition with regard to the

confinement of the jurisdiction is well settled proposition of law. The decisions on this question relating to the confinement of the jurisdiction

supported with Section 66(1) of the Income Tax Act, 1922 since followed and reiterated in relation to the decisions concerning Section 256 of the

1961 Act. These principles are equally applicable in respect of cases covered u/s 35G of the Central Excise and Salt Act, 1944. In this

connection, we may refer to the decisions in CIT v. Tata Tea Ltd. - ITA No. 233 of 2002, disposed of by us on 12th June 2004 and Lalit Mohan

Thapar v. CWT (Central), Calcutta - (GA No. 835 of 2002) AWT No. 3730 of 1998, disposed of by us on 23rd July 2004 wherein we had

occasion to discuss the law referring to various decisions operating in the field.

9.4 The leading decision relied upon by Mr. Khaitan in Scindia Steam Navigation (supra) had crystallized the principles. Having regard to the

question raised by Mr. Khaitan and which now we are called upon to decide, we would confine ourselves only to the extent of the High Court''s

power to frame a question in a form different from what was urged before the learned Tribunal and reference was sought for u/s 35G(1) and the

question formulated in an application for reference in a High Court when the learned Tribunal refused to refer u/s 35G(1). Admittedly, if there is

any obscurity, in that event, High Court is empowered to remove such obscurity and reframe the question. High Court is also equally empowered

to reframe the question, which is otherwise involved in accordance with the guidelines laid down in Scindia Steam Navigation (supra) provided

such question was involved in the case out of which reference is sought for and it was so formulated for the purpose of seeking reference either

under Sub-section (1) or Sub-section (3). But this power is limited to the extent of reframing the question in the form already formulated. It cannot

frame the question altogether in a different form not raised though could have been raised and neither argued nor dealt with by the learned Tribunal

in the form in which the applicant seeks the High Court to frame it.

9.5 The jurisdiction exercised by the High Court under Sub-section (3) is invoked only when the learned Tribunal refuses to refer the question.

This jurisdiction, in essence, is a jurisdiction to direct the learned Tribunal to refer the question to it after the learned Tribunal had refused it under

Sub-section (1), a mandamus upon the learned Tribunal. In these circumstances, the principle of mandamus as is applicable in the exercise of

jurisdiction to issue mandamus by the High Court would be equally applicable in the present case. It was so held in Scindia Steam Navigation

(supra). In order to justify our above observation, we may derive inspiration from the observation made by the Apex Court in Scindia Steam

Navigation (supra) at page 609 of Commissioner of Income Tax, Bombay Vs. Scindia Steam Navigation Co. Ltd., :

Moreover, the power of the court to issue direction to the Tribunal u/s 66(2) is, as has often been pointed out, in the nature of a mandamus and it

is well settled that no mandamus will be issued unless the applicant had made a distinct demand on the appropriate authorities for the very reliefs

which he seeks to enforce by mandamus and that had been refused. Thus, the power of the court to direct a reference u/s 66(2) is subject to two

limitations the question must be one which the Tribunal was bound to refer u/s 66(1) and the applicant must have required the Tribunal to refer it.

R(T) is the form prescribed under rule 22 A for an application u/s 66(1) and that shows that the applicant must set out the questions which he

desires the Tribunal to refer and that further, those questions must arise out of the order of the Tribunal. It is, therefore, clear that u/s 66(2), the

court cannot direct the Tribunal to refer a question unless it is one which arises out of the order of the Tribunal and was specified by the applicant

in his application u/s 66(1). Now, if we are to hold that the court can allow a new question to be raised on the reference, that would in effect give

the applicant a right which is denied to him u/s 66 (1 and 2), and enlarge the jurisdiction of the court so as to assimilate it to that of an ordinary civil

court of appeal.

It is again to be noted that, whereas Section 66(1), as it stood prior to the amendment of 1939, conferred on the Commissioner a power to refer a

question of law to the court suo motu, that power has been taken away under the present section and it has accordingly been held that u/s 66(1),

as it now stands, there is no power in the Tribunal to refer a question of law suo motu for the decision of the court. If, as contended for by the

respondents, the court is to be held to have power to entertain in a reference, any question of law which arises on the facts found by the Tribunal,

its jurisdiction u/s 66(5) must be held to be wider than u/s 66(1) and (2). The correct view to take, in our opinion, is that the right of the litigant to

ask for a reference, the power of the Tribunal to make one and the jurisdiction of the court to decide it are all co-extensive and, therefore, a

question of law which the applicant cannot require the Tribunal to refer and one which the Tribunal is not competent to refer to the court cannot be

entertained by the court u/s 66(5). In view of the above considerations, we are unable to construe the words, any question of law arising out of

such order, as meaning any question of law arising out of the findings in the order of the Tribunal.

9.6 Similarly, Section 35G of the 1944 Act does not conform any jurisdiction on the Tribunal to refer a question of law suo motu. Sub-section (1)

gives a right to a party to apply before the Tribunal to seek a reference. If refused, the party aggrieved can approach the High Court under Sub-

section (3). Therefore, on the same principle, unless the party has asked for reference of a question in a particular form seeking relief intended and

which had since been refused, it can ask for a mandamus upon the learned Tribunal through Sub-section (3) for referring such question, which it

had demanded the learned Tribunal to refer. Therefore, even though the question may be involved could have been raised and could have been

dealt with but neither raised nor dealt with and nor sought to be referred, can be entertained by the High Court through a process of framing of the

question all by itself. The right is given to refer to the High Court any question of law arising out of such order. If the Tribunal refuses to refer under

Sub-section (1), then under Sub-section (3) the party could approach the High Court under Sub-section (3) to require the Appellate Tribunal to

refer the question to the High Court. Thus, the High Court''s power under Sub-section (3) of Section 35G of the 1944 Act is subject to two

limitations - the question must be one which the Tribunal is bound to refer and the applicant must have required the Tribunal to refer it. In the same

manner the right of a party to ask for reference, the power of the Tribunal to make one and the jurisdiction of the Court to decide being

coextensive, the party can neither ask for a question not raised for reference nor the Tribunal can make the same nor the Court can frame when

refused by the Tribunal for being decided by it. The form in which the reference is sought for is Form No. EA-6 [Rule 218(1)]. Form EA in clause

(viii) requires the question of law to be framed or formulated. Since it is necessary that a specific point is required to be formulated, therefore, the

High Court cannot deviate from the point so formulated and frame the same in a form different from what was sought to be raised for reference.

Whether the scope of Section 35G(3) wider than Section 35G(1):

10. The proposition that the provisions of Sub-section (3) are wider than those in Sub-section (1) does not seem to be a sound proposition.

Inasmuch as the refusal of the learned Tribunal under Sub-section (1) does not confer any additional right on the party seeking the reference.

Under Sub-section (3) the party seeks to enforce a direction by the High Court to refer the question by the learned Tribunal, which it had refused

to do. Therefore, it cannot ask for direction upon the learned Tribunal to refer a question different from that the reference of which was refused by

the learned Tribunal since raised by the party in Form EA-6. The High Court under Sub-section (3) directs the learned Tribunal to refer the

question, which it had refused to refer. Since the High Court is not exercising any original or appellate jurisdiction, it has no power to formulate any

other question other than which is permissible within the scope of the limited jurisdiction conferred upon it u/s 35G(1) and in case of refusal by the

learned Tribunal under Sub-section (3) thereof. The scope of the jurisdiction conferred u/s 35G is very limited and High Court has no jurisdiction

to enlarge the scope thereof.

Whether the observation of the Apex Court in Scindia Steam Navigation (supra) binding:

11. It is further contended that the observation of the Apex Court with regard to the nature of the order passed under Sub-section (3) as

mandamus was an obiter. Since the Apex Court was not called upon to decide the said question, therefore, the said observation would not be

binding upon this Court. However, without the observation of the Apex Court having regard to the discussion made above, we have come to an

independent conclusion with regard to the proposition as laid down by us in this decision. We do not find any reason to distinguish the proposition,

even if an obiter laid down by the Apex Court. But then an obiter on a principle of law is equally binding.

Conclusion :

12. From the above discussion, it appears that the High Court has no power to frame the question in a form different from the form in which

reference was sought for under Sub-section (1) of Section 35G and the form in which it was formulated in the application u/s 35G(3) unless the

framing of the question by the High Court is in the nature of refraining of the question in order to remove the obscurity without formulating a

question in a form altogether different from that on which reference was sought for.

Order:

13. In these circumstances, the preliminary objection raised by Mr. Khaitan is sustained. The order dated 23rd of September 2004 so far as it

proposed to admit the reference is hereby recalled and the application for reference is hereby dismissed.

13.1 However, before we part with, we must appreciate the assistance rendered by senior Mr. Mukherjee on behalf of the applicant and the fair

stand taken by him in placing the relevant provisions of law for arriving at a correct decision.

13.2 There will, however, be no order as to costs.

13.3 Xerox certified copy of the order, if applied for, be given within 7 days.

R.N. Sinha, J.

14. I agree.