(2011) 02 BOM CK 0138

Bombay High Court

Case No: Writ Petition No. 10002 of 2010

Apcotex Industries Ltd. (formerly known as Acotex Lattices Ltd.)		APPELLANT
	Vs	
Union of India and Customs Excise Service Tax Appellate Tribunal		RESPONDENT

Date of Decision: Feb. 3, 2011

Hon'ble Judges: Mridula Bhatkar, J; J.P. Devadhar, J

Bench: Division Bench

Advocate: V. Sridharan and Prakash Shah, PDS Legal, for the Appellant; M.I. Sethna and A.M. Sethna, for the Respondent

Final Decision: Dismissed

Judgement

J.P. Devadhar, J.

All these writ petitions arise from the order of CESTAT dated 08/04/2010, whereby the CESTAT has upheld the order in original dated 16/12/2005 and dismissed the appeals filed by the Petitioners. By the order in original dated 16/12/2005, the assessing officer had enhanced the assessable value of the imported goods declared by the Petitioners and confirmed the duty demand with fine and penalty.

2. Mr. Sethna, learned senior Advocate appearing on behalf of the Respondents raised a preliminary objection regarding the maintainability of the Writ Petitions. He submitted that in view of the statutory remedy of appeal available under the Customs Act, 1962, these writ petitions ought not be entertained. In this connection, Mr. Sethna, relied on the decision of the Apex Court in the case of Raj Kumar Shivhare Vs. Assistant Director, Directorate of Enforcement and Another, .

3. Mr. Sridharan, learned Counsel appearing on behalf of the Petitioners submitted that in the facts of the present case, the writ petition is maintainable, because, firstly, the CESTAT has wrongly relied upon the decision of the Apex Court in the case of Hyderabad Industries Ltd. Vs. Union of India and Others, , even though the

said decision is not applicable to the present case. Secondly, the CESTAT has neither considered the written nor oral submissions made by the Petitioners and, therefore, the decision of the CESTAT which suffers from patent illegality can be rectified in exercise of writ jurisdiction. Thirdly, the Petitioners had relied upon a decision of the Apex Court in the case of Ispat Industries Ltd. Vs. Commissioner of Customs, Mumbai, which is squarely applicable to the present case, however, the Tribunal failed to consider the above binding decision of the Apex Court. Moreover, in the case of Ispat Industries Ltd. (supra) the Apex Court after distinguishing its earlier decision in the case of Kiran Spinning Mills Vs. Collector of Customs, held that the charges for transportation of the goods by barges from the mother ship at Bombay Floating Light (BFL) to the jetty cannot be added to the assessable value of the imported goods for the purpose of levying customs duty. Totally disregarding the aforesaid decision of the Apex Court, the CESTAT by relying on the decision of the Apex Court in the case of Kiran Spinning Mill (supra) has held that the post importation charges incurred by the Petitioners upto the date of clearance of the goods from the warehouse at Chembur are includible in the assessable value of the goods for the purposes of levying customs duty. In these circumstances, Mr. Sridharan submits that the order of the CESTAT being ex-facie erroneous and contrary to law laid down by the Apex Court, it is absolutely essential in the interest of justice to exercise writ jurisdiction and decide the issue on merits, either by this Court or by remanding the matter back to the Tribunal with direction to decide the matter afresh and in accordance with law.

4. We see no merit in the above contentions. The dispute in the present case is, whether the assessable value of the imported goods is to be determined on the value at which the high seas seller has purchased the goods from the foreign supplier or on the value at which the Petitioners have purchased the goods from the high seas seller. Thus, the dispute in the present case relates to the valuation of the imported goods for the purposes of assessment. Under the provisions of the Customs Act, 1962, an appeal against the order of CESTAT relating to valuation of the imported goods for the purpose of assessment is required to be filed before the Supreme Court and not before the High Court. The question therefore to be considered herein is, if this Court cannot entertain the appeal relating to the issue of valuation, can it be considered in exercise of writ jurisdiction ?

5. It is well established in law, that ordinarily writ petition ought not to be entertained where efficacious alternate remedy of appeal is provided in the statute itself. In the present case, are there any extra ordinary circumstances which warrant the invocation of extra ordinary writ jurisdiction, is the question.

6. It is contended on behalf of the Petitioners that the writ petition is not filed with a view to challenge the valuation aspect of the matter, but filed with a view to challenge the ex-facie errors committed by the Tribunal which can be rectified in exercise of the writ jurisdiction. It is contended that the Tribunal has wrongly relied

upon the decision of the Apex Court in the case of Hyderabad Industries Ltd. In that case, MMTC had imported certain goods and sold the same to the Hyderabad Industries Ltd. in the high seas at a value which included certain service charges. The question was, whether the assessable value of the goods is to be determined on the basis of the price on which MMTC purchased the goods from the foreign supplier or the assessable value should be determined on the basis of the price including service charges paid by Hyderabad Industries Ltd. to the MMTC (high sea seller). According to the Petitioners, this decision of the Apex Court is an authority on the question as to whether service charges paid to the high sea seller constituted buying commission or not and the said decision does not decide the question as to whether sale in high seas by high seas seller (located in India) to a buyer (also located in India) can be said to be a sale for export to India, within the meaning of Rule 4 of the Valuation Rules. It is contended that an issue which passes sub-silentio cannot be said to be the ratio laid down by the Court. In our opinion, the fact that the Petitioners can distinguish the decision of the Apex Court relied upon by the Tribunal cannot be said to be extra ordinary circumstances for invoking writ jurisdiction and it would be open to the Petitioners to agitate the same by filing an appeal. In other words, the fact that the Tribunal has followed the decision of the Apex Court where the issue has passed sub-silentio, does not render the decision of the Tribunal ex-facie bad in law so as to invoke writ jurisdiction.

7. Similarly, the contention of the Petitioners that the Tribunal failed to consider the oral and written submissions made by the Petitioners is also not entirely correct, because, the Tribunal has considered the basic contentions raised by the Petitioners and arrived at a conclusion which if aggrieved, can be challenged by filing an appeal. The fact that the decision in the case of Kiran Spinning Mills (supra) has been distinguished in the case of Ispat Industries Ltd. (supra), it does not mean that the ratio laid in the case of Kiran Spinning Mills (supra) is no longer a good law. Therefore, in the facts of the present case, the Tribunal chose to rely on the decision of the Apex Court in the case of Kiran Spinning Mills (supra) instead of relying on the later decision of the Apex Court of Ispat Industries Ltd. (supra). In such a situation, the proper course is to file an appeal against the order of the Tribunal instead of filing Writ Petition.

8. In the result, we see no reason to entertain these Writ Petitions as the Petitioners have equally efficacious alternate remedy of appeal. Accordingly, all these writ petitions are hereby dismissed with no order as costs.