BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED : 30.11.2016

CORAM:

THE HONOURABLE MR.JUSTICE M.SATHYANARAYANAN
AND
THE HONOURABLE MRS.JUSTICE J.NISHA BANU

C.M.A(MD)No.1498 of 2008
and
M.P(MD)No.1 of 2008

The Commissioner of Central Excise,
Central Revenue Building,
Tractor Road,
NGO 'A' Colony,
Tirunelveli - 627 007. ... Appellant/ Respondent

Vs.

M/s.Transworld Garnet India Pvt. Ltd.,
Opp. Tuticorin Airport,
Kuttudankadu,
Tuticorin - 628 103. ... Respondent/ Appellant

PRAYER: Appeal filed under 35 G of the Central Excise Act, 1944, to set aside the Final Order No.439/2008, dated 02.05.2008 passed by the CESTAT, Chennai, in Appeal No.E/713/2005 arising out of Order-in-Appeal No.102/2005, dated 23.06.2005 passed by the Commissioner (Appeals), Madurai.

For Appellant : Mr.R.Nandakumar

For Respondent : Mr.R.Aravindan

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JUDGMENT

(Judgment of the Court was delivered by M.SATHYANARAYANAN,J.)

The Commissioner of Central Excise, Tirunelveli, aggrieved by the order of CESTAT, South Zone, Chennai, dated 02.05.2008, passed in the Appeal filed by the respondent in Appeal No.E/713/2005, in and by which, the directive contained in the circular dated 07.04.2003 issued by the Central Board of Excise and Customs, is not enforceable one, as it ultra vires the Regulation 3 of the Customs (Fees for Rendering Services by Customs Officers) Regulations, 1998, had filed this Civil Miscellaneous Appeal and it was admitted on the following substantial question of law:

> *"Whether, in the facts and circumstances of the case, the Tribunal is right in concluding that the Circular No.31/2003, dated 7.4.2003 is not enforceable in law as it is ultra vires Regulation (3) of the Customs (Fees for Rendering Services by Customs Officers) Regulations, 1998?"*

2. The learned Standing Counsel for the appellant/revenue would submit that admittedly, the respondent herein is willing to pay the supervision charges on the basis of the Merchant Over Time (in short 'MOT') charges and also exercised the option dated 28.06.2003 to avail the services of the Central Excise Officers on payment of said charge, in terms of the Board's Circular dated 07.04.2003 and therefore, it is not open to resile from the terms and conditions of the Board's Circular dated 07.04.2003 and take a contra stand. He would further urge that in the light of the judgment in ***Naval Overs***

reported in ***2007 (218) E.L.T. 673 (Tribunal - Ahmedabad)***, the impugned order passed by the Tribunal warrants interference.

3. Per contra, the learned Counsel for the respondent has drawn the attention of this Court to the judgment of the Larger Bench of the CESTAT, West Zonal Bench, Ahmedabad, in ***C Ltd.,*** reported in ***2013 (294) E.L.T. 403*** and would submit that in the light of the conflict/contrary view expressed in (i) ***Naval Overs*** reported in ***2007***

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E.L.T. 673 and

(ii) ***C***

(Tribunal), a reference was made and by that time, a decision came to be rendered by the High Court of Delhi in ***C***

reported in ***2013***

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E.L.T. 649

(Del.

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wherein it has been held that *"where an Excise Officer (who is a deemed Customs Officer) provides supervisory services/functions at the factory of an assessee within the jurisdiction of such Excise Officers, the services are rendered within the range of such officer and since admittedly these functions were executed during "normal working hours", such levy is impermissible and therefore, held that the issue for consideration by the Larger Bench does not survive and rejected the reference"* and would further contend that in the light of the judgments rendered by the Honourable Supreme Court, the appeal deserves dismissal and therefore, prays for appropriate orders.

4. This Court paid it's best attention to the rival submissions and also perused the materials available on record.

5. The original authority as well as the appellate authority has held that in view of the Board's Circular dated 07.04.2003, the Export-Oriented Units have to pay MOT charges even for Customs/Central Excise-related works even during office working hours and as such, the respondent had also exercised his option on 28.06.2003 and therefore, the prayer sought for by the respondent herein cannot be granted.

6. The respondent filed an appeal before the CESTAT, South Zone, Chennai and the Tribunal after taking into consideration the decisions rendered in

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Ltd. v. Commissioner reported in ***2005 (190*** and ***Rajasthan Textile Mills v. Commissioner*** reported in ***2007 (216***

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E.L.T. 380

(Tribunal - Delhi), has held that the Board's directive in Circular dated 07.04.2003 is not enforceable as it ultra vires the Regulation 3 of the Customs (Fees for Rendering Services by Customs Officers) Regulations, 1998 and therefore, allowed the appeal.

7. In the considered opinion of this Court, that issue also arose for consideration before the High Court of Delhi in

C

reported in ***2013***

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(Del.

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and the following substantial question of law was framed under Section 35G(2) of the Central Excise Act, 1944:

> *"Whether the Central Excise Officer discharging his duties as a Customs Officer, in the factory premises of the assessee,could be said to be discharging such functions in a "Customs Area" as defined in sub-section (11) of Section 2 of the Customs Act, 1962?"*

8. The High Court of Delhi having referred to the fact that overtime fee is collected under the Customs Act, 1962 read with 1998 Regulation and also referred to the Notification No.14/2002-C.E.(N.T.) dated 08.03.2002, as amended by Notification No. 22/2002 - C.E.(N.T.) dated 04.06.2002, issued by the Central Board of Excise and Customs and concluded as stated supra.

9. The said decision rendered by the High Court of Delhi has not been put to challenge and therefore, it has become final.

10. Though the issue was referred to a Larger Bench of the CESTAT, West Zonal Bench, Ahmedabad, taking into consideration the above cited judgment, the Tribunal held that the issue referred for consideration does not survive and also rejected the reference vide judgment in ***Cen***

Ltd., reported in ***2013***

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11. Thus, in the light of the above cited judgment rendered by the High Court of Delhi in ***C***

reported in ***2013***

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E.L.T. 649 (Del.), the substantial question of law is answered in negative against the appellant.

12. Accordingly, this Civil Miscellaneous Appeal is dismissed, confirming the order in Final Order No.439/2008, dated 02.05.2008 passed by the CESTAT, Chennai, in Appeal No.E/713/2005. No costs. Consequently, the connected miscellaneous petition is also dismissed.

Index :No **(M.S.N.,J) (J.N.B.,J.)**
Internet :Yes **30.11.2016**
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M.SATHYANARAYANAN,J.
AND
J.NISHA BANU,J.

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