

GAHC010063662020



**IN THE GAUHATI HIGH COURT**  
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM &  
ARUNACHAL PRADESH)

**C EX APP 3 OF 2020**

Commissioner of Central Excise and  
Service Tax, Guwahati, Sethi Trust  
Building, GS Road, Bhangagarh,  
Guwahati – 781005, Kamrup (M),  
Assam.

**.....Appellant**

**-Versus-**

Indian Oil Corporation Limited,  
Finance Manager, Taxation Finance  
Department, Bongaigaon Refinery,  
PO: Dhaligaon, Chirang, Assam –  
783385.

**.....Respondent**

For the Writ Appellant : Mr. S.C. Keyal, Advocate.

For Respondent : Dr. A. Saraf, Senior Advocate.

**-BEFORE-**

**HON'BLE THE CHIEF JUSTICE MR. SUDHANSHU DHULIA**  
**HON'BLE MR. JUSTICE MANASH RANJAN PATHAK**

Date of hearing and  
Judgment & order : 11<sup>th</sup> August, 2021.

**JUDGMENT & ORDER (ORAL)**

**(SUDHANSHU DHULIA, CJ)**

The matter is taken up through video  
conferencing.

**2.** Heard Mr. S.C. Keyal, learned counsel for the appellant. Also heard Dr. A. Saraf, learned senior counsel for the respondent.

**3.** This is an appeal filed by the Revenue under Section 35G of the Central Excise Act, 1944 (for short, "the Act"). The assessee before this Court is the Indian Oil Corporation, which has paid an excise duty on SKO, which is Superior Kerosene Oil, as applicable at the relevant point of time. The Revenue, on the other hand, relied upon a Circular dated 22.04.2002 and its objection was that since SKO is mixed with Motor Spirit (MS) or High Speed Diesel (HSD), it will have to pay the duty, which is applicable on MS and HSD, as stipulated in the Circular dated 22.04.2002. Admittedly, the rate of duty on MS and HSD is higher than what it is on SKO.

**4.** The argument of the assessee was that the duty has to be paid at the time of removal of the goods from the gate and admittedly at the time when the goods were removed from the gate, even though from the pipeline, it was in the form of SKO and not MS or HSD. This, however, did not find favour of with the authority and thereafter, the matter was later taken to the Tribunal by the assessee, which gave an order in favour of the assessee holding that the duty was liable to be paid only as SKO and not payable as on MS or HSD and as far as the applicability of Circular was concerned, the Tribunal was of the view that it is the law which would be applicable and the Circular, which is on

the face of it against the law cannot be applied in the present case. Aggrieved by the order of the Tribunal, the Revenue has filed the present appeal under Section 35G of the Act. Sub-section (1) of Section 35G as applicable as of now reads as under:-

**"35G. Appeal to High Court. –**

*(1) An appeal shall lie to the High Court from every order passed in appeal by the Appellate Tribunal on or after the 1<sup>st</sup> day of July, 2003 (not being an order relating, among 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 the purposes of assessment), if the High Court is satisfied that the case involves a substantial question of law."*

5. A preliminary objection has thus been raised by Dr. A. Saraf, learned senior counsel appearing for the assessee who would argued that an appeal shall lie to a High Court from an order of the Appellate Tribunal only if it is an order which is not relating, among 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 the purposes of assessment." In case the dispute relates to rate of duty for the purposes of assessment, then an appeal would lie before the Supreme Court under Section 35L<sup>1</sup> of the Act.

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<sup>1</sup> 35L. Appeal to Supreme Court.—

(1) An appeal shall lie to the Supreme Court from -

(a) \*\*\* \*\*

(B) any order passed (before the establishment of the National Tax Tribunal) by the Appellate Tribunal relating, among 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.

6. The two decisions primarily relied upon by the learned senior counsel for the assessee are ***Sterlite Optical Technologies Limited -Vs- Commissioner of C.Ex, Aurangabad***<sup>2</sup> and ***Commissioner of Customs & Central Excise, Jammu -Vs- Bharat Box Factory Limited***<sup>3</sup>. The case which was before the Jammu & Kashmir High Court was an appeal under Section 35 of the Act filed by the Revenue and a similar objection, as has been raised before this Court, was raised on behalf of the assessee regarding maintainability of the appeal in view of the exclusive jurisdiction on these matters of the Hon'ble Apex Court. Relying upon the earlier judgment of the Bombay High Court, which in turn relied upon the judgment of the Supreme Court, the Jammu & Kashmir High Court in Paragraph 5 to 10 gave its detailed findings, which read as under:-

*"5. M/s. Bharat Box Factory Ltd. is holding Central Excise registration in respect of their units which are engaged in the manufacture of printed corrugated cartons, printed duplex cartons and mosquito repellent coils. These items fall under Tariff Items 4819.12; 4819.19 and 3808.10 of the First Schedule to the Central Excise Tariff Act, 1985. However, the company is also availing the Cen-vat credit facility under Rule 3 of the Cenvat Credit Rules, 2004 on duty paid inputs as well as on capital goods. They are also availing benefits of Notification No. 56/2002-C.E., dated November 14, 2002, as amended. In respect of their Unit-I, the respondent-company had filed a refund claim by way of self credit for Rs. 32,00,562/- on account of Central Excise duty and for Rs. 63,936/- on account of Education Cess paid through Permanent Ledger Account for the month of August 2005. Similarly, in respect of their Unit-II, the respondent-company had filed a refund claim for Rs. 40,68,392/- on account of Central Excise duty and for Rs.*

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<sup>2</sup> 2007 SCC Online Bom 1435

<sup>3</sup> 2008 SCC Online J&K 107

81,368/- on account of Education Cess paid through Permanent Ledger Account for the month of August 2005. The Assistant Commissioner, Central Excise, vide his orders dated September 27, 2005 and October 3, 2005, sanctioned the refund claims of Rs. 32,00,562/- and Rs. 40,68,392/- and rejected the refund claims of Rs. 63,936/- and Rs. 81,368/- on account of Education Cess on the reasoning that Education Cess was not exempted under notification dated November 14, 2002. Aggrieved by the same, the respondent filed appeal before the Commissioner (Appeals), Central Excise, Jalandhar. The Commissioner (Appeals), vide his order dated December 7, 2005, upheld the order of the Adjudicating Authority and rejected the respondent's appeal. The respondent then filed appeal before the Appellate Tribunal. The Tribunal vide order dated June 12, 2006 set aside the orders of the Commissioner (Appeals) and allowed the appeals with consequential relief to the respondent holding that Education Cess was also required to be refunded on the reasoning that it was in the nature of piggy back duty on the excise duties under Central Excise Act, 1944, Additional Duties of Excise (Goods of Special Importance) Act, 1957 and Additional Duties of Excise (Textiles and Textiles Articles) Act, 1978 and, therefore, was not at all leviable in view of entitlement to exemption worked out under paragraph 2 of the Notification.

6. From a perusal of the provisions of the aforementioned Acts as well as the claims made by the respondents, it is clear that the orders impugned related to the rate of duty of excise. The Apex Court in *Navin Chemicals Mfg & Trading Co. Ltd. v. Collector of Customs (supra)* had the occasion to consider the scope of Sections 129C(4), 129D(5), 130(1) and 130E(b) of the Customs Act, 1962 and Sections 35D(3), 35E(5), 35G(1) and 35L(b) of the Central Excises and Salt Act, 1944. The Apex Court examined the scope of words "determination of any question having a relation to the rate of duty of customs to the value of goods for purposes of assessment". The provisions of Section 129C of the Customs Act, 1962 are *pari materia* with the provisions of Section 35G of the Central Excise Act, 1944. Interpreting this provision, the Apex Court held as follows:

"It will be seen that sub-section (5) uses the said expression 'determination of any question having a relation to the rate of duty or to the value of goods for the purposes of assessment' and the Explanation thereto provides a definition of it 'for the purposes of this sub-section'. The Explanation says that the

*expression includes the determination of a question relating to the rate of duty; to the valuation of goods for purposes of assessment; to the classification of goods under the Tariff and whether or not they are covered by an exemption notification; and whether the value of goods for purposes of assessment should be enhanced or reduced having regard to certain matter that the said Act provides for. Although this Explanation expressly confines the definition of the said expression to sub-section (5) of Section 129D, it is proper that the said expression used in the other parts of the said Act should be interpreted similarly. The statutory definition accords with the meaning we have given to the said expression above. Questions relating to the rate of duty and to the value of goods for purposes of assessment are questions that squarely fall within the meaning of the said expression. A dispute as to the classification of goods and as to whether or not they are covered by an exemption notification relates directly and proximately to the rate of duty applicable thereto for purposes of assessment. Whether the value of goods for purposes of assessment is required to be increased or decreased is a question that relates directly and proximately to the value of goods for purposes of assessment. The statutory definition of the said expression indicates that it has to be read to limit its application to cases where, for the purposes of assessment, questions arise directly and proximately as to the rate of duty or the value of the goods."*

7. *The aforesaid judgment is followed by Bombay High Court in Commissioner of Customs and C. Ex., Goa v. Primella Sanitary Products (P) Ltd., 2002 (145) E.L.T. 515 (Bom.). The Punjab and Haryana High Court has also considered the scope of Section 35L(b) of the Act in Commissioner of Central Excise, Chandigarh v. Suraj Udyog Ltd., 2003 (158) E.L.T. 684 (P & H). Reference may also be made to the Rajasthan High Court decision in Laxmi Udyog v. Commissioner of Central Excise, 2002 (142) E.L.T. 27 (Raj.). The Delhi High Court also had the occasion to consider the scope of Section 35L of the Central Excise Act, 1944 in Perfect Electric Concern Pvt. Ltd. v. Assistant Collector/CCE, 2000 (118) E.L.T. 578 (Del.).*

8. *The Bombay High Court in Sterlite Optical Technologies Ltd. v. Commissioner of C. Ex., Aurangabad, 2007 (213) E.L.T. 658 (Bom.) also considered the scope of Section 35G of the Central Excise Act, 1944. Placing reliance on Navin Chemicals Mfg & Trading Co. Ltd. v.*

*Collector of Customs (supra) the Court observed that the word Assessment is used as meaning sometimes the computation of rate of duty, sometimes the assessable value of goods and sometimes the whole procedure laid down under the Act for imposing duty liability upon the manufacturer or importer. The Court held that the word 'assessment' is, thus, capable of bearing a very comprehensive meaning, in the context, it can comprehend the whole procedure for ascertaining and imposing duty liability.*

9. *We are inclined to apply the principles laid down in the above decisions of the Apex Court and other High Courts. The question posed would not fall under Section 35G of the Act but under Section 35L. Whether Education Cess levied and collected under Section 91 of the Finance Act, 2004 can be considered as a duty of excise for the grant of refund in the cases or by way of self credit under notification dated November 14, 2001, is definitely related to rate of duty of excise for the purpose of assessment. We have, therefore, no hesitation to say that the point raised is directly related to the rate of duty of excise and that being so, the only remedy open to the Commissioner is to move the Supreme Court and this Court cannot entertain these applications under Section 35G of the Act, since appeal shall lie to the High Court only against those orders not being orders related 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.*

10. *We, therefore, uphold the preliminary objection raised by the respondents in all these cases and dismiss all these applications."*

7. Mr. S.C. Keyal, learned counsel for the Revenue, on the other hand, would argue that the assessee has not paid their liability and the duty was liable to be paid by them on MS and HSD in terms of the Circular dated 22.04.2002.

8. Whichever way we look at this dispute, what goes to the root of the present dispute is as to at what rate the duty was liable to be paid by the assessee, i.e. whether it was a duty liable to be paid on SKO or on MS and HSD.



That is the core issue. Sub-Section (1) of Section 35G states that an appeal will not lie before the High Court but before the Supreme Court if "among other things" the matter relates to rate of duty of excise. Therefore, even if one of the many issues relate to the rate of duty, the appeal would still lie before the Hon'ble Apex Court and not before the High Court.

9. The dispute here in any case falls in a very limited area as to the determination of the rate of duty to be paid by the assessee. That being so, this matter lies within the exclusive jurisdiction of the Hon'ble Apex Court under Section 35L of the Act and it is an appeal which cannot be heard by this Court under Section 35G of the Act.

10. In view thereof, we allow the preliminary objections of the assessee and dismiss the appeal as not maintainable.

11. Having made the aforesaid determination, we make it absolutely clear that dismissal of the present appeal will not prejudice the case of the Revenue in case they choose to file an appeal before the proper forum.

**JUDGE**

**CHIEF JUSTICE**

*M. SHARMA*