

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION**

CENTRAL EXCISE APPEAL NO. 60 OF 2018

The Commissioner of CGST & Central Excise,
Belapur 1st Floor, C. G. O. Complex,
CBD, Belapur, Navi Mumbai – 400 614.

... Appellant

Versus

Hindustan Petroleum Corporation Ltd.
Vashi Terminal, D-99/TTC,
Industrial Area, Turbhe, Vashi
Navi Mumbai – 400 705.

... Respondent

Mr. Pradeep S. Jetly, Senior Advocate a/w Mr. Jitendra Mishra for the Appellant.
Ms. Padmavati Patil a/w Ms. Manasi Patil, Mr. Kiran Chavan, Mr. Siddharth
Sriram, Mr. Viraj Roshanwala for the Respondent.
Mr. Murtaza Najmi, Advocate appeared.

**CORAM: R. D. DHANUKA,
NITIN W. SAMBRE, AND
ABHAY AHUJA, JJJ.**

**RESERVED ON : 26th NOVEMBER, 2021
PRONOUNCED ON : 23rd DECEMBER, 2021**

JUDGMENT (Per R.D. Dhanuka, J.) :-

. The Division Bench of this Court at Mumbai by its order dated 2nd November, 2018 passed in this appeal found it difficult to reconcile the conflict of views of this Court in ***APM Terminals India Pvt. Ltd. v/s. Commissioner of Central Excise, Navi Mumbai and Anr., 2019 (21) G.S.T.L. 26*** in Central Excise Appeal No. 124 of 2017 delivered on 6th September, 2018 and the judgment delivered by Division Bench of this

Court in case of ***Facor Steels Ltd. v/s. Commissioner, 2015 (320) E.L.T. A357 (Bom.)*** and formulated two questions for consideration by Larger Bench, which Larger Bench is accordingly constituted pursuant to the Administrative Order passed by the learned Chief Justice in view of the said order dated 6th September, 2018. The Division Bench has referred following questions of law to the Full Bench.

(i) *Whether on the facts and circumstances of the case and in law, the issue of a demand being time barred when it is made on the basis of valuation and / or rate of duty, is an issue relating to the assessment of goods and, therefore, an appeal under Section 35G of the Act, is not maintainable before this Court ?*

(ii) *Whether an appeal under Section 35G(1) of the Act would be maintainable before this Court when there is no dispute with regard to the rate of duty and / or valuation as arrived at by the Tribunal (both parties accept the decision of the Tribunal on that issue) and challenge the impugned order only to the extent of the demand being barred by limitation ?*

2. It would be appropriate to set out few facts for better appreciation of the dispute involved herein and for the purpose of answering the questions of law involved and referred to the Full Bench for determination.

3. The respondent has an Oil Terminal where they *inter-alia* received non-duty paid Superior Kerosene Oil (SKO) from their Mahul, Mumbai refinery and cleared the said product falling under Chapter 27 of the Central Excise Tariff on payment of duty to Public Distribution System (PDS)

dealers and to other Oil Marketing Companies.

4. According to the appellant-revenue, the respondent had cleared SKO to Oil Marketing Companies and in respect of those clearances to the said Oil Marketing Companies, paid Central Excise Duty on value which is allegedly lesser than the transaction value, actually recovered by them from the other Oil Marketing Companies. The revenue accordingly called for the details from the respondent vide letter dated 8th September, 2005. The respondent furnished details of the transactions vide letter dated 21st September, 2005. According to the revenue, the Central Excise Duty on an assessable value was much less than the transaction value actually recovered from the Oil Marketing Companies in contravention of the provisions of Section 4(1)(a) of the Central Excise Act, 1944 (for short 'the said Act').

5. According to the revenue, the differential duty payable by the respondent on account of higher realization of their value from their customers for the period from 1st September, 2000 to 6th September, 2004 was worked out as Rs.3,64,29,967/-. According to the revenue, the respondent had intentionally with the sole purpose of evading payment of Central Excise Duty willfully mis-declared the value of the SKO cleared by them to the other Oil Marketing Companies, which was much less than the actual value recovered from the Oil Marketing Companies. According to revenue, the respondent suppressed the actual value realised by not declaring the same to the Department and contravened the provisions of Section 4 of the said Act, read with Rule 9, 49, 173G and Rules 173F of the erstwhile Central Excise Rules, 1944 and Rules 4, 6 and 8 of the Central

Excise Rules, 2001/2002.

6. Revenue accordingly issued show-cause notice upon the respondent as to why the Central Excise Duty/CENVAT duty amounting to Rs.3,64,29,967/- should not be demanded and recovered from them under the proviso to Section 11A(1) of the said Act and also as to why penalty should not be imposed on them under Section 11AC of the said Act and / or Rule 173Q read with 209 of the Central Excise Rules, 1944 and under Rule 25 of the Central Excise Rules, 2001/2002. In the said show-cause notice, the respondent was also called upon to show-cause as to why interest under Section 11AA/AB of the said Act should not be charged and recovered from them.

7. On 30th October, 2007, the Commissioner of Central Excise, Belapur adjudicated upon the said show-cause notice dated 30th September, 2005 and held that the respondent had paid the duty on a lower value which purportedly was the subsidized value fixed by the Oil Coordination Committee for PDS sale. According to the impugned order, the respondent had recovered higher value from Oil Coordination Committee than the value on which they had paid the Central Excise duty which is not permissible as per amended Section 4 of the said Act introduced w.e.f. 1st July, 2000. The Commissioner also held that the respondent is also liable to pay interest under Section 11AB of the said Act.

8. The respondent had raised the point of time bar claim on the ground that there was no case of invoking the authority in the extended time limit. In the impugned order, the Commissioner observed that the respondent at no

stage informed the revenue that they were recovering higher amounts from the Oil Marketing Companies than the value on which they were paying duty. The Commissioner observed that it was a clear case of mis-declaration and suppression of facts justifying the invocation of the extension of the time limit by the revenue. It is further held that the respondent was also liable to pay penalty under Section 11AC of the said Act in the sum of Rs.3,64,29,967/- and interest under Section 11AB of the said Act.

9. The respondent filed an appeal against the said order passed by the Commissioner before CESTAT (for short 'the Tribunal'). By an order dated 31st October, 2017, the Tribunal held that the assessee had to discharge the excise duty on the transaction value which was collected from the Oil Marketing Companies by issuing commercial invoice. However, the Tribunal held that the respondent being a public sector undertaking of the Government of India, it is not proper to assume that Government Company was involved, in the fraudulent act of evasion of duty as no individual's interest was involved for this reason. There cannot be any malafide intention of the respondent to evade payment of duty and thus a demand of extended period will not survive.

10. The Tribunal was of the view that dispute of valuation of SKO (PDC) was not suppressed by the respondent herein and it was very much in the public domain. The revenue thus could not invoke the extended period of limitation for recovering the differential duty. In the concluding paragraph, it is held that though on merit issue was held against the respondent assessee, the demand is held to be not sustainable on limitation. The

Tribunal accordingly quashed and set aside the impugned order passed by the Commissioner on the ground of limitation. Being aggrieved by the said order dated 31st October, 2017 passed by the Tribunal, the appellant revenue preferred this Appeal under Section 35G of the said Act.

11. Mr. Pradeep Jetly, learned senior counsel for the appellant tendered a joint compilation of provisions and judgments for the consideration of this Full Bench and relied upon Sections 35G, 35H and 35L of the Central Excise Act and Sections 129C, 129D, 130 and 130E of the Customs Act, 1962. He submits that Section 35L of the Central Excise Act is in *pari-materia* with Section 130E of the Customs Act, 1962 similarly Section 35G with Section 130 of the Customs Act.

12. It is submitted by the learned senior counsel that in this case, the order passed by the Commissioner of CGST & Central Excise confirming the demand of duty and payment of interest and penalty against the respondent is upheld by the said Tribunal. The respondent has not impugned the said order passed by the Tribunal confirming the demand made in the show-cause notice regarding payment of duty, interest and penalty. He submits that only the revenue has impugned the order passed by the Tribunal setting aside the demand made by the revenue against the respondent on the ground of limitation.

13. Learned senior counsel submits that the issue of limitation which is subject matter of the Central Excise Appeal filed by the revenue is not 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. Thus the said issue would not be covered by the exclusion placed in the bracket of Section 35G which orders are appealable before the Hon'ble Supreme Court under Section 35L of the said Act.

14. It is submitted by the learned senior counsel that the issue as to whether the revenue could have invoked extended period of limitation for demanding differential duty was hit by limitation or not would have no bearing on the issues of determination of rate of duty of excise or the value of goods for the purposes of assessment as such, is an independent issue.

15. It is also submitted by the learned senior counsel, if the issue of limitation as well as the issue arising out of determination of any question having a relation to the rate of duty of the excise or value of goods for the purposes of assessment would have arisen in the same order. If the revenue would have been aggrieved by such order involving both the issues affecting the rights of the revenue, in that event, the revenue would have been required to file an appeal before the Hon'ble Supreme Court under Section 35L of the said Act. The revenue could have filed an appeal under Section 35L to the Hon'ble Supreme Court also in a situation where the rate of excise or the value of goods for the purposes of assessment would have been determined against the revenue. In this case, admittedly the issue is not arising out of determination of question having relation to the rate of duty of excise or value of goods for the purposes of assessment.

16. Learned senior counsel also invited our attention to the question of law formulated by the revenue in this appeal in paragraph 4 i.e. "whether the CESTAT after deciding the case on merits in favour of the revenue, is

right in law in setting aside the demand of limitation?”. He submits that the appellant revenue in this situation cannot agitate only the issue of limitation before the Hon’ble Supreme court in the appeal provided under Section 35L of the said Act.

17. Learned senior counsel invited our attention to the judgment of this Court in case of **Facor Steels Ltd.** (supra), the question of law formulated by this Court and the issue of limitation raised by the revenue before this Court in the said matter. The Division Bench while admitting the said appeal observed that the third objection on the issue of limitation was devoid of merit. Learned senior counsel invited our attention to the judgment of Division Bench of this Court in case of **APM Terminals India Pvt. Ltd.** (supra) more particularly paragraph 11 and would urge that the issue before this Court in the said judgment was whether the consideration which is received under the head of ‘Cargo Handling’ services is in fact consideration received for services classifiable under ‘Storage and Warehousing’ services as claimed by the revenue. No substantial question of law is formulated by this Court on the issue of limitation by the Division Bench in case of **APM Terminals India Pvt. Ltd.** (supra) as has been framed in this matter.

18. Ms. Padmavati Patil, learned counsel for the respondent submits that her client has not disputed the order passed by the Commissioner on the issue of recovery of duty, interest and penalty by preferring an appeal before the Tribunal, as such and has accepted that part of the order. It is vehemently submitted that the issue of limitation has no direct relation to the rate of duty or value of goods for the purposes of assessment. The issue

of limitation is *inter-se* issue in the facts of this case. She has strongly placed reliance on the judgment of the Hon'ble Supreme Court in case of ***Commissioner of Customs, Bangalore-1 v/s. Motorola India Ltd, (2019) 9 SCC 563*** dated 5th September, 2019 so as to claim that after construing the provisions of Sections 130 and 130E of the Customs Act, 1962 which are respectively in *pari-materia* to Sections 35G and 35L of the Central Excise Act, the Hon'ble Supreme Court was pleased to set aside the order passed by the High Court holding that the appeals were not maintainable under Section 130 of the Customs Act but were tenable under Section 130E of the Customs Act.

19. The order passed by the High Court came to be set aside by the said judgment. Learned counsel has drawn support from paragraphs 10 to 18 of the said judgment to substantiate that the expression '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' must be read and would mean a direct and proximate relationship to the rate of duty and the value of goods for the purposes of assessment. The issue as to whether the revenue could invoke the extended period of limitation for recovery of excise duty against the respondent has no bearing, directly or indirectly on the rate of duty and to the value of goods for the purposes of assessment.

20. Learned counsel for the Respondent fairly invited our attention to the judgment of Punjab and Haryana High Court in the case of ***Principal Commissioner of Central Excise and ST Vs. Raja Dyeing, 2017 (5) G.S.T.L. 231 (P&H)*** and submits that in the said decision, the Punjab and

Haryana High Court had occasion to interpret the words “among other things” in Section 35G and observed that these words are of singular importance in determining the ambit of Section 35G. The Court held that these words indicate that an appeal is maintainable under Section 35G to the High Court only if the order passed in appeal by the Tribunal is not one relating 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, as an appeal against that order would lie only to the Supreme Court under Section 35L and not to the High Court under Section 35G. This according to the Punjab and Haryana High Court would be so even if the appeal is only in respect of questions other than the rate of duty or the value of the goods for the purpose of assessment. It is the nature of the order of the Tribunal and not the scope of the appeal that determines the maintainability of the appeal under Section 35G.

21. It was also considered in the above decision whether an appeal lies to the High Court under Section 35G or to the Supreme Court under Section 35L cannot possibly depend upon the nature or scope of the appeal that the party intends filing. A party may seek to challenge only that part of the order of the Tribunal which relates to questions other than those relating to the rate of duty of excise or the value of the goods for the purposes of assessment. Such an appeal would, absent any other question, lie to the High Court. Once it is held that an appeal against the order of the Tribunal which deals with questions that fall within the ambit of Section 35L as well as other questions lies to the Supreme Court under Section 35L, the mere fact that the party chooses to challenge only that part of the order that falls within the ambit of Section 35G would make no difference. It cannot be said

that the party that chooses to challenge the order of the Tribunal only so far as it relates to the determination of questions falling within the ambit of Section 35G must file the appeal before the High Court even though the order also deals with questions that fall within the ambit of Section 35L. In that event, if the other party files an appeal against the order of the Tribunal on issues that fall within the ambit of Section 35L in the Supreme Court, the very purpose of Section 35G of bringing the appeals either before the Supreme Court or before the High Court would be defeated. In any event that is not the issue here.

22. It is clear in the case at hand that the appeal filed in the High Court does not relate to the bracketed portion, viz., question relating to determination of the rate of duty of excise or the value of goods for the purposes of assessment. Learned counsel for the Respondent, therefore, submits that in view of the fact that the bracketed portion in Section 35G is not subject matter of the appeal before the Tribunal, the said appeal would be maintainable under Section 35G of the Excise Act, 1944 and not under Section 35L to the Hon'ble Supreme Court.

23. The expression "other things" in Section 35G was also subject matter of discussion in the case of **Commissioner of Service Tax, Delhi Vs. Bharti Airtel Ltd., 2013 (30) S.T.R. 451 (Del.)**, where it has been held as under :-

"3. *On a plain reading of Section 35G of the Central Excise Act, 1944 it is clear that no appeal would lie to the High Court from an order passed by CESTAT if such an order relates to, among other things, the determination of any*

question having a relation to the rate of duty or to the valuation of the taxable service. It has nothing to do with the issues sought to be raised in the appeal but it has everything to do with the nature of the order passed by the CESTAT. It may be very well for the appellant to say that it is only raising an issue pertaining to limitation but the provision does not speak about the issues raised in the appeal, on the other hand, it speaks about the nature of the order passed by the Tribunal. If the order passed by the Tribunal which is impugned before the High Court relates to the determination of value of the taxable service, then an appeal from such an order would not lie to the High Court.

4. *However, we feel that although those decisions do support the contention of the learned counsel for the respondent, the approach that we have taken is a more direct. We reiterate, it is not the content of the appeal that is determinative of whether the appeal would be maintainable before the High Court or not but rather the nature of the order which is impugned in the appeal which determines the issue."*

24. Mr. Murtaza Najmi, learned counsel sought to intervene in this matter so as to assist this Court on the question of law referred to the Full Bench by the Division Bench and would submit that the issue of limitation being a mixed question of fact and law, appeal cannot be preferred before the

Hon'ble Supreme Court under Section 35L of the said Act.

25. Sections 35G(1), 35H(1) and 35L of the Central Excise Act, 1944 are extracted as under :-

“Section 35G(1) :- 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 1st 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 purposes of assessment), if the High Court is satisfied that the case involves a substantial question of law.”*

“Section 35H(1) :- Application to High Court – (1) *The Principal Commissioner of Central Excise or Commissioner of Central Excise or the other party may, within one hundred and eighty days of the date upon which he is served with notice of an order under Section 35C passed before the 1st 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 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, apply to the High Court to direct the Appellate Tribunal to refer to the High Court any question of law arising from such order of the Tribunal.”*

“Section 35L :- Appeal to the Supreme Court – (1) An appeal shall be lie to the Supreme Court from (a) any judgment of the High Court delivered (i) in an appeal made under Section 35G; or (ii) on a reference made under Section 35G by the Appellate Tribunal before the 1st day of July, 2003; (iii) on a reference made under Section 35H, in any case which, on its own motion or on an oral application made by or on behalf of the party aggrieved, immediately after passing of the judgment, the High Court certifies to be a fit one for appeal to the Supreme Court; or (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. (2) For the purpose of this Chapter, the determination of any question having a relation to the rate of duty shall include the determination of taxability or excisability of goods for the purpose of assessment.”

26. Sections 130(1) and 130E of the Customs Act, 1962 are extracted as under :-

“Section 130(1) :- An appeal shall lie to the High Court from every order passed in appeal by the Appellate Tribunal on or after the 1st 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 customs 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.”

“Section 130E :- Appeal to Supreme Court – An appeal shall lie to the Supreme Court from – (a) any judgment of the High Court delivered - (i) in an appeal made under Section 130; or (ii) on a reference made under Section 130 by the Appellate Tribunal before the 1st day of July, 2003; (iii) on a reference made under Section 130A, in any case which, on its own motion or on an oral application made by or on behalf of the party aggrieved, immediately after passing of the judgment, the High Court certifies to be a fit one for appeal to the Supreme Court; or (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 customs or to the value of goods for purposes of assessment.”

27. It is admitted position that the Commissioner of Central Excise and Customs in the order dated 30th October, 2007 had confirmed the demand made in the show-cause notice in respect of excise duty, interest payable under Section 11AB and also penalty under Section 11AC of the said Act. The Commissioner of Central Excise rejected the plea of limitation raised by the respondent herein on the ground that since the transactions value has a direct impact on the liability of duty after 1st July, 2000, the respondent-assessee was duty bound to declare the correct transaction value and to pay duty accordingly. It was a clear case of mis-declaration and suppression of facts justifying the invocation of the extended time limit.

28. It is an admitted position that the respondent-assessee preferred an appeal before the Tribunal impugning the order of the Commissioner of Central Excise adjudicating rate of excise duty and of limitation. The Tribunal in the impugned order dated 31st October, 2017 confirmed the order passed by the Commissioner of Excise on the aspect of duty, interest and penalty against the respondent-assessee, however, decided the issue of limitation against the revenue. The Tribunal held that the revenue could not have invoked the extended period of limitation for recovery of differential duty and was pleased to quash and set aside the order passed by the Commissioner of Central Excise being hit by limitation.

29. It is thus clear that the order passed by the Commissioner of Central Excise on the merits of rate of levy claimed in the show-cause notice, including payment of interest and penalty has been confirmed by the Tribunal and has attained finality, in view of the respondent-assessee not having impugned that part of the order passed by the Commissioner of Central Excise. Admittedly, the only issue raised by the revenue in the Central Excise Appeal No. 60 of 2018 is in respect of limitation which was decided by the Tribunal against the revenue. The substantial question of law formulated in the Central Excise Appeal by the revenue would clearly indicate that only the issue of limitation is raised in the Central Excise Appeal.

30. The question now arises for consideration of the Full Bench is whether the only issue of limitation which is subject matter of the Central Excise Appeal would lie before this Court under Section 35G or before the

Hon'ble Supreme Court under Section 35L of the said Central Excise Act. A comparative reading of Sections 35G and 35L of the said Act would clearly indicate that the order passed by the Appellate Tribunal on the issue of determination of any question in relation to the rate of duty of excise or to the value of goods for the purposes of assessment is maintainable under Section 35-L before the Hon'ble Supreme Court only. Under Section 35L(2), it is expressly clarified that the determination of any question having a relation to the rate of duty shall include the determination of taxability or excisability of goods for the purposes of assessment.

31. It was also observed in the said case of ***Steel Authority of India Ltd.*** (supra) that before admitting an appeal under Section 130E(b) of the Customs Act, 1962 (which is *pari materia* to Section 35L of the Excise Act), the question raised or arising must have a direct and/or proximate nexus to the question of determination of the applicable rate of duty or to the determination of the value of the goods for the purposes of assessment of duty and that this is a *sine qua non* for the admission of the appeal before this Court and such question must involve a substantial question of law which has not been answered or on which there is a conflict of decisions. It was further held in this case that if the tribunal, on consideration of the material and relevant facts, had arrived at a conclusion, the same must be allowed to rest even if this Court is inclined to take another view of the matter.

32. In our view, any decision on the issue whether the revenue could have invoked the extended period of limitation for recovery of the excise duty, or would not have any bearing or impact on the rate of duty of excise or to the

value of goods for the purposes of assessment. Such determination on the issue of limitation would also have no bearing on the issue of determination of taxability or excisability of goods for the purposes of assessment. In our view, the issue of limitation in this case being purely question of fact or atmost mixed question of fact and law disclosed in decision of the Tribunal would thus not be a decision in *rem* but has to be in *personam*. No appeal against the order of the Tribunal in this situation would lie before the Hon'ble Supreme Court under Section 35L of the said Act.

33. A perusal of Section 35G of the said Act would clearly indicate that all appeal shall lie to High Court from every order passed in appeal by the Appellate Tribunal on or after 1st day of July, 2003 subject to exception expressly provided in the bracket, to Section 35G, same is providing exclusion of the orders which cannot be challenged before High Court under the said provisions.

34. Upon careful perusal of the said exclusion to Sections 35G and 35L minutely, it can be noticed that expression 'determination of any question having a relation to the rate of duty of customs or to the value of goods for purposes of assessment' prescribed under Sections 130 and 130E of the Customs Act is in *pari-materia* to Sections 35G and 35L of the said Central Excise Act. Interpretation of both these provisions i.e. Sections 130 and 130E of the said Customs Act fell for consideration before the Hon'ble Supreme Court in case of ***Navin Chemicals Mfg. & Trading Co. Ltd. v/s. Collector of Customs, 1993 (68) E.L.T. 3 (S.C.)*** wherein it is held that the phrase 'relation to' is ordinarily, of wide import but, in the context of its use in the reading Section 129C, must be read to mean a direct and proximate

relationship to the rate of duty and to the value of goods for purposes of assessment. The Hon'ble Supreme Court held that the 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 expression 'a dispute as to the classification of goods and as to whether or not they are covered by an exemption notification relating directly and proximately to the rate of duty applicable thereto for purposes of assessment'. It is held that 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.

35. In the facts of this case, order of Tribunal holding that the revenue could not have invoked the extended period of limitation for recovery of excise duty from the respondent-assessee purely based on the finding of facts *inter-se* and would not fall within the purview of public importance falling under Section 35L of the said Act. In this case, it is not the case of the respondent-assessee that the issue of limitation decided by the Tribunal would involve the question of any general/public importance.

36. In our view, the issue as to whether the revenue could have invoked the extended period of limitation for recovery of excise duty being a question of fact and/or a mixed question of fact and law, only such order cannot be impugned before the Hon'ble Supreme Court under Section 35L of the said Central Excise Act.

37. The Judgments of Hon'ble Supreme Court in case of *Navin*

Chemicals Mfg. & Trading Co. Ltd. (supra) and in case of **Steel Authority of India Ltd.** (supra) have been adverted to by a three Judge Bench of the Hon'ble Supreme Court in case of **Commissioner of Customs, Bangalore-1** (supra). After construing the provisions of Sections 130 and 130E of the Customs Act which are respectively in *pari-materia* with Sections 35G and 35L of the Central Excise Act, has held that the legislature has carved out only following categories of cases to which it has intended to give a special treatment of providing an appeal directly to the Supreme Court. The categories carved out by the Hon'ble Supreme Court in the said judgment reads thus :-

- “(i) *determination of a question relating to a rate of duty;*
- (ii) determination of a question relating to the valuation of goods for the purpose of assessment;*
- (iii) determination of a question relating to the classification of goods under the Tariff and whether or not they are covered by an exemption notification;*
- (iv) whether the value of goods for purposes of assessment should be enhanced or reduced having regard to certain matters that the said Act provides for.”*

38. In our view, the issue of limitation raised in this Central Excise Appeal has no direct or proximate relationship to the rate of duty and the value of goods for purposes of assessment. Only such questions which relate to the rate of duty and the value of goods for purposes of assessment would squarely fall within the meaning of the said expression ‘determination of any question having relationship to the rate of duty and to the value of goods for the purposes of assessment. Neither any question in

that regard to determination of rate of duty nor any question relating the value of goods arise for determination of this appeal, as respondent-assessee has not impugned the order of the Tribunal confirming the demand raised in the show-cause notice for recovery of duty.

39. In our view, the adjudication on the said issue of limitation in the Central Excise Appeal filed by the revenue under Section 35G before this Court even remotely, would not determine either the rate of duty of excise or the value of goods for the purposes of assessment. The order, if any passed in appeal under Section 35G would also not determine the taxability or excisability of the goods for the purposes of assessment. The provisions of Sections 130 and 130E of the Customs Act are in *pari-materia* to Sections 35G and 35L. The said provisions of Sections 130 and 130E have been interpreted by the Hon'ble Supreme Court in case of **Navin Chemicals Mfg. & Trading Co. Ltd.** (supra), **Steel Authority of India Ltd.** (supra) and in case of **Commissioner of Customs, Bangalore-1** (supra). The principles laid down in those judgments would apply to the facts of this case. We are respectfully bound by the principles of law laid down by the Supreme Court in those three judgments.

40. In our view, the order of this Court in case of **Facor Steels Ltd.** (supra) admitting the Central Excise Appeal preferred under Section 35G of the Central Excise Act rejecting the objection relating to issue of maintainability of appeal against the issue of limitation and having admitted the said appeal is the correct view.

41. Insofar as the judgment of this Court in case of **APM Terminals India**

Pvt. Ltd. (supra) relied upon by this Court while referring questions of law to the Full Bench indicates that a classification dispute between the revenue and the assessee was canvassed before this Court in the said matter. The question was whether High Court would have jurisdiction to entertain an appeal under Section 35G(1) of the Central Excise Act? In our view, the Division Bench of this Court was not correct in holding that the said judgment could not be reconciled with the order passed by this Court in **Facor Steels Ltd.** (supra) thereby admitting the appeal. In case of **APM Terminals India Pvt. Ltd.** (supra) the issue whether appeal under Section 35G would be maintainable before this Court, if the only issue of limitation having no bearing on the rate of duty or value of goods was the subject matter of such appeal or not.

42. Insofar as the judgment of Punjab and Haryana High Court in case of **Principal Commissioner of Central Excise and ST** (supra) is concerned, the issue before the Punjab and Haryana High Court was whether the impugned order made by the Tribunal could be said to be an order made in accordance with the law, when the Tribunal has set aside the order to the extent of clandestine removal without giving any reasoning and ignoring the submissions of the department with regard to facts and evidence on record. In paragraph 14 of the said judgment, it is held that the question as to whether an appeal lies to the High Court under Section 35G or to the Supreme Court under Section 35L will not depend upon the nature or scope of the appeal that the party intends to lodge. A party may seek to challenge only that part of the order of the Tribunal which relates to questions other than those relating to the rate of duty or the value of the goods for the purposes of assessment. In the facts of this case, the revenue could

challenge only part of the order having aggrieved on the issue of limitation. The appeal thus filed by the revenue is maintainable under Section 35G of the said Act before this Court. In this case, the issue of recovery of excise duty and issue of rate and classification of dispute decided by the Tribunal against the respondent-assessee has attained finality. It is not the case of the revenue of challenging any portion of the order selectively though aggrieved by the larger part of the order or entire order.

43. We accordingly answer the questions formulated by the Division Bench of this Court as under :-

- (a) Question (i) : Answer is in negative. Appeal is maintainable against the respondent in this Court.
- (b) Question (ii) : Answer is in affirmative.
- (c) In view of the answer to the questions as framed the Appeal papers be placed before the Division Bench for further consideration of the appeal.

(R.D. DHANUKA, J.)

(NITIN W. SAMBRE, J.)

(ABHAYAHUJA, J.)