2013 (298) E.L.T. 45 (Guj.)

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD
Akil Kureshi and Sonia Gokani, JJ.

CLARIS LIFESCIENCES LTD.
Versus
UNION OF INDIA

Special Civil Application No. 12686 of 2012, decided on 6-12-2012

Adjudication - Precedent - Question of Computation of Education Cess and Secondary and Higher Education Cess was decided finally by Tribunal in favour of petitioner - Such decision of Tribunal holds the field - Such decision of Tribunal would be binding on the adjudicating authority - Even if the Department is of the opinion that the issue is not free from doubt, it is not open for the adjudicating authority to ignore the binding precedent - Adjudicating authority acts as a quasi judicial authority - He is bound by law of precedent and binding effect of the order passed by higher authority or Tribunal of superior jurisdiction - Impugned order set aside. *[paras 7, 8, 9]*

Petition disposed off

CASES CITED

— Tax Appeal No. 2012 of 2012, dated 19-1-2012 — *Relied on*..... [Para 5]
Union of India v. Kamlakshi Finance Corporation Ltd. — 1991 (55) E.L.T. 433 (S.C.) — *Relied on* [Para 9]

REPRESENTED BY : Shri Paresh M. Dave, Advocate, for the Petitioner.
Shri Darshan M. Parikh, Advocate, for the Respondent.

[Order per : Akil Kureshi, J. (Oral)]. - Heard learned advocates for the parties for final disposal of the petition.

2. Petitioners have challenged order dated 13-7-2012 passed by the Deputy Commissioner of Central Excise, Ahmedabad.

3. This challenge arose in following factual background :-

The petitioners are engaged in the business of manufacturing of medicines and are operating as 100% Export Oriented Undertaking. For goods manufactured by the petitioners as 100% EOU and brought to any other place in India, the rate of excise is prescribed under clause (ii) of the proviso to Section 3(1) of the Central Excise Act, 1944.

4. It is the case of the petitioners that the petitioners have been paying as excise duty, the sum total of duties of Customs and Education Cess as well as Secondary and Higher Education Cess on the basic Customs duty leviable on similar medicines imported into India. However, the dispute of the Department is regarding calculation of the excise duty leviable on the clearances made by the petitioners as EOU to the domestic tariff area suggesting that Education Cess as well as Secondary and Higher Education Cess are leviable on sum total of the customs duties and above cesses. In other words, the case of the Department is that the Education Cess and Secondary and Higher Education Cess to be computed second time would be inclusive of the customs duty and such cesses. Previously, such issue was raised by the Department against the petitioners. The adjudicating authority having ruled against the petitioners, the matter was carried further in appeal. Finally, the Customs, Excise & Service Tax Appellate Tribunal, ("the Tribunal" for short) in the case of this very petitioners ruled in favour of the petitioners by an order dated 21-6-2010. In such order, the Tribunal held and observed as under :-

> "2. The issue that has arisen is whether the appellant is liable to pay education cess again on the amount which has been worked out by calculating the customs duty payable on the goods in respect of clearances made by 100% EOU to domestic tariff area. The lower authorities have held that even after arriving at the measure of Customs duty for working out the Central Excise duty payable, the education cess has to be levied once again.
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> 3. Both sides agree that this issue is covered by the decision of this Tribunal in the case of *M/s. Sara Performance Pvt. Ltd.* - 2010-TIOL-408-CESTAT Ahmedabad, wherein it was held that once the measure of Customs duty equivalent to Central Excise duty leviable on the like goods has been worked out, the question of levying education cess separately in respect of clearances by 100% EOU to DTA does not arise. Inasmuch as the issue is covered by the decision of the Tribunal cited above, we allow the appeal with consequential relief to the appellant."

5. Such decision of the Tribunal along with similar other decisions were challenged by the Department before this Court. Several appeals were clubbed together. Division Bench of this Court by an order dated 19-1-2012 passed in Tax Appeal No. 2012 of 2012 and connected appeals held such appeals were not maintainable before the High Court and would lie before the Supreme Court only.

6. Counsel for the Department informs us that because of the small claims, the Department had not filed further appeals before the Supreme Court. In other words, as of now, the issue rests by virtue of the decisions of the Tribunal noted above, in favour of the petitioners in their own cases.

Despite such position, Respondent No. 3 Deputy Commissioner of Central Excise passed yet another order dated

13-7-2012 and demanded from the petitioners additional duty of Rs. 2,62,001/- towards Education Cess and Rs. 1,31,002/- as Secondary and Higher Education Cess. He ordered recovery of a total sum of Rs. 3,93,003/- with interest. He also imposed a penalty of Rs. 3,93,003/-. It is this order that the petitioners have challenged in this petition.

7. Having heard learned Counsel for the parties, we are of the opinion that the approach adopted by the adjudicating authority was wholly impermissible in law. At the outset, we may record that we are conscious that such order is appealable in terms of statutory appeals provided under Central Excise Act, 1944. However, we find that the adjudicating authority committed serious error in disregarding binding precedent and that there are absolutely no disputed facts. We would, therefore, not insist that the petitioners once again follow the same gamut of taking the appeal route. To revert back to the issue at hand, we may recall that the question of computation of Education Cess and Secondary and Higher Education Cess was decided finally by the Tribunal in favour of the petitioners. As of now, such decision of the Tribunal holds the field. Such decision of the Tribunal would be binding on the adjudicating authority. Even if the Department is of the opinion that the issue is not free from doubt, it is not open for the adjudicating authority to ignore the binding precedent. We may notice that under the Central Excise Act, 1944 and the Customs Act, the Department has the right to appeal even against the order-in-original passed by the adjudicating authority. This is in contrast to the provisions contained in the Income-tax Act, 1961 where against an order passed by the assessing officer, the Department has no right to appeal. Only remedy available to the Revenue is by way of a revision against the order of the assessing officer that too only if it is found that such order is erroneous and prejudicial to the interest of the Revenue. Such rigors however, are not applicable insofar as the Department's right to appeal against the order of the adjudicating authority is concerned under the Central Excise Act, 1944.

8. The adjudicating officer acts as a quasi judicial authority. He is bound by the law of precedent and binding effect of the order passed by the higher authority or Tribunal of superior jurisdiction. If his order is thought to be erroneous by the Department, the Department can as well prefer appeal in terms of the statutory provisions contained in the Central Excise Act, 1944.

9. Counsel for the petitioners brought to our notice the decision of the Apex Court in the case of *Union of India* v. *Kamlakshi Finance Corporation Ltd.* reported in 1991 (55) E.L.T. 433 (S.C.) in which while approving the criticism of the High Court of the Revenue Authorities not following the binding precedent, the Apex Court observed that :-

> "6...It cannot be too vehemently emphasized that it is of utmost importance that, in disposing of the quasi-judicial issues before them, revenue officers are bound by the decisions of the appellate authorities. The order of the Appellate Collector is binding on the Assistant Collectors working within his jurisdiction and the order of the Tribunal is binding upon the Assistant Collectors and the Appellate Collectors who function under the jurisdiction of the Tribunal. The principles of judicial discipline require that the orders of the higher appellate authorities should be followed unreservedly by the subordinate authorities. The more fact that the order of the appellate authority is not "acceptable" to the department - in itself an objectionable phrase - and is the subject-matter of an appeal can furnish no ground for not following it unless its operation has been suspended by a competent Court. If this healthy rule is not followed, the result will only be undue harassment to assessees and chaos in administration of tax laws.
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> 7. The impression or anxiety of the Assistant Collector that, if he accepted the assessee's contention, the department would lose revenue and would also have no remedy to have the matter rectified is also incorrect. Section 35D confers adequate powers on the department in this regard. Under sub-section (1), where the Central Board of Excise and Customs (Direct Taxes) comes across any order passed by the Collector of Central Excise with the legality or propriety of which it is not satisfied, it can direct the Collector to apply to the Appellate Tribunal for the determination of such points arising out of the decision or order as may be specified by the Board in its order. Under sub-section (2) the Collector of Central Excise, when he comes across any order passed by an authority subordinate to him, if not satisfied with its legality or propriety, may direct such authority to apply to the Collector (Appeals) for the determination of such points arising out of the decision or order as may be specified by the Collector of Central Excise in his order and there is a further right of appeal to the department. The position now, therefore, is that, if any order passed by an Assistant Collector or Collector is adverse to the interests of the Revenue, the immediately higher administrative authority has the power to have the matter satisfactorily resolved by taking up the issue to the Appellate Collector or the Appellate Tribunal as the case may be. In the light of these amended provisions, there can be no justification for any Assistant Collector or Collector refusing to follow the order of the Appellate Collector or the Appellate Tribunal, as the case may be, even where he may have some reservations on its correctness. He has to follow the order of the higher appellate authority. This may instantly cause some prejudice to the Revenue but the remedy is also in the hands of the same officer. He has only to bring the matter to the notice of the Board or the Collector so as to enable appropriate proceedings being taken under S. 35E(1) or (2) to keep the interests of the department alive. If the officer's view is the correct one, it will no doubt be finally upheld and the Revenue will get the duty, though after some delay which such procedure would entail."

10. Under the circumstances, we have no hesitation in striking down the impugned order dated 13-7-2012. We clarify that this should not be seen as any indication of our view of upholding the view of the Tribunal contained in its decision dated 21-6-2010. It would be open for the department to call in question such a view in appropriate proceedings as in the manner permissible to the Department. Petition is disposed of accordingly.
