

CASE NO.:
Appeal (civil) 2833 of 2006

PETITIONER:
Commnr. Of Central Excise, T.N.

RESPONDENT:
M/s. Vinayaga Body Building Indus. Ltd

DATE OF JUDGMENT: 04/03/2008

BENCH:
S.B. Sinha & V.S. Sirpurkar

JUDGMENT:
J U D G M E N T

CIVIL APPEAL NO. 2833 OF 2006

S.B. SINHA, J :

1. Classification of the motor cabs manufactured by the respondent is the question involved in this appeal, which arises out of a judgment and order dated 22.09.2005 passed by the Customs, Excise and Service Tax Appellate Tribunal, South Zonal Bench, Chennai in Appeal No. E/616 of 2005.

2. Respondent is engaged in body building on duty paid chassis. Indisputably, it amounts to manufacture within the meaning of Note 3 of Chapter 87 of Central Excise Act, 1944 (for short "the Act"), which is in the following terms:

"3. For the purposes of this Chapter, building a body or fabrication or mounting or fitting of structures or equipment on the chassis falling under heading No. 87.06 shall amount to 'manufacturer' of a motor vehicle."

3. For carrying out its manufacturing activities, the respondent purchased duty paid chassis from Tata Motors Ltd. The seating capacity of the cabs for which the body building activity was being carried out by the respondent is 12 PLUS 1 (i.e. 12 passengers and one driver).

4. Indisputably, National Calamity Contingency Fund was created by Finance Act, 2003 wherefor inter alia it was proposed to impose one per cent duty on motor cars and multi utility vehicles.

5. The manufacturers of chassis in their invoices placed the said goods under Sub-Heading 8706.29.

Appellant, however, classified the said motor cabs under Sub-Heading 8702.90 which has been specified for payment of National Calamity Contingency Duty (NCCD) at one per cent for the period 1.03.2003 to 30.09.2003. Admittedly the said duty was not paid.

6. A show cause notice was issued calling upon the respondent to show cause as to why an amount of Rs. 4,42,823/- should not be recovered from them in terms of Section 11A of the Central Excise Act read with Rule 4(1) of the Central Excise Rules towards NCCD at one per cent on the motor vehicles with seating capacity of more than 6 but less than 12, excluding driver's seat as also a penalty and interest thereupon. Cause was shown to the said notice by the respondent.

7. By an order dated 29.11.2004, the assessing authority confirmed the demand of Rs. 4,42,823/-. A penalty for an amount of Rs. 5000/- was also imposed at the prescribed rate. It was furthermore directed that on the said amount of duty interest shall be payable.

8. An appeal was preferred thereagainst by the respondent contending that the job cards issued by them indicate that the orders were for fabrication of more than 16 seats in the cab and as such thereby the 'goods' manufactured by them should be classified under Sub-Heading 8702.90 wherefor no NCCD was payable.

The said contention was rejected by the appellate authority in terms of its judgment dated 18.04.2005 holding:

"The evidences of job cards produced at the time of personal hearing cannot be relied upon by them as the same are new evidences in the form of new plea which were not produced before the Lower Authority that cannot be entertained at this stage as held by the Hon'ble Supreme Court in the case of Naharwar Engg. Works Vs. UOI reported in 2002 (143) ELT 34(SC). Further the Hon'ble Apex Court in the case of Krishna Steel Industries Vs. CCE Patna reported in 2004 (172) ELT 305 Authority or Tribunal, the same cannot be allowed to be relied upon". Applying the ratio of the above decision, I, therefore, reject this fresh plea/ evidences put forth for the first time by the appellants.

10.3 Even presuming without admitting that these job cards are fresh evidences, these cannot be relied upon in the matter of classification of said vehicles in the CETA 1985 inasmuch as the heading No. 87.02 and 87.03 have been aligned on the basis of Motor Vehicles Act, 1988 based on passenger carrying designed for the transport of 12 PLUS 1 persons" by the State Transport Authorities as discussed in para 8 supra."

9. As noticed hereinbefore, an appeal preferred thereagainst by the respondent before the Tribunal has been allowed stating:

"3. It is not disputed that the seating capacity of the vehicles manufactured by the appellants was more than 12, excluding the driver. Hence the vehicles were classifiable under SH 8702.90 only. The chassis (from M/s Tata Motors Limited) used by the appellants was classified by its manufacturer under SH 8706.29 vide invoices of M/s. Tata Motors Limited. The Tariff entry (8706.29) also clearly indicates that chassis falling thereunder is meant for motor vehicles of SH 8702.90. Hence there is no question of the appellants' product being classified under SH 8702.10 and demanded NCCD is set aside. The appeal is allowed."

10. Mr. Mohan Parasaran, learned Additional Solicitor General appearing on behalf of the appellant, would submit that the Tribunal committed a serious error in passing the impugned judgment insofar as it proceeded to determine the issue relying only on or on the basis of the invoice issued by the manufacturer of chassis, which is impermissible in law.

11. Mr. S. Nanda Kumar, learned counsel appearing on behalf of the

respondent, on the other hand, submitted that not only the manufacturer of chassis; even the job cards produced by the respondent would clearly show that NCCD was not payable.

12. Chapter 87 of the Act as applicable in the year 2003 contains the heading "Vehicles other than Railway or Tramway Rolling Stock and Parts and Accessories thereof". Sub-Headings 8702.10, 8702.90 and 8706.29 thereof read as under:

"Heading

No.

Sub-heading No.

Description of goods

Rate of

duty

87.02

8702.10

8702.90

Motor vehicles principally designed for the transport of more than six persons, excluding the driver, including station wagons.

Motor vehicles principally designed for the transport of more than six persons, but not more than twelve persons, excluding the driver, including station wagons

Other

16%

16%

87.06

8706.29

Chassis fitted with engines,
for the motor vehicles of
heading Nos. 87.01 to 87.05

For the vehicles of sub
heading 8702.90

16% plus
Rs.
10,000
per
chassis"

13. A "maxi cab" has been defined in Section 2(22) of the Motor Vehicles Act, 1988 to mean:

"(22) "maxi cab" means any motor vehicle constructed or adapted to carry more than six passengers, but not more than twelve passengers, excluding the driver, for hire or reward;"

14. Indisputably, body building of chassis amounts to manufacturing. It falls under Heading 87.06. The question, therefore, which arises for consideration is as to whether a maxi cab should be classified under the respective tariff heads, i.e., 87.02 to 87.05 of Central Excise Tariff Act, 1985 or under the Chapter Heading 87.07?

15. Indisputably, again NCCD was imposed at the rate of one per cent advalorem on the goods falling under Sub-Headings 8702.10, 8703.90 and 8704.90.

Respondent during the period in question allegedly manufactured 87 numbers of maxi cabs. An investigation in regard to the number of seats of the said vehicle was carried out. Statements of two of the officers of the respondent, viz., S. Balamurugan and P.V. Subbaraj were recorded wherefrom it appeared that the respondent had built maxi cabs with seating capacity of 12 PLUS 1 and not 16 PLUS 1. Documentary evidences were also collected by the revenue from various customers.

16. Respondent inter alia contended that NCCD is paid on the chassis supplied by the owners of the motor vehicles and the intention of the Revenue was to collect the same from the manufacturers of the chassis and not independent body builders.

17. The said contention of the respondent was rejected inter alia on the premise that the seating capacity of maxi cabs manufactured by the respondent is 12 PLUS 1 only.

18. Sub-Heading 8702.10 would, therefore, be applicable.

19. Sub-Heading 8702.90 no doubt provides for the residuary whereas Sub-Heading 8706.29 refers to the vehicles falling under Sub-Heading 8702.90. Sub-Heading 8702.10 specifies for a vehicle designed for the transport of more than six persons but not more than twelve persons excluding the driver. It is also a 'cab' within the meaning of the provisions of the Motor Vehicles Act.

For good and sufficient reasons, in our opinion, the contention raised on behalf of the respondent with reference to the job-work prepared by them had been rejected.

The finding that they manufacture bodies for user thereof for maxi

cabs with seating capacity of 12 persons excluding the driver is a finding of fact. Only because the manufacturers of chassis had classified them under Sub-Heading 8702.90, the same having regard to the independent manufacturing activities carried on by the respondent, was not decisive.

The question in regard to the payability of duty would furthermore depend upon the registration certificates in respect of the vehicle in question. It is a statutory document granted under the provisions of the Motor Vehicles Act, 1988. Such a certificate is issued upon an inspection of the vehicle by the authorities of the transport department. What is relevant was the terms of the contract entered into by and between the respondent and their customers. On a chassis classifiable under Sub-Heading 8706.29, the manufacturer can make a body thereupon having regard to the nature of orders placed by their customers. In a given case, it may be of sixteen seating capacity but it may be more or less than the same in some other cases. What is, therefore, relevant is the seating capacity for which the registration certificates had been granted and not the opinion of the manufacturer of the chassis.

20. For the reasons aforementioned, the impugned judgment cannot be upheld, which is set aside accordingly.

21. The appeal is allowed. However, in the facts and circumstances of this case, there shall be no order as to costs.