(2004) 02 GUJ CK 0043

In the Gujarat High Court

Case No : Special Civil Application No. 4248 of 2001

Afrique Tradelinks Pvt. Ltd. APPELLANT

Vs

Union of India (UOI) RESPONDENT

Date of Decision : 03-02-2004

Acts Referred:
Customs Act, 1962 — Section 18, 18(2), 27, 27(1), 27(2)

Citation : (2004) 114 ECR 156 : (2004) 2 GLR 667

Hon'ble Judges : M.S. Shah, J;A.M. Kapadia, J

Bench : Division Bench

Advocate : Paresh M. Dave, for Petitioner Nos. 1-2, for the Appellant; Mukesh R. Shah, for Respondent Nos. 1-2, for the Respondent

Final Decision : Allowed

Judgement

M.S. Shah, J.—When this petition was filed on 18.6.2001, the petitioners had prayed for a direction to the respondent authorities to give the petitioners refund of Rs.5,21,099/- alongwith interest u/s 27A of the Customs Act, 1962 for the period from 31.1.1996 till the date of actual payment of the above amount. The petition was admitted after hearing the other side.

2. When the petition has reached final hearing today, the learned counsel for both the sides state that the amount of Rs.5,21,099/- has already been paid to the petitioners on 30.6.2001. The dispute, therefore, now remains only about interest claimed by the petitioners on the aforesaid amount from 31.1.1996 till the date of payment i.e. till 31.6.2001.

3. The facts leading to filing of this petition, as averred by the petitioners and briefly stated, are as under:-

The petitioner-Company is engaged in the business of importing, exporting and trading in various goods. In the year 1995, the Government of India decided to issue election identity cards and, therefore, a huge quantity of holograms containing the national emblem of three lions and Ashok Chakra was required for affixing such holograms on identity cards. The petitioner-Company was awarded contracts by the State Governments of Madhya Pradesh and Rajasthan for supply of holograms. Similar contracts were awarded by the other State Governments also to other suppliers. The hologram is a three dimensional image made by means of a laser beam and the process of manufacturing hologram is by way of a special kind of embossing. Although a plate of combination of plastic and aluminium is the material on which such printing is made, the identity of hologram is imparted only because of the printing and, therefore, it is regarded as an article of printing industry falling under Chapter 49 of the Customs Tariff. Various other importers had imported such holograms at Ahmedabad Air Cargo Complex and they were assessed to duty under Chapter 49 and, therefore, the petitioner-Company also filed Bills of Entry about its imports under Chapter 49 for assessment of customs duty at 45%. However, the Customs Department assessed holograms under Chapter 39 to customs duty at 65% as a plate of plastic and, therefore, the petitioners filed Special Civil Application No.1382 of 1995. On 10.3.1995, this Court directed that the order of assessment shall be treated as a provisional assessment u/s 18 of the Act and the petitioners shall deposit customs duties as per the said assessment order on provisional basis and subject to adjudication of the petitioners'' claim by the respondents and a fresh order would be passed after hearing the petitioners. In view of the above, the petitioners deposited the higher amount of duty under Chapter 39 at 65% on provisional basis. The additional amount of duty worked out to Rs.20,04,402/-. Subsequently, by an order dated 21.10.1995, the customs authorities classified the hologram labels as falling under Chapter 49 with duty liability at 45% and ordered to finalize the assessment accordingly.

Pursuant to the above order dated 21.10.1995, the petitioner-Company made an application on 31.10.1995 u/s 27A of the Customs Act, for the refund of the differential customs duty paid (i.e. the difference between the duty paid at the rate of 65% and the duty payable at the rate of 45%). According to the petitioners, since the petitioners had succeeded before the Assistant Commissioner of Customs when he finalized the assessment of duties on holograms imported for the election identity cards and supplied to various Governments for election purposes, the petitioners were entitled to get refund of Rs.20,04,402/= as per the above assessment order.

4. However, on 6.6.2000, the Deputy Commissioner passed an order sanctioning refund of Rs.14,83,303/(and subsequently also paid Rs.9,56,729/- being the interest on the said delayed refund u/s 27A of the Act). However, the Deputy Commissioner took the view in his order dated 6.6.2000 that although the refund for Rs.5,21,099/- does become due but since the incidence of duty in this case has been passed on to the buyer, therefore, as per Section 27(2) of the Act the amount of Rs.5,21,099/- should be credited to the Consumer Welfare Fund.

5. In appeal, however, the Commissioner of Customs (Appeals) held by order dated 26.2.2001 that the petitioners had entered into a contract with M/s Pankti

International Ltd. to sell the hologram at a fixed price which was inclusive of all taxes. The price fixed by the petitioners at that time may have taken into consideration the duty payable at that time which was at that time to be 45% under Chapter 49. However, subsequently, if the duty rate is increased or decreased, the petitioners were not entitled to modify the price at which they were selling the holograms to M/s Pankti International Ltd.. Therefore, it cannot be said that the petitioners had passed on the differential duty element between 65% under Chapter 39 and 45% under Chapter 49 to M/s Pankti International Ltd. because the prices were fixed under a contract inclusive of all taxes. Hence, the Commissioner (Appeals) set aside the finding given by the Deputy Commissioner that the petitioners had passed on the burden of differential duty to M/s Pankti International Ltd. The Commissioner (Appeals) also relied on the decisions of the CEGAT taking the view that when the prices are fixed under a contract which did not provide for an element of duty, then the bar of unjust enrichment would not be attracted when the price is inclusive of duties and taxes. The Commissioner held that accordingly there was no need of credit of the amount of Rs.5,21,099/- to Consumer Welfare Fund. The Commissioner also gave an additional reason that when the provisional assessment is finalized u/s 18(2) of the Act, the provisions of Section 27 of the Act are not applicable for transferring the refund to the Consumer Welfare Fund. Accordingly, the Commissioner modified the order of the Deputy Commissioner and held that the amount of Rs.5,21,099/= should be refunded to the petitioners. This appellate order dated 26.2.2001 was received by the Commissioner on 5.3.2001. The petitioners'' refund application pursuant to the above order was received on 3.4.2001. The department paid Rs.5,21,099/- on 30.6.2001. The revenue''s case is that the petitioners are not entitled to any interest on the refund amount of Rs.5,21,099/-.

6. Mr Paresh M Dave for the petitioners has submitted that just as the respondents refunded the duty amount of Rs.14,83,303/- on 6.6.2000 and also paid interest thereon u/s 27Aof the Act at Rs.9,56,729/- on 12.7.2000 for the period from 31.1.1996 till the date of payment, the respondents were also required to refund the balance amount of Rs.5,21,099/alongwith interest thereon from 31.1.1996 till the date of payment. It is submitted that the order dated 26.2.2001 of the Commissioner (Appeals) was not the first adjudication in favour of the petitioners because that adjudication had already taken place on 21.10.1995 and the petitioners had made application for refund on 31.10.1995. Hence, there is no question of denying the petitioners interest for the delay in payment of refund between 31.1.1996 and 30.6.2001.

7. On the other hand, Mr MR Shah, learned additional standing counsel for the Central Government has opposed the petition and has submitted that the first refund order in favour of the petitioners was passed on 26.2.2001 and received by the department on 5.3.2001. The refund application pursuant to that order was received on 3.4.2001 and, therefore, there was no liability to pay interest because the refund amount was paid on 30.6.2001 i.e. within three months from

the date of receiving the refund application.

8. We may now refer to the relevant provisions of Section 27 and Section 27A of the Customs Act which read as under :-

Sec. 27 Claim for refund of duty.- (1) Any person claiming refund of any duty and interest, if any, paid on such duty -

(i) paid by him in pursuance of an order of assessment; or

(ii) borne by him,

may make an application for refund of such duty and interest, if any, paid on such duty to the Assistant Commissioner of Customs or Deputy Commissioner of Customs -

(a) ... . (b) in any other case, before the expiry of six months from the date of payment of duty and interest, if any, paid on such duty, in such form and manner as may be specified in the regulations made in this behalf and the application shall be accompanied by such documentary or other evidence (including the documents referred to in section 28C) as the applicant may furnish to establish that the amount of duty and interest, if any, paid on such duty in relation to which such refund is claimed was collected from, or paid by, him and the incidence of such duty and interest, if any, paid on such duty had not been passed on by him to any other person :

... ...

(2) If, on receipt of any such application, the Assistant Commissioner of Customs or Deputy Commissioner of Customs is satisfied that the whole or any part of the duty and interest, if any, paid on such duty paid by the applicant is refundable, he may make an order accordingly and the amount so determined shall be credited to the Fund :

Provided that the amount of duty and interest, if any, paid on such duty as determined by the Assistant Commissioner of Customs or Deputy Commissioner of Customs under the foregoing provisions of this sub-section shall, instead of being credited to the Fund, be paid to the applicant, if such amount is relatable to -

(a) the duty and interest, if any, paid on such duty paid by the importer, if he had not passed on the incidence of such duty and interest, if any, paid on such duty to any other person.

....

Sec.27 Interest on delayed refunds.- If any duty ordered to be refunded under sub-section (2) of Section 27 to an applicant is not refunded within three months from the date of receipt of application under sub-section (1) of that section, there shall be paid to that applicant interest at such rate, not below ten per cent and not exceeding thirty per cent per annum as is for the time being fixed by the

Board, on such duty from the date immediately after the expiry of three months from the date of receipt of such application till the date of refund of such duty:

Provided that ... ... Explanation.- Where any order of refund is made by the Commissioner (Appeals), Appellate Tribunal or any court against an order of the Assistant Commissioner of Customs or Deputy Commissioner of Customs under sub-section (2) of Section 27, the order passed by the Commissioner (Appeals), Appellate Tribunal or as the case may be, by the court shall be deemed to be an order passed under that sub-section for the purposes of this section.

9. While the submission of Mr Shah, learned additional standing counsel for the Central Government will have a bearing in so far as the question of implementation of the final order is concerned, that is, if the order of the Assistant/Deputy Commissioner is varied by the order of the Commissioner (Appeals), it is the order of the appellate authority which is required to be given effect to. The Section, however, does not provide that the interest would be paid from the date of the order of the appellate authority. Section 27A clearly provides that interest is to be paid to the applicant on the duty in question from the date immediately after the expiry of three months from the date of receipt of such application (for refund) till the date of refund of such duty. There is no dispute about the fact that the petitioners had made the original application for refund of excess customs duty (65% less 45%) on 31.10.1995 and, therefore, the petitioners have claimed interest for the period from 31.1.1996 onwards. Even in respect of the petitioners'' claim for interest for delayed payment of refund amount of Rs.14,83,303/-, the respondent authorities have paid the petitioners interest for the period from 31.1.1996 till the date of payment of the said refund amount which worked out to Rs.9,56,729/- and which was paid to the petitioners on 12.7.2000. There is no reason for the respondent authorities to justifiably refuse payment of interest for the delay in payment of refund amount of Rs.5,21,099/= which was ultimately sanctioned by the Commissioner (Appeals) by his order dated 26.2.2001 and actually paid to the petitioners on 30.6.2001.

10. At this stage, we may also note the departmental instructions as contained in the explanatory note to the Finance Act, 1995 (22 of 1995) as contained in para 67.21 which reads as under :-

"SECTION 27A INTEREST ON DELAYED REFUNDS

A new Section 27A is being incorporated in the Customs Act to provide for payments of interest on refunds of duty which is not paid to the applicant within three months from the date of receipt of application under sub-section (1) of Section 27. It would, therefore, be necessary to streamline the functioning of Refund Department in all Collectorates to ensure that all refund applications filed in the prescribed form and manner under sub-section (1) of Section 27 are finally decided within the stipulated time-limit.

It has also been provided that in case where appellate remedies are resorted to either by the Department or the assessees, the refund finally payable shall bear interest for the period starting from the date immediately after the expiry of three months from the date of receipt of application under sub-section (1) of Section 27 till the date of refund of duty. As such, all quasi-judicial officers should be very careful in deciding the refund claims. It may be specifically noted that :

(a) interest will be paid only on the amount of duty which is finally held to be refundable. For example, in case the assessee has claimed a refund for Rs.60,000/-, the Assistant Collector allows a refund of Rs.10,000/- and on appeal the amount decided to be refunded is Rs.30,000/- then the interest would be payable on the amount finally decided to be refunded viz., Rs.30,000/- for the period commencing from the expiry of three months from the date of the refund application till its payment. Conversely if the Assistant Collector has determined the amount due as refund at Rs.30,000/which on appeal by the Department is reduced to Rs.10,000/- interest would be payable for the aforesaid period only on the amount of Rs.10,000/-.

(b) the interest will be paid at the rate fixed by the Board as simple interest. Interest on interest is not payable.

(c) no interest is to be paid on any refunds of fines or penalties; the provision has been made for payment of interest only on delayed refund of duty amounts.

(d) it is to be clearly noted that interest if any would be payable on the amount of duty to be refunded arising only from proceedings initiated u/s 27 i.e. where an application for refund has been filed."

In note (a), it is clearly mentioned that even if the Assistant Collector had allowed a refund of Rs.10,000/- and on appeal the amount decided to be refunded is Rs.30,000/-, then interest would be payable on the amount finally decided to be refunded i.e. on Rs.30,000/- from the expiry of three months from the date of the refund application till its payment. It is only where the appellate authority determines the refund amount as less than the amount ordered to be refunded by the original authority that the interest would be payable on the lesser amount.

11. In the facts of the instant case, while the Deputy Commissioner had determined the refund amount of Rs.14,83,303/-, the appellate authority allowed the additional refund amount of Rs.5,21,099/- and, therefore, there is no justification for denying the petitioners interest for the delay in payment of the said amount of Rs.5,21,099/- for the period from the date of expiry of three months from 31.10.1995 when the petitioners had made the application for refund of the entire amount of Rs.20,72,023/- out of which Rs.14,83,303/- was directed to be refunded by the Deputy Commissioner''s order dated 6.6.2000 and the balance amount of Rs.5,21,099/- was ordered to be refunded by the Appellate Commissioner''s order dated 26.2.2001.

12. In view of the above discussion, the petition is allowed. The respondents are

directed to pay the petitioners interest at the rates applicable in accordance with the notifications issued u/s 27A of the Customs Act, 1962, on the amount of Rs.5,21,099/- for the period from the date of expiry of three months from the date on which the petitioners made the refund application till the date of payment of refund of the said amount i.e. for the period from 31.1.1996 till 30.6.2001. The amount of interest shall be calculated within one month from the date of receipt of the writ of this Court and the actual payment of interest so calculated shall be made within one month thereafter i.e. within two months from the date of receipt of the writ of this Court.

If the respondent authorities fail to comply with the aforesaid direction regarding payment of interest within the aforesaid time limit, it will be open to the petitioners to move this Court for claiming interest on interest.

13. Rule is made absolute to the aforesaid extent with no order as to costs.