

(2015) 09 GUJ CK 0033
In the Gujarat High Court

Case No : Special Civil Application Nos. 5983 and 5991 of 2015

Anita Exports

APPELLANT

Vs

Union of India

RESPONDENT

Date of Decision : 23-09-2015

Acts Referred:

Customs Act, 1962 — Section 129, 27

Citation : (2015) 52 GST 1082

Hon'ble Judges : Harsha Devani and Abdullah Gulamahmed Uraizee, JJ.

Bench : Division Bench

Advocate : Kuntal A. Parikh, Paresh M. Dave and P.R. Gupta, Advocates, for the Appellant; Devang Vyas, R.J. Oza and Priyank P. Lodha, Advocates, for the Respondent

Judgement

Harsha Devani, J.—Rule. Mr. Priyank Lodha, learned Central Government Standing Counsel waives service of notice of rule on behalf of the respondents No. 1 and 3 in each of the petitions and Mr. R.J. Oza, learned Senior Standing Counsel waives service of notice of rule on behalf of the respondent No. 2. Since common questions arise in this batch of petitions, the same were taken up for hearing together and are disposed of by this common judgment.

2. Having regard to the controversy involved in the present petitions, which lies in a very narrow compass, with the consent of the learned counsel for the respective parties, the matters were taken up for final hearing today.

3. For the sake of convenience, reference is made to the facts as appearing in Special Civil Application No. 5983 of 2015.

4. The petitioner firm has established a manufacturing unit at KASEZ for manufacture of industrial wipers. The petitioner firm was allowed to import worn and used clothing as raw materials and such raw materials were used in relation to manufacture of wipers and garments. The petitioner firm sold a quantity of 9.110 MTs of goods manufactured by it to one M/s. Archee Trade Links. The sale

of goods by any SEZ unit to a local person situated in India is considered as import, and accordingly, the provisions of the Customs Act, 1962 (hereinafter referred to as "the Act") are made applicable to the import of goods and are required to be followed by the local person procuring such goods from any SEZ unit. Accordingly, the buyer M/s. Archee Trade Links filed a Bill of Entry for the above goods and declared the same as old and used mutilated rags, classifying the same under the Customs Tariff Heading 63101020. It was the case of the customs authorities that the local entities like the petitioner firm, who were in the nature of DTA units had, in collusion with SEZ units, mis-declared the goods by classifying them under CTH 63101020 because the customs authorities were of the view that such goods were classifiable under CTH 6309 as worn clothing and other worn articles. Accordingly, inquiry and investigation came to be initiated against various KASEZ units by the customs authority as well as against various importers like the petitioner firm and an order in original dated 13.04.2012 came to be passed against the petitioner firm and Archee Trade Links by the Assistant Commissioner of Customs, who classified the goods under CTH 63090000. The Assistant Commissioner also enhanced the value of the goods and while ordering confiscation of the goods with redemption fine, imposed penalties on the petitioner firm as well as the purchaser/importer M/s. Archee Trade Links. Pursuant to the said order, the petitioner deposited a total sum of Rs. 40,000/- being penalty imposed under the order-in-original. The petitioner firm also preferred an appeal before the Commissioner of Customs (Appeals), Kandla against the adjudication order. By an order-in-appeal dated 10.05.2013, the Commissioner (Appeals) held that the Assistant Commissioner of Customs had no jurisdiction to pass any order in matters relating to KASEZ units and, therefore, the order passed by the Assistant Commissioner of Customs was illegal. The Commissioner (Appeals), accordingly, annulled the adjudication order and held that proper adjudicating authority shall adjudicate the case by following principles of natural justice. Subsequent thereto, it appears that no proceedings have been taken against the petitioner firm and no adjudication order or decision fastening any liabilities on the petitioner firm for sale of the said goods had been made by any competent authority. The petitioner in the light of the fact that there is no adjudicated or concluded liability of any nature against the petitioner firm in respect of the sale of the above referred goods, filed a refund application dated 31.03.2014, claiming restitution of Rs. 40,000/- as a consequence of the adjudication order having been set aside by the Commissioner (Appeals). However, such refund claim papers which were filed before the Assistant Commissioner of Customs (Refund), at Kandla, came to be returned to the petitioner under a covering letter dated 10.07.2014 stating that the refund claim pertained to KASEZ, Gandhidham, and therefore, the same should be filed with KASEZ, Gandhidham. The petitioner, therefore, submitted refund claim before the said authority, which however, refused to refund the amount in question on the basis that there was no provision in the SEZ Act and rules or regulations made thereunder for refund of excess customs duty paid by SEZ units. The petitioner, thereafter, approached this court by way of a writ petition being

Special Civil Application No. 12654 of 2014 as the legitimate claim of the petitioner was being tossed between two Departments. By a judgment rendered on 20.11.2014 in the above referred writ petition, this court held that the Commissionerate of Customs would continue to hold the authority under section 27 of the Customs Act, 1962 to entertain refund claims of excess payment of customs duty, redemption fine or penalties, as the case may be, adjudicated and collected by them under the Customs Act even with respect to units situated in SEZ areas. This court in the above order, further observed that whatever refund claims being returned to the petitioners by the Customs Commissionerate, the petitioners would represent the same to the appropriate authority. If the petitioners do so latest by 15.12.2014, all such applications shall relate back to the first presentation before the Customs authority. However subsequently, the petitioners have received a letter dated 09.02.2015 from the office of the second respondent informing the petitioner and similarly situated parties that the cases were remanded back for re-adjudication by the Commissioner (Appeals), and the process of re-adjudication in all matters by the proper authority was pending and filing of refund claims at that stage was premature. Being aggrieved, the petitioners have filed the present petitions challenging the above referred communication and seeking a direction to the second respondent to forthwith return the amount paid by the petitioners with interest at the appropriate rate for the period commencing from three months after the date of application till the actual payment of the refund amounts.

5. Mr. Paresh Dave, learned counsel for the petitioners submitted that the amount of penalty had been deposited with the respondent authorities in the light of the order of adjudication made against them. However, the Appellate Commissioner having allowed the appeal preferred by the petitioners and having annulled the order on the ground of lack of jurisdiction on the part of the adjudicating authority, as on date, there is no adjudication against them, under the circumstances, the respondents have no authority to retain the amount paid by the petitioners towards penalty under the adjudication order. It was submitted that the impugned letter holding that the claims were premature, are contrary to the settled legal position as held by various High Courts as well as the Supreme Court. In support of such submission the learned counsel placed reliance upon the decision of the Bombay High Court in the case of *Nelco Limited Vs. Union of India (UOI)*, wherein the CEGAT had remanded the matter to the adjudicating authority for re-adjudication. The court held that since the parties were put back to the situation of a show cause notice, there was no provision under the Act which requires deposit of any amount at the stage of adjudication and that the only provision which requires deposit is section 35F of the Act after the adjudication has quantified the liability towards duty. The court held that the respondents were, therefore, not entitled to hold on to the money merely because the adjudication was proceeding on the original show cause notice. It was pointed out that the special leave petition against the above decision of the Bombay High Court came to be dismissed by the Supreme Court. Reference was

also made to the decision of the Andhra Pradesh High Court in the case of Afcons Infrastructure Ltd. Vs. Union of India (UOI), , wherein the court observed that the CEGAT had remanded the matter to the adjudication Commissioner of Central Excise for de novo consideration. The order of the Collector was set aside. Though it is a remand order for de novo consideration by the Commissioner of Central Excise, insofar as the appeal before the CEGAT is concerned, the matter can be said to have been finally disposed of setting aside the order of the Collector. The court observed that the pre-deposit made by the petitioner under section 35F of the Act is thus liable to be refunded with interest. A deposit under section 35F is for availing the remedy of appeal. Such amount has to be returned when the appeal is allowed, as in the case at hand. The decision of the Delhi High Court in the case of Voltas Limited Vs. The Union of India and Others, , was cited wherein the court expressed an opinion that once the order of adjudication was set aside, the Tribunal could not have ordered the amount of pre-deposit to be retained awaiting the order of adjudication. The court held that there is no provision in the law requiring certain amount to be retained as a pre-deposit pending finalization of the adjudication proceedings. As the amount is being withheld without any authority of law, it is liable to be refunded. Reliance was also placed upon the decision of the Allahabad High Court in the case of K.S. Steel Works Vs. Union of India (UOI), as well as by the Punjab and Haryana High Court in the case of Raghu Exports v. Union of India 2008 (229) ELT 655, wherein a similar proposition of law has been laid down. It was, accordingly, urged that the retention of money paid by the petitioners by the respondent authorities, being without any authority of law, all these petitions deserve to be allowed by granting the reliefs prayed for in the petitions.

6. Opposing the petitions, Mr. R.J. Oza, learned senior standing counsel for the second respondent reiterated the contents of the affidavit-in-reply dated 5th June, 2015 made on behalf of that respondent wherein, it has been averred that the Appellate Commissioner has not decided the case of the petitioners on merits and remanded the case back for de novo adjudication by the proper authority in accordance with law and therefore, the claims for refund filed by the petitioners are thoroughly misconceived, inasmuch as, the defence of the petitioners has not been adjudicated on merits by the adjudication Commissioner. It was further submitted that the petitioner has made payment of penalty without any demur pursuant to the order-in-original and that such payment has not been made during the investigation or adjudication or during the pendency of appeal as pre-deposit in terms of the order passed by the Appellate Commissioner under section 129 of the Act, and hence, the payment made by the petitioner is neither deposit nor pre-deposit, therefore, the decisions cited by the petitioners would have no applicability to the facts of the present case. The learned counsel further pointed out that against the order-in-appeal dated 10.05.2013 passed by the Commissioner of Customs (Appeals), the Commissioner of Customs, Kandla, has preferred an appeal which is pending for final hearing. It was, accordingly, urged that the petitions being devoid of merit, deserve to be dismissed.

7. Mr. Priyank Lodha, learned Central Government Standing Counsel for the respondents No. 1 and 3, reiterated the submissions advanced by the learned counsel for the respondent No. 2.

8. The facts are not in dispute. Orders-in-original came to be passed against all the petitioners herein levying duty and/or penalty and/or redemption fine. Pursuant to such orders-in-original passed in their respective cases, the petitioners deposited the amounts towards duty and/or penalty and/or redemption fine respectively. Such orders-in-original came to be challenged by the petitioners before the Appellate Commissioner, who held that the adjudicating authority was not competent to adjudicate the matters and accordingly, annulled the orders-in-original and remanded the matters to proper authority for deciding the cases de novo. Consequently, as on date, all the orders-in-original passed by the adjudicating authority, pursuant to which the amounts have been paid by the petitioners towards the duty and/or penalty and/or redemption fine, cease to have any existence in the eye of law. Under the circumstances, once the orders-in-original has been set aside, the second respondent has no authority in law to retain the amounts deposited by the petitioners towards duty and/or penalty and/or redemption fine under the orders-in-original, which subsequently have been annulled by the orders passed by the Appellate Commissioner. Under the circumstances, the submission advanced on behalf of the second respondent that the refund claims filed by the petitioners are premature, cannot be countenanced. This court is in agreement with the view adopted by different High Courts in the decisions referred to hereinabove, that the respondents are not entitled to hold on to the money merely because the adjudication was proceeding on the original show cause notice. In the present case, in the light of the fact that the orders-in-original have been set aside and the matters have been remanded to the proper authority, the adjudication is at the stage of the original show cause notice and no adjudication has been made thereupon as regards the duty liability or the amount of redemption fine or penalty to be paid by the petitioners. Under the circumstances, the respondents are not entitled to retain the amounts paid by the petitioners pursuant to the orders-in-original which have been subsequently annulled and hence, the impugned orders/communications issued by the second respondent returning the refund claims filed by the petitioners as being premature, cannot be sustained.

9. For the foregoing reasons, the petitions succeed and are, accordingly, allowed. The impugned communications dated 09.02.2015 issued by the second respondent returning the refund claims filed by the petitioners as being premature, are hereby quashed and set aside. Having regard to the fact that the refund claims have already been returned to the petitioners, the petitioners shall submit such refund claims once again within a period of four weeks from today. If the petitioners file refund claims latest by 26th October, 2015, all such applications shall relate back to the first presentation before the Customs authority. The period of limitation for presenting such application and

computation of interest in case eventually the refund is granted, shall be reckoned from such date. Upon such refund claims being filed by the petitioners, the respondent authorities shall decide the same in accordance with law within a period of four weeks thereafter.

10. Rule is made absolute accordingly in each of the petitions, with no order as to costs. Registry to place a copy of this order in each of the petitions.