(2006) 06 BOM CK 0039

In the Bombay High Court

Case No : First Appeal No. 2062 of 2005

Bombay Hospital Trust APPELLANT

Vs

The Commissioner of Customs RESPONDENT

Date of Decision : 15-06-2006

Acts Referred:

Customs Act, 1962 — Section 110, 111, 12, 125, 125(1)

Citation : (2006) 5 BomCR 184 : (2006) 201 ELT 555 : (2006) 5 MhLj 395 : (2006) 5 MhLj 394

Hon'ble Judges : V.C. Daga, J;J.P. Devadhar, J

Bench : Division Bench

Advocate : E.P. Bharucha and Daruwala, instructed by Kanga and Co, for the Appellant; M.I. Sethna and A.M. Sethna, for the Respondent

Final Decision : Dismissed

Judgement

J.P. Devadhar, J.—This appeal filed u/s 130 of the Customs Act, 1962 was admitted on 13th March, 2006 on the following substantial questions of law:

a. Whether the customs Authorities have the power to recover duties of customs dehors the provisions of Sections 28 and 125 of the Customs Act ?

b. Whether the customs Authorities have the power to recover duty of customs on confiscated goods even when the option of redemption is not exercised ?

2. The facts relevant for the present appeal are that the Bombay Hospital Trust (hereinafter referred to as ''the assessee'') is a Public Charitable Trust registered under the Bombay Public Trust Act, 1950. The assessee runs a hospital known as Bombay Hospital which inter alia provides medical relief to outdoor and indoor patients. The assessee conducts medical education courses and also medical research through the Bombay Hospital Medical Research Centre.

3. During the period from 1988 to 1994, the assessee had imported various medical equipments / spares / accessories (hereinafter referred to as ''hospital

equipments'') valued at Rs.8,24,78,366/- and the customs duty payable thereon was Rs.11,52,06,608/-. However, the assessee obtained clearance of the hospital equipments without payment of duty by availing benefit of exemption Notification No. 64/88 dated 1st March, 1988. Under the said exemption notification issued by the Central Government, the hospital equipments were exempt from payment of customs duty if the import was approved by the Government of India in the Ministry of Health & Family Welfare or by the Directorate General of Health Services to the Government of India and the said notification further stipulated that the hospital equipments cleared under the said notification without payment of duty shall be used for treatment of the poor patients in the manner prescribed therein. It is not in dispute that the assessee has failed to comply with the post importation conditions set out in the said notification No. 64/88.

4. In these circumstances, the Customs authorities issued two show-cause notices on 23rd September, 1998 and 17th March, 1999, calling upon the assessee to show-cause as to why the hospital equipments cleared by them without payment of duty should not be confiscated and duty payable thereon should not be recovered with interest under the provisions of the Customs Act, 1962. In its reply to the show-cause notice, the assessee denied the charges set out in the show-cause notices and also denied its obligation to pay the customs duty.

5. By an order-in-original dated 27th June, 2002, the Commissioner of Customs, Air Cargo Complex, Bombay upheld the contention of the Revenue that the assessee had violated the conditions set out in the notification No. 64/88 and accordingly confiscated the hospital equipments referred to in the aforesaid two show-cause notices u/s 111(O) of the Customs Act, 1962 with an option to the assessee to redeem the said hospital equipments on payment of fine of Rs.20,00,000/-and penalty of Rs.2,00,000/-. By the said order, the Commissioner of Customs directed payment of customs duty amounting to Rs.11,52,06,608/- (Rs.11,12,69,866/-+ Rs.39,36,742/-) payable on the above hospital equipments.

6. On appeal filed by the assessee, a Division Bench of the CESTAT by its order dated 1st July, 2003 referred the matter to the President for constituting a Larger Bench. Thereafter, a Larger Bench of CESTAT heard the matter and by its judgment and order dated 8th April, 2005 directed that the matter be placed before the President to constitute a five member Bench. Accordingly, the matter was heard by a five member Bench constituted by the President of the CESTAT. By its decision dated 3rd October, 2005, the five member Bench of CESTAT held that when post importation conditions in an exemption notification are not fulfilled, the department has the power to recover the escaped duty in terms of Section 12 of the Customs Act, 1962. Challenging the aforesaid decision of the Tribunal, the assessee has filed the present appeal.

7. Mr.Bharucha, learned senior advocate appearing on behalf of the assessee fairly submitted that the issues raised in this appeal are covered by the judgment

of this Court in the case of Commissioner of Customs V/s. Wockhardt Hospital and Heart Institute (Customs Appeal No. 22 of 2004) delivered on 28th April, 2006. However, Mr.Bharucha submitted that the said decision requires reconsideration on the following grounds. Firstly, Mr.Bharucha submitted that u/s 125(2) of the Customs Act, the liability to pay duty is in addition to the redemption fine and if the redemption fine is not payable, the question of paying duty does not arise at all. The submission is that the duty liability u/s 125(2) is dependent upon the payment of fine in lieu of confiscation and where the option is not exercised and the fine in lieu of confiscation is not payable then the duty is also not payable. Secondly, Mr.Bharucha submitted that having held that the golden rule of literal interpretation should be strictly followed while construing a taxing statute, this Court in the case of Wockhardt Hospital & Heart Institute has failed to follow the said golden rule. According to Mr.Bharucha, plain reading of Section 125(2) is that where confiscated goods are allowed to be redeemed by imposing fine in lieu of confiscation u/s 125(1), then the duty and charges payable on such goods have to be paid in addition to the fine in lieu of confiscation. According to Mr.Bharucha this literal interpretation of Section 125(2) has not been followed in the case of Wockhardt Hospital and, therefore, the decision in that case needs reconsideration. Lastly Mr.Bharucha submitted that the findings recorded in para 41 and 43 of the judgment in the case of Wockhardt Hospital are mutually contradictory. In para 41 of the said judgment, it is stated that ''the duty payable on the confiscated goods has to be paid on imposition of fine in lieu of confiscation and it is immaterial whether such option is exercised or not''. However, in para 43 of the said judgment it is stated that ''where the imported goods are confiscated before an order for clearance is made with an option to redeem the goods on payment of fine in lieu of confiscation, then the duty on such goods does not become payable on imposition of fine in lieu of confiscation but has to be paid before seeking clearance of the goods. In view of this mutually conflicting views, Mr.Bharucha submitted that the judgment in the case of Wockhardt Hospital needs reconsideration.

8. In our opinion, there is no merit in the above contentions. While rejecting the very same arguments advanced in the case of Wockhardt Hospital, we have held that Section 125(2) is enacted to recover duty and charges in respect of goods which are confiscated. Where the goods are confiscated absolutely the question of paying duty thereon does not arise. Therefore, Section 125(2) provides that where the goods are allowed to be redeemed by imposition of fine in lieu of confiscation, then on such imposition of fine in lieu of confiscation, the duty and charges payable on such goods have paid. The duty liability to be discharged u/s 125(2) is on imposition of fine in lieu of confiscation and not on the payment of fine in lieu of confiscation. Therefore, whether the fine in lieu of confiscation is paid or has become payable or not, on imposition of fine in lieu of confiscation, the duty and charges payable on the confiscated goods have to be paid as per Section 125(2). The word ''in addition to'' in Section 125(2) is relatable to the imposition of fine in lieu of confiscation and not payment of fine in lieu of

confiscation. Accordingly, on proper construction of the statute, we have held in the case of Wockhardt Hospital that where the confiscated goods are allowed to be redeemed, then on imposition of fine in lieu of confiscation u/s 125(1), the duty and charges payable on such goods have to be paid u/s 125(2), irrespective of the payment of fine in lieu of confiscation.

9. In the case of Wockhardt Hospital it was argued that the above literal interpretation of Section 125(2) would result in absurd situation. While rejecting the above argument, we have noted in para 43 of the judgment in the case of Wockhardt Hospital that the word ''payable'' in Section 125(2) avoids any such absurd situation. The word ''payable'' in the context of Section 125(2) is referable to the duty / charges which become due and payable on confiscation. It is pertinent to note that u/s 47 of the Customs Act, assessed duty and charges have to be paid before an order permitting clearance of the imported goods for home consumption is made. Unless the duty and charges are paid, the imported goods are not allowed clearance for home consumption. However, in some cases the imported goods are permitted clearance for home consumption without payment of duty subject to fulfilment of the post clearance conditions set out in the exemption notification. If it is found that the post clearance conditions of the exemption notification are violated, then the goods cleared without payment of duty u/s 47 are liable to be confiscated u/s 111(o) of the Customs Act. In such cases, the duty becomes payable on confiscation because the benefit of exemption from payment of duty is lost on account of the violation of the post importation conditions set out in the exemption notification. Therefore, Section 125(2) provides that where the confiscated goods are allowed to be redeemed by imposing fine in lieu of confiscation, then on imposition of fine in lieu of confiscation the duty and charges payable on such goods have to be paid.

10. In cases, where the goods are confiscated before clearance, the duty and charges become payable when clearance of the goods for home consumption are sought for u/s 47 of the Customs Act. In such cases, the duty on the confiscated goods become payable only when clearance of the confiscated goods is sought by exercising the option given u/s 125(1). Therefore, the legislature has appropriately used the word ''payable'' in Section 125(2) so that the duty which becomes due and payable on confiscation, has to be paid on imposition of fine in lieu of confiscation and in all other cases duty and charges have to be paid as and when they become due and payable.

11. As in the case of Wockhardt Hospital in the present case also the goods were cleared for home consumption u/s 47 of the Customs Act without payment of duty subject to fulfilment of the conditions set out in the exemption notification. As in the case of Wockhardt Hospital, in the present case also it is not in dispute that the post clearance conditions of the exemption notification have been violated. Therefore, the goods have been confiscated u/s 110(o) with an option to redeem the same by imposing fine in lieu of confiscation u/s 125(1). In such a case, the duty becomes payable on confiscation and in terms of Section 125(2)

the assessee who is admittedly the owner of the goods is liable to discharge the duty liability on imposition of fine in lieu of confiscation, even if the assessee chooses not to redeem the confiscated goods.

12. It is pertinent to note that the duty liability u/s 47 is on the importer, whereas, the duty liability u/s 125(2) is on the owner of the goods. This distinction is made by the legislature because once the goods are cleared u/s 47, there is every possibility that the goods may change hands. To obviate any difficulty in recovering duty payable on such goods, the legislature has provided that, where the goods are confiscated with an option to redeem the goods by imposing fine in lieu of confiscation, then on imposition of fine in lieu of confiscation the duty and charges payable have to be paid by the owner of such goods.

13. Thus, we do not find any merit in the argument of the petitioner that the judgment delivered in the case of Wockhardt Hospital needs reconsideration. Since the issues raised in this appeal are squarely covered by the judgment delivered in the case of Wockhardt Hospital (Customs Appeal No. 22 of 2004) dated 28th April, 2006, we answer the questions raised in this appeal by holding that in the facts and circumstances of the customs authorities are justified in seeking to recover duty from the assessee u/s 125 of the Customs Act even though the assessee has not opted to redeem the goods by paying fine in lieu of confiscation.

14. Accordingly, the appeal fails and the same is hereby dismissed with no order as to costs.