(1995) 06 BOM CK 0031

In the Bombay High Court

Case No : Writ Petition No. 862 of 1987

Cipla Limited APPELLANT

Vs

Union of India RESPONDENT

Date of Decision : 29-06-1995

Acts Referred:
Customs Act, 1962 — Section 74

Citation : (1995) 60 ECR 389 : (1995) 80 ELT 17

Hon'ble Judges : S.H. Kapadia, J;M.L. Pendse, J

Bench : Division Bench

Judgement

1. By this petition, the petitioners seek to challenge order dated August 14, 1986 passed by respondent No. 3 as also order dated February 24, 1987 passed by respondent No. 2. Briefly, the petitioners seek to challenge demand made by respondent No. 3 to pay duty amounting to Rs. 22,99,044/-. Facts giving rise to this petition briefly are as follows :-

Petitioners manufacture life saving drug ''Refampicin Capsules'' from bulk drug known as ''Refampicin''. On March 1, 1979, Central Government issued Notification No. 45 under the Customs Act exempting the bulk drug ''Refampicin'' from whole of Customs duty if the said bulk drug is used in the manufacture of life saving drug viz.''Rifampicin Capsules''. On September 22, 1981, Central Government issued Notification No. 208/81 exempting above mentioned life saving drug viz.''Rifampicin Capsules'' also from whole of Customs duty. Pursuant to the said Notifications, petitioners imported 950 kgs. of above mentioned bulk drug ''Rifampicin'' for use in the manufacture of life saving drug ''Rifampicin Capsules''. Pursuant to the above Notifications, petitioners executed bonds in favour of the Customs by which the petitioners agreed to pay on demand the Customs duty if the goods were not proved to have been used for manufacture of life saving drugs. Pursuant to the bonds, petitioners were given clearance in respect of three consignments containing 950 kgs. of Rifampicin (bulk drug). The clearance was made without payment of Customs duty in view of Notification No.

45, dated March 1, 1979. After clearance, there was a change in market conditions and petitioners were not able to manufacture life saving drug ''Rifampicin Capsules'' and therefore petitioners decided to re-export the bulk drug in original packing to their foreign suppliers who agreed to buy back the goods at higher price. Accordingly, petitioners addressed a letter to the Assistant Collector of Customs for permission to re-export the bulk drug. Petitioners also asked for cancellation of bonds. According to the petitioners, the Assistant Collector of Customs instructed the petitioners to obtain R. B. I. permission for re-export. On July 23, 1984 petitioners filed three shipping bills for re-export of the bulk drug. At that time, the Customs carried out detailed examination and certified the identity of the goods (vide) certificate dated September 15, 1984. Similarly, the Excise Department also issued the certificate identifying the goods. As the goods which were initially imported found to be the same as the re-export, pursuant to the above certificates, Customs allowed the petitioners to re-export the consignments. However, on July 19, 1985, respondent No. 3 passed an order forfeiting the bonds and ordered payment of Rs. 22,99,044/- as duty on the ground that the imported bulk drugs were not used for manufacture of life saving drugs. The order of the respondent No. 3 proceeds on the basis that when bonds are given by the petitioners and pursuant to the bonds the goods are imported, they have to be used for manufacture of life saving drugs and since the same end use is not fulfilled, petitioners were liable to pay Rs. 22,99,044/-. Being aggrieved by the said order, the petitioners preferred an appeal to the Collector of Customs (Appeals). By order dated April 10, 1986, the Collector of Customs (Appeals) came to the conclusion on the above facts that the documentary evidence clearly proves that the petitioners did not make any use of the imported material and that the petitioners re-exported the same to the same suppliers at a higher price and since imported goods were re-exported, the question of end use certificate did not arise. The Collector of Customs (Appeals) also held that there was a technical lapse on the part of the petitioners in not obtaining proper permission from respondent No. 3 before actually exporting the goods, but the same technical lapse was a minor lapse and therefore penalty of Rs. 22,99,044/- was very large and unjustified. According to the Collector of Customs (Appeals), in the absence of end use certificate, the petitioners should have deposited customs duty of Rs. 22,99,044/- and under the procedure prescribed by Section 74 of the Customs Act, petitioners should have claimed refund of 98% of the duty paid. According to the Collector of Customs (Appeals), in the present case, the goods came to be re-exported without end use certificate. But this was only a technical lapse because petitioners were willing to pay 2% differential duty in the above set of circumstances. However, the fact remains that the Collector of Customs (Appeals) by the above order dated April 10, 1986 had decided the matter on merits in favour of the petitioners. Despite the said order passed by the Collector of Customs (Appeals) on remand, respondent No. 3 once again demanded Rs. 22,99,044/- on the ground that end use certificates were not produced by the petitioners. By the impugned order dated August 1, 1986, the respondent No. 3 on remand once again came to the same conclusion. By the said order, respondent No. 3 did not accept petitioners'' offer to pay the differential duty at the rate of 2% on the ground that it cannot be decided in adjudication proceedings. Being aggrieved by the impugned order dated August 1, 1986, petitioners once again preferred an appeal to the Collector of Customs (Appeals). By the impugned order dated February 24, 1987, the Collector of Customs (Appeals) came to the conclusion that in adjudication proceedings, it is not permissible to the respondent No. 3 to sanction the drawback and hence in view of this, petitioners should pay Rs. 22,99,044/- with the Customs, as the goods were not supported by end use certificates. Being aggrieved by the said orders, the present writ petition is filed.

2. Shri Bhatt, learned counsel appearing on behalf of the petitioners, contended that the Customs Authorities must exercise their power in a reasonable and fair manner. Shri Bhatt pointed out that in the present case, in the absence of end use certificates the petitioners were required to follow the proceedings u/s 74 of the Customs Act, However, the petitioners were advised by the Customs to re-export the goods after obtaining R. B. I.''s permission against three shipping bills. Petitioners re-exported the goods accordingly. Shri Bhatt further pointed out that the decision of Collector of Customs (Appeals) in favour of the petitioners dated April 10, 1986 has given a finding to the effect that the goods imported only were re-exported and therefore, there was no doubt about identity of the goods. Shri Bhatt pointed out that the Customs permitted the petitioners to re-export the goods because the petitioners had complied with all the formalities. This was in September 1984. Shri Bhatt pointed out that once the Customs and the R. B. I. permitted petitioners to re-export the goods in 1984, petitioners cannot be asked to pay entire duty of Rs. 22,99,044/-. Shri Bhatt pointed out that u/s 74, petitioners were entitled to re-export the said goods under the cover of duty drawback shipping bills but they were advised to re-export the said goods against free shipping goods. Shri Bhatt pointed out that u/s 74, petitioners were required to pay the entire duty of Rs. 22,99,044/- and thereafter they were entitled to claim drawback of 98% whereas in the present case, since re-export was permitted by the Customs under the above circumstances, the petitioners in order to show their bona fides offered to pay duty to the tune of 2%. Shri Bhatt contended that under the above circumstances, the Assistant Collector of Customs i.e. respondent No. 3 erred in taking hypertechnical view of the matter. Shri Bhatt further contended that when the Customs permitted the petitioners to re-export the goods even though the petitioners had not put the goods to end use. In the circumstances it was not possible for the petitioners to obtain end use certificates.

3. Shri Mehta, learned counsel for the respondents, contended that once the bonds are given by the petitioners on the basis of which import of bulk drug took place, petitioners were bound to obtain end use certificate and therefore respondent No. 3 was right in demanding the entire amount of Rs. 22,99,044/-. Shri Mehta also contended that thereafter the petitioners would be entitled to take back 98% of the duty paid as provided u/s 74 of the Customs Act. Shri

Mehta contended that if indulgence is shown to the petitioners, then it would lead to breach of conditions contained in the bonds.

4. We find considerable merit in the contentions advanced on behalf of the petitioners. In the present case, petitioners were allowed to re-export the goods by the Customs on the footing that they were the same goods, which were imported. The petitioners also obtained permission to re-export from R. B. I. The Collector of Customs (Appeals) (vide) order dated April 10, 1986 came to the conclusion that identity of goods stood established. The Collector of Customs (Appeals) also came to the conclusion that it was not possible for the petitioners to obtain end use certificate and that there was only technical fault on the part of the petitioners who re-exported the goods under free shipping bills whereas petitioners were required to re-export the goods under duty drawback shipping bills. In the circumstances, the Collector came to the conclusion that there was a technical lapse on the part of the petitioners. Actually, the Collector of Customs (Appeals) should have decided the matter. There was no need to remand the matter. In any event, the matter stood remanded. Respondent No. 3, after remand, has only proceeded on the footing that conditions mentioned in the bonds should be complied with and since end use certificate has not been produced, respondent No. 3 directed petitioners to pay Rs. 22,99,044/-. We are in agreement with the contention advanced on behalf of the petitioners that in the present case the view taken by respondent No. 3 operates harshly on the petitioners. If the findings of respondent No. 3 as contained in the impugned order dated August 14, 1986 are to be accepted, then one fails to understand on what basis the Customs permitted petitioners to re-export the goods in 1984. Further, petitioners have shown their bona fides by agreeing to pay differential duty at the rate of 2% because u/s 74 of the Customs Act, petitioners were entitled to re-export the goods as a matter of right under the cover of duty drawback shipping bills. u/s 74, petitioners were entitled to take back duty to the extent of 98%. Petitioners have deposited the differential duty with the Customs at the rate of 2% under the interim order passed by this Court at the time of admission. In fact they have deposited Rs. 66,000/- whereas according to the petitioners 2% of Rs. 22,99,044/- comes to Rs. 45,980.88. In the circumstances, we find merit in the petition. However, before concluding, we would like to mention that our view is based only on the facts and circumstances of this case.

5. For the above reasons, Writ Petition succeeds and Rule is made absolute in terms of prayer (a). Pursuant to interim order dated March 9, 1987, Rs. 66,000/- were deposited by the petitioners with the Customs. As the petitioners have succeeded in the petition, the respondent No. 3 herein is directed to verify the amount payable by the petitioners and if the amount deposited pursuant to the order dated March 9, 1987 exceeds the amount payable, then the balance amount shall be refunded to the petitioners. In the circumstances, there will be no order as to costs.

