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In the Delhi High Court

Case No : Custom. A. 3 of 2013, CM. Application 7238 of 2013

Commissioner of Custom, ICD, New Delhi — APPELLANT

Vs

M/s. Chandra Prabhu International Ltd. — RESPONDENT

Date of Decision : 10-03-2014

Acts Referred:
Central Excises and Salt Act, 1944 — Section 3
Customs Act, 1962 — Section 128 130 15 27 27(1B)(b)

Citation : (2014) 302 ELT 168 : (2014) 27 GSTR 161

Hon'ble Judges : S. Ravindra Bhat, J;R.V. Easwar, J

Bench : Division Bench

Advocate : Priyadarshi Manish and Ms. Anjali Manish, for the Appellant; Rahul Kaushik, for the Respondent

Judgement

S. Ravindra Bhat, J.—This is an appeal u/s 130 of the Customs Act, 1962, against the Final Order No. C/240/2011 CU [DB] dated 3.6.2011 of the Customs, Excise and Service Tax Appellate Tribunal ("CESTAT"). The appellant/Revenue feels aggrieved by the CESTAT''s order directing refund of duty paid by the respondent/ assessee. The facts leading to this dispute are that the respondent (hereafter "the assessee") paid anti-dumping duty under protest in respect of 27 bills of entry under Customs Tariff Heading No. 390390 (under the Customs Tariff Act- hereafter "CTA") for import of certain products into India, on which it was claimed that such duty was not leviable. Later, it made a refund claim for `28,85,394/- on 24.7.2006, which was adjudicated by the Assistant Commissioner (Refund) by an Order-in-Original No. 557/07 dated 25.5.2007. That order rejected the claim on the ground that the respondent should have in the first instance filed an appeal before the Commissioner (Appeals) challenging the assessment order imposing antidumping duty, as provided u/s 128 of the Customs Act.

2. The order relied on two decisions of the Supreme Court. The first was Collector of Central Excise, Kanpur Vs. Flock (India) Pvt. Ltd. C-7, Panki

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Industrial Area, Kanpur, , where the Court held that:

Where an adjudication authority has passed an order which is appealable under the statute and the party aggrieved did not choose to exercise the Statutory right of filing an appeal, it is not open to the party to question the correctness of the order of the adjudicating authority (sic) had committed an error in passing the order

3. The revenue also relies on another decision, in Priya Blue Industries Ltd. Vs. Commissioner of Customs (Preventive), , where the Supreme Court noted:

6. We are unable to accept this submission. Just such a contention has been negatived by this Court in Flock (India) ''s case (supra). Once an Order of Assessment is passed the duty would be payable as per that order. Unless that order of assessment has been reviewed u/s 28 and/or modified in an Appeal that Order stands. So long as the Order of Assessment stands the duty would be payable as per that Order of Assessment. A refund claim is not an Appeal proceeding. The Officer considering a refund claim cannot sit in Appeal over an assessment made by a competent Officer. The Officer considering the refund claim cannot also review an assessment order.

7. We also see no substance in the contention that provisions for a period of limitation indicates that a refund claim could be filed without filing an Appeal. Even under Rule 11 under the Excise Act the claim for refund had to be filed within a period of six months. It was still held, in Flock (India)''s case (supra), that in the absence of an Appeal having been filed no refund claim could be made.

8. The words "in pursuance of an Order of assessment" only indicate the party/ person who can make a claim for refund. In other words, they enable a person who has paid duty in pursuance of an Order of assessment to claim refund. These words do not lead to the conclusion that without the Order of assessment having been modified in Appeal or reviewed a claim for refund can be maintained.

4. The assessee''s claim that the duty was mistakenly paid, without challenging the assessment order, was rejected. The assessee successfully appealed this order to the Commissioner of Customs (Appeals) (hereafter "CC(A)"). The CC(A) held that refund of anti-dumping duty was covered under the special provision of Section 9A(2)(b) of the Customs Tariff Act, 1962 and not under the general provision of Section 27 of the Customs Act, 1962, to which the cited judgments of the Supreme Court relate. For, this reliance was placed on the decision of the Supreme Court in Sneh Enterprises Vs. Commnr. of Customs, New Delhi, . The CC (A) also relied on a previous order of the Supreme Court in Commissioner of Customs (ICD) v. M/s. Relaxo Rubber and Anr., under Civil Appeal no. 7180 and 7181 of 2001, where the Court held that the CESTAT''s conclusion that the goods imported in that case were Styrene Butadiene Co-Polymer, and thus, not subject to anti-dumping duty, did not mandate any interference. The CC(A) held that since the goods imported in this case are of the same description-which has not

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been denied by the Customs authorities-no anti-dumping duty can be levied. Thus, in terms of Section 9A which states that "refund shall be made of so much of the anti-dumping duty which has been collected as in excess of the anti-dumping duty as so reduced", the CC(A) held that the duty paid was liable to be refunded even though the original assessment order was not challenged.

5. The CC(A)''s order was challenged by the Revenue before the CESTAT, which dismissed the appeal, holding that first, merely because the authority conducting the original assessment failed to appreciate the provisions of the Customs Tariff Act is no reason to prejudice the importer; secondly, the reasoning of the CC(A) as regards the applicability of Section 9A(2)(b), as opposed to Section 27 of the Customs Act, was correct; and finally, the respondent in this case had paid the duty under protest, thus indicating that, in any case, it contested the levy of the anti-dumping duty. Accordingly, the following questions of law arise in this case:

(i). Whether the CESTAT ought to have found that Section 9A(2)(b) of the Customs Tariff Act does not apply in this case as it is related only to those circumstances where anti-dumping duty is provisionally determined pending finalization of investigations and not in cases such as the present;

(ii). Whether the CESTAT erred in its decision that Section 9A(8) of Customs Tariff Act (which makes provision of Customs Act, 1962 relating to refunds u/s 27 also applicable to anti-dumping duty), was inserted by Finance Act, 2004, and that the amendment thereto by Finance Act, 2009 applicable retrospectively with effect from 01.01.1995 will apply in this case?

6. It was argued on behalf of the revenue, by Mr. Rahul Kaushik, learned counsel, that with amendment to CTA and the introduction of Section 9A(8), application of Section 27 of the Customs Act, is now no longer in doubt. It was argued that Priya Blue Industries Ltd. (supra) has placed the matter beyond any controversy. In case the importer or assessee does not carry the matter in appeal and the refund application is filed beyond the prescribed period, there is no question of its being entertained. Counsel relied on various amendments made by Parliament to provisions of the CTA in this regard, to say that provisions of the Customs Act were to apply "as far as may be" to the CTA, particularly the anti-dumping provisions. Learned counsel submitted that the retrospective amendment, by Act 33 of 2009, with effect from 01-01-1995, proves that Section 27 applied always.

7. Mr. Priyadarshi Manish firstly argued that the revenue''s appeal should not be considered because it is hopelessly time-barred. It was argued on the merits, that the decision in Sneh Enterprises (supra) has settled that Section 9A(8) is not retrospective. In this case, the goods had landed in January, 2000; the anti-dumping duty was later confirmed by the CESTAT. Much later, the Supreme Court, in March 2006, held that the duty was not justified as there was no injury. The appeal was decided in the context of one of the matters which involved the same goods that are the subject matter of the present appeal. In these circumstances, it would be inequitable to entertain the appeal; the impugned

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judgment does not require interference.

8. The relevant provisions of the CTA, to the extent they are relevant are as follows:

Section 9A-Anti-dumping duty on dumped articles

(1) Where [any article is exported by an exporter or producer] from any country or territory (hereinafter in this section referred to as the exporting country or territory) to India at less than its normal value, then, upon the importation of such article into India, the Central Government may, by notification in the Official Gazette, impose an antidumping duty not exceeding the margin of dumping in relation to such article.

Explanation.-For the purposes of this section,-

(a) "margin of dumping", in relation to an article, means the difference between its export price and its normal value;

(b) "export price", in relation to an article, means the price of the article exported from the exporting country or territory and in cases where there is no export price or where the export price is unreliable because of association or a compensatory arrangement between the exporter and the importer or a third party, the export price may be constructed on the basis of the price at which the imported articles are first resold to an independent buyer or if the article is not resold to an independent buyer, or not resold in the condition as imported, on such reasonable basis as may be determined in accordance with the rules made under sub-section (6);

(c) "normal value", in relation to an article, means:

(i) the comparable price, in the ordinary course of trade, for the like article when [destined for consumption] in the exporting country or territory as determined in accordance with the rules made under sub-section (6); or

(ii) when there are no sales of the like article in the ordinary course of trade in the domestic market of the exporting country or territory, or when because of the particular market situation or low volume of the sales in the domestic market of the exporting country or territory, such sales do not permit a proper comparison, the normal value shall be either-

(a) comparable representative price of the like article when exported from the exporting country or 1[territory to] an appropriate third country as determined in accordance with the rules made under sub-section (6); or

(b) the cost of production of the said article in the country of origin along with reasonable addition for administrative, selling and general costs, and for profits, as determined in accordance with the rules made under sub-section (6):

Provided that in the case of import of the article from a country other than the country of origin and where the article has been merely transhipped through the

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country of export or such article is not produced in the country of export or there is no comparable price in the country of export, the normal value shall be determined with reference to its price in the country of origin.

(2) The Central Government may, pending the determination in accordance with the provisions of this section and the rules made thereunder of the normal value and the margin of dumping in relation to any article, impose on the importation of such article into India an anti-dumping duty on the basis of a provisional estimate of such value and margin and if such anti-dumping duty exceeds the margin as so determined:-

(a) the Central Government shall, having regard to such determination and as soon as may be after such determination, reduce such anti-dumping duty; and

(b) refund shall be made of so much of the antidumping duty which has been collected as is in excess of the anti-dumping duty as so reduced.

[(2A) Notwithstanding anything contained in sub-section (1) and sub-section (2), a notification issued under sub-section (1) or any anti-dumping duty imposed under sub-section (2), unless specifically made applicable in such notification or such imposition, as the case may be, shall not apply to articles imported by a hundred per cent, export-oriented undertaking or a unit in a free trade zone or in a special economic zone.

Explanation.-For the purposes of this sub-section, the expressions "hundred per cent export-oriented undertaking", "free trade zone" and "special economic zone " shall have the meanings assigned to them in Explanations 2 to sub-section (f) of section 3 of the Central Excise Act, 1944 (1 of 1944)]

(3) If the Central Government, in respect of the dumped article under inquiry, is of the opinion that-

(i) there is a history of dumping which caused injury or that the importer was, or should have been, aware that the exporter practices dumping and that such dumping would cause injury; and

(ii) the injury is caused by massive dumping of an article imported in a relatively short time which in the light of the timing and the volume of imported article dumped and other circumstances is likely to seriously undermine the remedial effect of the antidumping duty liable to be levied, the Central Government may, by notification in the Official Gazette, levy anti-dumping duty retrospectively from a date prior to the date of imposition of anti-dumping duty under sub-section (2) but not beyond ninety days from the date of notification under that sub-section, and notwithstanding anything contained in any law for the time being in force, such duty shall be payable at such rate and from such date as may be specified in the notification.

(4) The anti-dumping duty chargeable under this section shall be in addition to any other duty imposed under this Act or any other law for the time being in

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force.

(5) The anti-dumping duty imposed under this section shall, unless revoked earlier, cease to have effect on the expiry of five years from the date of such imposition

Provided that if the Central Government, in a review, is of the opinion that the cessation of such duty is likely to lead to continuation or recurrence of dumping and injury, it may, from time to time, extend the period of such imposition for a further period of five years and such further period shall commence from the date of order of such extension:

Provided further that where a review initiated before the expiry of the aforesaid period of five years has not come to a conclusion before such expiry, the antidumping duty may continue to remain in force pending the outcome of such a review for a further period not exceeding one year.

(6) The margin of dumping as referred to in subsection (1) or sub-section (2) shall, from time to time, be ascertained and determined by the Central Government, after such inquiry as it may consider necessary and the Central Government may, by notification in the Official Gazette, make rules for the purposes of this section, and without prejudice to the generality of the foregoing, such rules may provide for the manner in which articles liable for any anti-dumping duty under this section may be identified, and for the manner in which the export price and the normal value of and the margin of dumping in relation to, such articles may be determined and for the assessment and collection of such anti-dumping duty.

[(6A) The margin of dumping in relation to an article, exported by an exporter or producer, under inquiry under sub-section (6) shall be determined on the basis of records concerning normal value and export price maintained, and information provided, by such exporter or producer:

Provided that where an exporter or producer fails to provide such records or information, the margin of dumping for such exporter or producer shall be determined on the basis of facts available.]

(7) Every notification issued under this section shall, as soon as may be after it is issued, be laid before each House of Parliament.

[(8) The provisions of the Customs Act, 1962 (52 of 1962) and the rules and regulations made thereunder, including those relating to the date for determination of rate of duty, assessment, non-levy, short levy, refunds, interest, appeals, offences and penalties shall, as far as may be, apply to the duty chargeable under this section as they apply in relation to duties leviable under that Act]

9AA. Refund of anti-dumping duty in certain cases

(1) [Where upon determination by an officer authorised in this behalf by the

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Central Government under clause (ii) of sub-section (2), an importer proves to the satisfaction of the Central Government that he has paid anti-dumping duty imposed under sub-section (1) of section 9A on any article, in excess of the actual margin of dumping in relation to such article, the Central Government shall, as soon as may be, reduce such anti-dumping duty as is in excess of actual margin of dumping so determined, in relation to such article or such importer, and such importer shall be entitled to refund of such excess duty]:

Provided that such importer shall not be entitled to refund of so much of such excess duty under this subsection which is refundable under sub-section (2) of section 9A.

Explanation.-For the purposes of this sub-section, the expressions, "margin of dumping", "export price" and "normal value" shall have the meanings respectively assigned to them in the Explanation to sub-section (1) of section 9A.

(2) The Central Government may, by notification in the Official Gazette, make rules to-

(i) provide for the manner in which and the time within which the importer may make application for the purposes of sub-section (1);

(ii) authorise the officer of the Central Government who shall dispose of such application on behalf of the Central Government within the time specified in such rules; and

(iii) provide the manner in which the excess duty referred to in sub-section (1) shall be-

(A) determined by the officer referred to in clause (ii); and

(B) refunded by the Deputy Commissioner of Customs or Assistant Commissioner of Customs, as the case may be, after such determination.]

9. It would be necessary to notice that the charging provision under CTA, i.e. Section 3, never envisioned a duty of the kind imposed u/s 9A. CTA applied, as originally visualized, to countervailing and additional duties; the Supreme Court in its decisions recognised that these duties were of customs. However, that anti-dumping duty is not a duty of customs; Section 9A itself clarifies that the imposition of duty is dependent upon existence of circumstances and a provisional finding-confirmed by later final findings that import of a particular article is injurious to Indian industry. The rate of duty and the terms on which it is imposed are also dependent upon the extent of injury determined. Thus, unlike the incidence of duty, which occurs immediately upon the importation of goods, here, the imposition of duty is dependent upon existence of certain determined circumstances.

10. The scheme of anti-dumping duty under the CTA also provides for refund claims. The mechanism for refund of the duty imposed provisionally u/s 9A(2) pending determination in accordance with Section 9A, is indicated in Section

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9A(2)(b). The mechanism for refund of duty imposed u/s 9A(1) after final determination, if the importer can show that he has paid a duty in excess of the actual margin of dumping for the imported article, is indicated in Section 9AA. The Central Government is empowered to make rules to provide the manner in which the application for a refund claim can be made u/s 9AA u/s 9AA(2). This being the case, the mechanism for refund in the Customs Act u/s 27, for claim of refund per se, does not apply.

11. The applicability of Section 9A(8) to incorporate Section 27 of the Customs Act, in the opinion of this Court, would be after the final determination of applicability of anti-dumping duty u/s 9A(1), only "as far as may be" applicable keeping in mind Section 9AA. This is because, Section 9AA appears to be a complete code for refund claims after final determination, given that the Central Government is empowered to make rules regarding the manner and the time within which claims for refund may be made, u/s 9AA(2) of the CTA. Thus, Section 9A(8) would operate to incorporate Section 27 of the Customs Act only as far as may be applicable, in absence of rules on limitation, until they are made/alongside the rules once made.

12. Thus, this Court is of the opinion that in the absence of rules u/s 9AA(2)(i), the limitation period of one year for making a refund application would be as indicated in Section 27(1B)(b), which reads:

Section 27-Claim for refund of duty

(1B) Save as otherwise provided in this section, the period of limitation of one year shall be computed in the following manner, namely:-

(a) XXXXXX

(b) where the duty becomes refundable as a consequence of any judgment, decree, order or direction of the appellate authority, Appellate Tribunal or any court, the limitation of one year shall be computed from the date of such judgment, decree, order or direction;

(c) XXX XXX

13. In the present case, the duty became refundable as a consequence of the order of the Supreme Court in Commissioner of Customs v. M/s. Relaxo Rubber and Anr. under Civil Appeal no. 7180/7181 of 2001 on March 8, 2006. The refund application, therefore, must be filed by the assessee within one year from the date of the order in Relaxo Rubber, i.e. March 8, 2006. The refund application having been made on July 24, 2006 was thus made within the limitation period.

14. It is pertinent to note that the decision in Sneh Enterprises (supra) is of no relevance in this case. The facts therein were that certain articles were imported by the appellant in April 2002, although a bill of entry was filed by the appellant with the Customs authorities on 22.5.2002. An anti-dumping duty was sought to be imposed vide a notification of 22.5.2002 on these goods. Revenue sought to

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apply Section 15 of the Customs Act, by which the taxable event occurs when the goods pass the Customs barrier, on the ground that Section 9A(8) of the CTA, as it stood then, applied retrospectively. The appellant sought to argue first, that the notification could not apply retrospectively to impose a duty upon goods that were imported prior to the notification on the ground that taxable event occurred on the date of import of the articles per Section 9A of the CTA i.e. in April 2002 and second, that Section 15 of the Customs Act could not apply through Section 9A(8) of the CTA, as Finance (No. 2) Act, 2004 (which it was argued, introduced Section 9A(8)) did not apply retrospectively to a notification in 2002. The Court held that the date of import was to be considered the date of passing the Customs barrier only in case of levy of customs duty; for all other duties including anti-dumping duties, the contract between the parties would determine the date of import in common law i.e. when the goods enter the territory of the importing country. In this context, the Court also held that the Parliament could not have intended to incorporate Section 15 of the Customs Act (via Section 9A(8) of the CTA) prior to 2004 since "Sub-section (8) of Section 9A was introduced by Finance Act, 2004. Prior thereto, the statute did not contemplate application of the provisions of the Customs Act and the rules and regulations made thereunder." (para 6, Sneh Enterprises (supra)

15. As is evident, the question of retrospective application of Section 9A(8) as it stands today did not arise in Sneh Enterprises (supra). The question before the Court in Sneh Enterprises (supra) was whether the Finance (No. 2) Act, 2004 which amended Section 9A(8) could apply retrospectively to a 2002 notification, since the Amendment was otherwise to come into force w.e.f. 09.07.2004. On the other hand, the question before this Court is whether the 2009 Amendment of Section 9A(8) (Finance (No. 2) Act, 2009) has retrospective application w.e.f. 1st January, 1995, thus causing Section 27 of the Customs Act to apply over and above Sections 9A and 9AA of the CTA. The ruling in Sneh Enterprises (supra) thus is of no consequences to the question before this Court today.

16. Moreover, it appears that the Supreme Court was under the impression that Section 9A(8) of the CTA was introduced by the Finance Act, 2004, although in reality, the provision was inserted by Section 89 of the Finance Act, 2000 (Act 10 of 2000). The original Section 9A(8) as inserted in 2000 read:

(8) The provisions of the Customs Act, 1962, (52 of 1962) and the rules and regulations made thereunder, relating to non-levy, short levy, refunds and appeals shall, as far as may be, apply to the duty chargeable under this section as they apply in relation to duties leviable under that Act.

The provision was only amended by the Finance Act, 2004 to read:

(8) The provisions of the Customs Act, 1962 (52 of 1962) and the rules and regulations made thereunder, 4[relating to, the date for determination of rate of duty, non-levy, short-levy, refunds, interest, appeals, offences and penalties] shall, as far as may be, apply to the duty chargeable under this section as they

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apply in relation to duties leviable under that Act.

17. To answer the question of retrospective application of the 2009 Amendment to Section 9A(8), it is pertinent to note that this amendment was made via the Finance (No. 2) Act, 2009 w.e.f. 1st January, 1995. Section 9A(8) now reads:

(8) The provisions of the Customs Act, 1962 (52 of 1962) and the rules and regulations made thereunder, including those relating to the date for determination of rate of duty, assessment, non-levy, short levy, refunds, interest, appeals, offences and penalties shall, as far as may be, apply to the duty chargeable under this section as they apply in relation to duties leviable under that Act.

18. Section 27 of the Customs Act is to be incorporated through this provision, as regards refund claims w.e.f. 1st Jan 1995, only "as far as may be" applicable, i.e. as far as is not covered by Sections 9A and 9AA of the CTA. As concluded earlier, since Section 9AA of the CTA is a complete code, Section 9A(8) has extremely restricted application in its allusion to provisions of the Customs Act, "so far as may be" in their application to the CTA itself. The quests of law framed are thus answered against the revenue and in favour of the assessee. The appeal is consequently dismissed. No costs.

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