
(2008) 01 MAD CK 0205

In the Madras High Court

Case No : Civil Miscellaneous Appeal No. 213 of 2008

Commissioner of Customs

APPELLANT

Vs

Aristo Spinners Pvt. Ltd.

RESPONDENT

Date of Decision : 25-01-2008

Acts Referred:

Customs Act, 1962 — Section 130, 27, 27(1)

Citation : (2008) 129 ECC 127 : (2008) 155 ECR 127

Hon'ble Judges : K. Raviraja Pandian, J;Chitra Venkataraman, J

Bench : Division Bench

Advocate : R. Thirugnanam for Central Government, for the Appellant;

Final Decision : Dismissed

Judgement

K. Raviraja Pandian, J.—The Commissioner of Customs has filed this appeal u/s 130 of the Customs Act, 1962 by formulating the following two substantial questions of law:

1. Whether the Hon"ble Tribunal is right in holding that time limit is not applicable to the refund of bank guarantee for Rs. 12,58,190/- being the difference in duty between actual rate of duty and concessional rate of duty by enforcing the bank guarantee realised by the appellant on 03.09.2001 and refund claim was filed only on 01.06.2005, i.e., beyond the period of six months as stipulated in Section 27 of the Customs Act, 1962?
2. Whether the Tribunal is right in not considering the legal issue that whether the respondent is entitled for refund when the respondent has not discharged the export obligation within the stipulated time?
2. The appeal is filed on the ground that the respondent had imported certain capital goods under EPCG scheme and cleared the same without payment of duty. The relevant licence as well as the relevant notification required the importer to fulfil export obligation in relation to the imported capital goods. The respondent fulfilled its obligation but could not produce discharge certificate from

the licensing authority. Before the certificate was produced, the bank guarantee furnished by the respondent as security for payment of duty on the imported goods in the event of non-fulfilment of export obligation had been invoked by the appellant and credited to the revenue towards duty on the imported goods. On obtaining the discharge certificate the respondent filed refund application but the same was rejected as time barred u/s 27(1)(b) of the Customs Act. On appeal by the respondent, the Commissioner (Appeals) allowed the refund. The CESTAT on the appeal filed by the revenue confirmed the order of the Commissioner by dismissing the appeal. Hence, the present appeal by the revenue.

3. We heard the learned Counsel on either side and perused the materials available on record.

4. It has been repeatedly held that the bank guarantee furnished in order to secure the due performance of the export obligation cannot be regarded as payment of duty. If that be so, the invocation of Section 27 of the Customs Act, which provides for refund of any duty and interest, if any, paid on such duty in pursuance of an order of assessment, is misconceived, as there is no payment of duty in pursuance of an order of assessment. The bank guarantee has been furnished in order to safeguard the interest of the revenue in the event of the importer committing default in performing the export obligation cast upon him for the purpose of availment of concession in importing the capital goods. The differential duty was neither levied nor demanded.

5. On the facts of the case, importer has fulfilled the export obligation though he was not able to produce the relevant certificate within the time. The licensing authority upon satisfying himself has not only discharged the undertaking, but also discharged the bank guarantee. While that being the position, the stand of the revenue that the claim made by the respondent is barred by Section 27 of the Act cannot be legally sustained, as we are of the view that Section 27 of the Customs Act cannot be made applicable to the facts of the present case. This was the view taken by the Constitution Bench of the apex Court in the case of *M/s. Somaiya Organics (India) Ltd. Vs. State of Uttar Pradesh and Another*, . In that case, the collection of vend fee has been challenged. During the challenge proceedings pending before the Court, the appellant before the Supreme Court was directed to furnish bank guarantee. Ultimately, the levy of vend fee has been struck down prospectively with effect from 25.10.1989. In certain other cases, interim orders were passed directing the petitioners to deposit the amount to the Government. In those circumstances of the case, the Supreme Court has held that even though the bank guarantee has been ordered to be furnished prior to 25.10.1989 the guarantee so furnished to ensure the collection cannot be allowed to be invoked.

6. In yet another case in *Oswal Agro Mills Ltd. and Another Vs. Asstt. Collector of Central Excise, Division Ludhiana and Others*, also the Supreme Court has taken the same view to the effect that furnishing of bank guarantee pursuant to the order of the Court was not equivalent to payment of excise duty and for the

purpose of securing revenue in the event of the revenue succeeding in the proceedings before the Court, the Court as a condition of staying the demand in the disputed tax or duty imposed a condition that the assessee should provide a bank guarantee for the full amount of tax or duty or part thereof. The bank guarantee is the security for the revenue that in the event of the revenue succeeds, its due will be recoverable being backed up with the guarantee of the bank. The amount of disputed tax or duty that was secured by a bank guarantee could not therefore be held to be paid to the revenue. Thus, it is clear that the furnishing of bank guarantee cannot be regarded as payment of duty by the importer to the revenue. Section 27, which speaks about the refund of the duty paid cannot be pressed into service to deny the refund.

7. In an identical set of facts, this Court, in the case of the Commissioner of Customs (Exports) v. Jraj Exports (P) Ltd. 2007 (3) TLNJ 532, in which one of us is a party, has held in favour of the importer. In that decision the decision of the Supreme Court in the case of Oswal Agro Mills Ltd. and Another Vs. Asstt. Collector of Central Excise, Division Ludhiana and Others, has been taken in aid.

8. In respect of the second question of law, from the facts available on record it is seen that the respondent has fulfilled the export obligation by submitting a discharge certificate from the licensing authority. This factum is evident from the order of the Deputy Commissioner, who rejected the claim of refund. It is also equally evident from the order of the Commissioner of Income Tax (Appeals) that the licensing authority vide order dated 10.02.2005 certified that the importer had fulfilled the export obligation. It is also on record that EPCG also accepted the fulfilment of the export obligation and cancelled the bond and the bank guarantee executed by the assessee. In the Tribunal's order which confirmed the order of the first appellate authority and which formed the basis for filing the present appeal, the finding of fact is that the respondent fulfilled the export obligation but could not produce the discharge certificate from the licensing authority. Hence, the second question of law does not arise for consideration at all. We do not find any substantial question of law for consideration. The appeal is dismissed. No costs. The connected miscellaneous petition is consequently dismissed.