(2014) 05 DEL CK 0376

In the Delhi High Court

Case No : Cus. A.C. No. 7 of 2013 and C.M. No. 3693 of 2013

Commissioner of Customs APPELLANT

Vs

Dinkar Khindria RESPONDENT

Date of Decision : 09-05-2014

Acts Referred:
Customs Act, 1962 — Section 129B(2)

Citation : (2015) 320 ELT 428

Hon'ble Judges : S. Ravindra Bhat, J;Vibhu Bakhru, J.

Bench : Division Bench

Advocate : Ashwani Bhardwaj, Advocate, for the Appellant; Prem Kumar, for the Respondent

Judgement

1. This Court on, 28-10-2013, made the following order:--

"This appeal is directed against the two orders of the tribunal dated 2nd February, 2009 and 29th April, 2011. Order dated 29th April, 2011 was passed on the rectification application filed by the appellant - Revenue, which stands dismissed holding/observing that it was barred by limitation and the delay cannot be condoned under Section 129B(2) of the Customs Act, 1962. Tribunal has observed that they do not have power of condonation of delay beyond the period specified. In view of the said position, order dated 29th April, 2011 is in accordance with law.

The present appeal was filed on 5th October, 2011 challenging order dated 2nd February, 2009, 2009 (237) E.L.T. 41 (Tri. Del.)] is clearly barred by limitation. The appellant has not filed any application seeking condonation of delay. The appeal can be dismissed on this ground alone. We notice that as per order dated 2nd February, 2009 the tribunal has directed return of gold weighing 2 kgs. to the respondent upon payment of redemption fine etc. The said duly/penalty/fine was deposited on 9th April, 2009. It later on transpired that the appellant had transferred the said gold to State Bank of India on 3rd February, 2006 and had received Rs. 19,74,00,000/-. This factual position was not informed or brought to the notice of the tribunal at the time of hearing by the officers of the customs department. This issue was raised for the first time in the application under Section 129B(2) of the Act, which was filed belatedly and beyond time."

The facts of the case are as follows: On 13-4-1992, 4 kg of gold were brought into India by Mr. Dinkar Khindria (respondent/assessee) and Mr. Mohit Thakore, A show cause notice was issued on 26-6-1992 to the respondent/assessee, Mr. Dinesh Khindria (brother of the respondent/assessee) and Mr. Mohit Thakore for illegal importation and alleged evasion of Customs Duty. This led to an adjudication order by the Collector of Customs on 20-8-1993 and confiscation of the entire quantity as well as imposition of penalties. Aggrieved by the order dated 20-8-1993 by the Collector of Customs, appeals were preferred by Mr. Dinesh Khindria (brother of the respondent/assesee) and Mr. Mohit Thakore. The Tribunal by order dated 6-5-1994, set aside the confiscation of 2kgs. of gold, and ordered its release to Mr. Mohit Thakore upon payment of Redemption Fine (RF) and Payment of Penalty (PP). The appellant/revenue''s attempt to reopen/revive/ recall that order was unsuccessful and its application was dismissed by the Tribunal on 29-9-1994. Eventually, that led to release of 2kgs of gold to the said Mr. Mohit Thakore.

2. On 25-7-2000, in the peculiar circumstances, the appeal preferred by Mr. Dinesh Khindria (the brother of the respondent/assessee), was dismissed. Thereafter, an application was preferred by Mr. Dinesh Khindria (the brother of the respondent/assessee) on 10-11-2002, for rectification on the ground that there was a complete reversal of the operative order as announced by the Tribunal itself. On 22-3-2004, the said rectification application was dismissed for non-prosecution. Against the said order, the respondent/assessee filed a Writ Petition before this court. This court by order dated 4-12-2004, found that the Tribunal had erred in dismissing the rectification application and directed the respondent/assessee to file another rectification application. Mr. Dinesh Khindria (the brother of the respondent/assessee), filed a second rectification application which was neither signed nor was there any authorisation and therefore, the same was also dismissed on 19-12-2004. A third rectification application was filed, which too was dismissed on 03-06-2005.

3. The respondent/assessee in the meanwhile had preferred an appeal to the Tribunal claiming that he along with his brother were the owners of the balance 2 kgs of gold. This appeal was allowed on 2-2-2009 2009 (237) E.L.T. 41 (Tri.-Del.)] . The Tribunal noted that this Court in its previous order made on 23-9-2008 had observed the difference between the final order of the Tribunal passed on 25-5-2000, the hand written order dated 5-7-2000 and the one made later on 3-6-2005. The Tribunal further noted that the High Court had set aside the previous order of the Tribunal in the case of both the importers/assessees. It was in these circumstances that by its elaborate order of 2-2-2009, the Tribunal directed the release of gold of the amount subject to payment of redemption fine Rs. 2,50,000/-, penalty of Rs. 15,000/- and Customs Duty of Rs. 20,000/-.

Apparently, these amounts were deposited on 9-4-2009.

4. The appellant/Revenue contends that the circumstances of the case are such that this Court ought to intervene with the impugned order given the nature of the previous order dated 25-7-2000 by which the earlier appeal was rejected. It was contended that since that order was in force and this Court had not intervened till 2008, the gold was actually disposed of on 3-2-2006. It was submitted that therefore, the Tribunal''s impugned order is incapable of compliance and if at all the respondents would be entitled to the price of gold as on the date of importation.

5. The learned counsel for the respondent/assessee points out that the stand taken by the revenue would amount to grave injustice inasmuch as, the appeal preferred by the other importer Mr. Mohit Thakore was allowed on merits and the gold was released upon payment of fine and duty. Since, this course of action took place as far as back in 1993-1994, the pendency of proceedings before the Tribunal and the irregularity attaching to those proceedings leading to the erroneous order 25-7-2000 which was eventually cured by this Court in 2008, should not visit the respondents/assessee with the adverse consequences. It was submitted that in these circumstances the suggestion by this Court in its order of 28-10-2013 that the revenue should pay the value of gold as on 9-4-2009 (i.e. the date on which the Customs Duty, redemption fine and penalty were deposited by the respondents) should be adopted and appropriate rate of interest, imposed.

6. It is evident from the above narrative that when the goods, i.e., gold biscuits of 4 kgs were imported in 1992, there were two claimants, i.e., Mr. Mohit Thakore and the respondent/assessee''s brother. Concededly, in the case of Mr. Mohit Thakore, the Tribunal''s order directing release of goods upon payment of redemption fine, penalty and Customs Duty became final and was complied with as far back as in 1993-1994. In these circumstances, even if one were to assume that the order of 25-7-2000 was not tainted with any irregularity (as is actually the case), the assessee was bound to succeed because that led to an anomalous situation of inconsistent orders in the same matter. The assessee''s contentions were eventually vindicated on 2-2-2009 and this Court set aside the Tribunal''s order which was in conflict with its previous order directing redemption in the case of Mr. Mohit Thakore. It was in the light of these circumstances that by the impugned order of 2-2-2009, the Tribunal allowed redemption on payment of duty and directed release of goods. That the Department choose to dispose of the gold on 3-2-2006, in the opinion of this Court cannot alter the circumstances or be claimed in equity to release the revenue from its obligations in law. In these circumstances, the approach indicated by the Court on 28-10-2003, i.e., directing that the revenue should pay the price of the gold as on 9-4-2009 is fair and reasonable. This Court notices that in para 7.3 of the impugned order the Tribunal noticed that the approximate value of the gold as on 9-2-2009 was more than Rs. 29 lakhs. This has not been seriously disputed by the appellant. In the

circumstances, we direct that the appellant to pay a sum of Rs. 29 lakhs with interest calculated at the rate of 12% p.a. from 9-4-2009 till the date of payment, within four weeks from today. If any amount is left to be payable by the respondent towards shortfall in duty/fine or differential duty, a separate order shall be made by the Commissioner in accordance with law.

7. The appeal is dismissed subject to above directions. Order Dasti.

