
(2008) 02 BOM CK 0025

In the Bombay High Court

Case No : Customs Appeal No. 99 of 2007

Commissioner of Customs

APPELLANT

Vs

Jubilant Organosys Ltd.

RESPONDENT

Date of Decision : 29-02-2008

Acts Referred:

Customs Act, 1962 — Section 14, 149, 17, 17(2), 17(3)

Citation : (2008) 4 BomCR 843

Hon'ble Judges : Rebello F.I., J; Mohite R.S., J

Bench : Division Bench

Advocate : R.V. Desai, N.V. Masurkar, Lata Patne and H.P. Chaturvedi, for the Appellant; Prakash Shah, instructed by PDS and Co., for the Respondent

Final Decision : Dismissed

Judgement

Rebello F.I., J.—Revenue had preferred this appeal on the question of law as formulated in para 4 of the appeal Memo. At the hearing of this appeal learned Counsel, however, has submitted the reframed question which reads as under:

Whether it is open to an assessee to apply for amendment of a document u/s 149 of the Customs Act after final order of Assessment has been made u/s 70 of the Customs Act, 1962.

The case of the respondents is as under:

2. The respondents had filed Bill of Entry No. 70 dated 6th August, 2004 for warehousing of the imported goods. The warehouse Bill of Entry was provisionally assessed and 70% of the goods were allowed to be cleared pending receipt of the test report. The respondents filed exbonded bill of entry for clearance of 70% of the goods for home consumption which were also provisionally assessed pending test report of the Deputy Chief Officer. The respondents on execution of provisional duty bond cleared 70% of the imported goods on payment of applicable duty. For the purpose of payment of duty the respondent tendered DEPB License and debited the credits available in DEPBs for

payment of custom duties. According to the respondents Custom Notification No. 45/02-Cus governs import of goods against DEPBs. Relying on the decision of the Tribunal in the case of 2003 (107) ECR 1 45 , the respondents bonafidely believed, that CVD paid through DEPB credit can be taken as cenvat credit and accordingly paid CVD on the imported goods by utilizing the DEPB credit. It appears that a larger Bench of the Tribunal in 2004 (97) ECC 753 held that CVD paid through DEPB credit cannot be availed as Cenvat Credit. The Larger Bench did not agree with the view expressed in the decision earlier referred to and overruled the same. The respondents came to know of this judgment subsequently. The respondents also came to know of the amendment made to the DEPB Scheme by the Foreign Trade Policy 31st August, 2004 permitting the assessee to avail CVD paid through DEPB. On realising the legal position the respondent requested the Custom Department by letter dated 29th October, 2004 to permit them to pay CVD in cash along with interest and permit re-credit of the DEPB. According to the respondent they pointed out in the said letter that since the assessment was provisional they should be permitted to pay CVD in cash. The respondents relied on the decision of the Tribunal in 2002 (149) ELT 764 .

The inbound bill of entry was finalised by the Department on 17th February, 2005 whereas the exbond bills of entries against which goods were cleared on payment of duty continue to be provisional. The respondents continued to make request to consider their case favourably and requested the Deputy Commissioner to pass a speaking order, which request of the respondent was not granted.

3. The Assistant Commissioner of Customs passed his order on 28th June, 2005 holding that there is no provision in the Customs Act, 1962 for changing the mode of payment of CVD and accordingly rejected the permission sought by the respondents to pay the CVD in cash and re-credit of the DEPB. Aggrieved by that order the respondents preferred an Appeal before the Commissioner of Customs (Appeals), Mumbai. That appeal was dismissed by order dated 31st October, 2005 (30-9-2005). The Commissioner (Appeals) noted that the respondents prayer was to allow to pay CVD and cash to avail CENVAT credit after provisional assessment is over. The learned Appellate Authority held that as per the Export/ Import Policy 2002-07, para.4.35 prevailing on the date of Bill of Lading in the instant case, CVD debited under DEPB is not cenvatable. The learned Commissioner also held that he was of the opinion that the issue of CENVAT once a Bill of Entry is provisionally assessed is binding and does not fall back again with the purview and jurisdiction of the customs department. Hence held that demand of ex-bond duty by cash or debit in DEPB on final assessment is justified and consequently upheld the order of the Lower Authority and rejected the Appeal.

4. The respondents aggrieved preferred an Appeal which came to be disposed of by order dated 2nd April, 2007. Before the Tribunal it was argued on behalf of

the respondents that the issue is covered by the Division Bench decision of the Tribunal in the case of Brakes India Ltd. v. Commissioner of Customs reported in 2007-TIOL-323-CESTAT-MAD. On behalf of the revenue, it was submitted that once the assessments are finalised it is not open for the assessee to seek reassessment by agreeing to change the mode of payment in cash. The learned Tribunal concurred with the argument advanced on behalf of the respondents that the issue was covered by the judgment in Brakes India Ltd. (supra) Reference was also made to Section 14 of the Customs Act. The learned Tribunal also relied on their judgment of this in Man Industries (I) Ltd. v. C.C. (EP) Mumbai 2006 (202) E.L.T. 433 (Tri-Mum). The Tribunal observed, that they are in agreement with the view taken there. It may be mentioned that the judgment in Man Industries (I) Ltd. (supra) came up for consideration before a learned Bench of this Court in Commissioner of Customs v. Man Industries (I) (Bom.) Ltd. 2007 (216) E.L.T. 15 (Bom.). The order of the Tribunal was upheld.

5. At the hearing of this Appeal on behalf of the Appellant it was contended that the judgment of the Tribunal in Man Industries (I) Ltd., and the order of this Court confirming that order could not have been relied upon as the issue involved therein was not the issue which is argued before this Court.

We proceed on the footing that in Man Industries (I) Ltd. (supra) the question as argued over here was not for consideration before the Tribunal or before this Court. The question before us ultimately is, whether the order of the Tribunal requires to be reconsidered.

6. Section 149 of the Customs Act reads as under:

149. Amendment of documents.—Save as otherwise provided in Sections 30 and 41, the proper officer may, in his discretion, authorise any document, after it has been presented in the customs house to be amended:

Provided that no amendment of a bill of entry or shipping bill or bill of export shall be so authorised to be amended after the imported goods have been cleared for home consumption or deposited in a warehouse, or the export goods have been exported, except on the basis of documentary evidence which was in existence at the time the goods were cleared, deposited or exported as the case may be.

Assessment of duty is covered u/s 17. For the purpose of our discussion it would be necessary to reproduce Section 17, which reads as under:

17. Assessment of duty.— (1) After an importer has entered any imported goods u/s 46 or an exporter has entered any export goods u/s 50 the imported goods or the export goods, as the case may be, or such part thereof as may be necessary may, without undue delay, be examined and tested by the proper officer.

(2) After such examination and testing, the duty, if any, leviable on such goods shall, save as otherwise provided in Section 85, be assessed.

(3) For the purpose of assessing duty under Sub-section (2), the proper officer may require the importer, exporter or any other person to produce any contract, broker's notice, policy of insurance, catalogue or other document whereby the duty leviable on the imported goods or export goods, as the case may be, can be ascertained, and to furnish any information required for such ascertainment which is in his power to produce or furnish, and thereupon the importer, exporter or such other person shall produce such document and furnish such information.

(4) Notwithstanding anything contained in this section, imported goods or export goods may, prior to the examination or testing thereof, be permitted by the proper officer to be assessed to duty on the basis of the statements made in the entry relating thereto and the documents produced and the information furnished under Sub-section (3); but if it is found subsequently on examination or testing of the goods or otherwise that any statement in such entry or document or any information so furnished is not true in respect of any matter relevant to the assessment, the goods may, without prejudice to any other action which may be taken under this Act, be re-assessed to duty.

(5) Where any assessment done under Sub-section (2) is contrary to the claim of the importer or exporter regarding valuation of goods, classification, exemption or concessions of duty availed consequent to any notification therefore under this Act, and in cases other than those where the importer or the exporter, as the case may be, confirms his acceptance of the said assessment in writing, the proper officer shall pass a speaking order within fifteen days from the date of assessment of the bill of entry or the shipping bill, as the case may be.

6. The question before us is whether considering the terminology of Section 149, is it open to a party like the respondent to apply for amendment of the document including the bill of entry or the shipping bill or bill of export, if the final assessment has been made u/s 17 of the Customs Act.

A perusal of Section 149 leave's no manner of doubt that except for what is contained in Sections 30 and 41 which refers to delivery of import manifest or import report, the proper officer may in his discretion authorise any document to be amended after it has been presented to the customs. A bill of entry of shipping bill or bill of export will not be authorised to be amended after the imported goods have been cleared for human consumption or deposited in a warehouse or the export goods have been exported. Even in these cases an exception is provided, that the amendment can be allowed on the basis of documentary evidence which was in existence at the time the goods were cleared, deposited or exported as the case may be. It is no doubt true that the respondents sought to amend the bill of entry based on subsequent events i.e. the decision of the larger bench of the Tribunal. The documents were, however, available. Will Section 17 control the exercise of discretion u/s 149 of the Customs Act. In our opinion Section 149 has to be construed independently of Section 17 and is only subject to the proviso to Section 149. In other words any document presented to the Customs House can be amended in the manner

prescribed. The exceptions are in the proviso but even in such cases the documents referred to the proviso can be amended if there be documentary evidence which was in existence at the time the goods were cleared, deposited or exported. There is no dispute raised by the revenue on that count.

Section 149 is a power to amend the document. The Section atleast does not set out that where the final assessment is made Section 149 cannot be resorted to. In the absence of the Legislature placing any limitation on the exercise of discretionary power u/s 149 except as contained in the proviso, it will not be possible to construe or to hold that Section 17 will have to be read with Section 149. We are not considering a case where after amendment an importer may still not be entitled to any relief. That would be a decision for the concerned Authorised Officer to decide on an application made to him. It is within the jurisdiction of a proper Officer not to grant an amendment even if permissible if the granting of an amendment would be an act in futility. We are at the stage whether such an exercise can be made and if made can be allowed u/s 149. On a conjoint reading of Section 17 and 149 we have no manner of doubt that the document, be it a bill of entry or shipping bill or bill of export can be amended, subject to the limitations as provided under the proviso to Section 149.

7. We, therefore, do not find that there is any illegality in the order passed by the Tribunal nor will the question of law as framed arise.

8. We, however, make it clear that as to whether the respondent would be entitled to any consequential benefit pursuant to the order permitting amendment of the document is an independent issue to be decided by the Competent Authority if an application is made to it or if an application is already pending.

9. In the light of the above the question of law as raised would not arise and consequently Appeal dismissed.