(2012) 07 KL CK 0208

In the High Court Of Kerala

Case No : R.P. No. 373 of 2012 in Writ Petition (C) No. 4814 of 2012

Commissioner of Customs, Cochin — APPELLANT

Vs

Shree Simandar Enterprises — RESPONDENT

Date of Decision : 24-07-2012

Acts Referred:
Customs Act, 1962 — Section 27

Citation : (2012) 283 ELT 369 : (2013) 18 GSTR 209

Hon'ble Judges : S. Siri Jagan, J

Bench : Single Bench

Advocate : Saiby Jose Kidangoor, for the Appellant; P.A. Augustine, for the Respondent

Final Decision : Dismissed

Judgement

S. Siri Jagan, J.—This Review Petition is filed by the Commissioner of Customs, Kochi, who is the respondent in W.P. (C) No. 4814 of 2002 seeking review of my judgment dated 28-3-2012 in that writ petition, which reads as follows : This writ petition is filed by the petitioner seeking refund of excess fine and penalty consequent to appellate order in which the fine and penalty have been reduced. Learned standing (sic counsel) for the Central Board of Excise and Customs submits that the excess fine and penalty consequent on the appellate order would be refunded to the petitioner within 10 days.

Accordingly, this writ petition is disposed of with a direction to the respondent to refund the excess fine and penalty consequent to the appellate order to the petitioner within ten days from today.

The review petition reads thus :

1. The review petitioner is the respondent in the writ petition. The writ petition was filed with the prayer to issue a writ of mandamus commanding the respondent to refund due amount of Rs. 6,62,275/- to the petitioner with interest at the rate of 8% from the date of Ext, P2 order and direct the respondent to

recover the interest from, the officer who delayed payment of due amount and to take disciplinary action as per the Exhibit P7 circular.

2. The above writ petition was disposed off by Judgment dated 28-3-2012 with a direction to the respondent to refund the excess fine and penalty consequent to the appellate order to the petitioner within 10 days from the date of the judgment. It is also recorded that the standing counsel of Excise and Customs submits that the excess fine and penalty consequent on the appellate order would be refunded to the petitioner within 10 days.

3. It is respectfully submitted that the submission was regarding the refund of the amount on production of original documents such as importers copy of bill of entry and duty paid TR 6 challan which are mandatory documents as per customs regulations. It is also relevant to submit that the review petitioner has also filed a counter affidavit in the above writ petition staring that refunds are allowed only against original bill of entry and duty paid challan evidencing the payment of amount claimed as refund.

4. But it is respectfully submitted that the judgment of this Hon''ble Court it is mentioned that standing counsel for the Central Board of Customs submits that the excess fine and penalty consequent to the appellate order would be refunded to the petitioner within 10 days. The above recording of the submission in such a manner will put the review petitioner into irreparable injury and hardship.

Consequently the review petitioner respectfully seeks to review the judgment on the following mainly among other :

GROUNDS

A. This Honourable Court had delivered the judgment dated 28-3-2012 directing the respondent, Commissioner of Customs, Customs House, Kochi to refund the excess fine and penalty consequent to the appellate order to the petitioner within ten days from the date of judgment.

B. It is submitted that the submission made on behalf of the standing counsel for the Central Excise and Customs that the excess fine and penalty consequent to the appellate order would be refunded on production of original documents such as importer''s copy of bill of entry and duty paid TR 6 challan which are mandatory documents do not find a place in the judgment. It is also submitted that the submissions made on behalf of the standing counsel could not be properly placed before this Hon''ble Court even though the same is clearly stated in the counter affidavit. It is respectfully submitted that if the above judgment is not reviewed the review petitioner will be put to irreparable injury and hardship.

For these and other grounds that may be urged during the course of argument it is most humbly prayed that this Honourable Court may be pleased to review the judgment in WP (C) No. 4814/2012, dated 28-3-2012 in the interest of justice.

Going by the averments in the review petition also, the liability to refund the amount in question is not disputed. Therefore, I need consider only two aspects. The first is whether the intention of the learned counsel appearing for the respondent in the writ petition, while undertaking to make the refund was to agree to make the refund on production of original documents such as importers copy of bill of entry and duty paid challan and if I accept the same, the second is whether production of such documents are mandatory for claiming the refund.

As far as the first question is concerned, although the undertaking was not actually qualified by the requirement to produce documents, at the time when the undertaking was made before me, in so far as a responsible standing counsel of a department of the Government of India makes a submission that actually the intention in making the submission was as stated, I am inclined to accept the same on face value, for the purpose of further considering the contention regarding the requirement of documents. Therefore I shall proceed to consider the other question on merits as to the legality of insistence on the production of documents for making the refund.

2. The contention raised by the petitioner in the Review Petition is that in all cases of refund, original documents viz. importers copy of bill of entry and original duty paid TR 6 challan are insisted upon, without which refund cannot be effected. In the course of arguments, the counsel would also argue that an order rejecting the application for refund was issued to the petitioner as early as in 2009, which was returned with postal endorsement ''addressee not known''. Since the petitioner in the writ petition has not chosen to challenge the same, his remedy is lost for ever. I am not inclined to go into the question since such a contention is absent in the review petition and further the petitioner in the review petition has already undertaken to make the refund notwithstanding the said contention. It is further submitted that the importers copy of bill of entry and the original duty paid TR 6 challan are insisted upon for effecting refund for three reasons. The first is to ensure identity of the person claiming the refund. The second is that if refund is made without the documents, there is chance of a duplicate claim for refund of the same amount. The third is that since such refunds are not covered by Section 27 of the Customs Act, the same can be made at any time and when refund is claimed after several years, for verifying previous refund, if any, original documents are mandatory. According to the petitioner in the Review Petition, in the counter affidavit filed in the writ petition, these facts have been elaborately dealt with.

3. A counter affidavit has been filed in this review petition by the petitioner in the writ petition. They would submit that in view of Exts. P3 and P7 circulars issued by the Government of India, for effecting refund as per the appellate order, even a refund application is not necessary for claiming refund of pre-deposit made during pendency of appeal, but only a simple letter from the person who has made such deposit, requesting return of the amount of such deposit along with an attested copy of the TR 6 challan evidencing payment of the amount of such deposit addressed to the concerned officer of customs will suffice for the

purpose. In Ext. P7, this has been reiterated and a time-limit of 3 months has been stipulated for such refund. According to the petitioner in the writ petition, as evidenced by Ext. P4, this requirement has been fully complied with and therefore the petitioner in the writ petition cannot insist on any other document cither original or copy. It is further submitted that in the decision of Sudha Silk House v. C.C., Chennai, reported in 2008 (228) E.L.T. 274 the CESTAT, Bangalore Bench has held that "When order-in-original has been set aside, the order-in-original refers to the amount which has been imposed therein. This itself is sufficient for granting relief to the assessee. No further documents are required from the parties to grant refund. The review section can take an indemnity bond to secure the payment." According to them, apart from that even if such a document is necessary and is not produced, the refund has to be made after obtaining an indemnity bond.

4. In his reply affidavit, the petitioner in the review petition reiterates his contentions and takes the stand that Exts. P3 and P7 are applicable to pre-deposit of duty and not to payment of fine and penalty.

5. I have considered the rival contentions in detail. I am of the opinion that the stand of the petitioner in the review petition is totally hyper-technical and unreasonable. When an appellate authority allows an appeal filed against imposition of tax, duty, fine, penalty etc., it is the bounden duty of the assessing authority, as part of a democratic government, to refund the amounts covered by orders of the appellate authority, when appeals are allowed fully or partially. The same shall be refunded even without a formal request for the same. Certainly, on a request made for refund, the same shall be refunded immediately, failing which the assessing authority is bound to pay interest on the amount from the date when the refund became due. This position has been formally accepted by the Government of India also based on the decisions of the High Courts and the Supreme Court as is evident from Exts. P3 and P7. When by Ext. P3 and P7, the Government of India themselves have reminded all the officers under them of the necessity to make refunds consequent on appellate orders expeditiously, the petitioner in the review petition cannot act as a super government, insisting on documents, production of which is not mandated by any rule, order or circular.

6. I am surprised by the contention of the petitioner in the review petition that Exts. P3 and P7 are not applicable to payment of fine and penalty. Pre-deposit pending appeal is covered by Section 129E, which reads as follows :

129E. Deposit, pending appeal, of duty and interest, demanded or penalty levied. - Where in any appeal under this Chapter, the decision or order appealed against relates to any duty and interest demanded in respect of goods which are not under the control of the customs authorities or any penalty levied under this Act, the person desirous of appealing against such decision or order shall, pending the appeal deposit with the proper officer duty and interest demanded or penalty levied:

Provided that where in any particular case, the Commissioner (Appeals) or the Appellate Tribunal is of the opinion that the deposit of duty and interest demanded or penalty levied would cause undue hardship to such person, the Commissioner (Appeals) or, as the case may be, the Appellate Tribunal may dispense with such deposit subject to such conditions as he or it may deem fit to impose so as to safeguard the interests of revenue :

Provided further that where an application is filed before the Commissioner (Appeals) for dispensing with the deposit of duty and interest demanded or penalty levied under the first proviso, the Commissioner (Appeals) shall, where it is possible to do so, decide such application within thirty days from the date of its filing.

(underlining supplied)

The said Section relates not only to duty and interest, but to penalty levied also. Exts. P3 and P7 relates to pre-deposit, which includes pre-deposit of ail amounts covered by Section 129E, including pre-deposit, of penalty also. That contention adds to the unreasonable stand of the petitioner in the review petition.

7. Apart from the same, as I have already held, it is the cardinal duty of assessing officers to implement appellate orders by refunding amounts already paid in accordance with the adjudication order, even without a request for the same, since the government cannot act like private parries in the matter of payment of money due, when money is due to citizens from the government. It is the duty of all government officers also to see that the image of the government before the citizens is clean and in accordance with basic principles of fair play. Even otherwise, occasionally, in appropriate cases the officers of the government can be magnanimous also to improve the image of the government before the public.

8. The reasons put forward by the petitioner in the review petition justifying the insistence on the production of original documents also does not impress me at all. When an import is assessed to duty and penalty and fine are imposed, necessarily, the assessing authority maintains a file in relation to the same, which will contain all the documents in original relating to the levy. When payment is made pursuant to the orders of the assessing authority, details of the same would also be available in that file. When appeal is filed by the importer against the orders of the assessing authority the file will contain orders and details relating to the same also. Therefore, there is no difficulty for the assessing officers to decide the claim for refund based on those documents, when the appeal is allowed in full or in part. When payment as per the adjudication order is known to the assessing authority, refund as per the appellate order is the duty of the assessing authority. The assessing authority cannot retain the amount due to the assessee, even for a moment, depriving the assessee of the use of his money unreasonably. Refunds are made by crossed cheques in the name of the importer. Cheques are sent by registered post in the

address of the assessee available in the file. As such there is no scope for any unauthorised person claiming and obtaining any refund or any duplication of the refund, unless the authority making the refund is negligent in his duties. Situation is the same even if the refund is after several years, if the file is still available. Therefore, I am of opinion that these contentions are raised only to find out some reason or other to deny the petitioner, the legitimate refund due to the petitioner in the writ petition.

9. In this case as evidenced by Ext. P4, the petitioner has in fact filed an application for refund and produced copies of the challan, copy of bill of entry and a working sheet, in addition to the appellate order, which, according to me, are more than sufficient for the purpose of making the refund as per the appellate order. The counsel for the petitioner in the writ petition submits that his copy of the original challan is missing from his files. Even assuming that the original of the challan is missing, and that a document is necessary for processing the refund nothing prevents the petitioner in the review petition from making the refund after obtaining an indemnity bond even though legally that even is not mandatory. If an assessee has lost a document that does not mean that he should lose his right to claim legitimate refund due to him for that reason alone. It is the usual practice in such cases to make refund after obtaining an indemnity bond, which would certainly safeguard the interest of the revenue in the matter against any possible future claim on the basis of the missing document. The petitioner in the review petition must have been aware of that legal position in view of the decision of the Tribunal quoted by the petitioner in the writ petition in his counter affidavit in this review petition, despite which the petitioner in the review petition had the audacity to make such frivolous contentions in this review petition. After acknowledging the liability to refund the amount as per the appellate order, which was also confirmed by this court in Ext. P5 judgment, the counsel during arguments tried to take the stand that since the petitioner in the writ petition had not challenged the order dismissing the refund application, the petitioner in the review petition is not liable to make the refund at all, which contention was not even taken in the review petition in so far as the review petition was confined to the question of necessity to produce documents as condition for making the refund. That adds to the unreasonable stand of the petitioner in the review petition. Since that question does not arise in the review petition, I am not inclined even to consider the same. Even otherwise, insofar as the refund became due as per an appellate order, the petitioner cannot, under law, deny the benefit of the appellate order by passing another order rejecting the refund, especially when the petitioner in the review petition himself admits that the refund is not a refund as contemplated u/s 27 of the Customs Act, orders in respect of which alone an appeal would lie. Even otherwise, admittedly, that order was not served on the petitioner and has been returned by the postal authorities. In view of my above findings, I am of the opinion that the filing of this review petition itself is an abuse of the process of the court. In fact the writ petition was liable to be allowed with interest and costs, which opinion I had

made abundantly clear to the petitioner in the review petition, at the time of initial hearing of the writ petition. That opinion I had expressed in other similar writ petitions also. In fact on the very day next to the date when the writ petition was disposed of, I had disposed of two other writ petitions on similar undertaking. If, as a matter of fact, at the time of making the undertaking to refund the amount, the same was qualified by the necessity to produce documents as stated in the review petition, I would have considered the writ petition on merits, in which case I would certainly have allowed the writ petition with at least interest, if not costs also. It is only because the petitioner in the review petition voluntarily undertook to make the refund himself, without an order from the court, I let it go at that. The petitioner in the review petition has tried to take advantage of that lenience shown by the court, which now I think was unmerited, to delay further the payment of the refund due to the petitioner in the writ petition, on most untenable and cantankerous contentions. The petitioner in the writ petition was put to unnecessary harassment and hardship, by this unreasonable attitude of the petitioner in the review petition. Precious time of the court has also been wasted by this frivolous review petition. Therefore, while dismissing the review petition, I direct that the refund would also carry interest at the rate of 6% per annum from the date of the appellate order, till payment. The petitioner in the review petition shall also pay exemplary costs of Rs. 25,000/- (Rupees Twenty five thousand only), to the petitioner in the writ petition, within one month from today. The interest and costs so paid shall not be debited to the exchequer and the same shall be recovered from the petitioner in the review petition and all officers responsible, if any, for not making the refund in time and for filing this unnecessary and frivolous review petition.

