(2015) 03 BOM CK 0263

In the Bombay High Court

Case No : Customs Appeal No. 12 of 2006

Commissioner of Customs (Export) APPELLANT

Vs

Reliance Industries Ltd. RESPONDENT

Date of Decision : 13-03-2015

Acts Referred:
Customs Act, 1962 — Section 84(3)

Citation : (2015) 322 ELT 121

Hon'ble Judges : S.C. Dharmadhikari, J;S.P. Deshmukh, J

Bench : Division Bench

Advocate : A.S. Rao, for the Appellant; J.C. Patel, Shilpa Balani instructed by Junnarkar and Associates, Advocates for the Respondent

Judgement

1. This appeal by the revenue challenges the order passed on 7th August, 2005 by Commissioner of Customs vs. Reliance Industries Ltd.2005 (188) ELT 449 . The revenue appealed to the Tribunal against the order dated 6th December, 2004, that was delivered by the Commissioner of Customs (Appeal), Mumbai.

2. This appeal has been admitted on the following substantial questions of law.

"(a) Whether the CESTAT is vested with powers or has jurisdiction to hold and declare that notification/circulars issued by the Board are inconsistent to legislature?

(b) Whether Education Cess is leviable on imports made under DEPB Scheme as per Finance (No. 2) of 2004 read with Board''s Circular No. 5/2005 dated 31-1-2005?"

3. The Counsel appearing for both sides have addressed us on Question 2(b). In their submission, same would suffice for disposal of this appeal.

4. The respondent-assessee filed about 16 bills of entries for the purpose of assessment of various goods imported by them and claimed benefit of Notification No. 45/02-Customs, dated 22nd April, 2004. On finalization of the

assessment, the benefit of this notification was extended to all the bills of entries inter alia, exempting duties leviable subject to the conditions that the duties leviable were debited from the relevant pass book under a scheme known as DEPB Scheme. The Education Cess at 2% on these duties was also debited from the duties of DEPB as per clause of the Finance Bill, 2004.

5. The respondent protested against the debit of education cess by submitting various letters addressed to the Assistant Commissioner of Customs. They did not insist on issuance of show cause notice. However, they did not get satisfactory solution and therefore, preferred an appeal. That appeal has been allowed, inter alia, holding that debit of education cess and in terms DEPB Scheme so also exemption notification was impermissible in law.

6. The Tribunal has upheld this view in the impugned order.

7. The Tribunal has in dealing with this controversy referred extensively to the salient features of the DEPB Scheme, relevant provisions of the Finance Act, 2004 and the Exemption Notification dated 22nd April, 2002. The Tribunal has held as under :--

"We find that the DEPB Scheme operates under an exemption Notification No. 45/2002-Customs, dated 22nd April, 2002. The said notification specifically exempts goods imported under DEPB Scheme from basic, additional and special additional duties of Customs. However, in terms of the conditions specified in the said notification, the exemption operates by allowing duty credit in the Duty Entitlement Pass Book on exports at the rate specified and subsequently by debiting an amount equal to duty payable, against such credit in the pass book, on imports. As such, such crediting and debiting of duty amounts is a matter of procedure and convenience, but the notification basically provides full exemption from Customs duty. Our view is supported by earlier decision of Essar Steel Ltd. vs. Commissioner of Central Excise2004 (97) ECC 753 wherein it was held that Modvat credit against DEPB debits cannot be allowed as duties are exempted under DEPB Scheme and the relevant notification."

We find that the provisions in the said Finance Act specify the Education Cess as 2% of the Customs duty levied and collected. In the case of imports under the DEPB Scheme, which are fully exempt, the Customs duty is nil. Hence, the Education Cess being 2% of the Customs duty is also nil. If it were the intention of the Parliament to debit and credit Education Cess for imports under DEPB Scheme, then the quantum of cess would have been specified in absolute terms with a notification similar to Notification No. 45/2002 with similar conditions. That is, however, not the case. On the other hand, the cess has been specified at the rate of 2% of the Customs duty in relative terms. In which case, it becomes nil for exempted DEPB imports.

Accordingly, we hold that no education cess is leviable on fully exempted DEPB imports and therefore, no debits from DEPB scrip are required. We are also of the view that the circular dated 31st January, 2005 is contrary to the provisions of the Finance (No. 2) Act, 2004 read with Notification No. 45/2002-Customs, dated 22nd April, 2002. The revenue appeal is, therefore, rejected."

8. It is the correctness of this view of the Tribunal which is challenged before us. Mr. A.S. Rao appearing on behalf of the revenue submits that merely because there is a scheme and an exemption is granted that does not wipe out the duties. The Customs duty is leviable and recoverable. In the light of the exemption it cannot be said that these duties are not legally recoverable. Therefore, the education cess also could have been levied and recovered. The Tribunal''s view is therefore, erroneous in law.

9. On the other hand, Mr. Patel appearing on behalf of the respondent assessee submits that the Tribunal''s view as taken above has found favour at least with three High Courts in India and in that regard he invites our attention to the judgment of High Court of Gujarat in the case of Gujarat Ambuja Exports Ltd. Vs. Government of India, (2013) 289 ELT 273 and Commissioner of Customs v. Pasupati Acrylon Ltd. - 2013 (296) E.L.T. 182 (Guj.) . He submits that the view taken by Gujarat High Court in Pasupati (supra) has been not interfered with by the Hon''ble Supreme Court and the revenue''s appeal is dismissed on 8th May, 2013.

10. The Tribunal''s view is endorsed not only by the High Court of Gujarat but equally by the High Court of Madras in Commissioner of Customs, Tuticorin v. DCW Ltd. - 2014 (306) E.L.T. 398 (Mad.) and the High Court of Commr. of C. EX., Visakhapatnam-II Vs. Kedia Vanaspathi Ltd., (2012) 275 ELT 46 : (2012) 28 STR 308 : (2013) 39 STT 95 . Our attention is invited to the judgments of the Gujarat and Andhra Pradesh High Courts.

11. After hearing both sides we find that the Gujarat High Court has extensively dealt with this issue. It has expressed an opinion that the duty exemption remission scheme and the duty exemption passbook scheme are essentially to promote economic growth and in terms of the new policy adopted by the Government of India. The education cess on imported goods shall be in addition to any other duties of Customs chargeable on such goods under the Customs Act, 1962 or any other law for the time being in force. By Section 84(3) the provisions of the Customs Act, 1962 and the rules and regulations made thereunder including those relating to refund and exemption from duty and imposition of penalty shall as far as may be applied in relation to levy and collection of the education cess on the imported goods. If education cess is to be collected from the Customs duty levied and collected by the Central Government, then, in the given facts and circumstances when there is exemption from payment of that duty which exemption is in favour of the respondent assessee, then, there is no collection of the Customs duty. The Customs duty may be leviable but in the light of the exemption in favour of the respondent assessee, the duty has not been recovered and collected from the assessee. In view thereof the education cess on imported goods has also not been levied and collected. It is in that regard that the view taken by the High Court of Gujarat in

the case of Gujarat Ambuja Exports Ltd. (supra) from paras 9 to 19 has been quoted and followed with approval of the same High Court. That view has also been applied by the High Court of Gujarat in the case of Pasupati (supra). Once the Tribunal''s view taken in the present case has found favour with at least three High Courts and has not been interfered with, then, we are of the view that the Tribunal''s decision cannot be termed as perverse. It is also not vitiated by any error of law apparent on the face of the record. Following the High Court Gujarat judgment as above, we answer the substantial question of law in Para 2(b) in favour of the assessee and against the revenue. Appeal of the revenue fails and is dismissed. There shall be no order as to costs.

