(2011) 04 MAD CK 0442

In the Madras High Court

Case No : CMA. No. 3873 of 2005

Commissioner of Customs (Exports) APPELLANT

Vs

VBC Industries Limited RESPONDENT

Date of Decision : 09-04-2011

Acts Referred:
Customs Act, 1962 — Section 142, 2(15), 27, 27(1), 27(2)
Income Tax Act, 1961 — Section 214, 214(1), 240, 244, 244(1A)

Citation : (2011) 270 ELT 314

Hon'ble Judges : P.P.S. Janarathana Raja, J;Chitra Venkataraman, J

Bench : Division Bench

Advocate : Mallika Srinivasan, for the Appellant; C. Natarajan for N. Inbarajan, for the Respondent

Judgement

Chitra Venkataraman, J.—The Revenue has come on appeal by raising the following substantial questions of law:

1. Whether the Appellate Tribunal is correct in ordering for payment of interest on interest when there is no provision for payment of interest on interest under the provisions of the Customs Act or its Rules framed their under.

2. Whether the Appellate Tribunal is correct in pleading reliance upon the decision of the Supreme Court in Commissioner of Income Tax Vs. Narendra Doshi, when the facts of the case and provisions of the Income Tax Act is not applicable to the facts of this case and the provisions of the Customs Act.

2. The Assessee/respondent herein applied for registration of six contracts under Project Import Regulations with Visakapatnam Customs House during 1991. Out of six contracts, five had been cleared through Madras Customs House. It is seen from the facts herein that the Assessee imported certain capital goods for the manufacture of Ammonium Nitrate and Nitric Acid. These goods were assessed to duty as Project imports. Following the announcement of new Export Import Policy for clearance of capital goods under the EPCG Scheme, which provided for

concessional rate of Customs duty subject to fulfilment of certain export obligation, the Assessee got the Import Licence amended accordingly through DGFT. In respect of performance of the obligation, a show cause notice dated 26.7.1999 was issued by the Revenue, alleging violation of Notification No. 160/92 - Cus dated 20.4.1992, that the Respondent had not fulfilled the obligation. The adjudication ultimately culminated into an order dated 28.8.2002 passed by the Commissioner of Customs (Sea), Chennai. The adjudication order, apart from confirming the duty demanded, also resulted in confiscation of seized goods with option for redemption and imposition of penalty to a sum of Rs. 2,01,89,241/-. The said amount was paid by the assesee.

3. On appeal by the Assessee before CESTAT, Bangalore, by order dated 11.7.2003, the same was allowed and thus the liability to pay duty as well as interest was set aside. The Tribunal held that interest was not leviable, since notification No. 160/92-Cus did not contain a condition to that effect. It is stated that the order passed by the CESTAT, Bangalore was taken on appeal before the High Court. In the meantime, the Assessee sought for refund of duty paid along with interest. The Assessee filed a refund claim dated 16.8.2003, having regard to the CESTAT order allowing the appeal filed by the Assessee/respondent, cancelling the duty levy as well as interest. The Deputy Commissioner (Customs) found that the refund claim had arisen consequent on the order passed. He further pointed out that the claim was hit by limitation, inasmuch as the amount claimed was not paid under protest. The Deputy Commissioner further pointed out that the Commissioner of Customs, in his order in original No. 147/2002 dated 30.8.2003, had appropriated the payment towards the interest liability. He further pointed out that even though the Assessee had not passed on its liability to the customers, yet, having regard to the order passed dated 28.8.2002 of the Commissioner (Customs), a sum of Rs. 3,59,62,163/- was remaining outstanding towards differential duty together with interest. Thus, in terms of Section 142 of the Customs Act, a sum of Rs. 2,01,89,241/- refundable to the Assessee/ respondent herein, was to be deducted as against a sum of Rs. 3,59,62,163/-. Thus the Deputy Commissioner sanctioned the sum of Rs. 2,01,89,241/- alone by way of refund u/s 27 of the Customs Act. On appeal by the Respondent/ assessee before the Commissioner of Customs, by order dated 31.03.2004, the Commissioner modified the order of the Deputy Commissioner and held that the Assessee paid the differential duty and interest on the differential duty on account of non-fulfilment of export obligation. However, the Commissioner of Customs ordered confiscation of goods. Consequent on the DRI booking a case for evasion of duty against the Assessee, the Commissioner of Customs demanded extra duty, which was subsequently set aside by the CEGAT. The Commissioner held that the Deputy Commissioner of Customs (Refunds) overlooked the relief granted by the Tribunal, but however, ordered adjustment of the refund claimed as against the demand. The Commissioner further pointed out that the Deputy Commissioner did not place any evidence on record to show that the demand made by any other proper officer u/s 142 of the Customs Act

requiring him to deduct the amount as payable by the Assessee. When the demand had been struck down by the CEGAT vide order No. 911/03 and having regard to the fact that the Commissioner (Export) had recorded that no amount is due from the Assessee as per the CEGAT''s order, the adjustment was illegal. As far as interest issue is concerned, the Deputy Commissioner had not passed any order. Therefore, the said aspect was not considered in the appeal. The Assessee preferred a further appeal before the CESTAT, as against the interest claimed, which was not granted by the Commissioner. By order dated 14th February, 2005, CESTAT allowed the appeal holding that the Revenue was liable to pay interest from the date of payment of interest till the date of refund of the same. In so holding, the Tribunal followed the decision reported in Commissioner of Income Tax Vs. Sakthi Sugar Ltd., to order refund of interest as well as interest on interest for the belated payment. Aggrieved by the same, the Revenue has come on appeal before this Court.

4. Before going through the rival contentions, the relevant provisions, viz., Section 27 of the Customs Act relating to claim for refund of duty and Section 27A of the Customs Act relating to interest on delayed refunds, have to be seen. Section 27(1) of the Customs Act deals with the order to be passed on the claim made for refund of duty, which reads as follows:

27(1) Any person claiming refund of any duty,

(i) paid by him in pursuance of an order of assessment; or

(ii) borne by him,

may make an application for refund of such duty and interest, if any, paid on such duty to the Assistant Commissioner of Customs or Deputy Commissioner of Customs....

5. In respect of interest on delayed refunds also, the Customs Act provides for payment of interest. Section 27A of the Customs Act deals with interest on delayed refunds which reads as follows:

27A. Interest on delayed refunds. If any duty ordered to be refunded under Sub-section (2) of Section 27 to an applicant is not refunded within three months from the date of receipt of application under Sub-section (1) of that section, they shall be paid to that applicant interest at such rate, not below five per cent and not exceeding thirty percent per annum as is for the time being fixed by the Central Government, by notification in the Official Gazette, on such duty from the date immediately after the expiry of three months from the date of receipt of such application till the date of refund of such duty.

6. Learned Standing Counsel appearing for the Revenue placing reliance on Section 27A of the Customs Act submits that the Tribunal committed a serious error in law in just adverting to the provisions of Section 27A of the Customs Act. As Section 27A of the Customs Act has a restricted operation to grant interest only on the duty element, it cannot be taken to cover the payment of interest on

the interest paid on the belated payment.

7. Per contra, learned Senior Counsel appearing for the Respondent/Assessee submitted that going by the decision of the Apex Court reported in Commissioner of Income Tax Vs. Narendra Doshi, , when interest payment is compensatory in character, it takes the character of principal duty. The word ''duty'' appearing in Section 27 of the Customs Act has to be read as inclusive of interest on the belated payment. Hence, the Assessee is entitled to interest on interest. Referring to the definition of duty in Section 2(15) of the Customs Act, he pointed out that having regard to the interest payable on the payment of duty, the interest thus paid, ought to have been included into the concept of duty for the purpose of considering the claim u/s 27A of the Customs Act. In any event, he pointed out that the provisions of Section 27(2) of the Customs Act contemplates refund of duty with interest. As such, going by the Heading to Section 27A of the Customs Act, ''interest on belated refund'', the scope of the term ''duty'' for the purposes of grant of interest should be read as ''inclusive of interest payment on the belated remittance of the duty''. Thus, when the Section contemplates interest on delayed refund, the interest payable on the refund amount, as such has to be inclusive of interest on the interest paid on the belated payment.

8. Learned Senior Counsel appearing for the Assessee placed reliance on the decision reported in Sandvik Asia Ltd. Vs. Commissioner of Income Tax-I, Pune and Others, , only to submit that the payment of interest on belated refund has to be treated on par with the duty paid.

9. He also placed reliance on the decision reported in AIR 2005 Supreme Court 2119 Igbal Singh Marwah v. Meenakshi Marwah, wherein, the Supreme Court held that the heading to the Chapter cannot be used to give a different effect, when the words of the Section are clear as to the ordinary meaning; yet, they constitute an important part of the Act itself. The heading is not to be treated as mere marginal notes for the purposes of classifying the enactment. Thus these headings not only explain the Sections which follow them, but they afford as a better key to the construction of the Section which follow them. Thus the Supreme Court held that heading to the Chapter of the Section are not mere preamble, but they are a clear pointer to the Legislative intent, as espoused in the Section following.

10. Heard learned Standing Counsel appearing for the Revenue and the learned Senior Counsel appearing for the Assessee and perused the materials placed before this Court.

11. As already pointed out, Sections 27 and 27A of the Customs Act deal with the claim of refund of duty and interest on belated refund. A reading of Section 27(2) of the Act, as it originally stood, had referred to refund of duty alone for the purposes of considering the refund claim. However, by reason of amendment brought forth under Act 55 of 1991, with effect from 23.12.1991, the interest

component on the belated payment of duty was also made the subject matter of refund, provided under Sub-section (2) of Section 27 of the Customs Act. Thus, on and from 23.12.1991, on an application made by the Assessee for refund of duty paid as well as for interest thereon, on satisfaction of the conditions on refund, the Assistant commissioner of Customs or Deputy Commissioner of Customs, as the case may be, has to pass an order of refund of duty as well as interest on belated payment.

12. Section 27A of the Customs Act was inserted by Act 22 of 1995, with effect from 26.5.1995. The amendment contemplates payment of interest, depending on the period of delay in ordering refund.

13. A reading of the said Section shows that if any duty ordered to be refunded under Sub-section (2) of Section 27 of the Customs Act is not refunded within a period of three months from the date of receipt of application, interest shall be payable by the Central Government on the refund claim. It is a matter of interest to note that while Section 27(2) of the Customs Act speaks about the refund of duty and interest, Section 27A of the Customs Act stops with making reference to the refund of duty alone and makes no reference at all to the interest payable on the interest on the belated payment of duty, which is ordered to be refunded. When the language used in the Section is clear and there is no ambiguity, it is a well settled principle of law that Section does not call for any interpretation. Section 27(1) and (2) of the Customs Act speaks about the refund of claim on duty on interest; Section 27A of the Customs Act, inserted in the year 1995, reads as follows:

27A. Interest on delayed refunds.-- If any duty ordered to be refunded under Sub-section (2) of Section 27 to an applicant is not refunded within three months from the date of receipt of application under Sub-section (1) of that section, there shall be paid to that applicant interest at such rate, not below five per cent and not exceeding thirty per cent per annum as is for the time being fixed by the Central Government, by notification in the Official Gazette, on such duty from the date immediately after the expiry of three months from the date of receipt of such application till the date of refund of such duty:

Provided that where any duty, ordered to be refunded under Sub-section (2) of Section 27 in respect of an application under Sub-section (1) of that section made before the date on which the Finance Bill, 1995 receives the assent of the President, is not refunded within three months from such date, there shall be paid to the applicant interest under this section from the date immediately after three months from such date, till the date of refund of such duty.

Explanation. -- Where any order of refund is made by the Commissioner (Appeals), Appellate Tribunal, National Tax Tribunal or any court against an order of the Assistant Commissioner of Customs or Deputy Commissioner of Customs under Sub-section (2) of Section 27, the order passed by the Commissioner (Appeals), Appellate Tribunal, or, as the case may be, by the court shall be deemed to be an order passed under that Sub-section for the purposes of this section.

14. Given the settled principle of law that the Legislature knows the law prevailing at the time when the amendment was brought forth and that the Legislature has chosen to restrict the grant of interest on delayed refunds alone, it is difficult to stretch the language in Section 27A to accept the plea of the Assessee that it is entitled to interest on the interest too on the score that Section 27(2) contemplated refund of duty and interest. The provision, as it stands u/s 27A of the Act, has to be read as restricted to claim on duty alone and it cannot be extended to include interest within its fold for the purpose further grant of interest u/s 27A of the Act.

15. It is also relevant to note that a reference to duty and interest in Section 27(2) of the Customs Act was added by way of substitution under Act 55/1991 with effect from 23.12.1991. As already pointed out, Section 27A of the Customs Act, granting interest on delayed refund, was inserted by Act 22/1995 with effect from 26.5.1995. In this connection the decisions relied on by the learned Senior Counsel for the Assessee have to be seen.

16. In the decision reported in Sandvik Asia Ltd. Vs. Commissioner of Income Tax-I, Pune and Others, , filed as against the judgment of the Bombay High Court reported in Sandvik Asia Ltd. Vs. Commissioner of Income Tax and Others, , the Supreme Court considered the grant of interest for the delay in the payment of amount due to the Assessee, which were held contrary to law. The Supreme Court held that Section 214(1) recognises in principle, the Government has the liability to pay interest on the amount of tax paid by an Assessee in excess of the amount of assessed tax. Once the interest becomes due, it takes the same colour, as the excess amount of tax refundable to the Assessee, on regular assessment. Consequently, as advance tax is treated as paid in pursuance of an order of assessment, interest is payable u/s 244 of the Income Tax Act. The expression ''amount'' in Section 244(1A) of the Income Tax Act, refers not only to tax, but also to interest, the term being a neutral expression. Thus, reversing the decision of the Bombay High Court, the Apex Court held that the Assessee was entitled to interest on the amount of interest paid u/s 214 and/or Section 244 of the Income Tax Act.

17. A reading of the above-said decision of the Supreme Court shows that while charging interest from the Assessee, the Department has to first adjust the amount paid towards interest, so that the principal amount of tax payable remains outstanding. But when it comes to the question of granting interest on refund of taxes, refunds are first adjusted towards taxes and then the balance towards interest. The Supreme Court further pointed out that the award of interest on the refund amount has to be as per the statutory provisions and when specific provisions are made, the same has to govern the field. While reaffirming the view taken by the Supreme Court in the decision reported in Commissioner of Income Tax Vs. Narendra Doshi, , the Supreme Court held that

having regard to the inordinate delay and that deprivation was solely due to the Revenue, on general principles, the Department ought to compensate the Assessee for the deprivation of the amount lawfully due to the Assessee. In this regard, the Supreme Court directed payment of simple interest at 9% per annum from the date the refund became payable till the date it was actually paid within one month from the date of the judgment, failing which, the Department should pay penal interest at 15% per annum.

18. A perusal of the judgment shows that the Income Tax Act recognises the principle that a person should only be taxed in accordance with law and hence, where excess amount of tax are collected from an Assessee or any amounts are wrongfully withheld from an Assessee without authority of law, in spite of a decision of the Court in favour of the Assessee, the Revenue must compensate the Assessee. Section 240 of the Income Tax Act deals with refund on appeal. The expression used therein is "refund of any amount". The Supreme Court held that the said phrase has to be interpreted in the same manner as u/s 244(1A) of the Income Tax Act, that the expression referred not only to tax, but also to interest.

19. The Supreme Court referred to the decisions in the case of Commissioner of Income Tax Vs. Goodyear India Ltd., , D.J. Works Vs. Deputy Commissioner of Income Tax, , Commissioner of Income Tax Vs. Needle Industries Pvt. Ltd., and Commissioner of Income Tax Vs. Ambat Echukutty Menon, and rejected the view of the Bombay High Court. The Apex Court held that the Assessee was entitled to interest as per the provisions of Sections 244 and 214 of the Income Tax Act. On the interest payable on the belated refund of interest paid by the Assessee, in paragraphs 75 and 76, the Supreme Court considered the general principles and ultimately held that the Assessee was entitled to interest.

20. It must be noted herein that the decision of the Apex Court is based on the interpretation of the word ''any amount'' as appearing in Sections 240 and 244(1A) of the Income Tax Act and in the absence of any specific provision on grant of interest on the belated refund of the interest component, it applied the general principles. Quite apart, even otherwise, the facts therein indicated that the claim of the Assessee was by way of Writ Petition, challenging the order of the Commissioner, rejecting the claim of the Assessee for interest. Hence, the decision relied on by the learned Senior Counsel appearing for the Assessee has to be understood in the context of the facts therein and the provisions of law and the same cannot be of any assistance to the Assessee herein.

21. As regards the applicability of general principles herein to the case, it must be pointed out that the proceedings before this Court is by way of appeal, as against the order of the CESTAT, made in exercise of Appellate Jurisdiction under the provisions of the Customs Act. In considering the question of law raised by the Revenue, one has to go in accordance with the provisions of the Customs Act and not by the general principles of law.

22. The reliance placed by the Appellate Tribunal to the decision reported in [2002] 245 ITR 606 CIT v. Narendra Doshi has no relevance for considering the claim of the Assessee under the Customs Act. As regards the reliance placed on the decision reported in Mahalaxmi Sugar Mills Co. Vs. Commissioner of Income Tax , Delhi, , it relates to a claim on expenditure on the interest paid on belated payment on sugarcane cess; hence, the said decision does not help the Assessee herein.

23. In the light of the discussion thus made, going by the provisions u/s 27A of the Customs Act, we do not agree with the reasoning of the CESTAT. Consequently, the Civil Miscellaneous Appeal stands allowed and the substantial questions of law raised before this Court are answered in favour of the Revenue. No costs. As regards the belated refund ordered, the Assessee shall be entitled to interest only on the duty and not on the interest amount.