(2010) 03 BOM CK 0128

In the Bombay High Court

Case No : Customs Appeal No. 59 of 2009

Commissioner of Customs (I) APPELLANT

Vs

Sir Harkisandas Narottamdas Hospital RESPONDENT

Date of Decision : 09-03-2010

Acts Referred:
Customs Act, 1962 — Section 125

Citation : (2010) 254 ELT 286

Hon'ble Judges : V.C. Daga, J;K.K. Tated, J

Bench : Division Bench

Advocate : R.V. Desai and R.B. Pardeshi, for the Appellant; Rohan Shah and J.C. Patel, instructed by A.S. Dayal and Associates, for the Respondent

Judgement

1. Heard learned Counsel for the parties. Perused appeal.

2. This appeal is directed against the impugned order passed by the Customs, Excise and Service Tax Appellate Tribunal, West Zonal Bench at Mumbai (Tribunal for short) dated 11th May, 2008; wherein, in the case of appellant, the Tribunal observed as under:

33.3 We have considered the submissions. We find that so far the denial of principles of natural justice is concerned we have dealt with this matter in our findings on common issues and the decision of the Supreme Court in Metal Forging case has also been discussed elsewhere. As regards Madras High Court decision in the case of Nuwood cited supra once the Bombay High Court in Wockhardt case has held that even where there is no demand of duty in the show cause notice, duty becomes payable as soon as Section 125 of the Customs Act, 1962 confirmation of demand cannot be assailed on grounds of denial of principles of natural justice. As regards violation of conditions of notification, once the CDEC certificates have been withdrawn the effect of the same as already held, is that the exemption becomes in admissible ab initio. However, we find that in the appellants own case which is subject matter of dispute before us, the Bombay High Court has held that duty can be demanded only if upon confiscation of goods, option to redeem is exercised. Since the revenue has not challenged this decision, the same has to be considered as final between the two parties i.e. Harkishan Das hospital and the UOI though it may not bind others. In view of the same we hold that if the appellants have chosen not to exercise their option duty cannot be demanded.

3. Mr. Desai, learned senior counsel appearing for the appellant submits that the Tribunal has relied upon the order of this Court dated 13th April, 2005 passed in W.P. No. 388/2005 [2009 (234) E.L.T. 426 (Bom.)] to which one of us (Daga, J.) is party; wherein observations were made in para-5 thereof, reading as under:

...If the appellants were not interested in redeeming the goods, then, the Customs Act does not create liability to pay the customs duty....

The Tribunal held that this finding operates as res judicata between the parties since the said order was not challenged by the Revenue in the higher Court. Mr. Desai submits that the aforesaid observation was made by this Court while sustaining the order dispensing with the pre-deposit, just to observe that prima facie case for consideration on merits was made out requiring consideration of the said issue by the Tribunal. He, thus, submits that this observation made was prima facie; and not conclusive, since that was not the issue before this Court for consideration on merits.

4. Learned Counsel for the respondent tried to support the findings recorded by the Tribunal contending that the said observation made by this Court was binding on the Tribunal. He, however, could take his submission to the logical end.

5. Needless to mention that the observation made by this Court in the order dated 13th April, 2005 passed in W.P. No. 388/2005 was prima facie; and no conclusive finding was recorded. Having made this position clear and looking to the consensus between both parties that impugned order needs to be set aside and the matter is required to be remanded to the Tribunal for hearing afresh in the light of the clarification made in paras-3 and 4 (supra).

6. In the above backdrop, the impugned order is set aside making it clear that the observation made by this Court in para-5 of the order dated 13th April, 2005 passed in W.P. No. 388/2005 was prima facie. Appeal stands restored to the file of the Tribunal with direction to hear the said appeal afresh and decide the same on its own merits by a reasoned order following principles of natural justice with expeditious despatch, at any rate, within six months from the date of receipt of copy of this order. All rival contentions are kept open.

7. Accordingly, appeal stands disposed of in terms of this order with no order as to costs.

