
(2004) 07 DEL CK 0073

In the Delhi High Court

Case No : Civil Writ Petition No. 6712 of 2002 with W.P.C. No. 327 of 2003

Commissioner of Customs, ICD

APPELLANT

Vs

CEGAT

RESPONDENT

Date of Decision : 05-07-2004

Acts Referred:

Constitution of India, 1950 — Article 226
Customs Act, 1962 — Section 27, 27(3)

Citation : (2005) 121 ECR 291 : (2005) 179 ELT 394

Hon'ble Judges : B.C. Patel, C.J.; Badar Durrez Ahmed, J

Bench : Division Bench

Advocate : Bishwajit Bhattacharya and Debasish Moitra, for the Appellant; V. Lakshmikumaran and Alok Yadav, for the Respondent

Final Decision : Disposed Off

Judgement

B.C. Patel, C.J.—These writ petitions are taken up together. The petition (CW 6712/2002) filed by the Commissioner Customs, New Delhi is taken up first. The petitioner has prayed for quashing of the order dated 26-9-2002 passed by the respondent No. 1 whereby a direction was given to the petitioner to refund the amount, received by way of encashment of bank guarantee on the alleged ground that the refund has been directed without following the procedure as prescribed u/s 27(3) of the Customs Act, 1962.

2. The facts are taken from the impugned order made by the Customs, Excise and Gold (Control) Appellate Tribunal, copy of which is produced on record at page 25 of the paper book. By the order dated 4-9-2002 2002 (146) ELT 414 , the Tribunal disposed of the appeal which was filed against the order-in-appeal passed by the Commissioner (Appeals). It is required to be noted that the Commissioner (Appeals) dismissed the appeal on the ground that the appeal was maintainable. By an order dated 31-5-2004/4-6-2002, the Commissioner of Customs adjudicated the show cause notices dated 19-12-2000 and 16-8-2001. The show cause notices were in relation to the valuation of the Concentrate of

Alcoholic Beverages (CAB) imported by the appellants from Scotland during the period from 1995 to May, 2001. The Commissioner finalised the provisional assessment and confirmed the differential duty demand. Against the above order, the assessed filed an appeal along with a stay application before the Tribunal. It is required to be noted that based on the order passed by the Commissioner, the Deputy Commissioner of Customs finalised the provisional assessment for the subsequent period, namely, June, 2001 to May, 2002 covering 46 Bills of Entry to which the present petition is confined. The differential duty of Rs. 8,81,85,011/- was confirmed under the proceedings dated 18-6-2002.

3. The department sought to encash the bank guarantee executed by the assessed for an amount of Rs. 12.77 crores as a consequence of finalisation of the assessment as above. The assessed was constrained to file a writ petition before this Court being CW 3885/2002. By an interim order, the department was directed to maintain status quo with regard to the status of bank guarantee till the disposal of the writ petition and thereafter the High Court disposed of the writ petition by an order dated 23-7-2002 with the direction that the interim order dated 19-6-2002 passed by the High Court would continue to be in force till the Commissioner of Customs (Appeals) takes a final decision on the application stated to have been filed by the petitioner.

4. It transpires that the Commissioner (Appeals) dismissed the appeal as well as the stay application holding that the order impugned before him can be regarded to be only a correspondence and not an appealable order. In view of this, before the Appellate Tribunal, it was pointed out that a grave error has been committed by the Commissioner of Customs (Appeals) as it was not a mere correspondence but an order indicating finalisation of the assessment for the period from June, 2001 to May, 2002 covering 46 Bills of Entry. In the meanwhile, the bank guarantee was encashed to the tune of Rs. 12.77 crores on 2-9-2002. It may be noted that the Tribunal pointed out that if the proceedings impugned before the Commissioner of Customs (Appeals) was only a correspondence and not a proceeding finalising the assessment, how could the revenue have proceeded to realise the amount due by way of encashing the bank guarantee. The Tribunal held that the Commissioner decided finally and also impugned before the Commissioner was an order and not a correspondence. The Tribunal, Therefore, held that the Commissioner (Appeals) had committed a grave error in dismissing the appeal and the application for stay on the ground that the appeal is not maintainable. It is in view of this that the order was set aside and the appeal as well as the stay application came to be restored by the order made by the Tribunal. It is required to be noted that the Revenue has not challenged that part of the order before this Court.

5. The Tribunal, while disposing of the appeal, also directed that the action of the Commissioner being illegal and untenable in law, the Revenue was directed to see that the amount is returned and the bank guarantee is submitted by the assessed as it was submitted earlier within a period of two weeks. The Tribunal

considering the decision of the Bombay High Court in the case of Mahindra and Mahindra Ltd. Vs. Union of India, directed the respondent to see that the status quo ante is maintained. And, in fact, in view of the order made by the High Court, the order was revived by the Tribunal.

6. It is this part of the order which is strongly objected to by the Revenue by stating that the Tribunal had no jurisdiction to pass such an order. It was open for the petitioner to come to this Court for obtaining such an order and this Court could have passed the order, if deemed fit. It is at this juncture that it is required to be noted that the assessed had also preferred a writ petition (the other writ petition being disposed of hereby) for such a relief, though not immediately after the order was made, but after about a period of four months.

7. We have perused the order passed by the Bombay High Court in the case of Mahindra & Mahindra (supra). The Division Bench pointed out that the three months time which is given by the statute is required to be respected and when the amount was secured, it could not be said that there was any emergency in encashing the bank guarantee. In the instant case, the order was passed on 27-8-2002 and the bank guarantee was encashed on 2-9-2002. According to the assessed, the order was received by him on 2-9-2002, while according to the petitioner, it was received by the petitioner on the same date, namely, 31-8-2002. Page 187 of the paper book refers to the date of communication of the order as 31-8-2002. The petitioner has pointed out the copy of the order at Annexure "A" page 179 which clearly indicates that the order was dispatched on 2-9-2002. The learned Counsel has explained that at page 187, there is a reference to the order, dated 31-8-2002 as the bank informed by fax about the passing of the order and that is how he has referred to the said date. Whatever it may be, we are not required to examine these aspects in detail but suffice it to say that the Commissioner after receiving the order approached bank for encashment without waiting for the expiry of the period of limitation.

8. The Bombay High Court in the case of Mahindra & Mahindra (supra) has pointed out that it is improper to invoke the bank guarantee in such a situation.

9. Insofar as the contention raised by the learned Counsel for the revenue that the Tribunal could not have granted refund is concerned, it is required to be noted that, in fact, there is no refund but the direction is given to the effect that the amount be returned to the petitioner and the petitioner is directed to furnish the bank guarantee of the same amount, namely, Rs. 12.77 crores so as to maintain status quo ante in view of the order made by the High Court earlier. Our attention was invited to the decision of the Supreme Court in the case of Oswal Agro Mills Ltd. and Another Vs. Asstt. Collector of Central Excise, Division Ludhiana and Others,). The Court considered the arguments with regard to Section 11B of the Central Excises and Salt Act, 1944 which is *pari materia* to Section 27 of the Customs Act. The court pointed out as under in Paragraph 10 thereof :-

"10. The question, Therefore, is whether it can be said that the furnishing of a bank guarantee for all or part of the disputed excise duly pursuant to an order of the court is equivalent to payment of the amount of excise duty. In our view, the answer is in the negative. For the purposes of securing the Revenue in the event of the Revenue succeeding in proceedings before a Court, the Court, as a condition of staying the demand for the disputed tax or duty, imposes a condition that the assessed shall provide a bank guarantee for the full amount of such tax or duty or part thereof. The bank guarantee is required to be given either in favor of the principal administrative officer of the Court or in favor of the concerned Revenue authority. In the event that the Revenue fails in the proceedings before the Court the question of payment of the tax or duty, the amount of which is covered by the bank guarantee, does not arise and, ordinarily, the Court, at the conclusion of its order, directs that the bank guarantee shall stand discharged. Where the Revenue succeeds the amount of the tax or duty becomes payable by the assessed to the Revenue and it is open to the Revenue to invoke the bank guarantee and demand payment thereon. The bank guarantee is security for the Revenue, that in the event the Revenue succeeds its dues will be recoverable, being backed by the guarantee of a bank. In the event, however, unlikely, of the bank refusing to honour its guarantee it would be necessary for the Revenue or, where the bank guarantee is in favor of the principal administrative officer of the Court, that officer to file a suit against the bank for the amount due upon the bank guarantee. The amount of the disputed tax or duty that is secured by a bank guarantee cannot, Therefore, be held to be paid to the Revenue. There is no question of its refund and Section 11B is not attracted."

10. Thus, it is clear that the amount of disputed duty, i.e., secured by the bank guarantee, Therefore, cannot be held to be paid to the Revenue. There is no question of its refund and, Therefore, Section 11B (Section 27 in this case) is not attracted. The Supreme Court in Para 11 of the said judgment directed as under :-

"We reiterate our direction to the 1st and 2nd respondents forthwith, to repay to the State Bank of Patiala, Overseas Branch, Millar Ganj, Ludhiana, the amount of Rs. 1,18,00,000/- collected upon the bank guarantees within two weeks."

11. The Tribunal has used the word "refund", but in fact it is not refund because on payment of the amount, the bank guarantee of the same amount is required to be furnished by the petitioner and actually it is a "repayment" as directed by the Supreme Court in the case of Oswal Agro (supra).

12. We are not examining the aspect whether the Tribunal had the jurisdiction to pass such an order or not in view of the facts and circumstances of the case as in view of the order passed by the Tribunal, status quo ante is directed to be maintained and we feel that that would be an appropriate order in this case.

13. In these circumstances, no interference with the impugned order is called for and the Writ Petition (CW 6712/2002) is disposed of accordingly.

14. In view of the order which we have passed in the aforesaid writ petition (CW 6712/2002), the Writ Petition (WPC 327/2003) filed by the assessed has become infructuous and stands disposed of as such.

15. At the request of the learned Counsel for the assessed, we direct that the revenue shall deposit the amount in the Citi Bank, 3 Parliament Street, New Delhi to enable the said bank to immediately issue a bank guarantee in favor of the Commissioner Customs, ICD, Tughlakabad in terms of the earlier bank guarantee issued by the said bank. The bank guarantee shall be issued for a period of two years initially and thereafter it shall be renewed automatically if it is not invoked or discharged in view of the orders that may be passed by the competent authorities.