(2015) 03 BOM CK 0171

In the Bombay High Court

Case No : Customs Appeal No. 87 of 2014

Commissioner of Customs (Import) APPELLANT

Vs

Kodak India Ltd. RESPONDENT

Date of Decision : 30-03-2015

Acts Referred:
Customs Act, 1962 — Section 27

Citation : (2015) 320 ELT 779

Hon'ble Judges : B.R. Gavai, J;A.S. Gadkari, J

Bench : Division Bench

Advocate : Pradeep S. Jetly, for the Appellant; Sujay Kantawala and Brijesh Pathak, Advocates for the Respondent

Judgement

1. The appellant Revenue has approached this Court being aggrieved by the Judgment and Order passed by the learned CESTAT dated 24-12-2013 thereby dismissing the appeal filed by the Revenue. The respondent had imported 20 Rolls Colour Graphic film in Jumbo Rolls from Kodak, U.S.A. on 9-12-1996 and filed Bill of entry for assessable value of Rs. 1,53,64,149/-. The bill of entry was assessed under CTH 3702 at duty rate of 30% + 2% + 15% CVD amounting to Rs. 79,58,629/-. The duty was paid on 16th December, 1996. Subsequently, the Respondent filed a refund claim on 13-6-1997 for an amount of Rs. 11,95,219/-. Vide order dated 17-3-1998 the refund claim was rejected. Being aggrieved thereby the respondent filed an appeal before the Commissioner of Customs (Appeals). The Appellate Authority vide order dated 16-10-2000 remanded the matter to the adjudicating authority on the ground that the adjudicating authority had disqualified the refund claim without considering the documentary evidence submitted by the respondents. On remand, the original authority vide order dated 23-10-2003 sanctioned the refund amount of Rs. 11,95,219/- under Section 27 of the Customs Act, 1962 (hereinafter referred to as the said Act).

2. Being aggrieved thereby the Revenue preferred an appeal before the Commissioner of Customs (Import) before the Appellate Authority. The appellate

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authority vide order dated 6-1-2005 accepted the appeal of the department on the ground that the respondents were entitled to the refund only when they rebut the presumption of unjust enrichment against them. Being aggrieved thereby, an appeal was preferred before the CESTAT. The CESTAT vide its order dated 29-4-2005 set aside the order in appeal passed by the Commissioner (Appeal) and referred the case back to the Commissioner (Appeal) for fresh decision only for decision on the issue of unjust enrichment, after examining all relevant documentary evidence produced by the respondents herein and to pass fresh order after hearing the parties afresh. Vide order dated 19-10-2005, the original authority Commissioner (Appeals) upheld the claim of assessee and rejected the departmental appeal.

3. Being aggrieved thereby the appeal is preferred before the CESTAT. The CESTAT on 24-12-2013 has also dismissed the appeal. Hence, the present appeal.

4. Shri Pradeep Jetley, learned Counsel for the appellant submits that substantial question of law arises as to whether a refund claim can be entertained, without the order of assessment, having been challenged. The learned Counsel submits that without there being any modification or revision in the assessment order at an appellate or revisional stage, claim for refund could not have been entertained. The learned Counsel relies on the various judgment including the Judgment of the Division Bench of this Court in Aurangabad Paper Mills v. Union of India reported in 2013 (298) E.L.T. 214 (Bom.) to which one of us (B.R. Gavai, J.) is a party.

5. Shri Kantawala, learned Counsel for the respondents submits that appeal arises purely out of the concurrent orders passed by the three authorities. The learned Counsel submits that since there is no perversity in the findings of the three authorities, i.e., by the Original Authority, by the Commissioner (Appeals), by the CESTAT, present appeal would not be tenable.

6. No doubt that Shri Jetley is justified in relying on the judgment of this Court in the case of Aurangabad Paper Mills (supra) holding that unless assessment order is challenged, claim for refund would not be tenable.

7. However, in the present case, undisputedly, the learned CESTAT had directed the learned Commissioner (Appeals) to examine the issue as to whether the respondents/assessee makes out a case and remanded for fresh decision on the issue of unjust enrichment after examining all relevant documentary evidence produced by the respondents and to pass fresh order after hearing the parties afresh. Learned Commissioner (Appeals) vide order dated 19-10-2005 on the basis of the certificate of Chartered Accountant and the details of balance sheet found that the claim of refund as granted by the original authority requires no interference. The same has been upheld by the learned CESTAT. The learned CESTAT had restricted the issue for determination regarding unjust enrichment after examining all relevant documentary evidence produced by the respondents. The same was not challenged by the department and the Revenue submitted to

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the said order. In that view of the matter, the proceedings before the Commissioner (Appeals) were limited only for examination of the issue as to whether a case of unjust enrichment on the basis of material placed on record. The finding of fact arrived by Commissioner (Appeals) is confirmed by the learned CESTAT. In that view of the matter, we find that the present appeal only arises out of the concurrent finding of fact as recorded by three authorities and as such no substantial question of law arises for consideration. The Appeal is therefore, rejected.

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