(2010) 10 GUJ CK 0044

In the Gujarat High Court

Case No : Tax Appeal No. 2042 of 2009

Commr. of Cus. (Preventive) APPELLANT

Vs

Ghaziabad Ship Breakers Ltd. RESPONDENT

Date of Decision : 07-10-2010

Acts Referred:
Customs Act, 1962 — Section 128, 129(E), 130, 131, 27

Citation : (2010) 259 ELT 522 : (2013) 19 GSTR 115

Hon'ble Judges : Harsha Devani, J;D.A. Mehta, J

Bench : Division Bench

Advocate : Amee Yajnik, for the Appellant; None, for the Respondent

Final Decision : Dismissed

Judgement

H.N. Devani, J.—In this appeal u/s 130 of the Customs Act, 1962, the Appellant-revenue has challenged order dated 16th April, 2009 made by the Customs, Excise & Service Tax Appellate Tribunal (the Tribunal) proposing the following three questions:

"(a) Whether the cestat was correct in holding vide Order dated 16-4-2009, that pursuant to the remanding back the matter to the Commissioner of Customs (Appeals) vide the cestat''s Order dated 13-12-2005, the refund-liability arises in favour of the Respondents and the amount of duty paid by the Respondents till then to be treated automatically as pre-deposit, whereas as per the facts of the case the said amount of duty was not paid by the Respondents as pre-deposit in terms of Section 129E of the Customs Act, 1962, but in pursuance of the OIO No. 238 to 248/SBY-De novo/2000-01 dated

1. On appeal from 2009 (246) E.L.T. 478 (Tri. - Ahmd.).

19-3-2001 passed by the Deputy Commissioner of Customs, Bhavnagar?

(b) Whether in the facts and circumstances of the case, the cestat was correct in fastening the interest holding that the interest liability starts to run from

12-3-2006 onwards till the date of payment of refund of duty, particularly when the doctrine of merger does not apply with reference to the OIO No. 238 to 248/ SBY-De novo/2000-01 dated 19-3-2001 in the case of the Respondents in view of the fact that the Order No. 105 to 108/2003-B dated 14-2-2003 passed by the cestat had not at all altered the said OIO dated 19-3-2001 of the Deputy Commissioner of Customs, Bhavnagar, as a consequence of which duty of Rs. 16,21,583/- was paid by the Respondents, but cestat had in fact set aside the OLA No. 672 to 682/2002 (265 to 275-CCP)/Cus/Commr (A) Ahd. dated 21-6-2002 of the Commissioner of Customs (Appeals), Jamnagar with direction to the Commissioner of Customs (Appeals), Jamnagar to entertain the appeal of the Respondents after revival thereof?

(c) Whether in the facts and circumstances of the case, the cestat was correct in fastening the interest-liability on the Department, when the Commissioner of Customs (Appeals), Jamnagar had though set aside the OIO No. 238 to 248/SBY-De novo/2000-01 dated 19-3-2001 of the Deputy Commissioner of Customs, Bhavnagar, vide the OLA No. 14 to 17/JMN/2006, dated 6-2-2006, whereby he directed the original adjudicating authority to re-assess the Bills of Entry after taking into consideration the specific directions i.e. after supplying the Respondents the relied upon documents and to arrive at the correct quantity and value of the imported goods?"

2. Without going into the chequered history of the case which is chronologically set out in the impugned order of the Tribunal, the basic facts necessary for determination of the controversy in issue are that vide order dated 19-3-2001 made by the adjudicating authority duty demand came to be confirmed against the Respondent. The appeal against the said order came to be dismissed for non-payment of the amount of pre-deposit. Ultimately, the matter was carried up to the Supreme Court. During the period September, 2004 to November, 2004, the Respondent-Assessee deposited the entire demand made under the order in original when the SLP to file appeal against the order of the High Court was pending before the Supreme Court. On 15th July [2006 (193) E.L.T. 142 (S.C.)], the Supreme Court passed an order in the following terms:

"In view of the fair stand taken by the learned Solicitor General of India that in case the Appellant deposit the full amount, as directed by the Tribunal, as a condition for hearing the appeal, the impugned orders may be set aside. It is, therefore not necessary to go into the questions sought to be raised in these appeals. Accordingly, without expressing any opinion on the merits of the case, we set aside the impugned orders and direct the deposit of the amount by the Appellants in terms of the order of the Tribunal within a period of six weeks from today. In case the said amount is deposited, the appeals before the Tribunal would stand restored and decided on merits. In case of default in deposit, the impugned orders would stand.

The civil appeals are, accordingly, disposed of.

No costs."

3. Pursuant to the aforesaid order the matter came up before the Tribunal, and the Tribunal vide order dated 13-12-2005 recorded that the Respondent had complied with the stay order and remanded the matter to Commissioner (Appeals) for deciding the same on merits. Commissioner (Appeals), in turn, remanded the matter to the Adjudicating Authority. The Adjudicating Authority vide order dated 24th April, 2006 held that the Assessee was liable to pay differential duty amounting to Rs. 9,21,836/- and ordered that the same should be adjusted against duty of Rs. 16,21,583/- already paid by the Assessee. It was directed that the excess duty amounting to Rs. 6,99,797/- would be admissible for refund subject to the fulfillment of the conditions u/s 27 of the Act and that the Assessee may file refund claim if so desired. Against the order of the Adjudicating Authority, the Assessee preferred the appeal before Commissioner (Appeals) who dismissed the appeal. The Assessee carried the matter in second appeal before the Tribunal which came to be allowed.

4. The learned Senior Standing Counsel for the Appellant has assailed the impugned order of the Tribunal submitting that amount paid by the Assessee was towards the demand of duty and was not by way of pre-deposit, hence, the Adjudicating Authority was justified in directing the Respondent to file refund claim u/s 27 of the Act. It was submitted that the Assessee had not deposited the amount pursuant to any order of pre-deposit made by any appellate authority or judicial forum u/s 129E or Section 131 of the Act, and that the amount had been paid prior to the order dated 15-7-2005 made by the Supreme Court and as such the amount in question not being in the nature of pre-deposit, the Respondent was liable to make application for refund u/s 27 of the Act. It was urged that the Tribunal was not justified in holding that the amount paid by the Assessee was by way of pre-deposit and that the appeal does give rise to questions of law and as such deserves to be admitted.

5. Considering the facts of the case as well as the submissions advanced by the learned Counsel for the Appellant, it appears that the main grievance ventilated in the appeal is that the amount paid by the Respondent-Assessee was towards the payment of duty and not by way of pre-deposit u/s 129E of the Act and as such the Respondent was liable to make an application for refund u/s 27 of the Act. For the purpose of deciding as to whether the amount in question had been paid by way of pre-deposit or was towards payment of duty, it would be necessary to refer to the provisions of Section 129E of the Act which reads thus:

"129-E. Deposit, pending appeal, of duty and interest demanded or penalty levied. - Where in any appeal under this Chapter, the decision or order appealed against relates to any duty in interest demanded in respect of goods which are not under the control of the customs authorities or any penalty levied under this Act, the person desirous of appealing against such decision or order shall, pending the appeal, deposit with the proper officer the duty in interest demanded or the penalty levied:

Provided that where in any particular case the Commissioner (Appeals) or the Appellate Tribunal is of opinion that the deposit of duty in interest demanded or penalty levied would cause undue hardship to such person, the Commissioner (Appeals) or, as the case may be, the Appellate Tribunal may dispense with such deposit subject to such conditions as he or it may deem fit to impose so as to safeguard the interests of revenue:

Provided further that where an application is filed before the Commissioner (Appeals) for dispensing with the deposit of duty and interest demanded or penalty levied under the first proviso, the Commissioner (Appeals) shall, where it is possible to do so, decide such application within thirty days from the date of its filing.

6. On a plain reading of Section 129E of the Act, it is apparent that the same provides that a person desirous of appealing against an order relating to any duty or interest demanded in respect of goods which are not under the control of the customs authorities or any penalty levied under the Act, is required to deposit the duty and interest demanded or penalty levied with the proper officer. Under the section such amount has to be paid by such person on his own and does not require any order to be passed before making such deposit. Deposit of the said amount is a pre-condition for entertaining the appeal. What is important to note is that the amount to be deposited before the appeal can be entertained on merits is nothing else but the amount of duty and/or interest, or penalty demanded in consequence of an order-in-original. In principle the deposit is of duty or interest or penalty. The term "pre-deposit" is conveniently used to denote payment before entertaining the appeal. It is only a mode of payment prescribed by legislature with an intention to protect interest of Revenue.

7. However, if the person desirous of preferring appeal seeks waiver of the pre-deposit on the ground of undue hardship as contemplated under Sub-section (2) of Section 129E, he is required to file an application seeking dispensation of such deposit, in which case he is required to make the pre-deposit in terms of the order that may be passed by the Commissioner (Appeals) or the Appellate Tribunal. Thus, the contention that it is only the payment made pursuant to any order of any appellate authority or judicial forum u/s 129E or Section 131 of the Act would fall within the ambit of pre-deposit under the said provision is fallacious and contrary to the provisions of the section itself and as such does not merit acceptance.

8. Another aspect of the matter is that u/s 129E of the Act in case of any appeal under the Chapter, the person desirous of appealing against an order relating to any duty and interest demanded in respect of goods which are not under the control of the customs authorities or any penalty levied under the Act, is required to deposit with the proper officer duty and interest demanded or penalty levied. Section 129E of the Act falls under Chapter XV under the heading Appeals. Chapter XV of the Act is comprised of various provisions from Section 128 to Section 131C of the Act. Section 130 of the Act which provides for appeal to High

Court and Section 130E of the Act which provides for appeal in Supreme Court also fall under Chapter XV. Thus, an appeal before the Supreme Court would also be an appeal under the said Chapter as envisaged u/s 129E of the Act. Thus, any amount deposited during the pendency of an appeal before the High Court or the Supreme Court would also be by way of deposit u/s 129E of the Act and has to be treated accordingly.

9. Adverting to the facts of the present case, it is an undisputed position that the amount in question had been deposited by the Respondent during the pendency of the appeal before the Supreme Court. In the circumstances, it is apparent that the amount so deposited would squarely fall within the ambit of Section 129E of the Act and has to be treated as pre-deposit. Thus, the contention raised on behalf of the Appellant that the amount has been paid by way of duty and not pre-deposit, being contrary to the provisions of Section 129E of the Act, does not merit acceptance.

10. In the light of the aforesaid, it is not possible to state that the Tribunal has committed any legal error so as to warrant interference. No question of law, much less, a substantial question of law can be stated to arise out of the impugned order of the Tribunal. The appeal is, accordingly, dismissed.

