(2016) 03 DEL CK 0003

In the Delhi High Court

Case No : Writ Petition (C) No. 3059 of 2003

Diwan Chand Satya Pal Aggl. APPELLANT

Vs

Union of India RESPONDENT

Date of Decision : 21-03-2016

Acts Referred:

Citation : (2017) 345 ELT 182

Hon'ble Judges : S. Muralidhar and Vibhu Bakhru, JJ.

Bench : Division Bench

Advocate : Shri M.P. Devnath, Abhishek Anand and Yogendra Aldak, Advocates, for the Petitioner; Shri Satish Kumar, SSC, for the Respondent

Final Decision : Allowed

Judgement

1. This is a writ petition that has been preferred in peculiar circumstances. The challenge in the petition is to a notice dated 5th April, 2003 issued by the Assistant Commissioner of Customs (Import & General) New Custom House, Near IGI Airport, New Delhi asking the Petitioner, inter alia, to pay a sum of Rs. 49,13,969/- which comprised duty, redemption fine, interest under Section 28AB of the Customs Act, 1962 (''Act'') and penalty under Section 114A of the Act.

2. The background to the petition is that between March, 1990 to December, 1992, the Petitioner, which is a diagnostic centre engaged in providing diagnostic services, imported seven consignments of medical equipment for use in the diagnostic centre. On the strength of the certificate issued by the Director General of Health Services (DGHS), the Petitioner availed exemption from payment of customs duty under Customs Notification No. 64/88, dated 1st March, 1988. The bills of entries (B/Es) were assessed by the Customs Department and the equipments imported were cleared without payment of customs duty.

3. More than ten years thereafter, on 8th September, 1998, a Show Cause Notice (SCN) was issued by the Assistant Commissioner Customs stating that the

Petitioner ought not to have availed by the exemption under Notification No. 64/88 since the Petitioner had failed to fulfil the conditions subject to which such exemption was granted. The SCN proposed to recover the differential duty in respect of the said seven consignments. The SCN also proposed imposition of penalty on the Petitioner under Sections 112 and 114A of the Act along with penal interest under Section 28AB of the Act.

4. At this stage, it is required to be noticed that both Sections 28AB of the Act and Section 114A of the Act were introduced in the Act by means of Act 33 of 1996 with effect from 28th September, 1996. In other words, on the date that the equipments were imported by the Petitioner, the aforementioned two provisions did not exist in the statute.

5. By a order dated 30th September, 1999, the Commissioner of Customs, Air Cargo (Respondent No. 2) passed an adjudication order holding that the Petitioner was liable to pay customs duty in the sum of Rs. 14,80,943/- under the proviso to Section 28 of the Act. The equipments imported by the Petitioner were confiscated under Section 111(o) of the Act and the redemption fine of Rs. 2 lakhs was imposed. Additionally, a penalty of Rs. 32,47,446/- (equal to the duty plus interest) was levied under Section 114A of the Act. Further, interest under Section 28AB of the Act was also imposed.

6. Aggrieved by the above adjudication order, the Petitioner preferred an appeal before the Customs Excise & Gold (Control) Appellate Tribunal (CEGAT) subsequently, re-designated as Customs Excise Service Tax Appellate Tribunal (CESTAT). Among the grounds raised in the appeal filed by the Petitioner before the CESTAT, one related to the non-applicability of Section 28AB of the Act as well as Section 114A of the Act.

7. By an order dated 29th May, 2000, in Diwan Chand Satyapal Agarwal I.R. Centre v. CCE, New Delhi - 2001 (136) E.L.T. 1116 (Tri.-Del.) the CEGAT allowed the Petitioner''s appeal. Specific to the question of penalty and interest, the CEGAT observed as under in Para 11 of the said judgment :

"11. As regards penalty under Section 114A and the interest demanded under Section 28AB, we find that the said provisions were enacted subsequent to the imports and therefore the said provisions will not be applicable in the facts and circumstances of the case. The penalty under Section 114A and interest demanded under Section 28AB cannot therefore sustain."

8. Aggrieved by the above order, the Customs Department, i.e., the Commissioner of Customs filed an appeal being Civil Appeal No. 52 of 2001 [2002 (142) E.L.T. A74 (S.C.)] before the Supreme Court. Interestingly, in the memorandum of appeal, there was no specific ground urged as regards the non-applicability of Section 114A and 28AB of the Act.

9. The said appeal was disposed of by the Supreme Court by an order dated 21st August, 2001, which reads as under :

"The issue involved in this matter stands covered by a decision or Three Judge Bench of this Court in CA No. 2680 of 2000 entitled Commissioner of Customs (Import), Mumbai v. M/s. Jagdish Cancer & Research Centre decided on 2nd August, 2001.

Since the matter stands covered by this judgment, as noticed above, the pleas raised by M/s. Dewan Chand Satyapal Agarwal Imaging & Research Centre fail and the order of the CEGAT is not sustainable. In the result, the appeal is allowed, the order of the tribunal is set aside and that of the Commissioner of Customs, New Delhi is restored. There will be no order as to costs."

10. Following the above order a notice was issued by the Department to the Petitioner on 4th/5th September, 2001 asking it to deposit "duty demanded, redemption fine, penalty and interest up to the date of payment" in terms of the order dated 30th September, 1999 within ten days.

11. In reply thereto, the Petitioner informed the Department that they were not liable to pay penalty and penal interest under Section 114A and Section 28AB of the Act respectively since the portion of the Commissioner''s order which levied such penalty and penal interest was set aside by the CEGAT and that portion of the CEGAT order was not challenged by the Department before the Supreme Court.

12. The Petitioner also filed IA No. 2 in the disposed of Civil Appeal No. 52/2001 before the Supreme Court on 5th December, 2001 seeking a clarification that the Petitioner would not be liable to pay any penalty or penal interest under the aforementioned provisions. This application was disposed of by the Supreme Court on 22nd April, 2002 by the following order :

"We are not inclined to entertain I.A. 2 by reason of the fact that the point in issue as raised in this I.A. was never raised before any Court at any point of time. As such, this I.A. is dismissed. This order of dismissal, however, shall not prevent the applicant from taking other steps in accordance with law, if available."

13. The Petitioner made a further representation on 7th January, 2003 to the Department. The Assistant Commissioner, Import & General, New Customs House by letter dated 17th January, 2003 informed the Petitioner that interest and penalty in the sum of Rs. 49,13,969/- remained unpaid and should be deposited within 15 days. On 27th March, 2003, the Petitioner once again pointed out that the imposition of penalty and interest under the aforementioned two provisions was not warranted. A further representation was made on 9th April, 2003 by the Petitioner and, thereafter, the present writ petition was filed.

14. On 8th May, 2003, this Court while issuing notice in the petition directed the Respondent not to take any coercive steps against the Petitioner for recovery of interest (Rs. 17,66,523/-) and penalty (Rs. 32,47,446/-) as indicated in the impugned notice of demand dated 5th April, 2000.

15. Thereafter, on 30th September, 2003, while issuing Rule DB, the Court passed the following interim order in C.M. No. 5190/2003 :

"Having heard learned counsel for the parties for some time, we are of the view that the matter requires consideration.

Rule D.B.

Leave granted to the parties to apply for early hearing.

CM No. 5190/2003

We have heard learned counsel for the parties.

Having perused the orders passed by the Supreme Court in Civil Appeal No. 52/2001 and in petitioner''s IA No. 2/2001, dated 22nd April, 2002 and bearing in mind the ratio of the decision of the Apex Court in Commissioner of Central Excise v. Elege Equipment Ltd., 2001 (128) E.L.T. 52 (S.C.), we are of the view that it is a fit case where interim relief needs to be granted to the petitioner. We may also note that against the additional demand of duty, redemption fine, interest under Section 28AB and penalty under Section 114A of the Customs Act, 1962, the petitioner has already made full payment towards the duty and redemption fine and against interest a sum of Rs. 4 lacs has been paid.

Accordingly, we make our interim order dated 8th May, 2003 absolute till the disposal of the writ petition, subject to the petitioner''s furnishing a security, other than a bank guarantee for the balance amount to the satisfaction of the Commissioner of Customs (Import & General), New Custom House, New Delhi.

The applications stands disposed of."

16. It is stated that the Petitioner has furnished a security for the balance sum which remains stayed in terms of the aforementioned order.

17. This Court has heard the submissions of Mr M.P. Devnath, learned Counsel for the Petitioner and Mr. Satish Kumar, learned Senior Standing Counsel for the Respondent.

18. The fact that, on the date of import of the seven consignments by the Petitioner, i.e. March, 1990 to December, 1992, neither Section 28AB of the Act nor Section 114A of the Act existed in the statute, is not disputed. It is not the case of the Department that these provisions, introduced with effect from 28th September, 1996, had retrospective operation. Therefore, it is clear that the said two provisions could not be applied to the Petitioner for the non-compliance with the conditions attached to under Notification No. 64/88.

19. It is perhaps for this reason that when the CEGAT by its aforementioned order dated 29th May, 2000 set aside the levy of penalty and penal interest on the Petitioner, the Department Revenue did not question that portion of the CEGAT''s order in its appeal before the Supreme Court. The Department was aware that Sections 28AB and 114A of the Act could not be made applicable to

the Petitioner notwithstanding that the Petitioner may have not conformed to the conditions for availing the exemption under Notification No. 64/88.

20. In allowing the appeal of the Revenue by its order dated 21st August, 2001, the Supreme Court referred to its judgment in Jagdish Cancer & Research Centre v. Commissioner of Customs - 2001 (132) E.L.T. 257 (S.C.). A perusal of the said order shows that it only made a reference to Section 125(2) of the Act. There was no occasion for the Supreme Court to have considered the applicability of either Section 114A or Section 28AB of the Act. Clearly, therefore, the judgment of the Supreme Court in Commissioner of Customs v. Jagdish Cancer & Research Centre (supra) was not a precedent for setting aside the order of the CEGAT and restoring the order of the Commissioner of Customs on the question of the applicability of either Section 114A or 128AB of the Act.

21. The question, therefore, that arises is whether as a result of the order dated 29th August, 2001 of the Supreme Court, the entire order dated 30th September, 1999 passed by the Commissioner of Customs should be held to have revived or only that portion of the order which pertained to the customs duty and interest thereon that was payable by the Petitioner, as a result of being found not eligible to avail of the exemption under the Notification No. 64/88?

22. When this issue was raised by the Petitioner before the Supreme Court by an application, the Supreme Court declined to clarify its order dated 21st August, 2001. However, the Supreme Court clarified that the dismissal of the application "shall not prevent the Petitioner from taking other steps in accordance with law if available".

23. The only issue raised before this Court by the Department is that instead of filing the present writ petition, the Petitioner should have again filed an appeal before the CESTAT against the order of the Commissioner dated 30th September, 1999.

24. However, the Court is unable to appreciate how the Petitioner could possibly have gone before the CESTAT when the order dated 30th September, 1999 of the Commissioner has been upheld by the Supreme Court. The CESTAT would have been bound by the order of the Supreme Court.

25. The limited issue before this Court concerns the applicability of Section 114A and 28AB of the Act to the imports in question made by the Petitioner. In law there is no denial by the Department that the said two provisions did not exist in the statute at the time of import of the seven equipments by the Petitioner. In other words, the Department is unable to deny that neither Section 114A nor Section 28AB could have been invoked as far as the SCN issued to the Petitioner was concerned.

26. The legal position being explicit, the Court considers it necessary in the interests of justice to declare that the impugned notices issued to the Petitioner by the Department seeking to recover the penal interest under Section 28AB as

well as the penalty under Section 114A of the Act pursuant to the order dated 30th September, 1999 passed by the Commissioner of Customs are unsustainable in law.

27. The writ petition is accordingly allowed. Consequently, the impugned notice dated 5th April, 2003 and further consequential steps taken by the Respondents to recover the aforementioned amounts are hereby quashed.

28. The Petitioner is relieved of the obligation to furnish security in terms of the order dated 30th September, 2003 passed by the Court. Any amount paid by the Petitioner either towards the penalty under Section 114A of the Customs Act or the interest under Section 28AB of the Act shall be refunded to the Petitioner in accordance with law within a period of four weeks from today.

