(2012) 02 DEL CK 0104

In the Delhi High Court

Case No : Writ Petition (Civil) No. 3985 of 2011

Em Pee Syndichem Pvt. Ltd. APPELLANT

Vs

Union of India and Another RESPONDENT

Date of Decision : 07-02-2012

Acts Referred:

Citation : (2012) 02 DEL CK 0104

Hon'ble Judges : Sanjiv Khanna, J;R.V. Easwar, J

Bench : Division Bench

Advocate : K. Kumar and Mr. P.K. Mittal, for the Appellant; Jatan Singh, Advocate for UOI, Ms. Sonia Sharma, Advocates for R-2, for the Respondent

Judgement

Sanjiv Khanna, J.—The petitioner EMPEE Syndichem Pvt. Ltd., on 24th June,2005 had deposited Customs duty of Rs. 1,52,251/- with the Commissioner of Customs, I.G. Airport, in respect of a consignment of industrial synthetic diamond powder imported from Ireland vide 5 invoices and on bill of entry No. 969856 dated 23rd June, 2005. The petitioner has placed on record the said bill of entry for home consumption in which the description of aforesaid goods stands stated and the name of the supplier/exporter was described as "Element Fix Ltd., Ireland". On 24th June, 2005, it was noticed that the goods imported did not tally and match the goods mentioned in the bill of entry and the invoices. The name of the importer mentioned on the packaging was "Element Fix Limited, Taiwan", whereas the petitioner was the importer.

2. The petitioner got in touch with the exporter Element Fix Limited, Ireland and came to know that due to the fault and negligence of the consolidator, the petitioner''s consignment had been sent to Taiwan and the consignment that was meant for Element Fix Ltd., Taiwan had been sent to India instead. The petitioner accordingly wrote a letter to the Commissioner of Customs dated 30th June, 2005, stating that they were not at fault and that the matter had been enquired into by the supplier who had confirmed the mistake. The correspondence exchanged with the supplier was enclosed with this letter. For the purpose of

clarity and to put the record straight, there is no allegation and it is not the contention of the respondents that the petitioner was involved or had any hand or was responsible for the wrong goods being shipped to India. The respondents have not challenged or questioned the intention, nor have they stated that the conduct of the petitioner lacked bonafides or was questionable.

3. By letter dated 30th June, 2005, the petitioner asked for permission from the authorities to re-export the consignment.

4. After about 22 months, the Commissioner of Customs, granted permission for re-export of the consignment on 1st May, 2007, and that too after imposition of penalty of Rs. 10,000/-. Accordingly, the goods were entered for re-export on 27th June, 2007.

5. The petitioner claimed refund or drawback of Rs. 1,49,207/- being 98% of the customs duty of Rs. 1,52,251/- paid by them. On being denied the refund, as facts stated below exposit, it has approached this Court by way of the present writ petition.

6. The Assistant Commissioner of Customs by letter dated 31st January, 2008 raised objections to the refund, on the ground that the re-export had been made beyond two years. The petitioner replied and answered the objections stating that the delay was occasioned because of lapses and the time taken by the Custom authorities to grant permission for re-export. Prayer for condonation of delay was also made vide letter dated 12th March, 2008. The Assistant Commissioner of Customs (Drawback) vide letter dated 15th March, 2008, informed the petitioner that it was beyond his competence to condone the delay and the letter dated 31st January, 2008, might be treated as an appealable order.

7. After receipt of this letter, the petitioner took two steps. Firstly, on 14th May 2008, a representation/application was made to the Central Board of Excise and Customs (CBEC, for short) for extension of time for re-export beyond two years under proviso to Section 74 of the Customs Act, 1962 (Act, for short) and secondly, filed an appeal before the Commissioner (Appeals) against the order dated 15th March, 2008.

8. The Commissioner (Appeals) vide his letter dated 17th December, 2008, rejected the appeal on the ground that the goods were not entered for re-export within two years from the date of payment of customs duty. The CBEC/Chief Commissioner had not extended the time. Accordingly, the claim u/s 74 of the Act was barred by time. He further held that the appeal was barred by time by 58 days as the order passed by the Assistant Commissioner was dated 31st January, 2008. It may be noticed here that vide letter dated 15th March, 2008, the petitioner was informed, for the first time, that the order dated 31st January, 2008, should be treated as appealable order. In fact, the so-called order dated 31st January, 2008, is a letter written by the Assistant Commissioner in his own handwriting to the petitioner. In the said letter it was not stated that this was an order rejecting the claim and it should be treated as an appealable order. Thus,

the finding of the Commissioner (Appeals) that the appeal was barred by time is clearly wrong and contrary to law.

9. The application for extension of time filed by the petitioner with CBEC on 14th May, 2008, remained pending till 23rd October, 2008. By letter 23rd October, 2008, Technical Officer (DBK), CBEC wrote to the Chief Commissioner of Customs, Delhi Zone, stating that the application for condonation of delay filed by the petitioner should be decided by him in view of the powers conferred on the Chief Commissioner to condone delay of upto 12 months, beyond the prescribed period of 2 years. The Chief Commissioner of Customs was requested to consider the case expeditiously. The petitioner thereafter wrote letters dated 1st December, 2008 and 10th December, 2008, for consideration of their claim for extension of time for re-export beyond two years. On 15th December, 2008, the Chief Commissioner of Customs, Delhi Zone, passed an order rejecting the request for extension of time on the ground that Section 74 of the Act was not applicable and, therefore, extension of time under the proviso to Section 74 cannot be granted. The reasoning portion of the order passed by the Chief Commissioner of Customs, reads as under:-

Under Section 74 of the Customs Act, 1962 drawback of the duty paid on the goods which have been imported into India is allowable subject to export of the goods. Goods in the facts and circumstances of the case can be said to have been imported into India only if they had been incorporated in and mixed up with the mass of the goods in the country, which though is not the situation in the present case. The goods in this case were left with Customs custody from where they were exported. The goods never came out of the Customs control. The goods were not given ''Out of Charge'' and were not cleared. It is apparent from the above that the goods were never delivered to the importer. Re-export of the goods vis-?-vis drawback claim only arises when the goods have been taken release of the Customs control. Thus the present case being of duty paid on goods but not delivered, is not of drawback u/s 74 of the Customs Act, 1962. Reference in this regard is made to Hon''ble Tribunal decisions in the case of 1990 (31) ECR 68 and 2004 (96) ECC 573 . In the circumstances, when it is not a case of drawback no occasion arises for the Chief Commissioner for exercise of power under proviso to Section 74 (1) (iii) (b) of the Customs Act, 1962.

(Emphasis supplied)

10. Thus after about a year, the respondents Revenue completely changed their stand. Earlier, the stand was that there was delay beyond two years and, therefore, refund of duty/drawback u/s 74 cannot be granted without extension of time by CBEC/ Chief Commissioner. The aforesaid stand and position was reiterated by the Commissioner of Customs (Appeals) in the order dated 17th December, 2008. However, the Chief Commissioner of Customs in his order dated 15th December, 2008, has held that Section 74 of the Act was not applicable as the goods in question were left in the custody of Customs and were never "out of charge" and thus, were not cleared for home consumption. The goods, according

to him, were not imported into India and did not get mixed up with the mass of the goods in the country and therefore section 74 was not applicable.

11. Faced with the aforesaid position, the petitioner had no option but to file the present writ petition inter-alia with the following prayers:

(i) Quash the Department''s letter dated 15.12.2008 being unlawful.

(ii) To Sanction the drawback claim for Rs. 1,49,207/-

(iii) To Sanction the refund of Rs. 10,000/- imposed as penalty contrary to law:

(iv) To award interest to the Petitioner on the drawback amount of Rs. 1,49,207/- from the date of claim till the date of payment.

(v) To award cost for the suffering, legal expenses and harassment faced by the Petitioner.

(vi) Any other order or orders or reliefs as this Hon''ble Court deem fit and proper, under the circumstances of the whole case, may kindly be allowed.

12. The facts narrated above, speak for themselves and elucidate the harassment suffered by the petitioner. The respondents have been taking different stands as is clear from letters dated 31st January, 2008, 17th December, 2008 and the order dated 15th December, 2008. It is rightly pointed out by the petitioner that in case goods had not been imported into the country then there is no question of assessment, demand and payment customs duty. Thus, Rs. 1,52,251/- deposited by the petitioner with the respondents should be refunded.

13. In the counter affidavit filed before us and during the course of arguments, it was contended that Section 74 of the Act is not applicable as the goods had not been cleared for home consumption and were in custody of the Customs. Reliance is placed on decision of the Supreme Court in the case of Garden Silk Mills Ltd. and Another Vs. Union of India and Others, . Secondly, it is submitted that the delay in re-export was on account of the fault of the petitioner as they failed to submit the No Objection Certificate (NOC, for short) from the Reserve Bank of India which was mandated and required for re-export as per CBEC Circular No. 100/2003-Cus dated 28th November, 2003 and Standing Order No. 2/2001 dated 7th March, 2001.

14. The first contention fails to notice that if the petitioner''s case was/is not covered by Section 74, then the duty paid has to be refunded. Respondents however rely upon Section 27 of the Act and submit that the claim for refund is barred by limitation.

15. There are a number of reasons why in the present case, the said plea should not be accepted. For Section 27 of the Act to apply, it is mandatory that duty should have been paid by the petitioner in pursuance to an order of assessment. No assessment order has been placed on record. Further, where duty has been

paid pursuant to an assessment order, the payer can move an application for refund of such duty and interest within the stipulated time. However, the application must be accompanied with documents and other evidence to establish that the amount of duty and interest, if any paid, was refundable. It appears that the petitioner had filed the bill of entry and deposited the custom duty on the basis of the bill of lading. However, when the goods were physically examined by the customs authorities, it was found that goods did not tally with the details mentioned on the bill of entry and it was recorded by the authorities as under:-

As per Bill of Entry and Invoices description of the goods does not tally with the goods found in the pkg. The name of the Importer found on the packages is Element Fix Ltd., Taiwan whereas the name of the importer in the Bill of Entry and invoices is Em Pee Syndichem Ltd., New Delhi.

S.A may like to see the goods.

16. Immediately, thereafter on 30th June, 2005, the petitioner applied to the Commissioner of Customs to re-export the goods. As noticed below, the custom authorities took their own time to grant permission to re-export and their conduct has been adversely commented upon. The permission for re-export was granted on 1st May, 2007, though the request was made on 30th June, 2005. Accordingly, the goods were entered for re-export on 22nd June, 2007 and on the same day request for payment of refund of duty of Rs. 1,52,252 @ 98% being Rs. 1,48,207/- was made. The second proviso to Section 27(1) of the Act stipulates that limitation period of one year or six months will not apply where duty and interest have been paid under protest. Under the fourth proviso to Section 27, if refund becomes payable consequent upon a judgment, decree, order or direction of an appellate authority, one year/six months have to be computed from the date of the judgment, decree, order or direction. In the present case, it was only after the order of re-export was made and the goods were re-exported, that the petitioner could have asked for refund. Prayer for re-export was made immediately. The application for refund made on 22nd June, 2007 cannot be read in isolation and has to be read along with the facts and conduct of the parties. As noticed, the consignment was physically inspected on 24th June, 2005 and it was found that the goods imported did not match and tally with the description of the goods mentioned in the bill of entry/invoices. On 30th June, 2005, the petitioner had filed an application for re-export of goods. These steps were taken in furtherance of and to enable the petitioner to claim refund of the duty paid. The petitioner and respondents had proceeded and assumed that till the goods were re-exported, duty paid cannot be refunded. Time limits u/s 27 have been incorporated to ensure that no belated or stale claims for refund are made as it may not be possible to verify and re-examine the facts. The administration should not be put to inconvenience. In the present case, the lapses and default have been on the part of the Respondents.

17. Even if it is assumed that there was an order of assessment, the same was

required to be rectified u/s 154 of the Act, once it was found that the goods mentioned in the bills of entry were different from the goods shipped. The present case would be covered u/s 154 of the Act as it is a case of errors arising out of incidental slip or omission. The respondents should not have computed the duty and passed an order without inspecting the goods and noticing that the goods were not meant for importer and were different from the goods mentioned in the bill of entry/invoice. This was apparent from the description on the package itself. The goods or the packages were never inspected by the customs authorities before 24th June, 2006. Had the goods been inspected by the custom authorities before asking the petitioner to deposit the duty, the error or mistake would not have been occurred.

18. Section 18 of the Act deals with refund of duty provisionally paid subject to final assessment. In such cases, it is the obligation and duty of the respondents to suo moto or on their own refund the duty paid provisionally subject to final assessment (See decision dated 9th January, 2012 by this Bench in Commission of Customs versus Indian Oil Corporation, CUSAA No. 43/2011 in, which reference is made to Mafatlal Industries Ltd. and Others Vs. Union of India (UOI) and Others, , Commissioner of Central Excise, Chennai Vs. T.V.S. Suzuki Limited, Hosur, and Commissioner of Central Excise, Mumbai-II Vs. Allied Photographics India Ltd.,)

19. In the case of Garden Silk Ltd. (supra), the question which had arisen and was decided by the Supreme Court related to computation of import value and whether landing charges, when and after the goods have been discharged from the ship, could be added. In this context, Sections 12, 14 and 15 of the Act were interpreted. It was held that Section 14 is a deeming provision and the legislative intent is clear that the actual price of the imported goods would include the landing costs. While examining the said contention, the Supreme Court held that the taxable event is reached at the time when the goods reach the customs barrier and the bill of entry for home consumption is filed. The goods are imported into India when they enter the territorial waters as per Section 12 of the Act, but it continues and the import is complete when the goods become part of the mass of goods of the country. The Supreme Court noticed their earlier decisions in Union of India and others Vs. Apar Private Ltd. and Others, ; Bharat Surfactants (Private) Ltd. and Another Vs. Union of India (UOI) and Another, ; and Dhiraj Lal R. Vohra and Others Vs. Union of India (UOI) and Others, . In the said decisions, it has been held that import of goods is complete u/s 12, the moment the goods enter the territorial waters. Accordingly customs duty is not payable, if no duty was payable when the goods had entered the territorial waters but was imposed thereafter.

20. The aforesaid decision merely shows that there can be considerable debate as to when Section 74 would apply and when Section 27/18 would be applicable. In such cases, it would be desirable that a holistic and a pragmatic approach is adopted rather than a technical approach. It would be appropriate to reproduce

the following paragraph from decision dated 3rd June 2011 in Indgalonal Investments & Finance Ltd. versus CIT (W.P. (C) No. 7127/2008) which reads:-

12. Another principle is that the refund provisions should be interpreted in a reasonable and practical manner and when warranted liberally in favor of the assessee. If there is substantial compliance of the provisions for refund, it may not be denied because it is not made strictly in the form or the prescribed manner. The forms prescribed may be merely intended to facilitate payment of refund. The tax authorities have to act judiciously when they exercise their power under an enactment. The power given to the tax authorities under the enactments are mandated with the duty to exercise them when the statutory provisions so warrant. It is imperative upon them to exercise their authority in an appropriate manner. In case the Assessing Officer or tax authority comes to know that an assessee is entitled to deduction, relief or refund on the facts of the case and the assessee has omitted to make the claim, he should draw the attention of the assessee. The tax authorities should act as facilitators and not occlude and obstruct. The role of tax authorities has been aptly described in Assistant Commissioner of Income Tax Vs. Rajesh Jhaveri Stock Brokers Pvt. Ltd., as :-

19... The function of the assessing officer is to administer the statute with solicitude for the public exchequer with an inbuilt idea of fairness to taxpayers.

21. The second contention is also without merit. The circular No. 100/2003-CUS dated 28th November, 2003, reads as under:-

I am directed to refer to the instructions contained in Board''s letter F- No. 18/1/59-Cus.(CRC), dated 08.06.1959 on the above mentioned subject wherein it was stated that the importer intends to re-export the same, the Commissioner may use his discretion and release the goods on payment of a nominal penalty or without any penalty as he deems fit, provided that he is satisfied that the goods have been imported as a result of bona fide mistake and contrary to the Importer''s instructions subject to production of a "no objection certificate" from the Reserve Bank of India for re-shipment of the goods. In this regard, trade has expressed difficulties in obtaining the "NOC" from RBI and stated that, at times, it takes a minimum of one week to obtain the certificate. Therefore, they have requested for allowing re-shipment without insisting on the production of "NOC" from RBI.

The matter has been examined in consultation with the Reserve Bank of India who have opined that the "NOC" from RBI need not be insisted from re-export of such imported items. Therefore, the Commissioner may use his discretion and allow re-export without the requirement of a "No Objection Certificate" from the Reserve Bank of India, on payment of a nominal penalty or without any penalty as he deems fit, provided that he is satisfied that the goods have been imported as a result of bona fide mistake and contrary to the importer''s instructions.

Kindly bring the above instructions to the knowledge of all concerned for strict compliance.

22. In the present case, the petitioner has placed on record the office nothings from 12th September, 2005 till 21st October, 2006. The petitioner had obtained an NOC from the Centurion Bank dated 19th October, 2005. In the said certificate, it was mentioned that the petitioner had not paid for the imported consignment, subject matter of the request for re-exported. The said NOC issued by the Centurion Bank was filed with the respondents. In the office noting, it was recorded that no payment relating to the bill of entry dated 23rd June, 2005, had been made. Accordingly, the file was put for approval of re-export. In the office noting it has been recorded that "NOC from RBI (was) required" signed dated 9th November, 2005. It is further recorded that "discussed NOC (was) required" signed dated 21st October, 2006. The aforesaid file nothings are contrary to Circular No. 100/2003-CUS dated 28th November, 2003, which has been quoted above. In the said circular, it has been stated that a number of importers were facing difficulties because of the requirement of furnishing of the NOC from the RBI for re-shipment. Accordingly the matter was examined in consultation with the RBI who had opined that the certificate from RBI need not be insisted. The petitioner has also drawn our attention to a number of letters written by him to the RBI to furnish the NOC in view of the demand by the respondents, but there was no response. Ultimately, the Centurion Bank again intimated that no payment had been made to the Element Fix Ltd., Ireland and enclosed with the letter of RBI "denying" the NOC. Thus, the NOC was never furnished and was not required to be furnished. The contradictory stand of the respondents is apparent as after this letter, the Commissioner, I&G on 1st May, 2007, allowed re-export but imposed penalty of Rs. 10,000/- for not furnishing NOC from the RBI. No reason or justification for imposition of the penalty was stated. This order was passed on the administrative side and was not communicated to the petitioner till vide letter dated 24th December, 2008. The relevant portion of the order as recorded in the letter dated 24th December, 2008, reads as under:-

Let re-export be allowed as per procedure in view of the facts stated on payment of a penalty of Rs. 10,000.

23. This order was passed without hearing the petitioner and does not state and justify any reason why a penalty of Rs. 10,000/- has been imposed. The circular quoted above gives discretion to the authorities to judiciously and in a fair manner decide whether or not to impose penalty/fine. The order passed shows complete arbitrariness and lack of objectivity. The question of bonafide mistake and whether the import was contrary to the petitioner''s order was not given due weightage as required vide circular No. 100/2003-CUS dated 28th November, 2003. The order of penalty, therefore, has to be quashed. Plea of alternate remedy raised by the respondents in the facts of the case has to be rejected. The petitioner has been made to go through several proceedings, furnish NOC, etc. Facts are not in dispute and the lapse and faults of the respondents are apparent.

24. We may now briefly deal with the other contentions of the respondents raised

in the counter affidavit stating that the writ petition should not be considered in view of the alternative remedy by way of revision available to the petitioner against the order dated 17th December, 2008 passed by the Commissioner (Appeals). The petitioner could not have filed appeal against the said order in view of the rejection of its request for extension of time u/s 74 of the Act by order dated 15th December, 2008 passed by the Chief Commissioner of Customs, Delhi Zone. Filing of appeal would have been a futile exercise. In these circumstances, we do not think that the writ petition should be dismissed on the ground of so-called "alternate remedy". Until and unless the order dated 15th December, 2008, was set aside, the petitioner could not have succeeded in an appeal/revision before the Joint Secretary under Sections 128 and 129 of the Act. The said contention has to be rejected.

25. Another contention raised by the respondents in the counter affidavit is that before re-export goods had not been identified as only sealed verification was done. It is further stated that original documents were not submitted and only photocopies thereof were submitted, and some documents were not even filed. These are again technical objections without any substance. Goods remained in the custody of the customs and had been inspected on 24th June, 2005. The respondent Revenue cannot contend that they were not aware of the description of the goods, the subject matter of the request for re-export, as the goods had remained in the custody of the respondents after the said inspection. With regard to non-submission of originals or documents, the petitioner could have been asked to submit the same before rejection. Nothing has been brought on record to show and establish that any request was made to the petitioner or regarding petitioner''s failure to respond.

26. In view of the aforesaid discussion, we allow the writ petition and quash order dated 15th December, 2008, passed by the Chief Commissioner of Customs, Delhi Zone. The penalty imposed of Rs. 10,000/- is also quashed. The respondents will refund Rs. 1,49,207/- along with interest @ 10% per annum w.e.f. 1st January, 2008 till payment is made. The respondents will also pay costs of the present proceedings which are assessed at Rs. 10,000/-. The aforesaid payments will be made by a crossed account payee cheque, which is to be sent by registered post to the petitioner within two months from the date a copy of this order is received by the respondents.

