(2008) 07 KL CK 0001

In the High Court Of Kerala

Case No : Writ Petition (C) No. 20496 of 2008 (M)

HDFC Bank Limited APPELLANT

Vs

Union of India RESPONDENT

Date of Decision : 25-07-2008

Acts Referred:
Customs Act, 1962 — Section 128, 17, 17(5), 46, 50

Citation : (2011) 271 ELT 175

Hon'ble Judges : S. Siri Jagan, J

Bench : Single Bench

Advocate : E.K. Nandakumar, for the Appellant; P. Parameswaran Nair, Asst. Solicitor General, for the Respondent

Final Decision : Allowed

Judgement

S. Siri Jagan, J.—The petitioner is a Company carrying on banking business. They imported certain consignments of gold bars as per Exts. P1 and P2 Bills of Entry. However, contrary to their claims in the Bills of Entry the goods were assessed to a higher rate of duty. They cleared the goods by paying the higher duty assessed. In the bill of entry itself the petitioner registered their protest against such assessment, which was followed by Ext. P4 Letter of Protest also. Thereafter they requested for a speaking order to be passed by the assessing authority to enable them to challenge the assessment in appeal. Since the 3rd respondent did not pass a speaking order, the petitioner filed Ext. P5 letter dated 30-1-2008 before the 3rd respondent requesting for a speaking order to enable them to file a meaningful appeal against the assessment made. However, by letter dated 16-4-2008 the 3rd respondent informed them that since 1 years have lapsed since the clearance of the goods covered by the Bills of Entry and no efforts have been made by the petitioner for preferring the appeal before the Commissioner (Appeals), the petitioner may approach the Commission (Appeals) for appellate remedies subject to eligibility, and the Bill of Entry itself could be considered as an appealable order of assessment. The petitioner submitted Ext. P8 letter before the 3rd respondent stating that the stand of the 3rd respondent is not correct and as per law they are entitled to a speaking order against which they can file proper appeal u/s 128. The 3rd respondent having not replied to Ext. P8 they have filed this writ petition seeking the following relief:

Issue a writ of mandamus or such other writ, order or direction, directing the 3rd respondent to issue a speaking order citing the reasons for denying the petitioner the benefit of the concessional rate of duty of Rs. 100/- per 10 gms as envisaged in Ext. P3 notification, while completing the assessments vide Exts. P1 and P2 Bills of Entry

2. A statement has been filed on behalf of the respondents by the Assistant Solicitor General of India. The primary contention in the statement is that the petitioner failed to approach the appellate authority within the period of limitation prescribed under the Act for filing an appeal. According to them once assessment has been made by the endorsement in the Bill of Entry, the bill of entry itself can be treated as an order against which the petitioner can file an appeal. Having not done so after more than two years, they cannot come and claim for a speaking order to enable them to file an appeal overcoming the limitation. The Assistant Solicitor General also relies on the decision of the Tribunal in 1991 (37) ECR 625 . It would go to show that the appeals under the Customs Act unaccompanied by the assessment order by the Bill of Entry is maintainable u/s 128.

3. I have considered the rival contentions in detail.

4. The procedure for assessment is prescribed u/s 17 of the Customs Act which reads thus :

17. Assessment of duty - (1) After an importer has entered any imported goods u/s 46 or an exporter has entered any export goods u/s 50 the imported goods or the export goods, as the case may be, or such part thereof as may be necessary may, without undue delay, be examined and tested by the proper officer.

(2) After such examination and testing, the duty, if any, leviable on such goods shall, save as otherwise provided in section 85, be assessed.

(3) For the purpose of assessing duty under subsection (2), the proper officer may require the importer, exporter or any other person to produce any contract, broker''s note, policy of insurance, catalogue or other document whereby the duty leviable on the imported goods or export goods, as the case may be, can be ascertained, and to furnish any information required for such ascertainment which it is in his power to produce or furnish, and thereupon the importer, exporter or such other person shall produce such document and furnish such information.

(4) Notwithstanding anything contained in this section, imported goods or export goods may, prior to the examination or testing thereof, be permitted by the

proper officer to be assessed to duty on the basis of the statements made in the entry relating thereto and the documents produced and the information furnished under sub-section (3); but if it is found subsequently on examination or testing of the goods or otherwise that any statement in such entry or document or any information so furnished is not true in respect of any matter relevant to the assessment, the goods may, without prejudice to any other action which may be taken under this Act, be reassessed to duty.

(5) Where any assessment done under sub-section (2) is contrary to the claim of the importer or exporter regarding valuation of goods, classification, exemption or concessions of duty availed consequent to any notification therefor under this Act, and in cases other than those where the importer or the exporter, as the case may be, confirms his acceptance of the said assessment in writing, the proper officer shall pass a speaking order within fifteen days from the date of assessment of the bill of entry or the shipping bill, as the case may be.

5. Going by sub-section (5) when assessee objects to the assessment against their claim, the appropriate authority is duty bound to pass a speaking order. Admittedly the 3rd respondent has not done that. After not having performed their statutory duty, the 3rd respondent cannot be heard to contend that because the petitioner has not filed any appeal against the Bill of Entry itself, they cannot now claim for a speaking order for filing an appeal. The decision of the Tribunal referred to by the Assistant Solicitor General is also of no use in this regard, in so far as it does not maintain that the petitioner shall file an appeal against the Bill of Entry despite the non-passing of speaking order. In fact that decision only says that even if without having for a speaking order, the petitioner files an appeal on the basis of Bill of Entry, that would also be maintainable. 1 am of opinion that in view of the categorie provision u/s 17(5) it was mandatory on the part of the 3rd respondent to pass a speaking order, in so far as in the Bill of Entry itself the petitioner has registered against such assessment which was followed by Ext. P4. Therefore, the petitioner was perfectly justified in finding for speaking order without which the petitioner cannot know the reasons for the assessment made by the 3rd respondent. In fact the limitation for filing appeal u/s 128 would start only from the date of communication of the decision or order to the petitioner. Clearly Bill of Entry is not a decision or order contemplated u/s 128. It can only be an order u/s 17(5) which has to be a speaking order. When admittedly there is no speaking order passed by the 3rd respondent in this case, the petitioner is entitled to get a speaking order against which he can file an appeal within the period prescribed u/s 128 from the date of communication of that order to them. Therefore, this writ petition is allowed, the 3rd respondent is directed to pass his speaking order in respect of the import in question and serve the same on the petitioner within a period of 15 days from the date of receipt of a copy of this judgment. Needless to say the petitioner would be entitled to file an appeal against that order within the period of limitation of purpose prescribed u/s 128 from the date of communication of that order