(2014) 04 BOM CK 0239

In the Bombay High Court

Case No : Customs Reference No. 1 of 1997

Inter Gold (India) Ltd. APPELLANT

Vs

Collector of Central Excise RESPONDENT

Date of Decision : 04-04-2014

Acts Referred:
Central Excises and Salt Act, 1944 — Section 3(1)
Customs Act, 1962 — Section 111(i), 111(j), 112, 125, 130(1)

Citation : (2014) 307 ELT 69

Hon'ble Judges : Mohit S. Shah, C.J;M.S. Sanklecha, J

Bench : Division Bench

Advocate : H. Daruwala and Nikita Vardhan i/b., Kanga and Co, Advocate for the Appellant; A.S. Rao and S.D. Bhosale, Advocate for the Respondent

Judgement

M.S. Sanklecha, J.—This petition is filed under erstwhile Section 130(3) of the Customs Act, 1962 ("the Act") from the order dated 16 September, 1996 of the Customs, Excise and Gold (Control) Appellate Tribunal (Tribunal) rejecting the petitioner''s application under the erstwhile Section 130(1) of the Act seeking to refer the following questions of law to this Court. (i) Whether cut and polished diamonds manufactured in a SEPZ area can be said to be dutiable goods at all having regard to (i) Entry No. 7101.10 (Chapter 7) of the Central Excise Tariff (ii) Notification No. 247/76, dated 2 August, 1976?

(ii) Whether Section III(i) could be invoked even in a case where the purported action of an employee was unauthorized?

(iii) What are the principles of law and how is discretion to be exercised for determining fine in lieu of confiscation u/s 125 of the Customs Act, 1962?

During the pendency of the present reference petition the petitioner reframed its questions of law and amended the petition raising the following questions.

(i) Can the Tribunal impose a heavy redemption fine of Rs. 20 lacs on the owner of the goods, once it holds:

(a) that the owner of the goods had acted in a bona fide manner;

(b) that it does not want to hold the owner of the goods vicariously liable to penalty; and

(c) it refrains from imposing any penalty upon the owner of the goods?

(ii) What are the principles of law and how is discretion to be exercised for determining redemption fine u/s 125 of the Customs Act, 1962 and whether in the facts and circumstances of the case the Tribunal was justified in levying any fine in respect of the goods belonging to the petitioner?

(iii) Can the Tribunal adjudicate upon and give a finding with regard to the conduct of a person in respect of whom there is no appeal before it. Particularly when the said finding is contrary to the finding arrived at by the original adjudicating authority whose order has been accepted by both sides?

(iv) Can the Tribunal, after expressing its desire to put the fear of law in the mind of over enthusiastic employee, indirectly penalize the employer who is the owner of the goods by imposing a very heavy redemption fine, particularly when there is no appeal being adjudicated by the Tribunal in respect of such employee?

(v) In determining the quantum of redemption fine is the Tribunal required to consider its own finding with regard to the bona fide conduct of the owner of the goods?

(vi) Can the Tribunal, when it wants to penalize an employee, impose a heavy redemption fine on the employer because there is no appeal pending before it in respect of the said employee?

2. However, at the hearing the petitioner proposed several fresh questions of law. However, the same can be crystallized in the following one question:--

Whether in the facts and circumstances of the case, the Tribunal was justified in imposing the redemption fine of Rs. 20,00,000/- on the confiscation, even though no penalty was imposed upon the petitioner and that in the overall facts and circumstance of the case, no redemption fine was justified?

3A. Briefly, the facts leading to this petition are as under:

(a) The petitioner is a 100% Export Oriented Unit (EOU), carrying on business of manufacture and export of Gold Jewellery and Polished diamonds. The petitioner has its factory located at Santacruz Electronic Export Processing Zone (SEEPZ);

(b) The petitioner was granted Industrial Licence on 11th September, 1989 for manufacture and export of Gold Jewellery and Polished diamonds as 100% EOU;

(c) In view of its status as 100% EOU, the petitioner was allowed to import goods without payment of customs duties subject to being used in manufacture of goods to be exported. The exemption from payment of duties of customs was extended under Customs Notification No. 196/87, dated 5th May, 1987;

(d) Being a 100% EOU, the petitioner was required to keep a record of the goods imported without payment of duty, processed and finally exported;

(e) On 31st May, 1990, the Officers of Customs posted at the gate of SEEPZ, stopped a fiat car in which one - Mr. Manish Parekh, the petitioner''s Manager (hereinafter referred to as ''Manager'') was travelling along with a plastic bag. On examination of the plastic bag, it was found that the Manager was carrying 587.92 carats of cut and polished diamonds. The Manager was unable to produce any documents in support of his attempt to remove the 587.92 carats of diamonds from the export processing zone. Consequently, the 587.92 carats of cut and polished diamonds were seized. Statements were recorded not only of the Manager but also of the others. On completion of the investigation, a show cause notice dated 19 November, 1990 was issued to the petitioner and others including its Manager. The above notice inter alia called upon the petitioner to show cause why duty of Rs. 37.36 lacs on the seized goods should not be recovered and also confiscated. Besides calling upon the petitioner and its Manager why penalty should not be imposed upon them;

(f) By an order dated 16th December, 1991, the Collector of Central Excise, Bombay dropped the show cause notice dated 19 November, 1990 so far as it was issued to the petitioner. The adjudication order dated 16 December, 1991 held that the seized diamonds are not liable for duty as the same was seized within the SEEPZ premises i.e. before being removed to the Domestic Tariff Area (DTA). It was also held that the seized diamonds are not liable for confiscation u/s 111(j) of the Act, as there was only a preparation and not an attempt to remove the diamonds from SEEPZ area and in fact no actual removal. However, even though the above order dated 16 December, 1991 of the Collector of Central Excise dropped the proceedings against the petitioner, a penalty of Rs. 20,000/was imposed u/s 112 of the Act upon its Manager;

(g) Being aggrieved by the order of the Collector of Central Excise dated 16th December, 1991, the Revenue filed an appeal before the Tribunal. By an order dated 4 December, 1995, the Tribunal partly allowed the appeal of the Revenue holding that the seized diamonds are liable for confiscation u/s 111(j) of the Act. However, the confiscated diamonds having a market value of Rs. 1.06 crores was allowed redemption on payment of redemption fine of Rs. 20 lacs. Save and except the above modification, the order dated 16 December, 1991 of the Collector of Central Excise was undisturbed.

(h) Consequent'' to the above order of the Tribunal, the petitioner filed application under the erstwhile Section 130(1) of the Act, seeking the Tribunal to refer the following questions of law to the High Court:

"(i) Whether cut and polished diamonds manufactured in a SEPZ area can be said to be dutiable goods at all having regard to (i) Entry No. 7101.00 (Chapter 7) of the Central Excise Tariff (ii) Notification No. 247/76, dated 2-8-1976?

(ii) Whether Section 111(i) of the Act could be invoked even in a case where the purported action of an employee was unauthorized?

(iii) What are the principles of law and how is discretion to be exercised for determining fine in lieu of confiscation u/s 125 of the Customs Act, 1962?"

The Tribunal by its order dated 16 September, 1996 rejected the above application. The Tribunal in its above order holds that Questions (i) and (ii) do not arise out of the order dated 4th December, 1995 passed by the Tribunal and therefore, no referable question of law arises.

So far as Question (iii) is concerned, the Tribunal dismissed the Reference Application on the ground that the same does not give rise to question of law as it is a question of fact.

(i) As the petitioner''s application to the Tribunal to make a reference to this Court was rejected the petitioner filed the present petition u/s 130(3) of the Act. By this petition the petitioner requires the High Court to direct the Tribunal to refer the questions of law framed herein above along with the statement of case to this Court for its decision thereon.

3. The present petition was filed u/s 130(3) of the Act, as then existing in the year 1997. This application was filed on the refusal of the Tribunal to refer the questions of law to this Court as sought by the petitioner u/s 130(1) of the Act. In terms of Section 130(3) of the Act, when the Tribunal refuses to refer the question of law to the High Court for its decision as sought by the assessee or the revenue then in such a case the applicant before the Tribunal can apply to the High Court to consider and if thought fit to direct the Tribunal to refer certain questions of law along with the statement of case. On receipt of the question of law from the Tribunal the High Court will decide the questions of law on the case stated by the Tribunal and send it to the Tribunal u/s 130D of the Act. Thereafter the Tribunal will dispose of the case in conformity with the judgment of the High Court.

4. The Counsel for both sides urged us that by taking into account the fact that the alleged offence is of 1990 and the reference is of 1997, the question of law be answered by the Court at this stage itself rather than direct the Tribunal to refer the question along with statement of case. The jurisdiction of this Court u/s 130D of the Act is an advisory jurisdiction. The Kerala High Court in COMMISSIONER OF Income Tax Vs. WANDOOR JUPITER CHITS (P.) LTD. (IN LIQUIDATION)., has while dealing with similar provisions under the Income Tax Act, 1961 held that it is not open to the High Court to dispose of the matter finally by answering the question proposed by the petitioner before it without having called upon the Tribunal to state the questions of law. However, as against the above, Delhi High Court in COMMISSIONER OF Income Tax Vs. MAHARISHI VED VIGYAN VISHWA VIDYA PEETHAM., held that when facts as contained in the order of the Tribunal passed on merits are not in dispute, the High Court can answer the question of law framed by it without calling for a statement of case from the Tribunal. The aforesaid view of the Delhi High Court has been followed

by the Punjab & Haryana High Court in Commissioner of Income Tax Vs. Munak Engineers (P) Ltd.,

5. Therefore, taking into account the above facts we find that the Delhi and Punjab High Courts have in identical situation disposed of the reference by answering the questions themselves without calling for the statement of case from the Tribunal. We agree with the view of the Delhi High Court in Maharishi Vishwa Vidyapeetham (supra). Therefore, at the request and by consent of the Counsel for both the sides, the reformulated question of law is taken up for consideration u/s 130(3) of the Act. In case we are of the view that the Tribunal was not correct in refusing to refer the question of law, at this stage itself we will answer the question of law u/s 130D of the Act. However, after we have answered the reference, the Tribunal would in accordance with the provisions of Section 130D of the Act will give effect to the same.

6. The following undisputed facts in the order of the Tribunal dated 4 December, 1995 passed on merits may be noted as under:

(a) That cut and polished diamonds were attempted to be removed unauthorizedly by the Manager of the petitioner-company from SEEPZ;

(b) The cut and polished diamonds were seized at the gate of SEEPZ i.e. just before removal to the DTA;

(c) No prior permission has been taken by the petitioner or by its Manager for taking the cut and polished diamonds out of the SEEPZ area for sale or for approval or for export;

(d) The Manager of the petitioner was aware of the procedural requirements to be satisfied, before taking the cut and polished diamonds outside SEEPZ''s area;

(e) In his first statement made during the seizure of diamonds, on 31 May, 1990 the Manager does not state that the diamonds are being taken out of SEEPZ for being showing to a Japanese buyer, so as to obtain an order for export. This version of the goods being removed to be shown to a Japanese''s buyer, was put forth later;

(f) There is no entry regarding removal of seized cut and polished diamonds on 31 May, 1990 by its Manager in the record of the petitioner''s factory;

(g) The Chairman of the petitioner in his statement admits that there is an omission on the part of the petitioner''s Manager and the petitioner is responsible for the omission;

(h) The benefit, if any, on account of the removal of the seized cut and polished diamonds would be obtained by the petitioner.

It is on the above facts that the Tribunal while confiscating the seized cut and polished diamonds valued at Rs. 1.06 Crores allowed redemption on payment of fine of Rs. 20 lacs.

7. Before us the fact that the seized cut and polished diamonds are liable for confiscation u/s 111(j) of the Act is not disputed by the petitioner. The only issue canvassed before us is the question of redemption fine to be imposed upon the petitioner.

8. Mr. Daruwalla, learned Counsel appearing for the petitioner in support of the petition that no redemption fine is imposable for redeeming the confiscated cut and polished diamonds submits as under:--

(a) No penalty has been imposed by the Tribunal u/s 112 of the Act. Therefore, the Tribunal has concluded that the conduct of the petitioner is honest and bona fide. Therefore, the petitioner cannot be held liable for the breach committed by its Manager;

(b) The Tribunal in its order held that the redemption fine is being imposed to put the fear of law in the mind of over enthusiastic employee of the petitioner who committed a mistake. In the circumstance, it is not fair to punish the petitioner by imposing redemption fine for redeeming the confiscated diamonds for acts of its Manager;

(c) No redemption fine is imposable upon the petitioner as the conduct of the petitioner even according to the Tribunal was bona fide as is evident by not imposing any penalty upon the petitioner. Therefore, in view of the decision of the Supreme Court in the matter of Jain Exports Pvt. Ltd. and Another Vs. Union of India (UOI) and Others, the conduct of the parties is a relevant factor for determining the quantum of redemption fine;

(d) There is no conceivable motive on the part of the petitioner to remove the diamond into the DTA at the relevant time. This is so as no customs duty was payable on the import of rough diamond under the Act nor any excise duty was payable on the cut and polished diamond under the Central Excise Tariff Act, 1985. Therefore, there was no motive for the petitioner to remove the cut and polished diamonds from SEEPZ''s area; and

(e) Redemption fine of Rs. 20 lacs on diamond valued at Rs. 35.5 lacs is harsh and excessive, keeping in mind the bona fide conduct of the petitioner.

9. As against the above, Mr. Rao, learned Counsel for the Revenue-Respondent in support of the impugned order submits as under:--

(a) No question of law arises in the present case from the order of the Tribunal dated 4th December, 1995;

(b) The imposition of redemption fine of Rs. 20 lacs by the Tribunal was admittedly within the permissible limit provided u/s 125 of the Act which provides that the redemption fine should not exceed the market price of the goods confiscated less the duty payable on the imported goods;

(c) The Tribunal has come to a finding of fact that the action of the petitioner''s Manager was done so as to benefit the petitioner. Therefore, the redemption of the confiscated diamonds can only be done on payment of the redemption fine;

(d) The quantum of redemption fine has been arrived at by the Tribunal on appreciation of facts relating to the conduct of the parties. Therefore, the imposition of redemption fine at Rs. 20 lacs cannot be found fault with as giving rise to a question of law;

(e) The excise duty payable on the cut and polished diamonds in terms of Section 3(1) of the Central Excise Act, 1944 is the quantum of customs duty payable under the Customs Tariff Act, 1975. In this case, the duty payable by the petitioner on the removal of cut and polished diamonds would be 60% ad valorem and not nil. Therefore, it is not correct to say that the petitioner had nothing to gain by surreptitiously removing the cut and polished diamonds without payment of duty;

(f) The quantum of redemption fine on the confiscated cut and polished diamonds is very reasonable, taking into account that the market value of seized diamonds is Rs. 1.06 crores and not Rs. 35.05 lacs as urged by the petitioner.

10. We have considered the rival submissions. The petitioner places heavy reliance upon the decision of the Supreme Court in Jain Exports Pvt. Ltd. (supra) and submit that for determining and imposing redemption fine, the conduct of a party is a relevant factor. The aforesaid decision places reliance upon the earlier decision of the Supreme Court in the matter of D. Navinchandra and Co. and Others Vs. Union of India (UOI) and Others, and D. Navinchandra and Co. and Others Vs. Union of India (UOI) and Others, . The aforesaid decision in Jain Exports (supra) while setting aside the order of the Tribunal, remanded the matter to the Tribunal to determine the quantum of redemption fine. On remand, the Tribunal came to the conclusion that the conduct of Jain Exports Pvt. Ltd. was not bona fide. This order was appealed before the Supreme Court by Jain Exports. The Apex Court considered the issue in Jain Exports Pvt. Ltd. and Another Vs. Union of India (UOI) and Others, and concluded that though the quantum of redemption fine would depend upon totality of the fact and circumstances of the case but merely because the importer acted in good faith will not entitle the importer to complete waiver of redemption fine. The Supreme Court also clarified that its earlier decision in the matter of D. Navinchandra (supra) and B. Vijaykumar (supra) did not lay down that if the conduct of the importer was beneficial then no redemption fine is to be imposed for allowing redemption of confiscated goods. In the present facts, there is no dispute that the seized cut and polished diamonds are liable for confiscation. In view of the Jain Exports-II (supra) decision, there can be no dispute that redemption fine is imposable on confiscated goods even if the conduct of the parties is bona fide.

11. Therefore the issue to be examined is within a very narrow compass namely the quantum of redemption fine to be imposed in the peculiar facts and circumstance of the present case. The Tribunal in the impugned order has held that the goods are liable for confiscation. The emphasis of the petitioner before

us was that in view of its bona fide conduct, no redemption fine or in the alternative, a token redemption fine would meets the ends of justice. Once the goods are liable for confiscation, redemption fine was imposable. The petitioner before us sought to emphasize the bona fide conduct of its manager by pointing out that diamonds were being taken out to show to the Japanese buyer who was leaving the country next day. This excuse or reason for not recording the removal of diamonds in petitioner''s record was found on facts by the Tribunal to be an afterthought as it was not so mentioned by its manager when the diamonds were seized on 31 May, 1990 at the gate of SEEPZ. In this case, the market value of the goods is Rs. 1.06 crores. The benefit of which the petitioner would obtain by the illegal conduct of its Manager would have resulted in non-payment of excise duty which is equivalent to customs duty i.e. 60% ad valorem. The petitioner being a limited company cannot act but through the human agency of its Directors, Manager and Workers. Therefore, the submissions of the petitioner that it cannot be held liable for the acts of its Manager/employees is unacceptable. The confiscation of the diamonds and the redemption fine of Rs. 20 lacs on the confiscated diamond was reached taking into account the overall facts and appreciation of evidence on record. This finding is not shown to be arbitrary and/or perverse. We are conscious of the fact that we are not sitting in appeal over the order dated 4 December, 1995 passed by the Tribunal on merits.

12. Therefore, according to us, no question of law arises so as to direct the Tribunal to send any case for our consideration. In any event, the question of law as framed for our consideration has to be answered in the negative i.e. in favour of the respondent-Revenue and against the petitioner-assessee. For the aforesaid reasons, we see no reason to interfere with the order 16th September, 1996 of the Tribunal refusing to state and raise the question of law for consideration. Accordingly, reference is dismissed with no order as to costs.