(2014) 03 BOM CK 0173

In the Bombay High Court

Case No : Writ Petition No. 152 of 2014

Kaizen Plastomould Pvt. Ltd. APPELLANT

Vs

The Union of India and Another RESPONDENT

Date of Decision : 03-03-2014

Acts Referred:

Central Excises and Salt Act, 1944 — Section 35(EE), 35EE
Constitution of India, 1950 — Article 226

Citation : (2014) 03 BOM CK 0173

Hon'ble Judges : S.C. Dharmadhikari, J;G.S. Kulkarni, J

Bench : Division Bench

Advocate : Prakash Shah, i/b Mr. Jas Sangvhvi, i/b PDS Legal, Advocate for the Appellant; Pradeep S. Jetley, a/w Mr. S.D. Bhosale, Advocate for the Respondent

Judgement

1. By this Writ Petition under Article 226 of the Constitution of India the petitioner challenges the order passed by the revisional authority dated 12.3.2012 dismissing the Revision Application filed by the present petitioner. The Revision Applicant challenged the order dated 1.9.2009 of the Commissioner of Central Excise (Appeals) Mumbai Zone-I. The Commissioner of Central Excise (Appeals) was dealing with four orders in original, three orders passed by the Assistant Commissioner of Central Excise, Bhayandar, Division Thane-II and another by a distinct Assistant Commissioner. The case of the present petitioner was that their goods are exempted. The petitioners were issued show cause notices demanding duty in respect of the export consignment cleared for which proof of exemption was not allegedly submitted in time. The other allegation is that in one of the cases excisable goods were removed without payment of duty under cover of invalid letter of undertaking (LUT). The original authority consequently confirmed the demand of duty by orders referred to by the revisional authority and also imposed a penalty on the petitioners.

2. The imposition of the penalty and confirmation of duty was questioned before the Commissioner of Central Excise (Appeals) and who proceeded to reject it.

3. The Revision Application u/s 35(EE) of the Central Excise Act, 1944 was filed on several grounds. The grounds inter alia are that the original authority confirmed the demand because the petitioner allegedly failed to produce the original and duplicate copies of ARE''s-1 duly endorsed as proof of export. This allegation was denied by the present petitioners and they claimed that there is enough proof of exports and that was referred by the petitioners in their reply to the show cause notice and they relied on a copy of commercial invoice, copy of the Bill of Lading, copy of shipping bill and true copy of the ARE-I. In para 7.1 of the Revisional order the documents on which Mr. Shah learned counsel appearing for the petitioners places reliance, and of the above nature are referred to.

4. Mr. Shah appearing on behalf of the petitioners would submit that the authorities have committed basic and fundamental error in rejecting the request of the present petitioners and confirming the allegations in the show cause notice. Mr. Shah would submit that one can understand the insistence on production of proof of exports. However, one cannot understand insistence of production of certain documents alone as holding that they alone constitute the proof. When there is proof of exports in the form of contemporaneous documents, then, non-production of ARE-1''s should not result in the petitioners being called upon to pay duty and equally penalty. There is nothing fallacious or erroneous much less lacking in bonafides, because a exporter is not producing the ARE.

5. Mr. Shah would rely upon the orders passed by the department itself and in original jurisdiction which have been noted by the Division Bench of this Court in the case of UM Cables Limited Vs. Union of India and Others, .

6. Mr. Jetley on the other hand submitted that there are concurrent findings of facts and they cannot be re-appreciated and re-appraised in writ jurisdiction. The authorities have concurrently held that non-production of such primary documents as ARE not minor or technical lapses but one of substance and the finding therefore, does not require interference and particularly in given facts and circumstances. The Writ Petition be therefore dismissed.

7. With the assistance of the learned counsel appearing for the parties, we have perused the writ petition and all annexures thereto including the original orders.

8. We have noted that the authority namely the revisional authority had before him a challenge to the three orders of the Central Excise (Appeals) and which arose out of original orders of the jurisdictional Assistant Commissioner.

9. In each of the matters show cause notices were issued on the allegation that proof of export was not submitted in time and that in one of the case excisable goods were removed without payment of duty under the cover of invalid LUT. In so far as that aspect is concerned, the present petitioners are not requesting this Court to invoke its writ jurisdiction. The interference of this Court is sought only to the extent that the show cause notice demands duty in respect of exports consignment on the allegation that there is no proof of export submitted by the

exporter. In its order it refers to this allegation in the show cause notice and the response to the same by the petitioner. We find that the Government of India, Ministry of Finance, Department of Revenue while exercising the revisional jurisdiction has referred to the documents. The point for consideration is summarized in para 7.1 at page 71A of the Paper book. The observations are that in three cases the original authority confirmed the demand on the ground that the petitioner failed to produce original and duplicate copies of AREs-1 duly endorsed by the customs as a proof of export.

10. While setting out this allegation in the show cause notice, the revisional authority on its own referred to the documents submitted vide letters dated 4.01.2005 and 6.1.2005. It is clear from the order that the commercial invoice, copy of Bill of Lading, copy of shipping Bill and triplicate copy of ARE-1, duplicate copy of AR-1 and such documents are on record of the department. The revisional authority therefore, was in obvious error in rejecting the Revision Application. The Revision Application is rejected only on the ground of non-submission of statutory documents namely customs endorsed ARE-1. That would result in duty demand being confirmed. The allegation in the show cause notice is held to be proved only because of the failure of the exporter to produce these documents.

11. We see much substance in the argument of the learned counsel that insistence on the proof of exports is understood. However, the insistence on production of ARE''s and terming it as a primary one has not been supported in law. Mr. Shah is therefore justified in criticizing the revisional authority on the ground that the authority was oblivious of execution of other documents and particularly in respect of the clearance of goods under bond/LUT. If there is adequate proof of exports then, non-production of ARE-1 would not result in the allegations being proved and the demand being confirmed. There is no question of penalty being imposed in such a case as well and without verification of the records. The penalty could have been imposed had there been absolutely no record or no proof of any export. The approach of the revisional authority therefore, is not in conformity with law as laid down in UM Cables Limited vs. Union of India. In referring to a identical issue, the Division Bench in UM Cables Limited observed as under:

16. However, it is evident from the record that the second claim dated 20 March 2009 in the amount of Rs. 2.45 lacs which forms the subject matter of the first writ petition and the three claims dated 20 March 2009 in the total amount of Rs. 42.97 lacs which form the subject matter of the second writ petition were rejected only on the ground that the petitioner had not produced the original and the duplicate copy of the ARE form. For the reasons that we have indicated earlier, we hold that the mere non-production of the ARE-form would not ipso facto result in the invalidation of the rebate claim. In such a case it is open to the exporter to demonstrate by the production of cogent evidence to the satisfaction of the rebate sanctioning authority that the requirements of Rule 18 of the

Central Excise Rules 2002 read together with notification dated 6th September 2004 have been fulfilled. As we have noted, the primary requirements which have to be established by the exporter are the claim for rebate relates to goods which were exported and that the goods which were exported were of a duty paid character. We may also note at this stage that the attention of the Court has been drawn to an order dated 23 December 2010 passed by the revisional authority in the case of the petitioner itself by which the non production of the ARE-form was not regarded as invalidating the rebate claim and the proceedings were remitted back to the adjudicating authority to decide the case afresh after allowing to the petitioner an opportunity to produce documents to prove the export of duty paid goods in accordance with the provisions of Rule 18 read with notification dated 6 September 2004 (Order No. 1754/2010-CX dated 20 December 2010 of D.P. Singh, Joint Secretary, Government of India u/s 35EE of the Central Excise Act, 1944) Counsel appearing on behalf of the petitioner has also placed on the record other orders passed by the revisional authority of the Government of India taking a similar view (Garg Tex-O Fab Pvt. Ltd.-2011 (271) E.L.T. 449) and Hebenkraft 2001 (136) E.L.T. 979. The CESTAT has also taken the same view in its decisions in Shreeji Colour Chem Industries vs. Commissioner of Central Excise 2009 (233) E.L.T. 367 Model Buckets & Attachments (P) Ltd. vs. Commissioner of Central Excise 2007 (217) E.L.T. 264 and 2003 (110) ECR 431 .

17. We may only note that in the present case the petitioner has inter alia relied upon the bills of lading, banker''s certificate in regard to the inward remittance of export proceeds and the certification by the customs authorities on the triplicate copy of the ARE 1 form. We direct that the rebate sanctioning authority shall reconsider the claim for rebate on the basis of the documents which have been submitted by the petitioner. We clarify that we have not dealt with the authenticity or the sufficiency of the documents on the basis of which the claim for rebate has been filed and the adjudicating authority shall reconsider the claim on the basis of those documents after satisfying itself in regard to the authenticity of those documents. However the rebate sanctioning authority shall not upon remand reject the claim on the ground of the non production of the original and the duplicate copies of the ARE 1 forms, if it is otherwise satisfied that the conditions for the grant of rebate have been fulfilled. For the aforesaid reasons, we allow the petitions by quashing and setting aside the impugned order of the revisional authority dated 22 May 2012 and remand the proceedings back to the adjudicating authority for a fresh consideration. The rejection of the rebate claim dated 8 April 2009 in the first writ petition is however for the reasons indicated earlier confirmed. Rule is made absolute in the aforesaid terms.

12. In the order passed by the Division Bench (Mohit S. Shah, C.J. and M.S. Sanklecha, J.) of this Court in Writ Petition No. 582 of 2013 decided on 14.2.2010 (Aarti Industries Limited vs. Union of India & ors), the Division Bench has held that if there is a proof of the goods, having been exported, then, the claim for rebate of duty could not have been rejected. While we do not have a

case of claim of rebate but demand of duty based on non-production of proof of export but the test is the same, namely, that there ought to be proof of exports. In the present case, this fundamental issue has not been examined and the order suffers from a patent error. It is also suffering from clear perversity and in not referring to the contents of the documents which are forming part of the two letters. If the two letters which are referred to at para 7.1. they point towards Bill of Lading and equally the commercial invoice, shipping bill. Mr. Shah would urge that the confirmation of payment by buyers is on record. Then, the Revisional authority should have expressed an opinion thereon and whether that has any impact on the claim made by the Department. That having not done, the Revisional authority failed to exercise its jurisdiction vested in it in law. The Revisional order deserves to be quashed and set aside.

13. As a result of the above discussion, the writ petition succeeds. The impugned order dated 14.10.2011 is quashed and set aside. The Revision Application is restored to the file of respondent no. 2 for a decision afresh on merits and in accordance with law. The revisional authority will decide the matter afresh within a period of three months without being influenced by any of its earlier findings and conclusions. It should apply its mind independently and in accordance with the law laid down by this Court.

