(2009) 02 BOM CK 0046

In the Bombay High Court

Case No : Customs Appeal No. 74 of 2008

Karan Associates APPELLANT

Vs

Commissioner of Customs (Import) RESPONDENT

Date of Decision : 04-02-2009

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

Citation : (2009) 4 BomCR 811 : (2009) 111 BOMLR 1309 : (2009) 163 ECR 93 : (2009) 236 ELT 23

Hon'ble Judges : Ranjana Desai, J;J.P. Devadhar, J

Bench : Division Bench

Advocate : Ankita Singhania and Sayeed Mulani, instructed by Mulani and Co, for the Appellant;

Final Decision : Dismissed

Judgement

J.P. Devadhar, J.—This appeal is directed against the order of the CESTAT dated 15/2/2008. According to the appellant, following questions of law arise out of the order of the tribunal dated 15/2/2008:

(a) Whether the judgment of the Hon?ble Supreme Court in Priya Blue case applies in cases where there is no speaking order of the assessing authority revising the declared value of the imported goods?

(b) If the answer to the first question is in the negative, then in that event, should the Appellate Tribunal have applied the ratio of the judgment in the T.E.L.C.O. Ltd. case to the facts of the present appeal?

(c) Whether the failure of the assessing authority to issue a speaking order and denying to the aggrieved party an opportunity of being heard prior to reassessment, negates the substantive right to appeal of the aggrieved party?

(d) In the event that the assessing authority does not issue a speaking order and does not afford the aggrieved party an opportunity of being heard while rejecting the declared value of the imported goods and reassesses the duty payable by the importer, is such a non-speaking order appealable? (sic)

2. In this case, the appellant had imported electronic parts, integrated circuits and regulators in the year 2003 and had filed a bill of entry for clearance of the said goods by computing the duty on the invoice value. The assessing officer assessed the said bill of entry by loading the invoice value. The appellant paid the duty as assessed without any protest and cleared the goods on 30/1/2003. Thereafter, by a letter dated 11/2/2003 the appellant requested the assessing officer to pass a speaking order giving reasons for enhancing the invoice value. Several reminder letters were sent by the appellant, however, it appears that no speaking order has been passed.

3. In the meantime, the appellant filed a refund claim on 10/4/2003 seeking refund of the duty paid on the enhanced value of the imported goods. The refund claim was rejected on the ground that so long as the assessment order holds the field, the refund claim cannot be entertained. Appeal filed against the order rejecting the refund claim was also dismissed by the Commissioner (A). On further appeal, the Tribunal remanded the matter back to the assessing officer for adjudication of the refund claim afresh in the light of the decision of the Tribunal in the case of 2003 (158) ELT 640 .

4. Thereafter, the matter was heard afresh and by an order in original dated 9/3/2007 the adjudicating authority once again rejected the refund claim of the appellant in the light of the decisions of the Apex Court in the case of Collector of Central Excise, Kanpur Vs. Flock (India) Pvt. Ltd. C-7, Panki Industrial Area, Kanpur, and Priya Blue Industries Ltd. Vs. Commissioner of Customs (Preventive), .

5. Challenging the aforesaid order, the appellant filed an appeal which was dismissed by Commissioner (A) on 31/7/2007. On further appeal filed by the appellant, the CESTAT dismissed the appeal filed by the appellant. Hence this appeal.

6. The basic question raised in this appeal is, where the imported goods are assessed on the bill of entry by enhancing the invoice value without passing a speaking order and the goods are cleared on payment of duty as assessed, whether the importer is entitled to claim refund of duty paid on the enhanced value of the goods on the ground that the assessing officer has failed to pass a speaking order though repeatedly requested by the importer?

7. In the present case, admittedly, the appellant had cleared the imported goods on 30/1/2003 on payment of duty as assessed without any protest. Though the appellant by a letter dated 11/2/2003 requested the assessing officer to pass a reasoned order, it appears that a speaking order has not been passed in the matter. However, the fact that the assessing officer has failed to pass a speaking order would not invalidate the assessment order so as to file refund claim on 10/4/2003 and seek refund of duty paid on the enhanced value as per the

assessment order. In other words, pendency of the application seeking a speaking order would not entitle the appellant to seek refund of duty paid as per the assessment order. It is well settled by the decisions of the Apex Court in the case of Flock (India) Pvt. Ltd. (supra) and Priya Blue Industries Ltd. (supra) that so long as the assessment order stands the question of granting refund does not arise at all.

8. The argument of the appellant that unless an appealable speaking order is passed, the importer cannot file an appeal against the assessment order is without any merit. Assessment order passed on the bill of entry is an appealable order and the same can be challenged even in the absence of a speaking order. In other words, in the absence of a speaking order, it cannot be said that the assessment order is not appealable. Where an assessment order is passed without giving reasons and in spite of repeated requests reasoned order is not passed, proceedings can be initiated for setting aside the assessment order passed on the bill of entry. In the present case, save and accept writing letters no proceedings have been initiated for setting aside the assessment order. Therefore, the fact that the assessing officer has not passed a speaking order would not entitle the appellant to claim partial refund of duty paid as per the assessment order.

9. Strong reliance was placed by the Counsel for the appellant on the decision of the Apex Court in the case of Karnataka Power Corporation Ltd. Vs. Commr. of Cus. (Appeals), Madras, followed by the Tribunal in the case of Telco Ltd. (supra). Both the aforesaid decisions have no relevance to the facts of the present case, because, in both the above cases, the Apex Court as well as Tribunal have remanded the matter back to the adjudicating authority to consider the application of the importer regarding the reclassification of the goods as well as the refund flowing therefrom. In the present case, the question raised is, where reasoned assessment order is not passed, whether the ratio laid down by the Apex Court in the case of the Priya Blue Industries Ltd. (supra) would be applicable. The Tribunal has rightly held in the affirmative. In both the aforesaid cases relied upon by the appellant, the importer had sought reclassification of the imported goods and the consequential refund. In that context, the matters were remanded for decision on merits regarding reclassification and consequential refund, if any. In the present case, during the pendency of the application filed on 11/2/2003 seeking reasoned order, the appellant had filed refund claim on 10/4/2003. The said refund application dated 10/4/2003 was disposed off in the light of the decisions of the Apex Court in Priya Blue Industries Ltd. (supra). Thus, the aforesaid two decisions relied upon by the Tribunal are distinguishable on facts.

10. Reliance was placed by the Counsel for the appellant on the decision of this Court in the case of Glaxo Laboratories (India) Private Ltd. Vs. A.V. Venkateswaran and Another, as well as the decision of the Punjab High Court in the case of Shreeram Durgaprasad, Tumsar Vs. Union of India and Others, which

have no relevance to the facts of the present case. As held in these cases, the appellate authority can properly decide the appeal only if the assessment order is a reasoned order. But it does not mean that in the absence of reasons the duty paid pursuant to the assessment order is liable to be refunded.

11. By inserting Section 17(5) into the Customs Act, 1962 with effect from 13/7/2006 the legislature has made it mandatory for the assessing officer to pass a speaking order within the time stipulated therein. Even before the insertion of the above provisions, the assessing officer was bound to pass a speaking order wherever demanded. However, the fact that a speaking order is not passed would not entitle the importer to claim refund of duty paid as per the assessment order. Therefore, the decision of the authorities below in rejecting the refund claim of the appellant by relying upon the decision of the Apex Court in the case of Priya Blue Industries Ltd. (supra) cannot be faulted.

12. In the result, we see no merit in the appeal and the same is hereby dismissed.

