(2014) 12 MAD CK 0131

In the Madras High Court

Case No : Writ Petition (MD) No. 17447 of 2014

Karur K.C.P. Packkagings Ltd. — APPELLANT

Vs

Commissioner of Cus., Tuticorin — RESPONDENT

Date of Decision : 03-12-2014

Acts Referred:
Customs Act, 1962 — Section 129

Citation : (2015) 317 ELT 453

Hon'ble Judges : T. Raja, J

Bench : Single Bench

Advocate : A.K. Jayaraj, Advocates for the Appellant; R. Aravindan, Advocates for the Respondent

Judgement

T. Raja, J.—This writ petition has been filed by M/s. Karur K.C.P. Pack-kagings Limited, represented by its General Manager (Works), Mr. T. Madhaiyan, Krishnarayapuram (Taluk), Karur District, seeking issuance of a Writ of Mandamus, directing the 3rd respondent/Assistant Commissioner of Customs (Draw Back), Customs House, New Harbour Estate, Tuticorin, to settle and release the pending balance duty drawback claim amount, entitled to the petitioner for the period from 18-2-2010 to 24-9-2010 in the light of the Notification No. 103/2008-Customs dated 29-8-2008 issued by the Government of India, Ministry of Finance and as per the decision of DGFT Committee Meeting No. 17/AM-14, dated 25-7-2013. Learned counsel for the petitioner would submit that the petitioner is the holder of the Central Excise Registration No. AABCK 04638B XM 001 and engaged in the manufacture and export of HDPE/PP Bags, Flexible Intermediate Bulk Container (FIBC Bags) and other similar products. The petitioner has classified FIBC under CETSH 6305 32 00. Subsequently, the said classification was also amended in RC under their application, while so, the Excise Range Officer, Karur, by letter dated 3-3-2010 asked the petitioner to re-classify the FIBC Bags under CETH 3923 29 90. Immediately on receipt of the aforesaid letter, the petitioner replied that their products, FIBC Bags are classified under CETH 6305 32 00 all over India and internationally, therefore, the classification done is well within the law, hence, there is no need to re-classify the same, but the Deputy Commissioner of Central Excise & Service Tax, Karur Division, Karur, not being satisfied with the classification of FIBC Bags under Chapter 63 had issued a show cause notice dated 25-3-2010 calling upon the petitioner as to why their products should not be re-classified under CETSH 3923 29 90 and the Registration Certificate should not be amended and all the goods exported under the classification of CETSH 6305 32 00 from 17-4-2009 to 15-3-2010 should not be taken as exported under CETSH 3923 29 90 and thereupon why penalty should not be imposed under rule 27 of the Central Excise Rules, 2002.

2. Thereafter, the matter was decided by the lower authority/Assistant Commissioner of Central Excise & Service Tax, Karur, by order dated 13-8-2010 holding that all the goods exported under the classification of CETSH 6305 32 00 from 17-4-2009 to 15-3-2010 as detailed in the Annexure-II enclosed with aforesaid order, shall be reclassified under CETSH 3923 29 90, thereupon, the lower authority imposed a penalty of Rs. 5,000/- under Rule 27 of the Central Excise Rules, 2002 for contravention of Rule 6 of the Central Excise Rules, 2002. Aggrieved by the same, the petitioner filed an appeal and the same was allowed by the Commissioner of Customs and Central Excise (Appeals) Tiruchirappalli, setting aside the order passed by the lower authority and the penalty was also waived holding that FIBC manufactured by the petitioner/appellants are to be classified under CETH 6305 32 00. As against the said order dated 15-11-2010, the respondents department filed an appeal under Section 129 of the Customs Act and the same is pending.

3. Taking support from another order passed by the Commissioner of Customs (Appeals), Chennai, learned counsel for the petitioner submitted that when the issue raised in the present writ petition has been finally concluded by the Commissioner of Appeals holding that the Flexible Intermediate Bulk Containers has been specifically covered under Chapter heading 63053200 and such classification also has been confirmed by the CESTAT in the case of TPI India Ltd. v. CCE, Mumbai-II reported in 2005 (189) E.L.T. 311 (Tri.-Mum.), on the ground that an appeal has been filed by the department without there being any order of stay granted against the order passed by the Commissioner of Customs and Central Excise (Appeals) Tiruchirappalli, the balance duty drawback claim amount entitled to the petitioner, he pleaded, cannot be denied, on this basis, he prayed for allowing the writ petition.

4. Mr. R. Aravindan, learned counsel for the respondents on instructions, submitted that the petitioner has succeeded before the Commissioner of Customs and Central Excise (Appeals) Tiruchirappalli, against which, the respondents have preferred an appeal before the CESTAT, Chennai, and the same is pending, therefore, the petitioner cannot show any urgency to settle and release the pending balance duty drawback claim amount.

5. Adding further, he submitted that when the department has got a fair chance

of success before the CESTAT, Chennai, in the pending appeal, in the event of success before the CESTAT, Chennai, the respondents would be put to grave prejudice if the present writ petition is allowed by giving a direction to the respondents to settle and release the pending balance duty drawback claim amount to the petitioner.

6. Heard the learned counsel for the parties and perused the materials available on record.

7. Admittedly, the question is whether the goods exported under the classification of CETSH 6305 32 00 shall be re-classified under CETH 3923 29 90. No doubt, the lower authority/Assistant Commissioner of Central Excise & Service Tax, Karur, disagreeing with the case of the petitioner imposed a penalty of Rs. 5,000/- under Rule 27 of the Central Excise Rules, 2002 for contravention of rule 6 of the Central Excise Rules, 2002, but the matter was not ended as the petitioner took up the matter before the Commissioner of Customs and Central Excise (Appeals) Tiruchirappalli, who setting aside the order passed by the lower authority also waived the penalty of Rs. 5,000/- holding that FIBC manufactured by the petitioner/appellants are to be classified under CETH 6305 32 00. Subsequently, while dealing with the contentions advanced by both parties, the Commissioner of Customs (Appeals), Chennai, by adverting to another order passed by the CESTAT in the case of TPI India Ltd. v. CCE, Mumbai II reported in 2005 (189) E.L.T. 311 (Tri.-Mum.) has held in favour of the petitioner stating that the Flexible Intermediate Bulk Container would fall under Chapter heading 6305 32 00. It is necessary to extract paragraphs 5.4, 5.5, 6 and 7 of the order passed by the Commissioner of Customs (Appeals), Chennai, which as under:-

"5.4. The above case law is squarely applicable to the case in hand in as much as Flexible Intermediate Bulk Containers has been specifically covered under sub-heading 6305 32 00. Further, the said classification has been confirmed by the Hon''ble CESTAT in the case of TPI India Ltd. v. CCE, Mumbai II reported in 2005 (189) E.L.T. 311 (Tri.-Mum.) which has held that articles of such as Kraft-lined bags and Flexible Intermediate Bulk Containers fall under Chapter 63 while deciding the issue of classification of goods between 63.05 & 39.23.

5.5 Apart from the above facts and discussions, it may not be out of place to mention that when the department itself sought to re-classify the impugned item under Chapter heading 6305 32 00, it is illogical to challenge the orders of the Lower Adjudicating Authority to bring back the same item under Chapter 39 which was challenged by issuing Show Cause Notices.

6. In view of the above I hold that the Flexible Intermediate Bulk Containers being manufactured and cleared by the respondents would fall under Chapter heading 63053200 and hence I set aside the 4 appeals filed by the department and an appeal filed by the appellant mentioned against Sl. No. 5 shown above.

7. The appeals are dismissed."

8. Apart from the above, the issue also has been decided by the Director General of Foreign Trade, Udyog Bhawan, classifying that Flexible Intermediate Bulk Containers are covered under ITC (HS) Code 63 and not under ITC (HS) Code 39. The Ministry of Finance (Department of Revenue) Central Board of Excise & Customs, New Delhi, in Circular No. 42/2011-Cus. dated 22-9-2011, F. No. 609/82/2011-DBK, also has settled the dispute regarding the classification of FIBC by bringing it under Chapter 63, therefore, this Court has no hesitation to allow the prayer made by the petitioner.

9. In view of the above, a Mandamus is issued directing the 3rd respondent to settle and release the pending balance duty drawback claim amount entitled to the petitioner for the period 18-2-2010 to 24-9-2010 in the light of the Notification No. 103/2008-Customs, dated 29-8-2008 issued by the Government of India, Ministry of Finance and as per the decision of DGFT Committee Meeting No. 17/AM-14, dated 25-7-2013, within a period of two weeks from the date of receipt of a copy of this order. Needless to mention that in the event of success by the respondents before the CESTAT in the pending appeal, it is always open to the respondents department to take recourse under rule 16 of the Customs Central Excise Duties Service Tax Drawback Rules, 1995. The writ petition is allowed accordingly. No costs. Consequently, connected miscellaneous petition is closed.

