(2014) 09 KL CK 0191

In the High Court Of Kerala

Case No : W.P. (C) No. 16331 of 2014

Malabar Extrusions Pvt. Ltd. APPELLANT

Vs

Union of India RESPONDENT

Date of Decision : 17-09-2014

Acts Referred:
Customs Act, 1962 — Section 128

Citation : (2015) 316 ELT 56 : (2015) 51 GST 548

Hon'ble Judges : P.R. Ramachandra Menon, J

Bench : Single Bench

Advocate : Manuel Thomas, Advocates for the Appellant; Thomas Mathew Nellimoottil, SC, Advocates for the Respondent

Judgement

P.R. Ramachandra Menon, J.—Rejection of the refund claim put forth by the petitioner, for excess deposit of Customs Duty pursuant to Ext. P1, is under challenge in this writ petition. Undisputed facts disclose that, the petitioner, on import of goods, submitted Ext. P1 Bill of Entry and duty was satisfied accordingly, effecting total deposit of Rs. 10,31,659/- under various heads. Subsequently, the petitioner realized that the commodity imported by the petitioner was not exigible to Customs Duty and accordingly, a refund application was preferred before the concerned authority vide Ext. P5 dated 29-3-2012. This was turned down by the Assistant Commissioner of Customs (Refund) as per Ext. P6 dated 11-4-2012 holding that, in so far as the assessment order stands, for not having it modified by a procedure known to law, the claim of the petitioner for effecting the refund was not liable to be entertained.

2. It was in the said circumstance, that the petitioner approached the 3rd respondent by submitting Ext. P7 appeal under Section 128 of the Customs Act, 1962. The appeal was not numbered and the same was rejected as per Ext. P9 proceedings dated 1-6-2012, holding that, Section 128 of the Customs Act was not liable to be invoked for claiming refund. The petitioner made a further representation by way of Ext. P10 dated 22-6-2012 before the Commissioner,

pointing out the facts and figures and also alerting him that, no opportunity of hearing was given to the petitioner before passing Ext. P9 order. This was followed by Ext. P11 dated 11-9-2013, wherein an endorsement was made by the 3rd respondent/Commissioner in the form of a clarification, to the effect that, appeal would be possible only against an order passed by ADC/JC/DC/AC and for want of any such order, the appeal was not maintainable under Section 128 of the Customs Act.

3. The petitioner moved the 3rd respondent further by way of Ext. P13, followed by Ext. P14 representation referring to the sequence of events, which was rejected by the said respondent as per Ext. P15, stating that the appeal was belated, having been preferred after the stipulated period of 60 days. This in turn is under challenge in this writ petition.

4. Heard the learned counsel for the petitioner and the learned Standing Counsel for the respondents.

5. The learned Standing Counsel appearing for the respondents submits that the refund application is not a substitute for appeal and since the law stands well settled that, the Bill of Entry itself could be treated as a self assessment order, the same could have been modified on approaching the concerned authorities, either the assessing authority or the Commissioner, without which the refund application could not have been entertained. It is also pointed out that, once the stipulated period for filing the appeal is over, it is not liable to be entertained by the Departmental authorities, in view of the law declared on this point as well. The learned counsel sought to rely on the decisions rendered by the Supreme Court in Priya Blue Industries Ltd. Vs. Commissioner of Customs (Preventive), and Collector of Central Excise, Kanpur Vs. Flock (India) Pvt. Ltd. C-7, Panki Industrial Area, Kanpur, with regard to the first aspect and with regard to the second aspect, the decision in Singh Enterprises Vs. Commissioner of Central Excise, Jamshedpur and Others, is relied on.

6. After hearing both the sides, this Court finds that there is no dispute with regard to the liability, which stands already declared by the Apex Court and by this Court on many an occasion. The basic aspect to be considered is whether the petitioner had actually approached the competent authority for getting the assessment order/Bill of Entry modified and what transpired thereafter. It was pursuant to Ext. P6 that the petitioner filed Ext. P7 appeal before the 3rd respondent. In Ext. P7, the date of service of the impugned order has been clearly mentioned by the petitioner against ''column No. 4'', that the same was served to the petitioner on 23-3-2012. The appeal was preferred on 8-5-2012, which is well within the time prescribed under the statute. The same was rejected by the appellate authority stating that Section 128 was not attracted.

7. Section 128 of the Customs Act reads as follows:

"Section 128. Appeals to Commissioner (Appeals). - (1) Any person aggrieved by any decision or order passed under this Act by an officer of customs lower in rank than a Commissioner of Customs may appeal to the Commissioner (Appeals) within sixty days from the date of the communication to him of such decision or order.

Provided that the Commissioner (Appeals) may, if he is satisfied that the appellant was prevented by sufficient cause from presenting the appeal within the aforesaid period of sixty days, allow it to be presented within a further period of thirty days.

(1A) The Commissioner (Appeals) may, if sufficient cause is shown, at any stage of hearing of an appeal, grant time, from time to time, to the parties or any of them and adjourn the hearing of the appeal for reasons to be recorded in writing:

Provided that no such adjournment shall be granted more than three times to a party during hearing of the appeal.

(2) Every appeal under this section shall be in such form and shall be verified in such manner as may be specified by rules made in this behalf."

Subsequently, the representation preferred by the petitioner was rejected as per the endorsement made in Ext. P11 in the following terms:

"It is clarified that an appeal is possible only against an order passed by ADC/JC/DC/AC. Without that, the appeal has no validity under Section 128 of the Customs Act."

The rejection lastly, is for the reason that the appeal was not preferred within 60 days as given in Ext. P15. The reasons given by the concerned authorities at different points of time do not reconcile with each other and the fact remains that the petitioner was never given an opportunity of hearing before passing Ext. P9 order.

8. After hearing both the sides and on going through the provisions of law, particularly the mandate under Section 128 of the Act, power is vested with the competent authority to deal with the situation so as to render justice, passing appropriate orders. The appeal preferred by the petitioner against Ext. P1 is well within time and as such, it ought to have been considered, passing appropriate orders on merits.

9. In the said circumstance, the impugned orders are set aside and the 3rd respondent is directed to reconsider the matter with regard to the claim for refund preferred by the petitioner passing appropriate orders in accordance with law. This shall be done after giving an opportunity of hearing to the petitioner. The matter shall be finalized at the earliest, at any rate, within ''two months'' from the date of receipt of a copy of this judgment. The writ petition stands disposed of.

