(2015) 01 KAR CK 0575

In the Karnataka High Court

Case No : CSTA Nos. 4/2011 and 12-15 of 2014

Mangalore Refinery and Petrochemicals Ltd. APPELLANT

Vs

C.C., Mangalore RESPONDENT

Date of Decision : 29-01-2015

Acts Referred:
Customs Act, 1962 — Section 18, 18(2), 26, 27, 27(2)

Citation : (2015) 323 ELT 484

Hon'ble Judges : N. Kumar, J;B. Veerappa, J

Bench : Division Bench

Advocate : B. Lakshmi Kumaran, for the Appellant; Y. Hariprasad, Advocates for the Respondent

Judgement

N. Kumar, J—The assessee has preferred these appeals against the order passed by the Tribunal which has held that the doctrine of unjust enrichment is not applicable in respect of refund claims arising out of Section 18 of the Customs Act (for short, hereinafter referred to as ''the Act''). The assessee is an Oil Refinery in Mangalore where crude petroleum is refined and diverse kinds of petroleum products are manufactured. For the purpose of refining, the assessee is importing crude oil falling under Chapter Heading 2709.00 of the First Schedule of the Customs Tariff Act, 1975. During the period in question i.e., 13-1-1986 to 15-3-1988, the crude oil was a canalized item, which could be imported through a canalizing agency designated by the Central Government. Around January, 2000, the assessee started importing full consignments of bill of lading and started importing certain consignments directly instead of importing through Indian Oil Corporation Ltd. (IOCL). There was no change in methodology of determining the value which was based on unit price and assessable value was arrived at by taking the unit price and multiplying with the shore tank quantity received. By taking this assessable value, the goods were cleared upon payment of duty. Once the cargo is received, the assessee would first file a provisional Bill of Entry for warehousing wherein they first indicate the quantity, as mentioned in the IGM filed by shipping agency. This quantity is multiplied by the unit rate mentioned in the intimation received from canalizing agency (IOCL) to arrive at a provisional assessable value, pending receipt of the details of Ullage quantity/ shore tank quantity. The actual discharge from vessel is, thereafter, measured and indicated in the tanker Ullage report. Based on the cargo index certificate (CIC), a revised figure is indicated in the same Bill of Entry for warehousing. There was an ongoing dispute between the assessee and the Department regarding indication of quantity in the Bills of Entry. In view of the said dispute, the assessee has to indicate only quantity as per Ullage Survey Report in the Bills of Entry. The appellants, thereafter, depending on their requirement, filed Bills of Entry for home consumption again indicating quantity as per Ullage Survey Report.

2. The assessee paid the duty under protest and for collecting the total value, multiplied the quantity as per Ullage Survey Report with the unit rate intimated by the Canalizing Agent. Freight and insurance is collected by the assessee depending on whether the price quoted by the supplier and the canalizing agent is in FOB, C & F or CSIF.

3. The assessee filed a detailed statement showing the full particulars of the import consignments in question and requested the Customs Authorities to finalise the assessment under Section 18(2) of the Customs Act, 1962 (for short hereinafter referred to as ''the Act''). In these statements, the assessee had shown the quantities also as per shore tank basis and sought for redetermination of the quantities to be adopted for the purpose of final assessment and to finalize the assessments accordingly. The assessee has been showing that he is paying the Customs duty in respect of the import consignments in the books of accounts based on the methodology of shore tank quantity. The customs duty indicated were at times less and at times more than the bill of lading quantities. The Lower Authority finalized the assessments by adopting the transaction value for the purpose of payment of duty, which resulted in excess payments towards duty made by the assessee. Consequent to the orders of assessments, the assessee filed refund claims for each assessment order for a total sum of Rs. 25,42,726/-.

4. On scrutinizing all the refund claims, the Assistant Commissioner of Customs, Mangalore, ordered for refund lesser than what had been claimed by the assessee and credited to the Consumer Welfare Fund in terms of Section 27(2) of the Act. The claim for refund was rejected on the ground that the assessee has not proved that the incidence had not been passed on to the customers. Aggrieved by the said order, the assessee preferred an appeal before the Commissioner of Customs (Appeals).

5. The Appellate Commissioner upheld the order passed by the original authority and dismissed the appeal. Aggrieved by the said order, the assessee preferred Second Appeal to the Tribunal.

6. The Tribunal following the judgment of the Bombay High Court in the case of Bussa Overseas and Properties Pvt. Ltd. Vs. Union of India (UOI), (2004) 2

BomCR 123 : (2003) 111 ECR 821 : (2003) 158 ELT 135 and other judgments, upheld the orders passed by the authorities. It was of the view that the doctrine of unjust enrichment would not be applicable and therefore, dismissed the appeal. Aggrieved by the said order, the assessee is in appeal.

7. The substantial question of law that arises for our consideration in these appeals is:

Whether the doctrine of unjust enrichment inserted by way of sub-section (5) of Section 18 of the Act with effect from 13-7-2006 was applicable to refund under Section 18 prior to the amendment in view of Section 27(2) of the Act?

8. Section 18 of the Act reads as under:

18. Provisional assessment of duty.-

(1) Notwithstanding anything contained in this Act but without prejudice to the provisions contained in section 4-

(a) where the proper officer is satisfied that an importer or exporter is unable to produce any document or furnish any information necessary for the assessment of duty on the imported goods or the export goods, as the case may be; or

(b) where the proper officer deems it necessary to subject any imported goods or export goods to any chemical or other test for the purpose of assessment of duty thereon; or

(c) where the importer or the exporter has produced all the necessary documents and furnished full information for the assessment of duty but the proper officer deems it necessary to make further enquiry for assessing the duty, the proper officer may direct that the duty leviable on such goods may, pending the production of such documents or furnishing of such information or completion of such test or enquiry, be assessed provisionally if the importer or the exporter as the case may be, furnishes such security as the proper officer deems fit for the payment of the deficiency, if any, between the duty finally assessed and the duty provisionally assessed.

(2) When the duty leviable on such goods is assessed finally in accordance with the provisions of this Act, then-

(a) in the case of goods cleared for home consumption or exportation, the amount paid shall by adjusted against the duty finally assessed and if the amount so paid falls short of, or is in excess of, 1 [the duty finally assessed], the importer or the exporter of the goods shall pay the deficiency or be entitled to a refund, as the case may be;

(b) in the case of warehoused goods, the proper officer may, where the duty finally assessed is in excess of the duty provisionally assessed, require the importer to execute a bond, binding himself in a sum equal to twice the amount of the excess duty.

2[(3) The importer or exporter shall be liable to pay interest, on any amount payable to the Central Government, consequent to the final assessment order under sub-section (2), at the rate fixed by the Central Government under Section 28AB from the first day of the month in which the duty is provisionally assessed till the date of payment thereof.

(4) Subject to sub-section (5), if any refundable amount referred to in clause (a) of sub-section (2) is not refunded under that sub-section within three months from the date of assessment, of duty finally, there shall be paid an interest on such unrefunded amount at such rate fixed by the Central Government under section 27A till the date of refund of such amount.

(5) The amount of duty refundable under sub-section (2) and the interest under sub-section (4), if any, shall, instead of being credited to the Fund, by paid to the importer or the exporter, as the case may be, if such amount is relatable to-

(a) the duty and, interest, if any, paid on such duty paid by the importer, or the exporter, as the case may be if he had not passed on the incidence of such duty and interest, if any, paid on such duty to any other person;

(b) the duty and interest, if any, paid on such duty on imports made by an individual for his personal use;

(c) the duty and interest, if any, paid on such duty borne by the buyer, if he had not passed on the incidence of such duty and interest, if any, paid on such duty to any other person;

(d) the export duty as specified in section 26;

(e) drawback of duty payable under sections 74 and 75.]

Section 18 of the Act deals with the provisional assessment of duty. Section starts with a non-obstante clause and the only exception being Section 46. It provides for provisional assessment and a proper officer directing the assessee to pay the duty leviable on such goods, be paid on provisional assessment, subject to the condition that the assessee shall pay the duty as may be finally assessed. Sub-section (2) provides when the duty leviable on such goods is assessed finally in accordance with the provisions of the Act and the amount paid on such provisional assessment is in excess of the duty finally assessed, the assessee shall be entitled to the refund. Therefore, the obligation is cast on the Revenue to make refund of the excess duty paid and collected.

9. Section 27 of the Act provides for claiming of refund of duty. It relates to a claim for refund of duty or interest paid by the assessee or borne by him in a case not falling under the provisional assessment. Sub-section (2) of Section 27 of the Act provides that any excess duty so paid after such determination shall be credited to the Fund. The proviso may be in exception instead of crediting to the Fund, the said amount is payable to the assessee, if the said amount does not fall within any of the categories mentioned in (a) to (f) of the said proviso.

One such instance where the assessee was not entitled to refund was where he had already passed on the burden of duty on the customer. That is, if it is refunded to him, it would be a case of unjust enrichment. Such a provision was conspicuously missing in Section 18 of the Act. It is by way of amendment which came into effect from 13-7-2006 the said provisions contained in sub-section (2) of Section 27 of the Act was added to Section 18 by way of sub-section (5). If for a claim under Section 18 of the Act, if an assessee has to put-forth a claim under Section 27 of the Act, there was no necessity for the parliament to introduce sub-section (2) of Section 27 of the Act by way of sub-section (5) of Section 18 of the Act. It only demonstrates Sections 18 and 27 are merely exclusive. Section 27 applies to a case of constitutional levy, illegal levy or a levy by mistake as held by the Apex Court in the case of Mafatlal Industries Ltd. and Others Vs. Union of India (UOI) and Others, (2002) 83 ECC 85 : (1997) 68 ECR 273 : (1997) 89 ELT 247 : (1996) 11 JT 283 : (1996) 9 SCALE 457 : (1997) 5 SCC 536 : (1996) 10 SCR 585 Supp : (1998) 111 STC 467 . Section 18 does not fall within any of those claims. By way of provisional assessment, the duty is paid subject to the condition that after final assessment, he would pay any additional levy and if the payment of duty is in excess of what is actually determined, then he would be entitled to the refund. To claim refund under Section 18 of the Act, the assessee was not expected to invoke Section 27 of the Act. Refund under Section 18 of the Act is independent of refund under Section 27 of the Act. It is for this reason when the Parliament wanted to prevent unjust enrichment, they amended Section 18 of the Act and introduced by way of sub-section (5) what is contained in sub-section (2) of Section 27 which includes unjust enrichment. Therefore, it follows prior to the amendment, this doctrine of unjust enrichment was not attracted to refund claim under Section 18 of the Act.

10. In fact this Court had an occasion to consider this aspect in the case of Commissioner of C. Ex. Vs. ITC Limited, (2011) 268 ELT 308 where after referring to the judgment of the Apex Court in the case of M/s. Mafatlal Industries Ltd. and Others Vs. Union of India (UOI) and Others, (2002) 83 ECC 85 : (1997) 68 ECR 273 : (1997) 89 ELT 247 : (1996) 11 JT 283 : (1996) 9 SCALE 457 : (1997) 5 SCC 536 : (1996) 10 SCR 585 Supp : (1998) 111 STC 467 and Commissioner of Central Excise, Mumbai-II Vs. Allied Photographics India Ltd., (2004) 92 ECC 777 : (2004) 166 ELT 3 : (2004) 4 JT 105 : (2004) 3 SCALE 447 : (2004) 4 SCC 34 : (2004) 3 SCR 261 : (2007) 8 STT 365 : (2004) AIRSCW 1771 : (2004) AIRSCW 6761 : (2004) 5 Supreme 230 as well as Commissioner of Central Excise, Chennai Vs. T.V.S. Suzuki Limited, Hosur, (2003) 156 ELT 161 : (2003) 6 SCALE 123 : (2003) 2 SCR 281 Supp held that refund claims consequent upon finalization of provisional assessment does not attract the bar of unjust enrichment. The refund is paid in pursuance of the finalization of provisional assessment order and the doctrine of unjust enrichment does not apply to such a case.

11. The Gujarat High Court in the case of Commissioner of Customs v. Hindalco Industries Ltd., reported in 2008 (231) E.L.T. 36 (Guj.) has taken a similar view

and these judgments are not referred to or looked into by the authorities. They are carried away by the judgment of the Apex Court in Mafatlal case (supra) which was not dealing with the provisional assessment at all and by wrongly applying the ratio laid down in that case to the facts of this case, committed an illegality in denying the lawful refund, the assessee was entitled to under Section 18 of the Act for the period anterior to the amendment of 2006. In that view of the matter, the impugned orders are not sustainable. Hence, we pass the following:

ORDER

(a) Appeals are allowed;

(b) The impugned orders passed by all the authorities are hereby set aside;

(c) The authorities are directed to refund the excess duty recovered on the basis of the provisional assessment which they are legally bound to refund after final assessment;

(d) Parties to bear their own cost.