(2012) 04 KL CK 0016

In the High Court Of Kerala

Case No : Cus. Appeal No. 1 of 2011

Neptune Trade Links Pvt. Ltd. — APPELLANT

Vs

Commissioner of Cus., Cochin — RESPONDENT

Date of Decision : 10-04-2012

Acts Referred:
Customs Act, 1962 — Section 114A, 130, 28(2), 28AA

Citation : (2012) 194 ECR 172 : (2012) 284 ELT 29 : (2013) 18 GSTR 529 : (2012) 2 KLJ 818

Hon'ble Judges : C.N. Ramachandran Nair, J;Babu Mathew P. Joseph, J

Bench : Division Bench

Advocate : G.L. Rawal, George Poonthottam, Sujith Mathew Jose, M. Praveesh and N. Anand, for the Appellant; Saiby Jose Kidangoor, SC, for the Respondent

Final Decision : Dismissed

Judgement

Ramachandran Nair, JJ.—This is an appeal filed u/s 130 of the Customs Act against the order of the Customs, Excise and Service Tax Appellate Tribunal [2009 (243) E.L.T. 622 (Tribunal)] with a delay of 705 days. The reason for the inordinate delay in the filing of appeal against the order of the Tribunal before the Karnataka High Court thinking that since the Tribunal which issued the order is located at Bangalore, jurisdiction over it is in the Karnataka High Court. Even though Standing Counsel opposed the delay condonation petition stating that delay is beyond condonable limit under the provisions of the Customs Act, we feel since the provisions of CPC are made applicable for appeals filed under the Customs Act, this Court has the authority to condone delay. It is seen from the judgment of the Karnataka High Court that within the statutory period appellant filed the appeal and the matter was pending there for long period. We, therefore, condone the delay and proceed to consider the appeal on merits. We have heard Senior Counsel Sri. G.L. Rawal appearing for the appellant and Standing Counsel Sri. Saiby Jose Kidangoor for the respondents. The dispute is only against levy and demand of interest u/s 28AB (now Section 28AA) read with Section 28(2) of the Customs Act (hereinafter called "the Act") for belated payment of customs duty for the goods imported by the appellant through the Cochin Customs. The facts leading to the controversy are the following. The appellant purchased duty credit available under the DEPB scheme from M/s. Bhagya Laxmi Exports which had DEPB credit registered on exports at Nhava Sheva Custom House, Mumbai. Based on the Telegraphic Release Advice (TRA) purportedly issued by Nhava Sheva Custom House and produced by the appellant, the Cochin Customs set off the customs duty payable on import made by the appellant against duty credit purchased and produced by the appellant. Much after import and release of the goods, the Cochin Customs verified with the Nhava Sheva Custom House at Mumbai about the genuineness of the DEPB credit purchased and produced by the appellant through Telegraphic Release Advice (TRA) purportedly issued by the Nhava Sheva Custom House. It was confirmed that the Telegraphic Release Advice of duty credit under DEPB scheme produced by the appellant was forged and bogus leading to customs duty evasion. Consequent upon this fraud, the Commissioner demanded the duty evaded by the appellant together with interest and also levied penalty u/s 114A of the Act for misdeclaration and suppression of fact that led to evasion of duty. The appellant promptly paid the duty demanded without contest but questioned the levy of interest as well as penalty in appeal before the CESTAT. The Tribunal accepting appellant''s theory that it is the seller of the DEPB credit M/s. Bhagya Laxmi Export that committed the deceit and also accepting that the appellant had made payment for the purchase of DEPB credit through cheque issued, cancelled the penalty levied, but sustained the demand of interest for belated payment against which this appeal is filed.

2. Senior counsel appearing for the appellant contended that interest u/s 28AB (now 28AA) read with Section 28(2) is payable only for default in payment of customs duty and since duty is paid as and when demanded by the Commissioner of Customs, the appellant is not at default. Standing Counsel appearing for the respondent on the other hand submitted that customs duty was payable at the time of clearance of goods in the course of import and it is only because of appellant''s fraud that they managed to get duty demand set off against bogus DEPB credit purchased through Telegraphic Release Advice and as and when such duty credit is found to be bogus, department will be justified in demanding interest for the delay that happened which is the period between the date of clearance of goods till date of actual payment. In support of the contentions raised counsel for the appellant relied on decision of the Supreme Court in Star India (P) Ltd. v. Commissioner of Central Excise, Mumbai & Goa reported in (2005) 7 SCC 203 = 2006 (1) S.T.R. 73 (S.C.), decision of the Bombay High Court in Union of India v. Valecha Engineering Limited reported in 2010 (249) E.L.T. 167 (Bom.) and also decision of the Gujarat High Court in Commissioner of C. Ex. and Cus., Daman Vs. Nirmala Dyechem, . Standing Counsel appearing for the respondents on the other hand relied on decision of the Calcutta High Court in ICI India Limited Vs. Commissioner of Customs (Port) and Others, . After considering the above decisions what we notice is that the

decision rendered by the Calcutta High Court above referred is exactly on the same set of facts inasmuch as party in that case against whom interest is sustained also produced forged DEPB credit and the High Court held that the fraud perpetuated in a transaction of this type should automatically lead to demand of duty and interest. We are in complete agreement with the decision of the Calcutta High Court for more than one reason. In the first place, admittedly, appellant committed an irregularity because Telegraphic Release Advice is basically not for transfer of DEPB credit but for transfer of import licence registered in another Custom House. Secondly, Telegraphic Release Advice has to be issued by the Custom House and it was the duty of the appellant to verify its genuineness with the Custom House which issued it before making huge payment of above Rs. 47 lakhs to the seller which according to the appellant played the fraud. Thirdly, the appellant''s transaction of purchase of DEPB credit from another concern namely, Bhagya Laxmi Export has nothing to do with the Customs Department which cannot be held liable for the fraud, if any, committed by the Mumbai Exporter against the appellant. Whatever is the recourse and remedy available to the appellant is against M/s. Bhagya Laxmi Export, Mumbai and not against the Customs Department. The only mistake committed by the Customs is that before verifying the genuineness of the Telegraphic Release Advice produced on the DEPB credit with the Nhava Sheva Custom House at Mumbai, the Customs allowed adjustment of duty credit against duty payable by the appellant for the imported goods released to him. We do not think the mistake committed by the Customs can be encashed by the appellant by avoiding statutory interest which is mandatory and payable at the prescribed rate for delay in payment of customs duty. When liability for payment of customs duty is admitted, interest for delay in payment which is statutory is automatic and we do not think the appellant can raise even a contest against levy and demand of interest for the belated payment, when the delay is attributable only for the fraud played on the department, whether it be with the complicity of the appellant or not. In our view, the Tribunal was very considerate to the appellant in waiving the penalty. Since interest is compensatory in nature for the belated payment of customs duty and the delay also having admitted by the appellant, we do not find any justification for the appellant even to challenge the same. Consequently we dismiss the appeal as devoid of any merit.

