(2015) 08 MAD CK 0036

In the Madras High Court

Case No : W.P. No. 11109 of 2015 and M.P. No. 1 of 2015

PNC Infratech Ltd. APPELLANT

Vs

Union of India RESPONDENT

Date of Decision : 04-08-2015

Acts Referred:
Customs Act, 1962 — Section 128, 130

Citation : (2015) 325 ELT 321

Hon'ble Judges : R. Mahadevan, J.

Bench : Single Bench

Advocate : B. Satish Sundar, for the Appellant; K. Mohanamurali, SCCG, for the Respondent

Judgement

R. Mahadevan, J.—The petitioner is a public limited company involved in the business of construction and laying of roads and development of infrastructural projects. It has been awarded the project of laying access controlled expressway between Agra and Firozabad by the Uttar Pradesh Expressways Industrial Development Authority under the Government of Uttar Pradesh. For the said project, the petitioner caused import of one Electronic Sensor Paver of Vogele Model, Super 1800-3 with AB-600 T.V. Screen, for which the petitioner filed Bill of Entry for clearance of the goods and sought for duty-exemption from basic customs duty and other duties under the Notification No. 12/2012-Cus. , dated 17-3-2012, read with Notification No. 5/2014, dated 17-2-2014 in Sl. No. 368-A. The third respondent-Assistant Commissioner of Customs raised queries as to the rejection of the exemption of duty and directed the petitioner to furnish the product catalogue and other import documents, for which the petitioner replied on 16-2-2015, justifying their claim for exemption by enclosing relevant document(s). By order dated 26-2-2015, the third respondent rejected the claim for exemption sought for by the petitioner under Order-in-Original No. 34374 of 2015. According to the third respondent, the duty exemption under Customs Notification No. 12/2012, Sl. No. 368-A is applicable only for Electronic Paver Finisher (with Sensor Device) for laying bituminous pavement of 7m. size and above. The third respondent found that the imported machinery is of standard width of "Screen", attached to the imported paver finisher of only 6m. The width larger beyond 6m. is created only through addition of bolt on extension manually up to a maximum of 9m. The third respondent followed the decision of the Customs, Excise and Service Tax Appellate Tribunal, West Zonal Bench, Mumbai in the case of Gammon India Ltd. v. Commissioner of Customs, reported in , 2013 (298) E.L.T. 740 (Tri.-Mumbai) , to arrive at his conclusion and held that even though the import documents like invoice, etc., mentioned in the description of the goods as "Electronic Sensor Paver--Vogele Model Super--1800-3 AB 600 T.V. Screen for laying bituminous pavement up to 9m. along with required accessories, the petitioner did not include the word "AB 600 T.V. Screen" to the description in the Bill of Entry and thus the petitioner was denied the benefit of the Notification No. 12/2012 , Sl. No. 368A and therefore, the third respondent worked out the actual duty therein and directed the petitioner to pay the differential duty.

2. As against the above order of the third respondent-Assistant Commissioner of Customs, the petitioner preferred appeal under Section 128 of the Customs Act, before the second respondent-Commissioner of Customs (Appeals) on 13-3-2015 and the said appeal was registered. The petitioner paid 7.5% of the duty imposed as pre-deposit for entertainment of the appeal. As the goods have not been cleared, the petitioner was given preference for the hearing of the appeal, as the Bill of Entry had been alive. However, the second respondent-appellate authority is guided by the ruling of the Customs, Excise and Service Tax Appellate Tribunal, West Zonal Bench, in the above said case of Gammon India Ltd., which was affirmed in the Larger Bench of the Tribunal in the case of Commissioner of Customs v. Ramky Infrastructure Limited, reported in , 2013 (296) E.L.T. 518 (Tri.-Mumbai) .

3. Subsequent to the decision of the Larger Bench of the Tribunal, the Department''s appeal in the case of Ramky Infrastructure, was allowed, vide order dated 3-6-2014. According to the petitioner, the point to be decided in the appeal is as to whether the petitioner is entitled to the benefit of the Customs Notification No. 12/2012-Cus. , dated 17-3-2012 in Sl. No. 368-A or not. The third respondent-Assistant Commissioner was mainly guided by the ratio of the Tribunal in the case of Gammon India, as stated above.

4. There is a contra view in the case of Ramky Infrastructure Ltd., pertaining to the ratio of the Tribunal in Gammon India Ltd. Since there was conflicting decisions of the Tribunal, a Larger Bench was constituted, which upheld the view taken in Gammon India case. Thus, there are conflict of views as to whether the benefits of exemption could be granted to the petitioner or not. Whether the Notification is size-specific with respect to the equipment or whether the machine has the capacity to lay the pavement of 7m. and above or not, has to be considered in the appeal. It is admitted that the product catalogue submitted along with the import documents, clearly shows that the machine is capable of

laying pavement of width of 10m. and the benefit of exemption pertaining to relevant Notification is available for the petitioner. The Larger Bench of the Tribunal construed the earlier Notification strictly, without giving room for any latitude and also not taking into account the object of the Notification in allowing the import at concession rate of duty in respect of the equipment imported for public purpose of laying of roads and highways. It is also specifically stated by the petitioner that the roads and construction thereof, are the sine-qua-non for the development and progress and are the hallmark of civilization, which is the dream of the policy makers and Constitutional functionaries.

5. The imported machine is solely for speedy and effective implementation of the project in question and the further delay in non-use of the machinery imported, entails penal and fiscal consequences to the petitioner-Entity. The imported goods landed in Chennai Port in the first week of February 2015, which had also been self-assessed to duty by availing of the benefit of the relevant Notification. The third respondent-Assistant Commissioner of Customs, denied the benefit of the Notification and assessed the relevant duty, for which, the petitioner is prepared to submit suitable bond to safeguard the interest of the Revenue.

6. The goods under import are neither prohibited, nor restricted, and they are freely importable and the project in question is a public project. The issue before the second respondent-appellate authority is as to whether the petitioner is entitled to the benefit of the exemption Notification or not. Since there are two views in respect of the interpretation of the earlier Notification by the Tribunal in its West Zonal Bench in Mumbai, the petitioner apprehends that the second respondent may kowtow the reasoning of the Larger Bench of the Tribunal and the same is imminent. Hence, the petitioner-Company has filed this Writ Petition seeking for a direction to the second respondent-appellate authority to dispose of the appeal.

7. The third respondent has filed counter affidavit, denying the averments of the petitioner, inter alia contending that the main issue involved in the Writ Petition is as to whether the impugned goods are eligible for concessional rate of duty under the Customs Notification No. 12/2012 , Sl. No. 368-A or not, which question has been placed before the Commissioner of Appeals, which is now in the final stage of disposal and hence, it is premature on the part of the petitioner to approach this Court; the contention of the petitioner that the second respondent-appellate authority may merely kowtow the reasoning''s of the Larger Bench of the Tribunal, is based on surmises and conjectures. The lower authority, with diligence and alacrity, had kept in mind the "live" nature of goods; the Order-in-Original was issued to enable them to exhaust the remedy available under the provisions of the Customs Act before the second respondent-appellate authority. By the said Order-in-Original, the petitioner got the opportunity to clear the impugned goods in time on payment of duty under protest, so that they stand to get back the duty paid under protest in the form of refund; in the event of getting favourable order from the appellate authority. It is further stated that

the petitioner filed appeal before the second respondent by keeping the cargo under warehouse, instead of clearing the goods by paying the duty under protest as provided under law. Hence, the petitioner''s argument for urgent need of goods for the project in question, is not sustainable. There is no stay of the operation of the order passed by the lower authority and the process of appeal is in the final stage; the petitioner is attempting to subterfuge the due process of law, more particularly, quasi judicial process. Though Section 130 of the Customs Act as it stood before amendment, provides for appeal to this Court against the order of the CESTAT, the present Writ Petition is filed only for issuance of a Writ of Mandamus, and any direction by this Court to the second respondent-Commissioner of Appeals to ignore the ratio of the order of the CESTAT in identical matters as prayed for by the petitioner, may go against the essence of Section 130 of the Customs Act. The petitioner does not have the locus standi to approach this Court seeking for the direction as prayed for in the Writ Petition and the same affects the merits of the order of the CESTAT relating to the rate of duty/classification and the same does not fall under the jurisdiction of this Court. It is further stated by the third respondent that by using the word ''kowtow'' in the affidavit filed in support of the Writ Petition, the petitioner attempted to disparage the Doctrine of Judicial Discipline, which warrants that the order of the Higher Judicial Forums be followed by the lower authority, and in this regard, the third respondent relied on various decisions and thereby the respondent(s) prayed for dismissal of the Writ Petition.

8. Heard both sides and perused the material documents available on record.

9. It is to be noted that as per Notification No. 12 of 2012-Customs , dated 17-3-2012, as amended by Notification No. 5 of 2014 , dated 17-2-2014, the relief sought for by the petitioner was negatived by the Tribunal originally, and the matter was subsequently placed before the Full Bench of the Tribunal, which also negatived the relief, against which, the Special Leave Petition is pending before the Supreme Court.

10. Learned counsel for the petitioner pointed out that non-consideration of certain areas relates to the classification of the machinery being called as Electronic Paver Finisher (with Sensor Device) for laying bituminous pavement 7m. size and above, and this aspect has not been originally considered by the Tribunal, or not even subsequently by the Full Bench of the Tribunal and SLP is pending before the Supreme Court. It is the further case of the petitioner that against such denial of the relief by the original authority, the petitioner has already filed appeal before the second respondent-Commissioner of Appeals, under Section 128 of the Customs Act, which is pending.

11. Hence, without being influenced by any of the findings of the Tribunal at the first instance as well as the Full Bench of the Tribunal, the petitioner prays that the second respondent-appellate authority (Commissioner of Appeals) may be directed to consider the said pending appeal independently and decide the issue on merits.

12. On the other hand, Mr. K. Mohanamurali, learned SCCG appearing for the respondents submitted that the original authority considered each and every aspect of the matter threadbare, more particularly, taking into consideration the relevant Notification of the Customs Department and passed a speaking order, against which, the petitioner''s appeal is pending before the second respondent-appellate authority, and the said appeal is in the stage of final disposal. He further submitted that the second respondent-appellate authority would decide the appeal on merits, independently, with due regard to the applicability of the relevant provisions of the Customs Act.

13. Upon consideration of the facts and circumstances of the case and the submissions made by the learned counsel appearing for both parties, in order to give a quietus to the issue, the second respondent-appellate authority (Commissioner of Customs-Appeals) is directed to dispose of the appeal of the petitioner, on its own merits and in accordance with law by providing due opportunity of hearing to the writ petitioner and independently decide the matter. The second respondent-appellate authority shall dispose of the said appeal within a period of eight weeks from the date of receipt of a copy of this order. With the above observations/direction, the Writ Petition is disposed of. No costs. The Miscellaneous Petition is closed.

