(2014) 07 MAD CK 0112

In the Madras High Court

Case No : Civil Miscellaneous Appeal No. 3297 of 2013 and M.P. No. 1 of 2013

Quest Life Services (P) Ltd. APPELLANT

Vs

CESTAT RESPONDENT

Date of Decision : 11-07-2014

Acts Referred:

Central Excises and Salt Act, 1944 — Section 35F
Customs Act, 1962 — Section 114(A), 28
Special Economic Zones Act, 2005 — Section 30

Citation : (2014) 308 ELT 670

Hon'ble Judges : R. Sudhakar, J;G.M. Akbar Ali, J

Bench : Division Bench

Judgement

R. Sudhakar, J.—The present appeal has been filed by the assessee against the order of the Customs, Excise and Service Tax Appellate Tribunal, Chennai, wherein direction was given to the appellant for pre-deposit for the purpose of hearing the appeal. The question that arises for consideration is ''Whether the Tribunal was justified in ordering pre-deposit of duty overlooking the decision of the Supreme Court in Commissioner of Customs (General), New Delhi Vs. Gujarat Perstorp Electronics Ltd., ''.

2. The Revenue demanded customs duty amounting to Rs. 24,48,632/- (Rupees Twenty Four Lakhs Forty Flight Thousand Six Hundred and Thirty Two only) and Rs. 25,43,198/- (Rupees Twenty Five Lakhs Forty Three Thousand One Hundred and Ninety Eight only) for two periods, viz., 2004-2.006 and 2006-2007 together with penalty under Section 114(A) of the Customs Act.

3. It is the case of the appellant that the appellant unit is situated in the Special Economic Zone, part of the Export Processing Zone. The appellant company is engaged in the business of contract research on behalf of Pharmaceutical companies. During the period in question, the department, on verification, found that the appellant unit had cleared goods to the Domestic Tariff Area (for brevity, ''the DTA'') and those clearances were done without following the procedure laid

down under Rule 48 of the Special Economic Zone Rules, 2006, and in violation of Section 30 of the Special Economic Zone Act. A show cause notice in terms of Section 28 of the Customs Act was issued and the matter was adjudicated and a demand for duty was ordered together with penalty. An appeal was filed challenging the order of the Deputy Commissioner dated 23-6-2006. The Commissioner (Appeals), vide his order dated 13-9-2006, set aside the order of the Deputy Commissioner on the ground of violation of principles of natural justice and remanded the matter back for de novo consideration. The Deputy Commissioner, on remand, took up the matter for reconsideration and, thereafter, on 16-11-2006, confirmed the demand under Section 28 holding that the material, which was cleared are not books within the meaning of Customs Tariff Heading 49.01, and that it will fall under 49.11 and not exempt from duty and, consequently, imposed the penalty under Section 114(A), against which an appeal was filed with the Commissioner (Appeals). The Commissioner (Appeals), by order dated 26-2-2007, set aside the order of the Deputy Commissioner holding that the decision of the Supreme Court in Commissioner of Customs (General), New Delhi Vs. Gujarat Perstorp Electronics Ltd., should be considered for the purpose of deciding the case. It was pointed out by the counsel for the appellant that the Commissioner (Appeals), at the time of taking up the appeal for hearing on merits, has clearly held that there was a prima facie case for waiver of pre-deposit. Thereafter, an order was passed by the Original Authority, viz., the Deputy Commissioner on 20-9-2007, confirming the duty and penalty as demanded in the show cause notice.

4. As against the said order, an appeal was filed to the Commissioner (Appeals), who confirmed the order of the Deputy Commissioner vide order dated 29-6-2009 against which an appeal was filed on 22-10-2009 to the Tribunal along with an application for waiver of pre-deposit. The Tribunal, by order dated 11-12-2012, passed in Misc. Order Nos. 895-896 of 2012 passed impugned Order Nos. 828-829 of 2012. The Tribunal, while holding that there was no prima facie case in favour of the assessee, was of the view that there is a dispute on classification of goods under Customs Tariff Heading 49 and came to the conclusion that for the grant of benefit under Notification No. 21/2002-Customs, the appellant should have filed Bill of Entry at the time of clearance of the goods to the DTA and the same has not happened and, therefore, the department was justified in issuing show cause notice by invoking the provision to Section 28 of the Customs Act on the ground of suppression. The Tribunal, while considering the prima facie case, held as follows:-

"5. Prima facie, we have not found a good case for the appellant in the aforesaid facts and circumstances of this case. They have pleaded financial hardships and have also produced copies of balance sheets and profit and loss account for the period from 2006-07 to 2010-11. The latest documents indicate a loss of Rs. 25 Lakhs. However, these documents also indicate considerable cash flow to the tune of Rs. 3.8 Crores for the year ending 31st March, 2011.

6. Nevertheless, for the ends of justice, we are considering the plea of hardships also in the context of determining the amount to be pre-deposited by the appellant.

7. We direct the appellant to pre-deposit an amount of Rs. 20,00,000/- (Rupees Twenty Lakhs only) towards total demand of duty of over Rs. 50 lakhs within six weeks and report compliance to the DR/AR on 30-1-2013. DR/AR to report to the Bench on 6-2-2013. Subject to the due compliance, there will be waiver and stay in respect of the penalties imposed on the appellant and the balance amount of duty. Application Nos. C/MISC/367/09 & C/MISC/369/09 will be listed along with appeals for hearing. As against the above order passed by the Tribunal, writ petition was filed and the same was dismissed with liberty to file appeal by an order passed by a Division Bench of this Court. Accordingly, this appeal has been preferred challenging the above order of the Tribunal ordering pre-deposit."

5. To canvass the plea that no duty is payable as claimed by the department in respect of the goods in clearance, reliance is placed on Notification No. 21/2002-Customs, dated 1-3-2002, wherein it is stated that for goods falling under chapter heading or sub-heading 49, viz., printed books (including covers for printed books) and printed manuals, in bound form or in loose leaf form with binder, executed on paper or any other material including transparencies, the rate of duty is ''Nil''. However, to buttress this argument that the goods are not subject to any duty and the interpretation sought for by the department is prima facie not maintainable, reliance is placed on the decision of the Supreme Court in Gujarat Prestorp Electronics Ltd.''s case (supra), where the very same chapter heading 49 was considered by the Supreme Court, and taking note of the exemption notifications issued from time to time in relation to chapter heading 49, held that Heading 49.01 deals with printed books, brochures, leaflets and similar printed matter, whether or not in single sheets, whereas Heading 49.11 deals with other printed matter, including printed pictures and photographs. The Supreme Court clearly held that specific or basic heading 49.01 should be the criteria for determining the nature of goods. For better clarity, it is useful to refer to the following paragraphs of the above said judgment, which are as hereunder:-

"50. In our opinion, the counsel is right in submitting that when the expression ''book'' is not defined in the Act, natural and ordinary meaning of the said expression must be kept in view. According to him, nowhere it is provided that all the nine characteristics or ingredients as highlighted by the learned Attorney General in Parasrampuria Synthetics Ltd. and referred to by this Court in paragraph 10 must be considered essential or sine qua non. He, therefore, submitted that a wrong test was applied by this Court in Parasrampuria Synthetics Ltd. and Scientific Engineering House Ltd. was erroneously distinguished. The proper way on the part of the Court was to consider the test laid down in Scientific Engineering House Ltd. and to come to a conclusion whether on the facts and in the circumstances of the case. Drawings, Designs and Plans in the case on hand could be said to be ''book''. By not doing so, a clear error of law had been committed and the decision deserves to be overruled.

51. It was also submitted that so far as factual aspect is concerned, CEGAT was right in holding that Drawings, Designs and Plans imported by the assessee were covered by Tariff Heading 49.01 and were also entitled to exemption under Notifications No. 107/93-Cus., and 38/94-Cus. Alternatively, it was submitted that if this Court is of the view that CEGAT has not entered into the said question in view of the Larger Bench decision, the matter may be remitted to CEGAT directing it to consider the case afresh by applying correct test and to take an appropriate decision.

52. The learned counsel for the Revenue submitted that Elecon Engineers Ltd. and Scientific Engineering Housing Ltd. were rendered in different context. The basic issue was - whether ''books'' were covered by the entry ''plant'' under the Income Tax Act. Those decisions, therefore, have no relevance to the issue in question since the entries are Supreme today with all High Courts pages 18 of 20 different. It was also submitted that since the article in question was to be used by the assessee and was prepared according to his requirement, it had no utility to others. Hence, it cannot be said to be a ''book'' in general sense. It was argued that this Court has considered the factual position in Parasrampuria Synthetics Ltd. and held that the article was not a book. It would not, therefore, be appropriate to hold otherwise in the present case.

53. In our opinion, all these questions have to be considered and decided by the CEGAT in the fact-situation of the case in hand. As already noted by us, some of the tests applied in Parasrampuria Synthetics Ltd. were not relevant and appropriate. The CEGAT will now consider the ratio in Parasrampuria Synthetics Ltd. in the light of the observations made by us in this judgment and decide the issue raised in the instant case.

54. The matter could be looked at from another angle also. As noted earlier, HSN has dealt with the point and as per Explanatory Note, it would fall under Chapter Heading 49.01. If it is so, it would not be covered by sub-heading 4911.99.

55. In this connection, we may refer to a three-Judge Bench decision of this Court in Collector of Central Excise, Shillong Vs. Wood Craft Products Ltd., . The Court, in that case, considered the question whether ''plywood'' was classifiable under sub-heading 4408.90 or sub-heading 4410.90? HSN Explanatory Notes was considered by this Court and it was observed:

"We are of the view that the Tribunal as well as the High Court fell into the error of overlooking the fact that the structure of the Central excise tariff is based on the internationally accepted nomenclature found in the HSN and, therefore, any dispute relating to tariff classification must, as far as possible, be resolved with reference to the nomenclature indicated by the HSN unless there be an express different intention indicated by the Central Excise Tariff Act, 1985 itself. The definition of a term in the ISI Glossary, which has a different purpose, cannot in case of a conflict, override the clear indication of the meaning of an identical expression in the same context in the HSN. In the HSN, block board is included within the meaning of the expression ''similar laminated wood'' in the same context of classification of block board. Since the Central Excise Tariff Act, 1985 is enacted on the basis and pattern of the HSN, the same expression used in the Act must, as far as practicable, be construed to have the meaning which is expressly given to it in the HSN when there is no indication in the Indian tariff of a different intention."

56. The ratio laid down in Wood Craft Products Ltd. was followed and reiterated in The Collector of Central Excise, Hyderabad, Vs. M/s. Bakelite Hylam Ltd., and in the Collector of Customs, Bombay Vs. Business Forms Ltd. Thr. O.L., . Hence, even that aspect has to be considered and kept in mind while deciding as to whether Drawings, Designs and Plans could or could not be said to be ''printed book'' covered by Chapter Heading 49.01, 49.06 or sub-heading 4911.99?

57. There is still one more aspect which is relevant. It cannot be disputed and is not disputed before us and is also concluded by a decision of a three-Judge Bench in Associated Cement Co. Ltd. that the basic heading is 49.01. It deals with ''Printed books, brochures, leaflets and similar printed matter, whether or not in single sheets''. 49.11 covers ''Other printed matter, including printed pictures and photographs''. Thus, specific or basic Supreme Today With All High Courts Page 19 of 20 heading is 49.01 and residual entry is 49.11. Priority, therefore, has to be given to the main entry and not the residual entry. According to the Company, the case is covered by the main entry under 49.01, and in that view of the matter, one cannot consider the residual entry 49.11."

6. Further plea, according to the learned counsel for the appellant, is that the balance sheet of the appellant company as on 31-3-2011 showed a carry forward loss of Rs. 25,46,881/- (Rupees Twenty Five Lakhs Forty Six Thousand Eight Hundred and Eighty One only). Nevertheless, the Tribunal thought it fit to direct the appellant to deposit a sum of Rs. 20,00,000/- (Rupees Twenty Lakhs only) as against the duty demanded, which is not justified in the facts and circumstances of the case. This will cause undue hardship.

7. Per contra, Mr. Gisthi, learned standing counsel for the 2nd respondent relied upon the findings of the Tribunal in para. 4 and submitted that the Tribunal came to the conclusion that there is a dispute on the classification of goods under Chapter Heading 49. Further, it is a case of suppression and no Bill of Entry was filed. It was also submitted that the Tribunal noted that there is a cash flow of Rs. 3.80 Crores for the year ending 31-3-2011 and, therefore, it ordered pre-deposit in a sum of Rs. 20,00,000/- only, which warrants no interference.

8. We have heard Mr. Kalam, learned counsel appearing for the appellant and Mr. Haja Mohideen Gisthi, learned Addl. Central Government Standing Counsel appearing for the 2nd respondent and also perused the documents available on record and the judgment relied on by the learned counsel for the appellant.

9. The issue that has to be considered is whether the goods that have been

cleared from the Special Economic Zone to the DTA are goods falling under Chapter Heading 49.01 or 49.11. Even as per the Tribunal''s preliminary finding, though there is a dispute in classification, it clearly admits that heading 49.11 is a residuary heading covering other printed matters. The Tribunal, further, has not adverted to the decision of the Supreme Court in Gujarat Prestorp Electronics Ltd.''s case (supra), wherein it has been clearly held that Heading 49.01 would clearly bring within its ambit various types of printed materials, which is in the nature of goods cleared by the appellant to the DTA. Therefore, there is a prima facie case in favour of the appellant that the goods are not liable to duty in terms of the exemption in Notification No. 21/2002-Customs. The above fact, in the light of the Supreme Court decision in Gujarat Prestorp Electronics Ltd.''s case (supra), was not considered by the Tribunal for deciding the prima facie case. The Commissioner (Appeals), in the earlier order, has clearly held that the main issue, which has to be considered is the question of durability of the goods, which has been cleared to DTA in the light of the decision of the Supreme Court while considering the issue of waiver of pre-deposit. That issue is still the primary issue for consideration by the Tribunal. We have also noticed that if the goods are not liable to duty in view of the exemption and in the light of the decision of the Supreme Court, the appellant necessarily will have to be given the benefit of being heard without the condition of pre-deposit of duty and also in view of the financial hardship, which is clearly established in the balance sheet showing a loss of Rs. 25 Lakhs despite there being a considerable cash flow to the extent of Rs. 3.80 Crores for the year ending 31-3-2011. It is one thing to say that there is a financial inflow, but that will be required for the purpose of running the business. The appellant cannot be forced to make substantial payment, which will jeopardize the business of the company unless there is adequate material to show that an element of duty liability is prima facie present warranting the appellant to make the deposit, which we find is lacking in the present case in view of the judgment of the Supreme Court.

10. At this juncture, it is apposite to refer to a decision of the Supreme Court in Benara Valves Ltd. and Others Vs. Commissioner of Central Excise and Another, , wherein it has been held as under:

"8. It is true that on merely establishing a prima facie case, interim order of protection should not be passed. But if on a cursory glance it appears that the demand raised has no legs to stand on, it would be undesirable to require the assessee to pay full or substantive part of the demand. Petitions for stay should not be disposed of in a routine manner unmindful of the consequences flowing from the order requiring the assessee to deposit full or part of the demand. There can be no rule of universal application in such matters and the order has to be passed keeping in view the factual scenario involved. Merely because this Court has indicated the principles that does not give a licence to the forum/ authority to pass an order which cannot be sustained on the touchstone of fairness, legality and public interest. Where denial of interim relief may lead to public mischief, grave irreparable private injury or shake a citizen''s faith in the impartiality of public administration, interim relief can be given.

9. It has become an unfortunate trend to casually dispose of stay applications by referring to decisions in Siliguri Municipality and Others Vs. Amalendu Das and Others, and Assistant Collector of Central Excise, Chandan Nagar, West Bengal Vs. Dunlop India Ltd. and Others, cases without analysing factual scenario involved in a particular case.

10. Section 35F of the Act reads as follows:

"35F. Deposit, pending appeal, of duty demanded or penalty levied. - Where in any appeal under this Chapter, the decision or order appealed against relates to any duty demanded in respect of goods which are not under the control of Central Excise Authorities or any penalty levied under this Act, the person desirous of appealing against such decision or order shall, pending the appeal, deposit with the adjudicating authority the duty demanded or the penalty levied:

Provided that where in any particular case, the Commissioner (Appeals) or the Appellate Tribunal is of opinion that the deposit of duty demanded or penalty levied would cause undue hardship to such person, the Commissioner (Appeals) or, as the case may be, the Appellate Tribunal, may dispense with such deposit subject to such conditions as he or it may deem lit to impose so as to safeguard the interests of the Revenue:

Provided further that where an application is filed before the Commissioner (Appeals) for dispensing with the deposit of duty demanded or penalty levied under the first proviso, the Commissioner (Appeals) shall, where it is possible to do so, decide such application within thirty days from the date of its filing."

11. Two significant expressions used in the provisions are ''undue hardship to such person'' and ''safeguard the interests of the Revenue''. Therefore, while dealing with the application twin requirements of considerations i.e. consideration of undue hardship aspect and imposition of conditions to safeguard the interests of the Revenue have to be kept in view.

12. As noted above there are two important expressions in Section 35F. One is undue hardship. This is a matter within the special knowledge of the applicant for waiver and has to be established by him. A mere assertion about undue hardship would not be sufficient. It was noted by this Court in S. Vasudeva Vs. State of Karnataka and others, that under Indian conditions expression ''undue hardship'' is normally related to economic hardship. ''Undue'' which means something which is not merited by the conduct of the claimant, or is very much disproportionate to it. Undue hardship is caused when the hardship is not warranted by the circumstances.

13. For a hardship to be ''undue'' it must be shown that the particular burden to observe or perform the requirement is out of proportion to the nature of the requirement itself, and the benefit which the applicant would derive from compliance with it.

14. The word ''undue'' adds something more than just hardship. It means an excessive hardship or a hardship greater than the circumstances warrant.

15. The other aspect relates to imposition of condition to safeguard the interests of the Revenue. This is an aspect which the Tribunal has to bring into focus. It is for the Tribunal to impose such conditions as are deemed proper to safeguard the interests of the Revenue. Therefore, the Tribunal while dealing with the application has to consider materials to be placed by the assessee relating to undue hardship and also to stipulate conditions as required to safeguard the interests of the Revenue."

11. We find much force in the plea of the appellant regarding undue hardship and financial difficulty in pursuing the appeal on payment of the pre-deposit as ordered by the Tribunal. The same, therefore, requires to be modified considering the prima facie case of the appellant. For the foregoing reasons, we pass the following order:

(i) On the question of law raised, we are of the view that the Tribunal was not justified in ordering the pre-deposit in the manner stated in its order dated 11-12-2012;

(ii) Consequently, the order of the Tribunal dated 11-12-2012 is set aside and the appellant is granted waiver of the entire amount ordered to be paid as pre-deposit by the Tribunal.

In the result, the appeal is ordered in the above terms. No costs. Consequently, connected miscellaneous petition is closed. Since the appeal is of the year 2009, the Tribunal shall take up the appeal and dispose of the same at an early date. The learned Standing Counsel for the 2nd respondent pleaded that the Tribunal may be directed not to be carried away by the reasons stated in the above order and that the appeal be decided by the Tribunal on merits. This Court while considering the appeal is concerned with the prima facie case for grant of waiver of pre-deposit. The Tribunal while hearing the appeal is not fettered by any observation in the disposal of the interlocutory application by way of appeal. It is entitled to go into the appeal on merits taking into consideration all the plea - both on facts and law submitted by the appellant as well as the department.

