

(2016) 01 GUJ CK 0145
In the Gujarat High Court

Case No : Special Civil Application No. 20321 of 2015

Roxul Rockwool Insulation India Pvt. Ltd.	APPELLANT
Vs	
Union of India	RESPONDENT

Date of Decision : 20-01-2016

Acts Referred:

Citation : (2016) 334 ELT 412

Hon'ble Judges : Akil Kureshi and Mohinder Pal, JJ.

Bench : Division Bench

Advocate : Kamal Trivedi, Senior Advocate assisted by Hardik P. Modh, Naresh Thaker and Amit Laddha, Advocates, for the Petitioner; R.J. Oza, Advocate, for the Respondent

Final Decision : Disposed Off

Judgement

Akil Kureshi, J.(Oral)—Petitioner is aggrieved by the respondents not deciding its refund application. In this context, the petitioner has challenged a communication dated 30-11-2015, under which the Assistant Commissioner of Customs, Surat has returned the refund application on the ground that he does not have authority to process the same.

2. Brief facts are as under:-

2.1 Petitioner is a unit situated in Dahej Special Economic Zone and is engaged in manufacture of stone wool insulation products. According to the petitioner, the respondents collected a sum of Rs. 18,66,985/- by way of countervailing duty, though it was not payable by the petitioner. The petitioner, therefore, made a refund claim before the concerned customs authority having jurisdiction over the unit.

2.2 The issue regarding who would be the correct authority to process refund claims with respect to units situated in SEZs has been brewing up since quite some time. The respondents authorities are unable to decide such applications on account of certain intra-departmental communications. The situation had

come to a stage where for prolonged period, neither customs authorities nor the SEZ authorities would entertain such refund applications. A bunch of petitions came up before this Court, which group of matters came to be decided in case of Anita Exports v. Union of India, reported in 2015 (320) E.L.T. 743 (Guj.), in which it was held and observed as under:-

"13. From the above, it can be seen that on account of the said letter dated 1-11-2012 issued by the Ministry of Finance, a situation has arisen where neither the Commissioner of Customs nor the Commissioner of SEZ are left in a position to decide the refund claims of SEZ units or in some cases buyers of the goods. We would advert to the legal position shortly. However, we must observe that the Government cannot bring about a situation where no authority is left with the power to decide refund applications of the importers. This situation was brought about by the Ministry in its letter dated 1-11-2012. In the letter, as we have noted, while noticing that SEZ Act has overriding effect over other laws, it was also noticed that the SEZ officers were not accepting or disposing the refund applications due to lack of any provision in the SEZ laws for dealing with the same. The issue was therefore, taken up with the Department of Commerce for incorporation of provisions leading to refund as well as appeal and review in the SEZ law to ensure disposal of cases related to this issue. Under the circumstances, pending refund applications had to be returned to the applicants with a advise to approach the Department of Commerce. It was further conveyed that if any appeal was pending, same may also be returned for approaching the Department of Commerce.

14. Two things immediately emerge from this letter. Firstly, that the Ministry of Finance also recognised that there was no mechanism under the SEZ Act and Rules framed thereunder for entertaining refund applications and secondly, that the Ministry was of the opinion that such a set up was required to be made by making suitable changes in law. In fact the communication does not stop short at covering refund applications for such treatment. It refers to appeals and reviews of proceedings concerning SEZ units. All such applications would be returned to the parties who would be advised to approach the Department of Commerce.

15. In our opinion, the entire approach was thoroughly incorrect. Firstly, without making statutory changes, it was simply not possible for the Ministry of Finance by a mere communication to stop the Commissioner of Customs from processing refund claims which was his statutory duty. Secondly, if such mechanism was to be changed for SEZ units from the authorities of the Customs Commissionerate to Commissionerate (SEZ), there had to be matching provisions providing such mechanism under the SEZ law. This admittedly was not done. In fact, till date it has not been done. Thirdly, all the refund claims, appeals and reviews were to returned with an advise to approach the Ministry of Commerce. We may recall this communication was issued by the Ministry of Finance. We wonder what Ministry of Commerce would do with such refund applications, appeals and reviews. There is no clarification whatsoever in this connection. The Ministry of

Commerce per se did not have any statutory power either to process the refund claims or entertain appeals or reviews. Appeals and reviews are also creation of statute. Provisions for refund are made in the Customs Act and Central Excise Act. They can be taken away by statutory amendments. The powers can be shifted into another authority if a valid law is made in order to do so. By a mere letter, Ministry of Finance could not have suspended the power of Commissioner(Customs) to exercise his statutory functions. It is undisputed that duty was collected by the Commissioner of Customs. Whatever be the character of the duty, the Commissioner of Customs collected the same on a perceived opinion that unit concerned was required to pay such customs duty, redemption fine or penalties as the case may be. If later on such duty, fine or penalty is declared illegal, the person from whom the same has been collected would have a right to seek refund thereof. Such right would be covered by statutory provisions particularly, Section 27 contained in the Customs Act, 1962. Such refund application would have to be made within the time permitted under Section 27 of the Customs Act, 1962. It may also be subject to verification on the question of unjust enrichment. Many issues may arise which are not clear to us. But one thing is clear that such issues can be decided only by the authority under the Customs Act.

16. Section 27 of the Customs Act, 1962 pertains to claim for refund of duty. Sub-section(1) thereof provides for an application to be made by person claiming duty or interest in prescribed form to the prescribed authority within the prescribed time. Sub-section (2) of Section 27 authorises the Assistant Commissioner of Customs or the Deputy Commissioner of Customs, if he is satisfied that whole or part of the duty or interest paid by the applicant is refundable, to make an order accordingly. Proviso to sub-section (2) statutorily embodies the principle of unjust enrichment.

17. In case of *Mafatlal Industries Ltd. and Ors. v. Union of India and Ors.* reported in (1997) 5 Supreme Court Cases 536, the Constitution Bench of Supreme Court considered the statutory provisions under the Customs Act, 1962 and the Central Excise Act and held that any claim for refund would be covered by Section 27 of the Customs Act or 11-B of the Excise Act as the case may be. It was observed as under :

"(i) Where a refund of tax/duty is claimed on the ground that it has been collected from the petitioner/plaintiff whether before the commencement of the Central Excises and Customs Laws (Amendment) Act, 1991 or thereafter by misinterpreting or misapplying the provisions of the Central Excises and Salt Act, 1944 read with Central Excise Tariff Act, 1985 or Customs Act, 1962 read with Customs Tariff Act or misinterpreting or misapplying any of the rules, regulations or notifications issued under the said enactments, such a claim has necessarily to be preferred under and in accordance with the provisions of the respective enactments before the authorities specified thereunder and within the period of limitation prescribed therein. No suit is maintainable in that behalf. While the

jurisdiction of the High Courts under Article 226 and of this Court under Article 32 cannot be circumscribed by the provisions of the said enactments, they will certainly have due regard to the legislative intent evidenced by the provisions of the said Acts and would exercise their jurisdiction consistent with the provisions of the Act. The writ petition will be considered and disposed of in the light of and in accordance with the provisions of Section 11B. This is for the reason that the power under Article 226 has to be exercised to effectuate the rule of law and not for abrogating it.

18. Under the circumstances, in our opinion, the directives issued by the Ministry of Finance in its letter dated 1-11-2012 are invalid and would have no force of law. It is declared that unless proper mechanism is framed under the SEZ laws and statutory provisions are enacted/amended, the Commissionerate of Customs would continue to hold the authority under Section 27 of the Customs Act, 1962 to entertain refund claims of excess payment of customs duty, redemption fine or penalties as the case may be, adjudicated and collected by the Customs authority under the Customs Act, 1962, even with respect to units situated in SEZ areas. Whatever refund claims being returned to the petitioners by the Customs Commissionerate, the petitioners would represent the same to the appropriate authority. If the petitioners do so latest by 15-12-2014, all such applications shall relate back to the first presentation before the Customs authority. The period of limitation for presenting such application and computation of interest in case eventually the refund is granted, shall be reckoned from such date."

2.3 Despite such legal position clarified by the High Court, once again the Assistant Commissioner of Customs, Surat refused to entertain the refund application of the petitioner. After recording facts in case of Anita Exports, he concluded as under:-

"6. In your case, the refund of Additional Duty of Custom ("CVD") is related to CVD paid under protest on clearance from SEZ unit to DTA. Such duty was collected by Range - Dahej, Commissionerate - Surat-I (as per Copy of TR6 challan submitted). Further, the administrative control /revenue collection from your unit is with Central Excise & Customs, Bharuch Commissionerate. It is evident that Ahmedabad Customs Commissionerate does not have jurisdiction over your unit. The order of Hon?ble High Court in case of M/s. Anita Exports may be applicable to those Customs Commissionerates who are having administrative control & collecting Customs duty from SEZ units. In the case of M/ s. Anita Exports also, as per High Court Order, since Kandla Customs Commissionerate has adjudicated and collected the penalty/fine, therefore they are the proper authority to process the refund claim. In the light of the above, it seems that this office is not the proper authority to process your refund claim, therefore your refund claim application along with all the documents filed by you is returned herewith."

3. In our opinion, for multiple reasons, the approach of the Assistant

Commissioner was incorrect. Firstly, in Anita Exports, there were bunch of petitions not having identical facts. It was only for convenience that we had referred to detailed facts in case of Anita Exports. Further, we do not see any material difference so far as the facts of Anita Exports and present case are concerned. The ratio of the decision was that for any customs duty collected, refund application would be maintainable under Section 27 of the Customs Act and such refund application would be maintainable before the specified authority of the customs. It was further held that without amending said statutory provisions, it was not possible for the Government of India to prevent the competent customs authority from entertaining and deciding such refund application. We do not see how such ratio becomes inapplicable in the present case.

4. Learned counsel Shri Oza for the Department, however, sought to draw distinction by contending that in the present case, duty was assessed and collected by the SEZ authorities. To this aspect, learned counsel Shri Trivedi for the petitioner joined issue contending that there has been no assessment and in any case, the duty has been collected by the customs authorities.

5. In our opinion, this distinction, even if exists, has no relevance. As long as the duty in the nature of customs duty has been collected, the refund would be payable only in terms of Section 27 of the Customs Act. Since the statute also prescribes the authority competent to entertain such an application, refund applications would be maintainable before such authority. Unless there is amendment in law, the respondents cannot prevent the competent officer from exercising his statutory powers, in fact, duties.

6. In the result, impugned communication dated 30-11-2015 is quashed. The refund application shall be decided by the competent officer under the Customs Commissionerate, Surat as expeditiously as possible and preferably before 30-4-2016.

7. We are informed that subsequent applications of the petitioner for similar refunds of CVD have not even been accepted by the Department. Without going into the correctness of this statement, if there are further refund applications presented by the petitioner under similar grounds, appropriate officer of the Department shall not return such applications without deciding.

8. The petition is disposed of accordingly.