(2014) 09 AHC CK 0040

In the Allahabad High Court

Case No : Writ Tax No. 592 of 2014

Sachin Chemical Agency APPELLANT

Vs

Union of India RESPONDENT

Date of Decision : 25-09-2014

Acts Referred:

Citation : (2015) 315 ELT 526

Hon'ble Judges : Mahesh Chandra Tripathi, J;Dilip Gupta, J

Bench : Division Bench

Advocate : Nishant Mishra and S.D. Singh, Advocates for the Appellant; Amit Mahajan, ASGI, Advocates for the Respondent

Judgement

1. The petitioners are aggrieved by the communication sent by the Deputy Commissioner, Customs, ICD Loni, Ghaziabad (The Deputy Commissioner) by which the petitioners have been directed to get the provisional assessment finalized as per the CRCL report and pay the differential duty with interest within three days of the receipt of the letter failing which action may be taken against them under the provisions of the Customs Act, 1962. The notice sent to the petitioner No. 1 is dated 12 September 2014 while notices sent to the remaining three petitioners are dated 10 September 2014. The dispute is as to whether the goods imported by the petitioner are ''calcite powder'' or ''precipitated calcium carbonate''.

2. According to the petitioners, the goods that are imported are calcite powder and in the earlier transactions, the department on the basis of reports submitted by the private accredited laboratories have accepted that the imported goods are calcite powder. This was done because the CRCL was not equipped to test the samples of calcite powder. NABL accredited laboratories were issuing test reports in favour of the petitioner. However, the CRCL gave test reports dated 24 March 2014 and 7 May 2014 declaring the samples to be ''uncoated precipitated calcium carbonate''.

3. In such circumstances, the petitioner along with their association submitted applications before the Commissioner, Customs and Central Excise, ICD Loni, Ghaziabad with a prayer that the samples may be re-tested strictly in accordance with the queries mentioned in the test memo by any other NABL accredited laboratory for which the petitioners were ready to bear the cost.

4. When the said applications were not decided, Writ Petition No. 538 of 2014 was filed by the petitioner Nos. 1 and 2. Petitioner Nos. 3 and 4 filed Writ Petition No. 539 of 2014 and Writ Petition No. 542 of 2014 respectively. These writ petitions were disposed of by a Division Bench of this Court on 8 September 2014 with following directions:-

"Heard Shri S.D. Singh, Senior Advocate assisted by Shri Nishant Mishra, Advocate on behalf of the petitioners and Shri Ajitabh Kumar Chaubey, Advocate on behalf of Union of India.

We are of the opinion that prayer ''B'', as made in the present writ petition, be granted at this stage of the proceedings.

By means of prayer ''B'' petitioner has asked for his application enclosed as Annexure Nos. 7 and 10 to the writ petition for testing of the samples of "Calcite Powder" be got done through any laboratory other than respondent No. 5 i.e. Central Revenue Control Laboratory, New Delhi. Petitioner appears to be dissatisfied with the testing of the samples done by respondent No. 5 i.e. Central Revenue Control Laboratory, New Delhi. Learned counsel for the department however, points out that there cannot be a direction for re-testing unless it is so permitted under law and it is for the concerned authority to decide as to whether such application for re-testing can be entertained or not.

We may not enter into the issue, as canvassed before us, by the parties qua re-testing being permissible under law or not at this stage. Interest of substantial justice would be served by requiring the respondent No. 2 to take a decision on the applications made by the petitioner enclosed as Annexure Nos. 7 and 10 to the writ petition without being influenced by any of the observations made hereinabove. It is ordered accordingly. Let the applications made by the petitioner (Annexure-7 and Annexure-10 to the writ petition) be considered and decided by respondent No. 2 strictly in accordance with the provisions applicable preferably within four weeks from the date a certified copy of this order is filed before him. All consequential action be taken accordingly.

With the aforesaid directions/observations, the present writ petition is disposed of."

5. It is stated that in compliance of the orders passed by the Division Bench, the petitioners submitted certified copies of the order on 12 September, 2014 with a request to take an early action on the pending applications but without waiting for any action on the applications, the Deputy Commissioner, Customs ICD, Loni Ghaziabad has proceeded to issue notices to the petitioners for finalization of the

provisional assessment otherwise action would be taken against them under the Customs Act, 1962.

6. It is the contention of Sri S.D. Singh, learned Senior Counsel for the petitioners that the departmental clarifications have been issued regarding the testing of imported and exported goods in various laboratories and in this connection he has placed reliance upon the Circular dated 5 January, 2015 (sic), of which the relevant portion is as follows:-

"3. However, withdrawal of Public Notice No. 30/96, dated 9-2-1996, would not imply that testing cannot be done in any outside laboratories in respect of import or export consignments. However, these tests in outside labs could be done, in private/outside laboratories only where specifically ordered by the Commissioner or where the CRC laboratory does not have the equipments/facilities to carry out necessary tests, for example, testing of food products would not be possible in the CRC laboratories and have necessarily to be sent to the PHO of the State Governments".

7. In this connection, learned Senior Counsel has also placed reliance upon the decision of the Supreme Court in Steel Authority of India v. Collector of Customs, Bombay reported in 2000 (115) E.L.T. 42 (S.C.). Paragraph No. 3 of the said judgment is as follows:-

"3. Learned counsel for the Revenue submitted that this trade notice had been issued only by the Bombay Customs House. It is hardly to be supposed that the Customs authorities can take one stand in one State and another stand in another State. The trade notice issued by one Customs House must bind all Customs authorities and, if it is erroneous, it should be withdrawn or amended, which in the instant case, admittedly, has not been done."

8. It is, therefore, the submission of the learned Senior Counsel for the petitioner that the Commissioner, Custom and Central Excise should have first decided the applications filed by the petitioner and only if he found no merit in the applications that an order for finalization of the provisional assessment could have passed been but that was not done. It is also the submission that even otherwise CRCL is not equipped to carry out any test for determining whether the imported product is calcite powder or not and the report of the CRCL also mentions that test No. 9 is not related with the testing and test No. 10 mentions that no test is recommended in the Indian Standard.

9. At the present stage, we are not inclined to examine whether the product is ''calcite powder'' or ''precipitated calcium carbonate''. As noticed above, the Division Bench of this Court by judgment and order, dated 8 September, 2014 had directed the Commissioner, Customs and Central Excise to decide the applications filed by the petitioners so as to determine whether it was necessary to get a re-testing done from an equipped laboratory.

10. According to the petitioner, the applications have not been decided and

notices have been issued to the petitioners for of the provisional assessment. Interest of justice would, therefore, require that an appropriate decision should be taken after the Commissioner, Customs and Central Excise passes an order on the applications submitted by the petitioners.

11. We, accordingly, set aside the notices dated 10 September 2014 and 12 September 2014 to leave it open to the Authority to pass an appropriate order after the applications filed by the petitioners pursuant to the judgment and order dated 8 September 2014 in the earlier writ petition filed by the petitioners are decided by the Commissioner, Customs and Central Excise. The petition is, accordingly, allowed with the aforesaid directions.

