
(2006) 02 CAL CK 0024

In the Calcutta High Court

Case No : C.A. No. 4522 of 2004 and CUSTA 32 of 2004

Secretary, Council of Science and Tech.

APPELLANT

Vs

Commissioner of Cus. (Port)

RESPONDENT

Date of Decision : 02-02-2006

Acts Referred:

Customs Act, 1962 — Section 130, 15, 15(1), 46, 49

Citation : (2006) 202 ELT 241

Hon'ble Judges : Pravendu Narayan Sinha, J; Bhaskar Bhattacharya, J

Bench : Division Bench

Advocate : Ramesh Chowdhury and Soma Chatterjee, for the Appellant; D.P. Mukherjee and J.P. Mukherjee, for the Respondent

Final Decision : Allowed

Judgement

Bhaskar Bhattacharya, J.—This appeal u/s 130 of the Customs Act, 1962 (hereinafter referred to as the Act) is at the instance of an importer and is directed against order dated June 1, 2004 passed by the Customs On appeal from 2004 (178) E.L.T. 491 (TriT- Kolkata) 13/202/2 Excise and Service Tax Appellate Tribunal, East Zonal Bench, Kolkata, in Appeal Case No. CDM-159/03 thereby dismissing the appeal preferred against the order dated June 19, 2003 passed by the Commissioner of Customs (Appeals), Kolkata refusing the claim of refund of the appellant herein.

2. The facts giving rise to filing of the present appeal may be summarised thus:

(a) The appellant on or about November 15, 2001 imported 12 cases of Model G-1518-AT-Planetarium Instrument System with 13 Panorama Screens and other accessories for the purpose of establishing a Planetarium in Lucknow for promoting and disseminating scientific education, knowledge and information amongst all the section of the society, students and research scholars.

(b) On January 30, 2002 the appellant filed ex-bond bill of entry to avoid further interest. The department assessed the goods to duty at the applicable rate @

35% + 16% + 4% SAD, the total duty amounting to Rs. 4,00,42,110/-.

(c) On 11th February, 2002 the appellant paid the duty by filing ex-bond bill of entry being No. 1-431 dated 11th February, 2002. The goods were however not cleared or removed from the warehouse.

(d) On 1st March, 2002, the Government of India issued Exemption notification dated 1st March, 2002 in respect of the goods in question when those were within the bonded warehouse under Customs" jurisdiction.

(e) On 11th March, 2002, the appellant applied for reassessment of the bill of entry and for refund of the excess duty already paid.

(f) On 21st March, 2002, the goods were removed from the Customs Bonded Warehouse after booking the Preventive Officer against payment of requisite fees on 21st March, 2002.

(g) The appellant on 22nd August, 2002 filed the refund claim but the Customs Refund Section rejected the refund claim on 22nd December, 2002. The appellant thus preferred an appeal before the Commissioner of Customs (Appeals) and the said authority rejected such appeal on 19th June, 2003.

3. Being dissatisfied, appellant preferred the appeal before the Tribunal and by the order impugned herein, the said Tribunal dismissed the appeal observing that the appellant had filed the bill of entry with all the required formalities for de-bonding and clearance of the goods on 11th February, 2002 and consequently, the goods were deemed to be cleared on 11th February, 2002 and the Godown keeper was holding the goods on behalf of the appellant. The Tribunal, thus, came to the conclusion that the rate of duty that would be applicable is the one prevalent on 11th February, 2002, and the appellant cannot take advantage of the subsequent Exemption notification dated 1st March, 2002.

4. Being dissatisfied, the appellant has come up with the present appeal.

5. Mr. Chowdhury, the learned Advocate appearing on behalf of the appellant, has laboriously contended before us that his client having cleared the goods on 22nd March, 2002, after the coming into operation of the Exemption notification, should be assessed according to the law as it stood on the date of actual delivery of goods. Mr. Chowdhury submits that in this case his client never applied for warehousing the goods in terms of Section 49 of the Act and as such, it should be presumed that the goods were warehoused and provision of Chapter IX shall be applicable to such goods. Mr. Chowdhury contends that in such a situation, his client should be entitled to the benefit of notification of Exemption issued on 1st March, 2002 when the goods were admittedly in the warehouse.

6. Mr. Mukherjee, the learned Advocate appearing on behalf of the Customs Authorities, has, however, opposed the aforesaid contentions of Mr. Chowdhury and has contended that the entire duty having been paid on February 11, 2002, it should be presumed that on the application of the appellant the Customs

authority directed warehousing of goods within the meaning of Section 49 of the Act and as such, the" appellant is not entitled to get the benefit of Chapter IX of the Act. Mr. Mukherjee, however, could not prove that any such application was ever filed by the appellant before the authorities for storing of the goods in warehouse in terms of Section 49 of the Act.

7. Mr. Mukherjee prayed for time for production of original record for satisfying us that the goods were warehoused on the application of the Appellant u/s 49 of the Act but in spite of giving opportunities of producing records, ultimately, could not produce any such application showing prayer for warehousing the goods.

8. Therefore, the only question that arises for determination in this appeal is whether the appellant is entitled to get the benefit of notification of Exemption issued on 1st March, 2002 when he got actual delivery from the custody of the Port authority on 22nd March, 2002.

9. For the purpose of appreciating the question involved herein it will be profitable to refer to Section 15 of the Act and the same is quoted below:

15. Date for determination of rate of duty and tariff valuation of imported goods.

- (1) The rate of duty and tariff valuation, if any, applicable to any imported goods, shall be the rate and valuation in force. -

(a) in the case of goods entered for home consumption u/s 68, on the date on which a bill of entry in respect of such goods is presented under that section;

(b) in the case of goods cleared from a warehouse u/s 68, on the date on which the goods are actually removed from the warehouse;

(c) in the case of any other goods, on the date of payment of duty.

(2) The provision of this section shall not apply to baggage and goods imported by post.

10. After hearing the learned Counsel for the parties and after going through the aforesaid provision of Section 15 of the Act it is apparent that the rule of duty and tariff valuation, if any, applicable to any imported goods should be the rate and valuation in force in case of goods entered for home consumption u/s 46 on the date on which the bill of entry in respect of such goods is presented under that Section; but in the case of goods cleared from a warehouse u/s 68, on the date on which the goods are actually removed from the warehouse. In this case the goods were actually removed from the warehouse on 21st March, 2002 when the Exemption notification dated 1st March, 2002 has already been published.

11. Mr. Mukherjee, the learned Advocate appearing on behalf of the Customs Authorities strenuously contended before us that the present appellant cannot get the benefit of Chapter IX of the Act because in this case on its prayer the goods were warehoused in accordance with the provision of Section 49 of the Act and such being the position, the goods cannot be stated to be warehoused within the meaning of Sub-section (1) of Section 15 of the Act although those were

really in the warehouse.

12. We were ready to accept the contention of Mr. Mukherjee if his client could convince us that any such application u/s 49 of the Act was ever filed on behalf of the appellant and on the basis of such application, the goods were kept in the warehouse. We have already pointed out that in spite of giving repeated opportunities, the respondent could not produce any such application. In such a situation, we are left with no other alternative but to hold that in spite of payment of duty on 11th February, 2002, it was the Customs Authority which did not permit the appellant to clear the goods for home consumption and those were warehoused and admittedly the goods were in the custody and controlled under the proper officer in the warehouse. It is now settled law, as laid down by the Supreme Court in the case of Union of India and others Vs. Apar Private Ltd. and Others, that what is relevant is the day on which the bill of entry in respect of goods is presented u/s 46 but in the case of goods which are warehoused, the relevant date would be the date on which the goods are actually removed from the warehouse. Such date of removal is the relevant date and not the earlier date when bill of entry in respect of goods was presented u/s 46 and the payment was made. We, have already pointed out that the respondent authority cannot take the advantage of Section 49 of the Act as no application filed by the appellant before appropriate officer in terms of Section 49 could be produced before us.

13. This Court cannot lose sight of the fact that in this type of a case it is for the Customs Authority to prove that they have realised the tax and duty in accordance with law and if they fail to produce the relevant papers, the Court cannot proceed on the basis of any presumption.

14. We, thus, find that in this case the appellant is entitled to get the benefit of Exemption notification dated 1st March, 2002 and as such, we direct the respondent authority to refund the excess amount realised from the appellant. Such amount should be refunded to the appellant within one month from today as if the appellant is entitled to the benefit of the said notification.

15. The appeal is, thus, allowed. In the facts and circumstances, there will be, however, no order as to costs.

Pravendu Narayan Sinha, J.

16. I agree.