(2014) 02 BOM CK 0073

In the Bombay High Court

Case No : Writ Petition No. 1344 of 2014

Sedco Forex International Drilling Inc. APPELLANT

Vs

Union of India RESPONDENT

Date of Decision : 05-02-2014

Acts Referred:

Constitution of India, 1950 — Article 226

Citation : (2014) 306 ELT 607

Hon'ble Judges : Mohit S. Shah, C.J;M.S. Sanklecha, J

Bench : Division Bench

Advocate : D.B. Shroff, Senior Advocate i/b. Anil Balani, Advocate for the Appellant; Pradeep S. Jetly, Advocate for the Respondent

Judgement

1. By this petition, the petitioner seeks to quash and set aside of the order dated 22 January, 2014 passed by the Deputy Commissioner of Customs (Import), rejecting the petitioner''s claim dated 4 April, 2003 for an amount of Rs. 1,89,15,549/-. It is the grievance of the petitioner that the impugned order dated 22 January, 2014 has been passed without granting personal hearing and also in defiance of the order dated 10 January, 2013 of the Commissioner of Customs (Appeals). The petitioner is carrying on business of drilling operations in India and for that purpose, had entered into a contract with Oil and Natural Gas Commission (O.N.G.C). In September, 2002, the petitioner imported spares and consumables to be used for drilling operations in India. These spares and consumables were exempted from duty under Customs Notification No. 21/2002 subject to producing an Essentiality Certificate from Director General of Hydrocarbons. However at the time of import, the petitioner was unable to claim the exemption in September, 2002 for want of Essentiality Certificate from the Director General of Hydro Carbons. Therefore, the petitioner paid the custom duty on the imported spares and consumables while clearing the same from customs.

2. As the O.N.G.C. refused to issue recommendation letters to Director General

of Hydrocarbons, the Essentiality Certificates were not being issued. In the circumstances, the petitioner filed Writ Petition No. 7019 of 2000, in Delhi High Court for issue of Essentiality Certificate by the Director General of Hydrocarbons. Pending the disposal of the petition, O.N.G.C. issued recommendation letters and Director General of Hydrocarbons issued to the petitioner the Essentiality Certificate. The Delhi High Court by order dated 11 March, 2003 directed the Customs authority to consider the petitioner''s claim for refund based on the Essentiality Certificate.

3. Thus on 4 April, 2003, the petitioner filed a refund application for Rs. 1,89,15,549/- on the imported spares and consumables goods imported on 27 September, 2002. The petitioner sought refund by claiming benefit under Customs Notification No. 21/2002.

4. Petitioner completed the contract awarded to it by O.N.G.C. and re-exported left over imported spares and consumables goods on 7 December, 2004. On 13 December, 2011, respondent No. 4 rejected the petitioner''s refund application on the ground that the re-export of left over items of goods had to be done before 30 April, 2004 in terms of the Essentiality Certificate issued by Director General of Hydrocarbons. However, as the re-export was done on 7 December, 2004, i.e. beyond 30 April, 2004, the benefit of Customs Notification No. 21/2002 could not be extended to the petitioner.

5. Being aggrieved, the petitioner filed an appeal to the Commissioner of Customs (Appeals). By order dated 10 January, 2013, the Commissioner of Customs (Appeals) allowed the petitioner''s claim to exemption under Customs Notification No. 21/2002 and set aside the order in original dated 13 December, 2011. The Commissioner of Customs (Appeals) by the order dated 10 January, 2013 held that:-

".........the appellant has fulfilled the substantial conditions of notification 21/2002, and therefore, is eligible for impugned notification benefit. For the above mentioned reasons, the adjudicating authority has erred in rejecting the impugned refund claim. Therefore, set aside the impugned order. The refund claim survives as on date. The original authority is directed to examine the proof of export and process the same after verification of the original documents.

Accordingly, the appeal is allowed, as above."

6. Consequent to the order of the Commissioner of Customs (Appeals), the petitioner requested the Deputy Commissioner of Customs to sanction refund of Rs. 1,89,15,549/-. The Custom Department called upon the petitioner to furnish documents establishing the proof of export of the goods so that the refund claim can be processed. Consequent to the above, petitioner filed its shipping bill, the dock attested import invoice and packing list as evidence of its proof of exports. The petitioner was not able to supply to the Deputy Commissioner of Customs the invoice under which the goods have been exported either in original or even a photo copy of the same.

7. By the impugned order dated 22 January, 2014, the Deputy Commissioner of Customs rejected the petitioner''s claim for refund without granting any personal hearing to the petitioner. The refund claim was rejected on the ground that the petitioner had failed to submit either the original or photo copy of customs attested invoice and also no evidence of the duty having been paid under protest. In the absence of the above, it was held that the refund of Rs. 1,89,15,549/- could not be granted.

8. The petitioner has challenged, the impugned order dated 22 January, 2014. The refusal to grant refund the absence of duty being paid under protest is wholly irrelevant. This is for the reason that the refund claim has been filed within the period of six months from the date of payment of duty. Therefore, the refund claim is in time and protest is irrelevant for grant of refund. Further, the export having taken place almost 10 years also, it is almost impossible to find the original documents. It appears that after filing of the petition, the petitioner had been able to obtain from the C.H.A. a photocopies of the customs attested invoice and the customs attested packing list accompanied by Annexure-II, of the export of the left over spares and consumables exported. Annexure-II sets out the balance quantity of goods not consumed and re-exported in December, 2004. The petitioner submits that the Deputy Commissioner of Customs (Import) passed an order after following the principle of natural justice and in view of the long delay of almost 12 years from the date of import and 10 years from the date of export, the petitioner be allowed to produce the photocopies of the documents under which the left over spares and consumables were exported in December, 2004.

9. Mr. Jetly, learned Counsel appearing on behalf of respondent - Revenue submits that the petition should not be entertained as there is an alternative remedy of statutory appeal from the order dated 22 January, 2014 of the Deputy Commissioner of Customs (Import).

10. We find that the impugned order dated 22 January, 2014 has been passed by the Deputy Commissioner of Customs (Import) in breach of natural justice inasmuch as the petitioner was not given any personal hearing before the passing of the impugned order.

11. In view of the above and in view of the peculiar facts and circumstances of the case, we deem it to exercise our extra ordinary jurisdiction under Article 226, of the Constitution of India, We, therefore, set aside the impugned order, dated 22 January, 2014 of the Deputy Commissioner of Customs (Import) and direct him to consider the petitioner''s refund application after hearing the petitioner on merits on all issues and also allowing the petitioner to submit photocopies of export invoices and packing list in support of its contention that balance quantity of spares and consumables have been re-exported in December, 2004 as claimed by the petitioner.

12. In the result, we pass the following order:-

(i) The impugned order dated 22 January, 2014/23 January, 2014 passed by the Deputy Commissioner of Customs (Import), Group V.B., Mumbai at Exhibit-I to the petition is quashed and set aside. The matter is remanded to the Deputy Commissioner of Customs (Import) with a direction to give the petitioner an opportunity of hearing and also an opportunity to produce the documents in support of its claim that it had re-exported the left over spares and consumables in December, 2004.

(ii) The Deputy Commissioner of Customs (Import) shall decide the matter afresh without being influenced by the previous order dated 22 January, 2014 which we have already quashed and set aside.

(iii) Since it is the case of the petitioner that the original documents were submitted to the Customs Department at the time of re-export of the goods on 7 December, 2004, it would be open to the petitioner to produce Photostat copies of such documents.

Petition is allowed in the above terms with no order as to costs.

