(2014) 01 DEL CK 0126

In the Delhi High Court

Case No : Writ Petition (C) 3636 of 2013

Sheel Chand Industries APPELLANT

Vs

Union of India and Others RESPONDENT

Date of Decision : 29-01-2014

Acts Referred:

Central Excises and Salt Act, 1944 — Section 35F
Constitution of India, 1950 — Article 265
Customs Act, 1962 — Section 129E 27

Citation : (2014) 303 ELT 503 : (2014) 25 GSTR 1

Hon'ble Judges : S. Ravindra Bhat, J;R.V. Easwar, J

Bench : Division Bench

Advocate : S.K. Mathur and Mr. Vibhor Mathur, for the Appellant; Prabjyoti K. Chadha, Advocate for Resp-2, 4 and 5, Mr. Satish Aggarwala and Mr. Anish Aggarwala, Advocates for R-3/DRI, Mr. Debashis Mukherjee, Proxy for Ms. Sweety Manchanda, Advocate for R-1/UOI, for the Respondent

Judgement

S. Ravindra Bhat, J.—Heard counsel for the parties. The petitioner seeks a direction to the respondent, i.e., customs department to refund a sum of Rs. 47,14,188/- and release the bank guarantee furnished to it.

2. The petitioner had imported a consignment of Palm Fatty Acid Distillate from Malaysia and Sri Lanka and landed them at ICD, Tughlakabad. The Revenue Intelligence Authorities conducted raids at the petitioner''s factory and premises on 21.11.2006 and drew samples. The petitioner sought provisional release of the goods and deposited certain amounts through demand drafts on 12.11.2007. The assessing authorities claimed differential duty to the extent of Rs. 7,14,188/- and at the same time show cause notice was issued claiming larger amounts. By an order in original, the demands were confirmed and the petitioner''s liability was fixed at Rs. 73,92,399/- on 31.03.2008. The petitioner appealed to the CESTAT; in an interim order, the CESTAT noticed that since over and above Rs. 7,14,188/- deposited earlier, a further amount of Rs. 20 lakhs had been deposited as an interim measure. It, therefore, permitted the petitioner to

deposit the second amount of Rs. 20 lakhs and waived the condition of pre-deposit of the balance amount. By its final reasoned order of 6.7.2011, the CESTAT allowed the appeal pending before it and held that there was no evidence to show that the importer/petitioner had undervalued the goods as was alleged. The findings of the Tribunal in this regard are as follows:-

9. The test report shows that the sample was of mixture of different fatty acids therefore in these circumstances we find no ground to concludes that the importer had mis-declared the goods by declaring the same as Mixed Fatty Acid. In respect of valuation we find that the Revenue has enhanced the value on the basis of imports made as mentioned in annexure 3 & 4 of the Show Cause Notice. In these annexures the Palm Fatty Acid is imported at the lower price than declared by the importer. For example in annexure 3 of the Palm Fatty Acid is imported at the price of US $ 170 per M.T. and in annexure 4 the goods were imported at US $ 200 per M.T. as stated above. As per the Rule 5 of Customs Valuation Rules in such a situation the lowest value has to be taken for determination of the value of goods. In the present case the lowest value is less than the value declared by the Appellants. There is no evidence on record to show that the importer has paid any consideration over and above the value declared to the supplier of the goods. Therefore in these circumstances we find merit in the contention of appellant. The impugned order is set aside and Appeals are allowed.

3. The petitioner applied for refund of the amounts deposited by application on 27.7.2012. A copy of that application has been annexed to the petition. It is alleged that on 15.2.2013 and subsequent dates, reminders were given to the authorities to deal with the claim. Eventually, the refund claim was rejected by the Deputy Commissioner on 17.10.2013. The Commissioner was of the view that the refund claim was made on 14.8.2012 after expiry of one year from the date of the CESTAT''s final order, i.e., 6.7.2011.

4. The petitioner''s counsel submits that the customs authorities have acted contrary to law in rejecting the refund application. It was submitted that once the Tribunal decided that the demands made were without authority, the amounts deposited had to be necessarily refunded. Counsel relied upon the Circular of Central Board of Excise and Customs dated 8.12.2004 which categorically stated that in terms of the Supreme Court''s order whenever the CESTAT or a final authority makes an order which requires return of pre-deposits or refunds, the same should be complied with within three months from the date of the order unless there is a stay.

5. The respondent contended that the order dated 17.11.2013 concludes the matter as against the petitioner and that its failure to apply for refund was fatal. It is also highlighted that the petitioner has an appellate remedy which it has chosen. Counsel, however, did not dispute that the order of the Tribunal dated 6.7.2011 set aside the demand for differential duty in respect of which the sum of Rs. 47,14,188/- had been deposited by the petitioner.

6. In the present case, the petitioner essentially relies upon the Circular of 8.12.2004 which reads as follows:-

Circular No. 802/35/2004-CX

8th December, 2004

F. No. 387/5/2001-JC

Government of India

Ministry of Finance

(Department of Revenue)

Central Board of Excise & Customs

Subject: Return of deposits made in terms of Section 35F of the Central Excise 1944 and Section 129E of the Customs Act, 1962.

Reference earlier instructions on the above subject and looking to the instances arising out of non-implementation of the judicial orders, the Board has reason to review and reiterate the earlier Circulars on the subject of non-implementation of orders of CESTAT or any Final Authority in relation to returning pre-deposits made as per directions of CESTAT or any other Final Authority in terms of Section 35F of the Central Excise Act, 1944 & Section 129E of the Customs Act, 1962. The Board has taken a strict view with regard to non-returning of such deposits.

2. As we are all aware the CESTAT has in a number of such cases awarded interest on pre-deposits where its orders have not been implemented and the Department had challenged this and filed Civil Appeals in the Supreme Court.

3. The Board has noted the observations of the Hon''ble Supreme Court in its order dated 21.9.2004 and has decided that pre-deposits shall be returned within a period of three months of the disposal of the appeals in the assessee''s favour.

4. Accordingly, the contents of the Circular No. 275/37/2000-CX.8A dated 02.01.2002, as to the modalities for return of the pre-deposits are reiterated. It is again reiterated that in terms of Hon''ble Supreme Court''s order such pre-deposit must be returned within 3 months from the date of the order passed by the Appellate Tribunal/Court or other Final Authority unless there is a stay on the order of the Final Authority/CESTAT/Court, by a superior Court.

5. Delay beyond this period of three months in such cases will be viewed adversely and appropriate disciplinary action will be initiated against the concerned defaulting officers. All concerned are requested to note that default will entail an interest liability, if such liability accrues by reason of any orders of the CESTAT/Court, such orders will have to be complied with and it may be recoverable from the concerned officers.

6. All Commissioners may advise implementation of these instructions and

ensure their implementation through a suitable monitoring mechanism. Field formation may be suitably informed. Copies of the instruction issued may be endorsed to this office for information.

7. Commissioners under your jurisdiction should be advised that similar matters pending in the High Courts must be withdrawn and compliance reported. The board has also decided to implement the CESTAT Orders already passed for payment of interest and the interest payable shall be paid forthwith.

8. This issues with the approval of Chairman/Member (L & J), CBEC.

9. Kindly acknowledge receipt.

Sheila Sangwan

Joint Secretary (Review)

7. Paragraph 4 and 5 of the above Circular direct the authorities to ensure that amounts deposited with them are refunded within the time indicated, i.e., three months. Paragraph 5 even underlines that if there is any delay beyond three months, it would be viewed adversely and appropriate disciplinary action shall be taken against the concerned defaulting officers.

8. In the present case, the petitioner has concededly deposited Rs. 47,14,188/- at various point of time as against the duty demanded of Rs. 73,92,399/-. Eventually, the entire confirmed duty was held to be illegal and set aside. The order of the CESTAT dated 6.7.2011 has become final. The provision relied upon by the Deputy Commissioner, i.e., Section 27 indicates that refund applications are to be made before the expiry of one year. In the present case, the department''s responsibility of ensuring refund in accordance with the Circular of 8.12.2004 existed and the said refund had to be made within three months of the date of the order, i.e., 6th July, 2011. The department did not do so, compelling the petitioner to approach it for refund on 11.8.2012. Even if the arguments of limitation were to be accepted, the department could not have summarily rejected the application having regard to the duty cast upon it to ensure refund within three months.

9. In this Court''s opinion, the claim of an individual whose amounts are retained without authority of law to seek refund or restitution cannot be rejected merely on the application of Section 27. Article 265 of the Constitution of India clearly applies in the circumstances of the case.

10. Having regard to the above discussion, the respondents are hereby directed to ensure that the amount which has to be refunded to the petitioner, i.e., Rs. 47,14,188/- is paid back to it within four weeks with interest @ 10% per annum reckonable from 1.11.2011.

11. The writ petition is allowed in the above terms. The respondents are also directed to return the documents taken into custody by them in the course of the proceedings against the petitioner within the said period.

