(2016) 03 GUJ CK 0180

In the Gujarat High Court

Case No : Special Civil Application No. 19302 of 2015

Styrolution ABS (India) Ltd. APPELLANT

Vs

Union of India RESPONDENT

Date of Decision : 31-03-2016

Acts Referred:

Citation : (2016) 338 ELT 678

Hon'ble Judges : Harsha Devani and G.R. Udhwani, JJ.

Bench : Division Bench

Advocate : Shri Dhaval Shah, Advocate, for the Petitioner; Shri R.J. Oza, Advocate, for the Respondent

Final Decision : Allowed

Judgement

Harsha Devani, J. (Oral)—Rule. Mr. R.J. Oza, learned senior standing counsel waives service of notice of rule on behalf of the respondents.

2. Having regard to the controversy involved in the present case, with the consent of the learned counsel for the respective parties, the matter was taken up for final hearing today.

3. By this petition under Article 226 of the Constitution of India, the petitioner seeks a direction to the Commissioner of Customs (Appeals), Kandla at Ahmedabad (third respondent herein) to decide the Appeal No. S/49-305/CUS/KDL/2013 without any further delay.

4. The petitioner is, inter alia, engaged in the manufacture of "Absolan (SAN)" which is a polymerized plastic resin produced from Acrylonitrile and Styrene, used for manufacturing home appliances, automobiles, etc. The petitioner company imported Acrylonitrile vide various bills of entries from its supplier M/s. Ineos Nitriles, USA. The appraising Group prima facie found that both the importer and the foreign supplier are related and accordingly, started investigation as to whether the relationship adversely affected the invoice price and therefore, referred the case to Special Valuation Branch (SVB), Mumbai.

Accordingly, a case came to be registered and provisional duty assessment came to be made with 1% of Extra Duty Deposit (EDD), in terms of Board''s Circular No. 11/2001, dated 23-2-2001 and bills of entry came to be assessed provisionally after taking SVB bond and 1% Extra Duty Deposit on assessable value, which came to be paid by the petitioner vide manual challans.

5. The assessment came to be finalized and the invoice price of the imported goods came to be accepted as the transaction value under Rule 3(3)(a) of the Customs Valuation (Determination of Value of Imported Goods) Rules, 2007 for the purpose of assessment. The appraising group finalised all the bills of entry and cancelled the SVB bond submitted by the petitioner.

6. The petitioner filed a refund claim for Rs. 1,54,45,656/- vide letter dated 11-8-2011. By an order dated 30-5-2013, the refund came to be sanctioned only to the extent of Rs. 52,69,354/- and the balance amount of Rs. 1,01,76,302/- came to be appropriated against the dues in terms of Detention Notice dated 7-2-2013 and 27-2-2013 respectively which are subject matter of appeals before the Commissioner of Customs (Appeals), Kandla and before the Customs, Excise and Service Tax Appellate Tribunal at Ahmedabad.

7. Being aggrieved by the order-in-original dated 30-5-2013, the petitioner preferred an appeal before the Commissioner of Customs (Appeals), Kandla on 10th October, 2013 and requested to decide the appeal in view of the fact that the amount appropriated against the detention notice dated 7-2-2013 and 27-2-2013 respectively are already subject matter of challenge before Commissioner of Customs (Appeals), Kandla and before the Customs, Excise and Service Tax Appellate Tribunal at Ahmedabad.

8. The petitioner attended the personal hearing on 10th October, 2013 before the third respondent. However, there was no communication from him and hence, the petitioner addressed a letter dated 6th June, 2014 to the third respondent, requesting him to pass the order since the hearing was already concluded on 10th October, 2013. It is the case of the petitioner that he was following up the matter and was informed that the order would be passed in a short time. The petitioner, after waiting for some time, on 3rd June, 2015, once again addressed a reminder requesting the third respondent to decide the appeal at the earliest. Since there was no response thereto, the petitioner sent another reminder letter dated 18th June, 2015. Since the appeal has not been decided and a huge amount of Rs. 1,01,76,302/- has been held back, the petitioner has filed the present petition, seeking the reliefs noted herein above.

9. Mr. Dhaval Shah, learned advocate for the petitioner invited the attention of the Court to the affidavit-in-reply filed by the Assistant Commissioner of Customs (Refund) under the instructions of the third respondent, wherein it has been stated that the appeal preferred by the petitioner has been transferred to the Call Book for the reason that two different proceedings were under way, namely, Detention Notice No. S/10-30/Gr.VII/2011-12, dated 7-2-2013, which arose out

of an order-in-original dated 3-2-2012 issued by the Customs, Kandla against which an appeal along with stay application was filed by the petitioner before the appellate authority as Appeal No. S/49-33/CUS/KDL/2012 along with stay application, which appeal has already been transferred to the Call Book. The second proceedings being Detention Notice No. S/10-36/Gr.VII/2011-12, dated 27-2-2013 which was issued in pursuance of another order-in-original No. 83/2011/CAC/CC/BKS, dated 23-12-2011 passed by the Commissioner (Adjudication), Mumbai. It was submitted that it is in the light of the above two proceedings, that the Appellate Commissioner has transferred the matter to the Call Book. It was submitted that insofar as the order-in-original dated 23-12-2011 is concerned, the Customs, Excise and Service Tax Appellate Tribunal, West Zonal Bench has already adjudicated such appeal by an order dated 31st August, 2015. The attention of the Court was invited to Circular No. 719/35/2003-CX, dated 28th May, 2003 to point out the types of categories of cases which can be transferred to the Call Book, to submit that the present case does not fall within the ambit of any of the types of categories mentioned therein. It was, accordingly, urged that the third respondent is, therefore, not justified in transferring the matter to the Call Book and not deciding the same. It was submitted that it is open for the authority to pass any orders as it deems fit and proper, however, it is incumbent upon such authority to decide the application.

10. On the other hand, Mr. R.J. Oza, learned Senior Standing Counsel for the respondents placed reliance upon the contents of the affidavit-in-reply filed on behalf of the respondents and submitted that in view of the pendency of the appeal before the appellate authority as referred to in Paragraph 4.3 of the affidavit-in-reply as well as in view of the fact that it is not clear as to whether the order passed by the Appellate Tribunal in respect of the order-in-original dated 23-12-2011 has been accepted by the Department, the third respondent has rightly transferred the matter to the Call Book. It was, accordingly, urged that the petition being devoid of merits, deserves to be dismissed.

11. The sole grievance voiced in the present petition is that the third respondent is not deciding the appeal against the order-in-original dated 30-5-2013 filed by the petitioner way back on 10-10-2013.

12. The case of the respondents as averred in the affidavit-in-reply filed by the Assistant Commissioner of Customs (Refund), is that in view of the pendency of the appeal against the order-in-original dated 3-2-2012, the matter has been referred to the Call Book and as such, the appeal has not yet been decided. Detailed reasons have been set out in the affidavit-in-reply as to why the matter has been referred to the Call Book.

13. Since the appeal preferred by the petitioner against the Order-in-Original dated 30-5-2013 is not being decided as the same has been transferred to the call book, it may be germane to refer to Circular No. 719/35/2003-CX, dated 28-5-2003 issued by the Central Board of Direct Taxes, New Delhi wherein, it is

clarified that only the types of categories of cases enumerated thereunder can be transferred to the Call Book. Such categories are :

(i) Cases in which the Department has gone in appeal to the appropriate authority.

(ii) Cases where injunction has been issued by Supreme Court/High Court/ CEGAT, etc.

(iii) Cases where audit objections are contested.

(iv) Cases where the Board has specifically ordered the same to be kept pending and to be entered into the Call Book.

14. Thus, the categories of cases which can be transferred to Call Book are, firstly, those cases in which the Department has gone in appeal to the appropriate authority. In the present case, it is an admitted position that the Department has not gone in appeal. The second category of cases is where injunction has been issued by Supreme Court/High Court/CEGAT, etc., which admittedly is not the position in the present case. The third category of cases is where audit objections are contested, which condition has also not been satisfied in the present case. The category of cases is where the Board has specifically ordered the same to be kept pending and to be entered into the Call Book, which is also not the position in the present case. Nothing has been pointed out to show that the Board has specifically order this case to be kept pending and to be entered in the Call Book. Evidently, therefore, the appeal preferred by the petitioner against the order-in-original dated 30-5-2013 does not fall under any of the categories of cases enumerated in the above circular of the Central Board of Excise and Customs that can be transferred to the Call Book. The third respondent, therefore, is not justified in transferring the appeal filed by the petitioner against the order-in-original dated 30-5-2013, to the Call Book.

15. It need not be stated that every case unless it is directly and proximately connected with another case, is an independent case and has to be decided on its own merits. In the present case, it is not the case of the respondents that the appeal preferred by the petitioner against the order-in-original dated 30-5-2013, is in any manner directly related to the proceedings in connection with which the third respondent is not deciding the appeal. Out of the two cases which are referred to for not deciding the present appeal, one case has already been decided by the Tribunal, whereas the other case has been referred to the Call Book by the Appellate Commissioner. Thus, if the case of the respondents were to be accepted, till Appeal No. 5/49-33/CUS/KDL/2012 which has also been transferred to the Call Book, is decided by the concerned appellate authority, the third respondent would not proceed further to decide the present appeal. In the opinion of this Court, it is incumbent upon the third respondent-Appellate Commissioner to decide any case which comes before him independently, as per the position of law as prevailing at that time, without waiting for the outcome of any other case. Merely because the existing position of law is adverse to the

Revenue, the matter cannot be kept in abeyance till the outcome of some other decision on a similar question of law. In the present case, the appeal preferred by the petitioner relates to the order-in-original passed by the Assistant Commissioner (Refund) and has no relation to the proceedings which are referred to in the affidavit-in-reply filed by the respondents as a ground for not deciding the present appeal. Under the circumstances, merely because of the pendency of such proceedings, the third respondent is not justified in not deciding the appeal preferred by the petitioner. The third respondent is also not justified in transferring the appeal against the Order-in-Original dated 30-5-2013 to the Call Book, despite the fact that it does not fall under any of the categories enumerated in the above circular, and keeping the matter pending for years together causing immense prejudice to the petitioner.

16. For the foregoing reasons, the petition succeeds and is, accordingly, allowed. The third respondent is directed to forthwith decide the Appeal No. S/49-305/CUS/KDL/2013 without any further delay and not later than three months from the date of receipt of a copy of this judgment, after affording a reasonable opportunity of hearing to the petitioner. Rule is made absolute accordingly with no order as to costs.