

(2012) 09 GUJ CK 0158
In the Gujarat High Court

Case No : Special Civil Application Nos. 5057-5058 of 2012 with SCA No. 6465 of 2012

Utkal Lumbers Pvt. Ltd.

APPELLANT

Vs

Union of India

RESPONDENT

Date of Decision : 25-09-2012

Acts Referred:

Citation : (2017) 345 ELT 101

Hon'ble Judges : Akil Kureshi and Harsha Devani, JJ.

Bench : Division Bench

Advocate : Shri Vikram Nankani with Hardik P. Modh, Advocates, for the Petitioner; Shri R.J. Oza, Advocate and Mrs. V.D. Nanavati, Counsel, for the Respondent

Final Decision : Disposed Off

Judgement

Akil Kureshi, J. (Oral)—Learned counsel, Ms. Vaibhavi D. Nanavati waives service of notice of rule on behalf of the Respondent Nos. 2 and 3 in all the petitions. In view of the controversy involved, it is not necessary to serve formal notice of rule on Respondent No. 1­Union of India. Petitions are taken up for final disposal at this stage.

2. Facts as arising in Special Civil Application No. 5057 of 2012 may be noticed since essential facts are common in all petitions :

2.1 Petitioner is a company registered under the Companies Act and is engaged in import of timber. Petitioner imported different consignments of timber in the financial years 2007­08 and 2008­09. The petitioner paid the basic customs duty as also the special additional duties on such imported goods. Case of the petitioner is that such additional duty was to be refunded on the petitioner producing proof of payment of Sales Tax or Value Added Tax upon sale of such goods in the local market. Case of the petitioner also is that having so paid the Sales Tax/VAT, the petitioner was entitled to refund of such additional duties.

Respondents, however, holding a belief that the present petitioner and other similarly situated timber importers were not selling the same goods which were imported, declined to grant any such benefit of set off Sales Tax/VAT against special additional duty. One such issue came up before this Court in group of Tax Appeal No. 86 of 2011 and connected appeals. In such appeals, the Revenue had called in question the decision of Customs Excise and Service Tax Appellate Tribunal ("CESTAT" for short) taking a view against the Revenue. Such appeals came to be disposed of by a common judgment dated 7-7-2011 [2014 (302) E.L.T. 519 (Guj.)]. This Court rejected the Revenue's appeals answering the following questions framed in favour of the assessee :

"[a] Whether in the facts and circumstances of the case, transformation of the imported round logs into sawn timber in different sizes and length by the importer before subsequent sale to domestic market would vitiate the condition of subsequent sale prescribed in exemption notification No. 102/2007­Customs, dated 14-9-2007?

[b] Whether in the facts and circumstances of the case, the Tribunal has committed substantial error of law in deciding issue in appeal by placing sole reliance on decision of Tribunal in case of *Vijrom Chem Pvt. Ltd. v. Commr. of Cus., Bangalore* reported in 2006 (199) E.L.T. 751 (Tri.­Bang.) and observing that the respondent is eligible to avail benefit under exemption notification No. 102/2007­Customs, dated 14-9-2007?

[c] Whether in the facts and circumstances of the case, the Tribunal has committed substantial error of law, by not considering the issue of interpretation of exemption notification by applying ratio laid down by the Apex Court in the case of *Novopan India Ltd. v. CCE & Cus; Hyderabad* reported in 1994 (73) E.L.T. 769 (S.C.)?

[d] Whether the impugned order of the Tribunal, which is passed without referring to and giving its finding on all submissions and precedents pointed out by learned Departmental Representative at the time of hearing of the appeal, can be said to be passed in accordance with law?"

2.2 Such judgment of this Court has been challenged by the Revenue before the Supreme Court. On 24-11-2011, in the Revenue's appeals, the Supreme Court passed following order :

"Upon hearing counsel the Court made the following order

Taken on Board.

Delay condoned.

Leave granted.

The appeals will be heard on the SLP paper books.

Additional documents, if any, may be filed by the parties.

In the meanwhile, the claims of the respondents for refund of Special Countervailing Duty, shall be processed by the Assessing Officer and the amount so due to them shall be refunded within four weeks from today, subject to the respondents furnishing bank guarantee for half of the amount to be refunded, to the satisfaction of the Assessing Officer. The guarantee shall be kept alive till disposal of these appeals. The quantum of payment of interest to the successful party shall be considered at the time of final disposal of the appeals."

2.3 Petitioner in the meantime filed refund claim of Rs. 20,04,574/- being additional duty of customs under application dated 5-10-2010. The Department, prima facie believing that such refund would not be allowable, issued a show cause notice dated 22-3-2011 calling upon the petitioner to show cause as to why such refund application be not rejected.

2.4 It is the case of the petitioner that the refund claim was based on payment of special additional duty which was to be refunded upon payment of Sales Tax/VAT. The case of the petitioner is clearly covered by the judgment of this Court dated 7-7-2011 passed in Tax Appeal No. 86 of 2011 and connected appeals. It is also the case of the petitioner that the Customs Department, at one stage, called upon the petitioner to furnish bank guarantee of 100% of the refund claimed in view of the interim arrangement made by the Supreme Court in its order dated 24-11-2011. The petitioner, accordingly, also furnished such bank guarantee. However, subsequently such bank guarantee was returned.

2.5 We may also notice that similar facts arise in Special Civil Applications No. 5058/2012 and 6465/2012 except that in Special Civil Application No. 6465/2012, no bank guarantee was furnished by the petitioner perhaps because there was no such demand by the Department.

3. In all cases, principally, the case of the petitioners is that in view of the decision of this Court and facts arising in their cases, they are entitled to refund of special additional duty and, at any rate, the refund application should be considered on merits. The case of the Department is that the petitioners were not parties before this Court when the judgment dated 7-7-2011 was rendered; they are also not respondents before the Supreme Court. They are neither covered under the directions issued by this Court in tax appeals nor by interim arrangement made by the Supreme Court in the Department's appeals.

4. We are of the view that the Department is duty bound to consider the refund applications of the petitioners on merits and dispose of the same in accordance with law. We would be well advised not to remark on allowability or otherwise of such refund claims. Suffice it to record, the Department cannot refuse to even entertain such applications or keep them pending merely on the ground that the petitioners were not parties in tax appeals before this Court or are not respondents before the Supreme Court.

5. We are informed that with respect to some of the refund claims covered under these petitions, the Department has yet to issue a show cause notice. Wherever

show cause notices have been issued, the petitioners have yet to respond to the same. Be that as it may, we direct the respondents to entertain the refund applications of the petitioners and dispose of the same in accordance with law as early as possible, after giving reasonable opportunity to the petitioners to represent their case. We are sure while doing so, the Department would be conscious of the decision of this Court dated 7-7-2011 passed in Tax Appeal No. 86 of 2011 and other connected matters and the interim order passed by the Supreme Court in the Department's appeals challenging such judgment of the High Court.

6. All the petitions stand disposed of. Rule is made absolute to the above extent.