(2014) 07 MAD CK 0098

Madras High Court

Case No: Civil Miscellaneous Appeal No. 322 of 2005

Commr. of Cus. (Sea)	APPELLANT
Vs	
South India Corpn. Agencies Ltd.	RESPONDENT

Date of Decision: July 24, 2014

Acts Referred:

- Customs Act, 1962 - Section 17, 17(4), 2(2), 47(1), 47(2)

Citation: (2014) 309 ELT 665 : (2015) 35 GSTR 383

Hon'ble Judges: R. Sudhakar, J; G.M. Akbar Ali, J

Bench: Division Bench

Judgement

R. Sudhakar, J.

The Revenue has filed this appeal aggrieved against the Final Order No. 1057 of 2003, dated 3-11-2003, passed by the Customs, Excise and Service Tax Appellate Tribunal (for brevity, "the Tribunal") 2004 (178) E.L.T. 229 (Tri.-Chen.)], setting aside the demand of interest from the date of return of Bill of Entry after the assessment on 23-3-2001.

1.1 The brief facts of the case are as follows : The first respondent (hereinafter referred to as "the importer") imported two numbers of Ship Unloaders of 2000 T/H capacity for handling coal for North Chennai Thermal Power Station of the Tamil Nadu Electricity Board. On 24-1-2001, the importer submitted an application for Project Import Contract Registration to the Assistant Commissioner of Customs, Group-VI, Chennai and requested them to register the said contract under the Power Generation Project claiming benefit of Customs Notification No. 16/2000 Sl. No. 337(iv) under CTH 98.01, so as to avail concessional rate of duty on the goods of import. Along with the said letter, the importer annexed the following documents:

"(i) Application form in duplicate;

(ii) Project Bond in duplicate;

(iii) Letter of Indemnity;

(iv) Essentiality Certificate from Secretary to Government, Energy Department, Government of Tamil Nadu, Chennai."

1.2 The fourth enclosure to the letter dated 24-1-2001, referred supra, is a letter issued by the Secretary to Government, Energy Department, Government of Tamil Nadu, Chennai, bearing Letter No. 520/B2/2001-1, dated 19-1-2001, which letter has been extracted as a part of the order of the Tribunal. The said letter dated 19-1-2001 of the Government clearly states that the goods to be imported by the importer fall under the category of freely importable goods and they are not in the negative list of imports. It is also stated that the goods are covered under Heading 98.01 of the Customs Tariff Act, as applicable for power generated projects as per Government of India, Ministry of Finance, Department of Revenue Notification No. 54/97-Customs, dated 5-6-1997, and are, therefore, entitled to concessional customs duty under "Power Generation Project".

1.3 Armed with this letter dated 19-1-2001 issued by the Secretary to Government, Energy Department, Government of Tamil Nadu, Chennai, the importer filed a Bill of Entry No. 003912, dated 8-2-2001 and requested the Assistant Commissioner of Customs, Group-VI, Chennai, to register the contract under the Power Generation Project claiming benefit of Customs Notification No. 16/2000 Sl. No. 337(iv) under CTH 98.01. The Department, it appears, made an endorsement in the Bill of Entry that certain documents are required to be submitted by the importer for considering their request for grant of benefit.

1.4 It is the case of the Department that the importer did not furnish the required documents within the stipulated period and, therefore, the assessment was made on merits under CTH 8428.90 with 25% Basic Customs Duty + 10% Surcharge + 16% Countervailing Duty + 4% Special Additional Duty, as against the concessional duty claimed. The assessment so made on merits was returned to the importer on 25-3-2001.

1.5 On receipt of the Bill of Entry on 25-3-2001, the importer, vide letter dated 26-3-2001, wrote to the Deputy Commissioner of Customs, Group-VI, Chennai, stating that they would like to register a protest against the assessment of the Bill of Entry on merits, as they have submitted all relevant documents to show that the goods imported are entitled to concessional rate of customs duty under "Power Generation Project". Certain other issues relating to surcharge have also been raised, of which we are not concerned in this appeal. The above said protest made by the importer was registered by the Department.

1.6 Thereafter, since there was no response from the Department, a write up was given by the importer on 24-5-2001 justifying the basis on which concessional rate of duty was claimed. Consequent to the same, series of correspondence was exchanged between the Department and the importer. In one such letter dated

19-6-2001 of the Department, it is, inter alia, stated that the Bill of Entry No. 003912, dated 8-2-2001, filed under cover of Customs Notification No. 16/2000 Sl. No. 337(iv) read with Project Import Regulations, 1986 seeking concessional rate of duty requires submission of certain documents. They identified certain documents to be furnished by the importer for the purpose of granting such benefit.

1.7 The importer vide letters dated 3-7-2001 and 27-8-2001 sought further time to produce the required documents. Subsequently, by letter dated 30-4-2002, the importer enclosed a certificate dated 30-4-2002 issued by the Secretary to Government, Energy Department, Government of Tamil Nadu, Chennai, reiterating the plea for granting concessional rate of duty on the import of the goods in question in terms of Notification No. 16/2000. That request of the importer was considered favourably by the Department and the Bill of Entry was reassessed on 13-5-2002, extending the benefit conferred under the Project Import Regulations and the Notification No. 16/2000. In the said reassessment order, there was a demand for payment of interest from 29-3-2001 till the date of payment of duty on the Bill of Entry in terms of Board Circular No. 64/2000-Cus., dated 26-7-2000. On 14-5-2002, the importer paid the duty reassessed and interest under protest and goods were allowed to be cleared.

1.8 The Department has not chosen to file an appeal against the reassessment order. On the contrary, the importer filed an appeal before the Commissioner of Customs (Appeals) challenging that portion of the order relating to levy of interest for the period from 29-3-2001 to 13-5-2002. The appeal was considered on merits and dismissed on 12-11-2002.

1.9 Assailing the said order passed by the Commissioner of Customs (Appeals), the importer filed an appeal before the Tribunal and the Tribunal after considering various factors allowed the appeal of the importer.

1.10 Challenging the said order passed by the Tribunal, the Revenue has filed this appeal on the following substantial questions of law:

"(i) Whether the Tribunal is correct in law in not considering the Board''s Circular No. 64/2000, dated 26-7-2000 along with Section 17(4) of the Customs Act?

(ii) Whether the reasoning of the Tribunal that the assessment was done only under Section 2(2) of the Customs Act, though in fact, the assessment was done under Section 2(2) of the Customs Act, read with Board''s Circular No. 64/2000 , dated 26-7-2000, is correct in law?

(iii) Whether the reasoning of the Tribunal for refund of interest is correct in law, without considering the legal position that when duty was not paid at the initial point and re-assessment is made subsequently on condition that the revised duty amount carries mandatory interest obligation with duty from the date of original assessment as per the Board''s Circular No. 64/2000 ? and

(iv) Whether the Tribunal committed a serious error of law in not strictly construing the Board''s Circular No. 64/2000, dated 26-7-2000 with letter and spirit, especially in a fiscal legislation?"

2. Heard the learned counsel on either side and perused the orders passed by the Tribunal and authorities below.

3. As all the questions of law raised are intertwined and are relating to the interpretation of Section 17(4) of the Customs Act (as it stood then) and Board Circular No. 64/2000-Cus., dated 26-7-2000, they are dealt with together.

4. For better appreciation of the factual matrix of this case on the questions of law raised, as above, it will be useful to refer to the Board Circular No. 64/2000-Cus., dated 26-7-2000 and Section 17(4) of the Customs Act (as it stood then), which read as under:

"Interest on delayed payment of duty - Relevant date under
Section 47(2) of the Customs Act, 1962.

Circular No. 64/2000-Cus, dated 26-7-2000
F. No. 438/36/99-Cus., IV

Government of India
Ministry of Finance (Department of Revenue)
Central Board of Excise & Customs, New Delhi.

Subject: Levy of interest on delayed payment of duty - Relevant date under Section 47(2) of the Customs Act, 1962 - reg.

I am directed to invite your attention on the subject mentioned above and to state that a case was referred to Board for clarification on certain doubt regarding levy of interest for delayed payment of duty under Section 47(2) of the Customs Act, 1962 where the Bill of Entry for certain imports was assessed provisionally denying the benefits of EPCG Scheme, as EPCG licence was not produced at the time of assessment. The importer did not clear the goods. Subsequently, the importer got the EPCG licence issued and submitted to Customs. The Bill of Entry was reassessed allowing the benefits of EPCG Scheme thus reducing the duty liability on the importer. The importer paid the duty so reassessed. A doubt was raised whether the date of original assessment or date of reassessment would be relevant for calculation of interest under Section 47(2) of the Customs Act. Another doubt raised was whether interest would be charged on originally assessed amount for the period during date of original assessment to the date of reassessment and on reassessed amount for the period subsequent to reassessment to date of payment of duty.

2. The issues have been examined in consultation with the Ministry of Law, Department of Legal Affairs. It has been clarified that the interest in cases similar to

as cited above would be payable on the reassessed amount for the period 2 days after the date of original assessment to the date of payment of duty.

3. Kindly acknowledge receipt of the letter."

"Section 17. Assessment of duty.

(1)to(3).....

(4) Notwithstanding anything contained in this section, imported goods or export goods may, prior to the examination or testing thereof, be permitted by the proper officer to be assessed to duty on the basis of the statements made in the entry relating thereto and the documents produced and the information furnished under sub-section (3); but if it is found subsequently on examination or testing of the goods or otherwise that any statement in such entry or document or any information so furnished is not true in respect of any matter relevant to the assessment, the goods may, without prejudice to any other action which may be taken under this Act, be reassessed to duty"

5. It is the case of the Department that the revised assessment would fall under Section 17(4) of the Customs Act (as it stood then), as the importer has not produced all the relevant documents required for assessment at the first instance and, therefore, reassessment was done on 13-5-2002. It is pleaded that Section 17(4) of the Customs Act (as it stood then) provides for reassessment, based on verification of the truth of the document or information earlier made at the time of assessment. Therefore, in a case of this nature, where documents were not furnished at the first instance and were furnished subsequently, the department is justified in invoking Section 17(4) of the Customs Act (as it stood then) and consequently, the Board Circular No. 64/2000-Cus., dated 26-7-2000 will come into play for demand of interest consequent to reassessment.

6. The above said plea raised by the Department was considered by the Tribunal in the following manner:

"As regards, the findings of the ld. Commissioner (Appeals) that reassessment can only be done under Section 17(4), it is noticed that this view of the Commissioner is not correct because it is not a case where they had withheld any information or it was a case of misdeclaration as can be seen from the provisions of Section 17(4) of the Customs Act. A perusal of the provisions of Section 17(4) would indicate that if subsequently on examination or testing of the goods or otherwise it is found that any statement in such entry or document or any information so furnished is not true in respect of any matter relevant to the assessment, the goods may, without prejudice to any other action which may be taken under this Act be reassessed to duty. Therefore the findings of the Commissioner that reassessment is permitted only under Section 17(4) of the Customs Act (even in a normal case where all the information furnished is found true) is not correct. The reassessment in their case

has been done under Section 2(2) read with Section 47(1) & (2) of the Customs Act. It is further noticed that the department has not gone in appeal against the reassessment and since the issue envisages reassessment under Section 2(2) of the Act and since the customs have reassessed the goods on 13-5-2002 and the appraising officer has marked it as "REASSESSED", as can be seen from the Bill of Entry. The duty becomes finally payable after reassessment and interest is payable after expiry of 2 days from the date of reassessment as the original assessment has been reversed by giving benefit of exemption which was delayed by the customs authorities, in spite of the fact that right from the beginning and at the time of filing of bill of entry they had informed the customs authority that they are importing these 2 numbers of Ship Unloaders of 2000 T/H capacity of handling coal for North Chennai Thermal Power Station as Power Generation Project and which was in the knowledge of the department and they were also informed by the competent authority i.e. Secretary to Govt. of Tamil Nadu, Energy Department that this is power generation project and is meant for Tamil Nadu Electricity Board under B.O.T. Scheme. Therefore, the original assessment is not valid in view of the reassessment done on 13-5-2002, and duty has been paid by the appellant on 13-5-2002 i.e. On the date of reassessment itself. They were not required to pay any interest and this interest amount of Rs. 3.65 Crores is, therefore, required to be refunded to them."

7. We find that for arriving at a conclusion that the importer has not withheld any information and there was no misdeclaration, the Tribunal had referred to the fact the importer had clearly sought for registration of the project under the Project Import Regulations, 1986 by cover of their application dated 24-1-2001, enclosing therewith Essentiality Certificate dated 19-1-2001 issued by the Secretary to Government, Energy Department, Government of Tamil Nadu, Chennai. The Bill of Entry was also filed seeking concessional rate of duty on import based on Customs Notification No. 16/2000 Sl. No. 337(iv) under CTH 98.01. The Tribunal also observed that the letters of the Secretary to Government, Energy Department, Government of Tamil Nadu, Chennai dated 19-1-2001 and 30-4-2002, in pith and substance, are identical.

8. We also notice that there appears to be no difference between the contents of the two letters issued by the Secretary to Government, Energy Department, Government of Tamil Nadu, Chennai to the Customs Department, while recommending the case of the importer for concessional rate of customs duty. In our considered opinion, the Tribunal was justified in holding that all necessary materials required for assessment under the Project Import Regulations, 1986 were available at the inception, namely at the time of filing of the Bill of Entry. We also uphold the finding of the Tribunal that in the present case reassessment done on 13-5-2002 under Section 2(2) of the Customs Act was not on account of any withholding of information or misdeclaration.

9. We find from the records that the Department has made assessment on merits and thereafter extended the benefit of the notification based on records produced after the protest was lodged on 26-3-2001. The protest lodged on the assessment made on merits and the act of the importer in pursuing the matter to its logical conclusion would go to show that the importer has not accepted the assessment made on merits. In the present case, the stand of the importer was accepted by the Department on 13-5-2002, on the basis of the very same document which was already available on record on 24-1-2001, as enclosure No. (4). The letter of the Secretary to Government, Energy Department, Government of Tamil Nadu, Chennai, dated 30-4-2002, does not in any way alter the situation inasmuch as the importer has already submitted the Essentiality Certificate dated 19-1-2001 from the Secretary to Government, Energy Department, Government of Tamil Nadu, Chennai, at the time of submitting application for Project Import Contract Registration on 24-1-2001. It has to be noticed that, at the first instance, the importer did not get the assessment under CTH 98.01 based on any misstatement in respect of information or on the basis of an erroneous document. The Department had declined their request for assessment under CTH 98.01 as Project Import. When it was declined, the importer protested and pursued the matter and the Department thereafter noticing the error rectified the mistake by passing the order of reassessment under CTH 98.01 as Project Import extending the benefit of Notification No. 16/2000. If the first assessment, on subsequent examination, is found to be based on documents or information furnished, which is not true, then the question of invoking Section 17(4) of the Customs Act (as it stood then) will arise. Such an eventuality did not arise in this case. There was no misstatement of information or erroneous document furnished to make a plea of reassessment under Section 17(4) of the Customs Act (as it stood then). We, therefore, have no hesitation to hold that the provisions of Section 17(4) of the Customs Act (as it stood then) will not be attracted the case on hand. It is a case of reassessment in terms of Section 2(2) of the Customs Act, as rightly held by the Tribunal.

10. As regards the applicability of Board Circular No. 64/2000-Cus., dated 26-7-2000, the Tribunal has stated that the circular is clarificatory in nature and is applicable to cases were the benefit under EPCG Scheme was denied on the ground that EPCG licence was neither obtained nor produced at the time of assessment by the importer; and that the importer did not clear the goods for want of the EPCG Licence and only after the importer got the EPCG licence and submitted it to the customs authorities, that the goods were cleared by the importer after reassessment. On such premise, the Tribunal in this case has rightly held that the said Board Circular is not applicable to the facts of the present case, as the required certificate was available at the time of submitting application for Project Import Contract Registration on 24-1-2001, even before the Bill of Entry was filed. We have no hesitation to hold that the reasoning given by the Tribunal on the above stated fact is acceptable and consequently, we hold that the Board Circular No.

64/2000-Cus., dated 26-7-2000 is not applicable to the facts of the present case and will not entitled the Revenue to demand interest. For the foregoing reasons, the substantial questions of law raised are answered against the Revenue and this appeal is dismissed. No costs. Consequently, C.M.P. No. 1738 of 2005 is closed.