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M/s. Allied Fibers Ltd. Vs Commissioner of Customs (Import), & Anr.

Court: BOMBAY HIGH COURT

Date of Decision: July 10, 2017

Acts Referred: Central Excise Act, 1944, Section 37C(a) - Service of decisions, orders, summons, etc. Customs Act, 1962, Section 59, Section 130,

Hon'ble Judges: Anoop V. Mohta, Anuja Prabhudessai

Bench: DIVISON BENCH

Advocate: Kiran Doiphode, V.M. Doiphode, S.I. Shah

Final Decision: Allowed

Judgement

1. This is an Appeal under Section 130 of the Customs Act, 1962.

2. Admit, on the following questions of law:

(a) Whether the Hon"ble Tribunal erred in holding that ROM Application filed within the period of six months from the date of receipt of the order

was beyond the time limit prescribed under the law?

(c) Whether the time limit of 6 months stipulated in Section 129B(2) will apply only in a case where the Tribunal suo moto rectifying the mistake

crept in an order, which is apparent from the record?

3. Heard forthwith finally by consent of the parties.

4. The Appellant has challenged impugned order dated 15.07.2017 passed by Customs, Excise & Service Tax Appellate Tribunal, West Zonal

Bench at Mumbai. (for short, ""the Tribunal""|)

5. The relevant facts are as under :

Between October 1994 to September 1995, the Appellant has imported 8 consignments of capital goods. On 24.03.1998, a Show Cause Notice

was issued to the Appellant demanding customs duty under Section 59 of the Customs Act, 1962 (The Act). On 27.3.1999, the Commissioner of

Customs (Import) Mumbai dropped all the proposal against the Appellant in the notice. On 30.7.2004, on appeal, Tribunal (CESTAT), Mumbai,

set aside the adjudication order and remanded the matter, to the original authority for de novo adjudication. On 30.11.2006, the learned

Commissioner of Customs Mumbai confirmed the demand of customs duty, confiscated the goods and imposed penalty on the Appellant. On

21.8.2014, Appellant preferred Appeal before the Tribunal which was dismissed. On 8.1.2015, Appellant did not receive the order passed by the

Tribunal for considerable time of conclusion of hearing, therefore, Appellant requested Registrar of the Tribunal for handing over the order if any to

bearer of the request letter. On 9.1.2015, the Registrar of the CESTAT handed over the order passed by the Tribunal to the representative of the

Appellant. On 6.7.2015 the Appellant filed an Application for Rectification of Mistakes as provided under section 129B of the Act. On

15.7.2015, the Misc. Application was dismissed on the ground that the same was filed beyond the time limit prescribed under the law.

6. Section 129B(2) reads as under:

129B. Orders of Appellate Tribunal.

(1) .....

(2) The Appellate Tribunal may, at any time within six months from the date of the order, with a view to rectifying any mistake apparent from the

record, amend any order passed by it under subsection (1) and shall make such amendments if the mistake is bought to its notice by the Principal

Commissioner of Customs or Commissioner of Customs or the other party to the appeal:

Provided that an amendment which has the effect of enhancing the assessment or reducing a refund or otherwise increasing the liability of the other

party shall not be made under this subsection, unless the Appellate Tribunal has given notice to him of its intention to do so and has allowed him a

reasonable opportunity of being heard.

7. Admittedly, the Appellant received the copy of order dated 9.1.2015. The Application for rectification was filed by the Appellant on 9.6.2015.

The Tribunal, therefore, in view of the stated provision and the judgment so referred in the order, rejected the Application. That resulted into

rejection of the Appeal on merit itself.

8. The provision so reproduced above itself provides that the Tribunal suomoto need to rectify the mistake, if any, within six months from the date

of the order. In this case, there was no such suo motu action initiated by the Tribunal. The Applicant/Appellant, however, after receipt of the

impugned order, taken out the Application so recorded above. The Tribunal, therefore, was required to consider and decide the merits of the

matter within six months from the date of receipt of such Application. This is for simple reason that the Appellant and/or the party would not be in a

position to apply for rectification unless and until the actual order is seen and/or verified. There is nothing on record to show that the Appellant has

received the copy of order on a particular date immediately after passing of the order. On the contrary, the Tribunal issued the copy of order on

9.1.2015, on the request/Application filed/made by the Appellant for the same. The statement is made that this Application for copy was moved as

the Respondent/Department raised the demand on 8.1.2015. The Department"s submission, that the plain reading of section itself is sufficient to

reject the Application for rectification so filed by the Appellant beyond six months from the date of order, is unacceptable.

9. The judgment so read and referred by the Tribunal while rejecting the Application are distinct and distinguishable on facts and cannot be the

foundation to reject such Application so filed by the Appellant. Furthermore, referring to clause (a) of Section 37C of Central Excise Act, 1944, a

judgment is delivered by the Gujarat High Court in Vadilal Industries Ltd v. Union of India, 2006 (197) E.L.T. 160 (Guj.) . The following are the

observations made in paras 14 and 15, in our view, support the case of the Appellant:

14 ... The Section is divided into two parts. The first part grants discretion to the Tribunal to take up any order made under sub

Section (1) of Section 35C of the Act for rectifying any mistake apparent from record or amending any order within six months from

the date of the order. The second part of the section requires that the Tribunal shall make such amendments if the mistake is brought

to its notice by either party to the appeal before it. The pʃarty to the appeal can bring the fact of apparent mistake on record only

after going through the order made by the Tribunal. Therefore, to read that the period of limitation has to be computed at any time

within six months from the date of the order does not fit in either with legislative intent or the language employed by the provision.

15 There is another angle from which the matter can be approached. It is only the party to the appeal who finds that the order

contains a mistake apparent from the record and is aggrieved by such mistake, would be in a position to move an application seeking

rectification of the order. Therefore also, unless and until a party to the appeal is in a position to go through and study the order it

would not be possible, nor can it be envisaged, that a party can claim to be aggrieved by the mistake apparent from the record.

Hence, even on this count the period of limitation has to be read and understood so as to mean from the date of the receipt of the

order.

We are also of the same view referring to the similar provision so reproduced above. Under Customs Act the party to the Appeal, other party, as

per the second part of the section, can apply for rectification of the mistake. Therefore, it is necessary for the party to see and verify the order so

passed. That can only be done after receipt of the same. Therefore, the Application for rectification filed by the appellant in view of the above

background which was admittedly within six months, the rejection order passed in the present case, is unacceptable. It renders the party

remedyless for their no fault. This amounts to dismissal of appeal without hearing on merits.

10. We have gone through the provisions and related provisions where it is noted that there is no power and/or remedy available and/or no

provision for condonation of delay in filing such Application for rectification. In the absence of any such provision, we are of the view that the

second part of the Section need to be read in the interest of the Appellant. The Application so filed after receipt of the order serve the purpose and

object of the Application for rectification. The Tribunal, suo motu, even as per proviso to Section may correct the mistake within six months. But, if

other party to appeal required correction, then second part of the Section is available to the Appellant/party. In such case, the strict interpretation

of appeal within six month from the date of order referring to first part of the Section is unacceptable. Any application for correction filed by the

appellant, other party, before the Tribunal, is required to be filed within six months from the receipt of the copy of the order, such application may

not be dismissed, as not filed, within six months from the date of order.

11. Strikingly, the Apex Court in Vidyacharan Shukla v. Khubchand Baghel & ors., AIR 1964 SC 1099 (Five Judges Bench) considering the

terms for the purpose of determining any period of limitation referring to provisions of Limitation Act and dealing with the rights of appeal conferred

under the Act, though while dealing with the Representation of the People Act, 1951 held that the Appellant is entitled to exclude the time taken by

him for obtaining the copy of the order and condoned the delay in filing such appeal. The provisions of Limitation Act read with the provisions of

the Act in question, therefore, is required to be read together as both are relating to procedural aspects of filing such an appeal/application. As

there is no specific provision to deal with the Limitation aspect from the receipt of the order, we are of the view that a case is made out by the

Appellant even to condone the delay, if any. The period of limitation may be different under two different circumstances. Therefore, the Application

so filed under the same provision from the receipt of order is within limitation. Such application cannot be liable to be dismissed as sought to be

contended by the Department.

12. Therefore, taking overall view of the matter, we are inclined to interfere with the order so passed by holding that the second part of the Section

read to mean that the Appeal/Application may be filed within six months from the receipt of the order. It would not be treated as beyond the

prescribed period of six months from the date of order.

13. Therefore, the following order :

ORDER

(a) The Appeal is allowed.

(b) Order dated 15.07.2015 passed by Customs, Excise & Service Tax Appellate Tribunal, West Zonal Bench at Mumbai is quashed and set

aside.

(c) Misc. Application for correction filed by the Appellant is restored to record. The same to be disposed of on merits in accordance with law.

(d) Accordingly, the questions of law (a) and (c) are answered.

(e) No costs.