IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 28.04.2015

CORAM:

THE HONOURABLE MR.JUSTICE R.SUDHAKAR

and

THE HONOURABLE Ms.JUSTICE K.B.K.VASUKI

Civil Miscellaneous Appeal No.755 of 2015
& M.P.No.1 of 2015

Mr.Francis Goel,
Proprietor
M/s.Tek Chand International
No.301, Nikita Tower- 2,
Commercial Complex,
Azadpur, Delhi - 33. .. Appellant

versus

1. Commissioner of Customs (Port-Export),
Customs House, No.60, Rajaji Salai,
Chennai - 01.

2. Customs, Excise and Service Tax Appellate
Tribunal, South Zonal Bench,
Shastri Bhavan, Chennai - 600 006. .. Respondent

PRAYER: APPEALs filed under Section 130 of the Customs Act 1962 against the order dated 16.02.2015 made in Misc.Order No.40311/2015 passed by the 2nd respondent and direct the 2nd respondent to dispose of the appeal C/40827/2014-DB without insisting on any further pre-deposit.

For Appellant : Mr.Raghavan Ramabadran

For Respondents : Mr.A.P.Srinivas - R1

J U D G M E N T

(Delivered by R.SUDHAKAR,J.)

This Civil Miscellaneous Appeal is filed against the order dated 16.02.2015 made in Misc.Order No.40311/2015 in C/Stay/41085/2014 in C/40827/2014-DB on the file of the Customs, Excise and Service Tax

Appellate Tribunal, South Zonal Bench, Chennai raising the following substantial questions of law:

> "i) Whether the 2nd respondent is correct in concluding that there should be no compromise with regard to pre-deposit of ADD on the ground that it is a trade remedy measure even when the ADD stands fully paid already?
>
> ii) Whether the 2nd Respondent has erred in directing the Petitioner/appellant to deposit Rs.60 lakhs towards total demand of ADD of Rs.60 lakhs, when Rs.73 lakhs already stands adjusted towards the said demand of ADD?

2. The brief facts of the case are as follows:

In the course of search conducted in the premises of the relative of the appellant, the officers of the Directorate of Revenue Intelligence, New Delhi, found that the appellant had imported silk fabrics in the name of M/s.Tek Chand International from various Chinese suppliers from May, 2005 onwards by resorting to both under-valuation and over-valuation from China and seized various incriminating materials including a laptop. Based on the documents recovered from the laptop and the disclosures made by the appellant, the Officers of the Department searched the godown premises of the appellant company and seized silk fabrics. Alleging that the appellant suppressed the actual transaction value with an intent to evade customs duty and to over-value the said imports in order to evade provisional Anti-Dumping Duty imposed on such imports, show cause notice was issued demanding customs duty of Rs.1,88,90,986/- and provisional anti-dumping duty of Rs.2,75,39,026/- vide provisional notification No.52/2006-cus. dated 31.5.2006 along with imposition of penalty.

3. Subsequent to the above said show-cause notice, the provisional anti-dumping duty was reduced to Rs.60.00 lakhs vide final notification No.121/2006-Cus. dated 26.12.2006. However, before issuing final notification, the appellant had paid a sum of Rs.73,34,856/- towards Anti-Dumping Duty and a sum of Rs.35,31,843/- towards customs duty.

4. The Adjudicating Authority, vide order-in-original, confirmed the proposals contained in the show cause notice including the proposal to appropriate the aforesaid amounts.

5. Aggrieved by the said order of the Adjudicating Authority, the appellant has filed an appeal before the Tribunal along with an application for waiver of pre-deposit.

6. The Tribunal after hearing the submissions, ordered pre-deposit holding as follows:

> "1. Ld. counsel explains that provisional anti-dumping duty was imposed on the imported goods by Notification No.52/2006-Cus. dt.31.5.2006. The duty so imposed was reduced by final Notification No.121/2006-Cus. dt. 26.12.2006. As a result of which, the provisional duty of Rs.2.75 crores (approx.) imposed is reduced to Rs.60 lakhs (approx.).
> 2. In addition to the anti-dumping duty as stated above, there was customs duty imposed to the extent of Rs.1.75 crores. Both the amounts taken together, the ultimate demand is reduced to Rs.2.40 crores. Against such demand, appellant has already protected the Revenue to the extent of Rs.1.10 Crores. Present recovery in any event, may be reduced to Rs.1.30 crores.
> 2. Revenue supports the adjudication.
> 3. Keeping in view that levy of anti-dumping duty is a trade remedy measure, there shall be no compromise at this stage for which appellant is directed to deposit Rs.60,00,000/- (Rupees Sixty lakhs only) by 25.3.2015. Subject to such deposit, there shall be waiver of predeposit of balance demand and stay of recovery thereof till disposal of appeal. Compliance to be made on 6.4.2015."

7. Aggrieved by the said order of the Tribunal, the present appeal has been filed by the appellant.

8. Learned counsel appearing for the appellant submitted that the appellant has paid a sum of Rs.73,34,856/- towards anti-dumping duty, which is in excess of Rs.13,34,856/-. A sum of Rs.35,31,843/- has also been appropriated towards customs duty. The Tribunal, even though recorded the said payments made by the appellant, has not considered the excess payment made and ordered pre-deposit of Rs.60.00 lakhs on the ground that anti-dumping duty is a trade measure. He further submitted that the Tribunal has overlooked the fact that the appellant had deposited the entire anti-dumping duty.

9. Heard learned counsel appearing for the appellant and the learned standing counsel appearing for the Department and perused the materials placed before this Court.

10. It is seen from the orders of the Adjudicating Authority as well as the order of the Tribunal, that on demand, the appellant has paid a sum of Rs.73,34,856/- towards Anti-Dumping Duty and a sum of Rs.35,31,843/- was appropriated towards customs duty. It is to be noted that vide final notification No.121/2006-Cus. dated 26.12.2006, the anti-dumping duty was reduced to Rs.60.00 lakhs. Hence there is an excess payment towards anti-dumping duty.

11. It is worth to note that Section 9A(2)(b) of the Customs Tariff Act provides for refund of anti-dumping duty, which reads as follows:

"SECTION 9A Anti-dumping duty on dumped articles (1) Where any article is exported by an exporter or producer from any country or territory (hereinafter in this section referred to as the exporting country or territory) to India at less than its normal value, then, upon the importation of such article into India, the Central Government may, by notification in the Official Gazette, impose an anti-dumping duty not exceeding the margin of dumping in relation to such article

Explanation ....

(a)....

(b)...

(c)...

(2) The Central Government may, pending the determination in accordance with the provisions of this section and the rules made thereunder of the normal value and the margin of dumping in relation to any article, impose on the importation of such article into India an anti-dumping duty on the basis of a provisional estimate of such value and margin and if such anti-dumping duty exceeds the margin as so determined:-

(a) the Central Government shall, having regard to such determination and as soon as may be after such determination, reduce such anti-dumping duty; and

(b) refund shall be made of so much of the anti-dumping duty which has been collected as is in excess of the anti-dumping duty as so reduced."

12. From a reading of the above-said provision makes it clear that if anti-dumping duty is reduced and the amount so paid is in excess of the demand, the said amount shall be refunded.

13. It is the case of the appellant that the Tribunal, without taking note of the excess payment made, had ordered pre-deposit of Rs.60.00 lakhs, which is not in consonance with the above-said provision.

14. Taking note of the above-said provision and also taking note of the deposit made towards anti-dumping duty at Rs.73,34,856/- in excess of the final notification dated 26.12.2006 at Rs.60.00 lakhs, we are inclined to accept the plea of the appellant. However, taking note of the demand of customs duty, at this point of time, the amount shall not be refunded.

15. Learned counsel appearing for the appellant submits that the appellant had suffered great prejudice at the time of adjudication, since most of the seized records including the laptop,

which contains relevant documents, are not returned and therefore, the adjudication could not be effectively conducted.

16. At this stage, we are not inclined to comment upon the same, except pointing out that if the appellant makes a request for return of the seized records or the laptop, as the case may be, the Department may consider such a request on its own merits and in accordance with the procedure.

17. Insofar as the pre-deposit order is concerned, we are inclined to modify the order of the Tribunal in the following manner:

i) On the question of law raised, we are of the view that the Tribunal was not justified in ordering the pre-deposit in the manner stated in its order dated 16.02.2015;

ii) Consequently, the order of the Tribunal dated 16.02.2015 is modified to the effect that out of the sum paid by the appellant at Rs.73,34,856/-, Rs.60.00 lakhs should be appropriated towards anti-dumping duty and the balance sum should be appropriated towards customs duty;

iii) In addition to the above-said deposit, the appellant is directed to deposit a further sum of Rs.25,00,000/- (Rupees twenty five lakhs only) towards pre-deposit of duty liability on or before 02.06.2015 and subject to such compliance, as stated in the order of the Tribunal dated 16.02.2015, the pre-deposit of balance amount demanded shall remain waived and its collection shall stand stayed during the pendency of the appeal before the Tribunal;

In the result, this Civil Miscellaneous Appeal is ordered. No costs. Consequently, M.P.No.1 of 2015 is closed.

Sd/-
Assistant Registrar

//True Copy//

Sub Assistant Registrar

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To

1. Commissioner of Customs (Port-Export),
   Customs House,
   No.60, Rajaji Salai,
   Chennai - 01.

2. Customs, Excise and Service Tax Appellate
   Tribunal, South Zonal Bench,
   Shastri Bhavan, Chennai - 600 006.

+ 1 cc to M/s. Lakshmikumaran, Advocate SR.24643

+ 1 cc to Mr.A.P.Srinivas, Advocate SR.23862

VD(CO)
EU 13.05.2015

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