IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 08.12.2016

CORAM :

THE HONOURABLE MR.JUSTICE HULUVADI G. RAMESH
and
THE HONOURABLE MRS.JUSTICE ANITA SUMANTH

Writ Appeal No.1220 of 2016
and
C.M.P. No.15645 of 2016

M/s. Welcome Fisheries Limited
rep. by Director K. Anandh .. Appellant/ Petitioner

Vs.

1. The Commissioner of Customs
(Appeals II) , Customs House
No.60 Rajaji Salai
Chennai - 600 001.

2. The Commissioner of Customs
(Export) , Customs House
No.60 Rajaji Salai
Chennai - 600 001.

3. The Deputy Commissioner of Customs
(Refunds), Customs House
No.60 Rajaji Salai
Chennai - 600 001. .. Respondents/Respondents

Writ Appeal under Clause 15 of the Letters Patent to set aside the order dated 06.06.2016 passed in W.P No.149 of 2016 on the file of this Court. Petition filed under Article 226 of the constitution of India praying for the issuance of a writ of certiorari calling for the records of the case relating to the impugned order in appeal C.Cus.II, NO.71/2014, dated 31.10.2014, passed by the 1st Respondent and to quash the same.

For Appellant : Mr. T. Ramesh

For Respondents : Ms. Hema Muralikrishnan

J U D G M E N T

(Judgment of the Court was made by HULUVADI G. RAMESH,J.)

This Writ Appeal is preferred by the assessee against the order of the learned Single Judge dated 06.06.2016 passed in W.P No.149 of 2016, directing the writ petitioner to approach the Tribunal as against the order of Commissioner (Appeals).

2. The facts of the case, transpires that the assessee is an exporter of Prawns/ Shrimps through Chennai Seaport and were paying Cess at the rate of 0.5% under the provisions of the Agricultural Produce Cess Act, 1940 during 1998-2004. Challenging the levy and collection of cess of 0.5% on export of prawns/ shrimps, the assessee filed W.P. No.13884 to 13887 of 1998 before this Court, on the ground that they are different from fish. While disposing the same, vide order dated 16.12.2006, this Court directed the assessee to file an appeal under Section 5A of the Customs Act, 1962 before the Appellate Authority, with a further direction to the Commissioner (Appeals) not to raise any objections including those of limitation and maintainability of the appeal and to dispose of the same on merits. Pursuant to the said order, the assessee filed an appeal before the Commissioner (Appeals), Chennai. It appears that the Commissioner passed an order on 28.02.2007, holding that cess is not leviable on export of Prawns/Shrimps and that the cess paid by the assessee needs to be refunded. There was also an order to take into consideration the aspect of unjust enrichment, in accordance with law.

3. It appears that the department not accepting the order of the Commissioner (Appeals), challenged the same before the Customs, Excise and Service Tax Appellate Tribunal, Chennai. The appeal filed before the Central, Excise and Service Tax Appellate Tribunal was dismissed on 02.08.2007. The final order of CESTAT was challenged before this Court in C.M.A Nos. 13486 to 13493 of 2008 and the same is pending. However, stay of the order could not be obtained by the department.

4. It appears that based on the orders of the appellate authorities, the assessee filed a refund claim, for Rs.1,80,09,475/- paid for the period from 1998-2004 and the Deputy Commissioner of Customs, by an order dated 21.07.2011 sanctioned refund of Rs.1,77,75,784/-, excluding the claim towards the goods exported other than prawns/ shrimps and the same was also refunded to the assessee.

5. It further appears that on review, the Commissioner of Customs (Exports), Chennai directed the adjudicating authority to file an appeal under Section 129D of the Customs Act, 1962. In view of the same, the department filed an appeal before the

Commissioner (Appeals) and issued a Show cause cum Demand notice for recovery of the refunded amount. However, an order of stay of recovery was obtained by the assessee before this Court in W.P. No.10737/2012 and so the recovery order was kept in abeyance. The Commissioner (Appeals) passed an order dated 31.10.2014, holding that in terms of limitation and unjust enrichment, the refund is erroneous and ordered for recovery of the refunded amount. As against the same, the assessee filed the Writ Petition No.149/2015 before this Court. The learned Single Judge directed the writ petitioner/ assessee to approach the Tribunal as against the order of Commissioner. Hence, this appeal.

6. Heard the learned counsel for the appellant assessee and the respondents department.

7. The grounds raised by the assessee is that the review itself is time barred and the review is not maintainable as the appeal has not been filed along with the signed order in original dated 21.07.2011, when it is mandatory to examine the original as per the provisions of Section 129D(2) of the Customs Act. It is submitted that the review has been filed along with the unsigned photocopy of the order without any relevant documents. It is further submitted that the order of the learned Single Judge directing the assessee to approach the Tribunal instead of considering the merits of the case and is not maintainable. Learned counsel further contended that once an order of review has been passed without there being an original signed order being produced, setting aside the order, is bad in law. Hence, the other grounds raised also fails and the same is liable to be dismissed.

9. Section 129D of the Customs Act, reads as follows :-

> " SECTION 129D. Powers of Committee of Chief Commissioners of Customs or Commissioner of Customs to pass certain orders. (1) The Committee of Chief Commissioners of Customs may, of its own motion, call for and examine the record of any proceeding in which a Commissioner of Customs as an adjudicating authority has passed any decision or order under this Act for the purpose of satisfying itself as to the legality or propriety of any such decision or order and may, by order, direct such Commissioner or any other Commissioner to apply to the Appellate Tribunal for the determination of such points arising out of the decision or order as may be specified by the Committee of Chief Commissioners of Customs in its order.

(2) The Commissioner of Customs may, of his own motion, call for and examine the record of any proceeding in which an adjudicating authority subordinate to him has passed any decision or order under this Act for the purpose of satisfying himself as to the legality or propriety of any such decision or order and may, by order, direct such authority or any officer of Customs subordinate to him to apply to the Commissioner (Appeals) for the determination of such points arising out of the decision or order as may be specified by the Commissioner of Customs in his order.

(3) Every order under sub-section (1) or sub-section (2), as the case may be, shall be made within a period of three months from the date of communication of the decision or order of the adjudicating authority.

(4) Where in pursuance of an order under sub-section (1) or sub-section (2), the adjudicating authority or any officer of customs authorised in this behalf by the Commissioner of Customs , makes an application to the Appellate Tribunal or the Commissioner (Appeals) within a period of one month from the date of communication of the order under subsection (1) or sub-section (2) to the adjudicating authority, such application shall be heard by the Appellate Tribunal or the Commissioner (Appeals), as the case may be, as if such application were an appeal made against the decision or order of the adjudicating authority and the provisions of this Act regarding appeals, including the provisions of subsection (4) of section 129A shall, so far as may be, apply to such application."

10. As submitted by learned counsel for the assessee appellant, Section 129D (3) provides to make an order within a period of six months but not beyond a period of one year, from the date of the decision or the order of the adjudicating authority. As far as the point of limitation is concerned the review petition has not been filed within the time limit. Apart from that, the order so passed by way of review is in order and produced by the department at this length of time, is allowed. The fact remains that on the point of limitation to file a review, the learned Single Judge has not applied his mind whether such a review can be entertained, after the expiry of the limitation period.

11. In the case on hand, the assessee claims exemption of cess paid at the rate of 0.5%, under the provisions of the Agricultural Produce Cess Act, 1940 for the period 1998 to 2004, especially for Prawns/Shrimps being exported. The appeal filed by the assessee has been entertained. Thereafter, on the ground of time barred claim of the assessee, the department seeks to review the order, which ofcourse have been entertained by the department, after an expiry of the limitation period of 90 days. Under such circumstances, without looking into the merits of the case, the learned Single Judge directed the appellant herein to approach the Appellate Tribunal. Considering that the review has been made belatedly, whether it is untenable or not, there appears to be unjust enrichment as fixed by the department. As such, the amount refunded should not have been recovered, which was being paid by the assessee to the department.

12. As per the provision under Section 129D (3) regarding the limitation for review, this aspect has not been considered by the learned Single Judge and the order passed by the Appellate Authority by way of review beyond the period of limitation is an onest order not a consent order, the department cannot entertain the same, at this length of time. We also have noted the position that no grounds have been raised in the proceedings either before the Commissioner (Appeals) or before the Learned Single Judge that the impugned proceedings are barred by limitation. However, since the question of limitation is raised as a question of law, it can be raised at any point of time. Hence, we are of the view, in consideration of the provisions under Section 129D (2) and the admitted dates that has been cited in the writ petition, the review is barred by limitation and hence the same is liable to be quashed.

13. With regard to maintainability of the review filed beyond the period of limitation, was in question. The assessee was right in approaching this Court to interfere with the said order. The order of the learned Single Judge to approach the Tribunal in this regard, is totally unnecessary. When there is violation of principles of natural justice and the question of maintainability, the same can be questioned under Article 226 and 227 of the Constitution of India. Learned Single Judge has rejected the writ petition solely on the ground that the writ petitioner is the beneficiary. However, we find that the refund has been recovered. They are independent and distinct and are not connected to each other.

14. In view of the above, the Writ Appeal is allowed and the order of the learned Single Judge and the order dated 31.10.2014 of the Commissioner (Appeals) is set aside, which is barred by limitation. No costs. Consequently, the connected Miscellaneous Petition is closed.

Sd/-
Assistant Registrar(CCC)

//True Copy//

Sub Assistant Registrar

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To

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+ 1 cc to Mrs. Hema Muralikrishnan, Advocate Sr.72406
+ 1 cc to Mr.Ramesh, Advocate Sr.72183

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MG(CO)
Eu 10.1.17