

YU TELEVENTURES PVT. LTD.

..... Petitioner

Through: Mr. Tarun Gulati, Mr. Shashi Mathews, Mr. Sparsh Bhargava, Mr. Ankit Sachdeva, Mr. Kishore Kunal, Mr. Manish Rastogi and Ms. Rachana Yadav, Advocates

versus

UNION OF INDIA & ORS.

..... Respondents

Through: Ms. Saroj Bidawat, Advocate for Respondent No.1

Mr. Pramod Kumar Rai, Senior Standing Counsel with Mr. Deepak Anand, Junior Standing Counsel for Respondent Nos. 2, 3 & 4.

CORAM:**JUSTICE S. MURALIDHAR****JUSTICE NAJMI WAZIRI****ORDER**

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03.08.2016**Dr. S. Muralidhar, J.:**

1. Notice. Ms. Saroj Bidawat accepts notice on behalf of Respondent No.1 and Mr. Deepak Anand for Respondent Nos. 2, 3 & 4.

2. This is another instance of open defiance of the law and the judgments of the Courts by a statutory authority vested with both the power and the responsibility to comply with the mandate of the governing statute.

3. The subject matter of the writ petition is a refund claim by the Petitioner for refund of excess additional customs duty paid under Section 3 (1) of the

Customs Act, 1962 ('Act') read with Serial Number 263A and condition no. 16 of Notification No. 12/2012-CE dated 17th March 2012 (as amended).

4. The Petitioner company sells, *inter alia*, electronic products such as mobile phones etc. As part of its business activities, the Petitioner imported mobile handsets including cellular phones. 10 Bills of Entry (B/Es) were filed by it in January 2015 - February 2015. On these B/Es, the Petitioner paid additional customs duty (commonly known as countervailing duty or CVD) @ 6%, even though the Petitioner was liable to pay only 1% CVD. The Petitioner refers to Serial No. 263A of Notification No. 12/2012 – CE dated 17th March 2012 (as amended by Notification No. 4/2014 and further amended by Notification No. 12/2015-CE dated 1st March 2015) which was applicable to mobile phones and provided for an effective rate of duty @ 1% of CVD for mobile phones, provided no CENVAT Credit on inputs or capital goods has been availed.

5. It is stated that the above condition regarding non-availing of CENVAT credit on inputs or capital goods was interpreted by the Supreme Court in ***SRF Ltd. v. Commissioner of Customs 2015 (318) ELT 607 (SC)***. The Supreme Court explained that for quantification of CVD in case of imported goods, it would have to be presumed that the imported goods were manufactured in India and the excise duty leviable thereon would then have to be ascertained for determining the extent of exemption from payment of CVD to which the importer would be entitled. It is stated that review petition filed by the Department against the said judgment has been dismissed by the Supreme Court on 15th July 2016. A copy of the said order

has been enclosed with the present petition as Annexure P-12.

6. The Petitioner filed a refund claim in Form 102 on 28th December 2015 claiming refund in the sum of Rs. 2,10,96,725. Along with the application, the Petitioner enclosed the following documents:

- a) Details of bills of entry and challans evidencing payment of customs duty;
- b) Working sheet detailing the amount of excess duty paid under Section 3(1) of the Customs Tariff Act, 1975;
- c) Details of Customs House Agents;
- d) Copy of judgment of the Supreme Court in *SRF Ltd. v. CC*;
- e) An affidavit stating that the claim for refund is not barred by limitation and the refund amount would not be used in subsequent refund applications.

7. The claim was examined by the Deputy Commissioner (Refunds) (Respondent No. 4) and a memorandum dated 1st February, 2016 was issued pointing out that:

- “a. That the Petitioner has not provided any re-assessed Bills of Entry in respect of the refund claims.
- b. That the Petitioner has not submitted copy of audited balance sheet for the subject period.
- c. That the Petitioner has not submitted CA certificate from Statutory Auditors in support of claim for Unjust Enrichment.
- d. That the Petitioner has not provided any calculation cum correlation sheet certified by Statutory Auditor.”

8. The Petitioner replied to the above memorandum on 18th February, 2016

inter alia pointing out that under Section 27 of the Act there was no requirement of getting the B/E re-assessed for the purposes of claiming refund. Three decisions of the Customs Excise and Service Tax Appellate Tribunal were referred to by the Petitioner.

9. It may be mentioned at this stage that in its recent decision in ***Micromax Informatics Ltd. v. Union of India 2016 (335) E.L.T. 446 (Del.)***, this Court clarified the legal position that for the purpose of claiming a refund under Section 27 of the Act it is not open to the Authority to refuse to consider the application for refund only because an appeal has not been filed against the assessment order. The Court in coming to the above conclusion analysed Section 27 of the Act, both prior to and after the amendments in 2011, and came to the following conclusion:

“12. An important change that has been made is that a person can now claim refund of any duty or interest as long as such duty or interest was paid or borne by such person. The conditionality of such payment having been made pursuant to an order of assessment does not exist. Secondly, once an application is made under Section 27(1) of the Act, it is incumbent on the authority concerned to make an order under Section 27(2) determining if any duty or interest as claimed is refundable to the applicant. The proviso to Section 27(2) of the Act sets out the instances where refund should be paid to the claimant instead of being credited to the Consumer Welfare Fund. The only relevance as far as payment of duty under protest is concerned is indicated in the second proviso to sub-section (1) of Section 27 of the Act which states that the limitation of one year shall not apply in such event. In other words, whether or not the duty is paid under protest once an application for refund is made in the requisite manner and form as prescribed, it is incumbent on the authority to deal with such an application. Where there is an assessment order, the

authority will take it into account in deciding the application for refund. If such assessment order has been reviewed or modified in appeal such further order will obviously be taken into account. In other words, under Section 27 of the Act, as it now stands, it is not open to an authority to refuse to consider the application for refund only because no appeal has been filed against the assessment order, if there is one.”

10. On 3rd March, 2016 Respondent No. 4 issued another memorandum calling upon the Petitioner to explain certain discrepancies. A hearing took place on 17th March, 2016. It is stated that the Petitioner in its reply dated 21st April, 2016 specifically adverted to the decision of this Court in ***Micromax Informatics (supra)*** and pointed out that there was no obligation on the Petitioner to get the B/Es in question re-assessed for the purposes of claiming refund.

11. By the impugned order dated 7th July, 2016, Respondent No. 4 rejected the Petitioner's refund application. As far as the decision of the Supreme Court in ***SRF Ltd (supra)*** was concerned, Respondent No. 4 chose to highlight in bold letters in the impugned order the fact that the Department had filed a review petition in the Supreme Court which had been admitted and was pending consideration. As far as the decision of this Court in ***Micromax Informatics (supra)*** was concerned, Respondent No.4 again highlighted in bold letters in the impugned order that “the above order of the Hon’ble High Court has not been accepted by the Department and the Department has now decided to file a SLP before the apex Court against the orders of the Hon’ble High Court.” Respondent No. 4, therefore, chose to completely ignore the decision of the Supreme Court and of this Court which were binding on him. Respondent No.4 concluded as under:

“In view of the above, I find that refund claim of Rs. 2,10,96,725/- filed on 29. 12.201 5 is not maintainable since the importer has failed to fulfil the basic condition for claiming of excess payment of customs duty under section 27 (1) (a) of the Customs Act, 1962. I find there is no proof of excess payment of custom duty in respect of Bill of entries filed by the party from the period 02.01.2015 to 10.02.2015 as these are finally assessed Bills of Entry and the party has also failed to submit the reassessed Bills of Entry as per benefit claimed by them . Thus the claim is not admissible and liable to be rejected.”

12. The mere fact that the Department was contemplating or in fact filed a review petition or an appeal against an order of the High Court or the Supreme Court that was 'unacceptable' to the Department cannot be a valid justification for not complying with or implementing the order. Unless the operation of the orders is stayed in subsequent proceedings by a Court of competent jurisdiction, the binding effect of the said orders on the Department continues. In *Union of India v. Kamlakshi Finance Corporation Ltd. 1991 (55) ELT 433 (SC)* the Supreme Court observed as under:

“6. Sri Reddy is perhaps right in saying that the officers were not actuated by any mala fides in passing the impugned orders. They perhaps genuinely felt that the claim of the assessee was not tenable and that, if it was accepted, the Revenue would suffer. But what Sri Reddy overlooks is that we are not concerned here with the correctness or otherwise of their conclusion or of any factual malafides but with the fact that the officers, in reaching in their conclusion, by-passed two appellate orders in regard to the same issue which were placed before them, one of the Collector (Appeals) and the other of the Tribunal. The High Court has, in our view, rightly criticised this conduct of the Assistant Collectors and the harassment to the assessee caused by the failure of these officers to give effect to

the orders of authorities higher to them in the appellate hierarchy. It cannot be too vehemently emphasised that it is of utmost importance that, in disposing of the quasi-judicial issues before them, revenue officers are bound by the decisions of the appellate authorities; The order of the Appellate Collector is binding on the Assistant Collectors working within his jurisdiction and the order of the Tribunal is binding upon the Assistant Collectors and the Appellate Collectors who function under the jurisdiction of the Tribunal. The principles of judicial discipline require that the orders of the higher appellate authorities should be followed unreservedly by the subordinate authorities. The mere fact that the order of the appellate authority is not "acceptable" to the department - in itself an objectionable phrase - and is the subject matter of an appeal can furnish no ground for not following it unless its operation has been suspended by a competent court. If this healthy rule is not followed, the result will only be undue harassment to assessees and chaos in administration of tax laws.

7. The impression or anxiety of the Assistant Collector that, if he accepted the assessee's contention, the department would lose revenue and would also have no remedy to have the matter rectified is also incorrect..... The position now, therefore, is that, if any order passed by an Assistant Collector or Collector is adverse to the interests of the Revenue, the immediately higher administrative authority has the power to have the matter satisfactorily resolved by taking up the issue to the Appellate Collector or the Appellate Tribunal as the case may be. In the light of these amended provisions, there can be no justification for any Assistant Collector or Collector refusing to follow the order of the Appellate Collector or the Appellate Tribunal, as the case may be, even where he may have some reservations on its correctness. He has to follow the order of the higher appellate authority. This may instantly cause some prejudice to the Revenue but the remedy is also in the hands of the same officer. He has only to bring the matter to the notice of the Board or the Collector so as to enable appropriate proceedings being taken under Section.35-E (1) or (2) to keep the interests

of the department alive. If the officer's view is the correct one, it will no doubt be finally upheld and the Revenue will get the duty, though after some delay which such procedure would entail.

8. We have dealt with this aspect at some length, because it has been suggested by the learned Additional Solicitor General that the observations made by the High Court, have been harsh on the officers. It is clear that the observations of the High Court, seemingly vehement, and apparently unpalatable to the Revenue, are only intended to curb a tendency in revenue matters which, if allowed to become widespread, could result in considerable harassment to the assesses-public without any benefit to the Revenue. We would like to say that the department should take these observations in the proper spirit. The observations of the High Court should be kept in mind in future and the utmost regard should be paid by the adjudicating authorities and the appellate authorities to the requirements of judicial discipline and the need for giving effect to the orders of the higher appellate authorities which are binding on them.”

13. In *E.I. Dupont India Pvt. Ltd. v. Union of India* 2014 (305) ELT 282 (Guj.) the Gujarat High Court referred to the law explained in *Legrand (India) Pvt. Ltd. v. Union of India* 2007 (216) ELT 678 (Bom.), and held that a failure to follow a binding decision would render the authority liable for prosecution under the Contempt of Courts Act. It was *inter alia* observed:

“Everybody is bound by law. To maintain the rule of law and judicial discipline, the lower authority is bound by the decision of the higher appellate authorities/courts. However, considering the fact that there is no other malafide alleged and that the Respondent No. 4 is reported to be recently joined the department in the year 2011 and the unconditional apology tendered, we close the proceedings so far as the proceedings under the Contempt of Courts Act are concerned.”

14. Learned counsel for the Respondents were unable to defend the impugned order which has been clearly passed in defiance of the binding decisions of the Supreme Court and this Court. As already noted there was no justification for Respondent No.4 to ignore the binding decisions only because an appeal was filed in which no stay was granted. As far as the Department's review petition against the decision of the Supreme Court in ***SRF Ltd.*** (*supra*) is concerned, that now stands dismissed by the Supreme Court by order dated 15th July, 2016. As far as the decision of this Court in ***Micromax Informatics*** (*supra*) goes, no order in an SLP staying the said decision has been produced. Therefore, there was absolutely no justification for Respondent No.4 to have rejected the Petitioner's refund claim on the above basis.

15. The impugned order dated 7th June 2016 passed by Respondent No.4 rejecting the Petitioner's refund claim is accordingly set aside.

16. With the Petitioner having already placed all the relevant documents on record and with the only reason for rejection of the refund application being the untenable ground of alleged failure by the Petitioner to submit re-assessed B/Es, the Court sees no reason why the Respondents should be permitted to deny the Petitioner the grant of refund any longer.

17. Accordingly, the refund claim filed by the Petitioner on 28th December 2015 is allowed. The Respondents will now pay to the Petitioner the amount of refund as claimed together with interest due thereon up to the date of refund not later than two weeks from today.

18. The Court is constrained, in view of the conscious violation of the law by Respondent No. 4 Mr. Pranjal Singh, to require a copy of this order to be sent to Respondent No. 3 i.e., the Commissioner of Customs Air Cargo Export, Refund Section New Customs House with a direction to him to call for an explanation from Mr. Pranjal Singh Deputy Commissioner Refund on the administrative side and take further action as he considers appropriate in accordance with law.

19. The petition is allowed in the above terms with cost of Rs.10,000/- which will be paid by the Respondents to the Petitioner within four weeks.

20. Order *dasti*, under the signature of the Court Master.

S.MURALIDHAR, J

NAJMI WAZIRI, J

AUGUST 03, 2016

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