IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

CUSTOMS APPEAL (LDG.) NO. 30 OF 2017

The Commissioner of Customs. ... Appellant.
V/s.
Jindal Drugs Ltd. ... Respondent.

Mr.Advait M. Sethna with Ms.Ruju R. Thakkar for the appellant.

Mr.Prakash Shah with Mr.Jas Sanghvi i/b. PDS Legal for the respondent.

CORAM : A.S.OKA AND A.K.MENON, JJ.

DATE : 9th October 2017.

P.C.:

Heard learned counsel for the appellant. The appellant has taken an exception to the judgment and order dated 28th December 2016 passed by the Customs, Excise and Service Tax Appellate Tribunal, West Zonal Bench at Mumbai (for short “the Appellate Tribunal”)

2. Two refund applications were filed by the respondent-assessee. The refund applications were for the refund of amounts in view of duty paid and duty benefit claimed under the notification dated 19th May 2002 for import of goods under advance licences dated 23rd January 1995 and for import of goods under advance licences dated 7th February 1995. On 5th March 2010, the refund applications were rejected

by orders-in-original. Appeals were preferred by the respondent before the Commissioner of Customs (Appeals). By order dated 4th May 2012, the appeals were dismissed. Being aggrieved by the said order in appeals, the respondent preferred appeals before the Appellate Tribunal which have been allowed by setting aside the order in appeal and the orders-in-original.

3. The learned counsel appearing for the appellant submitted that the appeal be admitted on the substantial questions of law A, B, and C mentioned in paragraph- 9 of the appeal memo, which reads thus:-

> "A) Whether in the facts and circumstances of the case and in law, the Hon'ble CESTAT has erred in holding that the issue of unjust enrichment does not arise, in law as the Respondent herein has not passed on the incidence of amount claimed as refund on anyone else without considering that the Respondent herein has not disclosed the requisite and mandatory details in the Refund Claim Application under law?
>
> B) Whether in the facts and circumstances of the case and in law, the Hon'ble CESTAT has erred in erroneously concluding that the Respondent herein has not passed on the incidence of amount claimed as refund on anyone else without considering the Appellant's submissions/contentions supported by corroborating material, in this regard?
>
> C) Whether in the facts and circumstances of the case and in law, the Hon'ble CESTAT has erred in applying the ratio in the decisions of the Hon'ble Tribunal reported in *2009 (248) ELT 457* and *2004 (312) ELT 73*, which are distinguishable and not applicable to the facts of the present case?

He submitted that on similar questions, the Customs Appeal No.96/2007 has been admitted by the Division Bench of this Court by order dated 14th February 2008.

4. The learned counsel appearing for the appellant invited our attention to the applications for refund submitted by the respondent in the prescribed form. He invited our attention to clause-9 of the refund applications. He submitted that the respondent did not comply with the mandatory requirement of furnishing documents as set out in clause-9. The submission is that the respondent did not produce originals of Bill of Entry, Customs attested invoice and packing lists though various sub-clauses of clause-9 of the refund applications required the respondent to do so. He invited our attention to the orders-in-original as well as orders in appeal. He urged that the Assistant Commissioner has recorded findings of fact against the respondent on the ground that the respondent has failed to produce the relevant material documents such as Bill of Entry, TR-6 Challan and before and after sales invoices of the imported goods and proof of confirmation that the incidence of duty has not been passed on to the consumers. He pointed out the finding recorded in the orders-in-original that the logging of S/Bills was done on 14th December 2009 as per the orders of the Appellate Tribunal. He submitted that the production of documents as set out in clause-9 is a condition precedent for considering the claim for refund and the said mandatory requirement cannot be dispensed with. He would urge that the findings recorded by the Appellate Tribunal in paragraphs- 6.2 to 6.4 and 7 are without any

basis and, therefore, this appeal requires consideration.

5. We have carefully considered the submissions. The learned counsel appearing for the appellant has tendered across the bar a copy of memorandum of appeal of Customs Appeal No.96/2007 [Customs Appeal (Ldg.) No.97/2007]. The order dated 14th February 2008 passed by the Division Bench records that the appeal has been admitted on the questions of law as formulated in paragraph-4 of the memorandum of appeal. We have perused the memorandum of appeal. Apart from the fact that questions (a) and (b) formulated in the said appeal are completely different from the questions formulated in the present appeal, even the factual controversy cannot be said to be similar. In the facts of the case of Customs Appeal No.96/2007, the adjudicating authority had in substance rejected the logging of exports of the respondent therein which order was confirmed by the Commissioner (Appeals). The Appellate Tribunal allowed the appeal of the assessee and that is how an appeal was preferred before this Court.

6. We have perused the applications for refund submitted by the respondent. They are in prescribed form. The material portion of clause-9 reads thus:

> "9. Enclosures (in original) in support of refund claim (please put a tick mark (✓) against the document being enclosed)
>
> a) Letter of authorization from the importer/buyer in case of applicant is an agent.

b) Triplicate copy of Bill of Entry/ Post parcel wrapper/ shipping bill/ baggage receipt/ or the purchase invoice.
c) Duty Challan/ other document as evidence of duty payment. ✓
d) Signed working sheet for the amount of claimed.✓
e) Customs attested invoice.
f) Customs attested packing list.......”

Firstly, no statutory provision or a provision of statutory rules is shown to us which makes the production of documents listed in clause-9 of the prescribed form of refund as mandatory. On the contrary, perusal of clause-9 would show that the requirement is not mandatory. Clause-9 only contains the list of enclosures which could be submitted along with refund application. Clause-9 merely requires the applicant to tick mark against the documents showing that the said documents have been produced with refund application. By no stretch of imagination, it can be said that the requirement of production of documents listed in clause-9 of the refund application form is mandatory. The question before the authority dealing with the applications for refund was whether the respondent has produced requisite documents which were sufficient to process the claim for refund. The orders-in-original show that the claim of refund was rejected merely on the ground of failure of the respondent to produce documents by treating the said documents as mandatory. The approach of the Commissioner (Appeals) while dealing with the appeal is no different. In paragraph- 11 of his order, the Commissioner (Appeals) has held that the requirement of production of documents as set out in clause 9 is mandatory and, therefore, the orders-in-original are confirmed on the ground that the said documents are not produced.

7. Now, we turn to the findings recorded by the Appellate Tribunal. In paragraph- 6.1, the Appellate Tribunal after perusal of challans, which were produced before the Commissioner (Appeals), has held that the challans indicate that the amount is deposited provisionally as per public notice No.197/96. The challans referred to Advance Licences numbers and date and DEEC book number and date. The challans did not refer to any Bill of Entry. The finding of fact has been recorded by the Appellate Tribunal that it is evident from the perusal of the challans that duty is paid with reference to the number and date of the Advance Licences. The Challans were prepared by the Department and were signed by the Assistant Commissioner of Customs. It is further recorded that there is no dispute that the export obligation under the said Advance Licences which are referred to in the challans has been discharged and in compliance of the order of the Appellate Tribunal dated 22nd March 2007, the Department has logged in the DEEC book. In paragraph- 6.2, the Appellate Tribunal has again reiterated that the original challans were produced before the Commissioner (Appeals). It is further recorded that as there is no dispute about the deposit of the amount and that the amount was not deposited with regard to any particular Bill of Entry, in peculiar facts of the case, the original of the triplicate Bills of Entry are not at all relevant for the purpose of refund of duty paid through the challans. For the same reason, it is held that customs attested invoices and customs attested packing list and bills of entry are also not required for consideration of refund application.

Paragraph- 6.3 records the following findings:

> "6.3 We further find that department has admittedly logged in the DEEC book both for imports and exports. At the time of logging of DEEC book for the exports effected by the Appellants, the proper officer could not have entered the details without the relevant documents produced before the appropriate officer who did the logging of the documents including customs attested invoices and customs attested packing list and bills of entry......"

In paragraph- 6.4 it is held thus:

> "6.4 There is no dispute that the goods were imported under the Advance Licence and exemption under Notification no.204/92 dated 19 May 1992 was claimed by the Appellants at the time of import. The Advance Licence and the said Notification require actual user of the imported goods in the manufacture of exported goods. There is no nothing on the record and it is not even the case of the department that, the exempt material was sold, transferred or otherwise dispose of in the domestic market. The fact that the export obligation has been discharged and DEC book is duly logged in, clearly indicates that the exempt material is used in the manufacture of export product. The record indicates that the export goods were manufactured by supporting manufacturers mentioned in the Licences and the documents on record indicate that the goods were duly exported by the Appellants."

8. In the light of the aforesaid findings of fact, in paragraph- 7, the Appellate Tribunal has held that the exempt material was not sold in the local market and was used in the manufacture of exported goods and,

therefore, question of passing the incidence does not arise. In paragraph-11, there is a finding of fact recorded that balance sheet of the respondent produced on record with corresponding ledger accounts clearly show that the amount of deposit is shown in the books of account of the respondent.

9. Thus, the findings of fact recorded by the Appellate Tribunal are on the basis of admitted position recorded by the Appellate Tribunal and in any event, the findings are supported by the documents on record.

10. Even assuming that clause-9 of the refund application requires production of certain documents, it is purely a procedural requirement and only on the basis of non-production of documents the claim of refund could not have been rejected. If the refund claim could be decided on the basis of available material on record, the same ought to have been decided without mechanically insisting upon the production of documents listed in clause-9. In fact, as stated earlier, perusal of the orders-in-original and the order in appeal shows that the refund applications were rejected only on the ground of non-production of documents without even considering whether the refund claims could be decided on the basis of other material on record.

11. Therefore, we find no merit in the appeal. No substantial question of law arises. The appeal is dismissed.

(A.K.MENON, J.) (A.S.OKA, J.)