

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 12.06.2017

CORAM

THE HONOURABLE MR.JUSTICE RAJIV SHAKDHER

And

THE HONOURABLE MR.JUSTICE R.SURESH KUMAR

C.M.A.No.2600 of 2015

M/s.Shoppers Stop Ltd.,
Eureka Towers, B-Wing, 9th Floor,
Mindpace, Link Road, Malad West,
Mumbai 400 064
Maharashtra. ... Appellant/Appellant

Vs.

1. The Commissioner of Customs (Exports),
Custom House, No.60, Rajaji Salai,
Chennai 600 001.
2. Customs, Excise and Service Tax Appellate Tribunal,
South Zone Bench,
No.26, Shastri Bhawan, Annexe Building,
Haddows Road,
Chennai-600 006. ... Respondents/Respondents

Prayer : Appeal filed under Section 130 of the Customs Act, 1962, against the final order No.40453/2015, dated 24.04.2015, in appeal No.C/132/2010-SM passed by the Customs, Excise and Service Tax Appellate Tribunal, Chennai.

For Appellant : Mr.Hari Radhakrishnan

For Respondents: Mr.V.Sundareswaran for R1

R2 - Tribunal

JUDGMENT

1. This is an appeal preferred by the Assessee against the judgment and order of the Tribunal dated 24.04.2015.

2. The captioned appeal was admitted by the Predecessor Bench on 26.11.2015, when, the following questions of law were framed :

"1) Whether the Honourable Tribunal is right in holding that chartered accountant certificate is not conclusive evidence ignoring the fact that the appellant company produced not only the chartered accountant's certificate but also the profit and loss account and balance sheet to establish that there was no unjust enrichment if the refunded amount is paid to the appellant company ?

2) Whether the Honourable Tribunal is right in rejecting the evidence produced by the appellant peremptorily as against the requirement of law that where the presumption in law is rebutted by evidence, the burden is on the respondents to adduce evidence and reasons for rejecting the evidence produced by the appellant ?"

3. Briefly, the issue, which arises in this case is, whether the Assessee has rebutted the presumption raised under Section 28-D of the Customs Act, 1962 (in short "the Act").

3.1. For the sake of convenience, the said Section is set forth hereafter :

"28-D. Presumption that incidence of duty has been passed on to the buyer :- Every person who has paid the duty on any goods under this Act shall, unless the contrary is proved by him, be deemed to have passed on the full incidence of such duty to the buyer of such goods."

3.2. A bare perusal of the section would show that there is a presumption qua the person, who has paid duty on any goods under the Act, that he has passed on the full incidence of such duty to the buyer of such goods, unless the contrary is proved by him.

4. In the instant case, there is no dispute that the Assessee was entitled to refund of duty amounting to Rs.18,91,127/-. This order came to be passed in favour of the Assessee by the Assistant Commissioner on 21.01.2008.

4.1. The said amount came to be quantified, after this Court, via an order dated 19.11.2007, passed in W.P.No.33620 of 2007, directed reassessment of duty.

4.2. The record shows that the Assessee had imported knitted apparels, qua which, it had paid countervailing duty (CVD), properly called Additional Customs Duty, at the rate of 16% Ad valorem duty. The appellant, evidently, had paid the duty under a mistake, as some of the apparels imported by it, were made of cotton. In so far as cotton was concerned, the correct rate of additional customs duty, which was leviable, at the relevant point in time, was 4% and for others, the correct rate of duty was 8%.

4.3. It is, in this context, that the Assessee had requested the Assistant Commissioner of Customs, to reassess the duty, vide communication dated 12.08.2006. Since, there was a refusal to reassess duty, as indicated above, the Assessee approached this Court, whereupon, the order dated 19.11.2007, was passed directing reassessment of duty.

4.4. Consequently, as alluded to above, the order dated 21.01.2008, came to be passed sanctioning refund of an amount equivalent to Rs.18,91,127/-.

4.5. Upon obtaining the order of reassessment in its favour, the Assessee filed refund application on 04.03.2008, which was adjudicated upon by the Assistant Commissioner of Customs (Refunds), vide order dated 05.10.2008. Via this order, the application made by the Assessee that the amount be refunded to it, was rejected. The Assistant Commissioner of Customs (Refunds) directed that a sum of Rs.15,97,268/- was to be credited to the Consumer Welfare Fund of India and, in so far as the balance amount was concerned, i.e., Rs.2,93,859/-, he concluded that the refund application was not properly filed and, according to him, refund was prematurely claimed.

4.6. Being aggrieved, the Assessee preferred an appeal to the Commissioner of Customs (Appeals). The said appeal was rejected vide order dated 03.12.2009.

4.7. The Assessee carried the matter further by way of appeal to the Tribunal. The Tribunal, as indicated above, vide order dated 24.04.2015, rejected the appeal of the Assessee.

4.8. It is, in this background, the instant appeal has been filed, in this Court.

5. Mr.Hari Radhakrishnan, who appears on behalf of the Assessee, says that the judgment of the Tribunal is flawed for the reason that it failed to take into account the following : (i) That the Assessee had not only filed the Chartered Accountant's certificate, but had also placed on record, the balance sheet for the relevant period, as well as the ledger account; and (ii) That having regard to the evidence placed on record, the burden of proof shifted, in as much as the statutory presumption obtaining against the Assessee by virtue of provisions of Section 28-D of the Act stood rebutted.

5.1. In support of his submissions, learned counsel placed reliance on the judgment of the Division Bench of the Delhi High Court in Hero Motocorp Limited V. Commissioner of Customs (Import and General), 2014 (302) E.L.T. 501.

6. Mr.Sundareswaran, who appears on behalf of the Revenue, in rebuttal, largely, relied upon the orders of the authorities below. It is the submission of the learned counsel for the Revenue that the Chartered Accountant's certificate, Profit and Loss Account, Balance Sheet and Ledger Account, by themselves would not disturb the statutory presumption that the burden of tax had not been passed on by the Assessee to his customers. It was the submission of the learned counsel that the primary documents, which included sales invoice, had not been placed on record by the Assessee, despite several opportunities being given, in that behalf, by the authorities below.

7. Before proceeding further in the matter, we must indicate that the learned counsel for the Assessee concedes that the sales invoices, pertaining both to the period prior to the import and that which followed thereafter, were not placed on record.

8. Given the aforesaid facts, what is required to be ascertained by us, is, whether the statutory presumption obtaining against the Assessee that it had passed on the burden of duty stood rebutted.

8.1. According to us, the Chartered Accountant's certificate, the Balance Sheet and the ledger account, by themselves, did not disturb the statutory presumption, as these are not primary documents, which would capture the transactions that the Assessee may have entered into with its customers. The primary evidence would be the sales invoice that would get generated every time a transaction was entered into between the Assessee and its customers.

8.2. It is well-settled that the transaction adverted to in a ledger or in a Balance Sheet can only, at best, be a secondary evidence. The primary evidence would be the underlying documents, such as Bills, Sales Invoices, etc. In so far as the entries in the books of accounts and ledgers are concerned, they do not get proved by themselves even those entries require proof. See M/s. Superior Crafts and others V. Sudhir Gupta, MANU/DE/4038/2013; Chandradhar Goswami and Others V. The Gauhati Bank Ltd., AIR 1967 SC 1058; and Central Bureau of Investigation V. V.C. Shukla and others, AIR 1998 SC 1406.

8.3. Before one could say that the Assessee had reached a stage that the statutory presumption obtaining against it in terms of Section 28-D stood rebutted, it would have to place on record, the necessary primary documents, based on which, entries were made in the ledger, and, the Balance Sheet was drawn up. If, the Assessee had placed on record, the primary documents/evidence, then perhaps, one could have said that the onus of proof had shifted on, to the Revenue, and if, the Revenue, thereafter, proceed to deny the refund, it would have to place on record the relevant documentary evidence to demonstrate that the incidence of duty had passed on to the customers of the Assessee.

8.4. Furthermore, we notice that the certificate of the concerned Chartered Accountant's firm only states that a sum of Rs.18,91,216.47 is receivable by the appellant from the Customs authorities. It further states that based on the explanation given to them, they believe that the said sum had not been collected by the Assessee, from its customers. We must indicate that in the opening paragraph of the Chartered Accountant's certificate, seems to indicate that the books of accounts and the relevant supporting documents have been verified. If, that was the position, then, we see no reason why the Assessee could not produce the relevant invoices, i.e., supporting documents before the Tribunal, despite opportunity having been given, in that behalf.

9. In so far as the judgement of the Division Bench of the Delhi High Court in Hero Motocorp Limited V. Commissioner of Customs (Import and General), 2014 (302) E.L.T. 501, is concerned, according to us, the said judgement does not help the cause of the Assessee. A careful reading of the said judgment would show that the Assessee in that case had placed on record, inter alia, apart from the Balance Sheet and the Chartered Accountant's certificate, self-attested invoice/packing list/bill of entry. As a matter of fact, the invoices placed on

record, pertained both to pre and post import period. (See paragraphs 4 and 17 of the judgment). Therefore, the said judgment, instead of helping the cause of the Assessee, would advance the case of the Revenue.

10. Furthermore, a Division Bench of this Court in Commissioner of Customs (Exports), Chennai V. BPL Limited, 2010 (259) E.L.T. 526 (Mad.), has taken a view similar to the one, that we have articulated above.

11. Having regard to the aforesaid circumstances, we find no merit in the appeal. Accordingly, the appeal is dismissed. The questions of law as framed, are answered in favour of the Revenue and against the Assessee. There shall, however, be no order as to costs.

Sd/-
Assistant Registrar(J)

//True Copy//

Sub Assistant Registrar

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To

1.The Customs, Excise and Service Tax Appellate Tribunal,
South Zone Bench, Shastri Bhavan Annexe,
I Floor, 26, Haddows Road,
Chennai-600 006.

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

+1cc to Mr.Hari Radhakrishnan, Advocate Sr.41662

C.M.A.No.2600 of 2015

sj[co]
srg 12/07/2017