IN THE HIGH COURT OF JUDICATURE AT MADRAS
DATED: 8/12/2017
C O R A M
THE HON'BLE MR.JUSTICE S.MANIKUMAR
AND
THE HON'BLE MR.JUSTICE R.PONGIAPPAN

Civil Miscellaneous Appeal Nos.3453 to 3455 of 2017

The Commissioner of Customs & Central Excise
6/7 ATD Street
Race Course Road
Coimbatore 641 018. ...Appellant in all the appeals

Vs

M/s. Lakshmi Machine Works Limited
Unit I, Periyanaicken Palayam
Coimbatore 641 020. ...Respondent in all the appeals

Appeals filed under Section 35 G of the Central Excise Act, 1944, against the Final Order Nos.757 to 759 of 2008, dated 23/7/2008, passed by the CESTAT, Chennai arising out of order - in appeal No.141/2004 (SCN)TRY-II dated 17.5.2004 and order in appeal No.51/2004 dated 16.3.2004 passed by the Commissioner of Central Excise (Appeals-II), Friday and order in Appeal No.1/2003 dated 24.1.2003, passed by Commissioner of Central Excise (Appeals), Coimbatore, all the there appeals arising out of order in original in C.No.V/84) 18/106/2001-refund dated 21.11.2002, order in original in C.NO.84/30/42/2001.Adj dated 19.9.2002 and order in Original in C.No.84/18/80/2000 dated 17.5.2001 passed by the Deputy Commissioner of Central Excise, Coimbatore Division IV, Coimbatore.

For appellant ...Mr.A.P.Srinivas

C O M M O N J U D G M E N T
(Judgment of the Court was made by S.MANIKUMAR, J)

Final Order Nos.757 to 759 of 2008, dated 23/7/2008, are impugned in the instant Civil Miscellaneous Appeals.

2. Short facts leading to the instant Civil Miscellaneous Appeals are as follows:-

M/s. Lakshmi Machine Works Ltd., Coimbatore/respondent is the manufacture of textile machinery parts falling under Central Excise Tariff, 1985. They are maintaining a private Customs Bonded Warehouse in their premises, where imported goods are stored without payment of Customs Duties and cleared on payment of appropriate customs duty through P.D.account. The goods so cleared were used captively by the assessee in the manufacture of final products. Under Section 61 (1) of the Customs Act, the imported goods could be warehoused by the importer without having to pay interest on duty for a specified period. On expiry, the goods shall ordinarily be removed on payment of duty without interest. However, interest will have to be paid for any period of overstay of the goods in the warehouse. The interest shall be paid at such rate as specified under Section 47 of the Act. Originally, the warehousing period was one year, which was reduced to six months and further reduced to 30 days. The goods imported by the respondents remained warehoused for a fairly long period beyond the warehousing period and it was during this period of overstay of the warehoused goods that the above amendments were brought to Section 61 of the Act. Dispute arose between the Department and respondent. According to department, the reduced warehousing period of 30 days would be applicable to goods which continued to be warehoused as on 1/6/2001. According to the importer, the law as it stood on the date of warehousing of the goods would continue to govern the warehousing period. Despite this dispute, in two cases of warehousing, the importer paid the interest in terms of the departmental view. Lateron, they filed refund claims and the same came to be rejected by the original authority and the decision of that authority came to be sustained by the Commissioner (Appeals). Appeal Nos.C/118/03 and C/243/04 are against the orders of the Commissioner (Appeals). In another case of warehousing, the imported did not pay the interest, demanded by the department. The original authority confirmed the demand, and the Commissioner (Appeals) sustained the same. The appellate Commissioner's order is under challenge in Appeal No.C/233/04. After hearing both sides, CESTAT, Chennai, allowed Appeal No.C/233/04

3. Out of three cases, two cases relate to refund of interest already paid by the assessee and the other is, against the very demand of interest. CESTAT, Madras, by common Final Order Nos.757 to 759 of 2008, dated 23/7/2008, disposed of the appeals against the order made in Appeal Nos.C/233/04, C/118/03 & C/243/04, in favour of the respondent.

4. Aggrieved against the order passed by the CESTAT, Chennai, Commissioner of Customs and Central Excise, Coimbatore has preferred the instant Civil Miscellaneous Appeals, on the following substantial questions of law:-

> "1. Whether the Tribunal is right in holding that the time limit fixed for claiming refund of interest under Section 27 of the Customs Act, 1962 is not applicable to the party in dispute by relying on a outdated Boards Circular

No.475/39/90-Cus, VII, dated 8/8/1990, which was not relevant after the "Customs Amendment Act, 1991", came into existence which has brought interest into the purview of Section 27 of the Customs Act, 1962 also along with duty?

2. Whether the Tribunal was right in deciding an appeal in favour of the party without ever discussing the question of unjust enrichment on which the refund claims were rightly rejected by the lower fora?

3. Whether the Tribunal was right in deciding the appeal in favour of the party by relying on Apex Court judgment in the case of M/s. Bangalore Wire Rod Mills reported in 1996 (83) ELT 251 (SC) in which there was no discussion at all about Section 27 of the Customs Act, 1962?

4. Whether the Tribunal was right in holding that the warehousing period applicable would be the period in force on the date of deposit of the goods in the warehouse, in spite of further amendment brought into reduce the warehousing period?

5. Whether the Tribunal was right in coming to a conclusion that the issue of interest free warehousing period was settled by the Apex Court by virtue of the above cited case law when in fact the Court has not made any observation nor came to any conclusion about the interest free warehousing period?"

5. We have heard Mr.A.P.Srinivas, learned counsel for the Commissioner of Customs & Central Excise, Coimbatore and perused the materials available on record.

6. In Union of India Vs. Bangalore Wire Rod Mill {1996 (83) ELT 251 (SC)}, the Hon'ble Apex Court held as follows:-

"3. For a proper appreciation of the questions arising herein, it is necessary to state a few more facts: on the date of warehousing the goods, the rate of customs duty chargeable on the imported goods was forty per cent ad valorem. The rate of duty was being raised from time to time and on September 9, 1988, the date on which the goods were cleared from the warehouse, the rate of duty was ninety per cent. The Act, as in force at the relevant time, permitted an importer either to clear the goods immediately on their import or to warehouse them without paying the duty. The warehousing of the goods without paying the duty was, however, subject to certain conditions specified in Section 59. Sub-section (1) of Section 59, which alone is relevant for our purposes, read thus at the relevant time.

"59. Warehousing bond - (1). The importer of any dutiable goods which have been entered for warehousing and assessed to duty under Section 17 or Section 18 shall execute a bond binding himself in a sum equal to twice the amount of the duty assessed on such goods;

(a). to observe all the provisions of this Act and the Rules and Regulations in respect of such goods;

(b). to pay on or before a date specified in a notice of demand, all duties, rent and charges claimable on account of such goods under this Act, together with interest on the same from the date so specified at the rate of six percent per annum or such other rate as is for the time being fixed by the Board and

(c). to discharge all penalties incurred in violation of the provisions of this Act and the rules and regulations in respect of such goods."

A reading of Section 59 (1) shows that an importer who seeks to have the imported goods warehoused has to first have the goods assessed under Section 17 or Section 18, as the case may be, and then execute a bond binding himself to pay double the amount of duty assessed on the said goods and undertaking "to pay on or before a date specified in a notice of demand all duties, rent and charges claimable on account of such goods under this Act, together with interest on the same from the date so specified at the rate of six per cent per annum or such other rate as is for the time being fixed by the Board". Clause (a) of sub-section (1) of Section 61, as obtaining on the date of warehousing of the said goods, [it is not disputed before us that the imported goods represent "consumable stores" within the meaning of Section 61 (1) (a)] prescribed a period of three years beyond which the imported goods could not be warehoused. On May 14 1983, however, this clause was amended and the period of three years was reduced to one year. Sub-section (2) of Section 61 [as inserted by Act 11 of 1983] reads as follows:-

"(2) Where any warehoused goods remain in a warehouse beyond the period of one year or three months specified in clause (a) or clause (b) of sub-section (1) by reason of the aforesaid period or otherwise, interest at such rate, not exceeding eighteen per cent per annum as is for the time being fixed by the Board, shall be payable on the amount of duty on the warehoused goods for the period from the expiry of the period of one year or as the case may be, three months, till the date of the clearance of the goods from the warehouse:

Provided that the Board may, if it considers it necessary so to do in the public interest, by special order and under circumstances of an exceptional nature to be specified in such order to whole or part of any interest payable under this sub-section in respect of any warehoused goods."

We have referred to sub-section (2) of Section 61 for the reason that it was relied upon by the appellant before us, though, in our opinion, it is not really relevant herein as we shall point out presently.

4. In this case, the respondent did execute a bond as contemplated by Section 59 (1) while warehousing the goods on November 11, 1982. Though the period of three years prescribed in Section 61 (1) (a) was reduced to one year by an Amendment Act with effect from May 13, 1983, neither the respondent cleared the goods nor the authorities issued a demand notice within one year from May 13, 1983. Only on March 7, 1985 did the authorities issue a notice to the respondent calling upon him to clear the goods on paying the appropriate duty. Now, according to the Act, the duty payable would be the duty in force on the date of clearance from the warehouse and not the date in force on the date of import or on the date of warehousing. For one or the other reason, the respondent did not clear the goods immediately but cleared them only on September 9, 1988. He paid the duty at the rate of ninety percent and that aspect is no longer in issue herein. While clearing the goods, the authorities demanded and collected interest on the said amount of duty for the period commencing from November 11, 1982 to September 9, 1988. It

is this aspect which alone is in dispute between the parties in these appeals. The Division Bench of the High Court has held that the interest is chargeable only for the period March 22, 1985 [on expiry of fifteen days from the date of notice, dated March 7, 1985] to September 9, 1988. The Division Bench has further directed that interest shall be calculated taking the rate of duty in force from time to time during the said period. The State has preferred these appeals contending that (1) it is entitled to interest from November 11, 1982 and (2) the interest should be charged calculating the duty @ ninety per cent fro the entire period November 11, 1982 to September 9, 1988.

5. We do not think that the claim of the appellant is sustainable in law. The language of Section 59 (1) (b), as it stood at the relevant time, is clear and unambiguous. It says that the importer shall have to execute a bond undertaking inter alia to pay interest from the date specified in the notice of demand. We have already extracted clause (b) in full hereinbefore. The liability to pay interest arises only after the expiry of the period prescribed in the notice of demand. It has been held by the High Court that the present matter is not governed by Section 61(2), as it stood at the relevant time, but by Section 59 (1) alone. Indeed, it is submitted that when the respondent applied for extension of time of warehousing under Sectin 61 (2), the Government told it that the said provision had no application and hence, time cannot be extended thereunder. Once that is so, we must go by what Section 59 (1) sayd. According to it, the duty became due on issuing the notice of demand. The notice prescribed fifteen days for payment. Interest is chargeable only thereafter as held by the High Court, which, in our opinion, is a reasonable way of understanding the provision. Secondly, we see no justification or legal basis for the appellants plea that the interst must be paid taking the rate of the duty at ninety per cent for the said entire period. As a matter of fact, the rate of duty on the said goods was not ninety percent throughout the period March 22, 1985 to September 9, 1988. It was varying. The High Court's direction, therefore, to take the actual rate in force

from time to time is a reasonable one. We are, therefore, of the opinion that the judgment of the High Court does not call for any interference. The appeals are accordingly dismissed."

7. In Commissioner of Customs, Chennai Vs. Lakshmi Electrical Control Systems Ltd., {2016 (336) ELT 619 (Mad)}, after considering the Circular No.475/39/90-Cus.VII, dated 8/8/1990, at paras 8 to 10, observed as hereunder:-

"8. But, we do not think that the learned Senior Panel Counsel is correct. The correct expression used in Section 27 (1) is 'interest, if any, paid on such duty'. The Circular dated 8/8/1990, reads as follows:

"F.No.475/39/90-Cus.VII, dated 8/8/1990
Government of India
Ministry of Finance (Department of Revenue)
Central Board of Excise & Customs, New Delhi
Subject: Warehousing Interest - Section 27 of Customs Act inapplicable
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It has been advised that warehousing interest levied under Section 61 (2) of the Customs Act is distinguishable from customs duty defined under Section 2 (xv) ibid. Accordingly, provisions of Section 27 will not apply to refund of interest recovered under Section 61 (2). However, the period under the Limitation Act may be applicable."

9. The circular does not refer to Section 27. It refers to only customs duty. Definitely, the law makers have understood the distinction between duty and the interest payable on such duty. If the contention of the learned Senior Panel Counsel is accepted, we may have to read 'interest' into the word 'duty'. The amended Section 27 (1) reads as follows:

"27. Claim for refund of duty - (1) Any person claiming refund of any duty and interest, if any, paid on such duty -

(i). paid by him in pursuance of an order of assessment or

(ii). borne by him,

may make an application for refund of such duty and interest, if any, paid on such duty, to the Assistant Commissioner of Customs -

a. in the case of any importer made by any individual for his personal use or by Government or by any educational, research or charitable institution or hospital, before the expiry of one year;

b. in any other case, before the expiry of six months,

from the date of payment of duty and interest, if any, paid on such duty, in such form and manner as may be specified in the regulations made in this behalf and the application shall be accompanied by such documentary or other evidence (including the documents referred to in Section 28 C) as the applicant may furnish to establish that the amount of duty and interest, if any, paid on such duty, in relation to which such refund is claimed was collected from, or paid by him and the incidence of such duty and interest, if any, paid on such duty, had not been passed on by him to any other person:

Provided that where an application for refund has been made before the commencement of the Central Excise and Customs Laws (Amendment) Act, 1991, such applications shall be deemed to have been made under this sub-section and the same shall be dealt with in accordance with the provisions of sub-section (2).

Provided further that the limitation of one year or six months, as the case may be, shall not apply where any duty and interest, if any, paid on such duty, has been paid under protest.

Provided also that int he case of goods, which are exempt from payment of duty by a special order issued under sub-Section (2) of Section 25, the limitation of one year or six months, as the case may be, shall be computed from the date of issue of such order.

Explanation I. - For the purposes of this sub-section, 'the date of payment of duty and interest, if any, paid on such duty', in relation to a person, other than the importer, shall be construed as 'the date of purchase of goods' by such person.

Explanation II - Where any duty is paid provisionally under Section 18, the limitation of one year or six months, as the case may be, shall be computed from the date of adjustment of duty after the final assessment thereof.

10. In so far as Section 61 (2) is concerned, it refers only to the interest that becomes payable under Section 47. As a matter of fact, the present sub-section (2) of Section 61, was amended only by Act, 27 of 1999. The amendment, on which, strong reliance is placed by the learned Senior Panel Counsel, to Section 27 (1), came in 1991. Yet Section 61 (2) does not refer to Section 27. Therefore, the view

taken by the Tribunal cannot be said to be incorrect."

8. Considering the fact that question of law No.4, had already been answered, as against the revenue, by the Hon'ble Supreme Court, in Union of India Vs. Bangalore Wire Rod Mill {1996 (83) ELT 251 (SC)}, substantial questions of law Nos.1, 2, 3 and 5 were also answered, as against the revenue by a decision of this Court, in Commissioner of Customs, Chennai Vs. Lakshmi Electrical Control Systems Ltd., {2016 (336) ELT 619 (Mad)} and going through the material on record, we are of the view that there are no merits in these appeals. All the substantial questions of law are answered against the revenue, and Civil Miscellaneous Appeals are dismissed. No costs.

Sd/-
Assistant Registrar(CS-VIII)

//True Copy//

Sub Assistant Registrar

mvs.

To

1. The Registrar Customs Excise and services Tax Appellate Tribunal Shastri bhavan 26, Haddown Road Chennai 600 006.

2. The Commissioner of Customs and Central Excise 6/7 ATD Street Race Course Road, Coimbatore 641 018.

3. The Commissioner of Central Excise (Appeals), Coimbatore.

4. The Commissioner of Central Excise (Appeals-II) No.1, Williams Road, Cantonments Trichy 620 007.

5. The Deputy Commissioner of Central Excise Coimbatore Division-IV, Coimbatore.

Civil Miscellaneous Appeal Nos.
3453 to 3455 of 2017

GMI(CO)
EU(31/01/2018)