

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 10.03.2017

CORAM :

The Hon'ble MR.JUSTICE RAJIV SHAKDHER

AND

The Hon'ble MR.JUSTICE R.SURESH KUMAR

C.M.A. No.3504 of 2010

M/s.Calcutta Iron & Steel Company,
Rep. By its Partner, Mr.Sital Kumar Agarwal. .. Appellant

-vs-

1. Customs, Excise and Service Tax Appellate
Tribunal, South Zonal Branch,
Shastri Bhawan Annexe, 1st Floor,
26, Haddows Road, Chennai 600 006.
2. Commissioner of Customs (Imports)
Customs House, Chennai 600 001. .. Respondents

Appeal filed under Section 130 of the Customs Act, 1962,
against the Final Order No.938/2010 dated 31.08.2010 on the file
of Customs, Excise & Service Tax Appellate Tribunal, South Zonal
Bench, Chennai.

For Appellant : Mr.S.Murugappan

For Respondents : M/s.R.Hemalatha for R-2
: R-1 Tribunal

J U D G M E N T

(Judgment of the Court was delivered by Rajiv Shakdher, J.)

1.This is an appeal filed by the assessee which is directed
against the order of the Customs, Excise and Service Tax
Appellate Tribunal, South Zonal Bench, Chennai, (in short 'the
Tribunal') dated 31st August, 2010. The appeal was admitted by
our predecessor Bench when the following question of law was
framed for consideration of this Court:

'Whether the Tribunal is correct in holding that the appellants are not entitled to interest on the differential duty paid by them during investigation when as per the law laid down by the Hon'ble Supreme Court in the case of Sandvik Asia Ltd. vs. Commissioner of Income Tax-I, Pune, reported in 2006 (196) ELT 257 (SC), interest is payable in such cases ?'

2. Before we proceed further, we may only indicate that the controversy in the appeal falls in a narrow compass. The assessee seeks payment of interest on the moneys deposited pursuant to investigation carried out at its premises by the Directorate of Revenue Intelligence (in short 'DRI'), while the Revenue resists the claim for payment of interest, as it is the stand of the Revenue that the moneys so deposited was in the nature of security deposit. The assessee, on the other hand, contends that pursuant to the adjudication order passed on 30th June, 1997, by the Commissioner of Customs (Imports) (in short 'the Commissioner'), even if it is assumed that, to begin with, the deposit made was in the nature of security deposit, it certainly took the colour of a duty and therefore, interest under Section 27A of the Customs Act, 1962, (in short 'the Act') is payable to the assessee.

3. Quite frankly, the matter has taken several twists and turns and therefore, in order to appreciate the context in which the deposit was made, certain broad facts would have to be noticed. These are as follows:

3.1. The assessee claims to be generally in the business of importing goods. The assessee, in the course of its business, in and about March 1995, had imported Non-Alloy Heavy Melting Steel Scrap (HMS). Accordingly, two Bills of Entry (BEs) bearing: No.13753, dated 22.03.1995 and No.25995, dated 24.03.1995, were filed with the customs authorities. After examination and assessment of the case, the concerned goods were cleared against advance licences issued under Duty Exemption Entitlement Certificate Scheme (DEEC), as reflected in Notification No.203/92.

3.2. The record shows that in October and November, 1995, the assessee imported two other consignments of goods, which were declared as rejected/damaged/non-serviceable scrap/rolls under Bills of Entry bearing: No.51371, dated 17.10.1995 and No.55041, dated 09.11.1995. According to the assessee, the said goods were in the nature of steel scrap, which had arisen out of rolls used in steel rolling mills, which, after they had worn out, were scrapped by rolling mills. This time around, the assessee could produce DEEC, only, for part of the goods. Accordingly, a

part of the goods were cleared upon payment of duty as they were not covered by advance licences.

3.3. In respect of goods covered by BE No.55041, dated 09.11.1995, equivalent to 19.075 MTs, the assessee sought classification under heading 7204.49 of the Customs of Tariff Act, 1975 (in short 'CTA'). Consequently, assessment was made based on the BEs filed by the assessee.

3.4. The record, however, shows that the DRI, based on intelligence, conducted investigation into the matter. It is at the time of investigation that the assessee, admittedly, deposited a sum of Rs.14,23,600/- with the customs authorities on 17.01.1996.

3.5. A Show Cause Notice (SCN) was, consequently, issued to the assessee which was adjudicated upon by the Commissioner, vide order dated 30.06.1997. The Commissioner, while passing the said order, issued the following operative directions:

'52. Under the above circumstances, I order the following:-

1. The goods should be considered as rolls for re-rolling mills, and not as heavy melting scrap.
2. The licence produced is not valid to cover the goods under import as admitted by them.
3. The goods shall be classified under Customs Tariff Heading 84.55.30 as rolls for re-rolling mills and charged to duty at the rate of 25% plus 15%.
4. The duty amount of Rs.4,57,892/- shall be adjusted against the amount of Rs.14,23,600/- which was voluntarily paid by the importers during the course of investigation.
5. The duty liability in respect of past clearances as admitted by the party is allowed to be adjusted against the amount voluntarily paid during the time of search in November, '95 namely, Rs.14,23,600/.
6. The goods under seizure are confiscated under sect.111(d) and (m) of the Customs Act, 1962. However the goods are allowed to be redeemed on payment of a fine of Rs.3,00,000/- (three lakh only).
7. also impose a personal penalty of Rs.1,00,000/- (one lakh) on the importers under Sec.112(a) of the Customs Act, 1962.'

(emphasis is ours)

3.6. Consequent to the aforementioned order of the Commissioner, on 29th August, 1997, a sum of Rs.4,52,735/- was adjusted out of the deposit made by the assessee on 17.01.1996.

3.7.The assessee, being aggrieved, preferred an appeal with the Tribunal. The Tribunal vide order dated 05.09.2001 remitted the matter for fresh adjudication to the Commissioner, whereby, inter alia, the Commissioner was directed to confine himself to the BEs, which were the subject matter of the SCN.

3.8.It is not disputed before us that the consignments imported vide BEs dated 22.03.1995 and 24.03.1995 were not subject matter of the aforementioned show cause notice.

3.9.On remand, the Commissioner, vide order dated 09.09.2002, held that scrapped goods were classifiable under CTH 7204.49, as against 8455.30. Accordingly, the charges levelled against the assessee in the aforementioned SCN were dropped.

4.0.Consequent thereto, the assessee applied for refund on 28.10.2002. Resultantly, assessee obtained a refund out of the total amount paid, i.e. Rs.14,23,600/-, a sum of Rs.9,70,865/-. This amount was refunded to the assessee on 01.04.2003. The assessee's claim for refund of balance amount was rejected by the Assistant Commissioner of Customs vide order dated 04.09.2003. The reason given for rejection of refund claim of the balance amount, i.e. Rs.4,52,735/-, was that the claim was time barred.

4.1.The assessee, being aggrieved by the order dated 04.09.2003, preferred an appeal before the Commissioner of Customs (Appeals) (in short 'CCA'). The CCA, vide order dated 31.12.2003 directed refund of the balance amount as well, i.e. a sum of Rs.4,52,735/-. While directing the refund, the CCA rejected the prayer of the assessee for grant of interest.

4.2.The assessee was, thus, aggrieved by the fact that it had been denied interest both on the sum of Rs.9,70,865/-, which was refunded to it on 01.04.2003 and, also, qua the sum of Rs.4,52,735/- refunded to it pursuant to the order dated 31.12.2003 passed by the CCA.

4.3.The assessee proceeded to ventilate its grievance by preferring an appeal to the Tribunal.

4.4.The Tribunal, by virtue of the impugned order, dated 31.08.2010, partly, allowed the appeal of the assessee, inasmuch as it directed payment of interest on the sum of Rs.4,52,735/-, while denying grant of interest on the sum of Rs.9,70,865/-. The order of the Tribunal is brief, and therefore, the operative directions are culled out hereunder:

'2. I have heard both sides. I find that an amount of Rs.9,70,865/- was paid as security while a further

amount of Rs.4,52,735/- was adjusted towards duty. Initially, only the security amount was refunded but vide the impugned order, the amount of duty adjusted has also been refunded. As far as the amount of Rs.9,70,865/- is concerned, I agree with the authorities below that the assessee is not entitled to interest as Section 27A of the Customs Act, 1962 only provides for payment of interest at the specified rate in the event of delay in refund of duty and not delay in refund of an amount representing security deposit. However, as regards the amount of Rs.4,52,735/-, which admittedly represents duty, since there has been a delay in refund of this amount, the assessee is entitled to interest on the sum of Rs.4,52,735/-. In the result, the appeal is partly allowed as above.''

5.The assessee, being aggrieved with the impugned judgment of the Tribunal, has approached this Court for grant of interest on the sum of Rs.9,70,865/-.

6.Arguments, in support of the appeal, have been advanced by Mr.Murugappan, while the Revenue is represented by Mrs.Hemalatha.

7.Mr.Murugappan has submitted that the sum of Rs.14,23,600/-, which was deposited by the assessee on 17.01.1996 was made over in circumstances which were anything but voluntarily. It is his submission that the said deposit was made under threat and duress, as the DRI officials had landed up at the assessee's premises, when, wedding celebrations were on. It is the learned counsel's submission that, even if it is assumed that, in the first instance, the sum of Rs.14,23,600/- was deposited voluntarily, however, after the passing of the adjudication order, dated 30th June, 1997, it took the colour of a duty, since the Commissioner had not only adjusted a sum of Rs.4,57,892/- towards duty for consignments cleared in October, 1995 and November, 1995, but had also, issued a direction that the balance amount should be adjusted in respect of 'duty liability', albeit, qua past clearances, i.e. clearances made in March, 1995.

8.In sum, it is, therefore, the submission of the learned counsel for the appellant that the Tribunal has proceeded on a mistake of fact and, therefore, erred in law in concluding that the sum of Rs.9,70,865/- was in the nature of security deposit, and thus, no interest would accrue or be payable to the assessee under Section 27A of the Act.

9.As against this, Mrs.Hemalatha, vociferously argues that it was the assessee's own case that the amount deposited was in the nature of security deposit and therefore, as rightly held by

the Tribunal, no interest would be payable to the assessee under Section 27A of the Act. In support of her submissions, the learned counsel relied upon the order of the CCA, dated 31.12.2003, wherein, an observation has been made to the effect that the assessee had stated in its grounds of appeal that the sum of Rs.14,23,600/- was deposited as security and not as duty.

9.1.Furthermore, learned counsel relied upon the proviso to Section 27 (2) of the Act to emphasize the point that interest was payable only if duty had been determined in the matter. In addition, learned counsel also relied upon Section 27A of the Act to further stress upon the fact that only if 'duty' is refunded, can interest be paid on the delayed refund of the same.

10.As indicated above, the result of the assessee's appeal before us, is dependent on the ascertainment of the nature of the deposit made by the assessee.

10.1.The facts narrated by us would show that the assessee had cleared four consignments. The first two consignments were cleared in March, 1995, while the remaining two were cleared in October / November, 1995. In so far as the October / November, 1995, clearances were concerned, duty was, admittedly, assessed and determined. The determination by the authorities led them to adjust a sum of Rs.4,52,735/- vide order dated 30.06.1997. By the very same order, in so far as the past clearances were concerned, the balance sum was adjusted towards 'duty liability'.

10.2.This aspect of the matter, according to us, clearly emerges upon reading of the operative portion of the order dated 30.06.1997 passed by the Commissioner. We have already extracted the operative portion of the said order. However, only to emphasize the point, we once again advert to sub-paras 4 and 5 of the operative directions contained in order dated 30.06.1997:

'52. Under the above circumstances, I order the following:-

1. ...
2. ...
3. ...

4.The duty amount of Rs.4,57,892/- shall be adjusted against the amount of Rs.14,23,600/- which was voluntarily paid by the importers during the course of investigation.

5.The duty liability in respect of past clearances as admitted by the party is allowed to be adjusted against the amount voluntarily paid during the time of

search in November, '95 namely, Rs.14,23,600/.''
(emphasis is ours)

10.3.A bare perusal of the aforesaid extract would show that while a sum of Rs.4,57,892/- was adjusted towards duty payable qua October and November, 1995 clearances, in so far as the balance amount was concerned, it was also adjusted towards 'duty liability', albeit, in respect of past clearances. Therefore, to our minds, the nature of deposit, even if the best case scenario qua the customs authorities is accepted, which is that it was a voluntary deposit, changed after 30.06.1997.

10.4.The aforesaid narration of facts would also show that, ultimately, the assessee was able to convince the authorities that it was not required to pay any amount towards duty. Even the sum of Rs.4,52,735/- was directed to be refunded by the CCA vide order dated 31.12.2003, albeit, without payment of interest. This error was corrected by the Tribunal vide the impugned judgment. The Tribunal, however, did not grant interest vis-a-vis the balance amount equivalent to Rs.9,70,865/-, though the said amount, as indicated above, was refunded to the assessee on 01.04.2003.

10.5.The argument of Mrs.Hemalatha that the interest on delayed refund can only be paid if the duty is determined, according to us, is clearly answered upon perusal of the CCA's order, dated 30.06.1997. In so far as argument based on Section 27 of the Act is concerned, according to us, it has no application because the said section is applicable when refund of duty or interest is sought. In the present case, the assessee is seeking interest on delayed payment of refund, and therefore, the circumstances obtaining in the present case can only be a subject matter of Section 27A of the Act. Since duty for past clearances was determined and adjusted, the assessee, to our minds, would be entitled to interest under Section 27A of the Act.

11.Before we conclude, we may also indicate that Mrs.Hemalatha had, while emphasizing of the point, advanced the argument that when DRI collected the amount, there was no assessment and that by itself would show that the amounts paid at that point in time by the assessee were voluntary in nature. According to us, this is an argument, which is, in a sense, self-destructive. To say that payments were made voluntarily when DRI officials descended on the premises of the assessee when wedding celebrations were on would amount to turning a blind eye to the harsh realities obtaining on ground. As a matter of fact, in our view, the officers of DRI had clearly no jurisdiction to demand and collect any amounts from the

assessee, in view of the fact that they are not vested with powers of an Assessing Officer. Furthermore, if we were to accept this argument of the learned counsel, then it would tantamount to allowing the Revenue to take advantage of its own wrong.

11.1.This apart, the Revenue has enjoyed the benefits of the money collected from the assessee on account of purported liability to pay duty, which was ultimately proved to have been wrongly foisted. Therefore, in our opinion, it only be right that the Revenue be called upon to pay interest to the assessee because, by its nature, any such collection of money by Revenue can only be termed as exaction under ostensible authority of law.

11.2.Fortunately, for the assessee, there is a provision in the Act for payment of statutory interest and therefore, we do not need to resort to any other principle of law for directing payment of interest.

12.For the foregoing reasons, we allow the appeal and accordingly, set aside the impugned judgment of the Tribunal to the extent it denies interest on a sum of Rs.9,70,865/-.

13.Consequently, interest will be paid to the assessee in terms of Section 27A of the Act on the sum of Rs.9,70,865/- for the period from 17.01.1996 to 01.04.2003. There shall, however, be no order as to costs.

Sd/-
Assistant Registrar(CO)

//True Copy//

सत्यमेव जयते
Sub Assistant Registrar

sra

To

1. The Registrar,
Customs, Excise and Service Tax Appellate
Tribunal, South Zonal Branch,
Shastri Bhawan Annexe, 1st Floor,
26, Haddows Road, Chennai 600 006.

WEB COPY

2. The Commissioner of Customs (Imports)
Customs House, Chennai 600 001.

+lcc to Mr.S.Murugappan, Advocate, S.R.No.15412
+lcc to Mr.R.Hemalatha, Advocate, S.R.No.15411

C.M.A. No.3504 of 2010

lrs(co)
rmp(24/03/17)



WEB COPY