IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 07.01.2022
CORAM

THE HONOURABLE MR.JUSTICE C.SARAVANAN

W.P.No.16259 of 2021
&
W.M.P.No17199 of 2021

(Through Video Conferencing)

M/s Bharti Airtel Limited.
Represented by its Authorized Signatory
Vijeyakumar Raja
Airtel Centre, Plot No.16,
Udyog Vihar, Phase-IV,
Gurugram - 122 015. ...Petitioner

Vs.

1. Union of India
Under Secretary, Ministry of Finance,
North Block,
New Delhi - 110 001.

2. Commissioner of Customs (Appeals-II),
Office of Commissioner of Customs, (Appeals-II),
Customs House, 60, Raja Salai,
Chennai - 600 001.

3. Deputy Commissioner of Customs (Group 5A),
Office of Commissioner of Customs, Chennai-II,
Customs House, 60, Raja Salai,
Chennai - 600 001. ...Respondents

Prayer: Writ Petition filed under Article 226 of the Constitution of India to issue a Writ of Certiorarified Mandamus, for quashing the impugned order dated 19.04.2021 bearing F.No.C3/11/454-46810/2020/Sec in Appeal SEAPORT C.Cus II No.347-361/2021 passed by the respondent No.2 and remanding the matter for fresh adjudication in accordance with the settled law in respect of classification of antennas in decision of Commissioner of Customs (Import) Mumbai Vs. Reliance Jio Infocom Ltd Customs Appeal No.85882 of 2018 and issue such further and other orders.

For Petitioner : Mr.Sujit Ghosh
For Respondents : Mr.Rajendran Raghavan
Senior Standing Counsel

ORDER

After hearing the learned counsel for the petitioner and the learned Senior Standing Counsel for the respondents for some time, this case is being disposed without expressing any opinion on the merits of the case as to whether the petitioner was entitled to file an application under Section 149 of the Customs Act, 1962 for amending the Bill of Entry which were filed between December 2018 to March 2019 and another three set of Bill of Entries during December 2018.

2.The case of the petitioner is that the petitioner is importing Antennas for Base Transmission Station and had classified them originally under Customs Tariff Sub-Heading 85.17.62.90 which is exempted the petitioner for payment of duty on the imported Antennas for Base Transmission Station. Since the department insisted that the Base Transmission imported by the petitioner was classifiable under the Customs Sub-Heading 85.17.62.90, the petitioner opted the classification imposed by the department and thus ended up paying higher custom duty.

3.Meanwhile, the identical issue in the case of imports by M/s.Reliance Jio Infocom Ltd came to be decided by the Tribunal by its final order No.85882 of 2018 dated 06.11.2019, pursuant to which, for the earlier imports, the petitioner filed refund of the customs duty paid under protest. For the 15 Bill of Entries filed between 2018-2019, the petitioner filed application under Section 149 of the Customs Act, 1962 on 12.04.2020 for amending the Bill of Entries in terms of the above decision of the Tribunal.

4.The petition filed under Section 149 of the Customs Act, 1962 on 12.04.2020 has culminated in a communication dated 21.07.2020 bearing reference No.F.No./smisc/46/2020/Gr.5A DIN:20200773MX0000IL4026.

5.Aggrieved by the same, the petitioner had filed appeal before the Commissioner of Customs (Appeals), the second respondent herein on 24.09.2020 which has been rejected. The operative portion of the impugned order reads as under:-

> ''5.I have carefully gone through the facts of the case, grounds of appeal and points put forth by the appellant during he personal hearing. The Deputy Commissioner of Customs (Gr.5A) had denied the request of the appellant for reclassification of the imported goods on the ground that "once an order of assessment is passed, the duty would be payable as per the order, unless that order of assessment including self assessment is duly modified by way of appeal.

Hence you are advised to approach the appellate forum to redress the grievance”.

6.The appellant had filed the appeal under the provisions of Section 128 of the Customs Act, 1962 against the aforesaid communication of the lower authority seeking amendment/modification of the bills of entry filed during the period December 2018 to March 2019 (13.12.2018 to 01.03.2019).

Section 128 of the Customs Act, 1962 reads as below:

Section 128.Appeals to Commissioner (Appeals)- (1)Any person aggrieved by any decision or order passed under this Act by an officer of customs lower in rank than a Principal Commissioner of Customs or Commissioner of Customs may appeal to the Commissioner (Appeals) [within sixty days] from the date of the communication to him of such decision or order:

[Provided that the Commissioner (Appeals) may, if he is satisfied that the appellant was prevented by sufficient cause from presenting the appeal within]

7.It is observed that the appeal request for change of classification should have been filed within three months from the date of assessment which is not so in the instant case. The appeals are filed beyond the permissible period prescribed under Section 128 of the Customs Act, 1962. Hence, the appeals are rejected as time barred.''

6.The learned counsel for the petitioner has drawn attention to the acknowledgement received by the petitioner from the office of the second respondent on 22.09.2020. He submits that the second respondent has passed the impugned order dated 19.04.2021 Order-in-Appeal SEAPORT C.Cus.II.No.347-361/2021 by simply referring to limitation prescribed under Section 128 of the Customs Act, 1962 by stating that the appeals were time barred. When indeed the appeal was filed in time on 22.09.2020 against communication dated 21.07.2020.

7.The learned counsel for the petitioner further submits that the impugned order has been passed in the gross violation of principles of natural justice and is perverse, inasmuch as the petitioner appeals was against the impugned communication dated 21.07.2020 of the third respondent and not against individual Bill of Entries, numbering in 15 filed between the period mentioned above December 2018 to March 2019.

8.Opposing the prayer in this writ petition, learned Senior Standing Counsel for the respondent on instructions submits that the writ petition is devoid of merits inasmuch as the petitioner has not filed an appeal against the respective Bill of Entries in time as is contemplated as has been settled by the Hon'ble Supreme Court in ITC Limited Vs. CCE, (2019) 17 SCC 46. In this connection, the learned Senior Standing Counsel for the respondents has referred to few passages from the decisions of the Hon'ble Supreme Court.

9.The learned Senior Standing Counsel for the respondents further submits that no useful purpose would be served by setting aside the impugned order inasmuch as no appeal has been filed against the respective Bill of Entries by the petitioner in time. It is further submitted that if duty was not paid under protest and it would be an empty formality to remit the case back to the second respondent to pass fresh order for de novo consideration.

10.The respondent further submits that petitioner has an alternative remedy before the Tribunal under Section 129A of the aforesaid Customs Act, 1962.

11.He further submits that since the customs duty was not paid ''under protest'' by the petitioner the refund will be in any event time barred.

12.By way of rejoinder, the learned counsel for the petitioner has specifically drawn the attention to para 47 from the decision of the Hon'ble Supreme Court in ITC Limited Vs. CCE referred to supra which reads as under:-

> 47.When we consider the overall effect of the provisions prior to amendment and post-amendment under the Finance Act, 2011, we are of the opinion that the claim for refund cannot be entertained unless the order of assessment or self-assessment is modified in accordance with law by making recourse to the appropriate proceedings and it would not be within the ken of Section 27 to set aside the order of self-assessment and reassess the duty for making refund; and in case any person is aggrieved by any order which would include self-assessment, he has to get the order modified under Section 128 or under other relevant provisions of the Act.

13.The learned counsel for the petitioner has also drawn attention to the decision of this Court rendered in the case of Usha International Limited Vs. ACC 2019(365) ELT 56 (Mad) and submits that the following orders of this Court, High Courts and the Tribunal have passed and attention was drawn to para 15 from the said order which reads as under:

> 15.Without prejudice, it is also pertinent to note that the Courts and Tribunals have held time and again that mistakes relating to classification or incorrect rate can always be corrected under Section 149 and/or 154 of the Customs Act and for the same, the Appellant places reliance on the following judgments:
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> (a)CC Vs.Thiru Arooran sugars Ltd., 2010(254) E.L.T 45(Mad)
>
> (b)UOL Vs.Aluminium Industries Ltd, 1996(83) ELT 41 (Ker)
>
> (c)Bennet Coleman and Co.Ltd Vs.CC, 2008(232) ELT 367(Tri-Bang).
>
> (d)Mahindra & Mahindra Ltd Vs.CC, 2008(230) ELT 425 (Tri-Mumbai).

14.I have considered the arguments advanced by the learned counsel for the petitioner and the learned Senior Standing Counsel for the respondents.

15.As mentioned at the beginning of this order, this Court has not expressing any opinion on the merits of the case as to whether the petitioner was indeed entitled to file the application under Section 149 of the Customs Act, 1962.

16.The fact of the matter is that after the petitioner filed application under Section 149 of the Customs Act, 1962 on 22.04.2020 and 05.05.2020. The 3rd respondent disposed the same in a peremptory manner vide communication dated 21.07.2020 bearing reference in F.No.Smisc/46/2020/Gr.5A DIN:20200773 MX0000IL4D26 without calling the petitioner for a personal hearing.

17.The third respondent ought to have called upon the petitioner to show cause as to why the application/petitions filed under Section 149 of the Customs Act, 1962 should not be rejected. The petitioner having chosen to file an appeal against the said communication before the second respondent, later ought not to have dismissed the appeal on account of limitation against the impugned communication dated 21.07.2020 bearing reference F.No.Smisc/46/2020/Gr.5A.

18. The appeal filed by the petitioner before the second respondent ought to have been decided on merits as to whether

the petitioner had a case for interference. Section 128 of the Customs Act, 1962 contemplates an appeal against the decision or order passed under the Act by an officer of the Customs lower in rank than the Principal Commissioner or Commissioner of Customs and such appeal can be filed within a period of 60 days from the date of communication of the order. The proviso further grants 30 days time period subject to appeal giving substantial reasons for not filing an appeal within 60 days. Therefore, the dismissal of the appeal filed by the petitioner against the communication dated 21.07.2020/24.09.2020 by the second respondent vide impugned cannot be sustained. There is a violation of the principles of natural justice, I am inclined to quash the impugned order passed by the second respondent and remit the case back to pass orders on merits by deciding the issue as to whether the petitioners was indeed entitled to file an appeal against the impugned communication dated 21.07.2020 and whether any consequential relief could be granted to the petitioner in the light of the order of the Tribunal in Reliance Jio Infocom Ltd accepting the stand of the petitioner regarding a classification of Antennas for Base Transmission Station imported by the petitioner.

19. In the result, the impugned order stands quashed and the case is remitted back to the 2nd respondent to pass appropriate orders on merits and in accordance with law. Needless to state, the petitioner shall also to be heard.

20.Accordingly, this writ petition stands disposed of with the above observations. No costs. Consequently, connected writ miscellaneous petition is also closed.

Sd/-
Assistant Registrar(CS V)

//True Copy//

Sub Assistant Registrar

nst/jas

To

1. Union of India
Under Secretary, Ministry of Finance,
North Block,
New Delhi - 110 001.

2. Commissioner of Customs (Appeals-II),
Office of Commissioner of Customs, (Appeals-II),
Customs House,
60, Raja Salai,
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MT(CO)
KKV/04/02/2022