

Sterlite Optical Technologies Vs. Commissioner of Central Excise

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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Mumbai

Decided On : Dec-19-2003

Reported in : (2004)(92)ECC285

Judge : A Wadhwa, S T C.

Appellant : Sterlite Optical Technologies

Respondent : Commissioner of Central Excise

Judgement :

1. Vide the impugned order Commissioner of Central Excise & Customs Aurangabad, apart from confirming demands of duties and imposing penalties had also confiscated the capital goods with an option to the appellant to redeem the same on payment of redemption fine of Rs. 30 crores.

2. Vide stay order dt. 28.10.2003 the Tribunal after observing that the appellant had already deposited an amount of Rs. 10 crores and a further sum of Rs. 3 crores was deposited at the stage of investigation and a Bank Guarantee for Rs. 11.74 crores was furnished and the goods valued at approximately Rs. 37.60 crores is in the custody of the department, dispensed with the condition of predeposit of balance amount of duties and penalties and stayed the recoveries thereof.

Subsequently, the appellants jurisdictional Assistant Commissioner of Central Excise vide its letter dt. 5.11.03 directed the applicant to stop operations of the

machineries confiscated under the impugned order to enable the enforcement of the confiscation. Thereafter the appellant filed the present miscellaneous application praying for staying the operation of that part of the Commissioner's order vide which he has confiscated the capital goods.

3. The Tribunal, on a mention made by the applicant's Advocate, vide its order dt. 7.11.2003 observed that, in the interest of justice, the department should not enforce the order of confiscation of plant and machinery till the party's application is disposed of. It was also observed that Rule 41 of the CEGAT (Procedure) Rules 1982 empowers the Tribunal to issue such an injection in the facts and circumstances of this case.

4. Today the miscellaneous application is posted for hearing, we are informed by Ld. Advocate appearing by the applicant that the main appeals are also listed for final disposal on 19th & 20th January 2004.

In these circumstances there is no justification on the part of the Revenue to enforce the confiscation of the capital goods and to stop their manufacturing activities. Such a confiscation would be ultimately dependent upon the final outcome of the appeals and if the same is not stayed by the Tribunal, it will result in undue grave injury to the appellant. It was also brought to our notice that such prayer was made in the stay petition also. However the Tribunal while disposing of the stay application did not explicit rejected the said prayer. The Tribunal should exercise its power under Rule 41 of the CEGAT (Procedure) Rules 1982 and has the jurisdiction to deal with the issue of the seized and confiscated capital goods.

5. Shri Uma Shankar Ld. SDR appearing for the Revenue strongly submits that the Tribunal does not have any powers to stay that portion of the Commissioner's order under which he has confiscated the capital goods.

6. We do not agree with the above contention of the Ld. SDR. The entire order of the Commissioner is impugned before the Tribunal which include that part also vide which he has confiscated the capital goods with an option to the appellant to redeem the same on payment of a redemption fine of Rs. 30 crores. In terms of the said order of the Commissioner such an option is to be exercised within a

period of three months from the date of receipt of the order. No doubt, the provisions of Section 35F speak of only duty and penalty but then the said provisions are only for dispensing with the condition of predeposit for the purposes of hearing of the appeal. Stay of recoveries of the duties and penalties are being given by the Tribunal in exercise of its inherent powers. When the entire order of the Commissioner is impugned before the Tribunal, the confiscation order would also be dependent upon the final outcome of the appeal. As such we are of the view that in terms of Rule 41 of the CEGAT (Procedure) Rules 1982, the Tribunal has the power to stay the operation of the said order of the Commissioner and in the alternative to extend the period for exercise of the option to redeem the goods till the disposal of the appeal. We also note that the appeal is fixed for final hearing in January and as such there is no justification for the respondents to proceed with the enforcement of confiscation of the capital goods thus bringing the appellants manufacturing activity to stand still. In view of the, forgoing we allow the miscellaneous application and restrain the Revenue from enforcing the confiscation order of capital goods till the final disposal of the appeals.

7. Pre-deposit of duty and penalty has been waived and the recovery of the same has been stayed by the Bench Order dated 28/10/2003 and final hearing of the case has been fixed on 19th January, 2004. The Miscellaneous Applications filed by the appellant seek stay of confiscation of seized goods and confiscation of plant and machinery etc. on the face of coercive action by the Department.

8. Shri Uma Shankar, the learned S.D.R. opposes the applications and strenuously argues that the Tribunal's powers under Section 35F of the Central Excise Act, 1944 and Section 129E of the Customs Act, 1962 are limited to dispensing with pre-deposit of duty and penalty pending appeal and that the Tribunal has no power under the law to stay an order of confiscation. He also cites the decision of the Larger Bench of the Tribunal rendered in the case of Dinkar Khindria v. C.C., New Delhi - 2000 (118) E.L.T. 77 to argue that the Tribunal is a creation of statute and hence it can only exercise powers conferred under the statute which created it and further that it has no inherent powers. He also cites the decision of the Hon'ble High Court of Orissa rendered in the case of C.C.E. & C. v. Golden Hind Shipping (India) Pvt. Ltd. - 1993 (68) E.L.T., 739 (On.) to

reiterate that the Tribunal has no inherent power and that it can only exercise such powers which have been conferred by the statute. Citing the Apex Court decision in the case of C.C.E. v. Berger Paints India Ltd., he also argues that CESTAT (Procedure) Rules, 1982 have been framed to carry out the purposes of the Act and hence strained construction of the Rules is not warranted to derive therefrom the power to grant stay on confiscation which is not available to it under the statute. He also supports his argument that confiscation and recovery of redemption fine cannot be stayed by the Tribunal under the said Sections 35F and 129E, by citing the decision of the Tribunal in the case of National Harbour Launch Service v. C.C. (Prev.) Bombay - 1983 (12) E.L.T. 617. He also cites a number of decisions to state that on confiscation, the goods vest in the Government and therefore, the Department can dispose off the confiscated goods.

9. I have very carefully considered these arguments. It is not in dispute that Section 35F of the Central Excise Act, 1944 and Section 129E of the Customs Act, 1962 provide for power to dispense with pre-deposit of duty and penalty (and additionally pre-deposit of interest under the Customs Act) pending appeal. It is not also in dispute that there is no specific provision under the Customs and Excise law empowering the Tribunal to grant stay on order of confiscation. It is also now settled that unlike the superior courts created under the Constitution, the Tribunal being a creature of the statute does not possess 'inherent' power or power 'to do complete justice'. Moreover, no such power can be derived from the Tribunal (Procedure) Rules framed by the Tribunal itself, if the same has not been conferred under the statute.

10. Yet, the Apex Court and the High Courts have ruled that the Appellate Tribunal has the power to grant stay as incidental and ancillary power to its appellate jurisdiction. It has also been held that if power to grant stay is not held to be implied in the appellate powers, then the appeal, if successful, would be rendered nugatory. One does not have to go beyond the decision of the Honourable High Court of Orissa in the case of Golden Hind Shipping (Supra) cited by the learned S.D.R. himself to find support for the aforesaid proposition. The Hon'ble High Court has also referred to the Apex Court decision in the case of ITO v. M.K. Mohammad Kunhi - 71 1TR 818 in this context.

11. That the Tribunal has incidental power to grant stay is also evident from the fact that the Parliament has specifically amended Sections 35C of the Central Excise Act, 1944 and Section 129B of the Customs Act, 1962 to limit the duration of stay to 180 days. If the Tribunal had no incidental power to grant stay, as the learned S.D.R. contends, then there would have been no need to limit the period of stay.

12. Since the Tribunal has the power to grant stay as incidental and ancillary power to its appellate jurisdiction, it needs to be considered whether the same needs to be applied in the present case. In view of the fact that the Bench in its Order dated 28.10.2003 has already waived the pre-deposit of duty and penalty, stayed recovery of the same and has fixed final hearing of the case on 19th January 2004, a date which is not far off, the balance of convenience lies in granting stay on confiscation of the seized goods. As far as confiscation of plant and machinery etc. is concerned, the same also deserves to be stayed for the added consideration that action to dispose off the same will affect the livelihood of the employees. As such, for the reasons stated above, I agree with the Order of my learned Sister in staying the confiscation of the seized goods as well as the confiscation of plant and machinery etc. till final disposal of these appeals. The miscellaneous applications are allowed in the above terms.

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