

Seaking Marine Services Vs. Commissioner of Cus. (Prev.)

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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

Decided On : Jun-01-2004

Reported in : (2004)(173)ELT276TriDel

Judge : A T V.K., P Chacko

Appellant : Seaking Marine Services

Respondent : Commissioner of Cus. (Prev.)

Judgement :

1. From the available records, it appears that M/s. Seaking Marine Services - a partnership firm, of which one Shri Bhavesh Gandhi was a partner - had imported numerous consignments of Seamless Stainless Steel Pipes etc. and warehoused the goods during 1992-94; that the goods were cleared from warehouse without payment of duty and sold to buyers in the local market; that a case of evasion of customs duty was booked against the appellant-firm by the department and the same was investigated; that, during the course of investigations (September - November '97), the appellants deposited certain amounts towards customs duty; that, in adjudication of the show cause notice issued to the firm and its partner, the Commissioner of Customs by order dated 10-3-98 appropriated the said deposits towards demand of duty on the goods and imposed penalties on the firm and its partner; that the Commissioner's order was challenged in appeals preferred to this Tribunal; that the Tribunal by Order Nos. A/963-966/99, dated 27-10-99 [2000 (116) E.L.T.220 (Tribunal)] set aside the demand of duty on those goods which had been cleared from warehouse in the State of Gujarat; that one Shri Chetan

Kothari filed an application with the department, claiming to represent the appellant-firm, on 11-11-2000 for refund of duty of Rs. 63,08,933/-; that the department by show cause notice dated 16-5-2001 proposed to reject the refund claim on the grounds of time-bar and unjust enrichment and on the further ground that the claim was unauthorised; that the notice was contested by the claimant's Counsel; that the adjudicating authority rejected the department's plea of limitation but disallowed the refund claim on the other two grounds; that, in the appeal preferred by the party, the Commissioner (Appeals) held that the claim was liable to be rejected on all the three grounds; and that the party has filed the present appeal against the order of the first appellate authority.

2. We have heard both sides and considered the submissions. We have three issues before us :- 3. Issue No. (i) : We find that the decision of the original authority on this issue was in favour of the party. That authority had held that the bar of limitation was inapplicable to the refund claim of Rs. 63,08,933/- vide paragraphs (20) and (28) of the said authority's order. This finding of the adjudicating authority was never challenged by the department and the same stood final and binding on the Revenue.

It was not open to the first appellate authority to reopen the issue in the appeal filed by the party. We, therefore, set aside the finding recorded by the Commissioner (Appeals) on the above issue. The original authority's finding on the issue will stand.

4. Issue No. (ii) : Both the lower authorities held, with reference to the provisions of Section 27 of the Customs Act, that Shri Chetan Kothari was not competent to file the refund claim on behalf of M/s.

Seaking Marine Services. The reasons for this view, as stated in their orders, are that Shri Chetan Kothari was neither an employee of, nor in any other way connected with, M/s. Seaking Marine Services and that he had himself stated to this effect under Section 108 of the Customs Act.

Neither of the authorities below has accepted the letter of authorisation, dated 8-11-2000, produced by the party. We have seen a copy of this letter which is

reproduced below : Marine & Preventive Wing 2nd Floor, Everest House, 100, Marine Drive, Sub : Grant of refund of Rs. 76,30,158 (wrongly mentioned as Rs. 76,29,9587-) Rs. 76,29,958. consequent upon the CEGAT's Final Order Nos. A/963-966/99-NB, dated 29-10-1999.

We hereby authorize Mr. Chetan V. Kothari, Officer in our company to sign all papers and letters in connection with our application for refund pursuant to CEGAT's Final Order No. A/963-966/99-NB, dated 29-10-1999 on behalf of the company. We also authorize Mr. Chetan V. Kothari, if necessary, to appear before you for presenting our case and answering all the information and answer queries that may be required by you. We also authorise Mr. Chetan V. Kothari to collect the cheque for refund from you on our behalf and give a valid discharge of the same.

This letter is by an unnamed partner of the appellant-firm, whose signature, however, looks like that of Shri Bhavesh Gandhi's and does not appear to be forged. We have also come across a copy of a notarised affidavit dated 30-7-2001 of Shri Bhavesh Gandhi, wherein the deponent has declared inter alia that he had signed the authority letter dated 8-11-2000 authorizing Shri Chetan Kothari to file the refund claim.

Obviously, this affidavit was not before the original authority when it passed its order dated 5-7-2001. The lower appellate authority's order also contains no mention of, or reference to, the affidavit. Even the memorandum of appeal before us does not refer to the affidavit dated 30-7-2001, though it refers to two other affidavits. One of these two affidavits referred to in the appeal memo is an affidavit dated 19-6-2001 sworn to by Shri Chetan Kothari on behalf of the appellant-firm as well as his own company viz. Fairlon Engineering Pvt.

Ltd. It was rejected by the original authority which held that Shri Chetan Kothari had not been authorized to make the refund claim or sign any affidavit or other document in support thereof. According to the adjudicating authority, any such affidavit should have been made by the principal officer of the firm as per the Supreme Court's ruling in ACC and Ors. v. Anam Electrical Manufacturing Co. [1997 (90) E.L.T. 260 (S.G.) = 1997 (69) ECR 12 (SC)]. The lower appellate

authority has also endorsed this view. We have no reason to disagree with this view. It appears to us that the appellants themselves have acquiesced in this view inasmuch as they have brought on record before us an affidavit dated 30-7-2001 of Shri Bhavesh Gandhi, partner of the firm. The second affidavit referred to in the appeal memo is one dated 6-7-2001 of Shri Bhavesh Gandhi. But we have not found any reference to any affidavit dated 6-7-2001 in the order passed by the lower appellate authority, nor is any copy of such affidavit available on record before us.

5. We have noticed that any affidavit dated 30-7-2001 of Shri Bhavesh Gandhi was not produced before the Commissioner (Appeals). It further appears that, though it was claimed before the lower appellate authority that the firm had subsequently (i.e., subsequent to 8-11-2000) passed a resolution authorizing Shri Chetan Kothari to file the refund claim, no evidence thereof was placed on record. No such evidence has been adduced by the appellants before us, either.

The authority letter dated 8-11-2000 claimed that Shri Chetan Kothari was an officer of the firm. Shri Kothari's own statement under Section 108 of the Customs Act, however, was categorical enough to disprove the claim.

In the aforesaid circumstances, we see no reason to find fault with the lower authorities' view that the refund claim was not filed by any duly authorized person. Our decision on issue No. (ii) goes against the appellants.

6. Issue No. (iii) : Both sides have argued exhaustively on this issue.

Learned Counsel has argued that, as the amount was paid after clearance of the goods and prior to issuance of the show cause notice, it cannot be treated as duty and consequently Section 27 of the Customs Act, which has created the bar of unjust enrichment for certain refunds of duty, cannot be applied to the refund claim in question. In this connection, Counsel has relied on the following case law. *Easter Industries Ltd. v. CCE*, 2003 (161) E.L.T. 1034 (T) = 1999 (35) RLT 696 (Tri.) *Indian Thermoplastics (P) Ltd. v. CC*, 2003 (155) E.L.T. 263 (Tri. - LB) *CCE v. Ravi Shankar Industries Pvt. Ltd.*, 2002 (150) E.L.T. 1317 (T) = 2002 (53) RLT 467. Learned SDR has countered the above argument by referring to the relevant

challans whereunder the amounts had been paid by Shri Bhavesh Gandhi qua partner of the firm. We have also perused copies of these challans available on record, which describe the payments as "payments towards the Customs duty evaded on import cargo cleared against Bond Bills of Entry and sold in the local market". Relying on the Tribunal's decision in Sun Export Pvt. Ltd. v. CC [2003 (156) E.L.T. 801], DR has also contended that the refund claim filed by a person who had not paid the duty cannot be allowed. DR has further contended that the bar of unjust enrichment is applicable in respect of past period also. In this connection, he has relied on the Supreme Court's decision in Union of India v. Jain Spinners Ltd. [1992 (61) E.L.T. 321 (S.C.)]. Id. SDR has also relied on the Supreme Court's judgment in Mafatlal Industries Ltd. v. U.O.I [1997 (89) E.L.T. 247 (S.C.)] and the Bombay High Court's decision in Bussa Overseas and Properties Pvt. Ltd. v. U.O.I [2003 (158) E.L.T. 135 (Bom.)], to argue that all claims of refund of duty should pass the test of unjust enrichment.

7. We have already held that Shri Chetan Kothari was not competent to claim refund of the duty paid by the appellant-firm. It would follow that he was not competent to rebut the presumption of unjust enrichment against the firm either. In our view, therefore, the presumption stood unrebutted in this case. The case law cited by Id. Counsel does not improve the position. Issue No. (iii) therefore is answered in the affirmative.

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