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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

Decided On : Jun-17-2004

Judge : A T V.K., P Chaeko

Appellant : Reliance Telecom Ltd.

Respondent : Cc

Judgement :

1. The issue involved in these two appeals, filed by M/s. Reliance Telecom Ltd., is whether the appeals filed by them against two Order-in-Original both dated 31.12.99 were filed within the time limit stipulated in Section 128 of the Customs Act.

2. Shri Rohan Shah, learned Advocate, submitted that the appellants imported computer hardware and filed Bills of Entry dated 21.6.97 and 15.7.97 classifying the goods under Sub-heading 8471.49 of the First Schedule to the Customs Tariff Act; that the consignments were permitted to be cleared on their furnishing Bond under the provisions of Section 143 of the Customs Act for production of import licence or otherwise proving that licence produced was valid for clearances of the goods; that by a letter dated 9.12.2000, they wrote to the .Deputy Commissioner of Customs stating that the Bonds were pending for cancellation and requested that copies of bonds and other related documents be provided to their clearing agent; that they were forwarded copies of the Orders dated 31.12.1999 by their clearing agent which were received by him on their behalf on 22.1.2000; that by these orders dated 31.12.1999 the Deputy Commissioner purported to confirm the

demands of duty issued under Section 28(1)/142 read with Section 18 of the Customs Act on the ground that the Appellants had not discharged their obligation to submit the Special Import Licence in respect of the goods imported by them; that they filed two appeals before the Commissioner (Appeals) who, under the impugned Order have rejected their appeals holding that the Order-in-Original which were despatched by speed post and acknowledged by the Postal Authorities, were deemed to have been served on the Appellants on 3.1.2000 in terms of Section 153 of the Customs Act and accordingly the appeals filed by them were barred by the time limit stipulated in Section 128 of the Customs Act.

3. 1 The learned Advocate, further, submitted that the Orders dated 31.12.1999 were received by their clearing agents on their behalf only on 22.11.1999 and as such appeals filed by them on 22.11.2001 are within three months time specified in Section 128 of the Customs Act; that it is settled law that it is the date of knowledge and not the date of despatch of the Order that is relevant; that the Clearing Agent in his letter dated 20.2.2001 has clearly mentioned that on 22.11.2000 his representative received the copy of confirmed demand from Customs House and the same was given to the Appellants thereafter. The order was never communicated to them and the negative aspect can be proved by them only by an Affidavit; that Shri A. Shankar, Vice President has affirmed an affidavit in which it is mentioned that the Appellants have not received the original certified copy of the Order-in-Original; that for the first time a copy of the said Order-in-Original was received by the Appellants from M/s. S.K. Jain & Company, Clearing & Forwarding Agents New Delhi on 22.11.2000. He emphasized that communication is a rebuttable presumption which has been rebutted by them. He relied upon the decision in the case of Green View Radio Service v. Laxmibai Ramji 1990 (SC2) GJX 479 SC wherein it has been held by the Supreme Court that "the presumption of service of a letter sent by registered post can be rebutted by the addressee by appearing as witness and stating that he never received such letter.The burden would then shift on the plaintiff who wants to rely on such presumption to satisfy the Court by leading oral or documentary evidence to prove the service of such letters on the addressee." The learned Counsel also mentioned that it has been held by the Tribunal in the case of CCE, Indore v. R.R. Tea Co. that presumption of service of a letter by Post is a rebuttable presumption; that an

affidavit filed by the addressee is sufficient to rebut the presumption.

3.2 The learned Advocate contended that the Revenue has merely produced the Despatch Register showing entries that the impugned Orders were despatched on 31.12.99 and the Commissioner (Appeals) has dismissed their appeals on the ground that the impugned Orders were despatched on 31.12.99 and duly acknowledge by the Postal Authorities and were not received back undelivered and as such the same were delivered to the Appellants; that the findings of the Commissioner (Appeals) are based on conjectures and surmises; that he erred in coming to a finding that delivery through Speed Post is deemed to be proper delivery when not returned back undelivered; that Section 153 of the Customs Act only provides for the mode service of an order while Section 128 provides that appeal has to be preferred by an aggrieved person within 3 months from the date of communication; that Section 153 refers to the discharge of the obligation by the authorities and Section 128 refers to the second leg namely the receipt of order by the party concerned; that the obligation to serve contemplated by Section 153 would stand fulfilled if the ingredients of Section 153 are satisfied; that but that does not mean that the Order has been communicated; that the Appellants received the orders only in November 2000 when their Clearing Agent forwarded the same to them. He also relied upon the decision in the case of Tele Tube Electronics Ltd. v. Delhi Sales Tax Appellate Tribunal 2003 (132) STC 424 wherein the Delhi High Court accepted the submissions, made by the Petitioner to the effect that once the petitioner discharged its initial burden by denying the receipt of copy of the Order by registered post or otherwise, it was for the department to prove from the records of the postal authorities that the alleged registered document was received by the Petitioner, by holding that "the Department has failed to prove, by summoning the postal records, that service of registered letter was effected on any person duly authorised by the petitioner company." Reliance has also been placed on the decision in the case of Satpushp Steels (P) Ltd. v.CCE, Jaipur 2001 (43) RLT 817 (CESTAT) wherein the Appellants did not receive Order-in-Original on despatch and came to know about it subsequently from the Range Superintendent and then obtained its copy.

The Tribunal has remanded the case for making enquiry for verification of the submissions made by the Appellants.

4. Finally, the learned Advocate submitted that the Tribunal, despite the dismissal of the appeals as time barred, can decide the appeals on merit as held by the Tribunal in the case to Mark Auto Industries v.CCE, Nezo Delhi 2000 (41) RLT 756 (CESTAT). He has also relied upon the following decision: (ii) Ntt wood Private Ltd. v. Superintendent, 1981 ELT 184 (Mad) wherein it has been held that an order passed in violation of principles of natural justice is a nullity and can be ignored with impunity. The learned Advocate contended that the impugned Orders were passed in gross violation of the principles of natural justice as neither any notice was given to them nor were they heard prior to confirmation of the demand.

5.1 Countering the arguments Shri Virag Gupta, learned DR, submitted that Orders confirming demand of duty were despatched on 31.12.99 and were duly acknowledged by Receipts No. 696 given by the Postal Authority; that the Despatch Register clearly shows the despatch of the said Orders; that the Despatch Register also mentions the mode of despatch i.e. SP (Speed Post) and the postal charges (Rs. 45); that thus the statutory requirement of Section 153 of the service of decision/order has been fully complied with; that in the case of Rajaram Jora v. CC, Chennai 2001 (94) ECR 688 (T) where order was despatched by Registered post and the same had been acknowledged by the postal department on the same date, the Appellate Tribunal has considered the same to be proper service in terms of Section 153 of the Customs Act. The learned SDR emphasized that as the orders sent by speed post were not received back from postal authorities, the presumption is that the orders were served on the Appellants; that the affidavit given by the Appellants has been rebutted by Revenue by furnishing the Affidavit of the Deputy Commissioner, Customs.

5.2 The learned DR also distinguished all the decisions relied upon by the learned Advocate for the Appellants. He submitted that the judgment in Green View Radio Service is not applicable as the affidavits of all their employees had not been submitted; that the Appellants appear not to maintain any Register regarding incoming letters; that the Affidavit of the Vice President is silent about any such

Register being maintained by them; that the Orders were sent to the proper address and mere denial of non-receipt cannot be treated as a rebuttal of the presumption of service; that in Tele Tube Electronics Ltd., there was a specific Rule i.e. Sub-rule (2) of Rule 46 of the Delhi Sales Tax Rules, 1975 which provided that when a notice or order is delivered to the addressee or his agent, personally, the serving officer is required to take signature of the person to whom the copy is so delivered on the original notice itself as acknowledgement of the service; that in view of this the ratio of said judgment is not applicable to the facts of the present matter; that in Satpusp Steels (P) Ltd., admittedly the Order was despatched mentioning wrong address of the Appellants; that in R.R. Tea Co. case, fact of non-despatch was accepted by both the sides.

5.3. The learned DR contended that as the Orders had been despatched by speed post, the same are presumed to have been received by the Appellants; that if they had not filed the appeal in the time specified in Section 128 of the Customs; they cannot claim any benefit on account of their negligence. He relied upon the decision in Shanti Alloys Put.

Ltd. v. CCE, Hyderabad 1999 (109) ELT 79 (A.P.) wherein the Andhra Pradesh High Court has held that "in view of the specific provision contained in the Proviso to Section 35(1) of the Central Excise Act, the condonation of delay beyond the period of 90 days does not arise." Reliance has also been placed on the decision in A Tosh & Sons P. Ltd. v. Assistant Collector, Central Excise Calcutta High Court has held that when claim for rebate has been sent under Certificate of Posting within the period of limitation and Appellants have produced receipts issued by postal authority, there would be a presumption of regularity that the said letter has reached the addressee unless the said presumption has been duly rebutted by due evidence to the contrary.

6. The learned DR also mentioned that no-show cause notice is required to be issued while finalizing the assessment as held by the Tribunal in the case of Pidilite Industries Ltd. v. CCE, Bombay- and S. Patnaik violation of principles of natural justice in demanding the duty under Bond; that the Appellants were required to submit the requisite documents in terms of Bond within one month

which were not submitted by them; that accordingly the assessments were finalized by the Deputy Commissioner. Finally, he submitted that it has been held by the Supreme Court in the case of CCE, Smithkline Beechen Co. 2003 (58)RLT 479 (SO that if the appeal is dismissed by the Commissioner (Appeals) on account of non-making of pre-deposit, the Tribunal cannot consider the case on merit; that the Tribunal has also held in Raymon Shoe Co.

v. CCE, Kanpur considered by the Tribunal where appeal has been dismissed by the Commissioner as time barred.

7. We have considered the submissions of both the sides. As per the provisions of Section 128 of the Customs Act, any person aggrieved by any decision or order has to file an appeal to the Commissioner (Appeals) "within three months from the date of communication to him of such decision or order." The contention of the Appellants is that both the Order-in-Original dated31.12.99 were received by them only on 22.11.2000 from their Clearing Agent and they had filed appeals on 22.1.2001 which is within the period of three months from the date of communication of the Order. On the other hand the contention of the Revenue is that both the orders were despatched to the Appellants by Speed Post on 3.1.2000 and have brought on record their Despatch Register and Receipt issued by the Postal Authority in token of having received the envelope. The registered post is the mode of service of decision or Order as specified in Section 153 of the Customs Act. The learned DR has relied upon some decisions to the effect that once it is shown that letters has been posted, there would be a presumption that the said letter has reached the addressee. We, however, find force in the submissions of the learned Advocate that Section 153 only specifies the method of service of an order or decision whereas Section 128 creates a statutory right to file appeal within three months from the date of communication of order. If order, though sent to them by registered post/speed post, does not reach them, there is no communication of order to them and in absence of the same they cannot file the appeal. Thus, the presumption of order being delivered to the Appellants is a rebuttable presumption. The Appellants have a difficult task before them as they have to prove a negative, i.e., the copy of the orders were not received by them. The learned Advocate has rightly emphasized that the Appellant can deny the

receipt of the Orders only by filing an affidavit of the officer of the company. This is what has been done by them. We are of the view that once the Appellants had taken a specific stand that orders had not been served, it is required of the Department to produce material in support of the assertion that in fact orders had been served on the Appellants or they had received the same. This could have been done by calling the records of the Postal Authorities to prove that orders sent by speed post were served on the Appellants. Neither the records of the Postal Authorities have been brought on record nor any letter from them to the effect that the Orders were served upon the Appellants. We observe that Revenue has also filed Affidavit of the Deputy Commissioner affirming the fact of sending both the Orders by Speed Post. As the Revenue has to prove a positive Act, Affidavit by itself is not sufficient which only shows despatch of the Orders and not their service upon the Appellants. In fact it is also mentioned in the Affidavit filed by the Deputy Commissioner that enquiries made with the Post Office at IGI Airport and with the General Post Office did not reveal anything as no reply had been received from the postal authorities. In view of these facts, it cannot be claimed by the Revenue with certainty that the Orders in question were served on the Appellants. The matter is required to be looked from the angle of any advantage for the Appellants in not filing the appeals. In fact both the orders confirm demand of customs duty against the Appellants so it cannot be said that they are likely to gain any undue advantage by deliberately delaying the filing of appeal.

We, therefore, hold that the Revenue has not succeeded in establishing the communication of Orders to the Appellants. As the Appellants have received both the Orders on 22.11.2000 and the appeals were filed by them on 22.1.2001 which is within the period of three months stipulated in Section 128 of the Customs Act, the appeals are not liable to be dismissed as time barred. We, therefore, set aside the impugned order and remand both the appeals to Commissioner (Appeals) for deciding the same on merits in accordance With law and after affording reasonable opportunity of hearing to the Appellants.

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