

Chk Electronics (P) Ltd. Vs. Cc

Chk Electronics (P) Ltd. Vs. Cc

SooperKanoon Citation : sooperkanoon.com/9057

Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Tamil Nadu

Decided On : Jan-09-1996

Reported in : (1996)(64)LC606Tri(Chennai)

Judge : S Kalyanam, Vice-, G T V.P., S T Gowri

Appellant : Chk Electronics (P) Ltd.

Respondent : Cc

Judgement :

1. This appeal is directed against the order of Collector of Customs, Madras, dated 16.9.1992 rejecting appellants' appeal and confirming the order of the Assistant Collector of Customs, Madras, dated 30.4.1992 and rejecting the appellants' claim for refund as time barred in respect of the claim pertaining to B/E No. 34113 dated 21.9.1989.

2. The appellant stated that their unit is a small scale industry with necessary SSI certificate issued by the Department of Commerce & Industry, Madras, dated 22.9.1986. The appellants' project for manufacture of Optical Mark Reading Computer Systems, has been approved by the Department of Electronics. The appellants were also issued a specific import licence dated 31.3.1989 covering the goods in question.

The appellant filed an application on 27.9.1989 requesting registration of their company under Project Imports to avail of concessional customs duty. The

appellants imported two consignments in September, 1989 and another two consignments in October, 1989 and filed four Bs/E in regard to the same and sought concessional assessment in terms of Project Import Regulations as per Heading 98.01 of the Customs Tariff Act read with customs Notification 315/83. The Assistant Collector of Customs passed an order dated 2.12.1989 after considering the consignments covered by B/E No. 40135 dated 7.11.1989 covering import of optical mark reader with accessories, rejecting the claim of appellant for registration of the project under Project Import Regulations cited supra. Against this order the appellants preferred appeal before the Collector (Appeals), Madras, who by his order dated 30.3.1990 set aside the order of the Assistant Collector of Customs, observing: the rejection of the benefit of customs Notification 315/83 for the project as a whole is not correct and appropriate.

and allowed the appellants' appeal. The Assistant Collector thereupon in pursuance of the order of the Collector (Appeals) granted the benefit of Project Import concession to the appellant and admitted all the claims of the appellant for refund of the excess duty paid excepting goods covered by B/E No, 34113 dated 21.9.1989 which has been rejected as time barred under Section 27 of the Customs Act, 1962, the 'Act' for short and the appellant preferred an appeal against this rejection of refund claim in respect of goods covered by B/E No. 34113 cited supra and the Id. Collector (Appeals) confirmed the same by the impugned order out of which the present appeal arises.

3. Shri Kumaraswamy, the Id. Consultant submitted, inter alia, the following: (1) The appellant filed an appeal seeking the benefit of project import in respect of all the four items before the appellant authority.

(2) The appellant authority allowed agreeing with the appellants' contention and gave a finding under the order referred to above holding the appellant is eligible for the benefit of Project Import Regulations for the project as a whole.

(3) This order was acted upon by the Assistant Collector by granting the benefit of the Project Import Regulations in respect of the goods imported and while giving consequential relief, rejected one refund claim pertaining to B/E dated 21.9.1989 cited supra.

(4) The appellant gets a right to claim refund only in consequence of the order of Collector (Appeals) dated 30.3.1990 referred to above and the appellant filed a refund application on 9.4.1990 and, therefore, the refund claim is well within time.

(5) When the Assistant Collector has granted refund in respect of two other Bs/E covering the same goods under Project Import Regulations, refund in respect of B/E 34113 should also have been given and reference to the bar of limitation is not legally correct in the facts and circumstances of the case. The Id. Counsel, therefore, prayed for relief.

4. Shri Prasad, the Id. SDR contended that the issue is with reference to grant of refund. In respect of the consignment in question duty was paid on 6.10.1989 for which refund claim was filed on 9.4.1990 after a lapse of six months and, therefore, the claim has been rightly rejected by the competent authority. The Id. SDR submitted that the appellant had not paid the duty under protest and, therefore, the bar of limitation is applicable under law.

5. We have carefully considered the submissions made before us. In the present case, against the Assistant Collector's rejection of the benefit of Project Import Regulations in respect of one B/E referred to above, the appellant preferred an appeal before the Collector of Customs (Appeals) and the Id. Collector (Appeals) by order dated 30.3.1990 held as under: From the evidence let in and the certificate given by the sponsoring authority viz. the Department of Electronics it is seen that the project embarked upon by the appellants has both hardware as well as software components. The project envisages import of Scanner transport system in S.K.D. form. These S.K.D., components get assembled and a scanner comes into being. All the concerned administrative agencies have recognised the appellant's unit as an industrial unit. Just because the manufacturing operation herein involves mere assembly of components, it can not be held that there is no 'manufacture' incident on the impugned project. In my view, therefore, the rejection of the benefit of C.N. 315/83 for the project as a whole is not correct and proper....In these circumstances, the denial of the benefit of C.N. 315/83 to the import of OPSCAN-21' machine is not justified. The order of the Original Authority is, therefore, set aside and the appeal allowed in so far as the assessment of

OPSCAN-21 with accessories and start up kit is concerned.

The appellant had also sought extension of Project import benefit in respect of equipments other than OPSCAN-21. Inasmuch as the order appealed against does not cover this aspect and there is no other appealable order concerning the said equipments, the appeal there against is not entertainable.

This order of the Collector (Appeals) was understood by the Assistant Collector as covering the project as a whole who has indeed acted upon, implemented and executed the same by giving the appellant the benefit of the concessional assessment in terms of the Project Import Regulations as per Customs Tariff Heading 9801 read with Customs Notification No. 315/83. The Assistant Collector could pass this order reversing his earlier stand only on the basis of the order of the Collector (Appeals) dated 30.3.1990 extracted above. In other words, it is the order of the Collector (Appeals) that gave the cause of action to the Department and to the competent original authority, namely Assistant Collector for reversing his earlier stand and conferring the benefit of concessional assessment under the Project Import Regulations. Therefore, when the cause of action arose only in consequence of the order of the Id. Collector (Appeals) dated 30.3.1990 the question of the appellant earlier filing a refund application when there was no order at all in his favour granting the benefit of concessional assessment in terms of Project Import Regulations would hardly arise. In other words, the appellant has been held entitled to the benefit of concessional assessment under the Project Import Regulations by virtue of the order of the Collector (Appeals), dated 30.3.1990. If the Department had taken the stand that inasmuch as the appellant had not specifically filed an appeal against the earlier assessment where under the appellant paid full duty and, therefore, the question of reopening or reviewing the same would not arise would be understandable in law. But unfortunately, the Department had not taken that stand. Even though the Id. Collector (Appeals) had to deal with one B/E dated 7.11.1989 yet by reason of the general observation of the Collector (Appeals) that the rejection of the benefit of customs Notification No. 315/83 for the project as a whole is not correct and proper the Department granted the benefit of the said Notification in favour of the appellant for the "project as a whole". In such a situation, it is only in this exercise of the statutory power by a

quasi-judicial authority, namely Assistant Collector in granting the benefit of customs Notification 315/83, in pursuance and by reason of the order of the Collector (Appeals) dated 30.3.1990 the appellant will have to be given the consequential benefits also without any reference to the provisions relating limitation Under Section 27 of the Customs Act. Even if the Id. Collector (Appeals) order dated 30.3.1990 is the basis, which has given rise to a cause of action, the refund claim in question dated 9.4.1990 is well within time even if one were to hold and apply the provisions relating to limitation Under Section 27 of the Act. It is not open to the Department to understand the order of the Id. Collector (Appeals) dated 30.3.1990 as conferring the benefit of customs Notification 315/83 in favour of the party for the project as a whole and giving benefit of the same acting on the said order and at the same time rejecting appellants' consequential relief to refund. The Department in other words cannot approbate and reprobate. We, therefore, hold that the view taken by the authorities below that the refund claim is barred by limitation is not sustainable in law and on the facts of this case. In this view of the matter, the impugned order is set aside and the appeal is allowed.

6. I have perused the order recorded by my Id. Brother, Shri Kalyanam, and I have not been able to agree with him that the refund claim in question is not hit by bar of limitation and refund has to be sanctioned as a consequential relief in pursuance of the order of Collector of Customs (Appeals) dated 30.3.1990 without reference to the provisions relating to limitation under Section 27 of the Customs Act or that the relevant' date for limitation could be considered as the date of the order of Collector (Appeals), ie. 30.3.1990.

7. It is observed that the Id. Collector (Appeals) in the order dated 30.3.1990 in the case involving the dispute regarding classification of OPSCAN-21 allowed the re-assessment of this item as pleaded for by the appellants' under Notification C.N. 315/83 holding the goods to be covered by the Project Import Regulations. While the Id. Collector in his order has observed that denial to the appellants' the benefit of project as a whole is not correct, in the operative portion of the order has observed that the appeal is allowed only so far as the assessment of OPSCAN-21 with accessories and the start-up kit is concerned. He has clearly held so in his order, the operative portion of which has been reproduced in the order recorded by

the Id. Brother, as under: The appellant had also sought extension of project import benefit in respect of equipments other than OPSCAN-21. Inasmuch as the order appealed against does not cover this aspect and there is no other appealable order concerning the said equipments, the appeal there against is not entertainable.

The scope of this order therefore has to be read in the context of the issue before the Id. lower appellate authority. The appellants plea is that since the benefit of Project Import Regulations under Customs Notification No. 315/83 has been allowed to the appellants', the refund of the duty paid in respect of the other consignments which formed part of the same project and which were cleared on payment of higher rate of duty should be allowed irrespective of bar of limitation. It is observed that once a duty has been paid the only course open for the appellants' to claim refund is either by way of filling a refund claim Under Section 27 or by way of filing an appeal before the Id. Collector (Appeals). In the present case, the appellants' filed the appeal only in respect of one item OPSCAN-21 and got the benefit of the project import concession under the orders of the Id. Collector (Appeals). In respect of other consignments, after the receipt of this order the appellants' filed refund claims. Refund claim was allowed in respect of the consignments cleared where the claim was filed within six months of payment of duty as required Under Section 27 and the claim was rejected in the case of goods covered by B/E No. 34113, as the refund claim was filed after a period of six months from the payment of duty. The bar of limitation would not apply unless a duty had been paid under protest or the goods were assessed to provisional assessment. No case has been made out that the appellants' followed either of the two courses.

8. The scope of the appellate order referred to and relied upon by the appellants' for claiming refund in respect of all the consignments has to be taken to be limited in respect of the clearance which was the subject matter of appeal and in respect of other consignments cleared earlier refund cannot be taken to be flowing from the order of the Id. lower appellate authority. No doubt the Id. lower appellate authority in his order has made an observation that benefit of CN 315/83 for the project as a whole was available. This observation would be relevant for the

purpose of consideration of the merits of refund claims which might have been pending or might have been filed after the issue of this order. But, this order does not give any dispensation so far as the limitation aspect prescribed Under Section 27 is concerned. The refund can be said to flow from an appellate order only in respect of such of those consignments which are the subject matter of issue before the appellate authority and any general observation made by the Id.lower appellate authority would be only relevant for consideration on the merits of any connected pending cases.

The limitation aspect has to be statutorily considered so long as the refund claim has been filed Under Section 27 of the Customs Act. In view of the above, I hold that the appellants' plea has no merits and has to be rejected.

whether in the facts and circumstances of the case, the appellants' plea for refund has to be allowed as the claim is not barred by limitation, as held by Member (J) for the reasons stated in the order recorded by him.

whether in the facts and circumstances of the case, the appellants' plea for refund cannot be allowed as the claim is barred by limitation, as held by Member (T) for the reasons stated in the order recorded by him.

Sd/- Sd/-(V.P.Gulati) (S.Kalyanam)Member (T) Vice-President 9. None for the appellant I have heard the Departmental Representative for the Collector.

10. The facts, briefly, are that the appellant filed an application in September, 1989 for registration so as to avail of the concessional assessment under Heading 98.01 of the tariff read with Customs Notification No. 315/83, i.e. Project Import Regulations. While this application was pending, the appellant imported an OPSCAN-21 machine.

In view of the urgency of the requirement and to avoid demurrages that would otherwise occur the appellant paid duty on the goods on merits i.e. without the concessional assessment for Project Imports. The appellant also cleared two other consignments consisting of a logic analyser and logic trouble shooting kit. By his order dated 22.12.1989 the Assistant Collector of Customs rejected the appellant's

claim for registration of the contract for the Project Import. He also consequently held that the OPSCAN-21 machine could not get the concessional assessment. Disposing of the appeal against this order, the Collector (Appeals) accepted the importer's contention that the project as a whole merited registration for the concessional assessment and consequently, gave the benefit of such assessment to the OPSCAN-21.

He however made it clear that the benefit would not be available to the other goods because the order impugned before him did not cover their assessment. The appeal to the Tribunal was against this order.

11. In the meantime the appellant had filed claims for refund of the duty paid on the other two consignments claiming concessional assessment. Refund was sanctioned with regard to one; the other was rejected as being barred by limitation. In the appeal before the Tribunal the appellant claims that the bar of limitation would not apply because the order of the Collector (Appeals) made the concessional assessment available to all the imports.

12. The duty was paid on the goods on 6.10.1989 and the claim for refund was made on 9.4.1990. Therefore, going by the date of payment of duty the claim is barred by limitation. The Member (J) has held that since it was in consequence of the order of the Collector (Appeals) that refund was granted in the other case, the benefit of that order will have to be extended to this case also without reference to the provisions of Section 27 of the Act. He has noted that the refund claim was filed within a few days of the order of the Collector (Appeals).

13. It was the appellant who chose to clear the other consignment on payment of duty while its claim for registration was pending. It was open to the appellant to await the decision regarding Project Imports, or to seek provisional assessment pending that decision. Once the appellant chose to clear the goods after assessment on merits, it was incumbent upon the appellant if it still wished to take the benefit of project assessment to have filed a claim for refund in time. The order of the Collector (Appeals) extended the benefit of Project Imports generally, and went on to extend concessional assessment to the consignment which has been dealt with by the Assistant Collector. The appellant itself does not disagree that its

claim before Collector (Appeals) was limited to the OPSCAN-21. From the fact that Collector (Appeals) passed an order allowing the concessional assessment, it does not in my view follow that there ought to be automatic reassessment of all the Bs/E which had been finalised. The order of the Collector cannot have the effect of modifying or suspending the provisions of law which governed assessment, reassessment and grant of refund. The registration of contract for Project Imports is not required for early importation in pursuance of the contract. It is in theory quite possible for a contract to be registered without any import following thereafter. The assessment of each B/E is an independent function.

Assessment of a B/E where a contract has been registered would be governed by such registration, but such assessment cannot be dispensed with. The order of the Collector (Appeals) allowing provisional assessment for the project does not therefore automatically result in all the imports being entitled to be assessed under Heading 98.01, unless a specific claim is made in the B/E for such assessment.

14. I am therefore, unable to agree with the views of Member (J). I agree with the views of Member (T) holding that the refund claim has been rightly rejected.

In the light of the majority view, the refund claim made by the assessee is barred by limitation and the same is therefore rejected.

SooperKanoon - India's Premier Online Legal Search - sooperkanoon.com