IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL, NEW DELHI
PRINCIPAL BENCH, COURT NO. IV

Customs Appeal No. 56244 of 2013

[Arising out of Order-In-Appeal No. CC(A)/ ICD/544 /2012 dated 30.07.2012 passed by Commissioner of Customs (Appeals), New Delhi]

M/s. Gurunanak Enterprises **Appellant**

Vs.

Commissioner of Customs **Respondent**
New Delhi

Appearance:

Ms Vidushi Shubham, Advocate for the Appellants
Shri K Poddar, AR for the Respondent

CORAM:

Hon'ble Ms Archana Wadhwa, Member (Judicial)
Hon'ble Mr. V Padmanabhan, Member (Technical)

Date of Hearing/ Decision: 15.3.2017

FINAL ORDER NO . 52523 /2017

Per Archana Wadhwa :

As per facts on record, the appellant imported certain 'assorted small gift item" and filed two Bills of Entry for clearance of the same on the declared value. On examination, it was found that along with declared items, there were certain undeclared items also. As the appellant could not produce any evidence, documentary or otherwise in support of legal import of undeclared items, same were seized. Subsequently, on adjudication the original adjudicating authority held the appellant guilty of illegal import and seized and confiscated the declared as well as undeclared items with an option to the appellant to redeem the same on payment of Redemption Fine of Rs. 2,50,000/- in respect of declared goods and of Rs.4 lakhs in respect of undeclared goods with a penalty of Rs.2,50,000/-. As the appellant had paid the duty of Rs.34,27,815/-, the same was appropriated.

2. As the appellant did not exercise their option to redeem the same on payment of Redemption Fine as adjudicated by the Commissioner and consequently did not clear the goods, they applied for refund of duty deposited by them. The said refund claim filed by them on 9.3.2010 was rejected by the original adjudicating authority and on appeal against the same, the order was upheld as legal and proper.

3. Hence the present appeal.

4. The short issue required to be decided in the present appeal is as to whether the duty already paid by the appellant in respect of goods imported by them can be claimed as refund in the case of non-clearance of the same. The Revenue's contention is that in terms of provisions of Section 23 of the Customs Act, such abandonment of the goods can be done only before the clearance order is passed and after the

adjudication, the importer cannot abandon the goods and is required to pay the confirmed rate of duty.

5. On the other hand, the appellants contention is that they have been given the option by the adjudicating authority to redeem the goods. On account of non exercising the option for redeeming the goods, the goods continued to rest with the Revenue and as such, no duty was required to be paid by them. Goods have not been cleared by them, the duty already deposited is required to be refunded. For the above proposal they have placed reliance on various decisions of the Tribunal.

6. After carefully considering the submissions made by both the sides, we note that section 23 of the Customs Act, 1962 has no applicability in the facts and circumstances of the case. It is a case where adjudication has already been completed and the goods stand confiscated. We also may note that in the present case, goods are still with the Revenue and were not cleared prior to adjudication. On the order of confiscation, the appellants have been given an option to redeem the same on payment of Redemption Fine which option the importer has not exercised. The factum of non-exercising of such option by the importer would lead to non-clearance of imported goods, which would continue to rest in the Government. If the goods have not been cleared, the question of payment of duty does not arise at all.

During the course of argument, a question arose that if instead of giving an option to the appellant to redeem the goods, the adjudicating authority would have absolutely confiscated the goods, whether the importer was required the pay the duty in that scenario or not, all sides fairly agree that in that case, there was no requirement of payment of duty. We note that non-exercise of option for redeeming the goods amount to absolute confiscation of the same. The option given to the assessee for redeeming the goods is a liberty given to the importer and if importer does not want to avail the said liberty to exercise his option, the net result would be that the goods stand absolutely confiscated and would continue to be under the ownership of the Revenue. If that be so, no question of payment of duty in respect of such goods would arise. This was so observed by the Tribunal in the case of ***CCE, Nagpur vs. Ankit Pulps and Boards Pvt. Ltd. [2007 (209) ELT 135 (Tri-Mum)] .*** In para 9 of the said decision it stand observed that - “Even in cases where the goods are held liable for confiscation and redemption is offered on payment of fine and if a importer does not choose to exercise his option, naturally the ownership of the goods rest with the Central Government and the question of demanding duty will not arise.”

We note that Commissioner (Appeals) has not followed the said decision on the sole ground that the duty deposited by the appellant had already been appropriated by the Commissioner and as such refund claim cannot be sanctioned. We further note that such distinction is not appropriate inasmuch as irrespective of order of appropriation, the importer would be entitled to refund of duty.

7. The problem can be viewed from another angle also. In a given case the importer might not have deposited the duty and an order of confiscation of goods and confirmation of duty is passed by the adjudicating authority. If the option to redeem the goods is not exercised by the importer, he cannot be compelled to pay the duty in the absence of clearance of goods. Merely because the importer has already deposited the duty instead of waiting for the adjudication order, will not change the legal issue.

8. At this stage, we note that the appellants are ready to deposit the penalty amount and infact the same stand deposited by them, for the offence committed. As such, we set aside the impugned order for refund of duty amount and allow the appeal with consequential relief to the appellant.

(dictated and pronounced in the open court)

(Archana Wadhwa)
Member(Judicial)

(V. Padmanabhan)
Member(Technical)

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