CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL REGIONAL BENCH AT HYDERABAD

Single Member Bench

Court – I

Appeal No. C/30949/2018

(Arising out of Order-in-Appeal No.VIZ-CUSTM-000-APP-012-18-19 dt.05.06.2018 passed by CCT & C (Appeals), Visakhapatnam)

M/s Maithan Ceramics Ltd,
P O Chirkunda, Dhanbad District,
Jharkhand – 828 202 **......Appellant**

VERSUS

Commissioner of Central Tax – Visakhapatnam - GST
GST Commissionerate, Port Area,
Visakhapatnam – 530 035 **......Respondent**

Appearance

None for the Appellant.
Shri P. Sudhakar Reddy, Authorized Representative for the Respondent.

Coram:

HON'BLE MR. P. VENKATA SUBBA RAO, MEMBER (TECHNICAL)

FINAL ORDER No. A/30508/2019

Date of Hearing: 07.05.2019
Date of Decision: 07.05.2019

[Order per: P.V. SUBBA RAO.]

1. This appeal is filed against Order-in-Appeal No. VIZ-CUSTM-000-APP-012-18-19 dated 05.06.2018.

2. None appeared on behalf of the appellant.

3. Heard learned departmental representative.

4. The facts of the case in brief are that the appellant imported goods and cleared them using DEPB licenses which were transferred to them by the original scrip holders. Consequent upon the investigations conducted by the officers of the Customs it was found that the exporters had fraudulently obtained DEPB scrips. Therefore, a demand was raised on the appellant seeking recovery of the customs duty debited in DEPB scrips against bills of entry Nos. 2198 & 2199 both dated 31.08.2005 in cash effectively denying them the benefit of DEPB scrips. After following due process the original authority vide his Order-in-Original No.07/2005 dated 09.09.2005 confirmed the demand and also imposed penalties upon them.

5. Aggrieved, the appellant appealed before this bench and vide Final Order No. A/30812-30813/2016 the appellant's appeal was allowed with consequential relief. Before filing the appeal the appellant has deposited differential duty and penalty as demanded by the Commissioner in this Order-in-Original. After the final order of this bench was passed the appellant sought refund of the amount of Rs.6,67,640/- paid by them as pre-deposit and penalty of Rs.10,000/- also paid by them, since they got a favourable order from CESTAT. After following due process and relying upon the CBEC circular No. 984/8/2014-CX dated 16.09.2014 learned Asst. Commissioner allowed the refund of the pre-deposit amount along with applicable interest in terms of notification 70/2014-CUS (NT) dated 12.08.2014 under section 129EE of the Customs Act, 1962. The findings of the Asst. Commissioner in Paras 7 to 10 were as follows:

> *"7. I find that this is a claim of refund or Pre-deposit paid by the importer while filing appeal before the Hon'ble CESTAT against the Order in Original passed by the Commissioner (Customs), in compliance with the provision under Section 129E of Customs Act, 1962, read with Boards Circulars No: 275/37/2K-CX.8A dated 02.01.2002 and No: 984/8/2014 CX dated 16.06.2014. This is not a claim of refund under Section 27 of the Customs Act, 1962.*
>
> *8. While introducing the new provisions Board had issued Circular No: 984/8/2014-CX dated 16.09.2014 for proper implementation of such provisions. In para 5.1 it is clarified that "Where the Appeal is decided in favour of the party/assessee, he shall be entitled to refund of the amount deposited along with the interest at the prescribed rate from the date of making the deposit to the date of refund in terms of Section 35 FF of the Central Excise Act, 1944 or Section 129 EE of the Customs Act, 1962. In Para 5.2 it is also clarified that such Pre-deposit for filling Appeal is not a payment of duty. Hence refund of Pre-deposit need not be subjected to the process of refund of duty under either Section 11 B of the Central Excise Act, 1944 or Section 27 of the Customs Act, 1962".*

9. Basing on the above instructions I am of the opinion that the importer is eligible for the refund of Pre-deposit paid. I also find that the payment of such Pre-deposit was made in cash by the importer as cited below:

Sl. No.	*Particulars of Payment*	*Reference No.*	*Amount paid as Pre-deposit (in Rs.)*
1	*Diff. Duty*	*I.C. No: 16 dt.16.06.2006*	*6,57,640/-*
2	*Penalty*	*CM No: 255 dt.16.06.2006*	*10,000/-*
Total			*6,67,640/-*

10. It is ascertained that the Final Order No: A/30812 to 30813/2016 dated 16.09.2016 of Hon'ble CESTAT, Hyderabad Bench has been accepted by the Department and has thus attained finality."

6. The department preferred an appeal against this order of the Asst. Commissioner before the first appellate authority who held that the provisions of the aforesaid notification allowing interest and the Board circular dated 16.09.2014 (supra) apply to pre-deposits only. In this case, what was paid was not pre-deposit but the entire amount of duty demanded was paid and therefore, this amount cannot be considered as pre-deposit. According to him the pre-deposit is an amount paid if, on a stay application filed by the appellant, CESTAT directs some amount to be paid as pre-deposit. Holding such a view, he set aside the order of the lower authority to the extent of sanctioning refund of interest. Hence this appeal.

7. The prayer of the appellant in this appeal is to set aside the impugned order and sanction them the refund.

8. I have considered the facts of the case. Section 129E of the Customs Act, 1962 as it stood during the relevant period read as follows:

*"**129E. Deposit of certain percentage of duty demanded or penalty imposed before filing appeal** – The Tribunal or the Commissioner (Appeals), as the case may be, shall not entertain any appeal, -*

(i) Under sub-section (1) of section 128, unless the appellant has deposited seven and half per cent. of the duty in case where duty or duty and penalty are in dispute, or penalty, where such penalty is in dispute, in pursuance of a decision or an order passed by an officer of customs lower in rank than the Commissioner of Customs;

(ii) Against the decision or order referred to in clause (a) of sub-section (1) of section 129A, unless the appellant has deposited seven and a half per cent. of the duty in case where duty or duty and penalty are in dispute, or penalty where such penalty is in dispute, in pursuance of the decision or order appealed against;

(iii) Against the decision or order referred to in clause (b) of sub-section (1) of section 129A, unless the appellant has deposited ten per cent. of the duty, in case where duty or duty and penalty are in dispute, or penalty

> *where such penalty is in dispute, in pursuance of the decision or order appealed against.*
>
> *Provided that the amount required to be deposited under this section shall not exceed rupees ten crores.*
>
> *Provided further that the provisions of this section shall not apply to the stay applications and appeals pending before any appellate authority prior to the commencement of the Finance (No. 2) Act, 2014."*

9. As is evident, section 129E required the appellant to deposit, pending an appeal, the entire amount of duty or interest demanded or penalty levied. In cases where the appellant files a stay application, the CESTAT often grants either complete waiver of pre-deposit or a partial waiver thereof. In case of partial waiver the appellant deposits some amount as directed by the CESTAT. It is the case of the first appellate authority that only when such application is made and part of the payment is made in pursuance of the stay order it can be called as pre-deposit. Where the entire amount of duty demanded is paid, it is the duty and not pre-deposit. A plain reading of section 129E does not say so. In fact, there cannot be any duty at all when the issue had not yet reached finality. Pending an appeal before the CESTAT the appellant deposited the entire amount under section 129E which is nothing but pre-deposit of the duty paid. Consequently, the interest, as applicable on pre-deposit, needs to be paid to the appellant. I, therefore, find that the order of the first appellate authority is incorrect and needs to be set aside and I do so.

10. The appeal is allowed and the impugned order is set aside with consequential relief.

(Order dictated and pronounced in the open court)

(P.VENKATA SUBBA RAO)
MEMBER (TECHNICAL)

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