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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Mumbai

Decided On : Oct-09-1996

Reported in : (1997)(72)LC727Tri(Mum.)bai

Judge : S Peeran, K D Shiben

Appellant : Bombay Processors

Respondent : Cc

Judgement :

1. This appeal arises from Order-in-Original dt. 22.2.1988, passed by the Collector of Customs, Bombay by which he was ordered that for duty free entitlements the goods should be such which is permissible in terms of Col. 4 of Appdx. 17-profiles, bars and rods and not steel plates. He has held that since the imported items are steel plates and not profiles, bars and rods therefore, the duty free benefit in terms of Appdx. is not available. Therefore, he has held that the REP licence produced for carbon steel/alloy steel is not valid in terms of para 8 of Appdx. 21 and hence liable for confiscation. Accordingly, he ordered to confiscate the goods imported under Section 111(d) of the Customs Act, 1962. However, he has granted an option to redeem the same on the payment of fine of Rs. 4,00,000/-. He has also ordered that since in terms of REP licence covered by Appdx. 21 only Col. 4 items could not be imported, therefore, the goods be released on payment of appropriate customs duty denying the duty free benefit under Appdx. 21.

2. The importers had claimed the clearance of 18 Bdls. containing 29.700 MT of H.R. Steel Plates per valued at Rs. 4,33,235/- FOB vide their Bill of Entry No. 266/259 presented by CHA No. 11/15 in terms of the import licence No. P/K/3167103 dt. 29.7.1987. The department took a view that the said claim for clearance against the said licence produced is not valid for the following reasons: Since the licence produced is an REP licence for the Export Product Group A. 51(iii) with an Appdx. 21 endorsement in terms of Col. 4 of Appdx. 17 what is permissible is 'Profiles, Bars and Rods of Carbon/alloy steel' and not steel plates which has been imported now against the REP licence issued under product Group A 51(iii) of Appdx. 17.

In view of the above, it is alleged that the goods have been imported in contravention of the provisions of Sub-section (1) of Section 3 of the Import & Export (Control) Act, 1947 read with Clause 3 of the Imports (Control) Order, 1955, which prohibition of restriction, by virtue of Sub-section (2) of Section 3 of the aforesaid Act, shall be deemed to be a prohibition under Sec, III of the Customs Act. 1962.

Hence the goods appear to be liable for confiscation under Section 111 (d) of the Customs Act, 1962 and the importer liable to penal action under Section 112 of the same Act.

The department's view was that since the licence issued is an REP licence for the Export Product Group A 51 (iii) with Appdx. 21 endorsement, in terms of Col. 4 of Appdx. 17 what is permissible is 'Profiles, Bars and Rods of Carbon/alloy steel' and not steel plates which has been imported now against the REP licence issued under product Group A. 51 (iii) of Appdx. 17.

3. The Collector in his order has held that since in terms of Notification what is needed for duty free benefit is an import replenishment licence issued in terms of Appdx. 21 namely for providing duty free imports containing the following endorsement: (a) Duty free imports against replenishment licence as per Appdx. 21 of the Import Policy AM 85-88.

(b) The quantity and the value of the said materials allowed to be imported under the said licence, the entitlement in terms of the quantity from the export of Steel Files made of High Carbon Steel/Alloy Steel in terms of product group A. 51 (iii) is 1.5 Kg.

could be imported for export of every kg. of steel files. The description shown in the licence produced for clearance is A 51 (iii) and the list indicated the quantity worked out at the rate admissible in terms of Annexure 11 to the Appdx. 21 read with Para 8 and that the value available in the replenishment.

Therefore, the Collector has held that this clearly establishes that the import product should have relation with the export product. Thus in terms of Col. 4 what could be permitted import against the export of the steel files is profiles, bars and rods of carbon/alloy steel. Para 8 makes it very clear tht Col. 4 & 5 is relevant factor to determine the import entitlement for the REP licence and even if it is for Appdx.

21, the position cannot be different. Therefore, he has concluded that the Customs Notification is to be generic because each category of goods that are imported against REP licence will not be indicated individually lest the notification will become too bulky. Hence, he has held that from the general description this cannot be taken to give the benefit which has not been entitled to duty free imports, which clear in terms of para 8 of Appdx. 21. He has opined that these two appendices should be studied harmoniously and not in isolation to extend the benefit to Appdx. 21 only. In the main order, the Collector has also held that the importer is entitled to import the goods under the REP licence duty free in view of exports done and the licence is not transferable. However, he has held that the department's contention that for export the goods that could be imported for duty free in which profiles, bars and rods of carbon/alloy steel and not H.R. Steel Plates as imported by the appellants.

4. Arguing for the appellants, Shri Kamal Parsurampurua, the Id.

Advocate submitted that the licence is freely transferable without any actual user condition. Initially the appellants had approached the High Court and obtained an

interim order by which the Hon'ble High Court had granted the benefit of clearance to the importer. Later, when the appeal came up for hearing, the High Court had directed the appellants to file an appeal before the statutory authority namely, CEGAT. It is his contention that large number of such importers had appealed before the High Court and there after they are able to get the benefit. It is also his contention that subsequently, the department have been granting the benefit, after the Joint Chief Controller of Imports and Exports i.e. licencing authority having clarified the issue by his letter dt. 19.5.1988. He has produced a copy of the said letter. In this letter a similar importer had represented to the said licencing authority about the objection raised by the department for not granting the benefit to the alloy steel imported under duty free REP licence.

The letter clarifies that the importer need not be a manufacturer of the export product against which the item is allowed for import. It also clarifies that the items allowed to be imported, the quantity of each item allowed and the import replenishment in terms of value against an export product under this scheme is indicated in Annexure II to Appendix 21. Except where the licence holder is also eligible for items of imports in Appendix 17 in addition to Appendix 21 items, this has no connection with that of items allowed in Appendix 17. The Learned Counsel points out that the importers have since been getting the benefit. It is his submission that the item is not an imported item under Appendix 17 and the view taken by the Collector is that duty free eligibility is for steel plates to Col. 4 & 5 of Appendix 21 is totally incorrect. It is his contention that Col. 4 & 5 of Appendix 17 is not applicable as the import of steel plates done in terms of Appendix 21.

He submits that only restriction is pertaining to value and quantity which is disputed in the present case. It is his submission that if the quantity imported is more than required quantity then they are required to pay duty only. He referred to the previous clearances made by the department in respect of similar goods. The Learned Counsel relied on the ratio of the Tribunal rendered in the case of Southern Sea Foods Pvt. Limited, v. Collector of Customs wherein the Tribunal has held that the word, "exported or manufactured" is clearly disjunctive and not conjunctive and further held that the licence holder would be entitled to import raw material or components or consumables etc. as are relatable to the product either

exported by him or manufactured by him. The Tribunal has further held that in terms of para 204 (1) of the Policy AM 1985-88, a manufacturer-exporter, holding a REP licence, would be entitled to import raw materials, components, consumables etc. which are related to select product exported or manufactured by him. The expression "select product" would only refer to export and not to manufacture. Appendix 16 of the Policy 1985-88 gives out select list of export product and the word "select product" does not refer to manufacture at all. It has been further held that a proper construction that should be adopted on para 204(1) of AM 1985-88 is that a manufacturer-exporter holding a REP licence would be entitled to import raw materials, components, consumables etc. which are related to select product exported by him or products manufactured by him. The Tribunal has further held that the opinion expressed by the Joint Chief Controller of Imports and Exports on this point has to be kept in view and the said clarification will prevail over any other clarification in the same matter given by any other authority or person. The Learned Advocate also referred to the judgment rendered in the case of Lokash Chemical Works v. M.S. Mehta, Collector of Customs (Preventive) Bombay & Others as reported in 1981 ELT 235 (Bom). This judgment mainly lays down that the validity of the licence for importation of goods cannot be construed by the customs authorities. He also relied on the judgment rendered in the case of Gujarat State Export Corporation Limited and Anr. v. The Union of India and Anr., as reported in 1984 ECR 886 (Bom), wherein it has been held that the long standing practice of Custom House to release similar goods against licence shows two views about the validity of import were possible and hence prohibition under Section 111(d) is not attracted for contravention and for imposition of fine. He also referred to the judgment rendered in the case of Bipinchandra Vrajlal Ghelani v. Union of India and Anr. as , wherein it has been held that the Import policy is mere intimation to the public regarding when, in which event and on what basis and conditions the licence would be issued under the Import and Export (Control) Act, 1947 and Import (Control) Order, 1955 and further held that if the licence had been issued, according to law, it gives a right to the petitioners to import the items as mentioned in the said licence. If there is no violation of any of the terms of the licence, nor is there any prohibition with regard to the import of the said goods, the Import Policy cannot stand in the way of clearance of goods. He also referred to

the judgment rendered in the case of Hindustan Lever Ltd. and Anr. v. Union of India and Ors. as , wherein the High Court has held that although the import of substitute item is not prohibited yet the request rejected for re-export was not reasonable. He also referred to the judgment rendered in the case of Dowsyl Polymers Pvt. Ltd. v.M.G. Abrol as reported in 1987 (13) ECR 1137 (Bom), wherein it has been held that the Import Policy is not binding on citizens.

5. The Learned DR arguing for the department submitted that the licence issued under Appendix 21 is in connection with Col. 4 & 5 of Appendix 17. In this regard he referred to Appendix 17 of the Policy wherein it has been laid down that the goods exported and replenishment goods by import should be the same, sale for using the same for the manufacture of exported goods. He also referred to the para 181 of General Policy for duty free and replenishment licence and therefore, he submits that even as per licence produced there is an endorsement of A 51(iii) which refers to Appendix 17 which states 'Profiles, bars and rods of carbon/alloy steel'. Therefore, he submits that they are required to import only this item and not HR Steel Plates. He submits that Appendix 21 refers to allow steel for REP licence only, the clarification issued by the licencing authority is not helpful to the party as it only clarifies that Appendix 21 should not be read with description in corresponding entry in Appendix 21.

6. We have carefully considered the submissions made by both the sides and have perused the order and various judgments as well as the clarification issued by the Joint Director of CCI. It is clear from the impugned order that the licence issued is a transferrable licence and that the licence had been issued against the goods exported by the manufacturers. The Learned Collector has clearly held that the importer would have been entitled for duty drawback. The only contention raised by the Revenue is that the licence issued under Annexure II to Appendix 21 has to be read along with Col. 4 & 5 of Appendix 17. It is also pointed out that the item A 51(iii), which the licence clearly bears, refers to profiles and sections of Carbon/Alloy Steel and therefore, the appellants cannot import HR Steel Plates.

7. On a careful consideration of the submission we notice from the licence that the licence is a duty free licence as per Appendix 21. It also refers to A 51(iii). A 51(iii)

in Appendix 17 refers to Profiles and sections of carbon/Alloy Steel. However, there is no mention of Appendix 17 of group A on the licence. The clarification issued by the Joint Director is to the fact that the licence issued by their office is with reference to the import licence duty free REP licence as contained in 1985-88 Policy only. It also clarified that the items allowed to be imported item, the quantity of each item allowed import replenishment in terms of value against the imported product in this Annexure II to Appendix 21 and it also clarifies that there is no connection with manufacturer. We notice that as per Annexure II to Appendix 21 in item No. 8 the description of export product is: As against this in col. 3 the relevant S. No. of Appendix 17 is A 51(iii) which refers to profiles and sections of carbon/Alloy Steel.

The goods that are permitted for import described in Col. 4 are profiles bars and rods of Carbon/Alloy Steel. The Col. 5, 6 and 7 deals with quantity of items allowed for import of duty, free import replenishment percentage quantity of relevant export product. There is no dispute pertaining to Col. 5, 6 and 7 and so also with regard to Col. 2 pertaining to description of export product. The export product which is relevant in Col. 3 is S. No. A 51(iii) of Appendix 17 which is profiles and sections of carbon/alloy steel. For this export item the goods that could be imported duty free are stated in Col. 4 and i.e.

high carbon steel and alloy steel. Therefore, it follows that for goods that are exported in S. No. A 51(iii) in Appendix 17 i.e. profiles and sections of carbon/alloy steel the importer can import duty free high carbon steel and alloy steel. Therefore, the connection of S. No. A 51(iii) of Appendix 17 is only with regard to the goods which are exported and it has no connection with regard to the goods imported, as has been clearly clarified by the joint Chief Controller of CCI. On the perusal of the licence as stated the reference has been made to Col. 3 to Annexure II to Appendix 21 which refers to S. No. A 51(iii) of Appendix 17 which are exported goods i.e. profiles and sections of carbon/allay steel. The licence is issued under Appendix 21 of AM 86 which refers to Col. 4 wherein the description for items allowed for import duty free is high carbon steel and alloy steel. Thus, the connection of S. No. A 51(iii) of Appendix 17 is relevant to the extent for looking into Col. 2 pertaining to the description of the export product and the goods which

are permitted for import is stated in Col.

4 which is high carbon steel/alloy steel. Therefore, the Collector's reading that only those goods which are referred to in Col. 3 i.e. A 51(iii) referring to profiles and sections of carbon/alloy steel are required to be read for description in Col. 4 which are items allowed for import duty free is totally incorrect as the item falling under Col. 4 is high carbon steel. Therefore, there is no violation of the licence in the present case. Taking note of the judgments and also the clarifications issued by the joint Chief Controller of CCI and interpretation of the licence issued under Appendix 21, we accept the appellant's contention and hold that the impugned order is unsustainable. In the result, the impugned order is set aside and the appeal is allowed.

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