Commissioner of Customs Vs. Sandeep Impex Pvt. Ltd.

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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Mumbai

Decided On : Feb-13-1997

Reported in : (1997)LC485Tri(Mum.)bai

Appellant : Commissioner of Customs

Respondent : Sandeep Impex Pvt. Ltd.

Judgement :

1. These are three applications seeking stay of the operation of identical orders of the Collector (Appeals) involving the same issue.

These are therefore taken up together for disposal.

2. The importers in these cases imported goods under transferable quantity based advance licences. The importers were asked by the Customs to show evidence that all the acrylic fibres imported by them was the same as was used in the final product already exported. The importers approached the Bombay High Court which directed the Customs to decide the matter within a certain time. The Assistant Collector in identical orders held the imported goods as not eligible for duty-free import under the concerned Notification Nos. 80/95-Customs and in the case covered by Order No. S/10-11/96VII Notification No. 204/92-Cus.

and ordered payment of duty on merits. The Collector (Appeals) following the ratio of the judgment of the Tribunal in the case of Nitco Marble and Granite P. Ltd. - 1996 (63) ECR 111 set aside the orders of the Assistant Commissioner. In these three applications the Commissioner of Customs has sought the stay of operation of these three orders passed by the Commissioner.

3. Shri K.M. Mondal, learned SDR arguing the case for the applicant Collector claimed that the Tribunal in other cases in dealing with the entitlement to import under similar circumstances in connection with other Notifications had given judgments the ratio of which is not the same as that of judgment. He referred to the final order of the Tribunal No. 2960-61/96-WRB, dated 25-9-1996 in which the issue involved the extension of benefit of Notification No. 117/88. In this decision the Tribunal upheld the finding of the lower authorities that since the exported goods did not contain a kind of fabric which had been under import, the benefit of the Notification was not available.

He also referred to the judgment of the Tribunal in the case of Zenith Tin Works - 1994 (55) ECR 137 in which it was held that under the scheme of replenishment imports the raw materials imported must be the same as were used in the export product. He also relied upon the judgment of the Supreme Court in the case of Sheshank Foods in which it was held that the jurisdiction of the Customs authorities to act under Section 111(o) of the Customs Act was not taken away even where similar powers were vested in the officials of the DGFT. It was his claim that in all cases of importation under the DEEC Scheme the importer had to discharge the burden of proving the similarity of the raw materials.

This burden was not discharged merely because the importer held a transferred acrylic licence. Referring to the conditions printed in the licence namely "only such raw materials as was used in the export product will be allowed for import". He argued that the breach of conditions of the licence would become the breach of condition of the exemption notification also.

4. Shri Kantawala the learned advocate referred to the judgment of the Tribunal in the case of Nitco Marble and Granite (supra) and stated that the Assistant Collector was bound to follow the ratio of the judgment. He has not followed the ratio on the logic that the order was not a final order and that the facts were not identical in the present case. He submitted that in Writ Petition No. 1186 of 1996 filed by Wearon Exports P. Ltd., the High Court Bombay, in their order dated 19-3-

1996 had cited paragraph 3 and 4 of the Tribunal's order (supra) and had concurred therewith in granting relief to the petitioners. He referred to Clause (vii) of Notification No. 80/95-Cus. and Clause (viii) of Notification No. 204/92 and stated that the wording does not cast any burden of proving nexus on the transferee importer. He also relied upon a decision taken by the Collectors of Customs in conference at Cochin in October, 1995 in which the conference had concluded that when dealing with import of yarn under the DEEC Scheme some degree of flexibility was required to be provided in the case of denierage to the extent that there was no change in the duty leviable. He argued that the decision which cited Board's circular was binding on the lower authorities. He however fairly conceded that this was not argued before the Assistant Collector. He stated that the Assistant Collector had directed the importers to provide a sample of the goods earlier exported which was an impossible condition for the importer to follow.

On these arguments he pleaded that stay of operation of the Commissioners orders should not be granted.

5. We have carefully perused the concerned documents and have considered the rival claims made before us. The issue whether the transferee importer was required to establish nexus between the goods imported and these used in the product earlier exported was considered by the Tribunal in the case of Nitco Marble and Granite P. Ltd. (supra). The Bombay High Court in the above writ petition has concurred with the judgment of the Tribunal. The Tribunal had clearly observed that at the stage of import the transferee of the licence would not be called upon to prove the eligibility for duty-free imports. This decision was a final decision and not an interim decision as understood by the Assistant Collector. The Assistant Collector was required to follow the ratio of this judgment which he failed to do. We have also seen the other judgments cited by Shri Mondal. We observe that although the issues in general were identical, the deliberations in the other cases pertained to the benefit of either other schemes or other notifications whereas in the judgment of Nitco Marble this very scheme under which the goods are imported in the present case were imported.

Although it is open to the revenue to argue the case further at the time of final hearing and to distinguish the facts of the present case from those occurring in the Nitco Marble case, at the stage of the present proceedings we do not see any reason not to follow the Nitco judgment. We therefore decline to stay the operation of the three orders of the Commissioner. However since the issue is of cardinal importance to the revenue, we direct the registry to place these three matters for final hearing on Monday the 17th February, 1997.