

Collector of Customs Vs. V.G.P. Video Vision of India

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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

Decided On : Feb-18-1997

Reported in : (1997)LC174Tri(Delhi)

Appellant : Collector of Customs

Respondent : V.G.P. Video Vision of India

Judgement :

1. This is a Revenue appeal against the order dated 28-7-1989, passed by the Collector of Customs (Appeals), Madras, who has allowed the Collector (Appeals) order and ordered for registration of 'project contract' for import of capital goods required to set up Video software Generation facilities. The respondents had produced the required import licence and also recommendatory letter from the Ministry of Information and Broadcasting, New Delhi. The original authorities had rejected the said request for registration on the ground that Chapter Heading 9801 of CTA extends project rate of duty only for industrial plants or Other specified projects notified by the Government of India, and the project for which the benefit was sought is not an 'industrial plant' to merit registration under project contract regulations. The learned Collector after considering the respondents' plea held that the imported equipment includes colour monitor, Microprocess based video editing system, Dual Channel-time based corrector with special effects, special effect generator, wave form monitor and others. According to the project report, the equipment is mainly utilised in producing video films. He has noted that the imported equipment is augmented by processing from indigenous source, video

camera, VCR, audio mixer and other item available locally. He has noted that the recording is done on a blank video cassette. The learned Collector has held that the activity of converting the blank video cassette into a recorded one could be considered as industrial activity and the equipment utilised in such process as 'Industrial Plant'. He has held that the activity involved in converting cassette into a recorded cassette would comprise a series of processes like shooting with video camera, mixing, dubbing, addition of special effect etc. with the help of imported equipments.

He has held that these processes according to the definition given in the Notification should result in a "commodity". In this context, the dictionary meaning of 'commodity' had been relied which states that a 'commodity' is an article which commands a price in the market and hence he has held that the recorded video cassette satisfies this definition and hence he has held that the equipments satisfies the term "Industrial Plant".

3. He has held that the activity would not fall within the term of 'service establishment', hence are not excluded from the scope of "Industrial Plant" and hence accepted the respondents' plea for registration of the imported items under project contract and assessment under Heading 9801 of CTA.4. The Revenue is aggrieved with this finding and it is contended that the term "Industrial Plant" has been defined as an industrial system designed to be employed directly in the performance of any process or service of processes necessary for manufacture, production or extraction of a commodity but does not include establishments designed to offer services of any description such as hotels, hospitals, photographic studios, laundries, photographic film processing Laboratories, garages and workshops. It is stated that the imported equipments are used for processes like editing, dubbing etc., of video films and this will not be covered by the description "Industrial Plant" and excluded from the purview of the same. It is stated that the Collector (Appeals) has erred in holding that the dictionary meaning of the word 'commodity' is applicable and concluding that the activity of converting a blank video cassette into a recorded one is an industrial activity, is erroneous.

5. The Revenue also challenges the Collector (Appeals)' findings viz.

photographic film processing and cinematographic film processing are entirely different and it is stated that the basic principle and activity of both the processes are identical and hence, they are excluded from the description "Industrial Plant". The Revenue states that the equipments in question are not eligible for 'Project Contract' benefits as the same is not notified specifically as a project by the Government.

6. We have heard the learned DR, Shri S.N. Ojha for the Revenue and the learned Advocate, Dr. Francis Julian for the respondents.

7. Reiterating the grounds made out in the appeal memo by the learned DR submitted that the activity of video recording does not fall within the definition of "Industrial Plant" in terms of Regulation 3 (a) of Project Import Regulation, 1986 which defines 'Industrial Plant', he submits that the various processes carried out by the respondents could not result in a commodity as held by the Collector (Appeals). It is his submission that the activity falls within 'the exclusion clause of definition of "Industrial Plant". The activity falls within the term photographic studios, photographic film processing laboratories which comes within the exclusion clause of Regulation 3(a)(i) which reads as follows: - "(i) establishment designed to offer services of any description such as hotels, hospitals, photographic studios, photographic film processing laboratories, photocopying studio, laundries, garages, and workshops." 8. The learned DR relies on an unreported judgment rendered by the SRB in the case of Popular Video Audio Private Ltd. v. Collector of Customs, Madras, as per Order No. 229/1988. The learned DR relied on the ratio of the following judgments: - 1. Subhash Photographies v. Union of India - 1992 (62) E.L.T. 270 (Bom.) 2. Subhash Photographies v. Union of India -1993 (66) E.L.T. 3 (S.C.)Collector of Customs v. Sarathi Studio Pvt. Ltd. -1994 (73) E.L.T. 382 9. The learned DR also pointed out that the Hon'ble Supreme Court in the case of Prabhat Sound Studios v. Additional Collector of Central Excise as reported in 1996 (88) E.L.T. 635 has held that recording of sound on duty paid magnetic cassette tapes or spool magnetic tapes does not amount to manufacture as no new substance or commodity emerges by sound recording and has further confirms the Tribunal's judgment rendered in the case of M. Basheer Ahammed v. Collector of Central Excise, as reported in 1990

(48) E.L.T. 591, which held that re-recording on pre-recorded tape by erasing pre-recorded cassette could not be considered as a process of manufacture and therefore, the learned DR submits that in the light of this judgment of the Hon'ble Supreme Court, the finding given by the Collector is erroneous.

10. Dr. Francis Julian, the learned Advocate appearing for the respondents vehemently argued the case and supported the reasoning given by the Collector. He submits that the activity of video recording falls within the definition of "Industrial Plant" as defined in the Regulation and the activity is not a service activity and cannot be compared with photographic studios or photographic film processing laboratories. It is his submission that the video recording of a film brings into existence a distinct commodity in the market and the activity is akin to producing cinema using cinematographic equipment.

The production and exhibition is regulated by the Cinematographic Act and the corresponding State laws relating to cinema and video. Relying on the judgment rendered in the case of South Indian Film Chamber of Commerce, Madras v. Enterprising Enterprises as reported in 1995 (2) SCC 462. He argued that the term 'Video film' would come under the expression 'cinema' in Entry 33 of List II. He also relied on the judgment rendered in the case of Laxmi Video -Theatre and Ors. v. State of Haryana and Ors. as reported in 1993 (3) SCC 715, wherein the Supreme Court held that the expression 'cinematograph' as defined under Section 2(c) of the Cinematograph includes video parlour wherein pre-recorded cassette of a cinematograph film is exhibited through VCR. He also referred to Section 2(f) of the Copyright Act, 1957, which defines "Cinematograph film" and submitted that the video film would fall within the said definition. It is his submission that the video software generation is totally different from the photography both in the technology involved and in the manner of its commercial use.

Therefore, it is his submission that the activity cannot be considered as a service industry and is not excluded from the definition of "Industrial Plant". It is his submission that the equipments used by the respondents produces a distinct commodity which has got a market.

Drawing our attention to the definition of Photography, the learned Advocate submitted that the photography is a process of producing a visible image upon a substance by the action of light or other radiant energy. It is his submission that on the other hand in video equipment video electro magnetic media is used to record the image in a video tape electromagnetically. In a video a series of picture are produced similar to cinematography, whereas in photography a single picture is produced. Thus the technology and processes involved in photography and videography are totally different and therefore, video studios or video laboratory would not fall within the expression of photo studio or photographic laboratories. He also referred to the expression 'Photography' as defined in Oxford Dictionary which states :- "The process or art of producing pictures by means of the chemical action of light on a sensitive film on a basis of paper, glass metal etc.; the business of producing and printing such pictures." 11. The learned Advocate also referred to the definition of expression 'Video' as defined in Dictionary as : "1. That which is displayed or to be displayed on a television screen or other cathode-ray tube; the signal corresponding to this, "1. (a) The process of making a cinematographic film of what appears on television screen, (b) The process of recording on video [tape]; 2. A film of a television broadcast. B. A recording on a video tape." 13. Referring to all these materials, the learned Advocate submits that the activity of video cassette recording and production of video film is akin to cinematographic film and does not fall within the exclusion of the term "Industrial Plant" and therefore, the Collector's reasoning for allowing the benefit of Project Import is sustainable.

14. We have carefully considered the submissions made by both the sides and have perused the materials produced before us including the citations.

15. The question before us is as to whether the imported items which are for setting up of video software generation facilities could be considered as falling within the definition of "Industrial Plant" as per Regulation 3(a) of Project Import Regulation, 1986, which defines "Industrial Plant". We notice that the definition "Industrial Plant" has been defined to mean the industrial system designed to be employed directly in the performance of any process or series of processes necessary for manufacture, production or extraction of a commodity, but does, not include: "(i) establishment designed to offer services of any description such as

hotels, hospitals, photographic studios, photographic film processing laboratories, photocopying studio, laundries, garages, and workshops; or (ii) a single machine or a composite machine within the meaning assigned to it, in Notes 3 and 4 to Section XVI of the First Schedule." 16. The Lower authorities had rejected the registration of the project on the ground that the Heading 9801 of the Customs Tariff Act excludes the importers' activity and it does not fall within the ambit of "Industrial Plant" as defined therein. We have noted the learned Collector's reasoning. The learned Collector has held that these activities brings into existence the commodity, which is video film and the said commodity has got a market. On a careful consideration, we have to hold that in the first place, the various process of recording video film would not result in a commodity, although it may have a market. The reason being that that recording is done on a video cassette and the said cassette can be re-used for recording by erasing the recorded material. Such recording of sound* on duty paid magnetic tapes or spool magnetic tape has been held by Hon'ble Supreme Court in Prabhat Sound Studio to be not a process of manufacture and that no new substance emerges by such recording. In the present case also the process of recording pictures on a video film with the help of video camera is akin to recording sound on duty paid magnetic cassette tapes.

Therefore, such an activity of video recording does not amount to manufacture, production or extraction of a commodity, although such a recorded video cassette may have a market.

17. It has to be observed that the project import is granted to "Industrial Plant" which helps in the manufacture, production or extraction of a commodity and those commodities are specifically classified under Customs Tariff Act and also under Central Excise Tariff Act. In the Central Excise Tariff Act, excise duty is levied on such manufacture of a commodity. On a specific query from the Bench, both the sides stated that no excise duty is paid on the recording of a video film. From this point of view, the activity is of a service industry and not a manufacturing industrial activity and therefore, the activity of video recording would fall within the exclusion clause of "Industrial Plant". The Photographic studios or photographic film processing laboratories offers services to customers for taking photographic

pictures and processing the same. The very studios are also offering video recording services to the same customers. The learned Advocate relied on the judgment of Hon'ble Supreme Court in the case of Southern Film Chamber of Commerce. This judgment is in the context of licence to be obtained by Video Cassette Library for the purpose of carrying on business of selling, letting to hire, distribution, exchange or putting into circulation in any manner whatsoever of video films recorded on video cassette tape, is required by Section 9(2) of the Act and the T. N. Exhibition of Films on Television Screen through Video Cassette Recorders (Regulation) Act, 1984. This judgment has been rendered in the context of the specific requirement for registering such an activity under the said legislation. In this case we -are concerned with the definition of 'Industrial Plant' in terms of Regulation 3(a) of the Project Import Regulation, 1986 and therefore, the citation is clearly distinguishable. Likewise, the judgment rendered in the case of Laxmi Video Theatre and Ors. is also in the context of Punjab Cinema Regulation Act, 1952 which regulates the activity of cinematography.

The judgment of Madras High Court rendered in the case of Super Recording Company Pvt. Ltd. v. Government of India, as reported in 1992 (61) E.L.T. 17, is no longer a good law in view of the Hon'ble Supreme Court's judgment rendered in the case of Prabhat Sound. Studios. It has to be noticed that the judgment of the Madras High Court is in respect of pre-recorded cassettes by sound duplication on tape to tape and does not deal with the video recording. However, even this judgment gets overruled by the noted judgment of the Hon'ble Supreme Court. The learned DR has relied on the judgment of the SRB rendered in the case of Popular Video Audio Private Ltd. v. Collector of Customs, as per Order No. 229/1988, wherein the Tribunal has held that the activity of sound recording from the master tape to cassette tape is more of a trading activity and if the appellants were carrying on such an activity as a process of manufacture, they have not probalised this claim of theirs by any material evidence, by way of their agreements for manufacture on a large scale, or the contract entered into by them to supply of duplicated cassettes on a large scale. The Tribunal has also noted that the appellants have not even mentioned what is the brand name under which the product they are to (sic.) is going to be marketed. The Tribunal has also noted that the other features referred to by the Collector (Appeal) viz., that these

machines do not have to be installed as in an industrial plant but are portable equipments is also relevant. The Tribunal has noted that the appellants have also not given any details regarding the machinery and equipment and the approval of their operations from the State Government authorities for the assembly of cassettes, which they say, they are undertaking. In these circumstances, the appellants claim for registration of Project Import was rejected by the Tribunal. We are of the opinion that the ratio of this judgment is applicable to the facts of this case, as we notice on perusal of the documents that the appellants have not produced any material to establish that they are to manufacture large scale printed films under any brand name as noted by the Tribunal. The Tribunal has clearly noted that such an activity is akin to trading activity and does not fall within the ambit of 'Industrial Plant'. As we have held that the activity of video recording is akin to recording of sound cassettes and that it is also akin to a photographic studio, therefore, the activity of the respondents is more a trading activity and does not come within the ambit of industrial plant for the purpose of registering their contract and the benefit under Chapter Heading 9801 of the Customs Tariff Act. *Collector of Customs v. Sarathi Studio Pvt. Ltd.* (supra) has held that the camera for studio films is not eligible for benefit under Project Import Regulation.

19. The Madras High Court in the case of *Suresh Colour Labs v. Union of India* (supra) held that photographic studio and labs do not fall within the ambit of Project Import.

20. Likewise, Bombay High Court in the case of *Subhash Photographies* (supra) also held that photographic machinery and the mini lab systems imported by the photographic studios and photographic film processing laboratories are not entitled to the Project Import benefit under Heading 9801 of Customs Tariff Act, 1975.

21. In that view of the matter, we do not find sufficient force and merit in this case and for the reasons stated, we set aside the impugned order and allow the appeal.

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