

Pearl Engineering Polymers Ltd. Vs. Commr. of Cus.

Pearl Engineering Polymers Ltd. Vs. Commr. of Cus.

SooperKanoon Citation : sooperkanoon.com/13420

Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

Decided On : May-13-1998

Reported in : (1998)(104)ELT465TriDel

Appellant : Pearl Engineering Polymers Ltd.

Respondent : Commr. of Cus.

Judgement :

1. These are three applications for waiver of pre-deposit and the stay of recovery of amount of Customs Duty and penalty imposed by the Commissioner of Customs, New Delhi under the impugned order. M/s. Pearl Engineering Polymers Ltd. have been asked to pay duty amounting to Rs. 4,18,12,425/- and penalty of Rs. one crore. Shri Chand Seth, Chairman-cum-Managing Director has been imposed a penalty of Rs. 50 lakhs and Shri Arun Gupta, Director has been imposed a penalty of Rs. 25 lakhs.

2. Shri V. Sridharan, Id. Advocate submitted that the applicant is engaged in the manufacture of Polyethylene Terephthalate (PET) Chips and for this purpose a factory was set up with Technical Collaboration of M/s. Zimmer AG Germany; that according to the agreement, the applicant had to pay DM 8 lakhs for supply of know-how and DM 26 lakhs for Front End Engineering Package (FEED); that the Collaborator has sent 112 volumes of know-how and FEED by courier.

Ld. Advocate submits that know-how and FEED have come in the form of printed books and will fall under Chapter 49 of the Customs Tariff and will be exempted

under Notification No. 107/93, dated 30-3-1993. It has also been submitted by him that valuation taken by the Commissioner in the impugned order is not correct as the entire DM 34 lakhs cannot be attributed to the printed materials supplied by the collaborator. The third argument mentioned by Id. Advocate was that these volumes which have been supplied by the collaborator are not books at all attracting any duty under the Customs Act.

3. In support of his contention that the technical know-how and the FEEP which have been supplied are the printed material, he has placed reliance on the Hon'ble Supreme Court decision in the case of Scientific Engineering House Pvt. Ltd. v. Commissioner of Income Tax - AIR 1986 SC 338 in which it was held that the documents would constitute book. The Hon'ble Supreme Court has observed in that case that it cannot be disputed that these documents regarded collectively will have to be treated as a 'book', for, the dictionary meaning of that word is nothing but 'a number of sheets of paper, parchment etc.

with writing or printing on them, fastened together along one edge, usually between protective covers; literary or scientific work, analogy, etc. distinguished by length and form from a magazine, tract etc. He also relied upon the decision of the Gujarat High Court in the case of Commissioner Income-Tax v. Elecon Engineering Co. Ltd. 1974 (96) ITR. 672 in which it was held that a book is not necessary a printed book....But in addition, according to the ordinary meaning of the English word "book" there are many books which are not necessarily the sort of books which one finds in a library at all, and which yet are books. Id. Advocate specifically referred to a paragraph which appeared at page 685 of the ITR which reads as under : "The decision referred to above bring into limelight the point that whenever the question has arisen before courts whether a particular article or object was book, the test which was commonly applied was whether it had the physical characteristics of a book. In other words, the test applied was: Is it a collection of sheets of paper, fairly securely fastened together at one end, and protected by two covers? Is it in a book form and does it look like a book? If this test was satisfied, the article or object was held to be a book no matter that its utility was only for the person who owned it and it was not in the nature of an ordinary book available in the market".

He further submitted that this decision of the Hon'ble Gujarat High Court was upheld by the Hon'ble Supreme Court reported in 1987 (166) ITR. 66 and it was also referred by the Hon'ble Supreme Court in the case of Scientific Engineering House Pvt. Ltd., referred to above. He has also referred to a decision in the case of Mitutronics v. Collector of CustomsCollector of Customs, Madras v. Tata Elxsi India Ltd. reported in 1995 (78) E.L.T. 370 in which it was held that there is no requirement that book must be usable by public at large. Further in Tata Elxsi case it was also observed that manual can certainly be treated as a book. He distinguished the ratio of the decision in the case of Tractor and Farm Equipment v. Collector of Customs reported in 1993 (68) E.L.T. 234 (Tribunal) which was relied upon by the Commissioner in the impugned order. Ld. Advocate has also relied on the judgment rendered in the case of Lakshmi Cement v. Collector of Customs, New Delhi -1996 (84) E.L.T. 271 (Tribunal) in which the Tribunal had taken a view that design specification, process control design and technique of latest power system are classifiable under sub-heading 4901.99 and not under Heading 49.06 or 49.11 of Customs Tariff Act, 1975.

3. On the question of valuation, he submitted that M/s. Zimmer A.G.Germany their collaborator, in their certificate which has been not dated on 30-9-1997, has given the bifurcation of DM 34 lakhs. According to this certificate the DM 34 lakhs paid by them covers fees for other services such as right to export, production lead time, support to get training of Pearl Personnel, free of cost after sales service etc. His contention was if at all the duty is payable, it should be paid only on the cost of technical know-how and FEEP. His another contention is that the present matter falls under Section 15(1)(C) of the Customs Act according to which rate of duty in force on the date of payment of duty has to be taken into consideration for the purpose of levying the duty and the day payment was made by them, the rate of duty was nil under Notification No. 11/97. Finally, the 3d. Advocate advanced the plea of financial hardship by referring to the latest balance sheet as on 20-6-1997 according to which the company had suffered total loss of more than Rs. 25 crores. He submitted that the Company had already paid Rs. 30 lakhs and any other payment will cause them undue hardship.

4. Countering the arguments Shri R.S. Sanghia, Id. DR submitted that the arguments have been placed before the Bench only in respect of technical know-how and no where any mention has been made by the other side about FEEP. By referring to the statement of Shri Chand Seth, Chairman-cum-Managing Director, and Shri Ramesh Mehta, General Manager, he submitted that these two persons have clearly stated in their statements that FEEP means 'Front End Engineering Package' which is comprising of basic engineering information and the pertinent technical documentation and design and Drawings for their PET plant. He also mentioned that Shri Chand Seth in his statement has clearly mentioned that technical know-how and basic engineering agreement means the latest up-to-date technical data and information available to seller as of the effective date especially secret technical knowledge relating to the processes and their implementation to the design operation and maintenance of the plant. Id. DR emphatically mentioned that nowhere the senior officials of the company are referring to FEEP printing books at all. These basic drawings will fall under Heading 49.11 of the Customs Tariff. According to him M/s. Lakshmi Cement case was in respect of design and not drawing and therefore, no benefit can be drawn by the applicants from that decision. The decision in Tractors & Farm Equipment Ltd. case is the right decision which has been rightly applied in the present case by the Commissioner. On the question of valuation, he again referred to the statement of CMD in which he had stated that total amount of DM 34 lakhs was to be paid under agreement and out of this DM 26 lakhs was for supply of FEEP. On the question of rate of duty he referred to the Para 53 of the impugned order in which Id. Commissioner has observed that as per Section 12 of the Customs Act on goods imported into India, duty of Customs as per rates specified under the Customs Act shall be levied. The rate of duty is determined by Section 83 because imports by courier, prior to the Courier Imports (Clearance) Regulation, was considered as import by post. As per section, the rate of duty on books imported by post was the rate in force on the date on which the list containing the particulars on such goods was presented to the proper officer. On the question of imposing penalty he mentioned that the mala fide of the applicants is apparent from the statement of Shri Ramesh Mehta and Shri Chand Seth where they have clearly admitted that they have never disclosed receipt of plans, drawings, designs

received from M/s. Zimmer to Customs Authority nor they have paid customs duty leviable on those items at Bombay.

5. In reply Id. Advocate submitted that all along, it has been mentioned by them that the FEEP contained the drawings of the plant and he also referred to the finding of the Commissioner in Para 50 of the impugned order in which it was mentioned that the goods imported as FEEP were not books merely because these had been supplied in loose leaf binders. He emphasises the words 'Textual matter' which was mentioned by the Commissioner himself in the impugned order. Further, he submitted that both Gujarat High Court and Supreme Court in the decisions referred to above were referring drawings and not to any other thing when both High Court and Supreme Court held that these are books under the Income Tax Act. On the question whether a decision under any other Act could be applied to the Central Excise matter, he relied on the decision of 1987 (30) E.L.T. 850 in which it was held that when the expression are similar the observation of the Supreme Court has to be taken into consideration. A reference can be made to the decisions by the Courts under Income Tax and Sales Tax Act etc.

6. We have considered the submissions of both the sides. We observe that the issue involved has to be gone into detail at the time of regular hearing as to whether the material imported i.e. technical know-how and FEEP are printed books or not so as to attract the benefit of exemption provided under Notification 107/93. As far as the present application is concerned regarding waiver of pre-deposit and stay of recovery of the amount confirmed by the Commissioner, the matter is arguable and the appellants have made out a prima facie case in their favour. Besides they have also pleaded financial hardship as the company has suffered a loss of more than Rs. 25 cores as on 30-6-1997.

We also take note of the fact that the company has already paid Rs. 30 lakhs towards impugned duty. We are, therefore, of the view that if the applicants are asked to pay the entire amount, this will cause undue hardship to them. We are of the view that M/s. Pearl Engineering should pay further Rs. 20 lakhs within eight weeks from today and subject to payment of this amount, we allow the waiver of pre-deposit of the remaining amount and the amount of penalties imposed on all

the three applicants. Matter to come up for mention on 17-7-1998. If the applicants fail to make the amount within the time limit specified, the appeals will be dismissed under Section 35F of the Central Excise Act.

SooperKanoon - India's Premier Online Legal Search - sooperkanoon.com