

Commissioner of Customs Vs. B. Arunkumar and Co.

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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Mumbai

Decided On : Nov-25-1998

Reported in : (1999)(106)ELT141Tri(Mum.)bai

Appellant : Commissioner of Customs

Respondent : B. Arunkumar and Co.

Judgement :

1. These three appeals have been filed by the Commissioner of Customs, Mumbai against three adjudication orders passed by the Commissioner of Customs, Mumbai-II which relate to imports by respondent B. Arunkumar & Co. These relate to two consignments imported by them through the Mumbai Custom House. One consignment was of crude palm kernel oil under 2 Bills of Entry each for a value of Rs. 5,96,578 /-. The other consignment was of bulk crude stearin for the clearance of which six Bills of entry were filed totally valued at Rs. 66,84,352/-. These goods were canalised items according to the Import Policy of 1978-79 and in the 1985-88 policy. The clearance of the goods were claimed against additional licence issued to them as diamond exporter under para 176 of 1978-79 Import Policy as per Supreme Court order, dated 18-10-1985 for the clearance of the goods and in view of the Supreme Court judgment, dated 18-10-1985 wherein it was held that the additional licence issued to diamond exporters in para 176 of Import Policy 1979 will be valid for import in accordance with relevant rules of all items whether canalised or otherwise, the Customs authorities and the licencing authorities were of the view that additional licence can be accepted for the clearance of the goods.

This view of the Supreme Court was sought to be clarified and the Supreme Court stayed the clearance of restricted limited permissible items against these licences by order on 18-10-1985. Subsequently, on 5-3-1986 in the case of Raj Prakash Chemicals [1987 (30) E.L.T. 45 (S.C.)] the Supreme Court clarified that the goods covered by Appendix 3 and 2A of the Policy will not be permissible against such additional licences. The Supreme Court also clarified that those diamond exporters who were granted additional licence under para 176 of the Import Policy AM 1979 as per the court's direction and had established irrevocable letter of credit before 18-10-1985, notwithstanding the construction the court had placed in its order on 18-4-1985, can clear the goods imported by them pursuant to such letter of credit, for which the cut off date was determined as 18-10-1985. In this case, in respect of these two consignments the respondent placed orders after and subsequently on 18-10-1985, which were beyond the cut-off date for opening of irrevocable letter of credit. The item was at the time of import, canalised through STC. The goods were, therefore, not importable against the additional licence produced. The case was, therefore, adjudicated by the Commissioner of Customs, who held that import was unauthorized and ordered its confiscation under Section 111(d) of the Customs Act. He levied a fine in lieu of the confiscation of Rs. 4,50,000/- against each Bill of entry in the case of the import of crude palm kernel oil and he imposed a fine of Rs. 49,90,000/- as a total fine against the six Bills of entry, filed for the clearance of the goods. No penalty was imposed on the respondent in both these consignments.

2. In respect of the other consignment imported by respondent M/s.

Everest Gem the Commissioner, for similar reasons, adjudicated the matter and imposed a fine of Rs. 5 lakhs in lieu of confiscation and did not impose any penalty on the respondent.

3. Shri K.L. Ramteke, the learned DR for the appellate Commissioner referred to the grounds of appeal and contended that the respondent at the time of establishing letter of credit for the import of the goods were very well aware of the fact that in view of the Supreme Court judgment of 5-3-1986 in the case of Raj Prakash Chemicals the additional licence issued to diamond exporter under para

176 of the Import Policy were not valid but still they deliberately sought to import the consignment against this licence. It was, further, urged that profit margin on the goods was in the region of 100% CIF value in the case of crude palm kernel oil and crude palm stearin and hence, the redemption fine imposed in the impugned orders at around 70% is inadequate and has to be enhanced. It was, further, submitted that being a deliberate contravention of Import Policy in a speculative manner, the adjudicating authority ought to have imposed a penalty under Section 112 of the Customs Act. In respect of respondent M/s.

Everest Gem it was argued by the learned DR that having found the import as unauthorised, the adjudicating authority should have imposed a suitable penalty on the respondent. Shri Anil Balani, the Id. Counsel for the respondent contended that in the case of respondent B.Arunkumar & Co. the items are canalised items and admittedly since their Letter of Credit were opened subsequent to the cut off date determined by the Supreme Court i.e. 18-10-1985, the goods could not have been imported against the additional licence. But the learned counsel contended that the law came to be settled on the issue regarding the validity of additional licence for import of canalised item only by the judgment of the Supreme Court in U.O.I, v. Godrej Soap -1986 (26) E.L.T. 465 wherein the Supreme Court had considered the earlier judgment in the case of Rajprakash Chemicals, and for the first time interpreted the expression, whether canalised or otherwise occurring in the earlier direction. The present adjudication orders have been passed subsequent to this judgment of the Supreme Court. The respondents, however, have placed orders for the goods earlier on 6-5-1986 and the import was in July 1986. The learned counsel refers to the adjudication order in one of the consignment No. NES/10-377/86-A, dated 13-10-1996 wherein the adjudicating authority has referred to the series of clarification issued on the subject of eligibility to import against additional licence by the Chief Controller of Imports and Exports on 17-3-1986, by secretary of the Ministry of Finance, Government of India on 23-4-1986, and by the Collector of Customs, Mumbai on 14-5-1986, to the effect that diamond exporters would be allowed to import items against their licences. It was contended that no mala fides can be attributed to such imports. In the circumstances, the learned counsel relied upon the Supreme Court judgment in the case of Hindustan Steel v. State of Orissa -1978 (2) E.L.T. (J 159). He urged

that no penalty should be imposed for technical breach of legal provisions where the breach flows from bonafide belief. The Id. Counsel also pointed out that while seeking enhancement of the redemption fine the department has not substantiated their grounds that the margin of profit on goods in question at the relevant time was around 100%. In respect of respondent M/s. Everest Gem, the Id. Counsel pleaded that the respondent had placed orders before the judgment in the Rajprakash Chemicals case, was available and there was no deliberate attempt to import the goods against the Additional licence and the ratio of the same decision of the Supreme Court in the case of Hindustan Steel supra, was relied upon to plead for not disturbing the impugned order as regards this respondent.

4. The submissions have been carefully considered. In respect of the import of crude palm kernel oil and palm stearin, these goods were canalised items at the relevant time. There were more than one judgment of Supreme Court ending with the judgment in the case of Godrej Soap supra and the law came to be clearly laid down that the diamond exporters in terms of para 176 of Import Policy cannot utilize additional licence for the import of canalised items. It is also relevant that the adjudication of these two consignments has taken place subsequent to the judgment of the Supreme Court in Godrej Soaps.

It is, further, noted that apparently the adjudicating authority had referred to the various clarification on the validity of additional licence issued by various authorities as recorded in one of his adjudicating orders impugned referred supra. It has been mentioned in that adjudicating order :- "Clarification have been made by the office of CCIE, New Delhi on 17-3-1986, that diamond exporter can import items permissible against additional licence in terms of Import Policy, 1978-79, even if such items were appearing in the list of canalised items in AM 1985-88; by the Under Secretary to the Government of India, Ministry of Finance on 23-4-1986 that diamond exporter would be allowed to import canalised items against their licences; and by the Collector of Customs, Bombay on 14-5-1986 that clearance of canalised items against these licences would be unconditionally allowed." These clarifications by the licensing authority and by the Ministry of Finance, as well as the Collector of Customs, had been issued subsequent to the orders of the Supreme Court dated 18-10-1985 and some after the Rajprakash Chemicals

judgment by the Supreme Court on 5-3-1986. Therefore, in the matter of the validity of additional licence produced by diamond exporters for the clearance of canalised items the matter came to be finally settled by the Supreme Court in the light of the judgment of the Godrej Soap on 12-9-1986, wherein, for the first time, the Supreme Court interpreted the expression 'whether canalised or otherwise' occurring in its earlier orders. While doing so, the Supreme Court observed that the court had no occasion to consider the significance of the words 'whether canalised or otherwise' mentioned in the order on 18-4-1985 because that point did not arise in that case before it. Therefore, in the light of fact that true and legally correct interpretation of the terms of the additional licences became available only subsequent to the import of these consignments, it cannot be stated that there was mala fide intention on the part of the respondents in importing the goods against the additional licences.

In such a view of the matter, the fact that no penalty has been imposed by the Commissioner on the respondent has to be considered in the light of the ratio of the Supreme Court judgment in the case of Hindustan Steel supra. The Supreme Court had held in that case that even if minimum penalty is prescribed the authority competent to impose personal penalty will be justified in refusing to impose penalty, where the breach of the law flows from the belief that the offender is not liable to act in the manner prescribed by the statute. In the present case, as noted above, in respect of these consignments bona fide belief was engendered by the clarifications by the various authorities also that such additional licences will be valid for canalised items.

Therefore, apparently these were the circumstances under which the adjudicating authority refrained from imposing penalty on the respondents. As regards the quantum of fine, the department has not substantiated the claim that the margin of profit on the goods was around 100% at the relevant time.

5. In respect of the other respondent, the department is aggrieved that no penalty has been imposed. But as we have already seen in this case that policy regarding the imports by diamond exporter against such additional licence was a matter of dispute and had to be resolved at the Supreme Court level, and another aspect to

be noted is that the adjudicating authority has maintained the level of redemption fine at about 100% of the CIF value of the goods. As we have already noted above, the Supreme Court in the Hindustan Steel case has laid down that the adjudicating authority could refrain from imposing penalty where the breach of law flowed from the bona fide belief regarding the validity of the action, and again as noted by us above, the bona fide belief was also strengthened by the department's in the clarifications in this case. In these circumstances, we are not inclined to hold that the impugned orders passed by the Collector of Customs, needs to be interfered with. The appeals are rejected.

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