

Cc Vs. Flex India Ltd.

Cc Vs. Flex India Ltd.

SooperKanoon Citation : sooperkanoon.com/15707

Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

Decided On : Apr-28-1999

Reported in : (2000)(88)LC482Tri(Delhi)

Judge : J Balasundaram, S T G.R.

Appellant : Cc

Respondent : Flex India Ltd.

Advocate for Def. : Shri. L.P. Asthana. Ld. Counsel

Judgement :

1. The captioned three appeals have been filed by the Revenue. As the three appeals arise out of the same order, they were heard together and are being disposed of by this common order.

2. The facts of the case briefly stated are that Directorate of Revenue Intelligence acting on specific information searched the factory premises of the respondent herein. On inspection of the consignment cleared under Bill of Entry No. 101490 dt. 15.10.1990 they found that the consignment consisted of Embossing Machine with hot oil unit and control panel and Electroforming Machine/tank with control cabinet and control panel. These goods were cleared under OGL in terms of Appendix I Part B Item No. 2, Section No. 4 of Import Export Policy 1990-93.

Importers claimed classification of goods under Chapter Heading 8443.60 and the benefit of the Notification No. 59/87. Statements of S/Shri A.K. Chaturvedi,

Managing Director, Pradeep Tyle, General Manager and K.L. Alreja, Manager Liaison were recorded and a Show Cause Notice was issued to them asking them to explain as to why the goods imported without a valid import licence should not be confiscated, why Customs duty amounting to Rs. 19,93,467/- should not be demanded on Electroforming Machine and Rs. 2,35,650/- on the mother shim of nickel should not be demanded and why penalty should not be imposed. In reply to the SCN the appellant submitted that Electroforming Machine was an essential accessory of Polyester Embossing Machine that Appendix I, Part B, S. No. 4 shows the description of the goods as "book binding machinery for hard cover and paper back binding including automatic folding machines, collating machine, adhesive binding machines, staple stitching machines, book sewing machines, Cases making machinery, embossing machines". It was, therefore, argued for the respondent herein that embossing machine was covered under Section No. 4 of Appendix I, Part B. It was submitted by them that they were actual users and the goods imported were capital goods and were covered by S.No. 4 as indicated above. They also submitted that actual users (Industrial) is defined in para 7(3) which reads "7(3) Actual User (Industrial) shall mean an industrial undertaking, be it in the large scale, small scale or cottage industries sector, engaged in the manufacture of any goods for which it holds a valid licence or Registration Certificate from the appropriate Government authority, wherever applicable.

It was argued for the respondent herein that they were registered for manufacture of articles of printing industry therefore, they were actual users (Industrial) and were legally entitled to import the machine in question. It was, therefore, contended that Electroforming Machine was a part of the Embossing Machine and the embossing machine could not function without the Electroforming shims. It was submitted that since embossing machine was covered under OGL, no specific licence was necessary regarding nickel shims (Electroforming machine) and it was argued that nickel shim was imported as a part of embossing machine and since the price is that of a Embossing Machine fitted with tension control device and prefectly regulated DC Drive and all essential accessories, therefore, they were entitled to the benefit of Notification No. 59/87 and that even if the goods were classified under Chapter Heading 84.20, no further duty was required to be paid.

3. It was also submitted by the respondent herein that the SCN was issued on 9.5.1991 and served on them on 11.5.1991 seeking recovery of differential duty amounting to Rs. 22,29,072/- with the Bill of Entry No. 101490 dt. 15.10.1998 in respect of duties of Customs as assessed were paid on 24.10.1990. Thus the SCN was beyond a period of six months from the date of payment of Customs duty. It was argued that there was no wilful mis-statement or collusion or suppression of facts to invoke the extended period of five years. It was also submitted that SCN was issued by the Assistant Director; that in case the extended period is invoked, the SCN should have been issued only by the Collector in terms of Sub-section I of Section 28 of the Customs Act, 1962. It was submitted that both on jurisdiction and the ingredients for invoking extended period beyond six months, the SCN is ab-initio void and warrants being set aside. The Id. Commissioner after hearing the various contentions and submissions made by the appellant observed "it is, therefore, not relevant to consider this issue at the stage of adjudication. However, it is apparent that machinery for packaging, manufacturing was also permitted to be imported under OGL and there was no intention to place the Polyester Embossing Machine under the list of restricted items. He further observed that it is apparent that imported machinery is installed at the factory of the importers and that it has not been traded. He also held that the respondents herein are actual users (Industrial) for this machinery" on the question whether Embossing Machine includes Electroforming Tank or not. Ld. Commissioner held that Electroforming Tank and Polyester Embossing Machine are part and parcel of the same machine and functionally they are not independent for each other. On the question of classification of the goods, the Ld. Commissioner held that "I am, therefore, not able to persuade myself to accept the department's case that Electroforming Tank needs to be re-classified under Heading 84.89 as against Heading 8420.11 under which the goods were classified by the Department on examination of the goods and were assessed accordingly".

4. On the question of limitation, Ld. Commissioner held "I am also not able to discover any evidence whatsoever or any material in support of the contention that there has been any suppression or mis-statement on the part of the Importer". The fact remains that Electroforming Tank was specifically mentioned in the invoice of the foreign supplier and was also in the technical literature of the said supplier and

other relevant documents filed along with the Bill of Entry". Ld.

Commissioner further observed that the goods were physically examined by the officer on 23.10.1990 and they noted the existence of Electroforming Tank as part of the Embossing Machine.

5. Ld. Commissioner further held that the SCN has been issued by the Assistant Director, DRI under proviso to Section 28(1) of Customs Act, 1962. However, by virtue of amendment to the proviso to Section 28(1) w.e.f. 27.12.1985, the power to issue SCN for invoking the extending period of five years is with the Collector. The Assistant Director, therefore, had no jurisdiction to issue this SCN. For this alone, the demand of differential duty alleged to have been not paid needs to be set aside. However, in addition to this lacuna, it is found that SCN has been issued on 9.5.1991 the demand of duty pertains to the Bill of Entry dt. 15.10.1990 assessed on 23.10.1990 and paid on 24.10.1990. The SCN therefore, has not been served within six months from the relevant date as required under Section 28(1) therefore is without the authority of law. In the circumstances of this case in which Bill of Entry was filed, goods were claimed to be covered under Item 4 of Sub-heading 2 of Appendix I, Part B of OGL and for assessment purposes under heading 84.43 which were classified by the Department subsequently under Chapter sub-heading 8440.10, a case of suppression of facts or mis-statement of facts cannot be even reasonably alleged, much less established. The Commissioner therefore, held that the allegation of suppression of facts is not sustainable and the demand for differential duty for which SCN has been issued after a period of six months from the relevant date cannot be enforced. The Commissioner therefore, ordered confiscation of Polyester Embossing Machine but allowed it to be redeemed on payment of a fine of Rs. 50,000/-. He also imposed a penalty of Rs. 25,000/- on the respondent herein being aggrieved by this order, the Revenue has filed the captioned three appeals.

6. Arguing the appeals for Revenue Shri R. Ramanathan, Ld. JDR submits that the following points were required to be decided by the Commissioner: 1. whether the goods are covered by S. No. 2(4) of Appendix I, Part B of the Import Policy and consequently whether the goods can be imported by M/s. Flex Industries under

OGI as actual user.

2. whether the Electroforming Machine forming part of the consignment is classifiable under heading 84.20 along with the Embossing Machine as claimed by the importer and assessed by the Customs or it should be classifiable separately under heading 34.79 of Customs Tariff Act and appropriate differential duty paid.

3. whether the item 'mother shim' valued at Rs. 10,000/- which was not declared, was chargeable to Customs Duty.

Ld. DR pointed out whether any evidence has been adduced against the finding of the Commissioner that the SCN issued by Assistant Director for extended period of demand beyond six months was valid and whether there was any collusion, mis-statement or suppression and what is evidence to support. He could not find out any grounds for limitation.

Shri L.P. Asthana. Ld. Counsel for the respondent herein submitted that the case has been dealt with on merits as well as on limitation by the Ld. Commissioner as adjudicating authority. However, in the appeal, there was nothing to say that the findings of the Ld. Commissioner on limitation and jurisdiction are rebutted. He therefore, submitted that even if on merits, the Department's case is strong, the appeals warrant dismissal on limitation and want of jurisdiction.

8. We have heard the rival submissions. We have perused the evidence on record and the findings of the adjudicating authority. We find that the adjudicating authority has given a very clear cut finding that there was no suppression, wilful statement or collusion and therefore, the demand beyond six months was not sustainable. We agree with this finding in the absence of any evidence placed on record. We also agree with the findings of the Ld. Commissioner that the Asstt. Director was not competent to issue the SCN by invoking a period longer than six months. Having regard to this aspect in particular and the findings in general, we find no substance in these appeals and the appeals are accordingly rejected.

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