

Kemp and Co. Ltd. Vs. Commissioner of Customs

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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Mumbai

Decided On : Jun-06-2003

Reported in : (2004)(175)ELT334Tri(Mum.)bai

Judge : S T S.S., K Kumar

Appellant : Kemp and Co. Ltd.

Respondent : Commissioner of Customs

Judgement :

1. This appeal is against following finding of the Commissioner (Appeals):- "I have gone through the facts of the case and submissions made by the appellants in the appeal memorandum. The basic issue to be decided is whether the impugned goods required specific import licence or were covered under OGL. The appellants contended that at the time of placing order with the supplier the impugned goods were allowed under OGL. The import policy was changed with the issue of ITC(HC) classification on 25.3.96.

They were therefore not in a position to cancel the order placed earlier. They submitted a copy of public circular No. 13/92-97 dated 30.08.96 issued by D.G.F.T. and claimed that in view of classification given by D.G.F.T., the clearance under OGL should be permitted.

I have gone through the clarification given by D.G.F.T. It is indicated in the same that if the consignment of such goods had already been shipped/arrived but not

cleared so far by the Customs authorities, then the benefit of Notification No. 9 (RE-96)/92-97 would extend to the goods imported. In this case goods have already been cleared by the appellants. Therefore, no benefit gets extended to the appellants." 2. The appellants had imported vide bill of entry dated 22.5.1996 Toy/Doll parts which were considered to be restricted items requiring a specific import licence vide amendment ITC(HC) Classification of Imports and Exports Items with effect from 25.03.1996. The importers had submitted to the lower authority that they were approaching licensing authority for re=classification and the part of Toys/Dolls under import were to be used in the manufacture of toys/dolls and therefore can not be considered as consumer goods. The consignment had arrived on the basis of order placed prior to the amendment of the policy which vide paragraph 5 thereof provided that relaxation of 45 days could be granted and requested that the import be cleared under OGL. The lower authority found as under:- "1. I have gone through the facts and records of the case and the submissions made by the importer. In terms of I.T.C. (H.S.) classification of Import and Export items, a licence is required for the import of the said goods, which the importer does not possess.

The importer has thus contravened the provision of Section 3 of Foreign Trade Regulation Act, 1962 and the importer has rendered the goods liable to confiscation under Section 111 (d) of the Customs Act, 1962 and the importer has rendered himself liable for penal action under Section 112 of the Customs Act, 1962. All the reasons given by the importer do not absolve the importer from the legal requirements. However, as regards fine and penalty, regard is to be paid to the fact that the party is an actual user and they have been importing these goods earlier also freely. Therefore a lenient view is called for.

2. In view of the foregoing, I order confiscation of the goods under Section 111(d) of the Customs Act, 1962. However, under Section 125 of the Customs Act, 1962 I allow redemption of the same on payment of a fine of Rs. 50,000/- (Rupees Fifty Thousand Only.) I impose a penalty of Rs. 15,000/- (Rupees Fifteen Thousand Only.) on M/s. Kemp & Company Ltd., Mumbai 25 under Section 112 of the Customs Act, 1962." "1. Thereafter, parts were shown in ITC/HC as consumer goods on 25.3.96 and included as restricted requiring specific licences.

Component parts are not marketable consumer goods and were specifically permitted under para 22 of the Exim Import/Export Policy 92-97. Obviously, there was some contradiction, as there was no change in the policy. The DGFT vide IPC Cir. No. 60/92-97 dated 28.11.95 had pointed out that in the context of the Export and Import Policy aligned on ITC/(HS) classification 92-97, representations were received by the DGFT, pointing out certain anomalies and made clarification in respect of certain items. In the said IPC circular, in para 3, it is stated "in this connection, it is hereby again clarified that the aforesaid publication is not an attempt to change the existing item wise policy. Hence, in case of any doubts/disputes as regards the nature of restriction application to individual items, of imports or exports, the Exim Policy provisions, as contained in the Export and Import Policy, 1992-97 (revised Edn March 95) and amendments thereon should be referred to and prevail in the matter of interpretation.

2. Notification No. (9 RE 96) 92-97 dated 21.8.96, under Exim code-95-58090-parts of other Toys and 950390.99 parts both have been shown as FREE obviously the anomaly has been rectified and status quo-ante restored. In the PC circular No. 13/92-97 dated 30.9.96, DGFT has again pointed out that there was no change in policy 1992-97, after the introduction of ITC/HC classification.

3. Evidently the gap between 25.3.96 and 21.8.96 has to be treated as an anomaly. The DGFT's clarification contained in Cir. Dated 13/92-97 dated 30.8.96, it is true, refers to consignments already shipped/arrived but not cleared so far by the customs authorities "but the appellants goods were imported on .5.96 and adjudicated on 24.6.96, the appellants had no other alternative but to clear the goods imported as actual users and clearance could not be kept pending for 3/4 months, awaiting issue of import licences for goods" already shipped or arrived.

4. No licences were issued, obviously, as the goods had been again listed under OGL other than negative list in terms of Notification No. 9(RE-96)92-97 dated 21.8.96 being included in 95038009 and 950390.09 -parts FREE. The fact that the DGFT has again listed parts of Toys/Dolls under OGL prima facie indicates that the ITC/HS classification list dated 25.3.96 there was no change in the policy, but there was an error. There was thus no justification for taking penal action against

the goods and against the appellants.

5. The change was unexpected and without prior notice and hence a caution or a warning would have met the end of justice or alternatively a nominal fine ought to have been imposed. Since, IPC circular No. 13 dated 30.8.96, the DGFT has admitted several omissions in the ITC/HS classification, at the same time confirming that there was no change in the 92-97 PB. If so, it was erroneous on the part of the import trade control authorities to describe "component parts" as "consumer goods" and demand specific licence." There was no justification for imposing high redemption fine and penalties.

4. When the matter was called none appeared for the appellants, learned J.D.R. for Revenue was heard. The matter considered and it is found:- (a) The lower authority has not come to any finding why para 5 of the policy and the benefit there under as claimed could not be applied in the facts of this case merely because the goods have been cleared the benefit of clarification could not be denied without adequate reasons. Instruction exist in the Apprising Manual that on the change of the policy and interpretation, past product and import pursuant thereof the importers could not be penalized.

(b) The orders of the lower authorities do not indicate why a routine penalty ad confiscation redemption fine was called for in the fact of this case when admittedly they are not contesting the plea made before them as regards the imports being parts of Toy/Dolls and not consumer goods which were restricted for import.

More so when appellants are actual users who would have used these parts in the manufacture of Toys/Dolls.

(c) In view of the finding, we would consider setting aside the order of the lower authorities and remit the same back to the original authority for re-adjudication of the matter with direction that a clear finding on each issue raised by the appellants should be arrived at and thereafter the matter determined. Needless to add the original authority will conduct denovo proceedings after granting a opportunity of hearing.