

Psa Sical Terminals Ltd. Vs. Commissioner of Customs

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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Tamil Nadu

Decided On : Sep-12-2003

Reported in : (2003)(158)ELT333Tri(Chennai)

Judge : S Peeran, R K Jeet

Appellant : Psa Sical Terminals Ltd.

Respondent : Commissioner of Customs

Judgement :

1. For the purpose of hearing this appeal, appellants are required to pre-deposit Rs. 21,60,84,019/- confirmed under Section 28(1) of the Customs Act, 1962 besides interest of Rs. 12,82,31,199/- for non-compliance of Notification No. 28/97-Cus., 1-4-97. The capital goods have been ordered to be confiscated. However, they have been directed to be released on payment of redemption fine of Rs. 4.50 crores. There is personal penalty of like amount of duty under Section 114A of the Customs Act, 1962.

2. The short facts of the case are that appellants, who are a private terminal operator at Tuticorin, have obtained EPCG licence for export of service under port handling services export category. In terms of the licence and the concerned notification, they are required to earn money only in freely convertible foreign currency for services rendered through utilisation of such capital goods. The period for expiry of the licence is 5 years. However, even before the expiry of the period of five years, Revenue has proceeded against the appellants on the ground

that they have earned foreign exchange in Indian rupees and not freely convertible foreign currency. On that premise, proceedings were initiated for violation of the said notification and after due process of adjudication, the final order has been passed confirming demands, penalty, confiscation of goods and granting redemption on payment of fine and for penalty under Section 114A of the Customs Act.

3. We have heard Shri Arshad Hidayatullah, Senior Advocate accompanied by his juniors.

(a) That there is already a bank guarantee of Rs. 21 crores furnished to the Customs, which is still subsisting and alive.

(b) It is pointed out that the issue pertaining to earnings in Indian rupees or in freely convertible foreign currency was the subject-matter of another proceedings before the Tariff Authority for Major Imports (TAMP) who by their order dated 8-12-99 in Case No. TAMP/90/9-TPT have held that earnings can be made in Indian rupees which is freely convertible.

(d) Further reference is made to the clarification given by the Reserve Bank of India on 17th May, 2002 which is at page 120 who have clarified as under : - Please refer to your letter PSA/SICAL/RBI, dated April 17, 2002 on the captioned subject.

In this connection, we advise that any such payment which would have been otherwise received in foreign exchange but paid in Indian rupees out of the amount remittable to overseas principal, thereby reducing outgo of foreign exchange can be considered as (i) deemed to be received in foreign exchange (ii) deemed to be earned in foreign exchange." (e) It is submitted that the time under the EPCG licence for completion of the export obligation is five years, which is not yet expired and as such, the proceedings initiated by the Customs is premature and not sustainable.

(f) Ld. Sr. Counsel pointed out that even in terms of the rulings given by the Tariff Authority for Major Imports and RBI, appellants have fulfilled the terms of the

notification in earning in Indian rupees to an extent of Rs. 25 crores which is much more than the amount which is required to be earned for the period in question.

(g) Ld. Sr. Counsel, further, submitted that they have a strong prima facie case on merits and amounts also are very huge and if they are directed to pre-deposit the sums, the appellants would be put to severe hardship and since balance of convenience is also in their favour, he seeks for waiver of pre-deposit of the amounts and has no objection for taking up the appeal out-of-turn hearing in view of large revenue involved in the matter. He also submits that it has got recurring effect.

5. Ld. SDR submits that Notification No. 28/97-Cus., dated 1-4-97 is exclusive and the order passed by the TAMP and RBI's notification have no bearing on the notification in question. She submits that notification has to be strictly construed. Ld. SDR submits that when major portion of the notification pertains to earnings have not been fulfilled for the period in question, then proceedings initiated is proper as held by the Commissioner in Para 24 of his order. She submits that although appellants have given Bank Guarantees, yet they are required to pre-deposit the amounts to determine the interest, penalty and in case, if they would utilise the goods, they are required to pay the amount towards the redemption fine. Ld. SDR points out to various portions of the Commissioner's order dealing with the arguments of the appellants.

6. Ld. SDR points out that RBI clarification pertains to the period 2002-2007 while the present imports are earlier to this period hence the notification is applicable.

7. We have carefully considered the submissions and notice that there are three points which have been urged which require consideration for grant of total waiver: - (i) that proceedings have been initiated before expiry of the terms of EPCG licence; (ii) that they have already executed bank guarantee to the tune of Rs. 21 crores as security which is still alive; (iii) that Tariff Authority for Major Imports and RBI have clarified that they can earn in freely convertible foreign currency which has been done.

They have also established that directing them to pre-deposit any amount would cause severe hardship. Since the appellants have already furnished bank guarantees, which are kept alive, we accept the prayer for granting waiver of pre-deposit and stay of its recovery during pendency of appeal, by allowing the stay application. Since the amounts are very high, the prayer made by both sides for listing the appeal for out-of-turn is accepted. Appeal to come up for hearing on 14-11-2003 on which day, Registry shall not list any other matter so that we can hear and dispose of the matter expeditiously. Appeal posted to 14-11-2003.

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