

Dab Exports and ors. Vs. Cc and Cce

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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

Decided On : Mar-25-2004

Reported in : (2004)(94)ECC221

Judge : K Usha, S Kang, N T C.N.B.

Appellant : Dab Exports and ors.

Respondent : Cc and Cce

Judgement :

"Whether, for the period 1.4.1997-31.3.2002, the Policy Circular No. 32 (RE-99)/1999-2000 dated 17.9.99 issued by the DGFT regarding ITC (HS) classification of 'dried garlic' is a valid and binding clarification on such classification in terms of para 4.13 of EXIM Policy, 1997-2002." The appellants had imported various quantities of 'dried garlic' and sought Clearance under ITC (HS) Heading 071290.04 and Customs Tariff Heading 0712.90 under Bill of Entry filed on different dates before 17.9.99, the date of Policy Circular No. 32 (RE-99)/1999-2000 issued by DGFT regarding ITC (HS) classification of 'dried garlic'. The garlic imported by all the appellants has a water content of above 10% WW. Relying on the Circular dated 17.9.99 issued by the Joint Director with the approval of the Director General of Foreign Trade, the adjudicating authorities took the view that the garlic imported are not dried garlic. The circular reads as follows :

- "It is hereby clarified that 'Dried Garlic' classified under Exim Code No. 071290.04 of ITC (HS) Classification, 1997-02 would be treated as 'Dried Garlic' provided the moisture content thereof does not exceed 10%, irrespective of the

method of drying. This issue with the approval of DGFT." Admittedly there is no specification regarding percentage of moisture in the Policy before the above circular was issued. The appellants contend that no reliance could be placed on the condition brought in by the Policy Circular to hold that the goods imported by them were not dried garlic. Their submissions are two-fold. The West Zonal Bench of the Tribunal held that the circular is not valid and binding and that the above decision had been followed by other co-ordinates benches of the Tribunal. Alternatively, it is contended that the circular if at all applicable can have no retrospective effect to cover the imports made by them. The Referring Bench was of the view that DGFT has the power to issue the circular dated 17.9.99 and it cannot agree with the view taken in J.B. Impex Vs. CCE Nhava Sheva, 2002-TAXINDIAONLINE-103-CESTAT-MUM, by the West Zonal Bench of the Tribunal. The Bench also took the view that the DGFT circular which is an Exim Policy Circular will have retrospective effect from the date of the Commencement of Exim Policy for the period 1.4.1997 to 31.3.2002.

2. We heard the learned counsel of the appellant and the learned DR. The appellants brought to our notice a recent decision of the Bombay High Court in Narendra Udeshi Vs. Union of India, 2003-TAXINDIAONLINE-68-HC-MUM-EXIM, where the Hon'ble High Court had occasion to consider the power of DGFT in the matter of issuing of the circulars. It was held that circulars and public notice issued by DGFT prohibiting duty free import of natural rubber under advance licence would amount to amendment to the Policy, that power to amend policy being within the exclusive domain of the Central Government. The said powers cannot be usurped by the DGFT in the guise of laying down regulatory measures. In the present case the contention taken by the appellant is that in the guise of clarificatory Circular the DGFT has in effect brought an amendment to the policy by introducing a condition regarding the percentage of water content for qualifying import 'dried garlic' without license. We do not think it is necessary for us to go into the dispute regarding power of DGFT to issue the circular dated 17.9.99 as the dispute in these appeals can be resolved by taking recourse to the alternate contention raised by the appellants.

3. It is not disputed that before the issue of the circular dated 17.9.99 there was no condition insisted by the Customs authorities regarding the percentage of water content in respect of 'dried garlic'.

If we accept the contention taken by the Revenue that the circular is clarificatory in nature and therefore, it will have retrospective effect from 1.4.97, it will hit import already made before 17.9.99 and thereby rendering such previous imports offences under the Act entailing confiscation and levy of penalties retrospectively. This Tribunal has considered very same question in East Punjab Traders & Others Vs. CC, Bombay, 2002-TAXINDIAONLINE-104-CESTAT-DEL-SB. In the above case the issue was whether the imported goods fall within the description of lining material or fabrics, made from man-made fabrics/yarns falling under Item 25 of the list of non-permissible items for import under Appendix 4. If the goods are lining or inter-lining materials excluding coated fabrics (25%) there is no dispute that the said material could be imported under the REP licence held by the importers. The ground on which the Collector of Customs came to the conclusion that the material was not lining material, was that in the Import & Export Policy document of April 1984-April 1985 Entry (vi) of col. 4 of Appendix 17 was changed, in that it was mentioned lining the inter lining materials of width not exceeding 87.5 cm excluding nylon taffeta coated fabrics (10%). The Collector of Customs took the view that the Export Policy April 1982-March 1983 must also be read as limiting the width to 87.5 cm as the amendment is clarificatory in nature and therefore has retrospective effect. This Tribunal took the view that no retrospective effect could be given to the amendment for the reason that it would render previous imports illegal entailing penal consequences on the importers.

5. The above decision of the Tribunal was approved by the Hon'ble Supreme Court in Collector of Customs Vs. East Punjab Traders 1989 (89) ELT 11. In paragraph 7 of the above judgment the Hon'ble Supreme Court after referring to the contentions raised by the Revenue that the amendment is clarificatory in nature and therefore, will have retrospective effect observed as follows : "The next question relates to the classification of the goods in question. The issue is whether the imported goods fall within the description 'lining material' or 'fabrics, made from man-made fibres/yarns' falling at Item 25 of the List of Non-permissible Items for

import under Appendix 4. If the goods are lining or inter lining materials excluding nylon taffeta coated fabrics (25%) there is no dispute that the said material could be imported under the REP licences held by the respondents. The learned counsel for the appellant did not question the validity of the licences for the reason that even the Collector of Customs had not held the respondents responsible for the discrepancy in the dates to which we have already referred. One ground on which the Collector of Customs came to the conclusion that the material was not lining material is that in the Import & Export Policy document of April 1984-April 1985 Entry (vi) in Column 4 of Appendix 17 was changed, in that it mentioned lining and inter lining materials of width not exceeding 87-1/2 cms. excluding nylon taffeta coated fabrics (10%). Two changes were made, the first relates to the introduction of the prescription as to width and the second relates to the percentage being reduced from 25% to 10%. We are not concerned with the latter.

The Collector of Customs relied on this change and concluded that it was only clarificatory in nature and, therefore, the Entry (iv) in Column 4 of the Appendix 17 of the Import & Export Policy 1982-March 1983 must also be read as limiting the width to 87-1/2 cms.

(approximately) 35 inches). The consequence of the interpretation would lead to certain penal liabilities in regard to payment of penalty, etc. and, therefore, we find it difficult to hold that this Entry prescribing the limit of the width has to be read retrospectively. The majority was clearly of the opinion that such an interpretation would lead to unforeseen consequences so far as the importers are concerned and many of them who imported lining material of the width exceeding the prescription would become liable to penalty, etc. We think that this view taken by the majority is unassailable." 6. We are of the view that the ratio of the above decision of the Supreme Court would be directly applicable in the present case. The clarification issued by the DGFT cannot have any application in respect of the imports made by the appellants before 17.9.99.

7. Since in the facts of the case it is not necessary for us to go into the larger question referred to us, we limit the consideration to applicability of the circular for the period prior to 17.9.99. As mentioned earlier, we hold that the imports made by

the appellant before 17.9.99 will not be governed by the terms of the Policy circular dated 17.9.99 issue dby DGFT.8. Since no other issue is involved in these appeals, we proceed to dispose of the appeals themselves. The orders impugned are set aside and the appeals stand allowed.

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