

Viraj Impex Ltd. Vs. Cc

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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Mumbai

Decided On : Sep-10-2004

Reported in : (2005)(120)LC106Tri(Mum.)bai

Judge : S T S.S., T Anjaneyulu

Appellant : Viraj Impex Ltd.

Respondent : Cc

Judgement :

1. Appellant's, a company registered under the Companies Act, 1956 are engaged in the business of import of iron and steel and its whole sale trade. During the year 1998-1999, they in the course of the normal trade, on 20 contracts entered into on DA (i.e. documents on acceptance) 180 days from Bill of Lading date, basis imported and cleared consignments of Hot-rolled Coils defective/secondary. The last such contract entered was for 40,000 MTS, No. 9815 dated 26.11.1998 & the shipments were made and cleared by Customs. A contract no 9817 was, thereafter on date 1.12.1998 for shipments to be made during the period from 1999 to March 1999 totalling 25,000 MTS No. entered, at price of USD 180 DMT.2. By notification No. 34/(RE-1998)/1997-2002 dated 10.12.1998 the EX1M POLICY 1997-2002 & ITC (MS) classification for the subject goods was amended as "Secured and Defective items specified below is permitted for imports free, except those there of which the value in below the value specified" and for HR Coils (TMQ) such Horr price specified was USD 232. The appellants wrote to their suppliers vide letter dated 15.12.1998, for cancellation.of contract No. 9817 dated

1.12.1998. The suppliers insisted on performance, as they in turn had placed an order for purchase with another firm. The imports were consequently effected 22.2.1999 & BE's were filed on 4.3.1999. Customs Authorities did not find the declaration of Quantity, Price etc to be incorrect. However, they interdicted the imports for infringement of Section 111(d) as price was below the Horr price fixed for Licence free import. Goods were confiscated and ordered to be redeemed on fine and appeared for redemption fine of Rs. 1.1 crores, after he Commissioner came to the following conclusion-- I have gone through the records of the case and considered written as well as oral submissions tendered by the importers and I find that the charge.of the import being in violation of the restriction imposed by ITC Notification No. 34(RE) 1997-2002 dated 10.12.1998, is clearly established. The import in the instant case is not against a letter of Credit. The contract for the import has been made on 1.12.1998 and the date of shipment is of 22.2.1998. In the absence of a letter of credit, the import does not fall within the transitional arrangement as envisaged under para 1.5 of Export-Import Policy and the goods are therefore liable to confiscation under Section 111(d) of the Customs Act, 1962.

During hearing, the party had pleaded for leniency, on the ground that they had made an effort to cancel the contract to prevent the import. However, their supplier refused to accede to the request and stated that the shipment would be made as per the contract. They produced copies of the letters exchanged between them and their suppliers, which were taken on record. They had also argued that bulk of their imports, m the past have not been against letters of credit but on DA basis. There is, therefore, nothing unusual or extraordinary about the present import.

I find that the party's plea for leniency deserves consideration. I have also taken note of the fact that this is their first import after the restriction was imposed. In view of this, I pass the following order.

a) The Commissioner has not found the Contract No. 9817 to be suspect antedated or fraudulent. This contract has been entered into on 1.12.1998, in the normal pattern and conduct of Trade by the Import there was no reason for the importer to have known about the Policy Changes. They have in the routine course without opening a letter of Credit, as per their practice, entered into another

contract. On learning about the Policy Changes effected by not.

34/1997 dated 10.12.1998, they have sought to get this contract cancelled. The same could not be achieved and shipments were effected. If the appellants had entered and opened a letter of Credit there was no violation of ITC regulation as per para 1.5 of the EXIM POLICY 1997-2002.

b) The Customs Appraising Manual Volume II. Chapter 5 para 24 on letter of Credit and Policy applicable provides (a) Nature of a letter of Credit ~ often shipment of goods is effected against an irrevocable letter of credit, a letter of credit is not a contract though it may form a part of a contract between the supplier and the importer. It is an instrument by means of which payments of the goods to the supplier is secured through the bankers. Generally, it contains the relevant Indent/order No. description of goods sought to be imported, CIP value, relevant licence No. or OGL covering the goods and date of shipment.

The policy: provisions never provided for a compulsory, opening of letter of credit to import the subject goods. Para 24(c) of the very same chapter 5 of Vol II of manual provides (c) Relevant of letters of credit under other circumstances - Difficulties will however arise where specific provisions for letters of credit for particular imports are not made either in the Policy Book or in the ITC Public notice notifying changes in the policy. A question therefore arises as to whether when a policy becomes restrictive, and the shipments takes place after the change in policy, clearance should be allowed on the ground that the irrevocable letter of credit had not been opened before the change in the policy came into effect. On a strict treatment the benefit of pre-ban commitment should not be given to such imports, unless there is a specific provisions for such consideration in the relevant policy or ITC Public notice. However, each case should be: decided on merits and a view may be held under the existing policies also the pre-ban commitment has been accepted in principle by the licensing authority and that in the particular case the importer opened the relevant letter of credit for his goods in good faith at the time when the goods were permissible under the policy and that he had no means to foresee the changes in policy and that once opened the letter of credit cannot be revoked without total loss. The practice of the Customs House

is to take a lenient view in such cases on the principle of equity, provided however. there is no mala fide goods on otherwise covered by them or OGL A reading of these instructions, along with the facts of no mala fide being established, would induce us to come to a finding that if in a particular case the importer has entered into a contract, in good faith, at the time when goods were permissible, and he had no reason or means to foresee the restrictive changes in policy as also when the revoking of contract would result in loss, then clearance of such bona fide imports should be allowed without confiscation and penalty.

Following the same, in the facts of this case, imports cannot be held to be liable to confiscation under Section 111(d) as ordered. The reliance of the Ld DR in the case in & 1995 (78) ELT 32 will not apply for such benefit of contract in this case are not under challenge.

c) The reliance of the Ld, Advocate for the appellants, on the case of Matracco (India) Ltd. is well founded. In that case the Hon'ble Division Bench of Bombay High Court after noting that the importers acts were found to be bona fide, as in this case, held 20... it is no doubt true that irrevocable letter of credit was not established by the petitioners but that by itself cannot be a ground to say that no concluded contract which was entered into by the petitioners was not a genuine contract. The condition relating to opening the irrevocable letter of credit put in the public notice was to prevent the importers entering into an import contract subsequent to the Public Notice....

and thereafter found no justification in the redemption fine upheld by the CEGAT in that case. Once it is found that the provision of "Letter of Credit" opening is only to ensure no subsequent renge from contracts, confiscation fines, however leniently imposed", by the Commissioner cannot be subscribed. The fine imposed is to be set aside.

4. In view of the finding arrived, the orders of the Commissioner are required to be aside.