

Essar Oil Ltd. Vs. Cc

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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Mumbai

Decided On : Dec-01-2004

Judge : S T S.S., T Anjaneyulu

Appellant : Essar Oil Ltd.

Respondent : Cc

Judgement :

1. Appellants for setting up a refinery at Jamnagar had, for the said purpose, imported in the following three consignments capital goods.-----Bill of Entry No. & date

Description	of	goods	CIF Value-----
System Cabinets	15,00,12,946/-	F-43/18-5-1999	Control System Cabinets
9,77,76,783/-		F-49/2-6-1999	Fittings
1,87,89,374/-			

2(a) The initial Warehousing period was valid till 18-5-2000 in terms of section 61(1) (b) of the Customs Act, 1962. Appellant's request for extension of the Warehousing period was rejected by the department on 18-6-2001. Thereafter, three demand notices dated 18.6.2001, 25.7.2001, and 27.7.2001 were issued to them under 72 of the Custom Act 1962 directing to forthwith remove the said goods on payment of duty and interest.

b) In the meantime, appellant had applied for and obtained two EPCG licences bearing Nos.0330000724 dated 27.11.2000 and 0330001481 dated 1.11.2001,

which "specifically" covered the goods imported by the appellant. The said licences referred to the goods, in question, by reference to the description of the goods as well as the specific invoices Nos. under which the same were supplied.

c) At the relevant time, para 6.6 of Chapter 6 of the EXIM Policy (1997-2002) dealing with EPCG Scheme, permitted the DGFT to issue an EPCG licence for goods already shipped/arrived provided customs duty had not been paid on such goods and the goods had not been cleared from the Customs. The said para 6.6 is extracted below for case of reference:-----_Clearance of

goods from Customs 6.6 The licence issued under this scheme shall be valid for the goods already d) The Customs Notification in terms of which EPCG benefit is

claimed was Notification no. 49/2000-Cus dated 27-4-2000. The relevant condition of the said Notification reads as under: "(1) The goods imported are covered by a valid licence issued under the Export Promotion Capital (EPCG) Scheme in terms of paragraph 6.2 of the Export and Import Policy permitting import of goods at the rate of 5% duty and the said licence is produced for debit by the proper officer of the customs at the time of clearance: Provided that for the import of spare parts, the validity period of the licence shall be deemed to be the period permitted for fulfilment of the export obligation in full" c) When the appellant claimed the benefit

of the aforesaid since the goods had "remained uncleared even after expiry of the warehousing period" duty amounting to Rs. 6,02,57,006/- along with interest at the rate in force amounting to Rs. 2,44,53,523/- till 30-11-2001 and further interest at the applicable rate "at the time of clearance" as per provisions of section 72(1) (b) of the Act was required to be paid by the appellant and recovered from it. Para 7 of the notice also alleged that since the appellant had "failed to ex-bond the goods" covered under the three Bills of Entry mentioned above on payment of duty even after expiry of the warehousing period of the goods, it had rendered itself liable for a penalty under section 72 and section 117 of the Act." f) This show cause notice was adjudicated by the Assistant Commissioner by confirming the demand for duty and interest mainly on the basis of the Tribunal's decision in the case of KLJ Plastics Ltd. v. Commissioner of Customs, Chennai, 2000 (117) ELT 108, wherein the Tribunal held, in the context of the DEEC Scheme, that an advance licence issued after the expiry of the warehousing period could not be used for debonding

the goods. The appeal filed before the Commissioner (Appeals) was rejected on the same basis. Hence this appeal.

a) The goods lying in a warehouse could not be regarded as goods "cleared from Customs" as they continued to be "warehoused goods" under the control and superintendence of Customs even after the expiry of the Warehousing period as the Bonded Warehouse is always under the double lock system, one lock key remains with Customs, at all time & no goods can be deposited or/ and removed or even inspected or dealt with by the owner without the Proper Officer of Customs approval/permission & supervision. The fact that the goods were not to be regarded as 'cleared from the Customs' even after the expiry of the Warehousing period' was evident from the show cause notice itself. The same in para 6 states that the Warehoused goods covered under Bs/E discussed in para "remained uncleared even after the expiry of warehousing period." They were physically in the warehouse would further, appear from the proposal in the same para to apply interest at the applicable rate at the "time of clearance".

This shows that the goods had not been' cleared from the Customs' merely by reason of expiry of the Warehousing period. The goods remaining deposited in Ware House without payment of import duty leviable thereon cannot be said to be "Cleared from Customs".

Therefore, since duty had not been paid by the appellant and the goods continued to be 'under Customs' control they had not been cleared from the Customs; hence both the conditions stipulated in para 6.6 of the EXIM Policy stand satisfied in the present case.

b) That this case was entirely different from the case of KLJ Plastics Ltd. for the following reasons: i) Unlike in the case of KLJ Plastics Ltd., the licence in question was a "specific" one issued by the Licensing Authority specifically for the goods imported by the appellant under invoices bearing dates more than one or two years prior to the issue of the licences.

ii) Unlike para 7.17 of the EXIM policy concerning the DEEC Scheme which was before the Tribunal in KLJ Plastics' case, the corresponding para 6.6 of the EXIM

Policy dealing with EPCG Scheme makes it mandatory for the Customs to grant the EPCG benefit to goods already arrived as long as the following two conditions laid down therein were fulfilled: iii) Customs duty had not been paid; & Goods had not been cleared from the Customs.

It was submitted that the Tribunal had held in that case that it was not open to the Customs authorities to question the Licensing authority's discretion exercised in issuing or amending the licence and Reliance was placed on the decision of the Tribunal in the case of Rama New Prints & Paper Ltd. v. Commissioner of Customs, Kandla, 2000 (122) ELT 473, to contend that the Licensing Authority had the requisite jurisdiction and power to relax the conditions of the policy or amend the licence retrospective to validate import of goods already received or arrived. Therefore the case of K.J. Plastics would not be applicable. The case of KLJ Plastics Ltd. was apparently a case where a conversion of Bill of Entry was being sought, which was not the situation in the case of hand.

c) The lower authorities have failed to appreciate the vital difference that existed between the EXIM Policy concerning the EPCG Scheme and the DEEC Scheme. While para 7.17 of the EXIM Policy relating to DEEC Scheme conferred a discretion upon the Customs for granting the benefit of an Advance Licence issued subsequently by using the word "may", the corresponding provision of para 6.6 in the EPCG Scheme did not confer any such discretion as it employed the word "shall".

d) The lower authority had completely mis-constructed and misread the judgement of the Supreme Court in the case of Kesoram Rayon v. Commissioner and Customs, 1996 (66) ECR 2001. The said judgement was dealing with the question as to what would be the rate or duty applicable in the case of Warehoused goods and had, in that context, held that in a case where the warehousing period expired, the rate of duty would be reckoned with reference to the date of the expiry of the warehousing period which was to be regarded as the date of deemed removal of the goods from the warehouse. In other words, the deeming fiction was applied only to the limited extent of finding out the rate of duty applicable as provided under Section 15 of the Customs Act, 1962. The said judgement did not have the

effect of holding that the warehoused goods after the expiry of the warehousing period would be regarded as "cleared from Customs" as had been wrongly assumed by the lower authorities. If the ratio laid down in the case of Kesoram Rayon was to be applied to the present case, it should have been held that the rate of duty as applicable on 17-5-2000, when the warehousing period expired, would be applicable. On 17.5.2000, Notification No. 49/2000-Cus dated 27.4.2000 was already in force and since a licence as required by that notification had been issued specifically for the goods already imported by the appellant by giving reference to their description and suppliers' Invoice Nos., there was no reason left for the Customs to overlook the provision of para 6.6 of the EXIM Policy and deny the benefit to the appellant by mis-reading and mis-interpreting the Supreme Court's judgement in Kesoram Rayon's case. As both the EXIM Policy (Chapter 6, para 6.6) as well as Customs Notification No. 49/2000-Cus dated 27.4.2000 specifically provide for the eventuality of an EPCG licence being issued, after an import but prior to clearance of the goods by the Customs, as is apparent from para 6.6 of the EXIM Policy and para 1 of the Notification which required EPCG licence to be produced for debit by the proper officer of the Customs "at the time of clearance". The expression "cleared from the Customs" and "clearance" appearing in the EXIM Policy and the Notification had to be constructed as referring to either the date of out of charge order passed under section of the Notification which requires EPCG licence to be produced for debit by the proper officer of the Customs "at the time of clearance". The expression "cleared from the Customs" and "clearance" appearing in the EXIM Policy and the Notification had to be constructed as referring to either the date of out of charge order passed under section 47/68 of the Customs Act, 1962 or the date when the goods were physically removed from the Lock & keys from the Control of Customs in the Warehouse. In the present case neither of the two events had taken place as the goods had continued to remain where they were (and therefore had not been physically removed) and also, no out of charge order under section 47 or section 68 had been passed by the proper officer permitting the importer to take charge & cash away the goods. The lower authorities have failed to appreciate and take note of the Supreme Court's judgement in the case of Pratibha Processors v. Union of India, 1996 (88) ELT 12, wherein the Hon'ble Supreme Court, while dealing with a

case where an Advance Licence had been produced after the expiry of the bond period, had not only upheld duty-free clearance but also held that no interest could be charged thereon.

e) Board Circular no. 3/2003 dated 14.1.2003 had completely changed the position with regard to the status of goods remaining in a Warehouse after the expiry of the Warehouse period. This Circular acknowledge that such goods continued to be Warehoused goods and even permitted Export of such goods without payment of duty under Section 69 of the Customs Act or an order had been issued by the Customs authorities demanding duty, interest and other charges on such goods upon expiry of the initial or extended period of warehousing. The Board had directed the Chief Commissioner to extend the period of warehousing to enable the importer to export the goods within the permitted period of Warehousing. Since the duty amount was nil, the interest thereon would also be nil as held by the Hon'ble Supreme Court in the case of Pratibha Processors v. Union of India, 1996 (88) ELT 12. It was submitted on behalf of the appellant that due to passage of time, the equipments needed to be refurbished/repared and for the said purpose, appellant to be permitted to export the goods in terms of the above Board Circular for the purpose of refurbishing the equipments and it may be held that in such an eventuality, no duty or interest would be required to be paid by the appellant on the said goods. It was also prayed that to enable such export to take place without payment of any duty or interest, the warehousing period and the warehousing licence may be directed to be extended; we find no reason to refuse grant of the prayers made.

3) In view of the findings arrived at, the prayer for Export of the consignment without insisting on duty/interest could be effected as per the Board Circular no 3/2000 dated 14.1.2003, ordered accordingly & appeal disposed off.

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