Deputy Commissioner of Vs. Dimexon

Deputy Commissioner of Vs. Dimexon

SooperKanoon Citation : sooperkanoon.com/69351

Court : Income Tax Appellate Tribunal ITAT Mumbai

Decided On : Feb-05-1998

Judge : H Srivastava, M Bakshi

Appellant : Deputy Commissioner of

Respondent : Dimexon

Judgement :

1. We find it convenient to dispose of these two appeals of the revenue and two cross-objections of the assessee, for assessment years 1987-88 and 1988-89, involving common issues, by this consolidated order.

3. The common issue involved is relating to the deduction of redemption fine imposed by the Customs Authorities for clearance of certain goods imported by the assessee.

4. The relevant facts, relating to this issue, briefly stated, are that the assessee is a Diamond Exporter. They had applied for grant of Export House Certificate and Additional Import Licence. However, the application was rejected. Similarly, other Diamond Exporters had also applied for grant of Export House Certificates and Additional Import Licences. All such applications were rejected and thereafter representation was made to the Government jointly on behalf of the Diamond. Exporters. Pending the representation of the Diamond Exporters with the Government, writ petitions were filed by the Diamond Exporters in the Bombay High Court and Delhi High Court. The respective High Courts held that the

Diamond Exporters were legally entitled to grant of Export House Certificates and consequently additional Import Licences. Against the order passed by the Bombay High Court, the Union of India preferred an appeal before the Supreme Court and the latter in its order dated 18-4-1985, in civil appeal No. 1423 of 1984, directed the Union of India to issue necessary Export House Certificates/Additional Import Licences for the year 1978-79, within three months from the date of the order, Le., from 18th April 1985. The Import Licences so granted was to be valid for all items except items which are specifically banned under the prevalent Import Policy at the time of import. The order further provided that the Diamond Exporters shall be entitled to import all items whether canalised or otherwise in accordance with the relevant rules. In pursuance to the - order of the Supreme Court, the assessee was granted Export House Certificate as also Import Licence bearing No. P 3069896, dated 26th July, 1985 for Rs. 4,34,52,005. Under the said Licence, the assessee was entitled to import all items excluding those items which were banned in the Import Policy for the period 1978-79. In accordance with the said Licence, the assessee established two letters of credit on 6th November, 1985, on the understanding that the items for which L/Cs had been established could be validly imported.

5. However, M/s. Rajprakash Chemicals Ltd. and another filed a writ petition in Bombay High Court urging that the items listed in Appendix 3 (List of Limited Permissible Imports) in Import Export Policy for the period 1985-88 should be treated as banned items and that those items should not be allowed to be imported under the Additional Import Licences granted to the Diamond, Exporters. The Bombay High Court rejected the plea of M/s. Rajprakash Chemicals Ltd. appeal to the Division Bench of the same High Court was also rejected on 16-8-1985.

The Division Bench of the Bombay High Court held that banned item means items listed in Appendix 2, Part A and that items listed in Appendix 3 could not be equated with the banned items. However, M/s. Rajprakash Chemicals Ltd. preferred an appeal before the Supreme Court and the latter vide order dated 5-3-1986 in CA No. 4978 of 1985 reversed the order of the Division Bench of the Bombay High Court. After the judgment of the Supreme Court the view of the

Government of India in respect of the canalised items was that these could still be imported by holders of Additional Import Licences. There is a reference in the order of the CIT (A) to the letter dated 14th/15th May, 1986 of the Principal Collector of Customs and Central Excise, Bombay, to the Federation of Indian Export Organisation, in which it has been stated that a decision had been taken in view of the Supreme Court orders that the canalised items shall be cleared unconditionally against Additional Import Licences. It was claimed by the assessee that they had opened two L/Cs in respect of these canalised items which were legally allowed to be imported as per the stand of the Government. However, after the L/Cs were opened, but before the goods could be cleaved, there came another judgment of the Supreme Court in the case of Godrej Soaps (P.) Ltd., where it was clearly held that only those canalised items could be imported which are permitted specifically to he imported under the policy. This judgment is dated 12-9-1986.

6. In view of the law laid down by the Supreme Court, the goods imported by the assessee were confiscated. However, under section 125 of the Customs Act, the assessee was given an option to pay a fine of Rs. 2,80,000 and Rs. 21,50,000 for assessment years 1987-88 and 1988-89 respectively, in lieu of confiscation of goods. The assessee paid the redemption fine, on the basis of which the imported goods were cleared.

It is claimed by the assessee that goods had been sold on the high sea and the payment of fine was the liability of the buyers. It is also claimed that the assessee has recovered the cost from the buyers and, accordingly, there is in effect no deduction claimed.

7. However, the Assessing Officer made the addition on the ground that the amount of Rs. 2,80,000 and Rs. 21,50,000 for assessment years 1987-88 and 1988-89 had been paid by the assessee as a penalty for infraction of law. He has placed reliance on the decision of the Bombay High Court in the case of T. Khemchand Tejomal [1986] 161 ITR 492/27 Taxman 72.

8. The CIT (A) has held that when the assessee opened the L/Cs for canalised items, these items were legally allowed to be imported as per the decision of the Bombay High Court. These items were also legally allowed to be imported as per

the understanding of the Government of India. In this connection, reference has been made to the affidavits filed by the two Deputy Chief Controllers of Imports and Exports, before the Court, stating that the items in question were legally allowed to be imported. The CIT(A) has further held that "it is a different matter that the decision of the Bombay High Court has later on been reversed by the Supreme Court". He has also referred to the letter dated 14th 15th May, 1986, issued by the Principal Collector of Customs, Central Excise, Bombay to the Federation of Indian Exports Organisation regarding the decision for allowing canalised items to be imported against Additional Import Licences. It was accordingly, held by the CIT(A) that the assessee had acted in accordance with the clarification given by the Government of India and as such it cannot be said that they had violated the provisions of law. Applying the law laid down by the Bombay High Court in the case of CIT v. Pannalal Narottamdas & Co. [1968] 67 ITR 667, it was held by the CIT(A) that redemption fine paid is by way of additional cost for the goods purchased and the amount has got to be regarded as expended wholly and exclusively for the purpose of business. The CIT(A) has also taken note of the decision to the Supreme Court in the case of B. Vijay Kumar & Co. where directions have been issued that the redemption fine should be refunded. It has been held that as and when the redemption fine is remitted to the assessee, the amount should be subjected to tax in the year of refund.

9. The revenue is in appeal before us against the decision of the CIT(A). The learned Departmental Representative has placed reliance on the decision of the Bombay High Court in the case of T. Khemchand Tejomal (supra) as also on the following decisions :- (1) Garden Silk Wvg. Factory v. CIT [1994] 207 ITR 394/74 Taxman 600 (Guj.) (2) Rohit Pulp & Paper Mills Ltd v. CIT [1995] 215 ITR 919/79 Taxman 168 (Bom.) It was contended that since the penalty has been imposed for breach of Customs Act, the deduction is not permissible.

10. The learned counsel for the assessee, on the other hand, sought to support the order of the CIT(A). It was further contended that there is a distinction between the levy of penalty and imposition of fine under the Customs Act. Reference was made to section 111 of the Customs Act, which provides for confiscation of goods. Section 125 of the Customs Act gives an option to pay the fine in lieu of

confiscation. Section 112 provides for penalty and prosecution. Reliance was placed on the decision of the Madras High Court in the case of CIT v. N. M.Parthasarathy [1995] 212 ITR 105 and that of the Himachal Pradesh High Court in the case of Khushal Singh Subhash Chander v. CIT [1997] 228 ITR 608 in support of the contention that when the assessee has acted in good faith there is no question of disallowance on the ground of having contravened the provisions of the law. It was further contended that the decision of the Bombay High Court in the case of T. Khemchand Tejomal (supra) is distinguishable on facts as that was a case of penalty, whereas the decision of the Bombay High Court in the case of Pannalal Narottamdas & Co. (supra) is directly on the point involved in this case. Distinguishing the other decisions cited by the learned DR, it was contended that the decision in the case of Garden Silk Wvg.

Factory (supra) was in regard to penalty imposed under section 112 and, therefore, it is distinguishable, as in the case of the assessee a fine was paid in lieu of confiscation. In the case of Rohit Pulp & Paper Mills Ltd. (supra), according to the learned counsel, the goods had been imported without having a valid licence, whereas in the case of the assessee it was believed that the goods could be imported and in fact the Government also believed so until the decision of the Supreme Court which was subsequent to the date of opening of the L/Cs. It was, accordingly, contended that the appeals of the revenue may be dismissed.

11. We have given our careful consideration to the rival contentions.

Under section 111 of the Customs Act, 1962 the goods imported can be confiscated if the import is in violation of the Act. Under section 112 of the Customs Act, a penalty can be imposed upon the importers.

Section 125 of the Customs Act, 1962, however, provides for a fine in lieu of confiscation of goods under section 111. In this case, the assessee had paid fine in lieu of confiscation of goods. The issue before us, in this case, is as to whether the fine paid by the assessee in lieu of confiscation is a permissible deduction in computing the income from business.

If we were not to consider the peculiar facts and circumstances of this case, then the issue had to be decided against the assessee on the authority of the jurisdiction High Court decision in the case of Rohit Pulp & Paper Mills Ltd. (supra). In this case also there had been confiscation of goods under section 111(d) of the Customs Act and a fine had been paid under section 125 of the Customs Act, in lieu of confiscation. Their lordships of the Bombay High Court held that payment was in the nature of penalty and, accordingly, not allowable as a deduction under section 37 of the Act.

12. However, there is another decision of the Bombay High Court in the case of Pannalal Narottamdas & Co. (supra) where their lordships have held that if the assessee had acted in good faith and had to pay the penalty in order to clear the goods, the disallowance would not be warranted.

13. When the reconcile the two decisions of the Bombay High Court referred to above, the principle that emerges is as under :- In cases where the penalty/fine has to be incurred because of the fault of the assessee himself, as for instance for the reason of his having carried on his business in an unlawful manner or in contravention of certain rules and regulations, the penalty/fine paid by the assessee for such conduct thereof could not be regarded as wholly laid out for the purpose of the business, because the incurring of the said expenses has not been necessitated by the business but by the conduct of the assessee in trying to carry out the business in an unlawful manner.

However, if on the other hand the assessee has acted in good faith without any intention of contravening the provisions of law and in the course of the business any expenditure is incurred towards the cost of goods by way of fine in lieu of confiscation, such expenditure would fall within the ambit of the expenditure wholly laid out for the purpose of the business.

14. Let us consider the case of the assessee in the light of the above principles. It is not disputed in this case that the assessee had opened the L/C for the import of such goods which were believed legally permissible to be imported. Even at the cost of repetition we would narrate the relevant facts which are decisive for the issue involved in this case. The assessee had been granted Export House

Certificate and Additional Import Licence as a consequence of the decision of the Supreme Court order dated 18-4-1985 in civil appeal No. 1423 of 1984.

The Import Licence so granted to the assessee was valid for all items except which were specifically banned under the prevalent Import Policy at the time of import. The order of the Supreme Court provided that the Diamond Exporters shall be entitled to import all items whether canalised or otherwise in accordance with relevant rules. In accordance with the said Import Licence, the assessee established two letters of credit on 6th of November, 1985, on the understanding that the items for which L/Cs had been established could be validly be imported.

However, M/s. Rajprakash Chemicals Ltd. had filed a writ petition in the Bombay High Court urging that for the period 1985-88, items listed in Appendix 3 (List of Limited Permissible Imports) should be treated as banned items and that these items should not be allowed to be imported under the Additional Import Licences granted to the Diamond Exporters. The Bombay High Court rejected the plea of M/s. Rajprakash Chemicals Ltd. appeal to the division bench of the same High Court was also rejected on 16-8-1985. The Division Bench of the Bombay High Court held that the banned item means items listed in Appendix 2, part A and that items listed in Appendix 3 would not be equated with the banned items. However, M/s. Rajprakash Chemicals Ltd. preferred an appeal to the Supreme Court and the latter vide order dated 5-3-1986 in C.A. No.4978 of 1985 reversed the order of the Division Bench of the Bombay High Court. Even after the judgment of the Supreme Court, the view of the Government of India in respect of canalised items was that these could be imported by the holders of Additional Import Licences. The assessee had opened two L/Cs on 6th November, 1985. However, by the time the goods were, imported, the Supreme Court in the case of Godrej Soaps (P.) Ltd. had decided that it is only those canalised items which are specifically permitted to be imported under the Import Policy which can be imported. In other words, as per the decision of the Supreme Court, the import of goods made by the assessee was not in accordance with the Import Policy. The judgment of the Supreme Court is dated 12-9-1986, when the L/Cs had been opened, as already pointed out, on 6th November, 1985. The facts stated above clearly establish that the assessee had no intention of violating the provisions of the Customs Act. It was only on the basis of the understanding of the law as per the decision of the Bombay High Court that the L/Cs had been opened and goods imported and in such circumstances the decision of the Bombay High Court in the case of Pannalal Narottamdas & Co. (supra), in our view, is applicable. We are, therefore of the considered view that the CIT(A) was justified in allowing deduction to the assessee in respect of the fine paid by the assessee on account of redemption fee in lieu of confiscation of goods. The order of the CIT(A) is thus upheld.15. In these circumstances, we do not consider it necessary to deal with the alternative contention raised on behalf of the assessee that the penalty had been paid on behalf of the buyers and, therefore, no disallowance could be made in the hands of the assessee.

16 to 23. [These paras are not reproduced here as they involve minor issues.