

Collector of Customs Vs. Sri Sarathi Studios (P) Ltd.

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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

Decided On : May-31-1994

Reported in : (1994)(73)ELT382TriDel

Appellant : Collector of Customs

Respondent : Sri Sarathi Studios (P) Ltd.

Judgement :

1.1 The respondents herein imported one No. Arriflex 35 111 Camera with accessories against capital goods allowed under OGL of ITC Policy 1984-March 1985. They filed an application for registration of their purchase order No. Nil dated 28-6-1984 under Project Imports (Registration of Contract) Regulations, 1965 for assessment under Heading 84.66 C.T.A., 1975. The respondents herein filed an application for registration on the ground that the existing unit of film production is for substantial expansion. The camera with accessories was needed for shooting of films both indoors and outdoors.

1.2 The original authority, namely, the Assistant Collector of Customs, denied the registration and consequently the benefit of Tariff Heading 84.66 on the ground that the film production unit of the respondents cannot be treated as an industrial plant inasmuch as an industrial plant envisages production of goods whereas no such production of goods takes place here. The activity of shooting of films cannot be considered as an industrial activity. The camera imported is in the nature of professional equipment. It is handy to move from place to place. This cannot be considered as an industrial plant contemplated under Heading 84.66.

1.3 On appeal before the lower appellate authority, the respondents herein succeeded. The said authority has come to a conclusion on the strength of evidence led by the respondents that film production unit of the respondents is considered as a factory ever since 1956; it had building and also equipments already installed for operation. It has also been stated that evidences have also been adduced that both the Government of India and the Government of Andhra Pradesh have recognised shooting of films and processing of films as a process of industrial activity. The said appellate authority has observed that it is also well-known that film industry is one of the largest employers of man power and had been recognised as a centre of industrial activity throughout the world. It was, therefore, held that the activity undertaken by the respondents is 'industry' for the purpose of lower assessment under Heading 84.66. Thus, the appeal of the respondents was allowed by the lower appellate authority.

2. The appellant-Collector in the grounds of appeal has urged that the imported goods i.e. 'Camera' is a professional equipment and is not any of the items mentioned in (a), (b), (c), (d) of Heading 84.66(i). The camera is not required for initial setting up of or substantial expansion of an existing unit of a specified industrial plant. The Collector has further urged that though Cinematographic Studio might be recognised as an industry by the Andhra Pradesh Government or as a factory under the Factories Act, 1956, still the Studio is not an industrial plant power project etc. specified under Heading 84.66. The studio equipment, camera, etc. are utilised not only by the owners for shooting their own films but are also hired out on rental basis for other producers of films. Thus the film studios belong to the category of 'Service Industries' like Five Star Hotels, Corporate Hospitals, Dubbing Theatres, etc. 'Service Industries' are not covered by the description 'Industrial Plant'.

3. Learned JDR, Shri S.K. Sharma for the Revenue in support of the appeal has reiterated the aforesaid grounds. He has relied on :-Sujatha International v. Collector.

4. Ld. Advocate for the respondents, on the other hand submits that the camera, the goods under consideration, converts raw film stock (unexposed films) into

exposed films. Both the raw material and the final product are liable to duty separately. Therefore, the imported goods are capital goods needed for production of goods i.e. exposed films. It, therefore, fully satisfies the description of 'Industrial Plant' according to the definition of the original authority and the appellant-Collector himself. He has further submitted that it is no longer in dispute that even 'Service Industries' were covered by the definition of 'Industrial Plant' and were given the benefit of concessional rate of Tariff Heading 84.66. He relies on (1) 1985 (21) E.L.T. 873 - Paras 3 & 4 [Satish Kumar Gael v. C.C.] and (2) 1985 (22) E.L.T. 68 - Paras 7 & 8 [Sarswati Stores v. C.C.].

5. We have carefully considered the pleas advanced on both sides. A film production unit is 'Industrial Plant' and produces films, a commodity tradable and marketable in the market. Therefore, there is no substance in the pleas for the Revenue that a film production unit does not produce any goods. It may be that at times the production unit is doing job work as well but this is so for all factories producing goods; they may be producing goods on their own account or on job work basis. There is no dispute in this case that the unit of the respondents is registered as a factory under the Factories Act. In that view, Sujatha International relied upon by the learned JDR is in favour of the respondents rather than the Revenue. In that case i.e. Sujatha International, benefit of Tariff Heading 84.66 was denied on the ground that till the time of importation of the goods the appellants' unit was not registered as a factory. This is not so in the instant case on the undisputed facts. Accordingly, we dismiss the appeal of the Revenue.

Sd/- 6. I have gone through the order prepared by my learned brother Shri P.C. Jain, Member Technical, however I could not persuade myself to agree to his findings.

7. In this revenue appeal, the Collector has contented, besides the ground brought out in the main order by my learned brother, that: i. Arriflex Camera imported by the appellant is a professional equipment for shooting of cinematographic films and is not any of the items mentioned in (a), (b), (c), (d) of Heading 84.66(i) of Customs Tariff Act, 1975 (as on 1-8-1985). The camera is not required for initial setting up of or substantial expansion of an existing unit of a specified: (6) Such

other projects as the Central Govt. may, having regard to the economic development of the country, notify in the official gazette.

8. It is also pleaded that the Hon'ble Tribunal in its Order No. 174/84 has held that the "Mini Colour Labs" are not entitled for the benefit of assessment under Heading 84.66 and that the ratio would squarely apply to this case. It is further pleaded that though cinematographic studio might be recognised as an industry by A.P. Govt. or as a factory under Factories Act, 1956, still the fact remains that the said studio is not an industrial plant, power project etc. specified under Heading 84.66(i)(1) to (5) nor has the Central Govt. notified the cinema studio as "such other project" having regard to the economic development of the country. It is also pleaded that cinematographic Film Studio does not belong to the class of industrial plant etc. specified under the Heading 84.66(i), which alone are eligible for assessment under the heading after registration of the contract under the Project Import (Registration of Contract) Regulations/1956. The imported item is Arriflex 35111 camera. Admittedly, it is not lent out for others on hire by the importers. This does not form the original project equipment, nor does it form the necessary plant as a (A) machinery, or fall under (B) instruments apparatus and appliances (C) control gear and transmission equipment or under (D) Auxiliary equipment as specified under Heading 84.66. It is better to reproduce the Tariff Heading 84.66 itself as below : (C) Control gear and transmission equipment, Auxiliary equipment, as well as, all components (whether finished or not) or raw materials for the manufacture of the aforesaid items and their components, required for the initial setting up of a unit, or the substantial expansion of an existing unit, of a specified : (6) Such other projects as the Central Government may, having regard to the economic development of the country, notify in the official gazette in this behalf: Provided these are imported (whether in one or in more than one consignment against one or more specific contracts, which have been registered with the appropriate Custom House in the manner prescribed by regulations which the Central Board of Excise and Customs may make under Section 157 of the Customs Act, 1962 (52 of 1962) and such contract or contracts has or have been so registered before any order is made by the proper officer of customs permitting the clearance for home consumption, or deposit in a warehouse of items, components, or raw-materials; (ii) All spare parts, other raw - materials (including

a) 40% Semifinished material), or consumable stores imported, as a part of a contract or contracts, registered in terms of sub-heading (i) provided the total value of such spare parts, raw-materials, and consumable stores does not exceed 10% of the value of the goods covered by sub-heading (i) and further provided that such spare parts, raw materials or consumable stores are essential for the maintenance of the plant or project mentioned in sub-heading (i).

(1) Engines and certain specified parts which fall abroad and are re-imported.

(2) Engines or certain specified parts sent abroad as a stand-by for replacement of a defective one and subsequently brought back to India in the same condition without being installed on an aircraft.

(3) Engines and certain specified parts lent by an Indian Company to a foreign company.

This concession will be admissible subject to such conditions and observance of such procedure as may be laid down by the Government of India from time to time." A clear reading of the above heading makes it clear that the imported camera does not fall in any of the items described in the Heading 84.66. The reasoning advanced for rejecting by the Id. Asstt. Collector is convincing and requires to be accepted. Further, the importer has not imported the camera, for initial setting up or for expansion of the project. The Heading 84.66 states that the project is required to be registered before the item is imported. This has also not been done by the importer. They have filed the application through their clearing agents for registration of their purchase order under the Heading 84.66 after the import has been done. Thus, the importer has not satisfied the specification and conditions specified under Heading 84.66 of Customs Tariff Act, 1975 and that they are not entitled for the said benefit. The larger bench in the case of *Toyo Engineering India Ltd. v. Collector of Customs, Bombay* as reported in 1994 (70) E.L.T. 769 (Tri.), has held that in para 25 "that in the absence of a specific contract covering the goods required for the initial setting up of the unit, the subject goods do not qualify for assessment under Heading 98.01". The larger Bench has clearly held in para 33 that the existence of a contract for the import of the consignments and the registration thereof in the Customs House prior to the clearance is SINE

QUA NON for classification under Heading 98.01 CTA...". The larger Bench has followed the judgment of Bombay High Court in the case of Subhash Photographies v. Union of India -1992 (62) E.L.T. 270 wherein it has been held in para 14 : "It has further been made clear that this Heading (98.01) would apply only to such goods which are imported in accordance with such regulations (Reference is to Project Import Regulations). In such a situation Heading 98.01 has to be read with Regulations framed under Section 157 of the Customs Act".

9. The above two judgments are clearly application to the facts of the case. In this present case, the importer has not registered the contract in Customs House prior to the importation and hence the benefit of the Heading 84.66 of Customs Tariff Act, 1975 cannot be extended to them. In the result, I order for allowing the appeal of the Revenue.

10. The following point/points arises for determination from the orders for consideration by the third Member.

Whether the appeal requires to be dismissed, as the importer has satisfied the conditions for assessment under Heading 84.66 CTA as held by Member (Technical) or whether the appeal is required to be allowed as the importer has not satisfied the conditions as stipulated in the said Regulations for assessment under Heading 84.66 CTA and also as per the reading of the said Heading, as held by Member (J) in his order.

11. The reference on the point of difference was posted for hearing on 21-4-1994 when Shri B.K. Singh, SDR appeared for the appellant - Collector of Customs, Madras. The respondent M/s. Sri Sarathi Studios Pvt. Ltd., Hyderabad were represented by Shri Ashok Grover, Advocate.

12. Shri B.K. Singh, the learned SDR stated that the matter related to old Customs Tariff Heading No. 84.66 relating to project import. The goods imported were movie camera for production of films. He submitted that the goods had been imported without reference to any project as such and that the photographic establishment could not be considered as an industrial plant for the purposes of Heading 84.66; further the importer had not fulfilled the regulation regarding

registration of imports. Only purchase order was submitted for registration and no contract as such was entered into with the suppliers. He referred to para 5 of the order of the learned Member (Technical) and contended that there was no evidence that the unit was registered as a factory.

The learned SDR referred to the Supreme Court decision in the case of Subhash Photographies v. Union of India, 1993 (66) E.L.T. 3 (SC) wherein it has been held that the project import regulation 1986 defining industrial plant so as to exclude service establishments like photographic studios from project import benefit were valid. Reliance was also placed on the Tribunal's decision in the case of Photo Visual, Calcutta v. Collector of Customs, Calcutta, 1984 (17) E.L.T. 443 (Tribunal) wherein it has been held that photographic establishment and photographic laboratories were neither an industry nor industrial plant/unit for the purposes of Heading No. 84.66 of the Customs Tariff Act, 1975. The learned SDR also referred to the Tribunal's decision in the case of Sujatha International as a project import and could be covered under Heading 84.66. The Tribunal had observed in that decision that mere placement of order, its acceptance, letter of credit etc. did not amount to a contract, and did not entitle the importer to the benefit under Heading 84.66 of the Customs Tariff Act, 1975 and that the benefit under Heading No. 84.66 was not admissible to photo colour laboratories.

13. Shri Ashok Grover, the learned Advocate stated that their photographic establishment was a factory and an industry; the import was under OGL and that when the photographic establishment came into existence no benefit of project import had been availed of. The date of registration of project import was 28-6-1984 while the project import regulations were of a later date. In this connection, he referred to the Supreme Court's decision in the case of Subhash Photographies v. Union of India, 1993 (2) SCALE 909 (Para 13). The goods have already been cleared after paying higher rate of duty.

14. In rejoinder, the learned SDR pleaded that the photographic establishment was not a plant. He also relied upon the Tribunal's decision in the case of National Newsprint and Paper Mills v. Collector of Customs, Bombay, 1987 (32) E.L.T. 153 (Tribunal) to show that by substantial expansion, what was contemplated was the

substantial expansion of a unit and not the substantial expansion of the production of unit.

15. I have carefully gone through the facts and circumstances of the case and have given my due thought and consideration to the submissions made by both the sides. Photo Visual, Calcutta v. Collector of Customs, Calcutta, 1984 (17) E.L.T. 443 (Tri.), the Assistant Collector of Customs, Madras had held that the unit of the importer could not be considered as industrial plant. Para 5 of the Assistant Collector's order is extracted below :- "I have gone through the records of this case and submissions made by Shri Sasi Bhusan, at the time of personal hearing. M/s. Sri Sarathi Studios Pvt. Ltd., are importing one camera with accessories for shooting of films. This cannot be considered as Industrial plant as described under Heading 84.66. The Customs, Excise & Gold (Control) Appellate Tribunal, New Delhi in their order No. 174/84-B published in Excise Law Times 443-Vol. 17 of 1984 (September issue) in the case of Photo Visual, Calcutta v. Collector of Customs, Calcutta 'Industry' has been defined in Chambers 20th Century Dictionary page 669 as "any branch of trade or manufacture". So manufacturing activity is an important indice to determine whether any particular establishment would be an industry. If there is no manufacturing activity or production, then it would not be an industry within the meaning of that term. "Plant" includes collection of machines and appliances grouped together in any workshop, factory or building.

Taking these two words together, it is manifest that an "industrial plant" envisages production of goods "machinery or plants" being used in that production." 17. The Collector of Customs (Appeals) had allowed the appeal on the ground that shooting of films and processing of films was an industry.

It is seen that it is the case of import of a camera. The import was without reference to any project. For the import, there was no contract. The application for registration of the purchase order was filed for the purposes of assessment after the import. It was pleaded by the importer that the camera was meant for production of films and that their film studio is an industrial plant. The camera was imported by a running concern and obviously it was not for initial setting. It also

appears that no item had earlier been imported under project import by the concern. By importing a single camera how the substantial expansion of the studio could be effected, has not been explained.

Even if the production of films could be taken as an industrial activity and film studio could be considered as a factory, it has to be seen whether import of a camera without reference to any project could be considered as a project import and could be covered under Heading 84.66 of the Customs Tariff. As referred to above, the import of a single camera could not help in substantial expansion of the existing unit, even if film studio/laboratory is taken as an industrial unit.

18. The learned Member (Judicial) in his order has extracted tariff entry No. 84.66 and has come to a finding that the imported camera did not fall in any of the items described in that heading. He has relied upon the larger Bench decision of the Tribunal in the case of *Toyo Engineering India Ltd. v. Collector of Customs, Bombay* as reported at 1994 (70) E.L.T. 769 (Tri.). The Tribunal in that decision has followed the judgment of the Bombay High Court in the case of *Subash Photographies v. Union of India*, 1992 (62) E.L.T. 270. *Sujatha International v. Collector of Customs* - 1989 (42) E.L.T. 413 (Tribunal), the Tribunal had held that the order placed, acceptance letter of credit etc. could not be taken as contract and that as contemplated in Heading 84.66 there should be some sort of a formal contract. It is also seen that the camera was not relatable to any particular project. In the case of *National Newsprint and Paper Mills Ltd. v. Collector of Customs, Bombay*, reported at 1987 (32) E.L.T. 153 (Tribunal), the Tribunal in paras 15 and 18 (of the order recorded by the then President) have held as under :- "Looking at the wording of the Tariff Heading No. 84.66 as it stood at the material time, it will be seen that it relates to machinery, etc., "required for the initial setting up of a unit, or the substantial expansion of an existing unit". What is contemplated is the substantial expansion of a unit, and not the substantial expansion of production of a unit. The intention behind this wording can be gauged from the reference to "initial setting up of a unit." What this contemplated was that a new unit should be set up. The concept of "substantial expansion of an existing unit" was complementary to the first part. Construed harmoniously, it would mean that it would apply to a case where there was already a unit, but an addition was made

on such a scale and of such a nature as would be comparable to the setting up of a new unit. Thus, if there were already two assembly lines, the setting up of a third assembly line would be in the nature of "a substantial expansion of an existing unit." 18. The order of the Tribunal in the case of Saurashtra Cement & Chemical Industries Limited is an authority for holding that where imports are only for modernisation and replacement of an existing plant without expansion of capacity, the concession under Heading No. 84.66 would not apply. It has also been pointed out that the Tribunal's order in this case has been upheld by the Hon'ble Supreme Court. The learned Consultant for the appellants had argued that the Tribunal's decision in the case of Punjab State Electricity Board 1987 (27) E.L.T. 432 was in their favour. It should be noted that in that case the article imported, namely a vehicle for transporting 100 MVA transformers, was held as not qualifying for assessment under Heading No. 84.66. It was held, firstly, that the vehicle was not "auxiliary equipment" within the meaning of the Heading; and secondly, that even if it was considered to be so, it was not relatable to any particular project and therefore, not eligible.

Shri Kohli's argument is that in the present case the twin flo refiner was relatable to a particular project. This has not been denied, but that does not mean that the decision in the case of Punjab State Electricity Board gives any support to his case.

Certainly, the Tribunal did not say in this case that anything which was relatable to a particular project would qualify for assessment under Heading No. 84.66." 20. Taking all the relevant considerations into account, I agree with the learned Member (Judicial) that the benefit of the Heading No. 84.66 of the Customs Tariff Act, 1975 cannot be extended to the respondent and that the appeal filed by the Revenue is required to be allowed.

Sd/-

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