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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

Decided On : Dec-06-1994

Reported in : (1995)(77)ELT403TriDel

Appellant : Jaln Studio

Respondent : Collector of Customs

Judgement :

1. The above application has been filed in terms of Section 130(1) of the Customs Act, 1962 for reference of following questions of law purporting to have arisen out of final order No. A-655/94-NRB, dated 13-7-1994: (1) Whether in the light of its finding that the Video projectors in question are indeed capital goods as far as the appellants are concerned, the Appellate Tribunal in the facts and circumstances of the case, was correct in holding that the import of the Video projectors was not covered by the import licences tendered by the appellants? (2) Whether in the light of its finding that the Video projectors in question are capital goods and in the light of the undisputed position that the items in question are not covered by Appendix 8 of the Import Export Policy 1988-91 and are not office machines, the Appellate Tribunal was right in its conclusion that the import of the Video projectors were not covered by the flexibility clause of Para 177(2) of the Import Export Policy 1988-91 (3) Whether the Appellate Tribunal was right in its conclusion that since the Video projectors are covered by SI No. 145 or 148 of Appendix 2B of the Import Export Policy 1988-91, they cannot be covered by the flexibility clause of Para 177 (2) of the Import Export Policy 1988-91? (4) Whether the Appellate Tribunal was right in

relying upon para 45 of the Import Export Policy 1988-91 to conclude that the Video projectors cannot be imported under the flexibility clause of Para 177(2) of the Policy? (5) Whether the Appellate Tribunal was right in its assumption and conclusion that the letter dated 12-11-1989 of the Joint Chief Controller constitutes an interpretation of the Policy as mentioned in Para 24(i) as final and binding? (6) Whether the Appellate Tribunal was right in law in relying upon Para 24(i) of the Import Export Policy 1988-91 and to be bound by the said clarification dated 12-11-1989 of the Joint Chief Controller? (7) Whether the Third Member of the Appellate Tribunal hearing the difference of opinion was not required under the law to pass a speaking order on all the issues arising before him? The applicants used Television and Video technology for disseminating information and broadcasting for promoting health, preventing diseases, etc. and setting up proper studios with technical facilities. The studios would produce health and family planning Video films which would be displayed/telecast in rural areas with the aid of mobile Video vans fitted with all necessary equipment like Video Projector, Video Cassette recorder etc. To meet the requirements of 24 number of Video projectors at a total value of Rs. 10 lakhs, the applicants obtained REP licence which carried identical endorsements to the effect that the licence was valid within its overall value for import of admissible items upto different CIF values as per Para 175 read with Para 177 of the Import Export Policy 1988-91.

3. The Customs Department raised an objection to the clearance of Video Projectors in question covered under this application. In the meanwhile, vide letter dated 8-11-1989, the Assistant Collector of Customs wrote to the office of the CCI & E seeking clarification as to whether the Video Projectors are non-OGI capital goods and whether the benefit of para 177(2) of the Import Policy 1988-91 could be allowed to the applicants. The JCCI&E clarified that the importer should be called upon to produce relevant evidence of approval of the expansion 'programme' by the Government with a mention of Video Projectors as capital goods.

4. Based upon this clarification, a show cause notice dated 3-3-1989 was issued proposing confiscation of the Video projectors as well as proposing penal action. The Adjudicating Authority by order dated 4-5-1990, ordered confiscation of the

Video projectors with option to redeem the same on payment of a fine of Rs. 5 lakhs and further imposed penalty of Rs. 25,000/- on the applicants. In the appeal before the Tribunal, the applicants inter alia submitted that the Video projectors in question are capital goods and the total value of the import does not exceed Rs. 10 lakhs per licence and hence all the terms and conditions stipulated in Para 177(2) of the relevant Import Policy are fulfilled and therefore, the import is covered by specific licence. The further contention of the applicants was that the clarification of the CCI&E runs contrary to the express provisions of para 177(2) and hence it cannot prevail over the statutory provision contained in the Import Policy.

5. The learned Member (Technical) held that even conceding that the Video Projectors are capital goods as contended, as these are not covered under OGL and restricted, they cannot be imported under the flexibility clause and accordingly, he upheld the order of the Collector and rejected the appeal. On the other hand, the learned Member (Judicial) held that the imported goods were non-OGL capital goods entitled to clearance in terms of Para 177(2) of the relevant Policy, and proposed setting aside the impugned order and allowing the appeal. The Difference of Opinion was heard by the Hon'ble President who agreed with the findings of the Member (Technical) and so the appeal was dismissed by a majority view. Hence this application.

6. Shri V. Sridharan, learned Counsel submits that in the face of the admitted position that the Video projectors in question are definitely capital goods as far as the applicants are concerned, the Tribunal has erred in law in holding that the import thereof was not covered by the Import licences tendered by the applicants. He submits that the question as to whether the goods are covered by the flexibility clause of Para 177(2) of the 1988-91 Import Policy, is a question of law requiring reference as it is a question of interpretation of the relevant provisions of the Import Policy. He refers to the decision of R.D. Electronics v. Collector of Customs reported in 1992 (62) E.L.T.781 wherein the Tribunal has held that the restrictions placed in terms of Para 124 (which is similar to Para 108 of the 1988-91 Policy for Video Software) of the 1990-93 Import Policy regarding office machines are not applicable to clearance of Fax machines against Exim Scrips (previously called

REF licence) in terms of Para 195(A) [which correspond to Para 177(2) of the 1988-91 Policy]. The learned Counsel submits that the ratio of this decision squarely applies to the facts of this case and therefore, prays for reference of the questions of law as framed.

7. Shri M.M. Mathur, learned Jt CDR while opposing the Reference application, contended that Para 177(2) of the 1988-91 Policy is governed by the over-riding provision of Para 108 which places certain restriction on import of Video Software and therefore, the import of Video projectors was not permissible under the flexibility clause of the Policy. He submits that what the applicants are seeking is a review of the order of the Tribunal which has considered every aspect in detail and this is not permissible in law. Lastly, no question of law arises out of the order of the Tribunal as it is based entirely on appreciation of evidence and findings of fact based upon appreciation of evidence, cannot form the subject matter of a Reference application.

8. We have heard both the sides and carefully considered their submissions. We agree with the learned Counsel that interpretation of the Import Policy is involved in the matter. One of the key issues to be determined is whether the Para 177(2) of the relevant Import Policy is to be read independent of Para 108 or both are to be read together and a harmonious construction given thereto. Interpretation of a Policy is a question of law as held by the Tribunal in the case of Collector of Customs v. Amar Rolling Flour Mills, 1990 (47) E.L.T. 122.

Accordingly, we are satisfied that the question of law do arise out of the order of the Tribunal which required to be referred to the Hon'ble Delhi High Court. We propose to refer the following questions - (1) Whether in the light of its finding that the Video projectors in question are indeed capital goods as far as the appellants are concerned, the Appellate Tribunal in the facts and circumstances of the case, was correct in holding that the import of the Video projectors was not covered by the import licences tendered by the appellants? (2) Whether the Appellate Tribunal was right in its assumption and conclusion that the letter dated 12-11-1989 of the Joint Chief Controller constitutes an interpretation of the Policy as mentioned in Para 24(i) as final and binding 9. The draft Reference order is placed for

finalisation after hearing both the sides on 6-12-1994 at 2 p.m.

10. By Misc. order No. M-385/94-NRB, dated 4-11-1994 the Bench proposed forwarding of the following questions of law for reference to the Hon'ble Delhi High Court: - (1) Whether in the light of its finding that the Video projectors in question are indeed capital goods as far as the appellants are concerned, the Appellate Tribunal in the facts and circumstances of the case, was correct in holding that the import of the Video projectors was not covered by the import licences tendered by the appellants? (2) Whether the Appellate Tribunal was right in its assumption and conclusion that the letter dated 12-11-1989 of the Joint Chief Controller constitutes an interpretation of the policy as mentioned in Para 24(i) as final and binding 11. The draft Reference as proposed was placed for finalisation on 6-12-1994 when both the sides agreed that the questions as framed may be referred. Accordingly, the statement of the case as set out in the enclosed Misc. order is hereby forwarded to the Hon'ble Delhi Court.

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