(1991) 04 CAL CK 0018

In the Calcutta High Court

Case No : Constitutional Writ - Civil Rule No''s. 137 (W) - 138 (W) of 1979

Asiatic Oxygen Ltd. APPELLANT

Vs

Assistant Collector of Customs RESPONDENT

Date of Decision : 01-04-1991

Acts Referred:

Constitution of India, 1950 — Article 226
Customs Act, 1962 — Section 157
Customs Tariff Act, 1975 — Section 16
Project Import (Registration of Contract) Regulations, 1965 — Rule 4

Citation : (1993) 49 ECR 215 : (1992) 57 ELT 563

Hon'ble Judges : Ruma Pal, J

Bench : Single Bench

Advocate : S. Chakraborty and Padam Khaitan, for the Appellant;N.C. Roy Choudhry and Amitabha Dutta, for the Respondent

Judgement

Ruma Pal, J.—The question involved in this case is whether the petitioner can avail of the concessional rate of duty under Heading of 84.66 of Section XVI of the Customs Tariff Act, 1975. The said Heading in so far as it is material read as follows :

84.66(i) all items of... 40%

***** ***** ***** (d) 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 :

1. Industrial plant:

***** ***** ***** 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 Central Board of Excise and Customs may make u/s 157 of the

Customs Act, 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.

Therefore in order to qualify for the concessional rate (i) the goods sought to be imported would have to be required for the initial setting up of the unit or for a substantial expansion thereof (ii) The contract under which the goods were to be imported would have to be registered with the appropriate Custom House in accordance with the regulation framed by the Central Board of Excise and Customs therefore.

2. The undisputed facts of this case are as follows.

The petitioner carries on the business of manufacturing diverse gases. In 1966 the petitioner started four new units for manufacturing gases at Bangalore, Bombay, Hyderabad and Rourkela (hereinafter referred to as the said units). The petitioner obtained Industrial Licences for that purpose. According to the petitioner the full licensed capacity of the said units could not be achieved at a time because they were unable to import the requisite number of gas cylinders. As a result from time to time they obtained import licences for the phased implementation of the licensed capacity of the said units.

3. In this case we are concerned with the import of 5000 empty gas cylinders for the said units. On 30th April, 1975 the petitioner''s application for import of the said empty gas cylinders was approved by the Ministry of Industry and Civil Supplies. The papers were then forwarded to the Chief Controller of Imports and Exports (CC & IE) New Delhi by the said Ministry. On 20th May, 1975 the petitioner applied to the Director General of Technical Development (DGTD), Government of India for making a recommendation to the CCI and E to make an endorsement on the petitioners'' Import licence to be granted by the CCI & E to the following effect.

"Project Import Licence assessable to Customs Duty under 72A of the Indian Customs Tariff."

It may be stated that 72A of the Indian Customs Tariff has been replaced by Heading 84.66 of the Customs Tariff Act, 1975.

4. By a letter dated 7th June, 1975 to the CCI & E, the DGTD recommended endorsement of the project import licence to be issued for the Import of the said empty gas cylinders under 72A of the Indian Customs Tariff. According to the petitioner the CCI and E issued a licence in favour of the petitioner for import of the said gas cylinders with the said endorsement. By a letter dated 2-8-1978 the CCI and E wrote to the petitioner stating that the licence had been endorsed for project import for assessment under Heading No. 84.66 of Section XVI of the Customs Tariff Act, 1975. It was also stated -

"A copy of the licence has been forwarded to the Collector of Customs, Calcutta, for such action as they deem fit"

In July 1978 the petitioner entered into a contract with a Japanese firm for supply of the said cylinders (hereinafter referred to as the said contract).

5. Under the cover of a letter dated 7/13-12-1978 the petitioner forwarded the necessary documents to the respondent No. l for registration of the said contract under the Project Imports (Registration of Contract) Regulations, 1965 (hereinafter referred to as the said Regulations). This was followed by reminders from the petitioner to the respondent No.l asking for registration of the said contract. By a letter dated 10-1-1979 the respondent No.l refused to register the said contract and as a result rejected the petitioner''s claim for assessment under Heading 84.66 of the Customs Tariff Act, 1975.

6. This application was moved by the petitioner in 1979 challenging the refusal of the respondents to register the said contract under the said regulations and praying for a direction on the respondents to assess the said cylinders under Heading No. 84.66 of Section XVI of the Customs Tariff Act, 1975.

7. On 18-1-1979 a Rule Nisi was issued as prayed. An interim order was also issued in terms of prayer (e) restraining the respondents from levying any duty on the import of the said cylinders except under the Heading 84.66 of the 1975 Act. The interim order was modified subsequently to the extent that the petitioner was directed to furnish a Bank guarantee in favour of the Collector of Customs for 60% of the difference between the concessional rate and the rate claimed by the Customs.

8. The petitioner has contended -

(1) The sponsoring authority for the import of the cylinders was the DGTD. Before recommending the endorsement on the licence to CCI and E the DGTD had satisfied itself in accordance with para 174 of the relevant Handbook of Import-Export Procedure. The language of para 174 was identical with Heading 84.66 for all material purposes.

(2) The petitioners'' project in respect of the said units had been approved under the Industries (Development and Regulation) Act, 1951 read with the Registration and Licensing of Industrial Undertakings Rules, 1952. The petitioners'' application had been scrutinized by the licensing committee which consisted of inter alia a representative of the Ministry of Finance under whom the respondents functioned.

(3) Under Rule 4 of the 1965 Regulations if the application for registration was in order the respondent No.l was bound to register the contract.

(4) The phrase ''initial installation'' must be read as meaning installation upto the licensed capacity. The object behind Heading 84.66 of the 1975 Act being to promote industrialization the heading must be construed in a manner to give effect to such object. Reliance has been placed on the decisions of the Supreme

Court in Commissioner of Income Tax, Amritsar Vs. Straw Board Manufacturing Co. Ltd., and in Tata Oil Mills Co. Ltd. Vs. Collector of Central Excise, in this connection.

9. The respondents on the other hand have argued.

(1) The phrase ''initial setting up'' must be construed with reference to the first commissioning. In other words in order that imports may qualify under Heading 84.66 they must be required at the beginning.

(2) The view of the respondent No.l was in any event not so unreasonable justifying interference under Article 226 of the Constitution.

(3) The CCI & E and DGTD were ''busy bodies'' who had no business to make any recommendation regarding the classification of the said goods under the 1975 Act. In any event the CCI & E had expressly left the matter to the discretion of the Customs Authorities to take action on the endorsement as they thought fit.

(4) The phrase ''initial setting up'' must be construed literally. There was no scope for reading "phased implementation" into the phrase. Reliance has been placed on the decision of the Supreme Court in Goodyear India Ltd., Gedore (India) Pvt. Ltd., Kelvinator of India Ltd. and the Food Corporation of India and Another Vs. State of Haryana and Another, in this connection.

10. I am unable to accept the contentions of the Customs Authorities for the following reasons -

11. Firstly, the phrase ''initial setting up'' has been wrongly construed by the Customs Authorities. The misconstruction has resulted from the Customs Authorities ignoring the meaning of the word ''setting up''. ''Setting up'' in my view in the context means to complete. This meaning finds support in the decision of Amritage v. Haigh reported in 9 T.L.R. 287.

12. Viewed in this light the phrase "initial setting up" is not inconsistent with phased implementation. It is not disputed that the cylinders were necessary for the initial functioning of the said unit, nor is it disputed that the cylinders to be imported were necessary for the said units to attain their full licensed capacity. It is also not disputed that the petitioners had been unable to import all the cylinders necessary for achieving it''s full licensed capacity at the beginning by reason of various constraints, financial and otherwise. If the petitioner had been in a position to import all the cylinders in 1966, the Customs Authorities by their own reasoning would have permitted their importation under Heading ''84.66''. It is illogical therefore to deny the petitioner the benefit of Heading ''84.66'' because the very same number of cylinders is being brought in stages.

13. Following the principle of construction elaborated by the Supreme Court in M/s. Goodyear''s case (supra) I hold that the language used in Heading ''84.66'' even strictly construed includes the setting up of a unit in stages for the first time.

14. Secondly the Customs Authorities cannot dismiss the recommendations and endorsement of the DGTD and the CCI & E as being "certificate of busy bodies". The certification was made pursuant to the import and export procedure prescribed by the Government of India and the relevant rules in this regard. The Customs Authorities are a department of the same Government. It is arbitrary on their part to put a construction on the phrase "initial setting up" different from the construction put by the other departments of the Government of India. It may be noted that the CEG AT in 1989 (19) ECC 187 held that in a case where the Deputy Chief Controller of Imports and Exports had interpreted a particular phrase in a particular manner, the customs authorities should also give the same interpretation to the same phrase for the purpose of Customs duty.

15. In another decision of the 1984 ECR 1345 it was held -

"These licences having been endorsed as Project Import, there was no reason for the Assistant Collector to deny the registration of the contract."

16. I also accept the contention of the petitioners that the obvious object behind Heading No. 84.66 was to promote industrialization. Therefore the Heading ''84.66'' must be construed liberally. As stated by the Supreme Court in the Straw Boards case (supra).

"It is necessary to remember that when a provision is made in the context of a law providing for concessional rates of tax for the purpose of encouraging an industrial activity a liberal construction should be put upon the language of the statute."

17. Furthermore para 4 of the Project Imports (Registration of Contract) Regulations, 1965 insofar as it is material provides as follows -

"Assignment of number to the contract. - The proper officer shall, on being satisfied that the application is in order, register the contract by entering the particulars thereof in a book kept for the purpose."

18. There is no reason for reading the word "shall" used in the said regulation as meaning "may". On the other hand the construction of the word "shall" used in the regulation as casting a mandatory duty on the concerned authority to register the contract is in keeping with the pattern for effecting a project import. If the customs authorities were given a discretion, the elaborate procedure followed by the sponsoring authority and CCI & E in recommending and granting an import licence as being eligible for the benefit of the Heading ''84.66'' would be rendered a futile exercise.

19. For all these reasons I hold that the decision of the respondent No.l as contained in the letter dated 10th January, 1979 cannot be sustained. The decision is accordingly set aside. The Rule is made absolute. There will be no order as to costs.

