(2014) 01 DEL CK 0181

In the Delhi High Court

Case No : CUSAA 10 of 2013

Commissioner of Customs APPELLANT

Vs

ESPN Software Ltd. RESPONDENT

Date of Decision : 13-01-2014

Acts Referred:

Customs Act, 1962 — Section 111
Foreign Trade (Development and Regulation) Act, 1992 — Section 3(3)

Citation : (2014) 309 ELT 685

Hon'ble Judges : S. Ravindra Bhat, J;Rajiv Sahai Endlaw, J

Bench : Division Bench

Advocate : Satish Kumar, Advocate for the Appellant

Judgement

1. C.M. Appl. 19998/2013 (condonation of delay): Allowed, subject to all just exceptions.

CUSAA 10/2013

The appellant, i.e., the Department of Customs claims to be aggrieved by an order of the Central Excise and Sales Tax Appellate Tribunal (for short CESTAT), dated 2-5-2013 2013 (293) E.L.T. 535 (Tri.-Del.) contending that the said Tribunal incorrectly appreciated the facts and circumstances of the present case and upset the findings of the Commissioner that the import licence issued in the present case was invalid.

Briefly, the facts are that the respondent (hereafter referred to as "importer") at the relevant time imported goods valued at Rs. 6,46,73,363/- claiming that they were classifiable under Headings 8529 and 8543 of the Customs Tariff Act. Eventually, these were held to be falling under Heading 8528 and so dealt with. The bone of contention in the present case is as to the determination of the Tribunal that the importer had produced the relevant licence after the import.

2. The import in the present case was made during the period 17-7-1996 to 13-2-1997. Apparently, the importer did not possess the licence but had relied

upon letter written to the Director General of Foreign Trade (for short DGFT) for clarification as to whether licence was required; the letter dated 11-2-1995 was relied upon for this purpose. More importantly, the DGFT''s clarification of 22-2-1996 that the said goods are freely importable was also pressed into service. The matter was adjudicated at different stages and also remanded several times.

3. Eventually, the Commissioner by his order-in-original dated 9-5-2012 upheld the show cause notice issued to the importer concluding that since the importation was of prohibited goods, necessary and consequential action in terms of provisions of the Customs Act, i.e., Section 111 was called for.

4. The importer''s appeal was allowed by the CESTAT which pertinently held as follows:-

"5. We have considered the submissions from both the sides and perused the records. In this case, the appellant prior to making the import of the goods, in question, had sought clarification from DGFT on the point as to whether these goods are freely importable. It is not disputed that in response to the appellant''s query, the DGFT vide letter dated 11-2-1995 had clarified that the decoders of model CDE 2002 DMAC are covered by Sl. No. 27 of the IP Circular dated 5-8-1992 and are freely importable. Though in terms of para 4.13 of the relevant foreign trade policy, if any question, or doubt arises in respect of the interpretation of any provision contained in this policy or regarding classification of any item in the ITC (HS) Handbook Vol. 1 and Handbook (Vol. 2), the said question or doubt shall be referred to the DGFT whose decision thereon shall be final and binding. However, in spite of clear provisions of Exim Policy and the opinion of the DGFT, the Customs Department still insisted on import licence and released the goods only against the ITC bond for full value of the goods and bank guarantee for Rs. 2.20 crores. We also find that even before the issue of show cause notice the bank guarantee was encashed. We fail to understand why this was done even before the matter had been adjudicated.

6. In our view, irrespective of the merits of the department''s view point, once the import licence has been issued by DGFT specifically covering the goods imported by the appellant, the customs department cannot challenge the DGFT''s power to issue the licence and hold the licence as invalid, as para 4.24 of the Exim Policy specifically provides that the goods already shipped or arrived in advance but not cleared from the customs, may also be cleared against import licence issued subsequently. In this case, the goods had been allowed to be cleared against ITC bond and bank guarantee and once import licence has been issued specifically covering the goods imported, the bond and bank guarantee have to be released unconditionally. The impugned order, therefore, is contrary to the provisions of the law and is absurd. The same is, therefore, set aside. The appeal filed by the appellant is allowed with consequential relief. As regards the Revenue''s appeal, since the confiscation of the goods is not sustainable, there is no merit in the same and hence the same is dismissed."

5. This Court has considered the submissions. Learned counsel for the appellant relies upon Section 3(3) of the Foreign Trade (Development and Regulation) Act, 1992 to say that the independent powers of customs authorities are preserved and that the validity of the licence issued at a later point of time despite the requirement at the time of importation can be gone into legitimately by the Customs authorities. It was submitted, therefore, that the view taken by the DGFT was not feasible and that the Customs authorities ought to have been permitted to take further action and pursued itself to its logical conclusion.

6. In the facts of this case, it is not disputed that on 11-2-1995, the importer sought clarification from the DGFT as to the necessity of possessing the import licence. Concededly, the DGFT clarified that no such import licence was required. On that understanding, the goods in question were imported. It is not in dispute that the goods were cleared after they were classified under Heading 8528, in tune with the Supreme Court''s judgment in Commissioner of Customs, New Delhi Vs. C-Net Communication (I) Pvt. Ltd., . In these circumstances, the insistence of the Customs authorities that they should have their pound of flesh despite the fact that the culpability of the importer is not apparent, seems to this Court, an insistence on hyper technicalities with a view to asserting power. In effect what the Customs authorities are contending is that they do not agree with the issuance of licence by the DGFT which covered the said import, and that they could still treat the goods as invalidly brought in and take punitive action. Having regard to the totality of facts and circumstances, this Court is of the opinion that no question of law arises for consideration. The appeal is accordingly dismissed.