(2013) 12 AHC CK 0082

In the Allahabad High Court

Case No : Central Excise Appeal No. 4 of 2012

Commissioner of Customs APPELLANT

Vs

Sri Krishna Singh Garbyal and Others RESPONDENT

Date of Decision : 18-12-2013

Acts Referred:

Citation : (2014) 303 ELT 525 : (2014) 25 GSTR 431

Hon'ble Judges : Satish Chandra, J;Rajiv Sharma, J

Bench : Division Bench

Judgement

Dr. Satish Chandra, J.—The present appeal has been filed by the appellant-Department u/s 130 of the Customs Act 1962 against the judgment and order dated July 14, 2011 passed by the Customs, Excise and Service Tax Appellate Tribunal (CESTAF) in Appeal Nos. C/26 to 28/ 2008-CU (DB). On December 5, 2013, this court has admitted the appeal on the following substantial questions of law:

1. Whether the learned Tribunal has rightly held that the respondents hereto have fulfilled all the conditions of exemption Notification No. 38/1996-Customs, dated July 23, 1996 while importing the seized silk inasmuch as the Ministry of Commerce letter OM No. 2/9/2005-FT (NEA), dated May 2, 2005 has clarified that exemption notification is guided by the memorandum of understanding (MOU)/trade treaty/ instructions/clarification?

2. Whether the learned Tribunal is justified in holding that the dispute in the appeal can be resolved without making any reference to the fact as to whether M/s. Krishna Enterprises is the owner of the goods or he is a dummy importer on behalf of the M/s. Elegant Industries and as to whether the import was made as border trade?

2. The brief facts of the case are that the assessee, M/s. Krishna Enterprises, is a proprietary concern of Shri Krishna Singh Garbyal, who had imported two consignments of raw silk from China and filed bills of entry dated September 2,

2005 and October 3, 2005 with the customs authorities at Gunji land port to claim of exemption from customs duty, in terms of Notification No. 38/1996-Customs, dated July 23, 1996. But the same was not allowed by the assessing officer as well as the first appellate authority. However, the Tribunal has allowed the claim of the assessee. Being aggrieved, the Department has filed the instant appeal.

3. With this background, Shri Rajesh Singh Chauhan, learned counsel for the Department submits that the said notification exempts specified goods including raw silk, when imported from China to India through Gunji in Pithoragarh District, Uttarakhand, through specified Tibet land route. He also read out the Memorandum between the Government of India and China, where the provision was made between the Government of the Republic of India and the Government of the People''s Republic of China to establish border trade markets at a few location including Gunji in Pithoragarh District. In the said Memorandum, it is mentioned that:

With a view to facilitating the visits of persons engaged in border trade and the exchange of commodities and means of transportation, the Government of the Republic of India and the Government of the People''s Republic of China have decided that Lipulekh (Qiangla) be the border pass for the entrance of the said persons, commodities and means of transportation must be accompanied by valid papers for entrance and exit and shall be subject to the supervision and control of the authorities concerned of either country.

4. The learned counsel submits that exemption was allowed only on the border area for the benefit of tribals of the area, but in the instant case, the goods were brought to Delhi. M/s. Krishna Singh Garbyal, proprietary of M/s. Krishna Enterprises, in his statement recorded on October 21, 2005 stated that his firm was established in July, 2005 only. The raw silk was made available to him from Tibet through Shri Ajeet Kumar Gupta, proprietor of one M/s. Elegant Industries, Delhi, who managed the transaction. The profit which earned was shared equally between the firms. Earlier, Shri Ajeet Kumar Gupta, proprietor, M/s. Elegant Industries has filed a writ petition at Delhi, as mentioned in the Tribunal order (paragraph 5). On May 19, 2006, a search was conducted at the premises of M/s. Elegant Industries and also at the residential premises of Shri Ajeet Kumar Gupta. He submits that the raw silk was brought to Delhi. The entire financial investment was made by M/s. Elegant Industries, who has ultimately sold the raw silk in the market. M/s. Krishna Enterprises is only a dummy importer, so the excise duty is leviable. Lastly, he made a request to uphold the order passed by the assessing officer.

5. On the other hand, Shri Prem Ranjan Kumar, the learned counsel for the assessee-respondents, has justified the impugned order. He has drawn the attention to the letter dated September 13, 2005 written by the Commissioner of Customs (Preventive), to the Joint Secretary (Custom), pertaining to "Duty-free import of raw silk through land customs station Gunji on Indo-China border",

where the notification dated November 21, 1994 was clarified as under:

(1) In Notification No. 63/1994-Customs (N.T.), dated November 21,1994 as amended issued u/s 7 of the Customs Act, 1962 (52 of 1962) there is no clause specifying the nature of trade between India and China and category of persons on both side eligible to carry on trade. Absence of any specific requirements should amount to that all importers irrespective of their place of residency in India are eligible to import through L.C.S. Gunji.

(2) Also in Notification No. 38/1996-Customs, dated June 23, 1996 exemption of duty of customs leviable thereon under the First Schedule to the Customs Tariff Act, 1975 and additional duty of customs leviable thereon u/s 3 of the Act is provided, but here also nature of trade or any other condition in this regard has not been mentioned. Absence of any specific requirements should therefore also amount to that all importers irrespective of their place of residency in India are eligible to import through land customs station Gunji.

It may be appreciated that the directions contained in OM dated May 2, 2005 issued under F. No. 2/9/2005-FT (NEA) based on the memorandum of understanding of 1991 between India and China by the Department of Commerce. The Government of India that border trade is meant for local residents border on both the sides and a further elucidation of the same as tribal communities, living on either side of the border as contained in paragraph 3 of the Board''s letter dated August 12, 2005 cannot be implemented as such in the absence of any such express mention either of the two notifications mentioned above. The provisions of the memorandum of understanding of 1991 between India and China are at the most international obligations of India but are not enforceable without being incorporated into domestic legislations like the notification or the foreign trade policy.

6. He further submits that the authority for advance ruling in Ruling No. AAR 28-Customs/2006 on August 29, 2006 held that the notification in question does not have any actual user condition, after the specified goods are imported.

7. It is also a submission of the learned counsel that the bills of the entry tax was filed by M/s. Krishna Enterprises. The raw silk imported was duly declared in the bills of entry and benefit of Notification No. 38/1996-Cus-toms, dated July 23, 1996, which exempts raw silk when imported into India from China through specified land route including Gunji land route, was claimed. The condition attached to the notification stands admittedly fulfilled by the assessee.

8. He also relied on the ratio laid down in the case of Commissioner of Central Excise, Jaipur Vs. Mewar Bartan Nirmal Udyog, , wherein it was held that the notification pertaining to exemption has to be read strictly and the same has to be interpreted in terms of its language. Where the language is plain and clear, effect must be given to it.

9. The learned counsel further submits that the Hon''ble Supreme Court in the

case of Shrimati Tarulata Shyam and Others Vs. Commissioner of Income Tax, West Bengal, held that in a taxing Statute, one has to look merely at what is clearly said. There is no room for intendment. There is no equity about tax and no presumption as to tax. Nothing is to be read in. Nothing is to be implied.

10. He also relied on ratio laid down in the case of Inter Continental (India) Vs. Union of India (UOI) and Others, , where (paragraph 14), it was held that:

14. Section 25(1) of the Act permits the Central Government to notify specified goods to be exempt generally either absolutely or subject to such condition which may be fulfilled before or after clearance and the exemption may be in relation to whole or in part of the duty of customs leviable on the notified goods. Hence, the Legislature was aware and conscience of the fact that it may be necessary in a given set of circumstances to lay down the conditions which shall be fulfilled by an importer even after clearance if the importer wanted to claim benefit of exemption from duty of customs under a particular notification and such condition shall have to form part of the notification. In other words, section 25(1) of the Act provides for complete machinery which would enable the importer to know before importing and before claiming exemption as to what are the conditions on fulfillment of which he was to become entitled to seek exemption under such a notification. The stand adopted by the revenue does not fit in with the scheme of the Act.

11. It is also a submission of the learned counsel that since 1996, the raw silk has been allowed to be imported without payment of customs duty from Gunji border under Notification No. 38/1996 irrespective of fact that the importer is the local resident of the Indo-China border or not; irrespective of the fact whether such duty from imported goods have been consumed or sold by the importer. There are hundred of bills of entries filed in the past, during the last nine years at the said Gunji.

12. The learned counsel has shown to the Bench some of the bills of entries under which goods were cleared without payment of duty. Lastly, he relied on the ratio laid down in the following cases:

1. Navin Chemicals Mfg. and Trading Co. Ltd. Vs. Collector of Customs, ;

2. Union of India (UOI) Vs. Auto Ignation Ltd., ;

3. The Commissioner of Customs Vs. Motorola India Limited, .

13. We have heard both the parties and gone through the material available on record.

14. It is an undisputed fact that M/s. Elegant Industries, whose sole proprietor is Shri Ajeet Kumar Gupta has financed Shri K.S. Garbyal to import the raw silk from China. Shri Krishna Singh Garbyal, proprietor of M/s. Krishna Enterprises is a dummy importer as observed by the Tribunal. Shri Krishna Singh Garbyal, in his statement dated October 21, 2005 has clearly accepted that he got 50

percent profit. This is the first year of the business. Earlier, he has no experienced. In the instant case, 440 cartons weighing (13,520 kg.) raw silk valued Rs. 1,67,47,293 covered under the bill of entry No. 23/2005, dated September 2, 2005 were seized and a fine of Rs. 5,00,000 was also paid by Shri Krishna Singh Garbyal, without depositing the duty of Rs. 51,24,672 pertaining to the raw silk. Similarly, 720 cartons weighing (21,996 kg.) raw silk valued Rs. 2,73,65,390 covered under bill entry No. 54/2005, dated October 3, 2005 was also confiscated and the fine of Rs. 7,50,000 was paid. In addition, personal penalty u/s 112 of the Custom Acts was also imposed. In the instant case, the entire goods reached Delhi from China without paying any customs duty.

15. It may be mentioned that the trade between India and China through Gunji shall be the "border trade" as per the practice "exchange of commodities" (barter) by the residents along with the border of Tibet Autonomous Region of China and Pithoragarh (India) in the "border trade market". The exemption under Notification No. 38/1996-Customs, is thus permissible only in respect of border trade in the true spirit of provisions of the memorandum of understanding between the two Governments. In the instant case, the assessees have misused this provision just to evade the customs duty. Hence, we are of the view that the import of the raw silk from Gunji by M/s. Elegant Industries, Delhi through M/s. Krishna Enterprises is not in accordance with the aforementioned provision of law. By looking the quantity and the destination, it is evident that the transaction is misuse of the provision. Neither M/s. Krishna Enterprises nor M/s. Elegant Industries, Delhi are entitled to import the raw silk without paying the customs duty in a huge quantity.

16. In the instant case, it appears from the statement of Shri Krishna Singh Garbyal, proprietor of M/s. Krishna Enterprises that his role was limited to complete import formalities at land customs station Gunji, brought the goods up to Dharchula to handover the same to the representative of M/s. Elegant Industries towards further sale in the market of the main land. In the instant case, the transaction was performed as per the memorandum of understanding executed between the parties. The raw silk was transported to the main land of the country to earn profit. Intention for the import of these goods has nothing to do with the object of the treaty, i.e., to promote the border trade between the local residents of India and China. Dharchula is located about 80 kilometer from the Gunji, Indo-China border. The exemption granted by both the Governments of India and China was misused just to evade the customs duty.

17. Hence, by considering the totality of the facts and circumstances of the case, we set aside the impugned order passed by the Tribunal and restored the order passed by the first appellate authority. In the result, the appeal filed by the Department is allowed.