(2014) 06 BOM CK 0035

In the Bombay High Court

Case No : Customs Appeal No. 13 of 2013

Commissioner of Customs (Export) APPELLANT

Vs

Goan Hotels and Clubs Pvt. Ltd. RESPONDENT

Date of Decision : 12-06-2014

Acts Referred:
Customs Act, 1962 — Section 111, 111(d), 112, 112(a), 125

Citation : (2014) 309 ELT 216

Hon'ble Judges : S.C. Dharmadhikari, J;B.P. Colabawalla, J

Bench : Division Bench

Advocate : Pradeep S. Jetly, Advocate for the Appellant; J.C. Patel i/b Anil Balani, Advocate for the Respondent

Judgement

1. Having heard the learned counsel appearing on behalf of the parties and perusing the order of the Tribunal [2013 (292) ELT 442 (Tri. -Mum)], we are of the opinion that the present Appeal raises substantial questions of law. It is, accordingly, admitted on the following substantial questions of law:- (i) Whether the order of the CESTAT in holding that the respondent is entitled to benefit under Notification No. 103/2009-Cus., despite restriction imposed under FTP is sustainable in law?

(ii) Whether the CESTAT is right in law in setting aside the duty charged, confiscation of the goods under Section 111(d), redemption fine of Rs. 20,00,000/- under Section 125 in lieu of the confiscation, and penalty of Rs. 10,00,000/- under Section 112(a)?

With the consent of the learned Advocates, we have taken up the appeal itself for final disposal.

2. Very few facts are needed for the purpose of the ultimate direction that we are inclined to issue in this appeal.

3. The respondent imported three consignments of goods declared as Processed Natural Limestone and sought clearance under the EPCG scheme vide three bills

of entries, details of which are set out. The clearance was sought under the scheme against three EPCG license. The Respondent sought to classify the goods under Customs Tariff Heading 68022900. However, while assigning the bills of entry, the appellant observed that the goods are appropriately classifiable under ITC (HS) Sr. No. 68029200. Further in terms of the Foreign Trade Policy in force, the goods covered under the said heading were freely importable only if their unit value is more than US Dollars 50 per square meter CIF.

4. It is alleged that the import value of goods, in the case of bills of entry in question at item Nos. 1 to 7, particularly No. 956066/24-3-2010 was less than US Dollars 50 per square meter. Thus, the appellant alleged that the goods were restricted for import in terms of the Foreign Trade Policy in force. The import was, therefore, held to be unauthorized. After the further procedure, a notice to show cause was issued on 25-5-2011. This was after the goods were confiscated and the appellant was of the prima facie view that the respondent was liable for penal action, as well. The show cause notice contains the above allegations which we have been summarized in brief. The notice to show cause, copy of which was at Annexure "A", came to be adjudicated by the Commissioner of Customs (Exports). The Commissioner inter alia observed as under:-

"2.12 As can be seen, the item, ''other calcareous stone'' are also restricted for import in case the CIF value is below US$ 50 per square meter. While discussing the issue regarding classifications, we have agreed with the contention of the importers (relying upon the explanatory notes of HSN) that the imported goods were covered by HSN 68022200, the equivalent of which in Indian Customs Tariff was 68022900. Intention of the Govt., is very clear that ''other calcareous stone'' falling in ITC (HS) classification 68022200 (equivalent to ICT classification 68022900) are restricted for imports if the CIF value was less than US$ 50 per square meter. The importers have declared the value of their goods to be less than US$ 50 per square meter and have insisted it to be the true transactions value. This being the case the goods are obviously restricted for imports. In this regards, it would also be relevant to mention that the General Notes on Import Export Policy make it very clear that restriction on import/export as prescribed in ITC (HS) Schedule is determined mainly by the description of the goods and nature of the restrictions in the schedule, code number being illustrative of classification but does not limit the description. As per the DGFT Notification No. 18/2008, dated 30-6-2008, the import of "marble, travertine, alabaster or other calcareous stone" whether it is classifiable in the second part (EXIM Code 6802.21 or 6802.22) or in the third part (EXIM Code 6802.91 or 6802.92) is permitted only if the CIF value is USD 50 or above per square meter. Thus, this restriction has been imposed on any type of calcareous stones irrespective of its tariff sub-heading.

2.13 The importers have neither produced any specific import license nor any permission from DGFT to avail himself of an exemption from floor price restriction as discussed above.

2.14 The goods are, therefore, liable for confiscation under Section 111 of the Customs Act, 1962 and importer is liable for penal action under Section 112 of the Customs Act, 1962 for violation of Foreign Trade Policy.

2.15 I find that as per endorsements made on the EPCG Authorization by the Licensing Authority, these are not valid for the import of restricted goods. As the said goods are restricted for import in terms of the Foreign Trade Policy, the same are not entitled to the benefit of exemption from duty under EPCG Scheme against the Authorization presented.

2.16 As regards challenge to the loading of value, I find that the Dept. has at no stage adduced any evidence to show that the declared value was lower than the actual transaction value or the value of the contemporaneous import of identical goods. The importer is in fact being penalized because the CIF value is less than the threshold of US$ 50. Under these circumstances the action of the Dept. in loading the value is indefensible."

5. Aggrieved by this order, the appeal was filed by the respondent before the Customs Excise and Service Tax Appellate Tribunal. This appeal is allowed by the impugned order. The Revenue is, therefore, in the appeal.

6. Mr. Jetly, learned Counsel appearing in support of this appeal submits that the appeal raises substantial questions of law because the order of the Tribunal dated 14th May 2012 is cryptic in nature. It does not deal with any of the contentions and particularly the findings in the order of the Commissioner of Customs. It fails to take note of the vital findings which we have reproduced above. Mr. Jetly submits that merely setting out the rival contentions would not suffice as the appeal has been disposed of finally without adverting to the findings of the Commissioner and as to how they could be said to be unsustainable. Mr. Jetly is inviting our attention to Paragraph No. 6 of the impugned order and the above findings of the Commissioner to submit that the goods were not as free as has been termed by the Tribunal. The Commissioner has in his order made a reference to the relevant policies. He has found that import is permitted freely provided CIF value is US Dollars 50 and above per square meter. If that is below this limit then all consequence in law must follow. That is how the Commissioner passed the order of confiscation and redemption and imposed redemption fine. In these circumstances, the Tribunal was obliged in law to consider the rival contentions and pass a detailed order in the event it was inclined to dispose of the appeal finally. The disposal is, therefore, vitiated in law.

7. On the other hand, Mr. Patel, learned Counsel for the respondent would submit that the Tribunal has in its short order upheld the contentions of the respondent that the Commissioner classified the goods under Customs Tariff Heading 68022900 and the ITC Note has been aligned with Customs Tariff Heading in 2005. As per ITC notes, the item is classifiable under 68022900 as other stone. Further, the submission of the Revenue that the classification under Customs Tariff Heading 68022200 has been withdrawn by Notification No. 94 of 2009

dated 2-3-2009, therefore, holding that the goods are classifiable under Customs Tariff Heading 68022200 is not sustainable as the entry was not in existence at the time of importation.

8. Mr. Patel, therefore, would submit that this appeal does not raise any substantial question of law and must be dismissed.

9. We have, with the assistance of the learned Counsel, perused the paper book including the impugned order. In Paragraph No. 6 of the order under challenge the Tribunal holds as under:-

"We have gone through the impugned order and ITC Policy, Customs Tariff Heading and Notification cited before us. On examination of the said documents and the impugned order, we find that the adjudicating authority has classified the impugned goods under Customs Tariff Heading 68022900, which is not in dispute. Therefore, the appellants are entitled for classifying the same under Customs Tariff Heading 68022900 as per ITC (HS) Policy and entitled for benefit of Notification No. 103/2009 under EPCG scheme. In view of this observation, we set aside the impugned order and allow the appeal with consequential relief."

10. We do not find any application of mind on the part of the Tribunal. A very vital and material contention is raised on behalf of the respondent and which is tried to be supported by producing number of documents including the relevant Notification. If the Tribunal is last fact finding authority and was dealing with a statutory appeal, we would expect it not to dispose of the same by a cryptic and short order, more particularly, when such vital contentions have been raised as would have a material bearing on the outcome of the appeal. It would also have some bearing on the pending cases. In the present case, the argument is that the Customs Tariff Heading No. 68022900 under which the goods are classifiable, then, whether there is any restriction in terms of the applicable policies or not ought to have been examined. Whether the Commissioner was right in making a reference to the Customs Tariff Heading 68022200 should have been then considered. If that was permissible, the Tribunal was obliged to not only make a reference to the relevant findings of the Commissioner to uphold them in their entirety or otherwise. If these findings were not tenable as urged on behalf of the respondent/original appellant, then, the Tribunal should have held accordingly. We do not find any discussion much less a conclusive finding on this aspect of the matter. Resultantly, we are constrained to quash and set aside the impugned order on this short ground alone.

11. As a result of the above discussion, this appeal by the Revenue succeeds. The impugned order is quashed and set aside. The appeal filed by the Respondent is restored to the file of the Customs Excise and Service Tax Tribunal and we direct the Tribunal to dispose of the appeal afresh on merits and in accordance with law without being influenced by any of the earlier observations and findings. All contentions of both sides on merits of this appeal are kept open and we express no opinion on the rival contentions. We also direct that, in the

facts peculiar to this case and since we have allowed the Revenue''s appeal only on the manner in which the Tribunal dealt with the matter, ends of justice would be served if we direct waiver of requirement of pre-deposit by the respondent in the pending appeal. Accordingly, there shall be an unconditional stay of the amounts demanded under the order of the Commissioner. Since, there is a direction of complete waiver and unconditional stay, we would expect the Tribunal to take up appeal expeditiously and dispose it of in accordance with law.

