
(2015) 10 SC CK 0097

In the Supreme Court Of India

Case No : Civil Appeal No. 5808 of 2011

Commissioner of Customs, Mangalore

APPELLANT

Vs

Kushalchand and Co.

RESPONDENT

Date of Decision : 30-10-2015

Acts Referred:

Citation : (2015) 325 ELT 813 : (2016) 53 GST 27

Hon'ble Judges : A.K. Sikri and Rohinton Fali Nariman, JJ.

Bench : Division Bench

Advocate : Mukul Rohatgi, AG, Nisha Bagchi, Aparjita Singh, Sujeeta Srivastava, Devashish Bharuka and B. Krishna Prasad, Advocates, for the Appellant; C. Hari Shankar, Senior Advocate, Jay Savla, S. Sunil, P.K. Singh, Jagdish and Renuka Sahu, Advocates, for the Resp

Final Decision : Dismissed

Judgement

1. The Respondent/Assessee herein had purchased certain duty free import Authorisations issued against export of biscuits and particulars thereof are as under:

(a) 0310444317, dated 26-9-2007

(b) 0310428441, dated 1-5-2007

(c) 0310428434, dated 1-5-2007

These Authorisations were originally issued in favour of Rani International and Pinnacle Export. It is not in dispute that the Authorisations were transferable and the Respondents were the bona fide transferees of these Authorisations. Under these Authorisations the Assessee was allowed to import "Flour". The Assessee imported "Cocoa Powder" and sought clearance thereof under the aforesaid Authorisations as input items, issued under Customs Notification No. 40/2006, dated 1-5-2006. This was not accepted by the Appellant/Department as according to the Customs Authorities the import of "Cocoa Powder" was not

permissible against the input "Flour" as "Cocoa Powder" is different from "Flour". A show cause notice was issued and the position taken therein was confirmed by the Commissioner vide his order dated 6-11-2009 thereby rejecting the contentions of the Assessee and confirming the demand contained in the show cause notice holding that the benefit of the aforesaid customs Notification was not available to the Assessee. The order of the Commissioner was challenged by the Assessee before the Customs, Excise and Service Tax Appellate Tribunal (hereinafter referred to as "the Tribunal"). The Tribunal disposed of the said appeal vide its order dated 29-12-2009. A perusal of the order would show that it specifically dealt with the issue as to whether the "Cocoa Powder" would be covered by the expression "Flour" and after going through the dictionary meanings of the two expressions it turned a finding that "Cocoa Powder" was so covered under the description of the input item "Flour" has bearing under the said Authorisations. However, at the same time it noticed that the impugned order was passed by the Commissioner without seeing all the amendment sheets which were produced before the Tribunal and for this reason the matter was remitted back to the Commissioner of Customs for examining the amendment sheets and further relevant clarification/circular to adjudicate the matter afresh following the principles of natural justice.

2. On remand, the Commissioner again took the same view viz. "Cocoa Powder" was not covered under the term "Flour" and, therefore, the Assessee was not entitled to the benefit of the Notification in question. The Assessee again challenged this order before the Tribunal. One of the contentions raised by the Assessee was that since the Tribunal had already decided the issue on merits vide its earlier order dated 29-12-2009 and the remand was only limited, it was not permissible for the Commissioner to go into the main issue all over again and take a view which is contrary to the view taken by the Tribunal. This contention was upheld by the Tribunal and on that basis the order of the Commissioner is set aside.

3. After hearing the learned Counsel for the parties, we are of the view that the approach of the Tribunal, in the aforesaid circumstances, is however unblemished and does not call for any interference. For this purpose, we may reproduce the operative portion of the order dated 29-12-2009 passed by the Tribunal in the first round by remitting the case back to the Commissioner on limited aspect which reads as under:

"After hearing both the parties and on going through the written submissions, we are of the opinion that the term "Flour" and "Powder" are synonymous, and the "flour" can therefore be interpreted on a wider scale and cannot be restricted to any powder of a particular grain or nut. From the various dictionary meanings and other available information, it is fairly clear that the imported item "Cocoa Powder" is covered under the description of the input item "flour" as appearing under the said DFIA's. Therefore there is force in the contention of the Appellant that the imported item "Cocoa Powder" is a flour and covered under the

description of the license. Therefore, the only issue ten before us is with regard to chapter headings which according to the Appellant are of no relevance to a transferee since no CTH number are appearing on the amendment sheets, after the licenses are transferred by the licensing authorities, amending actual user conditions.

We find that DFIA produced before the Commissioner covered, among others, maida/atta/flour of ITCHS code 19019090, the amendment sheets since received cover mostly goods which appeared in the original DFIA import item list, but without the ITCHS code against each entry as in the original license. We find that as per Chapter Note 2(b), Chapter 19 covers, flour, meal and powder of vegetable origin of any chapter, other than flour, meal or powder of dried vegetables (heading 0712) of potatoes (heading 1105) or of dried leguminous vegetables (heading 1106). As the impugned order as passed without the commissioner seeing all the amendment sheets now produced before us, we are of the opinion that the matter should be remanded back to the Commissioner of Customs, Mangalore for examining the amendment sheets and any other relevant clarification/circular to adjudicate the matter afresh following the principles of natural justice."

4. It is pertinent to mention that in spite of particular conclusion which was arrived at by the Tribunal that "Cocoa Powder" was "Flour" and covered under the description of the license, the Department did not choose to challenge this finding by filing any further appeal, therefore, at least inter se between the parties, the said issue attained finality and this finding was binding on the Commissioner and, therefore, it was not open to the Commissioner to re-visit the issue all over again and come to a contrary finding.

5. The learned Attorney General made an endeavour to show that "Cocoa Powder" would not be covered by the term "Flour". In view of the aforesaid facts emerging from the records, we refrain from going into the issue at all. Thus, insofar as the facts of this case are concerned, since the earlier order of the Tribunal was not challenged by the Department, the impugned order warrants no interference. We, thus, dismiss this appeal. The appeal is, accordingly, dismissed.