(2009) 09 MAD CK 0325

In the Madras High Court

Case No : R.C.P. No''s. 74-81, 85, 86 and 90 of 2002 and R.C.M.P. No''s. 43-44 of 2002

Commissioner of Customs (SEA), Chennai — APPELLANT

Vs

Cegat, Chennai — RESPONDENT

Date of Decision : 03-09-2009

Acts Referred:
Customs Act, 1962 — Section 111, 129B, 130A

Citation : (2012) 276 ELT 188

Hon'ble Judges : T. Raja, J;K. Raviraja Pandian, J

Bench : Division Bench

Advocate : T. Chandrasekaran, SPC, for the Appellant; A.K. Jayaraj, S. Murugappan and Ms. Sridevi, for the Respondent

Final Decision : Dismissed

Judgement

K. Raviraja Pandian, J.—As the issue involved in all reference applications is one and the same, the reference application in R.C.P. No. 74 of 1981 (sic) is taken up as a typical case for the sake of narrating the facts. The reference application is filed by formulating the following questions of law :

1. Whether the Tribunal is correct in setting aside the redemption fine and penalty imposed on the second respondent who violated the provision of Section 111(m) of Customs Act, 1962 by misdeclaring the imported goods?

2. Whether the Tribunal is correct in setting aside the order of redemption time and penalty imposed on the wrong presumption that the importer has produced licence contrary to the fact the second respondent has misdeclared the goods and its value hence liable for action under the provisions of Section 111(m) of Customs Act, 1962?

The facts of the case are as follows:

The second respondent-importer filed a bill of entry on import of goods declared as dried garlic for a quantity of 112 Metric Tons. The value declared was USD 310 PMT (C&F) and the bill of entry was filed classifying the goods under ITC (HS) EXIM Code No. 071290.04. Samples were drawn and tested at Customs laboratory. The test report revealed that the samples are whole garlic and those are other than dried garlic with 66% natural water content. One more representative sample was drawn and tested by analytical and quality control laboratory. Division of Horticulture Gandhi Krishi Vignana Kendra, Bangalore. The test report among other things revealed that (i) the samples analysed were found to be fresh (they were not subjected to mechanical drying); (ii) the natural water content inside the cloves/bulblets has not been removed by any mechanical process and (iii) the moisture content in the cloves of garlic was found to be in the range at 65 to 79 per cent. As per ITC (HS) EXIM Code No. 071290.04 garlic in order to be dry, is to be dehydrated or freeze dried to remove the water content. The Director General of Foreign Trade, the licensing authority, in their policy Circular No. 32 (RE), dated 17-9-1999 regarding import of dried garlic, has clarified that the moisture content should not exceed 10% irrespective of the drying method. Since the garlic under import has more than 60% water content those are treated as fresh garlic and was classified under ITC (HS) EXIM Code No. 0703.20.00 import of which is restricted and requires a specific licence under EXIM Policy 1997-02. The value declared at USD 340 PMT is also found to be low. During the personal hearing, the importer requested the Department to accept the specific import licence which they have obtained for clearance of impugned goods. Commissioner of Customs, Chennai in his Order-in-Original No. 12/2000 CAU dated 22-2-2000 ordered confiscation of the impugned goods u/s 111(m) of the Customs Act, 1962. However, since the importer has submitted a specific licence, lenient view was taken and an option to redeem to goods on payment of fine of Rs. 1,67,000/- was ordered. Penalty of Rs. 16,700/- was also imposed. The value was enhanced to USD 375 PMT based on contemporaneous imports. The second respondent carried the matter on appeal before the then CESTAT - the CEGAT and the Tribunal by its Final Order dated 22-4-2002 [2002 (150) E.L.T. 1083 (Tribunal)] has remanded the party''s appeal to the original authority for de novo consideration to decide the valuation aspect only. However, the Tribunal has set aside that portion of the order which ordered confiscation of the impugned goods u/s 111(m) of Customs Act, 1962 and imposition of redemption fine and penalty. The Tribunal held that once the special licence has been produced before the clearance of the imported goods, then in such circumstances fine and penalty is not imposable. In the present case, since the percentage of water content of garlic imported was more than 60% they were treated as fresh garlic as against the declared description of dried garlic. The importer has misdeclared the goods as dried garlic and obtained import licence only when the department objected. The importers would have cleared the goods without any import licence circumventing the restriction on the import of the subject goods, if no objection was raised by the Department. Hence imposition of redemption fine and penalty for the misdeclaration of the goods is legally correct. The Order of the CEGAT in setting aside the redemption fine and penalty imposed is not in accordance with law and on that basis, the reference petition has been filed before this Court.

2. Mr. Chandrasekar, learned counsel appearing for the reference petitioner argued that in the guise of import of dried garlic, the importer had imported fresh garlic with the moisture content of over and above 60 per cent of water content, which is not permissible for importation. He further contended that the order of the CEGAT setting aside the redemption fine and penalty is also against the action of second respondent in misdeclaring the goods and its value.

3. Section 130-A of the Customs Act, under which the reference petition has been filed, reads as follows :

130A. Application to High Court. - (1) The Commissioner of Customs or the other party may, within one hundred and eighty days of the date upon which he is served with notice of an order u/s 129B passed before the 1st day of July 2003 not being an order relating, among other things, to the determination of any question having a relation to the rate of duty of customs or to the value of goods for purposes of assessment, by application in the prescribed form, accompanied, where the application is made by the other party, by a free of two hundred rupees, apply to the High Court to direct the Appellate Tribunal to refer to the High Court any question of law arising from such order of the Tribunal.

(2)....

(3)....

(4)....

4. Here the first contention of the counsel for the petitioner that whether the imported goods is a dried garlic or a fresh garlic containing moisture over and above 60 per cent is a pure and simple question of fact and hence it would not come under the purview of reference u/s 130-A of the Customs Act. The other contention made by the learned counsel that the second respondent has misdeclared the goods and its value for clearance of the goods which is liable to auction u/s 111(m) of the Customs Act is also one specifically excluded from the scope and amplitude of Section 130-A of the Customs Act by stating that the order not being order relating to among other things to the determination of any question having relating to a rate of duty of customs or to the value of goods for the purpose of assessment. In the facts and circumstances of the case; the applicant cannot maintain reference case u/s 130-A of the Customs Act. For the fore-going reasons, the reference petitions are dismissed Consequently, the connected miscellaneous petitions are also dismissed.

