

(2010) 10 DEL CK 0050

In the Delhi High Court

Case No : Writ Petition (C) 741 of 1998

DKM Cassette P. Ltd.

APPELLANT

Vs

Union of India (UOI) and Others

RESPONDENT

Date of Decision : 21-10-2010

Acts Referred:

Central Excise Rules, 1944 — Rule 173Q

Customs Act, 1962 — Section 14(1)

Foreign Trade (Development and Regulation) Act, 1992 — Section 20(2)

Imports and Exports (Control) Act, 1947 — Section 3, 4I, 4I(1), 4I(2), 4K

Citation : (2010) 174 DLT 38 : (2010) 182 ECR 179 : (2010) 260 ELT 404

Hon'ble Judges : Dr. S. Muralidhar, J

Bench : Single Bench

Advocate : M.P. Devnath and Absheik, for the Appellant; Ravinder Agarwal, CGSC and Nitish Gupta, for R-3, for the Respondent

Final Decision : Allowed

Judgement

S. Muralidhar, J.

C.M. Appl. No. 10659/2010 (for restoration)

For the reasons stated therein, this application is allowed. The petition is restored to its file.

The application is disposed of.

W.P. (Civil) No. 741/1998

1. The Petitioner is aggrieved by the impugned order dated 22nd April 1996 passed by the Additional Director General of Foreign Trade ("ADGFT"), Respondent No. 3 herein holding the Petitioner guilty of contravening the provisions of Section 4-I of the Import & Export (Control) Act, 1947 ("IEC Act") and Clause (8) of the Import (Control) Order, 1955 read with Section 20(2) of the Foreign Trade (Development & Regulation) Act, 1992 ("FTDR Act") levying the

penalty of Rs. 55 lakhs on the Petitioner. The Petitioner also challenges the order dated 12th August 1997 passed by the Appellate Committee Cell (ACC), Respondent No. 2 upholding the above order.

2. The Petitioner applied to the Secretariat of Industrial Approvals ("SIA"), Department of Industrial Development, Ministry of Industry, Government of India in July 1985 for setting up a 100% export oriented unit ("EOU") for the manufacture of video-cassette shells. By a letter dated 4th November 1985 the SIA permitted the Petitioner to establish a 100% EOU with a capacity of 6 lakh pieces of video cassette shells per annum. Among the conditions in the said allotment letter was that the unit should achieve a value addition of 45% with the value of imported capital goods being set at Rs. 30.08 lakhs. The further condition was that the entire production should be exported. The letter also set out the list of capital goods permitted to be imported.

3. On a representation by the Petitioner the SIA by a letter dated 30th January 1987 reduced the value addition from 45% to 31.7% and enhanced the value of imported goods/capital to Rs. 50,16,000/-.

4. The Petitioner states that between October 1989 and August 1991 it manufactured and exported video cassette shells valued at Rs. 20,04,675.28 with a value addition of around 33%. It is stated that all the imported raw materials were used in the manufacture of the export products and there was neither any misuse nor misdeclaration of the imported goods. In 1992 the Petitioner's unit started facing labour problems which led to the closure of the factory. Consequently, the Petitioner closed down the manufacturing activities and could not meet the export obligation. The Petitioner approached the Development Commissioner (SEEPZ) on 9th February 1994 requesting him to recommend to the SIA that the Petitioner's unit should be withdrawn from the 100% EOU scheme. The Joint Development Commissioner forwarded a note to the Under Secretary, Ministry of Commerce on 15th March 1994 suggesting that the Petitioner's proposal should be placed before the Board of Approvals ("BOA") in the Ministry of Commerce. This note recorded that the labour strike was continuing and the Petitioner's unit had been closed down. On 18th March 1994 the Development Commissioner wrote to the Additional Secretary and Chairman of BOA in the Ministry of Commerce recommending the debonding of the Petitioner's unit. It was also recommended that no penal action should be taken against the Petitioner on its debonding. The Petitioner wrote to Ministry of Commerce on 5th April 1994 requesting for an early date for debonding. On 24th May 1994 the BOA in the Ministry of Commerce permitted debonding of the Petitioner's unit subject to the following conditions:

(1) That the unit shall deposit a penalty of 10% of the cif value of the imported capital goods (value of imported goods being Rs. 52,82,087/-) towards non-fulfillment of export obligation. The amount was to be deposited with the import licensing authority with whom the unit had executed the LUT.

(2) That the unit shall undertake an export obligation of 25% of the annual production for a period of five years or for an amount equal to five times the cif value of the imports whichever was higher.

5. The Petitioner states that it had complied with the condition at (1) and requested for a waiver of the second condition. This request was accepted and the SIA informed the Petitioner on 8th September 1994 that the condition regarding export obligation would be deleted as the Petitioner could not meet the export obligation after debonding. The Petitioner then proceeded with the formalities and on 21st July 1995 the Assistant Collector of Central Excise, Division 1, Bombay-II granted the Petitioner permission for debonding of raw material, semi-finished goods, finished goods and scrap and waste. The capital goods were also permitted to be cleared at depreciated value after payment of applicable rate of duty. Although in para 16 of the petition the Petitioner had submitted that due to its poor financial condition it could not at the time of filing the petition pay the 10% penalty, during the course of hearing learned Counsel for the Petitioner stated that the said penalty amount had since been paid.

6. Thereafter the impugned order dated 22nd April 1996 was passed by the ADGFT levying a penalty of Rs. 55 lakhs on the Petitioner for violation of Section 4-I IEC Act. The said order indicated that a show cause notice dated 17th August 1995 had been issued to the Petitioner. In response to the above order, the Petitioner replied on 14th May 1996 denying receipt of the show cause notice. Further it was pointed out that since a penalty of 10% of the value of imported goods had already been imposed by the SIA no further penalty should be imposed by the ADGFT. The Petitioner then filed an appeal before the ACC in the Ministry of Commerce u/s 20(2) of the FTDR Act.

7. Among the contentions raised by the Petitioner before the ACC was that penalty could not be imposed twice for the failure to meet the conditions upon which it was permitted to import the goods in question. It was further submitted that the permission letter allowing the Petitioner to import the goods in question was not a "licence" and, therefore, the provisions of IEC Act did not get attracted. A reference was made to the guidelines and circular dated 27th March 1995 issued by the Government of India which made it clear that prior to that date there was no question of two separate penalties being imposed for the non-fulfillment of the export obligation. It was lastly submitted that the impugned order dated 22nd April 1996 passed by the ADGFT imposing a penalty of Rs. 55 lakhs on the Petitioner did not indicate which particular offence as listed out in the sub-clauses of Section 4-I of the IEC Act had been violated and therefore, the penalty order was on this ground alone bad in law.

8. The ACC by the impugned order dated 12th August 1997 negatived all the above submissions. It held that the permission letter did amount to a licence to import the goods in question. The levy of penalty by the SIA was independent of the penalty under the IEC Act. It was further held that upon failure to meet the export obligation, the provisions of Section 4-I(1) of the IEC Act would stand

attracted as non-fulfilment of the export obligation after making the import should be construed as a misutilisation and the misdeclaration of the imported goods.

9. Mr. M.P. Devnath, learned Counsel for the Petitioner reiterated the submissions made before the ACC. In addition, he relied upon the decisions in *Amrit Foods v. Commissioner of Excise* 2005 (190) ELT 433 (SC), *Commissioner of Central Excise, Jalandhar v. Max G.B. Limited* 2008 (221) ELT 491 (P and H), *Commissioner of Central Excise & Customs v. Nakoda Textile Industries Limited* 2009 (240) ELT 99 (Bombay) and, *M/s Optina Impex Pvt. Ltd. Vs. Union of India and Others*, Mr. Ravinder Aggarwal, learned Counsel for the Respondents relied upon the decision in *Supercom India Limited v. Directorate General Foreign Trade Ministry of Commerce* 104 (2003) DLT 14.

10. The first question to be considered is whether the provisions of the IEC Act applied considering what was issued to the Petitioner was a letter permitting import of capital goods and raw material. There can be no doubt that it was only on account of the letter dated 4th November 1985 that the Petitioner was permitted to import under 100% EOU scheme for the manufacture of video cassette shells. Following this a formal agreement was entered into between the Petitioner and the Government of India whereby the Petitioner agreed to comply with the above conditions. Significantly the third para of the preamble to the agreement notes that the import was to be of capital goods valued at Rs. 55.35 lakhs, raw materials and components etc. free of import duty. The fifth para of the preamble further states that "whereas as a condition of the licence granted to the unit, the Government has stipulated that the unit must earn foreign exchange by exporting 100% of the production of the export product, namely video cassette shells for a period of ten years " Clause 6 of the said agreement reads as under:

6. In the event of the unit failing to fulfill the export obligation undertaken by it as aforesaid, except when the fulfillment of such obligation is prevented or delayed because of any law, order, proclamation, regulation or ordinance of the Government, the Government shall be free to issue any directions to the unit regarding the manner of disposal of the export goods and the unit shall be bound to comply with the same. This will be without prejudice to any other action which may be taken against the unit under the provisions of the Imports and Exports (Control) Regulations or any other rules.

11. A collective reading of the above clauses of the agreement shows that the letter dated 4th November 1985 by which the Petitioner was permitted to make import was in fact accepted and acted upon by both parties as a licence to import. That apart on 30th March 1985 Ministry of Commerce issued an order No. 23/88-91 being Open General Licence No. 23/88 u/s 3 of the IEC Act. This gave a general permission to all actual users approved by the Government as 100% EOU for the import of raw materials, components etc. One of the conditions in the said OGL order inserted by a subsequent amendment dated 8th

September 1988 was Clause 5A which reads as under:

5A. The importer shall maintain in the prescribed form proper account of the import consumption and utilization of all imported materials and of the exports made by him and submit them periodically as required to the Ministry of Commerce, Export Commissioner in the office of the Chief Controller of Imports & Exports and the licensing authority concerned. The importer shall adhere to the minimum value added condition stipulated by the Government in his case. He shall also conform to all other terms and conditions incorporated in the permission letter or letter of intent or industrial licence issued to him. Failure to abide by any of the said terms and conditions shall be construed as violation of this Open General Licence and the Importer shall be liable to penal action under the provisions of the Imports and Exports (Control) Act, 1947 (18 of 1947) and rules framed thereunder, without prejudice to any other action such as conciliation or revocation of permission letter or letter of intent or industrial licence.

12. The above Clause 5A in the OGL order is a further pointer that the failure to meet the export obligation in terms of the permission letter dated 4th November 1985 would not only attract penalty as a result of such violation but under the provisions of the IEC Act as well. Consequently, this Court finds no error having been committed by the ACC which held that permission letter issued by the Petitioner should be construed as an import licence and for any failure to comply with the conditions attached thereunder action could be independently taken by the SIA as well as the office of the ADGFT under the IEC Act.

13. The next question that arises for consideration is whether the impugned order of the ADGFT levying penalty of Rs. 55 lakhs on the Petitioner, which has been affirmed by the impugned order of the ACC is sustainable in law. A perusal of the order passed by the ADGFT it shows that it was an ex parte order. Service was presumed to have been effected on the Petitioner. There was no discussion of any of the provisions of the IEC Act at all. Merely because the firm did not avail of the opportunity of personal hearing, the ADGFT straightway proceeded to hold the Petitioner guilty of the contravention of Section 4-I of the IEC Act read with Section 4-K of the IEC Act and imposed a penalty of Rs. 55 lakhs. There was no mention in the said order as to which particular clause of Section 4-I IEC Act stood attracted in the facts of the case.

14. On this aspect the subsequent order dated 5th July 1991 of the ACC is really not much of an improvement. On the other hand the ACC concurred as under:

The Board of Approval permits an applicant to set up an EOU unit, it entitles specific privileges incorporated in the Exim Policy which includes duty free import of capital goods and raw material. The obligation of the appellant is to achieve a minimum stipulated value addition as mentioned in the LUT and an export obligation. In case the unit fails to perform, the very purpose for which the privileges were granted is lost. The Government consciously forgoes duty and

seeks to promote exports in the larger interest of the country and balance of payments. Therefore, it is a distorted argument to make that non-fulfillment of commitment does not amount to mis-declaration or misutilization of the conditions of the licence. Thus, the said non-performance are covered under the Act and the Additional DGFT was fully competent to proceed against the appellant under the said provisions of the Act.

15. This Court is unable to agree with the above reasoning. Section 4-I of the IEC Act reads as under:

4-I Liability to penalty: (1) Any person who,-

(a) in relation to any goods or materials which have been imported under any licence or letter of authority, uses or utilizes such goods or materials otherwise than in accordance with the conditions of such licence or letter of authority, or

(b) being a person to whom any imported goods or materials have been delivered by recognized agency, uses or utilizes such goods or materials or causes them to be used or utilized, for any purpose other than the purpose for which they are delivered to him or

(c) having made a declaration for the purpose of obtaining-

(i) a licence or letter of authority to import any goods or materials, or

(ii) allotment of any imported goods or materials, is found to have made in such declaration, any statement which is incorrect or false in material particulars; or

(d) acquires, sells or otherwise parts with or agrees to acquire, sell or otherwise part with, any imported goods or materials in contravention of the conditions of any licence of any licence or letter of authority in pursuance of which such goods or materials had been imported; or

(e) acquires, sells or otherwise parts with or agrees to acquire, sell or otherwise part with, any imported goods or materials in contravention of the terms of any allotment made by any recognized agency; or

(f) contravenes any direction given under a control order with regard to the sale of goods or materials which have been imported under any licence or letter of authority or which have been received from, or through, a recognized agency, shall be liable to a penalty not exceeding five times the value of the goods or materials have been confiscated or are available for confiscation.

Explanation For the purposes of this section, "value" has the meaning assigned to it in Sub-section (1) of Section 14 of the Customs Act, 1962.

(2) If any person abets the commission of any act or omissions, which act or omission would render any person liable to a penalty under Sub-section (1) or attempts to commit any act aforesaid, the person so abetting or attempting should be made to a penalty not exceeding five times the value of the goods or materials in respect of which such abetment or attempt has been made, or one

thousand rupees, whichever is more whether or not such goods have been confiscated or are available for confiscation.

(3) A penalty imposed under Sub-section (1) or Sub-section (2), may, if it is not paid, be recovered as an arrear of land revenue.

Provided that the adjudicating authority may, by order attach any money belonging to, or owed to, the person on whom any penalty has been imposed under Sub-section (1) of Sub-Section (2), and such attachment shall be made in the same manner in which an attachment is made by a civil court.

16. Section 4-I IEC Act is a penal provision which admits only of a strict construction. It sets out the circumstances under which the importer's liability to pay penalty up to five times the value of the import gets attracted. A careful reading of the various sub-clauses of Section 4-I IEC Act would show that the failure to fulfil an export obligation is not listed out expressly as an instance attracting the liability to pay penalty thereunder. In the circumstances, if the ADGFT in the instant case intended to levy a penalty on the Petitioner u/s 4I IEC Act, it was incumbent on him to indicate which of the sub-clauses of Section 4-I(1) IEC Act stood attracted. On this aspect, there can be no doubt that there was non-application of mind by the ADGFT. Nothing is discernible from his order dated 22nd April 1996 as to which of the sub-clauses of Section 4-I IEC Act, if any, was attracted. The order simply states that the offence is u/s 4-I. This is wholly insufficient for the purposes of imposing a penalty on the strength of Section 4I read with Section 4K of the IEC Act.

17. The need for a penalty order having to specifically indicate the precise provision under which the penalty is being imposed was emphasized by the Supreme Court in *Amrit Food v. Commissioner of Central Excise, U.P.* That was in the context of penalty imposed under Rule 173Q of the Central Excise Rules, 1944. It was observed that in the absence of any indication as to which particular clause of Rule 173Q had been contravened, the penalty could not have been imposed. The above judgment has been followed by High Courts in *Commissioner of Central Excise, Jalandhar v. Max G.B. Limited* and *Commissioner of Central Excise & Customs v. Nakoda Textile Industries Limited*. The decision of this Court in *Supercom India Limited v. Directorate General Foreign Trade Ministry of Commerce* relied upon by Mr. Aggarwal is of no assistance since the Court proceeded on the footing that Sub-clause (1)(a) of Section 4-I applied. No point appears to have been urged, and therefore considered, on whether in fact that sub-clause applied.

18. It was sought to be contended by Mr. Aggarwal that it was Section 4-I(1)(a) of the Act stood attracted. In the first place it must be noticed that this is not the basis on which the ADGFT proceeded to impose the penalty. A fresh reason cannot be supplied for the conclusion reached in the said order. A reading of Section 4-I(1)(a) IEC Act would show that it is attracted when the goods have been imported under any licence and such goods have been used or utilized

"otherwise than in accordance with the conditions of such licence or letter of authority." There was no finding by the ADGFT that the Petitioner has either misutilised or misdeclared the imported goods. There was no such finding by the ACC either. The surmise of the ACC was that failure to meet the export obligation would tantamount to misutilisation of the imported goods. There was no warrant for such a presumption particularly in the absence of any express words to that effect u/s 4-I(1)(a) of the IEC Act. The failure to meet the export obligation could be on account of various reasons not relatable to any of the sub-causes u/s 4I(1). However, it was incumbent on the ADGFT (and later the ACC) while imposing a penalty with the aid of the said provision to precisely indicate which sub-clause of such provision stood attracted in the facts of the present case. Clearly the Petitioner had stated that it has utilized the imported goods in the manufacturing of video cassette shells. It could not export those goods on account of labour unrest. It cannot, therefore, be concluded that there was either misutilisation or misdeclaration by the Petitioner to attract Section 4-I(1)(a) of the IEC Act.

19. This Court therefore, finds that the orders of the ADGFT and the ACC are unsustainable in law. Accordingly, the impugned order dated 22nd April 1996 passed by the ADGFT and order dated 12th August 1997 passed by the ACC are hereby set aside.

20. The writ petition is allowed in the above terms, but in the facts and circumstance of the case with no order as to costs.