(2006) 03 KL CK 0037

In the High Court Of Kerala

Case No : O.P. No. 23261 of 2002

Eapen APPELLANT

Vs

Director General of Foreign Trade RESPONDENT

Date of Decision : 17-03-2006

Acts Referred:

Foreign Trade (Development and Regulation) Act, 1992 — Section 5

Citation : (2006) 2 ILR (Ker) 556 : (2006) 2 KLT 650

Hon'ble Judges : Kurian Joseph, J

Bench : Single Bench

Advocate : Mathew John K and Baby Thomas, for the Appellant; John Varghese, Asst. Solicitor General and P.S. Sreedharan Pillai, S.C.G.S.C., for the Respondent

Final Decision : Allowed

Judgement

Kurian Joseph, J.—The Export Import Policy issued u/s 5 of the Foreign Trade (Development and Regulation) Act, 1992 provides for duty credit rates for rubber compounded sheets/rings. The credit rates are higher when compared to the rubber moulded goods. The goods exported by the petitioners are rubber mats. The simple question to be considered in these cases is whether rubber mats exported by the petitioners would come under the entry ''rubber compounded sheets''. If the rubber mats come under the ''rubber compounded sheets'', the petitioners get higher credit rate under the DEPB Duty Entitlement Pass Book Scheme.

2. The petitioners are engaged in the export of door mats and other similar products made of compounded rubber. The dispute in these cases pertains only to the duty credit rate of rubber mats. Though in the nature of the view I propose to take in these Writ Petitions it may not be necessary to deal extensively with the factual matrix, for the sake of appreciating the question it will be profitable to have a brief background of the facts. In Ext.Pl notification, which is a public notice in terms of the Export and Import Policy, Sl.No. 547 is rubber compounded sheets/rings. Such a public notice is issued in terms of the

procedure under the EXIM (Export and Import) Policy. Paragraph 2.4 deals with the procedure which reads as follows:--

2.4. The Director General of Foreign Trade may, in any case or class of cases, specify the procedure to be followed by an exporter or importer or by any licensing or any other competent authority for the purpose of implementing the provisions of the Act, the Rules and the Orders made thereunder and this Policy. Such procedures shall be included in the Handbook (Vol. 1), Handbook (Vol.2) and in ITC (HS) and published by means of a Public Notice. Such procedures may, in like manner, be amended from time to time.

The Handbook (Vol. 1) is a supplement to the EXIM Policy and contains relevant procedures and other details. The benefits available under various schemes of the Policy are given in the Handbook (Vol.1).

In respect of the Policy for the period 1997-2002 the petitioners had been availing the benefit of Ext.Pl notification declaring the goods as rubber mats as covered by entry 547 in Ext.Pl notification - rubber compounded sheets. While so the Customs entertained a doubt as to whether the vulcanised sheets would be covered by the entry. Some of the petitioners were issued show cause notices on the ground that only the sheets which are not vulcanised, if imported, would be covered by the entry. The rubber mats exported by them are vulcanised sheets. Objections were filed and aggrieved by the orders the matter was pursued in appeal. In the meanwhile Rubber Shippers'' Council took up the matter before the Ministry of Commerce and Industry. The matter is said to have been considered by the DEPB meeting held on 7-6-2002. It was contended in the DEPB meeting that merely because the rubber compounded sheets are vulcanised the sheets do not cease to be rubber compounded sheets. It was also submitted that the vuleanisation material - Sulpher - is covered by Sl.No. A-1704 of SIGN - Standard Input Output Norms. The Committee, after detailed deliberations, clarified that merely because a rubber compounded sheet is vulcanised, mat does not cease to be a rubber compounded sheet and the same would continue to be covered by DEPB entry No. 547 of Ext.P1 under the Chemical Product Group. The decision of the meeting is produced as Ext.P10 in all cases.

3. It may be noted that in the show cause notices issued to some of the petitioners the main issue was that the DEPB entry 547 of Ext.Pl rubber compounded sheets does not take in vulcanised rubber sheets. The question was answered in the negative by the DEPB Committee and the Department does not have any demur on that. But it is seen from Ext.P10 that the DEPB Committee did not stop with the clarification. It was further decided "... to clarify that door mats, foot mats etc. which are a stage further to sheets and involve further processing and also known in the commercial parlance as "door mats", "foot mats" etc., are not covered under rubber compounded sheets and hence ineligible for DEPB benefit under this entry." Thus the stand of the Department is that Ext.P10 is a clarification. The question is will Ext.P10 decision of the DEPB

meeting meet the requirements of few so as to deny the benefit of Ext.Pl notification in the case of export of rubber mats.

4. In the counter affidavit filed by the first respondent it is stated that in consonance with the EXIM Policy in force, Notification/Public Notice/Circulars/ Instructions are issued by the Director General of Foreign Trade from time to time. It is slated in the counter affidavit that "the Committee also noted that rubber compounded sheets are generally in running length and of irregular shape and against this the items exported are cut to size which are specifically known in the commercial parlance as door mats/ foot mats, etc, and cannot be considered as rubber sheets. Further the product - door mats etc. involve further processing beyond the stage of sheets". The crucial question yet remains - by merely cutting the sheet to the required sizes and using the same without any further chemical treatment, does the sized sheet cease to be sheet? No doubt, the respondents, being a policy matter, are free to lay down any policy, either including a product or excluding a product while describing a dutiable item. It is fairly clear that a sized sheet, though may have a different commercial description, does not cease to be a sheet in its content. It has to be noted that the entry is chemical product group. There is no case that in cutting the sheet to the required size and making it as door mats or floor mats, any further chemical treatment is involved. Therefore, unless the entry regarding sheets descriptively stated that it is to be understood as excluding the sized sheets, it may be difficult to accept the contention of the respondents. In this context it may be profitable to refer to the Schedule of DEPB rates published by the Ministry of Commerce and Industry. General instructions for DEPB rates at Clause 11 stipulates as follows:-

DEPB benefit would also be admissible on the export of composite product having more than one constituent items for which DEPB rates are individually fixed.

A mere perusal of different entries would also indicate that wherever the Department intended to either include or exclude a composite product, or a byproduct, or a product which contains the content of the notified product but commercially known with a different description, the same is clearly described. Therefore, unless the entry provides for specific exclusion of the sized sheets it cannot be said that by the mere commercial description of the same as mats, such sized sheets would cease to be rubber compounded sheets, as there is no other chemical treatment in the process. It has to be noted that it is not an entry on taxation. The Foreign Trade (Development and Regulation) Act, 1992 itself is introduced "... to provide for the development and regulation of foreign trade by facilitating imports into, and augmenting exports from, India and for matters connected therewith or incidental thereto." The thrust in the Export and Import Policy is based on the chemical content.

5. It is open to the DGFT to issue appropriate clarification in accordance with law. But what is, implied alone can be made explicit by way of a clarification, as held by the Supreme Court in W.P.I.L. Ltd., Ghaziabad Vs. Commissioner of Central

Excise, Meerut, U.P., . What is not implied no doubt, can also be introduced if required. But that can be done only by way of an amendment. Whether such clarification in the circumstances is feasible is a serious question, since as noted above, wherever any entry needed a clarification either by exclusion or by inclusion in order to avoid any doubt the same was expressed by adding the expression in the entry itself either as "including" or as "excluding". Even assuming for arguments'' sake it is a clarification, there is a procedure for issuing such clarifications. They are known as Policy Circulars. The Director General of Foreign Trade has issued several such circulars clarifying the position. No such clarification is issued in this case. The EXIM Policy regarding interpretation of the policy provides that in the event of a doubt the Director General of Foreign Trade is to be referred for a decision and his decision is final and binding. Paragraph 2.3 reads as follows:--

2.3. If any question or doubt arises in respect of the interpretation of any provision contained in this Policy, or regarding the classification of any item in the ITC (HS) or Handbook (Vol. 1) or Handbook (Vol.2), the said question or doubt shall be referred to the Director General of Foreign Trade whose decision thereon shall be final and binding.

If any question or doubt arises whether a licence/certificate/permission has been issued in accordance with this Policy or if any question or doubt arises touching upon the scope and content of such documents, the same shall be referred to the Director General of Foreign Trade whose decision thereon shall be final and binding.

The counter affidavits do not show that any such decision was taken by the Director General of Foreign Trade. The matter was only considered at the DEPB meeting. So far the DGFT has not issued any circular on the issue.

6. Sri. Mathew John, learned Counsel appearing for the petitioners during the course of arguments submitted that this dispute is raised by the Customs only at Kochi and Mumbai Ports. Even now the exporters of rubber mats at Tuticorin and Madras Ports are permitted to register their shipping bills under the DEPB Scheme. It is also submitted that 3000 shipping bills of 50 exporters for export of rubber mats have been cleared under the DEPB. Sri. John Varghese, leaned Assistant Solicitor General of India on the other hand, submits that merely because a few mistakes have been committed, the petitioners cannot take it as a deviation from the Policy and that two wrongs will not make a thing right. There is no quarrel with the submissions made by the learned Assistant Solicitor General. But the pleadings in the counter affidavit as well as the submissions made by the learned Assistant Solicitor General would show that there is a dispute rather a doubt as to whether the rubber compounded mats would be covered by the DEPB entry -- rubber compounded sheets. If that be so, certainly the matter requires either an amendment or a clarification. Be it an amendment or a clarification, in the very nature of its impact on the Export Import Policy, the same can only be duly issued - by means of a public notice, lest, as has

happened in the present case there should be different approaches in different Ports. Therefore, these Writ Petitions are allowed declaring that the export of the rubber mats shall be liable to be covered under Entry 547 -- rubber compounded sheets unless and until it is duly amended by the Central Government or clarified by the Director General of Foreign Trade by a public notice, if such clarification would meet the purpose. The accounts of the petitioners shall be settled accordingly within a period of three months from the date of production of a copy of the judgment.

