(2013) 03 BOM CK 0021

In the Bombay High Court

Case No : Writ Petition (L) No. 632 of 2013

Essar Investments Ltd. and Another — APPELLANT

Vs

Union of India and Others — RESPONDENT

Date of Decision : 21-03-2013

Acts Referred:

Citation : (2013) 23 GSTR 179

Hon'ble Judges : D.Y. Chandrachud, J;A.A. Sayed, J

Bench : Division Bench

Advocate : Darius B. Shroff and Rahul Jain instructed by Res Legal, for the Appellant; Pradeep S. Jetly, for the Respondent

Judgement

1. The petitioners have sought to challenge an order for provisional release dated October 11, 2012 as amended on November 9, 2012 and an order of the Additional Commissioner of Customs (Preventive), dated March 4, 2013 declining to accept the request for the substitution of a corporate guarantee in lieu of a bank guarantee. The petitioners filed five bills of entry, all dated July 9, 2012 for the importation of two sets of video conferencing suites and accessories; two sets of RPX 408M series and three sets of RPX 418M series. Five consignments were originally sent by Polycom Inc. U.S.A., the exporter, to Beetel Teletech Ltd., the importer. There was a first stage high seas sale by Beetel Teletech Ltd. to AGC Networks Limited under four agreements dated March 30, 2012 and March 31, 2012 at a value of Rs. 76.67 lakhs and Rs. 85.10 lakhs. AGC Networks Limited, in turn, sold the goods on high seas sale to the petitioners at a value of Rs. 1.29 crores for RPX 408M series and Rs. 1.45 crores for RPX 418M series under agreements dated March 30 and 31, 2012, respectively. On the basis of self assessment, the assessable value was declared at Rs. 1.31 crores for RPX 408M series and Rs. 1.47 crores for RPX 418M series. The petitioners paid customs duty of Rs. 1.18 crores together with interest on delayed payment. The consignments were detained on September 27, 2012 on specific intelligence indicating that there was an evasion of customs duty. The case of the

Department is that the manufacturers'' suggested retail price for RPX 408M series was US $ 599,999 and for RPX 418M series, it was US $ 665,999. Moreover, according to the Revenue, Polycom Inc., had classified the export products under their respective sub-headings and a part of the consignment value was not eligible for the benefit of Notification No. 24/2004. The five consignments were seized under a panchanama dated October 3, 2012 on the reasonable belief that the goods were liable to confiscation u/s 111(m) of the Customs Act, 1962. The petitioners have relied upon a letter dated September 21, 2012 of Polycom Asia Pacific Pvt. Ltd. stating that a discount of 73.5 per cent. was offered.

2. On October 5, 2012, the petitioners applied for provisional release of the seized goods. On October 11, 2012, the Commissioner of Customs (Preventive) granted provisional release subject to the following conditions which were referred to in the letter:

(1) Payment of the customs duty on enhanced value for five units of ''video conferencing suites and accessories'', which is determined at Rs. 22,00,21,354 (based on evidence available on record), (after apportioning values to components under respective chapter sub-headings) Rs. 3,33,79,605;

(2) 100 per cent. bond covering the value of the goods, viz., bond for Rs. 22,00,21,354;

(3) Bank guarantee at 20 per cent. of the value of the goods, viz., bank guarantee for Rs. 4,40,04,271;

(4) You are also required to submit an undertaking that the said seized goods offered for provisional release will not be disposed of without express written permission from the Commissioner of Customs (Preventive), Mumbai.

Subsequently, on the request of the petitioners, a further modification was made to the effect that the quantum of the bank guarantee would be restricted to ten per cent. of the re-determined value of the seized goods as opposed to 20 per cent. Subsequently, by a communication dated March 4, 2013, the Additional Commissioner of Customs (Preventive) has declined to accede to the request of the petitioners for the substitution of a corporate guarantee instead of a bank guarantee.

3. An affidavit-in-reply has been filed in these proceedings by the Assistant Commissioner of Customs (Preventive) in which it has been stated that goods were seized in the reasonable belief that they were liable to be confiscated u/s 111(m). According to the Department, Polycom Asia Pvt. Ltd. has certified that the manufacturers'' suggested retail price of RPX 408M series is US $ 599,999 and of RPX 418M series is US $ 665,999. Moreover, it has been submitted that even the internal correspondence in the form of an e-mail between the AGL Networks Ltd. and the petitioners shows a unit value of US $ 253,800 and US $ 285,770 per unit which is well in excess of the export value as per the invoice

declared by the petitioners. Moreover, it has been stated that though the consignments physically left the shores of the US on April 7, 2012, the bills of lading covering the import consignments were of a much prior date. The purchase order reference placed by Beetel Teletech Ltd. on Polycom Inc. is stated to be December, 2011. Considering the fact that the period of six months since the detention of the goods on August 27, 2012 was to expire on February 26, 2013, an order was passed on February 25, 2013 extending the period for the issuance of a notice to show cause by six months.

4. During the course of the hearing, the counsel appearing on behalf of the Revenue has placed on record, a statement containing the manner in which the provisional duty has been computed. As noted earlier, since the petitioners have paid duty in the amount of Rs. 1.18 crores, the order for provisional release requires the petitioners to pay the balance of Rs. 3.33 crores besides furnishing a bond and bank guarantee representing ten per cent. of the value of the goods.

5. During the course of the hearing, the counsel appearing on behalf of the petitioners questioned the computation on three counts: (i) The price per unit for RPX 408M series has been taken as US $ 599,999 and for RPX 418M series as US $ 665,999. According to the petitioners, this does not reflect even the normal discount of 19 per cent. which is provided by the manufacturer on his web-site, a copy of which is annexed at Exh. N to the petition. In that event, it has been submitted that even the normal discount would result in a price of US $ 485,999 and US $ 539,459; (ii) The statement shows that the Department has added pre-inspection, maintenance and service charges for the five units at US $ 154,999 per unit though as a matter of fact, the agreement between the petitioner and its supplier does not provide for the payment of any such charges. Moreover, it has been stated that the charges which were payable by the petitioner to its supplier have been duly accounted for in the invoice; (iii) The Department has sought to classify different parts of the video conferencing suites under three different heads of the Customs Tariff, namely, 8517, 8539 and 4411. In this regard, it has been urged that rule 3(b) of the First Schedule to the Customs Tariff which provides rules for interpretation, inter alia, provides that goods which are put up for retail sale are to be classified as if they consist of the material or component which gives them their essential character. In the present case, it has been submitted that this is exactly the manner in which a similar equipment which has been imported by other entities, including Governmental bodies has been classified. A reference to this is contained in a representation dated October 15, 2012 of the petitioners to the Commissioner of Customs (Preventive) (exhibit P).

6. In our view, the nature of the objections which have been raised by the petitioners to the computation which has been placed on record by the Department would require a reconsideration of the basis on which the order for provisional release has been passed. The order for provisional release has computed the value for the purposes of computing customs duty at Rs. 22 crores. The three fold contentions of the petitioners, namely, that: (i) The

determination of unit value does not take into account even the standard manufacturer discount; (ii) That there is no basis for making an addition towards the pre-inspection, maintenance and service charges when these do not form part of the agreement entered into by the petitioners with their own supplier; and (iii) That there would be no justification for assessing what essentially is a video conferencing suite which is put up in sets for retail sale under different headings of the Customs Tariff, would warrant careful consideration by the Commissioner of Customs (Preventive). These are matters, inter alia, involving a factual determination. Hence, it is but necessary that all relevant facts having a bearing on the determination of value even for the purposes of provisional assessment should be duly considered by the Commissioner of Customs (Preventive). In order to facilitate this and without expressing any view on the correctness of the contentions raised by the petitioners, we deem it appropriate to direct that the Commissioner of Customs (Preventive) shall reconsider the basis on which provisional release of the goods has been ordered under the provisions of the Customs Act, 1962.

7. For this purpose, we direct that the petitioners shall appear before the Commissioner of Customs (Preventive) on April 1, 2013 on which date the petitioners may place such submissions as they desire to make before the officer. The Commissioner of Customs (Preventive) shall pass a fresh order thereafter, preferably within a period of two weeks from the conclusion of the hearing. Following the personal hearing, it would be open to the Commissioner of Customs (Preventive) to modify the terms on which provisional release has been granted subject to his due satisfaction in accordance with law.

8. We do not find any merit in the challenge to the order of the Commissioner extending the period for the issuance of a notice to show cause by a further period of six months. Sufficient material has been placed before the court in the affidavit-in-reply to indicate that investigation was being carried out by the Customs Authorities in the light of which the extension of time was considered necessary. The petition is accordingly disposed of. There shall be no order as to costs.