(2006) 03 BOM CK 0072

In the Bombay High Court

Case No : Writ Petition No''s. 2549 of 1994 and 99 of 1995

I.P.C.A. Laboratories Ltd. APPELLANT

Vs

Union of India (UOI) RESPONDENT

Date of Decision : 02-03-2006

Acts Referred:

Citation : (2006) 199 ELT 409

Hon'ble Judges : S. Radhakrishnan, J;J.P. Devadhar, J

Bench : Division Bench

Advocate : Percy Ghandy and R.J. Majra, instructed by Wadia Ghandy and Co, for the Appellant; A.J. Rana and S.V. Bharucha, for the Respondent

Judgement

S. Radhakrishnan, J.—In the above petitions, the Petitioners are challenging the common adjudicating order passed by the Commissioner of Customs dated 8th July, 1998 with regard to two Bills of Entries dated 23-9-1994 and 23-12-1994. The above two petitions have been filed challenging the aforesaid common order. The facts and circumstances of both the petitions as well as the products involved in, both the petitions are identical and the impugned order which is challenged in both the petitions is the common order dated 8th July, 1998, and in view thereof, we are disposing of both the Petitions by this common judgment and order.

2. The Petitioners had imported by air consignment of Ostomy product from the United States Surgical Corporation for the following categories, (i) TA premium instrument/disposable loading units, (ii) EEA instruments and disposable loading units, (iii) GIA instruments and disposable loading units and (iv) Stapleoscopy products. It is the contention of Mr. Ghandy, the learned Counsel for the petitioners that these products are life-saving disposable sterilized products, ready to use only once and the same can be used either before, during or after, the surgical procedures for managing various cancer surgeries like colostomy etc. Mr. Ghandy also contended that these products are used for diagnosis, detection, treatment and prevention of cancer by surgical procedures such as Colostomy

etc.

3. It appears that with regard to first petition, the Petitioners seems to have filed the Bill of Entry on 23-9-1994 and claimed the clearance under OGL Import Export Policy 1992-1997, and the Petitioners had sought benefit of Exemption Notification No. 208/Cus., dated 22-9-1981 under Serial No. 22B. It appears that the Respondents Customs Authorities did not permit the petitioners the clearance and hence the aforesaid petition has been filed. It is pointed out on behalf of the Petitioners that the very same products were imported in the year 1990 and even for subsequent year and the said Ostomy products were allowed to be cleared by the Customs, after obtaining clarification from the Chief Controller of Imports and Exports, New Delhi. Mr. Ghandy, the learned Counsel has also pointed out that the Chief Controller of Import and Export by his letter dated 25th August, 1991 had clearly clarified that the above products were covered under Serial No. 51, List 2, Appendix 6 of OGL and therefore the imports were allowed under OGL. The learned Counsel for the Petitioners Mr. Ghandy has pointed out that the Assistant Collector of Customs had referred the matter by his letter dated 6th January, 1992 seeking the clarification from the Directorate General of Health Services. In pursuance of the said letter, the Directorate General of Health Services, New Delhi had issued a clarificatory letter dated 23rd April, 1992. The said letter addressed to the Assistant Collector of Customs, reads as under:

To, The Assistant Collector of Customs, Sahar Air Cargo Complex, Andheri (East), Bombay 400 099.

"Sub: Applicability of Notification No. 208/81-Cus. for Ostomy Products - OGL Appendix 6, list 2, S.No. 51.

1. TA premium instruments/disposable loading units

2. EEA instruments and disposable loading units

3. GIA instruments and disposable loading units

4. Stapleoscopy products.

Sir,

This has reference to your letter dated 6-1-1992 on the above-mentioned subject. In reply to CCIE''s ID Note No. 48 (822)/90-93/IPC, dated 30-5-1991 seeking a clarification regarding the above-mentioned 4 items under OGL policy, note of even number dated 14-8-1991 was issued by this Directorate. However, since the item described at S. No. 51, List 2, Appendix 6 of OGL policy and the item at S. No. 22-B of Notification No. 208/81-Cus. are exactly the same, it is implied that the items in question are covered under Notification No. 208/81-Cus. also.

Yours faithfully, (Dr. S.K. Das) Assistant Commissioner (RHS)

4. From the above clarification, it is clear that the products which were imported by the Petitioners were entitled to be cleared under the OGL and they were covered by Exemption Notification No. 208/Cus., dated 22-9-1981 under Serial No. 22B. Mr. Ghandy has referred to and relied upon the two certificates issued by the two leading Cancer Surgeons viz. a certificate/letter issued by Dr. L.J.D'' souza of TATA Memorial Hospital addressed to the Assistant Collector of Customs opining that the said Ostomy products imported by the Petitioners were for managing various cancer surgeries. Similarly, the other certificate was issued by Dr. Manoj Bharucha by his letter dated 22-11-1994 certifying that the products imported by the Petitioners were for managing cancer surgeries. Over and above, Mr. Ghandy has submitted that even the original suppliers from the USA had issued a certificate certifying that the aforesaid products imported by the Petitioners were used in cancer surgeries such as Colostomy etc.

5. It appears that when the above petitions came for admission before this Court on 20-12-1994 and 22-12-1994, this Court allowed the Petitioners to clear the Ostomy products without payment of duty, but on furnishing Bonds. Thereafter, the Respondent No. 3 appears to have issued the show cause notices to the Petitioners asking as to why the imported goods should not be confiscated and as to why the penalty should not be imposed on them. Thereafter the Respondent No. 3 itself had issued the Corrigendum dated 9-1-1995 withdrawing the aspect regarding the confiscation. The Petitioners had filed their reply to the aforesaid show cause notices contending that the aforesaid products were used for managing Colostomy etc. and as such they were entitled to exemption of duty. Thereafter, the final assessment order came to be passed by Respondent No. 2 on 8th July, 1998 holding thereby that the Petitioners were liable to pay the regular duty without extending the benefit of exemption notification, which order is impugned in both the above petitions.

6. Two main grounds on which the assessment order was passed are that the adjudicating officer came to the conclusion that though the words such as used in the notification No. 208/81-Cus. may imply illustrative but the same was construed as not exhaustive list and the notification will apply to only to the products mentioned in the said notification. To put it in other wards, the adjudicating authority came to the conclusion that the benefit was to be extended only to the products mentioned therein and not to the other products. The adjudicating authority also came to the conclusion that the benefit of notification can only be extended to post operative products and not to the products used before surgery or during surgery. Hence, the adjudicating authority on both the above grounds refused to extend the benefit of exemption of duty to the petitioners.

7. After hearing the parties for quite sometime, the learned Senior Counsel, Mr. Rana appearing for the Respondents very fairly brought to our notice Clause (c) in the aforesaid Notification, which reads as under:

(c) Life-saving drugs or medicine or equipment not specified in Headings A and B:

Any other drug, medicine end equipment including accessories or spare part or both of such equipment which is certified by the Director General or Deputy Director General or Assistant Director General, Health Services New Delhi, in each individual case to be life saving-drug, medicine, equipment, accessories or spare part and in respect of which a certificate to this effect, in the form annexed hereto, is produced to the Assistant Collector of Customs at the time of clearance or an undertaking as acceptable to the Assistant Collector is given to furnish this certificate within the period as specified by the Assistant Collector, failing which to pay duty leviable thereon.

8. Referring to the aforesaid Clause (c) of the Notification, the learned Senior Counsel, Mr. Rana appearing on behalf of the Respondents has submitted that even without going into the controversy whether the petitioners products were really used before surgery, during surgery or after surgery, as contemplated by Clause (c) that if the certificate is obtained from the Director General, Deputy Director General or Assistant Director General of Health Services, New Delhi, the party would be entitled to such an exemption from duty. In the instant case, there is no dispute that the Petitioners have duly obtained such certificates from the office of the Director General of Health Services dated 23-4-1992, which is quoted hereinabove.

9. We may mention herein that though Mr. Ghandy, the learned Counsel for the petitioners has challenged the impugned order on various grounds and has cited various authorities in support of his contentions, however, without going into the said controversy, we proceed to decide the above matters on the basis of the above-mentioned provisions of Clause (c) which were very fairly brought to our notice by the learned Senior Counsel, Mr. Rana appearing on behalf of the Respondents.

10. In view of the aforesaid stand taken by the Respondents, as the Petitioners have admittedly obtained the requisite certificates from the Director General Health Services, New Delhi, for the life-saving products which they had imported, the Petitioners are entitled to such an exemption from duty. We must also record our appreciation for the aforesaid fair stand taken by Mr. Rana, the learned Senior Counsel for the Respondents.

11. Under the aforesaid facts and circumstances, the aforesaid impugned common order dated 8th July, 1998 passed by the Respondent No. 2 stands quashed and set aside, the Bonds executed by the Petitioners with regard to both the Bills of entries shall also be cancelled and returned back to the Petitioners. Rule is made absolute in both the Petitions, in the above terms, however, with no order as to costs.

