(2015) 11 CESTAT CK 0016

In the Customs, Excise And Service Tax Appellate Tribunal

Case No : Customs Appeal No. 239 Of 2010

M/s Galaxy Star Trading Company — APPELLANT

Vs

CC, Jodhpur — RESPONDENT

Date of Decision : 18-11-2015

Acts Referred:
Customs Act, 1962 — Section 111(d)

Citation : (2015) 11 CESTAT CK 0016

Hon'ble Judges : R. K. Singh, Technical Member;Sulekha Beevi, C.S., J

Bench : Division Bench

Advocate : O.P. Agarwal, Ranjan Khanna

Final Decision : Allowed

Judgement

1. Appeal is filed against order-in-appeal dated 27.4.2010 in terms of which the Commissioner (Appeals) upheld the redemption fine of Rs.2,70,000/-

and penalty of Rs. one lakh on the appellant on the ground that it imported new radial tyres on a date after 24.11.2008 when imports of such tyres

were restricted by DGFT in terms of Notification No.64(RE)/20082004-2009 dated 24.11.2008 and the appellant did not have any import license for

the import of such tyres thereby rendering them liable to confiscation under Section 111(d) of the Customs Act, 1962.

2. The Id. Consultant for the appellant states that while it is a fact that the import took place after the restriction was imposed on 24.11.2008 by

DGFT, it had taken concrete steps for the import of the same prior to 24.11.2008 inasmuch as in response to the proforma invoice dated 13.10.2008 it

sent part payment of US $ 14,300/- out of total US $ 37,016/- and having made such part payment it was not possible to back out without adverse

financial consequences. It cited in its support judgements of CESTAT in the case of P.T. Impex Pvt. Ltd. Vs. CCE - 2014 (302) ELT 154(T)and

CCE, Vs. P.T. Impex - 2015 (321) ELT 38 (P&H) and also in the case of Viraj Impex Ltd. Vs. CC, Mumbai - 2004 (177) ELT 960 (Tri.).

3. Ld. DR, on the other hand, contended that in this case there is no contract nor was there any letter of credit established prior to 24.11.2008 and the

shipment took place after the restriction was imposed by DGFT. Therefore the impugned order is sustainable.

4. We have considered the contentions of both sides. The contention of Revenue is there was no agreement between the appellant and the foreign

supplier entered into before 24.11.2008 for supply of the impugned goods. However, an agreement need not always be in writing. In the present case,

we find that there was a proforma invoice of 13-10-2008 in response to which part payment of US $.14,300/- was sent on 18.11.2008 which was prior

to the imposition of restriction on 24.11.2008. Thus there is certainly ill~ substantial force in the contention of the Id. Consultant that all this amounts to

concrete steps taken prior to 24.11.2008 for the import of the impugned goods because the appellant would not have been in a position to back out

without the risk of losing money. In these set of circumstances, we agree with the appellant that making part payment against a proforma invoice

would constitute concrete steps for import of impugned goods and as these steps were taken prior to 24.11.2008, the ratio of CESTAT judgement in

the case of P. T. Itnpex Pvt. Ltd. (supra) would be applicable. Para 8 of the said judgement is reproduced below :-

8. In the light of the fact that the proforma invoice is dated 30-3-2006, the remittance for the value of sandalwood to be imported was also

made on 30-3-2006; the customs invoice, the fumigation certificate and the Bill of lading, though issued later establish a concretised

agreement for export of sandalwood prior to 7-4-2006 (when the restriction on import of sandalwood were issued by the policy circular).

The agreement to import the sandalwood thus got crystallised prior to 7-4-2006. The High Court decision in Matraco (India) Ltd. v. Union

of India - 2003 (162) E.L.T. 1192 (Born.) is an authority for the proposition that since the import of the sandalwood was bona fide, there is

no justification for imposing a redemption fine or confiscating the goods; and that existence of a concluded contract could be inferred from other circumstances, even in the absence of an irrevocable letter of credit. The material on record establishes on the basis of the relevant

circumstances that an agreement between the parties for the export and import was entered into and had crystallised prior to the change in

the policy. The appellant is entitled to paragraph 1.5 of Chapter 1A of the FTP 2004-09. The decision of this Tribunal in Viraj Impex Ltd. v.

CC, Mumbai - 2004 (177) E.L.T. 960 (Tri.-Mumbai) is an authority for the proposition that where an importer has entered into a contract in

good faith, at a time when goods were importable freely, without restrictions; and had no means to farseeing restrictive changes in the

import policy, there is no justification for imposing a redemption fine.

The Punjab & Haryana High Court dismissed Revenue's appeal against the said order vide order reported at 2015 (321) ELT 38 (P&H). Indeed

similar view was also held in the case of Viraj lmpex Ltd. (supra).

5. In view of the aforesaid analysis, we set aside the redemption fine and penalty and allow the appeal.