
(2020) 12 CESTAT CK 0020

In the Customs, Excise And Service Tax Appellate Tribunal

Case No : Customs Appeal No. 20380 Of 2020

M/s. Shri Amman Dhall Mill @Hash Commissioner of Customs

Date of Decision : 16-12-2020

Acts Referred:

Customs Act, 1962 — Section 2(33), 11, 111, 111(d), 112(a), 125, 125(1),
Foreign Trade (Development and Regulation) Act, 1992 — Section 3(2)
Imports and Exports (Control) Act, 1947 — Section 3

Citation : (2020) 12 CESTAT CK 0020

Hon'ble Judges : S.S. Garg, J;P. Anjani kumar, Technical Member

Bench : Division Bench

Advocate : P.A. Augustian, Gopa Kumar

Final Decision : Allowed

Judgement

1. The importer appellant has imported 210 MT of Canadian Green Peas vide bill of entry No.7978930 dated 23-06-2020. DGFT, vide 37/2015-2020

dated 18.12.2019, notified that the impugned goods can be imported only at a Minimum Price of Rs.200/ CIF per kilogram; of an annual quota of 1.5

lakh MT and only at Kolkata Sea Port. Commissioner of Customs. Cochin, vide order13/2020-21 dated 10.10.20, confiscated the imported goods

absolutely and imposed a penalty of Rs.4,00,000 on the appellants. Hence, this Appeal No. C/20380/2020 was filed.

2. Learned counsel for the appellants submits that earlier the import of pulses were freely importable; DGFT brought the same under restricted

category and invited application for allotment of quota from importers whose have own mill facility; the appellant being eligible to import such pulses,

applied for the same; meanwhile DGFT issued the above notification without taking any steps on their application; as the availability of goods was

dependent on season and due to undue delay in finalization of their request by

DGFT, they were forced to import the impugned goods; they do not dispute the confiscation of goods as Apex Court vide judgment dated 2608/2020 in Transfer petition Civil Nos. 496-509 of 2020 upheld the notification restricting import of said goods.

3. Learned counsel also submits that Section 125 of the Customs Act gives an option to pay fine in lieu of confiscation; sub-section (1) provides that whenever confiscation of any goods is authorized by the Customs Act, the officer adjudicating it, in the case of any goods the importation or exportation whereof is prohibited for the time being in force, may and in the case of other goods, shall give to the owner of the goods or the person concerned, an option to pay in lieu of confiscation, such fine as the said officer thinks fit; the prohibition under Section 125 relates to goods which cannot be imported or consumed by any one; this would not apply to a case where import/ export of goods is permitted subject to certain conditions or to a certain category of persons and which are ordered to be confiscated for the reason that the condition has not been complied with; In such a situation, the release of such goods confiscated would not cause any danger or detriment to public health; whereas sub-section (1) of Section 125 provides discretionary power in respect of prohibited goods, no such discretion is available and release on fine in lieu of confiscation is mandatory.

4. Learned counsel further submits that the issue, regarding confiscation and redemption of the used Digital Multifunction Machines restricted by DGFT, is considered by this Bench vide Final Order No 21593/2011 dated 09.08.17 (2018 (360) ELT 547) and allowed the same; on an appeal filed by Customs, Division Bench of Hon'ble High Court of Kerala, vide judgment dated 14.03.18 in Customs Appeal No.18/2017 (2018 (361) ELI 221 (Ker.)), observed that:

“On the reasoning above considering the fact that the goods detained, but for the violation of FTP, are restricted goods possible of importation and even in the teeth of the violation could be redeemed; we direct the release of the goods on payment of the redemption fine as modified by the Tribunal”.

Hon'ble Supreme Court, vide order dated 24.01.19 in Civil Appeal No. 1058/2019 and 1059/2019 dismissed the SLPs filed by respondent, observing that

9. Section 125 of the Customs Act vests discretion in the authority to levy fine In lieu of confiscation. The MFDs were not prohibited but

restricted Items for Import. A harmonious reading of the statutory provisions of the Foreign Trade Act and Section 125 of the Customs Act

will therefore not detract from the redemption of the consignment on payment of the market price it the reassessed value by the Customs

authorities with fine under Section 112(a) of the Customs Act, 1962.

5. Apex Court vide judgment dated 26/08/2020 in Transfer petition Civil Nos. 496-509 of 2020, while finalizing the issue of Notification regarding

restricting import of pulses, directed the Customs authority to adjudicate the issue in accordance with law; Commissioner Mumbai allowed to redeem

2500 MT of pulses on payment of fine in lieu of confiscation and penalty. As the department delayed clearance of the goods, the importer approached

the Hon'ble High Court of Bombay, who vide order dated 15-10-2020 Harihar Collections and Others (in WP 3502 to 3503/2020) allowed release

of the goods.

6. Learned Counsel further relied upon the following.

i. Atul Automations Pvt. Ltd 2019 (365) ELT 465 (SC)

ii. Parag Domestic Appliances 2018 (360) ELT547 (Tri. "Bang upheld in 2018 (361) ELT 221 (Ker)

iii. Horizon Ferro Alloys Pvt. Ltd. 2016 (340) ELT 27 (P & H)

7. Learned Authorised Representative for the Revenue reiterates the findings of OIO and submits that as import conditions were violated in the instant

case, goods were confiscated; redemption was not allowed in this case based on the stand taken by the Union government in the Hon'ble

Supreme Court that release of such imports would be against the interests of the farmers in India; the condition of import was at the Minimum Import

Price (MIP) @ Rs.200/ CIF per kg, whereas the appellants @ Rs.37.75 per kilogram only; if such imports are allowed into the market, it would cause

serious harm to the farmers in India.

8. Learned Authorised Representative for the Revenue submits that the importer was well aware of the notification which was published in December

2019 and that the violation of the conditions thereon would squarely attract absolute confiscation; importer's reliance on the judgment of the

Honâble High Court of Mumbai in M/s Harihar Collections, is incorrect as the said case is on a different footing; High court upheld that the basis

on which the revisionary power was invoked was not proper and hence it upheld the O-i-O (Para 21); Commissioner based his findings on the

observations of the Supreme Court in the UOI & Others Vs. Agricas LLP & Others (2020 (8) TMI 705 - SC); Honâble SC has observed that:

â48. Accordingly, we uphold the impugned notifications and the trade notices and reject the challenge made by the importers. The

imports, if any, made relying on interim order(s) would be held to be contrary to the notifications and the trades notices issued under the

FTDR Act and would be so dealt with under the provisions of the Customs Act 1962.â

9. Learned Authorised Representative further submits that as the DGFT issued notification no. 37/2015-20 dated 18.12.2019, under Section 3(2) of the

foreign Trade (Development and Regulation) Act, 1992, the subject goods would deemed to be prohibited under Section 11 of the Customs Act, 1962;

restriction imposed by the DGFT is one type of prohibition only; this view was upheld by the Honâble Apex court in CC, NEW DELHI Vs.

Brooks International (2007 (5) TMI 16 - SC). Apex Court observed

â9. Further, Section 2(33) of the Act defines ""prohibited goods"" as under:-

prohibited goods"" means any goods the import or export of which is subject to any prohibition under this Act or any other law for the time

being in force but does not include any such goods in respect of which the conditions subject to which the goods are permitted to be

imported or exported have been complied with.

10. From the aforesaid definition, it can be stated that (a) if there is any prohibition of import or export of goods under the Act or any other

law for the time being in force, it would be considered to be prohibited goods; and (b) this would not include any such goods in respect of

which the conditions, subject to which the goods are imported or exported, have been complied with. This would mean that if the conditions

prescribed for import or export of goods are not complied with, it would be considered to be prohibited goods. This would also be clear

from Section 11 which empowers the Central Government to prohibit either 'absolutely' or 'subject to such conditions' to be fulfilled before

or after clearance, as may be specified in the notification, the import or export of the goods of any specified description. The notification

can be issued for the purposes specified in sub-section (2). Hence, prohibition of importation or exportation could be subject to certain

prescribed conditions to be fulfilled before or after clearance of goods. If conditions are not fulfilled, it may amount to prohibited goods.

This is also made clear by this Court in *Sheikh Mohd Omer v Collector of Customs, Calcutta and Ors.* (1970 (2) SCC 728) wherein it was

contended that the expression 'prohibition' used in Section 111(d) must be considered as a total prohibition and that the expression does not

bring within its fold the restrictions imposed by Clause (3) of the Import Control Order, 1955. The Court negated the said contention and

held thus:-

...What Clause (d) of Section 111 says is that any goods which are imported or attempted to be imported contrary to "Any prohibition

imposed by any law for the time being in force in this country" is liable to be confiscated. "Any prohibition" referred to in that section

applies to every type of "prohibition". That prohibition may be complete or partial. Any restriction on import or export is to an extent a

prohibition. The expression "any prohibition" in Section 111(d) of the Customs Act, 1962 includes restrictions. Merely because Section 3 of

the Imports and Exports (Control) Act, 1947, uses three different expressions "prohibiting", "restricting" or "otherwise controlling", we

cannot cut down the amplitude of the word "any prohibition" in Section 111(d) of the Act. "Any prohibition" means every prohibition. In

other words all types of prohibitions. Restriction is one type of prohibition. From item (I) of Schedule I, Part IV to Import Control Order,

1955, it is clear that import of living animals of all sorts is prohibited. But certain exceptions are provided for. But nonetheless the

prohibition continues.â??

10. Learned Authorised Representative also submits that the adjudicating authority based his findings on the observation of the jurisdictional High

Court, while dismissing the request for provisional release of the consignment by the appellant, (2020 (9) TMI 82 - Kerala High Court). Honâ??ble

HC observed that

3. On a consideration of the facts and circumstances of the case and the submissions made across the Bar, I am of the view that the prayer for provisional release of the goods sought for by the petitioner cannot be granted. It cannot be ignored that what the petitioner has chosen to import is a commodity in respect of which the Central Government, through the Directorate General of Foreign Trade (DGFT), has issued Ext.P1 notification restricting imports with a view to safeguard the domestic industry. The minimum import price for the product imported is fixed as 200/- per kilo gram CIF and it is not in dispute that the price at which the petitioner imported the commodity is significantly lower than the minimum import price stipulated. The goods, if allowed to be provisionally cleared, would enter the domestic market, thereby frustrating the very objective of the notification issued by the Central Government.

11. Learned Authorised Representative further submits that this order was passed a week before the Hon'ble Supreme Court passed the order, in the case of Agricas LLP & others, upholding the power of Government in issuing the notification restricting the import of pulses; another writ filed by the appellants, against the earlier order, was dismissed by the Division bench of the Hon'ble High Court of Kerala while directing the Customs authorities to conclude adjudication expeditiously.

12. Heard both sides and perused the records of the case. Brief issue involved in the case is as to whether confiscated goods, which have acquired the nature of prohibited goods by virtue of the deeming definition under Section 2(33) of Customs Act, 1962, can be released on payment of redemption fine in terms of Section 125 of Customs Act, 1962. It is seen that the appellant had been a regular importer of different pulses including peas; they made an application dated 22.4.2020 before the DGFT to permit import of peas which are restricted in terms of Notification No.37/2015-20 dated 18.2.2019. The appellant claims that as the material was urgently required by them and as the permission was not forthcoming due to the COVID situation in the country, they were forced to import 210 MT of Canadian green peas and filed a Bill of Entry No.7978930. As per the Revenue, import of green peas is permissible, on having a license for personal use, subject to the following conditions:

- (i) Annual (fiscal year) quota of 1.5 lakh MT;
- (ii) Import at a minimum price of Rs.200 CIF;
- (iii) Import to be made at sea port Kolkata only.

13. Different importers of pulses have taken up the issue of the power of DGFT imposing restrictions by way of amendments in the policy or by

Notifications to various High Courts which were later transferred to Supreme Court. Honâ??ble Supreme Court in the case of Union of India vs.

Agricas LLP and Others, vide Order dated 26.8.2020 have upheld such power of DGFT, Honâ??ble Apex Court further held that imports if any

made contrary to Notifications would be dealt in accordance with FTDR Act and Customs Act, 1962.

14. Relevant provisions of Customs Act, 1962 are as follows.

14.1. In terms of Section 2(33) of Customs Act, 1962:

â??prohibited goodsâ? means any goods the import or export of which is subject to any prohibition under this Act or any other law for the

time being in force but does not include any such goods in respect of which the conditions subject to which the goods are permitted to be

imported or exported have been complied with;

14.2. In terms of Section 111(d) of Customs Act, 1962:

â??any goods which are imported or attempted to be imported or are brought within the Indian customs waters for the purpose of being

imported, contrary to any prohibition imposed by or under this Act or any other law for the time being in force;

14.3. In terms of Section 125 of Customs Act, 1962:

â??Option to pay fine in lieu of confiscation. â?" (1) Whenever confiscation of any goods is authorised by this Act, the officer adjudging it

may, in the case of any goods, the importation or exportation whereof is prohibited under this Act or under any other law for the time being

in force, and shall, in the case of any other goods, give to the owner of the goods [or, where such owner is not known, the person from

whose possession or custody such goods have been seized,] an option to pay in lieu of confiscation such fine as the said officer thinks fitâ??.

15. In the instant case, the impugned goods have been imported in violation of the conditions of the EXIM Policy Notification cited above. By virtue of

the same, the goods have acquired the nature of prohibited goods in terms of Section 2(33) of Customs Act, 1962 and have become liable for

confiscation in terms of Section 111(d) *ibid*. Now, the question arises as to whether the adjudicating authority has an option to allow such goods to be

redeemed on payment of fine in lieu of confiscation. In terms of Section 125 of the Customs Act, 1962, in case of goods other than prohibited goods,

the adjudicating authority shall allow the goods to be redeemed on payment of fine in lieu of confiscation; in case of prohibited goods, the adjudicating

authority has an option to allow the goods to be redeemed or to confiscate the goods absolutely. Whether absolute confiscation can be ordered in

respect of goods which are not primarily "prohibited goods" but have acquired the nature of "prohibited goods" by virtue of the definition

under Section 2(33) has been a subject matter of many judicial pronouncements. We find that Courts and Benches of the Tribunal have been

consistent in holding that such goods shall be allowed to be redeemed on payment of fine in lieu of confiscation. We find that Hon'ble Apex Court

in the case of *Commissioner of Customs vs. Atul Automobiles* in a bunch of Civil Appeals No.1057-1060, held *inter alia* that:

"9. It is...

Section 125 of the Customs Act, 1962 rests discretion in the authority to levy fine in lieu of confiscation. The MFDs were not prohibited but

restricted items for import. A harmonious reading of the statutory provisions of the Foreign Trade Act and Section 125 of the Customs Act

will therefore not detract from the redemption of such restricted goods imported without authorization upon payment of the market value.

There will exist a fundamental distinction between what is prohibited and what is restricted. We therefore, find no error with the

conclusion of the Tribunal affirmed by the High Court that the Respondent was entitled to redemption of the consignment on payment of the

market price at the reassessed value by the Customs Authorities with fine under Section 112(a) of the Customs Act, 1962."

We also find that High Court of Karnataka in the case of *CST No.4 & 5/2020* followed the above judgment of the apex court.

16. We find that the Chennai Bench of the Tribunal in the case of *Value Marks Traders Pvt. Ltd.* (Final Order No.41864/2018) has held that:

6. However, it remains undisputed that the impugned goods are restricted for import as per 2.31 of FTP 2015-2020 and hence will

become liable for confiscation under Section 111(d) of the Customs Act, 1962. Nonetheless, as there is no absolute prohibition on import of

these goods and but only a restriction brought about by para 2.31 of the FTP, there is no reason why appellants should not be given an

option to redeem the goods for home consumption as per provisions of Section 125 ibid. Hence, that part of the impugned order denying

their clearance for home consumption and instead ordering re-export on redemption fine cannot sustain and is set aside.

7. In the event, while upholding the order of confiscation for not having authorization as per the FTP, we however, order that they should

be allowed to be cleared for home consumption on imposition of suitable redemption fine under Section 125 ibid and payment of duties as

applicable. Only for the limited purpose of determining the appropriate quantum of such redemption fine, the matter is being remanded to

the adjudicating authority.

17. On going through the different judicial pronouncements on the issue, it appears that though the Customs Act does not find mention of

restricted goods, the Foreign Trade Policy along with Act and Rules made thereunder distinguish restricted and prohibited goods.

The ratio of the judgments goes to draw a distinction between these goods. Prohibited goods have a certain quality associated with them, that is to say

the goods which have an intrinsic taint, being harmful to the public health, public order, national security, etc., for example, arms and ammunition,

narcotic drugs, etc., are prohibited absolutely. Other goods are restricted that is to say that the import is permitted on fulfilling certain conditions like

having a license, etc., from DGFT. There is a discernible distinction between these two types of goods. Therefore, it is provided that in respect of

prohibited goods, the adjudicating authority may go for absolute confiscation. However, in respect of restricted goods, which are mostly commercial

goods, the adjudicating authority can release the goods on payment of fine in lieu of confiscation.

18. In the instant case, we find that the appellant is an actual user and had been importing green peas regularly. In respect of the impugned import also

they have applied to be DGFT for permission. It is pertinent to note that their application was not rejected and no order was passed on the said application. Under the circumstances, looking into the exigencies of the requirement of the impugned product, the appellants have imported the said goods. It is quite possible to accept the contentions of the appellants that they had a genuine expectation that their application would be considered in course of time and the permission would come forth about the time of import. Therefore, we find that the impugned goods are in the nature of restricted goods, can be allowed to be redeemed on payment of fine in lieu of confiscation in view of judicial pronouncements cited above. Moreover, we further find that at about the same time, different importers have imported green peas in violation of the restrictions imposed by the DGFT vide Notification cited above. In case of imports by M/s. Harihar Collections, Jaipur, Commissioner of Customs, Mumbai has allowed the imported green peas to be redeemed on payment of fine in lieu of confiscation. The appeal filed by the department in this regard was dismissed by Bombay High Court: 2020 (10) TMI 830 â?" Bom. HC. It would be travesty of justice to treat imports/importers with similar violations in a dissimilar manner. Importers at Mumbai and importers at Cochin cannot be treated differently. Therefore, we find that the impugned goods can be allowed to be redeemed on payment of fine in lieu of confiscation under Section 125 of the Customs Act, 1962 and penalty under Section 112(a) of the Customs Act, 1962. However, looking into the facts of the case that the appellant is a regular importer; is aware of the law and procedures regarding imports; has violated more than one condition of import, we find that interest of justice will be met if a deterrent redemption fine is imposed, in addition to the penalty already imposed by the Commissioner.

19. In view of the above, the appeal is disposed of by allowing redemption of impugned goods on payment of fine of Rs.12,00,000/- (Rupees Twelve Lakhs Only) in lieu of confiscation under Section 125 of the Customs Act, 1962. However, penalty of Rs.4,00,000/- (Rupees Four Lakhs Only) imposed by the Commissioner is upheld.

(Order was pronounced in Open Court on 16/12/2020)