(2021) 01 CESTAT CK 0019

In the Customs, Excise And Service Tax Appellate Tribunal

Case No : Customs Application No. 60281, 60282 Of 2020, Customs Appeal No. 60424, 60425 Of 2020

N. K. Impex India And Anr. @Hash C.C- Ludhiana

Date of Decision : 13-01-2021

Acts Referred:

Customs Act, 1962 — Section 2(25), 2(33), 2(39), 11, 47(1), 110(A), 111, 111(d), 123, 125, 130
Handling of Cargo in Customs Area Regulation, 2009 — Regulation 6(l)
Imports and Exports (Control) Act, 1947 — Section 3
Constitution Of India, 1950 — Article 14, 226

Citation : (2021) 01 CESTAT CK 0019

Hon'ble Judges : Ashok Jindal, J

Bench : Single Bench

Advocate : Sudhir Malhotra, Rajeev Gupta, M. S. Dhindsa

Final Decision : Allowed

Judgement

,,,,,,

1. The appellants are in appeals against the impugned orders wherein the request of provisional release of imported goods under Section 110(A) of the,,,,,,

Customs Act, 1962 has been rejected alongwith applications for early hearing of the appeals.",,,,,,

2. Today, when the matters were called, the Ld. Counsel for the appellant submits that the goods are in perishable nature and live consignments have",,,,,,

been seized; therefore, the appeals are to be heard on priority basis.",,,,,,

3. The Ld. AR submitted that this Tribunal has no jurisdiction to hear the appeals as the issue relates to classification and rate of duty which falls in,,,,,,

competence of division bench of this Tribunal.,,,,,,

4. In rebutted the objection raised by the Ld. AR, the Ld. Counsel submits that the issue before this bench is neither involve any question of",,,,,,

classification nor of rate of duty nor of interpretation of any exemption notification and nor of valuation, therefore, the appeals can be heard by this",,,,,,

bench and the goods are being perishable nature.,,,,,,

5. As stated by the Ld. Counsel these appeals do not have any issue of rate of duty, valuation, classification or benefit of any exemption notification,",,,,,,

the applications of early hearing of the appeals are allowed and as agreed by both sides the appeals are also taken for disposal today itself.,,,,,,

5. The Ld. Advocate for the appellant submits as under:-,,,,,,

(ii) Brief Facts,,,,,,

In both the appeals, Dry Dates falling under CTSH 08041030 were imported from Dubai having country of origin Saudi Arabia (in short impugned",,,,,,

goods).,,,,,,

In appeal no. C/60425/2020, bill of entry no. 6596563 dt. 23.01.2020 filed by M/s Findoc Impex - the impugned goods were cleared by Customs after",,,,,,

SIIB investigation; subsequent to clearance impugned goods were sold by importer to M/s N.K Impex India and from their godown quantity of 59,650",,,,,,

Kg. of Dry Dates seized by DRI, Ludhiana on 02.07.2020.",,,,,,

In appeal no. C/60424/2020, bill of entry no. 6887043 dt. 14.02.2020 filed by M/s N.K. Impex India and impugned goods were seized at the port on",,,,,,

19.05.2020.,,,,,,

The issue involved in both the appeals are common therefore, on request appeal of M/s Findoc Impex was taken for argument after explaining the",,,,,,

slight difference between two appeals i.e. in appeal no. C/60424/2020 impugned goods were seized at port and in appeal no. C/60425/2020 impugned,,,,,,

goods were seized by DRI from the godown after clearance by Customs on basis of investigation by SIIB.,,,,,,

(iii) Goods cleared after SIIB examination,,,,,,

The impugned goods imported against bill of entry no. 6596563 dt. 23.01.2020 (appeal no. C/60425/2020) were cleared after thorough investigation,,,,,,

conducted by SIIB Customs, Ludhiana. The examination order given in the bill of entry inter-alia reads as under :",,,,,,

â??...... PLEASE ASCERTAIN COUNTRY OF ORIGIN. IT MAY BE ENSURED THAT THE GOODS ARE NOT OF PAKISTAN ORIGIN.,,,,,,

SIIB MAY BE ASSOCIATED TO CARRY OUT THE INVESTIGATION.â??,,,,,, The detailed investigation was conducted by SIIB under the supervision of Ld. Joint Commissioner and was concluded that â??country of origin of,,,,,,

imported goods appears to be Kingdom of Saudi Arabiaâ??. The report signed by Assistant Commissioner SIIB Customs Ludhiana placed at page 36 to,,,,,,

38 of paper book refers. Consequent to SIIB investigation, impugned goods imported against bill of entry no. 6596563 dt. 23.01.2020 were cleared by",,,,,,

Customs.,,,,,,

The said factual position regarding clearance of impugned goods after investigation by SIIB has not been denied by the department, in their synopsis",,,,,,

submitted to Honâ??ble Bench with a copy to appellant on 08.01.2021; though the said ground emphatically taken in the grounds of appeal.,,,,,,

It is pertinent to mention that impugned goods after clearance by Customs no longer remain â??imported goodsâ? as per Section 2(25) of Customs,,,,,,

Act, 1962 and it reads as under:",,,,,,

Section 2(25),,,,,,

â??imported goodsâ? means any goods brought into India from a place outside India but does not include goods which have been cleared,,,,,,

for home consumption.â??,,,,,,

In the facts and circumstances of the case, the goods cannot be seized as cleared after investigation. For argument sake, the duty if any can be",,,,,,

demanded, if any new evidence brought on record.",,,,,,

(iv) Ground for denying provisional release other than those taken in seizure memo. In the operative part of seizure memo, the reason for seizure has",,,,,,

been mentioned as :,,,,,,

â??In view of the above mentioned facts and circumstances, the aforesaid detained goods appears to have been imported by way of",,,,,,

misdeclaration of country of origin with an intent to evade payment of appropriate custom duty â??,",,,,,,

Both in the provisional release order and in order-in-appeal, the impugned goods has been categorized as â??prohibited goodsâ? on the ground that",,,,,,

appellants had not submitted the attested copy of Phytosanitary Certificate from the country of origin though admittedly Phytosanitary Certificate from,,,,,,

the country of re-export had been submitted.,,,,,, It is stated that the Phytosanitary Certificate certifies the fitness of product for human consumption and it has nothing to do with rate of duty, as",,,,,,

country of origin is not in dispute vide impugned order. The provisional release order and order-in-appeal passed on entirely different grounds than that,,,,,,

in seizure memo. Accordingly, impugned order bad in law and be setaside.",,,,,,

(v) Reg. Phytosanitary Certificate of country of origin.,,,,,,

End-use

Purpose","Declared Means of

Conveyance",,Import Permit No.,,Total Quantity,"Total No.

of

Packages

Consumption,By Sea,"Transwor ld

Shipping and

Logistic",NIL,,208416 Kg (s),4160

Scientific Name,"Common

Name",Origin,PC No.,Quantity,"No. of

Packages","Commodity

Class

Phoenix

dactylifera",Dates,"Kingdom of

Saudi Arabia",NIL,"2084 16

Kg",4160,"Dry Fruits

and

Vegetables

i) Para 10(2) of Chapter III of Plant Quarantine (Regulation of Import into India) Order, 2003 specifies that â??Every consignment of plant species",,,,,,

herein specified in Schedule-V, VI and VII shall be accompanied by an original Phytosanitary Certificate issued by the authorised officer at country of",,,,,,

origin or Phytosanitary Certificate for re-export issued by the country of re-export alongwith attested copy of phytosanitary Certificate from the,,,,,,

country of origin as the case may be, with additional declarations being free from pests mentioned under Schedule-V and VI of this order or that the",,,,,, pests as specified do not occur in the country of origin.â? has not enclosed. The appellants have failed to submit the attested copy of phyto-,,,,,,

sanitary certificate from the country of origin as well as clearance from the PQ authorities, noncompliance of this special condition of",,,,,,

import has made the goods prohibited in terms of Section 2(33) read-with Section 11 of CA, 1962. It is well settled law that the impugned",,,,,,

goods fall in category of prohibited goods. Reliance is made on the following judgments of the Honâ??ble Supreme Court:-,,,,,,

(a) Sheikh Mohd. Omer vs Collector of Customs, Calcutta and othrs [1983(13)ELT1439(SC)]: -The Honâ??ble Supreme Court held that",,,,,,

â?? Any prohibitionâ?? in Section 111(d) means every and all types of prohibition, whether complete or partial, it includes restriction which is one",,,,,,

type of prohibition. Its amplitude cannot be cut down by the expressions â?? prohibitingâ?? or restricting or otherwise controllingâ?? occurring in,,,,,,

Section 3 of the Imports and Exports (Control) Act, 1947.",,,,,,

(b) Omprakash Bhatia vs Commisioner of Customs, Delhi [2003 (155) ELT 423(SC)] :- The Honâ??ble Supreme Court held that 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- Sections 2(33), 11 and 113(d) of the Customs Act, 1962.",,,,,,

ii). Chapter VI of Plant Quarantine (Regulation of Import into India) Order, 2003 covers power of relaxation and para 14(1) specifies that the",,,,,,

relaxation can be given as one time exception in favour of single party and not for repeated violations by that party and M/s Findoc Impex has,,,,,,

already been granted exemption by the Plant Quarantine authorities for Bill of Entry dated 6387411 dated 07.01.2020. The argument that,,,,,,

Phytosanitary Certificate for reexport issued by the country of re-export, Dubai and fumigation certificate at Dubai would suffice is",,,,,,

against the express provisions as contained in Plant Quarantine order 2003 supra. Rather the waiver can only be granted for cogent reasons,,,,,,

in public interest. Reliance is placed on following case laws:-,,,,,,

(a) The Delhi High Court in case of INDIA TIMBER & SEASONING PLANT vs. UNION OF INDIA--2016 (336) E.L.T. 640 (Del.) held though,,,,,,

undoubtedly the power of relaxation is contained in the Quarantine Order, yet it has to be exercised for some cogent reasons and that too, in larger",,,,,,

public interest. In fact, as pointed out by the Supreme Court in Union of India and Others v. Exim Rajathi India Private Limited, (2009) 16 SCC 263 =",,,,,,

2008 (232) E.L.T. 774 (S.C.), import of food and trees can be dangerous both for humans as well as for agriculture. This Court is also of the view that",,,,,,

even if the fault cannot be attributed to the petitioner for non-fumigation by the exporter, the consignment in question cannot be allowed to remain in",,,,,,

India as firstly, it would lay down a wrong precedent and secondly, nonfulfilment of mandatory condition of fumigation at exporterâ??s end could",,,,,,

have serious ramification for our flora and fauna as well as environment in general.,,,,,,

(b) The Honâ??ble Supreme Court in case of Commissioner of Customs Kochi vs Covai Raja Metals (India) Pvt. Ltd 2016 (335) E.L.T. 583 (S.C.),,,,,,

held that Writ jurisdiction - Exercise thereof against show cause notice - Import of construction sand - Plant quarantine order, applicability of - High",,,,,,

Court ought to have avoided invoking writ jurisdiction against show cause notice and should not have gone into applicability of impugned PQ order on,,,,,,

import of aforesaid goods - Article 226 of Constitution of India.,,,,,,

B. DRI cannot be barred from matter looked into by SIIB: -i) The Bill of Entry of M/s Findoc Impex was marked for first check examination to SIIB,",,,,,,

but SIIB had concurred with the importer regarding country of origin and Now DRI cannot challenge this. There is no bar in Customs Act for DRI not,,,,,,

to cause investigation after clearance when clearance has been allegedly obtained fraudulently under Section 47(1) of CA, 1962. Moreover SIIB was",,,,,,

not investigating violations of Plant Quarantine order, 2003",,,,,,

ii). The consignment of M/s N.K. Impex is a live B/E which has been seized by DRI and no involvement of SIIB is there regarding this,,,,,,

consignment.,,,,,,

C. Provisional Release Order of M/s TRB Internationa(l as submitted by opponent counsel in court and seeking parity in the form of waiver,,,,,,

of Plant Quarantine violations):-,,,,,,

i) M/s TRB International filed CWP No. 7365 of 2020 before the Punjab and Haryana High Court for provisional release of the seized goods which,,,,,,

was dismissed as withdrawn with directions to the department to expeditiously pass an order not later than 10 days and the Provisional Release Order,,,,,, No. 03/20 dated 05.06.2020 was passed in compliance to the same and the importerâ??s request was rejected as the importer declined to comply,,,,,,

with the conditions of the Boardâ??s Circular No. 35/2017-Cus dated 16.08.2017 and rather put his own conditions of paying only 10% of BG of,,,,,,

differential duty. It is pertinent to submit that the said importer had withdrawn his application for provisional release with his own set of,,,,,,

conditions as the same were against the laid down conditions of Boardâ??s Circular No. 35/2017-Cus dated 16.08.2017. In appeal the,,,,,,

Commissioner (Appeals) vide order 340/2020 has allowed provisional release on the following conditions as per Board circular 35/2017:-,,,,,,

[1]. Execute Bond for full value of seized goods.,,,,,,

[2]. Furnish Bank Guarantee or Security Deposit to cover the following-,,,,,,

(a) Differential duty of Rs. 1,38,39,91,144 on seized goods being provisionally release.",,,,,,

(b) 10% of Rs. 1,38,91,144 to cover amount of redemption fine that may be levied in lieu of confiscation u/s 125 of Customs Act.",,,,,,

(c) 25% of Rs. 1,38,91,144/- to cover amount of penalties that may be imposed.",,,,,,

ii). The primary issue raised for determination before the Joint Commissioner as well as the Commissioner (Appeals) in the case of M/S TRB was,,,,,,

only the provisional release of goods with regard to the security to protect the interest of revenue keeping in view the differential duty, due to goods",,,,,,

being of Pakistan origin. Joint Commissioner and Commissioner (Appeals) have not dealt specifically with the violation of Plant,,,,,,

Quarantine (Regulation of Import into India) Order, 2003 nor has waived the same and therefore to ask for parity on this basis in the",,,,,,

form non submission of Plant Quarantine clearance is illogical. The statutory violations cannot be waived off like this.,,,,,,

iii). On the other hand impugned provisional release orders 5/2020 (N.K.Impex) and 6/2020 (Finodoc) both dated 28/08/2020 has dealt,,,,,,

specifically with the violation of Para 10(2) of Chapter III of Plant Quarantine (Regulation of Import into India) Order, 2003 and is",,,,,,

reproduced as under:,,,,,,

â??The appellant request for provisional release of seized goods was rejected vide Provisional Release Order Nos. 5 & 6/20 passed by the Joint,,,,,, Commissioner by following para 2 of Circular 35/2017- Cus dt. 16.08.2017 on the following grounds:-,,,,,,

(a) The importer is adamant for his own set of conditions rather than fulfilling the conditions of Circular 35/2017- Cus dt. 16.08.2017 ignoring the facts,,,,,,

that the impugned goods do not prove the country of origin and the conditions of Plant Quarantine.,,,,,,

(b) Has not provided Plant Quarantine Certificate issued by Directorate of Plant Protection and Quarantine for clearance.,,,,,,

(c) Has not submitted the attested copy of the phytosanitary certificate from the country of origin with additional declaration under,,,,,,

schedule V and VI of Plant Quarantine order 2003.,,,,,,

(d) Impugned seized goods are prohibited under Section 2(33) of Customs Act for non-compliance under Plant Quarantine (Regulation of,,,,,,

Import into India) Order, 2003.",,,,,,

iv). Further It has been settled by the Honâ??ble Supreme court in case of Faridabad CT Scan Centre vs D.G. Health Services,,,,,,

[1997(95)ELT161(SC)] that wrong orders cannot be perpetuated with the help of Article 14 and there is no discrimination if correct,,,,,,

orders are passed even if wrong orders were passed in favour of some other persons. (Copy encosed). It has was held in SHIVA,,,,,,

TAXFABS LIMITED Versus UNION OF INDIA2011 (24) S.T.R. 525 (Del.) thwaht ile continuity and consistency are conducive to the,,,,,,

smooth evolution of Rule of law yet hesitancy to correct a wrong or set forth or correct a deviation for future can prevent/obstruct its,,,,,,

growth. Rule of estoppel applies to one and the same assessment and not to assessment of different years/persons. The doctrine of â??approbate,,,,,,

and reprobateâ? is only a specie of estoppel. It applies to the conduct of the parties. It cannot operate against the provisions of a statute [see CIT v.,,,,,,

V. Mr. P. Firm [1965] 56 ITR 67 (SC)].,,,,,,

v). Section 2(33) and 2(39) read with section 111 of the Customs Act casts a duty on the customs officer to stop the import of,,,,,,

PROHIBTED/SMUGGLED items being in violation aonf y other law for the time being in force. Here there is a specific violation of Para,,,,,,

10(2) of Chapter III of Plant Quarantine (Regulation of Import into India) Order, 2003 which has made liable for confiscation.",,,,,,

D. Non-compliance of special conditions of import hence prohibition confirmed by Plant Quarantine authorities:- The Assistant Director, PQ, Amritsar",,,,,,

has confirmed vide letter dated 22.05.2020 (copy enclosed) that:-,,,,,,

a). M/s Findoc Impex pertaining to impugned B/E No.6596563 has not even applied for clearance under the PQ information system and the clearance,,,,,,

of goods is subject matter of the investigation by DRI. b). M/S N.K.impex has not even applied for clearance under the PQ information system for the,,,,,,

impugned LIVE B/E No. 6887043,,,,,,

c) M/s TRB Internationalh as not even applied for clearance under the PQ information system for three B/E Nos 6922118/6923771/6924057 as,,,,,,

covered in the Commr (appeals) order No 340/2020 pertaining to provisional release order 03/2020. DRI is investigating all such past clearences.,,,,,,

E. The fact of evasion of customs duty due to goods of Pakistan origin is prima-facie established by scrutiny of the documents,,,,,,

recovered from M/s Today Logistics and M/s Today Global Forwarders (India) which revealed trail of emails exchanged between M/s,,,,,,

Today Global Forwarders (India) and M/s Aaamro Freight for bringing consignment of dry dates from Karachi port in Pakistan via,,,,,,

Jebel Ali to India. For these very reasons, on specific information, the goods were detained and seized thereupon and investigation is",,,,,,

underway by DRI. This fact was revealed upon search of premises of M/s N.K. Impex by DRI.,,,,,,

F. Provisional release order is not a mandatory right:- Objective satisfaction at the stage of provisional release casts a duty on the authority to consider,,,,,,

whether there are prohibitions/restrictions in the CA, 1962 or any other law for the time being in force and to exercise his discretion satisfying",,,,,,

principles of reasonableness which has been done in this case.,,,,,,

(a) The issue is no more res integra being decided by the Honâ??ble Madras High Court in case of Malabar Diamond Gallery P. Ltd. Vs ADG, DRI,",,,,,,

Chennai [2016 (341)ELT 65(Mad.)], wherein it has upheld the discretion exercises by the competent authority to deny provisional",,,,,,

release.,,,,,,

(b) The Honâ??ble Supreme Court in case of Union of India vs Lexus Exports Pvt. Ltd. [1994(71)ELT348(SC)] High Court should not have,,,,,,

intervened in a matter of this kind and at that particular stage - Pleas of the assessee that he is entitled to have the goods released on payment of,,,,,,

redemption fine even if there is confiscation of goods and export would earn foreign exchange are not acceptable because sanctity of legal,,,,,,

proceedings cannot be whittled down on grounds of such expediency and that exercise of such right under Section 110A is only provisional and not,,,,,,

absolute.,,,,,,

(c) The Honâ??ble Tribunal in case of VK. Mohammad Ali vs Commissioner of Customs, Cochin [2019(369) ELT 1538 (Tri.-Bang.) has held that",,,,,,

when importer is unable to submit anything to show seized goods were imported properly acquires nature of prohibited goods and Tribunal cannot sit in,,,,,,

judgment over discretion exercised by competent authority duly empowered ordering absolute confiscation of seized gold- Order not interfered with,,,,,,

Section 2(33) (and 125 of Customs Act, 1962.",,,,,,

(d) The Honâ??ble Madras High Court in case of Commissioner of Customs (Air), Chennai_I vs Abdul Azeez held that Appeal to Appellate",,,,,,

Tribunal- Remand Established facts indicating that noticee had smuggled gold into country and he had no documents/explanation for its lawful,,,,,,

possession - HELD : There was no scope for remand of matter to Commissioner with direction to exercise discretion to give option for,,,,,,

redemption of gold - Section 130 of Customs Act, 1962. [para 9, 10, 11, 12]",,,,,,

(e) The Delhi High Court in case of Mala Petrochemicals & Polymers v. AD.G., Directorate of Revenue Intelligence â?" 2017 (353) E.L.T. 446",,,,,,

(Del.) held Provisional release of seized goods - Judicial review - Scope of - Powers under Section 110A of Customs Act, 1962 involve exercise of",,,,,,

discretion, and scope of its judicial review limited to examination as if discretion exercised rightly, fair and reasonable in circumstances,",,,,,,

and not based on irrelevant material. [para 23] .Here the court had ordered for full payment of differential duty and reduced additional BG to,,,,,,

15% from 30% towards penalty. However SC stayed the reduction of BG.,,,,,,

Additional case laws and documents enclosed:-,,,,,,

(i) Letter dated 22.05.2020 addressed to Deputy Director, DRI by Assistant Director, Plant Quarantine, Amritsar..",,,,,,

(ii) Faridabad CT Scan Centre vs D.G.Health Services 1997(95) ELT 161(SC),,,,,,

(iii) Mala Petrochemicals & Polymers v. A.D.G., DRI 2017 (353) E.L.T. 446

(Del.).",,,,,,

(iv) ShivaTex Fabs Ltd. vs UOI 2011(24)STR 525.,,,,,,

7. After hearing both the sides in detail, the short issue involved in the matter is in appeals is that whether the goods can be released provisionally",,,,,,

under Section 110(A) of the Customs Act, 1962 or not? As the facts in both the cases are little difference, therefore, the findings of the each case is",,,,,,

give separately.,,,,,,

Appeal No. C/60425/2020,,,,,,

It is a case in which the goods have been cleared for home consumption and with a direction to SIIB to investigate the country of origin and it was,,,,,,

held by the SIIB that country of origin is Kingdom of Saudi Arabia. The said observation is placed herein as under:-,,,,,,

Further, the Ld. Counsel for the appellant during the course of arguments has also drew my attention to the fact that the goods in question are no more",,,,,,

imported goods in terms of Section 2(25) of the Customs Act, 1962 wherein â?? imported goods means any goods brought in India from a placed",,,,,,

outside India but doubts which has been cleared for home consumptionâ?. Admittedly, the goods in question were cleared for home consumption,",,,,,,

therefore, at the time of importation the assessment has been made after investigate the goods, in that circumstances, on mere presumption or on the",,,,,,

basis of third party evidence, it creates doubts that the country of origin is not Kingdom of Saudi Arabia. Therefore, in that circumstances, the goods",,,,,,

are required to be provisionally released under Section 110 (A) of the Customs Act, 1962 by putting reasonable condition for release of the goods in",,,,,,

terms of precedent decision. Therefore, the matter is remanded back to the adjudicating authority to re-consider the request of provisional release of",,,,,,

impugned goods in judicious manner as the goods are in perishable nature within seven days from the date of receipt of this order.,,,,,,

Appeal No. C/60424/2020,,,,,,

In this case, the goods have been seized at port itself on the premise that the goods in question are having origin of Phytosanitary Certificate and it is a",,,,,,

matter of investigation. Further, it has also alleged that the appellant has failed to produce the attested copy of Phytosanitary Certificate from the",,,,,,

country of origin, therefore, the Phytosanitary Certificate for re-export is required to examine, the same is reproduced herein as under:-",,,,,, Â,,,,,,

The said certificate itself clearly states that,,,,,,

the goods in question are originated from Kingdom of Saudi Arabia. In these circumstances, it is to be required to keep in mind that the appellant has",,,,,,

complied with substantial condition of Plant Quarantine Order 2003. Considering the same and keeping in mind to safeguard the revenue and the,,,,,,

goods are of perishable nature, the request for provisional release under Section 110(A) of the impugned goods is required to be considered by the",,,,,,

adjudicating authority taking the view of the same in similar type of situation in the case of other importers, therefore, the matter is remanded back to",,,,,,

the adjudicating authority to re-consider the request of provisional release of impugned goods in judicious manner as the goods are in perishable nature,,,,,,

within seven days from the date of receipt of this order.,,,,,,

8. In result, the appeals are allowed by way of remand.",,,,,,

(Order pronounced on 13.01.2021),,,,,,