(1993) 12 MAD CK 0041

In the Madras High Court

Case No : Writ Petition No. 648 of 1986

Orient Litho Press APPELLANT

Vs

Collector of Customs, Madras RESPONDENT

Date of Decision : 16-12-1993

Acts Referred:

Citation : (1994) 45 ECC 131 : (1994) 71 ELT 32

Hon'ble Judges : Kanakaraj, J

Bench : Single Bench

Advocate : Shri S. Ramasubramaniam, for the Appellant; Shri K. Illias Ali, Addl. Central Govt. Standing Counsel, for the Respondent

Judgement

Kanakaraj, J.—This Writ Petition coming on for hearing on Monday the 29th and Tuesday the 30th days of November 1993 upon perusing

the petition and the affidavit filed in support thereof the order of the High Court dated 29-7-1988 and made herein and the counter and reply

affidavits filed herein and the records relating to the order in C-3/1128/85 in Appeal M. Cus. 42/86 dated 9-1-1986 on the file of the first

respondent comprised in the return of the respondents to the writ made by the High Court, and upon hearing the arguments of Mr. S.

Ramasubramaniam Advocate for the petitioner, and of Mr. K. Illias Ali Additional Central Government Standing Counsel on behalf of the

respondents and having stood over for consideration till this day the court made the following order :-

The petitioner is a partnership firm carrying on business in printing and publishing. As part of its extension programme, it intended to import colour

offset printing machine with pre-press register system and other such technically advanced accessories and the Import Export Policy. The above proposal for a new project was submitted to the third respondent so that the machinery can be imported under the scheme ""Project Import"". If the

proposal is approved the petitioner can avail of concessional rate of Customs duty under the Customs Tariff Act, 1975. The relevant entry is Tariff

Item 84.66. The third respondent had recommended the import of the said machinery alongwith a small quantity of graphic art films in various

sizes, the graphic art films were required to test the machinery to see whether they were in order. Under the policy the importer is to register the

contract of the import with the appropriate Customs House. The Petitioner approached the second respondent for such registration. Since the

graphic art film had reached India earlier, the petitioner requested the second respondent to register the contract with reference to the graphic art

films to the value of Rs. 1,02,612.40. However, by an order dated 23-12-1985 the second respondent rejected the request, since, according to

him the graphic art films were not raw materials or consumable stores, essential for the maintenance of the project material. Thereafter all the goods

had arrived at the Madras Port and the petitioner contended that graphic art films formed part of machinery. However, by an order dated 9-1-

1986, the first respondent had also rejected the appeal. The Writ Petition is for the issue of a writ of mandamus to quash the order of the first

respondent dated 9-1-1986 and to direct the second respondent to register the contract with reference to the import of the graphic art films. The

goods were permitted to be imported by an interim order of this court dated 3-3-1989 on furnishing of the Bank Guarantee for 50% of the

disputed amount.

2. In the counter affidavit filed by the respondents 1 and 2 it is pointed out that the petitioner wanted registration in respect of five items of

machinery and the fifth item related only to graphic art films in various sizes. The dispute in this case relates only to the graphic art films. It is

admitted that the third respondent had issued a certificate on 1-11-1985 recommending the benefit of ""Project Import"" for all the above items.

Respondents 1 and 2 have rejected the claim of the petitioner for registration of the graphic art film under the ""Project Import"" Scheme on the

ground that the Tariff Heading 84.66(i)(d) permits raw-materials for manufacture of items mentioned therein whereas graphic art films are meant for the end-products. Similarly, Tariff Heading 84.66(ii) also will not apply because this heading permits all spare parts and other raw materials or

consumable stores imported as a part of the contract subject to 10% of the total value. The emphasis is laid by the respondents in respect of Tariff

Heading 84.66(ii) by stating that only if the spare parts and consumable stores are recommended for the maintenance of the Plant/Project such

goods are permitted to be imported under the heading. The contention is that graphic art films is actually used for the purpose of manufacturing final

products and not for the maintenance of the plant. In other words, the respondents contend that the impugned orders are perfectly legal and valid.

3. Before considering the reasoning given by the respondents in the impugned orders, it is worthwhile to advert to the arguments of Mr. Rama

Subramaniam for the petitioner. According to the learned counsel the word ""Setting up"" used in the heading means not only refer to the erection of

a plant, but also to the testing of the machinery to see that it is in working condition. The graphic art films are necessary to test the working

condition of the machines. This is precisely the reason why the graphic art films imported is only a small quantity being less than 1% of the

permitted 10% of spares under sub-heading 84.66(ii). It is also argued that the word ''maintenance'' would also include the test-working of the

machinery for which the graphic art films is absolutely necessary. In other words, it is argued that the word ''maintenance'' is not confined to the

popularly understood meaning of post-erection maintenance of the machines. The above arguments of the learned counsel for the petitioner

suggests that the import of graphic art films can either be brought under Tariff Heading 84.66(i)(d) or under the Tariff Heading 84.66(ii). I have

carefully perused the above two items in the Customs Tariff Act. Tariff Heading 84.66(i)(d) says,

(d) Auxiliary equipment, as well as all components (whether finished or not) or raw materials for the manufacture of the aforesaid items and their

components, required for the initial setting up of a unit, or the substantial expansion of an existing unit, or a specified;

(1) Industrial Plant,

. . .

The short question is whether the ''initial'' setting up of the unit would also means the test-working of the machinery. Coming to Tariff Heading

84.66(ii) relevant portion as follows :-

(ii) All spares parts, other raw materials (including semi-finished material) or consumable stores imported, as a part of a contract or contracts,

registered in terms of sub-heading (i), provided the total value of such spare parts, raw materials and consumable stores does not exceed 10% of

the value of the goods covered by sub-Heading (i) and further provided that such spare parts, raw materials or consumable stores are essential for

the maintenance of the plant or project mentioned in sub-heading (i)"".

Graphic art films cannot be deemed to be essential for the maintenance of the plant or project. In this case we have to keep in mind the fact that

four items of machinery had been permitted to be imported under the Scheme. The question is whether for the maintenance of those machineries

graphic art film is necessary. I have no hesitation in holding that graphic art films of various sizes are not necessary for the maintenance of the

machineries imported under 84.66(i). In other words, test-working of the machinery can by no stretch of imagination, be equated to maintenance

of the machinery.

4. But there is some substance in the argument that initial setting up of the unit may require some graphic art films to test-work the machinery. After

all, the petitioner has not sought to import a large quantity of graphic art films. The quantity sought to be imported seems to suggest that it was

mainly intended to test-work the machinery after erection work. This is precisely the reason why they have imported graphic art films of all sizes so

that the machinery can be test worked with all sizes of graphic art films.

4A. The authorities while rejecting the claim of the petitioner have stated that the graphic art films are used for the purpose of helping in their

printing activity in bringing home the final products. It is true that any amount of materials for test working a machinery may also be used for

producing the final product. But when a small quantity is imported just for the purpose of testing the machinery it cannot be said that the intention is

to use the graphic art films for the manufacture of final products. Neither of the respondents 1 and 2 have approached the question in the above

angle. When a foreign expert sells their machinery for erection in India, they would normally have the machinery tested with their own graphic art films. After the erection of the machinery the petitioner may either use the imported graphic art films or other types of graphic art films. But for the

purpose of test-working the machinery it was quite possible that the petitioner and his foreign exporter had decided to import a small quantity of

graphic art films. Therefore, there is no reason why the graphic art films should not be considered to be necessary as components for the initial

setting up of the unit covered under 84.66(i)(d) of the Tariff heading.

5. The second argument of Mr. Rama Subramaniam is the certificate given by the third respondent cannot be brushed side as having little value.

The certificate is in the following terms :-

VERIFIED that the above machinery equipment/raw materials are required by M/s. The Orient Litho Press, Sivakasi, for the substantial

expansion of their project for the printing of Lottery Tickets, calendars, text books etc., covered by Industrial Licence No. DGTD Reg. No.

DGTD/MDS/B/S. 16/R-60061/E-16(1)/SE/85, dated 25-7-1985 and is certified as ''Project Import'' for Assessment under Heading No. 84.66

of Section XVI of the Customs Tariff Act, 1975 (51 of 1975)"".

As against this argument it is contended on behalf of the respondents 1 and 2 that the question of payment of duty and the availability of a

concession is a matter for interpretation by respondents 1 and 2 and it is not for the third respondent. In any event the third respondent''s certificate

is not binding on the Customs Authority. In support of his argument Mr. Rama Subramaniam has relied on the Judgment of the Calcutta High Court

in Asiatic Oxygen Ltd. v. Assistant Collector of Customs, 1992 (57) E.L.T. 563 (Cal.) = 1993 (49) ECR 215. In that case, the question was

whether the import of gas cylinders over the phased implementation of a project would entitle them to get the benefit of the Heading 84.66. In that

case also the Director General of Technical Development had recommended the import of the machinery alongwith empty gas cylinders. One of

the reasons given by the Calcutta High Court for accepting the case of the importer is as follows :-

Secondary the Customs Authorities cannot dismiss the recommendations and endorsement of the DGTD and the CCI & E as being"" certificate of

busy bodies"". The certification was made pursuant to the import and export procedure prescribed by the Government of India and the relevant rules in his regard. The Customs Authorities are department of the same Government. It is arbitrary on their part to put a construction of the phrase

initial setting up"" different from the construction put by the other departments of the Government of India"".

Learned counsel for the respondents sought to distinguish the said decision by stating that, in that case the CCI & E had sought for a certificate

from the Director General whereas in this case the items are being imported under Open General Licence. This distinction does not take away the

ratio of the judgment namely, that certificate of verification by the third respondent has to be given due weight and cannot be brushed aside lightly.

May be, the certificate is not the last word on the subject, but it has to be given due weight.

6. For all the above reasons I hold that the import of the small quantity of graphic art films under the disputed bill of entry for the subject goods

valued at Rs. 1,02,612.40 only should be given benefit as part of the ''Project Import'' and entitled to the relief and concession sought for. The writ

petition is allowed in the above terms. There will, however, be no order as to costs.

