

(2005) 09 DEL CK 0043

In the Delhi High Court

Case No : Writ Petition (C) No. 1956 of 2005 and C.M. 1522 of 2005

Select Impex Ltd.

APPELLANT

Vs

Union of India (UOI) and Others

RESPONDENT

Date of Decision : 16-09-2005

Acts Referred:

Customs Act, 1962 — Section 113, 3

Citation : (2005) 123 DLT 613 : (2005) 84 DRJ 249 : (2006) 194 ELT 146

Hon'ble Judges : Vikramajit Sen, J

Bench : Single Bench

Advocate : Mukul Rohtagi and C. Hari Shankar, for the Appellant; Rajiv Sakhdar, for the Respondent

Final Decision : Allowed

Judgement

Vikramajit Sen, J.—This petition assails the Order dated November 25, 2004 of the Additional Director General of Foreign Trade holding that the Petitioner was not entitled to DEPB Credit in respect of the export of a consignment of Quartz wrist watches with gold bracelets. The Petitioner had earlier approached this Court by way of a Writ Petition bearing No. 392 of 2003 which was disposed of on August 29, 2004 remanding the matter for fresh consideration on merits. While doing so the Petitioner's contention had been noted to the effect that the question is on all fours with that of 2000 (72) ECC 95 which has been affirmed in Appeal to the Supreme Court, reported as Commissioner of Customs, Air Cargo, New Delhi Vs. J.G. Exports, . It reads as follows:

"Civil Appeal Nos.2636-2639/2001 are filed against the judgment and order dated 6th September, 2000 passed by the Customs, Excise and Gold (Control) Appellate Tribunal, New Delhi in Appeal Nos. C/409-411/99A and C/20/2000A and Civil Appeal Nos. 3403-3407/2001 are filed against the judgment and order dated 24th October, 2000 in Appeal Nos. C/434, 435. 437. 438, 439/1998 whereby the Tribunal after appreciating the facts arrived at the conclusion that for the goods which were sought to be exported there was no over-valuation by

the assessed concerned and, Therefore, the goods were not liable to confiscation. Hence the order passed by the Tribunal does not call for any interference. With regard to the other issues decided by the Tribunal, in our view, they are not required to be dealt with in these appeals and are left undecided. These appeals are dismissed accordingly. There shall be no order as costs.

2. I.A. Nos. 11-14/2003 would not survive and stand disposed of, accordingly".

Indubitably, the Apex Court gave its imprimatur only to the decision pertaining the confiscation of the goods on the grounds of over-valuation. Nothing more can be extracted from the dismissal of the SLP filed by the Customs Department.

2. The Additional Director General of Foreign Trade in its detailed order has opined that the question which had arisen in those proceedings were altogether different. Unfortunately, it has incorrectly been observed that "CEGAT is not competent to decide upon the Import and Export Policy. DGFT is the final authority on interpretation of Import and Export Policy. None of the DGFT offices/officers are imp ledged in the CEGAT and Therefore CEGAT would not be enlightened on the nuances of DEPB Scheme; fixation of DPB rates, administering the scheme etc." It does not behove a high functionary such as the Additional Director General of Foreign Trade to make these statements which may tantamount to Contempt of Court. One of the Departments of the Government was given a detailed hearing by CEGAT and it was always open to it to seek impleadment of the DGFT. It is true that Appeals against the Order of the DGFT do not lie to the CEGAT. However, it is quasi judicial authority deserving and commanding the respect of the Executive. I shall say no more.

3. So far as the applicability of the J.G. Exports dictum is concerned there appears to be force and merit in the view taken in the impugned order. Mr. Mukul Rohtagi, learned Senior counsel appearing on behalf of Petitioner, has relied on Section 113(d) of the Customs Act, 1962 as a foundation of the argument that the actions of the Customs Authority need not be circumscribed by the Customs Act alone and confiscation of goods admitted to be improperly exported can also be predicted on the infraction of any other law for the time being in force. It is, Therefore, an idle argument that the Directorate of Foreign Trade is not at all concerned with the actions of the Customs Department. The conundrum that has directly arisen in this petition also directly arose in J. G. Exports. In J.G. Exports a Redemption fine of Rs. 30 lakhs in lieu of confiscation had been imposed on the export of 215 Quartz Analog Watches, in addition to personal penalties on the partners of the firm to the extent of Rs. 20 lakhs each. It is also true that the question of valuation for purposes of availing high DEPB benefit of the consignment of goods which had been confiscated by the Customs Department had arisen in the earlier case. It had also been argued by the Department that the goods were not of the kind generally traded/exported and, Therefore, could not be covered under the DEPB Scheme. The larger Bench of the CEGAT, comprising 3 Learned Members drawn from different disciplines/experience, had paraphrased one of the arguments put forward on behalf of the Petitioners in the

following manner -

(ii) General instruction No. 4 under Appendix-28A to the Hand Book of Procedure [Volume 1] pertaining to Exim Policy 1997-2002, relied on by the Department to deny DEPB benefit to the wrist watches in question, was incorporated in Appendix 28A only w.e.f. 1-4-1999 and was not in force at the time of filing of the shipping bill; Quartz analog watches very much figured at Sl. No. 37 under Product Group Code 83 in the table of DEPB credit rates for the relevant period and, Therefore, were eligible for DEPB benefit at the rate of 21% of the FOB value".

The CEGAT held that the goods in question, i.e. Quartz Analog Watches with integrated bracelet were required to be assessed FOB value as a single unit. It also held that "the Department 's allegation that the gold bracelets were attached to ordinary watches for the purpose of over-valuation with intent to claim higher DEPB credit has no legal basis". These findings are directly binding on the Customs Department and would indirectly be binding on every other Department of the Government. The observations and approach of the Additional Director General of Foreign Trade in respect of the CEGAT can only be taken in very poor light.

4. Independent of the decision of the CEGAT, the neat question of law which arises is whether the Public Notice No. 1(RE-99)/97-02 is clarificatory in nature. It reads as follows -

"In exercise of powers conferred under paragraph 4.11 of the Export and Import Policy, 1997-2002, as notified in the Gazette of India extraordinary, Part-II, Section 3, Sub-section (ii) vide S.O. No. 283(E) dated 31.03.1997, the Director General of Foreign Trade hereby notified the Handbook of Procedures (Vol.1) (Revised Edition" March 99), 1997-2002, as contained in Annexure to the Public Notice . This shall come into force from 1st April, 1999.

This issues in public interest."

In the impugned Order it has been concluded that General Instructions NO. 4/ General Para 4 introduced in Policy was not an amendment of DEPB but a clarification. However, it must always be borne in mind that in fiscal matters retrospectivity is the exception. In Collector of Central Excise, Ahmedabad Vs. Ashoka Mills Ltd., , that the rate of duty that is payable is what was in place on the date of the clearance of goods. If retrospective liability is to be fastened then it must be unequivocally stated so. There is no gainsaying that in fiscal matters the benefit of doubt must be extended to the assessed. The following passage from the treatise `Principles of Statutory Interpretation" by G.P. Singh makes relevant and instructive reading:

Therefore, if the words used are ambiguous and reasonably open to two interpretations benefit of interpretation is given to the subject. (33) If the Legislature fails to express itself clearly and the tax-payer escapes by not being

brought within the letter of the law, no question of unjustness as such arises. (34) But equitable considerations are not relevant in construing a taxing statute, (35) and similarly logic or reason cannot be of much avail in interpreting a taxing statute. (36) It is well settled that in the field of taxation, hardship or equity has no role to play in determining eligibility to tax and it is for the legislature to determine the same. (37) But just as reliance upon equity does not avail an assessed, so it does not avail the Revenue. Thus if the Income Tax Act did not contain any provision making successor in business or the legal representative of an assessed liable to pay tax on the profits of the original assessed, the legal representatives could not be so taxed.(38)

33. The Central India Spinning and Weaving and Manufacturing Company, Limited, The Empress Mills, Nagpur Vs. The Municipal Committee, Wardha, ; Commissioner of Income Tax, Ahmedabad Vs. Karamchand Premchand Ltd., Ahmedabad, ; Board of Revenue, Uttar Pradesh Vs. Rai Saheb Sidhnath Mehrotra, ; C.A. Abraham, Uppotttil, Kottayam Vs. The Income Tax Officer, Kottayam and Another, ; J.K. Steel Ltd. Vs. Union of India (UOI), ; Controller of Estate Duty Vs. R. Kanakasabai and Others, ; Diwan Bros. Vs. Central Bank of India, Bombay and Others, ; Petron Engineering Construction Pvt. Ltd. and Another Vs. Central Board of Direct Taxes and Others, ; Hindustan Lever Ltd. Vs. Municipal Corporation of Greater Bombay and Others, ; M/s. Birla Cement Works Vs. The Central Board of Direct Taxes and Others, (more so when the interpretation in favor of the assessed has been acted upon and accepted by the Revenue for a long period.)

34. The Commissioner of Income Tax, Bombay Vs. The Jalgaon Electricity Supply Co., Ltd., .

35. Commissioner of Income Tax, West Bengal I Vs. Central India Industries Ltd., ; Lakshmi Kant Jha Vs. Commissioner of Wealth Tax, Bihar and Orissa, ; Commissioner of Income Tax, Bombay Vs. Gwalior Rayon Silk Manufacturing Co. Ltd., .

36. H.H. Prince Azam Jha Bahadur (Dead) through LRs Vs. Expenditure Tax Officer, .

37. Kapil Mohan Vs. The Commissioner of Income Tax, Delhi, .

38. Commissioner of Income Tax, Madhya Pradesh Vs. Hukumchand Mohanlal, ; Kapil Mohan v. Commissioner of Income Tax, supra.

In *St. Aubyn (L.M.) and Ors. v. Attorney-General* (No. 2) (1951) 2 ALL ER 473 Lord Simond's said in the House of Lords that "the question is not what transaction the section is according to some alleged general purpose aimed, but what transaction its language according to its natural meaning fairly and squarely hits"

5. Appendix 28A of the Handbook of Procedures vide Public Notice No. 1 dated 31.3.1999 reads thus -

The sole reason for rejection of their claim is GI 4 inserted in Appendix 28A of the Handbook of Procedure vide Public Notice No. 1 dated 31.3.1999.

"The DEPB rate aims to neutralize the incidence of duty on the inputs used in the export product. Therefore, the DEPB rates as given in Appendix 28A refer to normally tradable/exportable product. Items such as gold Nibs, Gold Pen, Gold Watches etc. though covered under the Generic description of writing instruments and watches are thus not eligible for benefit under the DEPB scheme".

6. I am unable to accept the argument of the Respondents that the General Instructions were merely a clarification and being so, should be applied retrospectively, even in the teeth of the statement that it would apply from 1-4-1999. Mr. Rajiv Sakhdar, learned counsel appearing on behalf of respondent has drawn attention to the asseveration made in the Counter Affidavit in order to show that the export of Quartz watches with gold straps was not what was envisaged at the time when 21% DEPB credit was notified for such exports. The question is how the Notifications are to be reasonably read by any person in the trade. In this regard I would entirely agree with the reasoning adopted by the Three Member Bench of the CEGAT to the effect that so far as inputs and output norms are concerned the subject consignment falls under Sl. No. B132 i.e. Quartz Analog Watches: case with or without integrated bracelet Watch Straps/ Bracelets. The consignment in question in this petition has been duly exported and it is not controverted that valuable foreign exchange has already come into country. The very fact that the consignment was permitted to be exported by the Customs Department at least leads to the position that the Authorities/ Department concerned construed the Notifications in the manner understood by the Petitioners. The only conclusion which can be arrived at is that the Department did not articulate in clear terms the circumstances in which DEPB credit at the rate of 21% would be permissible to Quartz Analog Watches with or without gold straps. Even accepting that credit at the rate of 21% under the DEPB was not what was contemplated, benefit of the doubt must be given to the Petitioner. The wordings of Public Notice No. 1, even though it is dated 31.3.1999 in terms states that it would come into force from 1-4-1999. If it was merely clarificatory in nature this date would not have been mentioned.

7. The consignment had already been exported prior to 1-4-1999. The Petitioner was, Therefore, fully entitled to the benefits of the Scheme as per its simple and straightforward interpretation. It is clear that this interpretation did not fall in line with what the Department intended and that is the reason why Public Notice No. 1. was issued. This, however, cannot have the effect of disentitling the Petitioner from availing of the benefits of the DEPB credit at the rate of 21% in terms of Public Notice No. 14 dated 4-6-1998. Quite rightly, the loop-hole that had manifested itself has been diligently plugged, but with applicability to transactions after 1-4-1999. The Petitioner's case does not fall in this category.

8. Mr. Sakhdar has relied on the sundry provisions of the Foreign Trade

(Development and Regulation) Act, 1992. In the analysis articulated above none of the provisions of this Statute would be of any avail to the Respondents in the factual matrix of this case.

9. This writ petition is allowed by quashing the impugned Order No. 1/82/45/24/AM99/DES.II/2791. A writ of mandamus is issued to Respondents to immediately release DEPB credit to the Petitioner in respect of claims which are the subject matter of these proceedings. Parties shall, however, bear their respective costs.