(2009) 12 MAD CK 0258

In the Madras High Court

Case No : Writ Petition No''s. 8740, 11809-11813, 11859-11863, 12314-12315 and 12529-12530 of 2005 and W.P.M.P. No''s. 12962-12966,13713-13714 of 2005 and W.V.M.P. No''s. 117-119 of 2007

Sidhi Smelters Pvt. Ltd. APPELLANT

Vs

Directorate General of Foreign Trade RESPONDENT

Date of Decision : 16-12-2009

Acts Referred:
Customs Act, 1962 — Section 18, 18(1), 47, 47(1)

Citation : (2010) 251 ELT 338

Hon'ble Judges : R. Sudhakar, J

Bench : Single Bench

Advocate : Abudu Kumar Rajarathinam, for R. Varadarajan, for the Appellant; Ravi Anantha Padmanabhan, Standing Counsel, T. Chandrasekaran, SCGSC and Mallika Srinivasan, SC, for the Respondent

Judgement

R. Sudhakar, J.—At the outset it has to be pointed out that the prayer in the writ petitions is misconceived and stems from misreading of the Ministry of Commerce and Industry Department of Commerce Policy Circular No. 19/2004-09 dated 18-2-2005 and on a misreading of the Ministry of Finance, Department of Revenue, Central Board of Excise and Customs Circular No. 56/2004-Cus., dated 18-10-2004 issued in File No. 450/108/2004-Cus.-IV. The petitioner challenges the Ministry of Commerce Policy Circular No. 19/2004-09 stating that it is prospective and cannot be applied to goods shipped prior to 18-2-2005, but the petitioners proceeded on the basis that they have complied with the Ministry of Finance, Department of Revenue, Central Board of Revenue and Customs Circular No. 56/2004-Cus., dated 18-10-2004 with regard to the inspection certificate issued by the National Accreditation body at the country of origin of the imported metal scrap. The writ petitioners have to satisfy that the certificate produced is in terms of the Ministry of Commerce Policy Circular as applicable. The Customs Circular is relatable to inspection of the goods at the time of clearance and it includes verification of the inspection certificate issued by the National Accreditation body specified in Appendix 28 of the Handbook of Procedure in the Foreign Trade Policy as amended. The petitioners have confused the issue by misreading the Commerce Ministry''s Circular with the Customs Circular, inasmuch as the writ petition prayer states that they have complied with the requirement of Customs Circular No. 56/2004, dated 18-10-2004 issued by Ministry of Finance, Central Board of Exercise and Customs in File No. 450/108/04-Cus. The Commerce Ministry''s Circular lays down certain guidelines for import clearance. It is the duty of the Customs Department to inspect the goods and verify the records including the inspection certificate as specified by the Commerce Ministry. The importers have to satisfy the requirements of the Circular issued by the Commerce Ministry at the time of Customs Clearance.

2. Petitioners in each one of the cases are importers of metallic waste and scrap in unshredded, compressed, metal scrap or loose form metal scrap. The goods Imported are covered by paragraph 2.32 of the Hand Book of Procedure (Volume 1) of the year 2002-2007, Foreign Trade Policy issued by the Ministry of Commerce and Industry, Department of Commerce, Government of India as amended in short the DGFT. Insofar as the present case is concerned, the matter is covered by Ministry of Commerce and Industry, Department of Commerce, Public Notice No. 16/2004-09 dated 15-10-2004 as amended by Public Notice No. 18/2004-09 dated 21-10-2004 issued by DGFT. Para 2.32 of the Foreign Trade Policy as amended by Public Notice No. 16/2004-09 dated 15-10-2004 reads as follows:

PUBLIC NOTICE No. 16/2004-09 NEW DELHI: the 15th October 2004

In exercise of powers conferred under paragraph 2.4 of the Foreign Trade Policy, 2004-09, and in supersession of Public Notice No. 15 dated 9-10-2004, the Director General of Foreign Trade hereby makes the following amendment a in Handbook of Procedures (Vol. I).

1. The existing para 2.32, will be amended to read as follows:

The following items may be imported without a licence/certificate/ permission.

(i) Any form of metallic waste, scrap, seconds and defectives, other than those which are of a value below the value specified for any such items by a notification issued in this behalf, and excluding hazardous, toxic waste, radio active contaminated waste/scrap containing radio active material;

However, import of any form of metallic waste, scrap referred to above shall be subject to the following conditions:

(a) Import of metallic waste and scrap in shredded form shall be permitted through all ports. Such imports will not require a pre-shipment inspection certificate in terms of Appendix-8 at the time of clearance of goods.

(b) import of metallic waste and scrap in unshredded, compressed and loose form shall be permitted through the following ports only:

1. Chennai, 2. Cochin 3. Ennore, 4. JNPT 5. Kandla, 6. Mor-rnugao, 7. Mumbai, 8. New Mangalore, 9. Paradip 10. Tuticorin, 11. Vishakhapatnam, 12. ICD Tughlabad, 13. Pipava 14. Mundra and 15. Kolkatta.

Moreover, in case of such Imports that exporter shall furnish that following documents to that customs at the time of clearance of goods:

(I) Pre-shipment inspection certificate as per the format in Annexure I to Appendix 8 from any of the Inspection & Certification agencies given in Appendix-28 to the effect that:

(a) The consignment does not contain any type of arms, ammunition, mines, shells cartridges, radio active contaminated or any other explosive material in any form either used or otherwise.

(b) the imported item(s) is actually a metallic waste/scrap/ seconds/defective as per the internationally accepted parameters for such a classification.

(c) The country of origin of the metallic waste scrap.

(II) copy of the contract between the importer and the exporter stipulating that that consignment does not contain any type of arms, ammunition, mines shells, cartridges, radio active contaminated, or any other explosive material in any form either used or otherwise.

In case any agency wishes to be enlisted under Appendix 28, they may furnish an application to the office of the Director General of Foreign Trade with the following documents:

(a) A brief on the activities of the agency, its history, membership, organisational structure, manpower etc.

(b) Infrastructural setup, logistics, testing labs etc. far carrying out the inspection of metallic scrap.

(c) List of companies/agencies for which tenting has been carried out.

DGFT trill review the performance of the Inspection and Certification Agencies in Appendix 28 on a regular basis.

(ii) Woolens rags/synthetic rags/shoddy wool in completely mutilated form subject to the condition that mutilation must conform to the requirements as specified by the customs authorities.

(iii) PBT bottle/waste

(iv) Import of all types of ships may be made without a licence/certificate/ permission on the basis of guidelines Issued by Ministry of Shipping and as per the age/residual life norms prescribed by the Ministry of Shipping.

Succeeding the earlier public notice as above, DGFT issued Public Notice No. 18/2004-09 dated 21-10-2004 was issued and it reads as follows:

PUBLIC NOTICE No. 18/2004-09 NEW DELHI: the 21st October, 2004

In exercise of powers conferred under paragraph 2.4 of the Foreign Trade Policy, 2004-09, the Director General of Foreign Trade hereby makes the following amendments in the Handbook of Procedures (Vol. I) Public Notice No. 16 dated 15-10-2004:

1. The para 2.32(i)(I), will be amended to read as follows:

(I) Pre-shipment inspection certificate as per the format in Annexure I to Appendix 28 from any of the Inspection & Certification agencies given in Appendix-28 to the effect that:

(a) The consignment does not contain any type of arms, ammunition, mines, shells, cartridges, radio active contaminated or any other explosive material in any form either used or otherwise.

(b) The imported item(s) is actually a metallic waste/scrap/seconds/defective as par the internationally accepted parameters; for such a classification.

(c) The country of origin of the Metallic waste scrap.

2. Annexure I to Appendix 28 will be amended as follows:

PRE-SHIPMENT INSPECTION CERTIFICATE Please see paragraph 2.32 (I) of Handbook of Procedure (Vol. 1) 1. Details of importer ______________________ (a) Name ______________________ (b) Address ______________________ (c) Telephone No. ______________________ (d) E-mail ______________________ 2. Details of import: ____ _____________________________ Description of metallic scrap Quantity Value Country of origin ____ __________________________ ____ ______________________________________ _______________________________ ____

3. Details of tests carried out: _________________ DECLARATION/ UNDERTAKING 1. The consignment at column 2 above does not contain any type of arms, ammunition mines, shells, cartridges, radio active contaminated or any other explosive material in any form either used or otherwise.

2. The imported item at column 2 above is actually a metallic scrap/seconds/ defective as per the internationally accepted parameters for such a classification.

3. I/we hereby declare that the particulars and statements made in this certificates are true and correct and nothing has been concealed or held therefrom.

Date _____________ Official Seal Signature _______________ Designation

____________ Name of the agency as per appendix 28 ______________

Note : This pre-shipment inspection certification is issued under paragraph 2.32(i) of Handbook of Procedures (Vol. 1) for unshredded, compressed and loose forms of metallic waste and scrap.

This issues in public interest.

The DGFT Public Notice No. 18/2004-09 dated 21-10-2004 is the effective Public Notice in respect of the present import and lays emphasis on the pre-shipment inspection certificate as specified in the policy. Needless to state the requirement of a proper certificate was emphasized due to public interest and to avoid import of arms and ammunitions and the importance is apparent in the Customs Notification No. 56/2004 dated 18-10-2004 which follows.

3. The Customs Department on its turn issued a Circular No. 56/2004-Cus. dated 18-10-2004 setting out certain procedures regarding clearance of imported metal scrap. This Circular was issued in view of an explosion which took place in Ghaziabad in a consignment of imported scrap. The relevant portion of the circular as may be required in the present case is as follows:

Circular No. 56/2004-Cus.

Dated 18th October, 2004

Clearance of imported metal scraps - Procedure regarding,

I am directed to say that till date following Circulars/instructions have been issued relating to the procedure for clearance of imported metal scrap, namely:

(i) 43/95-Cus., dated 26-4-1995

(ii) 46/97-Cus., dated 6-10-1997

(iii) Chairman''s letter D.O.F. No. L-6390/CH(BC)/2004 dated 11-10-2004.

2. The whole issue has since been reviewed In the background of the recent explosion at the premises of a scrap importer at Ghaziabad resulting in the death of ten persons. Consultations have been held with the concerned Ministries, namely Commerce & Industry, Home, Shipping , Steel and External Affairs. Discussions have also taken place between the concerned Trade Associations and the Government of India. Keeping all these aspects in mind, and in supersession of all existing instructions on the subject, it has been decided to follow the following procedure for clearance of imported metal scrap (both ferrous and non-ferrous).

3. The metal scrap may be divided in two categories, namely:

(i) Category-1 :- Scrap which has already landed in India and that which has left its port of origin on or before 25-10-2004, and which has not yet been cleared from a Customs Port, ICD/CFS or LCS,

(ii) Category-2 :- Scrap which is to be loaded for shipment to India after 15-10-2004.

5. As regards Category-2, i.e. future imports of metal scrap, the following procedure will be followed, namely:

(i) Import of metal scrap in shredded form will be permitted through all Ports/ ICDs/CFSs/LCSs without any pre-shipment inspection certificate.

(ii) Import and clearance of metal scrap in unshredded, compressed or loose form would be permitted only at the following Customs stations. Such consignments need not be shifted to the premises of the importer (except for BOU and SBZ units). Efforts should be made, with the help of port authorities/ custodians, to identify and segregate an open area for storage and examination of metal scraps at these Customs stations:

1. Chennai, 2. Cochin, 3. Ennore, 4. JNPT, 5. Kandla, 6. Mormugao, 7. Mumbai, 8. New Mangalore, 9. Paradip, 10. Tuticorin, 11. Vishakhapatnam, 12. ICD, Tughlakabad, New Delhi, 13. Pipava, 14. Mundra, and 15. Kolkata.

(iii) In all future cases, metal scrap in unshredded, compressed or loose form will have to be accompanied with a pre-shipment inspection certificate as per format in Annexure-1 to Appendix-8 from any of the Inspection and Certification Agencies given in Appendix-28 of the Handbook of Procedures (Vol. III) It may be noted that for such scrap in unshredded compressed or loose form, this pre-shipment certificate will be required irrespective of the fact whether or not the consignment has originated from a country affected by war or rebellion.

(iv) In respect of metal scrap in unshredded compressed or loose form accompanied by a pre-shipment inspection certificate as detailed in clause (iii) above, examination will be 25 of the containers in respect of manufacturer-importers and 50% in respect of traders, for each import consignment, subject to examination of a minimum of one container. The container selected will be examined 100%. where EDI is operational with Risk Management Module (RMM), the percentage of examination will be determined by the RMM.

(v) For metal scrap In unshredded, compressed or loose form imported in future if not accompanied by the prescribed pre-shipment inspection certificate, will be subject to 100% examination apart from stringent penal action for violation of provisions of the foreign Trade Policy, the examination may be done in the presence of police authorities, if considered necessary by the commissioner, at the risk & cost of the importer.

(vi) For scrap imported in shredded form examination may be limited to 10% of the consignment subject to examination of minimum one container. The container so identified should be examined 100%.

4. The consignment imported by the petitioners fall under the category 2 (i.e.) they have been shipped after 15-10-2004 and are unshredded, compressed

metal scrap or loose form metal scrap. Therefore, they require the Pre-shipment Inspection Certificate as per the format in Annexure-I to Appendix 2B in line with the DGFT amendment issued in Public Notice No. 18/2004-09 dated 21-10-2004 wherein para 2.32(i)(I) or Handbook of Procedure Volume-I has been amended to read as Annexure-I to Appendix 28 instead of Annexure-I to Appendix 8. There is no dispute with regard to nature and format of the certificate to be issued.

5. In all these cases, the goods were shipped after 15-10-2004. At the time when the goods landed in the port of Chennai and when the goods ware presented for clearance, the petitioners apprehended that the Pre-shipment Inspection certificate issued at the country of origin/port of loading may not be accepted by the Customs Department on the ground (hat it is in violation of Director General of Foreign Trade (DGFT) Policy Circular No. 19/2004-09, dated 18-2-2005. The petitioners, therefore, rushed to this Court for the above stated relief.

6. In effect, the plea of the petitioners is that so long as the petitioners have the Pre-shipment Inspection Certificate in the Format as per Annexure-I to Appendix 28, they should be allowed to clear the goods. The Department should not insist that they will go by the DGFT Policy Circular No. 19/2004-09 dated 18-2-2005. Therefore, the controversy revolves around the DGFT Policy Circular No. 19/2004-09 dated 18-2-2005 which read as follows:

Policy Circular No. 19/2004-09 Dated : 18-2-2005 To All Licensing Authorities, All Commissioners of Customs, Subject: Inclusion of branch offices in Appendix 28 of the Handbook of Procedures.

Requests have been received for including branch offices of Inspection agencies which are already registered under Appendix 28 of the Handbook of Procedures as inspection agencies for, issuing pre-shipment inspection certificate for import of metal scrap.

It is hereby clarified that only if the registered office gives an undertaking that the branch office has the requisite testing/inspection facilities to issue such a certificate for metallic scrap, will such branch offices be considered for inclusion in Appendix 28. All branch offices who wish to be so included may furnish such a declaration from their Registered office which is already enlisted in Appendix 28 OR they may produce a certificate to the affect that they are registered with the National Accreditation Body of the country of origin of the imported scrap.

This issues with the approval of PGFT.

(emphasis supplied)

7. The respondents were injuncted from enforcing the said Circular No. 19/2004-09 dated 18-2-2005 by an order of interim injunction pasted in W.P.M.P. No. 9436 of 2005 in W.P. No. 8740 of 2005. Following the interim injunction granted in W.P.M.P. No. 9436 of 2005 in W.P. No. 8740 of 2005, similar interim

orders were granted against the Customs Department from implementing the DGFT Policy Circular No. 19/2004-09 dated 18-2-2005. The goods imported were allowed to be cleared provisionally on the basis of the Inspection Certificate produced. It is stated by the respondent Department that the clearance was given subject to the result of the writ petitions and on furnishing a bond and pending further action in terms of the provisions of the Customs Act.

8. At the time of final hearing, the learned Counsel for the petitioners submitted as follows:

(i) The DGFT Policy Circular No. 19/2004-09 dated 18-2-2005 cannot be put against the petitioners and the Department should not take a stand that the Pre-shipment Inspection Certificate issued by the branch office of the Agency specified under Appendix 28 will not be accepted.

(ii) Petitioners'' contention is that there was no differentiation between the main office and the branch office in respect of the inspection agency listed in Appendix 20 of the Handbook-of Procedure and Customs.

(iii) The Customs Department were earlier allowing clearance on the basis of Certificate issued at the port of Shipment by branch office and the petitioners alone are discriminated and chosen for hostile treatment.

9. Learned Counsel Shi Ravi Anenthe Padmanabhan and Mr. T. Chandrasekaran appearing for the Department referred to the counter-affidavit and contended that the petitioners have rushed to this Court merely on an apprehension that the DGPT Policy Circular No. 19/2004-09 dated 18-2-2005 will be put against them and the Pre-shipment Inspection Certificate will be rejected. The writ petitions are premature as the Department has not taken any specific stand with regard to the import end the certificates produced for clearance. The Department has not issued a show-cause notice. No order rejecting the Pre-shipment Inspection Certificate has been passed and the petitioners have simply rushed to Court to pre-empt the Department from taking any action as per law. According to the Department, if the petitioners submit the Pre-Shipment Inspection Certificate in terms of DGFT Policy Circular No. 18/2004-09 dated 21-10-2004 as provided under para 2.32 of the Handbook of Procedure, Volume-I there will be no impediment in the clearance. The certificate issued by the inspection Agency has to be verified by the Customs Authorities and tested whether it is in accordance with para 2.32 of the Handbook of Procedure (Volume-I) 2004-09 as amended. In this view of the matter, it is submitted that the writ petitions are premature and has to be dismissed. The nature of relief sought for is to restrain the Department from taking any action whatsoever. If there is a violation under the provision of the Customs Act or the import policy, the Department should be allowed to proceed as per law and the pre-emptive writ petitions should be dismissed.

10. As could be seen from the prayer in the writ petitions, the petitioners clearly state that they have a pre-Shipment Inspection Certificate in terms of para 2.32

in the format as prescribed under Annexure-I to Appendix 28 of the Handbook of Procedure (Volume-I) 2002-2009. If that is the case, the Customs Authorities will have to verify whether the Pre-shipment Inspection Certificate qualifies for clearance of the goods in question and if it is in accordance with the Foreign Trade Policy. When the Department has not passed any order or issued a notice with regard to the certificate produced, or on the nature of goods imported, it cannot be presumed that the Department is going to stop the clearance based on the DGFT Policy Circular No. 19/2004-09 dated 18-2-2005. In any event, the clearance is provisional and the Department cannot be restrained from following the procedure contemplated under the provisions of the Customs Act or to take any action if there is a violation of the import policy or the provisions of the Customs Act.

11. Section 47 of the Customs Act, 1962 deals with clearance of goods for home consumption. Section 47(1) of the Customs Act reads as follows:

Section 47. Clearance of goods for home consumption :- (1) where the proper officer is satisfied that any goods entered for home consumption are not prohibited goods and the importer has paid the import duty, if any, assessed thereon and any charges payable under this Act in respect of the same, the proper officer may make an order permitting clearance of the goods for home consumption.

Section 18 of the Customs Act deals with Provisional Assessment of duty. Section 18(1) of the Act reads as follows:

Section 18. Provisional assessment of duty:

(1) Notwithstanding anything contained in this Act but without prejudice to the provisions contained in action 46:

(a) Where the proper officer is satisfied that an importer or exporter is unable to produce any document or furnish any information necessary for the assessment of duty on the imported goods or the export goods, as the case may be; or

(b) Where the proper officer deems it necessary to subject any imparted goods or export goods to any chemical or other test for the purpose of assessment of duty thereon; or

(c) Where the importer or the exporter has produced all the necessary documents and furnished full information for the assessment of duty but the proper officer deems it necessary to males further enquiry for assessing the duty the proper officer may direct the duty leviable on such goods may, pending the proper officer may direct that the duty leviable on such goods may pending the production of such documents or furnishing of such information or completion of such test or enquiry, be assessed provisionally if the importer or the exporter, as the case may be furnishes such security as the proper officer deems fit for the payment of the deficiency, if any, between the duty finally assessed and the duty provisionally assessed.

In this case, the proper officer has not completed the assessment and there is no order passed u/s 47 of the Act for home clearance. The issue is at the stage of assessment.

12. The prayer in the writ petitions to forebear the respondent Department from implementing the DGFT Policy Circular No. 19/2004-09 dated 18-2-2005 will only scuttle the Department from proceeding in s matter in accordance with the provisions of the Act. It is for the Department to take s definite stand with regard to the validity of the pre-shipment inspection certificate issued based on the nature of consignment imported end proceed against the petitioners if there is a violation of the import policy or the provisions of the Customs Act. Assuming without admitting that the Department intends to invoke or rely upon the DGFT Policy Circular No. 19/2004-09 dated 18-2-2005, it is always open to the petitioners to object the same at that stage stating that the said Policy circular will not be applicable to the import in question. The DGFT Policy Circular speak about including branch offices in Appendix 28 subject to availability of testing/ inspecting facility. As to how petitioners are aggrieved by such specification is not clear. Petitioners are importers of the goods stated above and they have to obtain the pre-shipment inspection certificate by following the procedure prescribed after inspection/testing of the goods prior to shipment.

13. The petitioners have taken a definite stand that for their import, the Pre-shipment Inspection Certificate has been issued in the format as contained in Annexure-I to Appendix 28 in terms of para 2.32 of Handbook of Procedure (Volume-I) after inspection/testing. The petitioners have to defend their stand if the Department takes a different view in the matter. At present, it cannot be decided by this Court as to whether DGFT Policy Circular No. 19/2004-09 dated 18-2-2005 is applicable to the import in question. The Department has to examine the consignment based on the DGFT Circular Customs Circulars applicable considering the period of shipment the nature of inspection certificate produced, the port of loading and the authority who issued the Pre-shipment Inspection Certificate after inspection/testing and take appropriate action in accordance with law if it is warranted.

14. The Customs Circular No. 56/2004-Cus., dated 18-10-2004 provides that on and from 18-10-2004 all future cases of metal scrap unshredded compressed metal scrap or loose form metal scrap should be accompanied by Pre-shipment Inspection Certificate issued in the format in Annexure-I to Appendix 28 from any one of the Inspection and Certificate Agency given in Appendix 28 of Handbook of Procedure (Volume-I), 2004-2009. Whether the Certificate produced is in terms of the Foreign Trade Policy or the Customs Circular is a matter for Department to decide.

15. In such view of the matter since the goods have been cleared provisionally based on the orders of the Court, the Customs Department will be entitled to finalise the provisional assessment and if necessary they are entitled to proceed the matter in accordance with the provisions of the customs Act, if there is any

breach of the import policy or the provisions of the Customs Act. The relief sought for in the writ petitions not to implement the DGFT Policy Circular No. 19/2004-09 dated 18-2-2005 is premature and misconceived. The Department should be allowed to take an unbiased decision in the matter and no direction will be issued by this Court to proceed with the assessment in one way or the other. It will amount to encroaching upon the functions and duties of the Customs Department. The relief sought for by the petitioners is premature and no cause of action has arisen. The Department, however, is at liberty to finalise the provisional assessment made in respect of the goods cleared as per the orders of this Court and proceed further in the matter. All the Writ Petitions stand disposed off with the above observations. Petitioners are at liberty to agitate their plea on merits before the Authorities as and when the issue arises for consideration. The Injunction granted till the disposal of the writ petitions in miscellaneous petitions is vacated. Consequently, connected miscellaneous petitions are closed. There will be no order as to costs.

