
(2014) 11 MAD CK 0411

In the Madras High Court

Case No : Writ Petition No. 18676 of 2013

Socomec UPS India Pvt. Ltd.

APPELLANT

Vs

Commissioner of Customs

RESPONDENT

Date of Decision : 06-11-2014

Acts Referred:

Customs Act, 1962 — Section 128, 129A

Citation : (2015) 316 ELT 556

Hon'ble Judges : T.S. Sivagnanam, J

Bench : Single Bench

Judgement

T.S. Sivagnanam, J.—The petitioner, a private limited company, engaged in the business of sale and installation of imported Uninterrupted Power Supply Systems (UPS) has filed this writ petition, challenging the order passed by the Commissioner of Customs (Appeals), in order in Appeal C-Cus No. 468-547/2013, dated 28.03.2013, in File Nos. C3/64/O/2012-Sea, C3/752-761, 789-802, 907-914, 1028-1034, 1070-1073, 1204-1206, 1210-1219, 1236/O/2012 SEA, C3/10-16, 132-135, 163-165, 202-209/O/2012-Sea C. CUS. No. 468 to 547 of 2013, dated 28.03.2013.

2. The facts, which are necessary for the disposal of the writ petition are that, the petitioner has filed 80 appeals against the orders of assessment made by orders-in-original, dated 03.02.2012, by the Assistant Commissioner of Customs, Group 5A, Sea Port, classifying the imported goods, namely, UPS under CTH 8504 40 90, denying the claim for exemption of basic customs duty, under Notification No. 25 of 2005, dated 01.03.2005, and ordering assessment with merit rate of duty.

3. The petitioner contended that there are two types of UPS systems, namely, Stand-by Power Systems and Online UPS Systems and the exemption notification, on which the petitioner placed reliance is an unconditional one and does not require any end-use proof and that the notification should be read in its plain language and since there is no end-use condition attached to it, the

petitioner is eligible for the benefit of exemption. In this regard, reliance was placed on Order-in-Original No. 21/2010, dated 11.01.2010. Further, it was contended that the order passed by the Assistant Commissioner of Customs, is per se illegal, having not followed the order, dated 11.01.2010, and it is a non speaking order.

4. Before the Appellate Authority, namely, the Commissioner of Customs (Appeals), the petitioner was represented through its counsel, who reiterated the submissions made in the Appeal Petition. It was contended that the denial of the benefit of the exemption notification is frivolous and will not stand legal scrutiny. It was further contended that, as against the order passed by the Assistant Commissioner of Customs, the petitioner has approached this Court and a direction was issued by this Court to pay 50% duty initially and to seek remedy before the Commissioner of Customs (Appeals). Further, it was reiterated that the exemption notification does not require the production of the end-use certificate and therefore, the stand taken by the Assessing Officer is erroneous.

5. The Appellate Authority, took up the case for consideration and in the impugned order, observed that there is no dispute on classification of the impugned goods, but the dispute is only with regard to the interpretation of the exemption notification. The Appellate Authority then proceeded to consider various decisions of this Court and other High Courts, laying down the principles for interpretation of the exemption notification. Summing up the decisions, the Appellate Authority stated that the meaning of the exemption notification has to be gathered from the language "employed", without ignoring the reason and cause, why the Government has issued the notification and the purpose not to be defeated, so as to deny and deprive what is clearly flowing from the notification; person claiming exemption must establish clearly that he is covered by the provision and there can be no doubt or ambiguity and if it is so, the benefit of it must go to the State and once the assessee satisfies the eligibility criteria, exemption therein to be construed liberally, if the contextual construction does not deserve the strict meaning. Having stated the legal principles laid down in the several decisions, which have been quoted in the impugned order, the Appellate Authority proceeded to examine the correctness of the order passed by the Assistant Commissioner.

6. After taking note of the notifications, it was pointed out that the intention of the Government is to exempt either the goods which are directly used in the IT industry or such goods required for manufacture of the above goods, subject to end-use condition or only exempted from the payment of basic customs duty. It was further pointed out that the petitioner, being trader, had not come out with any evidence to show that the goods are directly used only in the IT industry and when there is such uncertainty, the condition stipulated in the notification does not stand fulfilled. By relying upon the information culled out from the website of the petitioner, it was pointed out that the goods have wide application and capable of multiple use like domestic, industrial, health care, etc., and the goods

having a power rating of 200 KVA, the petitioner is bound to prove the end-use that the said goods are only used in the IT/Telecom industry to be entitled for the benefit of exemption and that the petitioner, having failed to prove the same, is not entitled to the benefit of the notification. Thus, the Appellate Authority held that the petitioner have failed to satisfy the first two conditions and it automatically follows that the petitioner do not satisfy the third condition.

7. As regards the order passed by the Assistant Commissioner of Customs, New Delhi, it was observed that the said order is not binding on the respondents, as they are not the superior quasi-judicial authorities and that apart, new facts like, multiple usage and explanatory notes to the description of the goods were not within the knowledge of the said authority, who pass the order, which has been relied on by the petitioner. Further, it was observed that, in the said case, the goods imported was chargers to mobile phones and not UPS 200 KVA. On the above grounds, all the 80 appeals, filed by the petitioner, were rejected, by an order, dated 28.03.2013, which is impugned in this writ petition.

8. Mr. Joseph Prabhakar, learned counsel appearing for the petitioner, elaborately referred to the factual details and contended that, as per Notification No. 25 of 2005, exemption is available for import of static converters (UPS system) for automatic data processing machines and units thereof and telecommunication apparatus and that the equipment imported by the petitioner is indeed an UPS system, which is meant for automatic data processing machines. It is further contended that the notification does not prescribe proof of actual use, as a condition, for availing the benefit under the said notification and the respondent cannot insist upon the end-use certificate for extending the benefit of the notification. Further, it is submitted that the respondent ought to have followed the orders passed by the customs authorities at New Delhi, wherein the petitioner was granted the benefit of the exemption notification. Further, it is submitted that the Order, dated 11.01.2010, passed by the Assistant Commissioner of Customs, ICD, New Delhi, is a detailed order, which clearly states that UPS is classifiable under customs, Chapter Heading 8504 and eligible for exemption under Notification No. 25 of 2005. Further, it is stated that Notification No. 25 of 2005 is unconditional and does not prescribe any undertaking or declaration to be furnished. It is further submitted that, in the Order-in-Original, dated 11.01.2010, passed by the Customs Authorities at New Delhi, in paragraph 1(b), in page 2, there is a reference to chargers/adapters and it is observed that they are nothing else, but are static converter, which supply either a constant current or voltage to the battery and this observation is erroneous and besides the context, since the order pertains only to UPS systems, and it is a mistake which has crept in, in the order, dated 11.01.2010, and therefore, this Court should ignore such observations/findings in the order. Further, the learned counsel referred to a note order passed by the New Delhi Customs Authorities, dated 27.04.2010, to drive home the point that the consignment imported by the petitioner qualifies for exemption under Notification No. 25 of 2005.

9. The learned counsel for the petitioner referred to the explanatory notes to Chapters 84 and 85, which deal with IT/Electronics and submitted that all goods imported for the manufacture of ITA bound items, subject to end-use condition, will also be exempted from customs duty under notification No. 25/98, as amended, and in respect of other items, the respondents cannot insist on end-use certificate. In this regard, reference was also made to the notification issued by the Department of Revenue, Ministry of Finance, Government of India, dated 28.02.2005 (Clause 9.1). Further, by referring to the Chapter Heading 8504 40, which describes the goods as static converters for automatic data processing machines and units thereof and telecommunication apparatus, the same does not insist upon the end-use certificate.

10. Further, the learned counsel for the petitioner placed reliance on a decision of the Hon'ble Supreme Court in the case of Collector of Central Excise, Guntur, vs. Andhra Sugars, reported in (1998) 38 ELT 564 (SC) for the proposition that the meaning "ascribed" by the authorities issuing the notification in question is a good guide of a contemporaneous exposition of the position of law. With the above submissions, the learned counsel for the petitioner has prayed for setting aside the impugned order.

11. Ms. R.K. Sekina Reshma, learned Central Government Standing Counsel, appearing for the respondents, by referring to the counter affidavit filed by the respondents, submitted that, Customs Notification No. 25 of 2005, was issued, consequent to India's commitment to reduce customs duty to zero level, after being a signatory to the Information Technology Agreement, WTO. When the petitioner was called upon to answer the query regarding the justification for the claim of exemption, as UPS systems are capable of multiple use, more so, when they have a power rating of 200 KVA, the petitioner's website also lists out varied application for the imported goods. While answering such a query, the petitioner stated that they are traders of UPS systems to the customers in IT/ITES, medical, banking and telecom sectors, to support the critical application like computers, servers, etc., and they relied upon an order passed by the customs authorities at New Delhi. It is further submitted that the goods on examination was found to be not in conformity with the description in the exemption notification and the petitioner failed to produce technical or commercial information to substantiate their case. Further, it is submitted that the petitioner has suppressed the fact that these goods can be used for uses other than automatic data processing machines and telecom apparatus, as supported by the information available in the petitioner's website. Therefore, it is submitted that the impugned order, passed by the first respondent, is perfectly legal and valid.

12. I have heard the submissions made by the learned counsel for both sides and perused the materials placed on record carefully.

13. Before this Court ventures into the factual and legal submissions made on either side, it has to be pointed out that the impugned order passed by the first

respondent is an appealable order, in terms of Section 129A of the Customs Act, 1962, and the appeal shall lie to the Appellate Tribunal, namely, CESTAT. The petitioner has failed to avail the said alternate remedy, available to them, under the Statute and straightaway approached this Court, by way of this writ petition. In the affidavit filed in support of the writ petition, no justifiable grounds have been raised by the petitioner to justify their action in by-passing the appellate remedy. Learned counsel for the petitioner also did not venture to make any submissions as to why the petitioner should not be directed to avail the alternate remedy. His contention was that the exemption notification is clear in its terms and the respondents cannot insist upon the end-use certificate, which is not contemplated in the notification, therefore, the petitioner has approached this Court.

14. Surprisingly, in the counter affidavit, the respondents have not raised any specific plea regarding the maintainability of the writ petition and the availability of an alternate remedy. Nevertheless, this, being a question of law, this Court deems it fit and appropriate to consider such an issue.

15. It is to be noted that, as against the order-in-original, dated 08.02.2012, the petitioner has filed a writ petition, in W.P. No. 4095 of 2012, before this Court, without filing an appeal before the first respondent herein, under Section 128 of the said Act. This Court, by an order dated 07.01.2013, declined to entertain the said writ petition and dismissed the same, on the ground that the petitioner, without exhausting the appellate remedy, cannot file the writ petition. The petitioner accepted the said decision and filed an appeal before the respondent under Section 128 of the Act. The said appeal was dismissed by the appellate authority, by a reasoned order, dated 28.03.2013, which is impugned in this writ petition. The impugned order clearly states that any person aggrieved by the order can prefer an appeal to the CESTAT under Section 129A of the Act.

16. The petitioner has not been able to establish any substantial ground to bypass the appellate remedy. Further more, the contention raised by the petitioner is with regard to interpretation of a notification granting exemption from basic customs duty. The petitioner is bound to explain that it is entitled to the benefit of the exemption notification, which obviously involves appreciation of facts and materials that may be called for by the Department or produced by the petitioner. The Tribunal would be in a position to appreciate the factual issues raised by the petitioner and as to whether the respondent would be justified in insisting upon the end-use certificate in the light of the fact that it is the petitioner's own admission that the goods imported are capable of multiple use.

17. The learned counsel for the petitioner submitted that, in the order passed by the Assistant Commissioner, ICT, New Delhi, an error has crept in, in page 2, paragraph 1(b), wherein there is a mention about charges/adapters. In my view, as long as the order has not been rectified by the concerned authority, the petitioner cannot seek to contend that one portion of the order is incorrect. The submission made by the learned counsel for the petitioner, in this regard,

deserves to be rejected.

18. In any event, each bill of entry has to be independently assessed and there is sufficient jurisdiction for the Assessing Officer to call for the information from the importer, more so, when the importer claims full exemption of basic customs duty, by placing reliance on the notification. The onus is on the importer to satisfy that the imported goods falls squarely within the four corners of the exemption notification. If the petitioner fails to prove the same, it is not entitled for the benefit of the exemption notification and the settled legal principles being that an exemption notification shall be interpreted strictly. The petitioner has not denied the information, which has been uploaded in its website, which shows that the product is capable of being put to multiple use, which is not contemplated under Notification No. 25 of 2005, under heading 8504 40, which describes the goods as "static converters" for automatic data processing machines and units thereof and telecommunication apparatus. Thus, it appears that the exemption notification is specific pertaining to static converters for automatic data processing machines and telecommunication apparatus. Therefore, if it is the case of the petitioner that though the product is capable of multiple use or used for automatic data processing machines or telecommunication apparatus, nothing prevented the petitioner from establishing the same and one such method is producing an end-use.

19. The Hon''ble Supreme court, in the case of Liberty Oil Mills (P) Ltd., Bombay Vs. Collector of Central Excise, Bombay, held that in a case of an ambiguity or doubt regarding an exemption provision in a fiscal statute, the ambiguity or doubt will be resolved in favour of the Revenue and not in favour of the Assessee. In any event, these contentions could very well be raised before the Appellate Authority and the petitioner has not placed any material before this Court to justify its action in bypassing the appellate remedy available under the Act.

20. In the light of the above findings, this Court is not inclined to go into the merits of the contentions raised by the petitioner and the writ petition is dismissed, as not maintainable. However, it is open to the petitioner to file an appeal before the CESTAT, if so advised. No costs.