(2008) 08 GUJ CK 0050

In the Gujarat High Court

Case No : Tax Appeal No. 813 of 2007

The Commissioner of Customs APPELLANT

Vs

Senor Metals Pvt. Ltd. RESPONDENT

Date of Decision : 12-08-2008

Acts Referred:
Customs Act, 1962 — Section 11, 111, 112

Citation : (2009) 236 ELT 445

Hon'ble Judges : Harsha Devani, J;D.A. Mehta, J

Bench : Division Bench

Advocate : P.R. Abichandani, for the Appellant; Paresh V. Sheth, for Opponent 1, for the Respondent

Final Decision : Dismissed

Judgement

D.A. Mehta, J.

1.The appellant Revenue has proposed the following questions:

[a] Whether pre-shipment inspection certificate issued by an agency not recognized as specified agency at the time of issuance of certificate can be

considered to be valid certificate or not in terms of para 2.32 of the Handbook of Procedures (Vol.1) of the Foreign Trade Policy 2004-2009 on

the agency subsequently being recognized as such?

[b] Whether violation of Exim Policy 2004-09 would attract confiscation and imposition of penalty in terms of Sections 111(d) and 112 of the

Customs Act, 1962?

[c] Whether or not, the goods imported in violation of requirements of the provisions of the Foreign Trade Policy can be confiscated in terms of

Section 111[d] of the Customs Act, 1962?

[d] Whether or not, penalty u/s 112 of the Customs Act, 1962 can be imposed on such importer?

2. The adjudicating authority came to the conclusion that the goods imported under Bill of Entry dated 25.5.2005 were not accompanied by a pre-

shipment inspection certificate as required by paragraph No. 2.32 of Hand Book of Procedures (Volume I) of the Foreign Trade Policy 2004-

2009. That the pre-shipment inspection certificate No. 401320 dated 13.3.2005 issued by M/s Bureau Veritas s.a., Hamburg, Germany was not

by a specified agency in Appendix 28 to the Hand Book on the date of inspection and issue of certificate. Accordingly, the adjudicating authority

held that the goods in question were liable to confiscation u/s 111(d) of the Customs Act, 1962 (the Act). Redemption fine of Rs. 3,10,000/- was

imposed and a penalty of Rs. 1,65,000/- was also imposed u/s 112 of the Act.

3. The matter was carried in appeal, but the order made by the adjudicating authority was not disturbed by the appellate authority. In the second

appeal filed before the Customs, Excise & Service Tax Appellate Tribunal, West Zonal Bench, Ahmedabad (the Tribunal), the Tribunal vide order

dated 15th November, 2006 allowed the appeal, by observing as under:

[4] The aforesaid Appendix ''V'' at Srl. No. 69 mentions Bureau Veritas, Hemburg, Germany as one of the inspection agencies. Therefore, at the

time of import of the consignment, the said agency was one of the authorized inspection agencies. That apart, of Bureau Veritas, Mumbai also

issued inspection certificate in regard to the consignment. In this factual situation, the Customs authorities were not justified in holding that the

consignment did not have certificate from authorized inspection agency.

4. Heard the learned Counsel for the appellant. The reasons which weighed with the adjudicating authority have been reiterated, and it was

submitted that the agency in question which issued the pre-shipment certificate was not a recognized inspection agency at the time of issuance of

certificate.

5. The adjudicating authority has also recorded in paragraph No. 11 of the adjudication order dated 14.7.2005 as under:

However, in view of the fact that the goods have been examined 100% and no explosive and war materials have been noticed, I take a lenient

view.

6. Paragraph No. 2.32 of the Hand Book of Procedures specifically deals with import of secondhand goods / waste scrap / seconds / rags and

under the said paragraph, it is stated that the items specified therein may be imported without a license / certificate / permission. However,

thereafter under Clause (i)(b), it is provided that import of metallic waste and scrap in unshredded, compressed and loose form shall be permitted

through the specified ports only, and -

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

[I] Pre-shipment inspection certificate as per the format in Annexure I to Appendix 5 from any of the Inspection & Certificate agencies given in

Appendix-5 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.

[II] Copy of the contract between the importer and the exporter stipulating that 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.

7. Thus, on a plain reading of the aforesaid requirement, the legal obligation has been cast on the exporter to furnish the two specified documents,

the first being a pre-shipment inspection certificate in the specified format as prescribed, and the second being a copy of the contract between the

importer and the exporter. The pre-shipment inspection certificate has to certify to the effect that, [a] the consignment does not contain any type of

aforesaid specified items, and [b] the imported items are actually metallic waste / scrap etc. as per internationally accepted parameters for such a

classification. Both these requirements of the pre-shipment certificate itself indicate that it is only an exporter who can obtain such a certification

before the goods are shipped. Similarly, the second requirement of the contract stipulating that the consignment does not contain any type of

specified items also, has the same underlying purpose. To wit, any of the specified items shall not be exported and correspondingly, shall not be

imported. The documents have to be furnished by the exporter and are to be produced by the importer before the Customs authorities at the time

of clearance of goods.

8. In absence of any of the aforesaid specified documents, or in absence of the specified conditions not being stated in the certificate which may be

produced, the importer shall have to undergo physical inspection of the goods in question and the Customs authorities shall undertake such

inspection in accordance with law. In other words, non-production of a pre-shipment certificate would require 100% goods carried by the

consignment being subjected to inspection. This becomes clear when one finds that the adjudicating authority has undertaken such an inspection

and recorded that no explosive and war materials have been noticed as extracted hereinbefore.

9. Thus, assuming there is any violation of the conditions prescribed by the Hand Book of Procedures, such a violation is by the exporter in the first

instance. The importer had, in fact, produced the certificate of inspection and the only dispute that was raised was that the agency not having been

notified and specified on the date of inspection prior to shipment. However, once it is found that the violation has not resulted in any specified

categories of items being imported, the importer cannot be punished for the lapse on the part of the exporter considering that the legal obligation

has been cast on the exporter to furnish the documents.

10. Section 11(d) of the Act permits confiscation of goods improperly imported, namely, any goods imported: (i) contrary to any prohibition

imposed by or under the Act, OR (ii) contrary to any prohibition imposed by any other law for the time being in force. The former is not the case

of revenue. In so far as the latter is concerned, there is no prohibition against import of the goods in question "" Paragraph No. 2.32 of the

Handbook itself specifies this. Only, the import is subject to fulfillment of stipulated conditions which are to be complied with by the exporter.

Non-compliance thereof may entail an importer to undergo 100% inspection of the entire consignment. That would not tantamount to improper

import of goods as required by Section 111 of the Act.

11. The view that the Court has taken, has already been taken by another Bench

of this Court in the case of Commissioner of Customs v.

Moolchand Steels Pvt. Ltd. as reported in 2008 (224) ELT 57), wherein on similar facts, it was held that the appeal does not deserve to be

admitted.

12. In the circumstances, in absence of any error in the impugned order of the Tribunal, none of the questions, as proposed or otherwise, can be

termed to be substantial questions of law. The appeal is, accordingly, dismissed.