

(2009) 03 BOM CK 0040

In the Bombay High Court

Case No : Writ Petition No. 8379 of 2008

Vodafone Essar South Ltd., Vodafone Essar Ltd., Peninsular
Corporate Park, Vodafone Essar Cellular Ltd. and Vodafone
Essar Digilink Ltd.

APPELLANT

Vs

The Union of India (UOI) and J.S. Shanshanwal, The
Assistant Director, Directorate of Revenue Intelligence

RESPONDENT

Date of Decision : 04-03-2009

Acts Referred:

Customs Act, 1962 — Section 110, 111

Citation : (2011) 6 BomCR 145 : (2009) 111 BOMLR 943 : (2009) 163 ECR 11 :
(2009) 237 ELT 35

Hon'ble Judges : Ranjana Desai, J;J.P. Devadhar, J

Bench : Division Bench

Advocate : V. Shridharan, for the Appellant; M.I. Sethna, for the Respondent

Judgement

J.P. Devadhar, J.—Rule. Rule made returnable forthwith. By consent of the parties, the petition is taken up for filing hearing.

2. The basic question raised in this petition is, whether the customs authorities are justified in seizing three consignments of 48F optic fibre cables ("OFC" for short) imported by the petitioners and cleared on assessment under tariff Heading 85.44 with the benefit of exemption notification No. 24/05 dated 1/3/2005 and whether the customs authorities are justified in collecting from the petitioners Rs. 1,83,46,210/- towards differential duty on the 11 consignments of OFC cleared in the past on assessment under tariff Heading 85.44 on the footing that the said goods were liable to be assessed under tariff Heading 90.01 of the Customs Tariff Act.

3. The petitioners are engaged in the business of providing telecommunication services in various states in India. For their business the petitioners have been importing OFC from time to time. Since 2006 there is dispute regarding the classification of the OFC. According to the petitioners, OFC are classifiable under

tariff Heading 85.44, whereas, according to the revenue, OFC are classifiable under heading 90.01 of the Customs Tariff Act.

4. It may be noted that the Commissioner of Central Excise, Chennai by various orders passed in Jan/Feb., 2008 had adjudicated the classification issue and by relying upon a decision of the Authority for Advance Ruling held that OFC are classifiable under tariff Heading 90.01. The said orders have been set aside by CESTAT, Chennai Bench vide order dated 22/9/2008 by way of remand and the matters are pending for fresh adjudication before the Commissioner of Central Excise, Chennai.

5. In the meantime, the Assistant Commissioner of Customs, Mumbai adjudicated one of the consignments imported by the petitioners and by an order dated 28/9/2007 held that OFC are classifiable under Heading 90.01. On appeal, the Commissioner of Customs (A) by his order dated 25/3/2008 set aside the adjudication order and held that OFC are classifiable under Heading 85.44. Further appeal filed by the revenue against the order of the Commissioner of Customs (A) is pending before the CESTAT, Mumbai.

6. In the light of the order passed by the Commissioner of Customs (A) on 25/3/2008, the petitioners who were hitherto filing Bill of Entry under Heading 90.01 started filing Bill of Entry under Heading 85.44. Accordingly, various consignments were cleared on assessment under Heading 85.44 with the benefit of the Exemption Notification.

7. On 18/12/2008 the premises of the petitioners were searched by the officers of the Directorate of Revenue Intelligence (DRI). It is the case of the petitioners that the customs authorities threatened to arrest the directors of the petitioner company and other staff unless differential duty between Heading 85.44 and 90.01 was paid. Therefore, by various letters all dated 19/12/2008 the petitioners recorded that in view of the threat to arrest the directors / employees given by the officers from DRI the petitioners were depositing in all Rs. 1,83,46,210/- towards the differential duty on the footing that OFC are classifiable under Heading 90.01 and not under Heading 85.44. It was further stated in the said letters that the assessments already made under heading 85.44 is proper and legal and the same is also supported by the order passed by Commissioner of Customs (A). On 22/12/2008 three consignments of OFC imported and cleared by the petitioners on payment of duty as assessed under Heading 85.44 were seized by the customs officers.

8. Immediately, thereafter the petitioners filed the present writ petition and moved the Court for various reliefs. By an interim order dated 25/12/2008 this Court permitted release of three seized consignments of OFC, on the petitioners furnishing bank guarantee for the disputed amount in respect of the two consignments. As regards the third consignment no bank guarantee was directed because the amount of Rs. 1.83 crores paid on 19/12/2008 included the differential duty allegedly payable on the third consignment.

9. Mr. Shridharan, learned Counsel appearing on behalf of the petitioners submitted that once the goods are cleared on payment of duty as assessed, then, unless the said assessment order is set aside by initiating proceedings in accordance with the provisions of the Customs Act, it is not open to the respondents to seize the said goods. He submitted that in the present case, the assessment orders passed have not been set aside and in fact not even a show cause notice has been issued to the petitioners. If the assessment orders are not set aside there is no question of paying or collecting any differential duty. Therefore, the amount of Rs. 1.83 crores collected under threat and coercion without there being any enforceable demand is liable to be refunded to the petitioners or in the alternative the respondents must be directed to deposit the entire amount of Rs. 1.83 crores in this Court. Mr. Shridharan in this connection relied upon the decisions reported in 19 STC 52 (A.P.), 110 STC 73 (A.P.), 102 STC 506 (A.P.) and 123 ELT 448 (A.P.).

10. Mr. Sethna, learned senior Advocate appearing on behalf of the respondents, on the other hand submitted that whether OFC are classifiable under Heading 85.44 or under Heading 90.01 is a classification dispute which is to be decided by the authorities under the Customs Act and not by a Writ Court. Therefore, the writ petition seeking the Court to decide the classification issue is not maintainable. Similarly, the writ petition seeking refund of duty voluntarily paid by the petitioners is also not maintainable. Therefore, no relief can be granted to the petitioners in the present writ petition.

11. Mr. Sethna further submitted that only "individually sheathed" OFC are classifiable under Heading 85.44. The petitioners have imported "optic fibre bundles" and not individually sheathed optic fibres and hence the said goods are classifiable under Heading 90.01. Therefore, the petitioners who are guilty of misdeclaring the classification of the imported goods under Heading 85.44 in the Bills of Entry filed under the Risk Management System and clearing the goods at a concessional rate, are not entitled to any relief in the present petition.

12. Mr. Sethna further submitted that since the benefit of Notification No. 24/2005 dated 1/3/2005 were wrongly availed by misclassifying the goods, the same were seized under the bonafide belief that they are liable to be confiscated u/s 110 read with Section 111(d) & (m) of the Customs Act.

13. Mr. Sethna further submitted that on examination of the representative samples drawn from the three seized consignments, the Telecommunication Engineering Centre, New Delhi by their report dated 14/1/2009 have opined that the goods are classifiable under Heading 90.01. Similarly, Component Approval Centre for Telecommunication, Bangalore have also examined the sample and opined that the goods in question are classifiable under Heading 90.01. In fact M/s. GTL Infrastructure Ltd., importer of similar goods has accepted the classification of the goods under Heading 90.01 and voluntarily paid the differential duty. Therefore, seizure as well as receiving the differential duty is justified.

14. Relying on the decision of CESTAT, Northern Bench, New Delhi in the case of 2005 (101) ECC 414 , Mr. Sethna submitted that OFC are classifiable under tariff heading 90.01.

15. As regards the refund claim of the petitioners is concerned, Mr. Sethna vehemently argued that the said amount has been voluntarily paid by the petitioners towards the differential duty payable on the imported goods, and therefore, there is no question of refunding the said amount. He submitted that the respondents are willing to issue show cause notice within two weeks and adjudicate the matter as expeditiously as possible. However, no refund should be ordered at this stage because the petitioners are guilty of misclassifying the goods in the Bills of Entry filed under the Risk Management System and have voluntarily paid the differential duty. In this connection, he relied upon decisions of the Apex Court in the case of Suganmal Vs. State of Madhya Pradesh and Others, and Dhanyalakshmi Rice Mills and Others Vs. The Commissioner of Civil Supplies and Another, . Accordingly, Mr. Sethna submitted that the writ petition is wholly misconceived and is liable to be dismissed.

16. Having heard the counsel on both sides, we are of the opinion that the action of the D.R.I. officers in the Customs Department in seizing the goods and collecting money from the petitioners is wholly unjustified and uncalled for, because, firstly, the Commissioner of Customs (A) in the petitioners own case has held on 25-3-2008 that the OFC imported by the petitioners are classifiable under Heading 85.44 and, therefore, no fault can be found with the petitioners in classifying the goods imported after 25/3/2008 under Heading 85.44. Secondly, the decision of Commissioner of Customs (A) is neither stayed by CESTAT nor by any other competent authority, and therefore, the mere fact that the appeal filed by the revenue against the decision of Commissioner of Customs (A) is pending before CESTAT cannot be a ground to hold that the petitioners are guilty of misclassifying the goods under Heading 85.44. Thirdly, the D.R.I. officers are bound by the decision given by Commissioner of Customs (A) and, therefore, so long as the decision of the Commissioner of Customs (A) in classifying the goods under Heading 85.44 holds the field, filing of bills of entry by classifying OFC under Heading 85.44 cannot be faulted. Fourthly, the Bills of Entry filed by the petitioners by classifying the goods under Heading 85.44 have been assessed under Heading 85.44 and the goods have been cleared only on payment of duty as assessed. Therefore, till the assessment is set aside, the customs authorities could not have seized the goods assessed and cleared under Heading 85.44, on the ground that the goods were liable to be assessed under Heading 90.01. Fifthly, in the absence of any reassessment order passed determining the duty liability, there would be no question of recovering differential duty, and therefore, collection of the amount of Rs. 1,83,46,210/- towards the differential duty is wholly unjustified.

17. The argument of the revenue that in view of the classification dispute pending before CESTAT/adjudicating authority no relief can be granted to the

petitioners in exercise of writ jurisdiction is without any merit because, admittedly the order passed by the Commissioner of Customs (A) has not been stayed by the CESTAT and till the appeal filed by the revenue against the order of Commissioner of Customs (A) is disposed of, both the revenue as well as the petitioners are bound by the order passed by Commissioner of Customs (A). Therefore, the petitioners could not be faulted for classifying the goods imported after 25/3/2008 under Heading 85.44 as per the order passed by Commissioner of Customs (A).

18. The fact that various authorities have opined that the OFC imported by the petitioners are liable to be classified under Heading 90.01 and the fact that the petitioners themselves were clearing the goods under Heading 90.01 may be a good ground for setting aside the assessment orders and the order passed by Commissioner of Customs (A). However, till the order of Commissioner of Customs (A) is set aside, the petitioners cannot said to be guilty of misclassifying the imported goods under Heading 85.44 as the action of the petitioners is in conformity with the order passed by Commissioner of Customs (A).

19. The argument of the revenue that the goods in question were seized under the bonafide belief that the same are liable to be confiscated u/s 110 r/w Section 111(d) and (m) of the Customs Act is also without any merit, because neither the goods imported by the petitioners are prohibited under the Customs Act nor the declaration made on the Bills of Entry to the effect that the goods are classifiable under Heading 85.44 is contrary to the classification upheld by the Commissioner of Customs (A) on 25/3/2008. The fact that the petitioners themselves were classifying the goods in the past under Heading 90.01 would not preclude them from classifying the goods under Heading 85.44 in the light of the order passed by Commissioner of Customs (A), Mumbai.

20. Reliance placed by the Counsel for the revenue on the decision of the CESTAT in the case of Optel Telecommunication Limited (*supra*) is misplaced, because, admittedly the classification in respect of one consignment of OFC imported by the petitioners under Heading 85.44 has been accepted by Commissioner of Customs (A). It is not in dispute that the consignments in question imported by the petitioners are similar to the consignments considered by the Commissioner of Customs (A). Moreover, it is not the case of the revenue that the order passed by the Commissioner of Customs (A) is a fraudulent order or a got up order. Therefore, the classification filed by the petitioners being in consonance with the order passed by the Commissioner of Customs (A) the action of the D.R.I. officers in seizing the goods duly cleared in accordance with law must be held to be totally unjustified.

21. The contention of the revenue that the petitioners have voluntarily paid the amount towards the differential duty is equally unacceptable, because, in the covering letters all dated 19-12-2008 the petitioners have specifically stated that the amount is being paid in view of the threat given by the D.R.I. officers to arrest the directions / employees if the differential duty is not paid. When the

goods have been cleared on payment of duty as assessed under Heading 85.44 which is supported by the order passed by the Commissioner of Customs (A), there is no reason for the petitioners to pay voluntarily differential duty on the footing that the goods were classifiable under Heading 90.01 and not under Heading 85.44 even though the assessment under Heading 85.44 is neither set aside nor any show cause notice is issued in that behalf. The fact that the search took place on 18-12-2008 and the fact that on 19-12-2008 the petitioners paid the amount of Rs. 1,83,46,210/- specifically stating that in view of the threat to arrest the directors / employees, clearly belies the contention of the revenue that the amounts were paid voluntarily. Moreover, the petitioners immediately thereafter filed the present writ petition on 24-12-2008 stating that the amount has not been paid voluntarily and that the amount collected under threat and coercion is liable to be refunded.

22. In these circumstances, we are clearly of the opinion that in the present case, the conduct of the D.R.I. officers is not only high handed but it is in gross abuse of the powers vested in them under the Customs Act. It is apparent that the D.R.I. officers in utter disregard to the order passed by the Commissioner of Customs (A), Mumbai have forced the petitioners to pay the amount by threat and coercion which is not permissible in law. Thus, the conduct of the D.R.I. officers in the present case in collecting the amount from the petitioners towards the alleged differential duty is wholly arbitrary, illegal and contrary to law. Having terrorised the petitioners with the threat of arrest, it is not open to the D.R.I. officers to contend that the amount has been paid by the petitioners voluntarily. We strongly condemn the high handed action of the D.R.I. officers in totally flouting the norms laid down under the Customs Act in relation to reassessment proceedings and purporting to collect the amount even before reassessment. We hope that such incidents do not occur in the future.

23. We make it clear that we are not expressing any opinion as to whether the OFC imported by the petitioners are classifiable under Heading 85.44 or under Heading 90.01. We only hold that where the classification filed is based on the classification upheld by Commissioner of Customs (A), the importer cannot be said to be guilty of misdeclaration and in such a case, seizure of the imported goods cleared on classification approved by the Commissioner of Customs would be unjustified and collecting any amount in excess of what is assessed would also be unjustified.

24. Strong reliance was placed by Mr. Sethna on the decisions of the Apex Court in the case of Suganmal (supra) & Dhanyalaxmi Rice Mills (Supra) in support of his contention that a writ petition for refund simplicitor is not maintainable. As rightly contended by Mr. Sridharan, the Apex Court in the case of U.P. Pollution Control Board and Others Vs. Kanoria Industrial Ltd. and Another, has held that the judgment in the case of Suganmal (supra) cannot be read as laying down the law that no writ petition at all can be entertained for only refund of money collected without the authority of law. Therefore, the decisions relied by Mr.

Sethna do not support the case of the revenue.

25. For all the aforesaid reasons, we in the ordinary course would have directed the revenue to forthwith refund the amount illegally collected from the petitioners. However, in view of the fair stand taken by the counsel for the petitioners that it is not the refund but is the conduct of D.R.I. officers which is to be deprecated and in view of the fair stand taken by the counsel for the revenue that the reassessment proceedings would be initiated and completed expeditiously, we pass the following order:

a) The conduct of the D.R.I. officers in seizing three consignments of Optic Fibre Cables imported and cleared by the petitioners on payment of duty as assessed under Heading 85.44 and the conduct of the D.R.I. officers in collecting Rs. 1,83,46,210/- towards differential duty on the footing that the said goods were liable to be assessed under Heading 90.01, even before initiating reassessment proceedings is totally high handed and in gross abuse of the process of law.

b) However, in the circumstances set out hereinabove, instead of directing refund of Rs. 1,83,46,210/- and return of the two bank guarantees, we direct the respondents to issue show cause notices for reassessment within two weeks from today, failing which the amount of Rs. 1,83,46,210/- as well as the two bank guarantees furnished pursuant to the interim orders of this Court shall be refunded / returned to the petitioners with interest @ 8% per annum on Rs. 1,83,46,210/- from 20-12-2008 till the date of refund.

c) If the show cause notices are issued within two weeks from today, then the petitioners are at liberty to file their reply within two weeks thereafter and the respondents shall complete the proceedings and pass appropriate orders within a period of four weeks from the date of petitioners filing their reply to the show cause notices.

d) In the event of the respondents issuing show cause notices within a period of two weeks from today, the amount collected would be subject to the final outcome of the show cause notices.

e) Contentions of both sides are kept open.

f) The respondents shall pay to the petitioners costs quantified at Rs. 10,000/- within a period of two weeks from today.

26. Rule is made absolute in the above terms and the petition is disposed off accordingly.