

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
SOUTH ZONAL BENCH
CHENNAI**

Appeal No.C/93/2012

[Arising out of Order-in-Appeal C.Cus.No.179 dt.21.3.2012 passed by
Commissioner of Customs (Appeals), Chennai]

Commissioner of Customs (Exports)
Chennai

Appellant

Versus

Ace Designers Ltd.

Respondent

Appearance :

Shri A. Cletus, ADC (AR)
For the Appellant

Shri B.N.Gururaj, Advocate
For the Respondent

CORAM :

Hon'ble Ms.Sulekha Beevi, C.S., Member (Judicial)
Hon'ble Shri Madhu Mohan Damodhar, Member (Technical)

Date of hearing : 30.07.2018
Date of Pronouncement :06.08.2018

FINAL ORDER No. 42191 / 2018

Per Bench

The facts of the matter are that M/s.Ace Designers Ltd. (hereinafter referred to as respondents) filed Bill of Entry No.729675 dt.1.5.2008 for clearance of goods under EPCG scheme, claiming benefit under Notification No.97/2004. Accordingly the goods were assessed @ 5% resulting in duty

liability of Rs.38,20,742/- which was paid under protest. Subsequently, the respondents preferred a refund claim of Rs.15,28,296/- on the ground that they are eligible to pay Customs duty @ 3% instead of 5% under amended Notification No.64/2008-Cus. dt. 09.05.2008. The said claim was rejected, inter alia on the grounds that the Bill of Entry was filed on 1.5.2008 and duty paid under protest on 7.5.2008, whereas the Notification No.64/2008-Cus.was issued on 09.05.2008 and further the said Bill of Entry was not reassessed. Aggrieved by the said order, the respondents filed an appeal with the Commissioner (Appeals) who found merit in the respondent's argument and allowed the appeal. Aggrieved, the Revenue is before this forum.

2. On behalf of the Revenue, Ld. A.R Shri A. Cletus reiterated the grounds of appeal and also made various submissions which can be broadly summarized as under :

- i) The Commissioner (Appeals) has allowed the respondent's appeal stating application of doctrine of promissory estoppel and giving retrospective effect to the exemption notification on the basis of Hon'ble High Court of Karnataka in the case of *UOI Vs Yokogawa Blue Star Ltd.* - 2000 (129) ELT 598 (Kar.) which was upheld by the Apex court as reported in 2001 (131) ELT A79 (SC).
- ii) However, the Hon'ble Apex Court did not address the question of law and have specifically stated in their order that they are "leaving the question of law open".
- iii) The claim of respondents that change in policy, for rejection of duty for EPCG imports to 3%, was made w.e.f. 1.4.2008 is not substantiated. On the other hand, the reduction in Customs Duty was brought into effect only w.e.f.

09.05.2008. As the respondents had filed Bill of Entry on 1.5.2008 and had paid duty on 7.5.2008, the benefit of a notification issued subsequently on 9.5.2008 cannot be claimed by them.

iv) Any notification issued will only have prospective effect unless otherwise notified.

v) Ld. A.R placed reliance on the ratio of the judgment of Hon'ble Apex Court in *Colgate Palmolive (India) Ltd. Vs CC Patna* - 2016 (339) ELT 161 (SC) where the Apex Court repelled the submission that exemption notification issued on a particular date is not clarificatory and held that such notification was only intended to be applied prospectively. He also placed reliance on case law of *Dimexon Vs UOI* – 2009 (241) ELT 519 (Bom.).

3. On the other hand, on behalf of the respondent, Ld. Advocate Shri B.N. Gururaj made various submissions which can be broadly summarised as under :

i) The procedure to be prescribed by authority implementing the policy must be in consonance with the policy. If the procedural norms are in conflict with policy, then policy will prevail, as upheld by the Hon'ble High Court of Bombay in *Narendra Udeshi Vs UOI* - 2003 (156) ELT 819 (Bom.).

ii) The interpretation which sub-serves the intention of the Central Government as laid down in the Policy as well as the procedure should be given effect to. In this regard, Ld. Advocate drew our attention to the Hon'ble Supreme Court decision in *UOI Vs Asian Food Industries* - 2006 (204) ELT 8 (SC) which has held this ratio.

iii) Ld. Advocate drew our attention to DGFT Policy Circular No.6 (RE-2008)

2004-09, dated 7-5-2008 wherein it was clarified as under :

“Subject : Amendment in EPCG Authorization issued from 1-4-2008 to 11-4-2008.

This has reference to the relevant paragraphs(s) of Foreign Trade Policy and handbook of Procedure (RE 11-4-2008) relating to issuance of EPCG authorization at 3% customs duty. The EPCG authorizations were issued at 5% Custom Duty from 1-4-2008 to 11-4-2008, whereas the policy announced on 11-4-2008 has come into effect from 1-4-2008.

2. In this context it is clarified that the EPCG Authorizations issued from 1-4-2008 to 11-4-2008 shall be deemed to be issued at 3% Customs Duty as per FTP (Revised 11-4-2008) and Customs shall automatically allowed clearance of goods at 3% Customs Duty. Regional Authorities may call back the Authorizations and make changes in the authorizations.

3. This issues with the approval of D.G.F.T”

From the above, it is clear that the goods imported based on EPCG authorization issued from 1.4.2008 to 11.4.2008 will get benefit of reduced rate of 3% Customs duty.

iv) In *Development Commissioner, MEPZ SEZ, Chennai Vs Hospira Health Care India Pvt. Ltd.* – 2017 (356) ELT 167 (Mad.), the Hon’ble Court inter alia held that Foreign Trade Policy (FTP) being an economic legislation which seeks to promote exports by giving various incentives, should in case of ambiguity, be construed liberally in favour of the exporter.

v) Ld. Advocate supported reliance of the Commissioner (Appeals) on the judgment of Hon’ble High Court of Karnataka in *UOI Vs Yokogawa Blue Star Ltd.* 2000 (129) ELT 598 (Kar.) which was upheld by the Apex court as reported in 2001 (131) ELT A79 (SC). The judgement of *Yokogawa* has upheld the ruling that delay in issuing the notification should not come in the way of implementation of the policy and that “merely because there is a delay in issuing a notification that

by itself does not give right to the respondent to seek differential duty from the petitioner in the case; that the authorities in the circumstances have acted against the policy of the Union of India. Ld. Advocate contends that in the present matter also there is an identical situation where the intention of the Foreign Trade Policy was not given effect to by the Customs Department only on the grounds that there was no corresponding Customs notification issued for reduction of Customs duty.

vi) Since there was clear intention of one wing of the Government to reduce Customs duty liability, that intention has to be given effect and the benefit cannot be denied to the respondent-importer only because the Customs notification was issued only on 9.5.2008.

4. Heard both sides and have gone through the facts of the case.

5.1 As per the facts of the *Yokogawa Blue Star Ltd.* (supra) relied upon by the lower appellate authority, the Government of India had issued a notification in the matter of Export and Import Policy for a period of five years. The writ petitioner acting on the said policy had imported capital goods and sought for concessional Customs duty which had also been granted. Only after audit objection, a show cause notice was issued and adverse orders were passed against the petitioner. The petitioner acting on the policy imported capital goods and after obtaining license under EPCG scheme at concessional rate of 25% of CIF value subject to undertaking of export obligation to be fulfilled to the extent three times of the CIF value within a period of 4 years. The petitioner placed purchase orders in terms of the policy to procure capital goods to be used exclusively for fulfilment of export obligation in April 1992. The Government permitted the petitioner to

import the goods. The petitioner thereafter imported capital goods by filing Bills of Entry and sought for concessional Customs duty which was allowed by the Customs authorities. Only after audit objection, a show cause notice was issued to the petitioner on 7.9.93 to answer short levy in the matter of Excise duty on account of existing benefit of notification. The demand for short levy arose on the grounds that the Customs Notification No.307/92-was issued only on 28.12.1992. The Hon'ble High Court of Karnataka held that delay in issuing the notification in the light of the promissory policy decision of the Government cannot come in the way of the petitioner availing the concessions in terms of the policy of the Government. Merely because there is a delay in issuing the notification that by itself does not give right to the respondent to seek differential duty from the petitioner in the case on hand.

5.2 Without doubt, the S.L.P filed against the above judgement was dismissed by the Hon'ble Apex Court. It is however useful to reproduce the exact order of the Hon'ble Supreme Court as reported in 2001 (131) ELT A79 (SC) as under :

“Delay condoned.

Having regard to the facts of the present case, we decline to interfere, leaving the question of law open.

The Special Leave Petition is dismissed.”

5.3 The High Court of Karnataka had, relying on the judgment of Hon'ble Punjab & Haryana High Court in *Nestle India Ltd. Vs State of Punjab* -1999 (13) PHT 132 (P&H), ruled that doctrine of promissory estoppel represents principles of equity evolved by the courts to prevent injustice and did not find any substance in the argument that the petitioner therein was not entitled for any

concessional duty. However, in our view, the very relevant take away from the order dt. 05.02.2001 of the Hon'ble Supreme Court is that the question of law in the issue has not been dealt with by the Apex Court and has been "left open".

5.4 In the circumstances, the relevant law to decide the issue at hand will have to be of any judgement of the Hon'ble High Court or the Apex Court which has decided the question of law in this regard.

5.5 In this regard, the case law of Hon'ble High Court of Bombay, in the case of *Dimexon Vs UOI 2009 (241) ELT 519 (Bom.)* has been brought to our attention wherein the Hon'ble High Court has delineated the functionalities of the Customs Act and the Import and Export Control Act as under :

"3. We have heard the learned Counsel for the parties and their respective arguments. In the first instance in so far as the Customs Act is concerned, Section 12 is the charging Section which sets out that duties of customs shall be levied at such rates as may be specified under the Customs Tariff Act, 1975 or any other law for the time being in force, on goods imported into, or exported from India. Section 25 thereafter confers a power on the Government if it is satisfied in the public interest to exempt generally either absolutely or subject to such conditions as may be specified in the notification goods of any specified description from the whole or any part of the duty of customs leviable thereon. It is pursuant to the power under Section 25 that a Notification in the matter of exemption of goods set out in the table for the manufacture of gem and jewellery for export has been issued by the Government.

It is thus clear that duty on customs is payable pursuant to the provisions of the Customs Act and exemption is also pursuant to the provisions of the Customs Act.

4. The Exim Policy has been issued pursuant to the powers conferred under the provisions of the Import and Export Control Act, 1947. Section 3 confers the power on the Government to prohibit and restrict the import of goods. This Act neither confers a power on the Government to impose either duty or to exempt from payment of such duty.

5. When there be two Acts, may be both Special Acts what has first to be examined is the field that they cover. Duty is payable pursuant to the Customs Act. The Import and Export Control Act regulates the import or export of goods. In so far levy of customs duty is concerned, the Customs Act is the Special Act. The issue whether any goods can be imported or exported has nothing to do with the assessment of customs duty. In our opinion, therefore, once the Notification is issued under Section 25 of the Customs Act that Notification alone would govern the

issue of exemption of customs duty. In the instant case a Notification has been issued. The Notification under Serial No. 67 of Table clearly uses the expression steel pots and steel counter pins made of steel as long as they are used for the manufacture of gem and jewellery for export. That has not been disputed. What has been contended is that by virtue of Exim Policy 'Press Pots' are not entitled to the benefit of the said notification. In our opinion, the stand of the respondents would be contrary to the provisions of the Notification issued under Section 25 of the Customs Act. The Exim Policy cannot have the effect of reading down the Notification issued under the provisions conferred under Section 25 of the Customs Act. The denial, therefore, of the benefit to the petitioners herein would be without jurisdiction and consequently this petition will have to be allowed."

5.6 In our view, the *Dimexon* judgment (supra) has unequivocally clarified that only a notification issued under Section 25 of the Customs Act, 1962 shall govern the issue of exemption of Customs duty. By implication, the exemption from Customs duty will be available to any importer only by way of an exemption notification issued under the Customs Act, 1962 which is prevalent and in force as on the date of import.

5.7 This view is fortified by Section 15 of the Customs Act, 1962 which reads as under :

"15. Date for determination of rate of duty and tariff valuation of imported goods. —

(1) The rate of duty and tariff valuation, if any, applicable to any imported goods, shall be the rate and valuation in force, -

- (a) in the case of goods entered for home consumption under section 46, on the date on which a bill of entry in respect of such goods is presented under that section;**
- (b) in the case of goods cleared from a warehouse under section 68, on the date on which a bill of entry for home consumption in respect of such goods is presented under that section;
- (c) in the case of any other goods, on the date of payment of duty :

Provided that if a bill of entry has been presented before the date of entry inwards of the vessel or the arrival of the aircraft or the vehicle by which the goods are imported, the bill of entry shall be deemed to have been presented on the date of such entry inwards or the arrival, as the case may be.

(2) The provisions of this section shall not apply to baggage and goods imported by post.” (emphasis supplied)

5.7 In the instant case, the Bill of Entry was admittedly filed by the respondent only on 1.5.2008. Applying the above provisions of Section 15 (1) of the Act and the ratio of *Dimexon* judgment (supra), the respondent-importer can then lay claim for exemption from customs duty on the basis of a customs notification, issued under the Customs Act, which was in force on 1.5.2008. As per the facts of this case, the notification in force was EPCG Notification No.97/2004-Cus.. This being so, the respondents cannot then get the rate of Customs duty which was actualized by Customs Notification No.64/2008-Cus. only on 9.5.2008.

5.8 In arriving at this conclusion, we also draw sustenance from the ratio laid down by the Hon'ble Apex Court in *Colgate Palmolive (India) Ltd. Vs CC Patna* - 2016 (339) ELT 161 (SC), also been relied upon by the Ld.A.R, where the Apex Court has inter alia repelled the plea that amending notification was only clarificatory in nature and that its issue was a formal ministerial act which got delayed for administrative reasons. The relevant portions of the said judgment are reproduced as under :

“28. It is vivid that the protocol to the Treaty of Trade had made a distinction between the “basic customs duty” and “additional customs duty”. The basic customs duty was granted exemption. However, in respect of “additional duty” provisions of Paragraph 3 or 4 were applicable. But, it is significant that the said protocol did not deal with special additional duty. Thus, *per se* and *ex facie* it is not possible to accept the position that “special additional duty” was itself exempted under the protocol. Paragraph 1 would not cover the “special additional duty”, which was specific and limited as was clear from the exemption notification

dated 23rd July, 1996. It was restricted to the goods specified in column 2 of the First Schedule from the customs duty leviable under the First Schedule to the Tariff Act. In fact, special additional duty was not leviable and enforced when the Treaty of Trade was signed and the protocol was executed. Under these circumstances, it is not possible to accept the position that Clause 1 of the protocol had included and had embraced the “special additional duty”, which was introduced in the form of Section 3A enacted in 1998.

29. The exemption which was granted by notification dated 29th September, 2000 was, therefore, in the nature of specific and new exemption from payment of special additional duty, which was otherwise payable in view of the introduction of Section 3A to the Tariff Act. It is difficult to appreciate that the exemption granted vide notification [dated 29th September, 2000] to special additional duty was clarificatory or to give effect to the existing protocol. We think so as protocol appended to the Treaty could not have conceived of future levy by way of proposition. In any case, factually it does not. Therefore, the notification of [29th September, 2000] conferred a new benefit which was not earlier stipulated or the subject matter of protocol.

... ..

32. Decisions in the case of *W.P.I.L. Limited v. Commissioner, Central Excise* - [2005 \(181\) E.L.T. 359](#) (S.C.) and *Ralson India Limited v. Commissioner of Central Excise, Chandigarh* - [2015 \(319\) E.L.T. 234](#) (S.C.) do not assist the appellant. In the said authorities, the contention of the assessee was accepted on the ground that both power driven pumps as well as parts of power driven pump had for long remained exempt. However, when earlier notifications were rescinded in order to consolidate and reduce the number of notifications and then the new notification was issued on 1st March, 1994 then by mistake and erroneously parts of power driven pump were not included, whereas manufacture of power driven pumps was included. In this context, it was held that the subsequent notification including parts of power driven pump was merely clarificatory and when clarificatory notifications are issued, they have retrospective effect. The instant case is not suggestive of any mistake or error or even inadvertence. **The plea that there was delay in issue of notification, exempting special additional duty is not acceptable. It is because, what was earlier exempted under the protocol was basic customs duty and also additional customs duty equal to the duty of excise in some cases and on satisfying the conditions stipulated and it did not deal and relate to special additional duty chargeable under Section 3A of the Tariff Act, which had introduced a new duty altogether. Therefore, we repel the submission that the exemption notification issued on 29th September, 2000 is clarificatory. It was intended to be applied prospectively. That apart, it cannot be also said the issue of notification was a formal ministerial act which got delayed for administrative reasons. It was a conscious act and a deliberate decision which came into existence after due deliberation when it was decided to grant exemption under Section 3A of the Tariff Act.”** (emphasis supplied)

5.9 More recently, a five Judge Constitution Bench of the Hon'ble Supreme Court examined the question "what is the interpretative rule to be applied while interpreting a tax exemption provision / notification when there is an ambiguity as to its applicability with reference to the entitlement of the assessee or the rate of tax to be applied ?" in the case of *Commissioner of Customs (Import), Mumbai Vs Dilip Kumar and Company & Ors.* in Civil Appeal No.3327 of 2007, where in their 82 page judgment of July 30, 2018, the Hon'ble Apex Court has inter alia held that the ratio in *Sun Exports* case (1997 6 SCC 564) which held that "*view favour to assessee in matters of taxation has to be preferred*" is not correct and accordingly overruled all the decisions which took similar view. The Hon'ble Apex Court also held that there is no implied power of taxation and that tax power must be specifically conferred and it should be strictly in accordance with the power so endowed by the Constitution itself. We find that the following portion of this landmark judgment is very relevant for the appeal at hand :

"43. There is abundant jurisprudential justification for this. In the governance of rule of law by a written Constitution, there is no implied power of taxation. The tax power must be specifically conferred and it should be strictly in accordance with the power so endowed by the Constitution itself. It is for this reason that the Courts insist upon strict compliance before a State demands and extracts money from its citizens towards various taxes. Any ambiguity in a taxation provision, therefore, is interpreted in favour of the subject/assessee. The statement of law that ambiguity in a taxation statute should be interpreted strictly and in the event of ambiguity the benefit should go to the subject/assessee may warrant visualizing different situations. For instance, if there is ambiguity in the subject of tax, that is to say, who are the persons or things liable to pay tax, and whether the

revenue has established conditions before raising and justifying a demand. Similar is the case in roping all persons within the tax net, in which event the State is to prove the liability of the persons, as may arise within the strict language of the law. There cannot be any implied concept either in identifying the subject of the tax or person liable to pay tax. That is why it is often said that subject is not to be taxed, unless the words of the statute unambiguously impose a tax on him, that one has to look merely at the words clearly stated and that there is no room for any intendment nor presumption as to tax. It is only the letter of the law and not the spirit of the law to guide the interpreter to decide the liability to tax ignoring any amount of hardship and eschewing equity in taxation. Thus, we may emphatically reiterate that if in the event of ambiguity in a taxation liability statute, the benefit should go to the subject/assessee. But, in a situation where the tax exemption has to be interpreted, the benefit of doubt should go in favour of the revenue, the aforesaid conclusions are expounded only as a prelude to better understand jurisprudential basis for our conclusion.

....

51. As already concluded in para 50 above, we may reiterate that we are only concerned in this case with a situation where there is ambiguity in an exemption notification or exemption clause, in which event the benefit of such ambiguity cannot be extended to the subject/assessee by applying the principle that an obscure and/or ambiguity or doubtful fiscal statute must receive a construction favouring the assessee. Both the situations are different and while considering an exemption notification, the distinction cannot be ignored.”

6. In the light of the findings and conclusions and also following the ratio of the judgments discussed hereinabove, we find that the impugned order cannot be sustained and will require to be set aside, which we hereby do. This will have the effect of restoring the order-in-Original No.9868/2009 dt. 19.10.2009 issued by the Deputy Commissioner of Customs (Refunds).

7. Revenue appeal allowed as above.

(Pronounced in court on 06.08.2018)

(Madhu Mohan Damodhar)
Member (Technical)

(Sulekha Beevi C.S)
Member (Judicial)

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