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CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL

PRINCIPAL BENCH, WEST BLOCK No.2, R.K.PURAM, NEW DELHI - 110066

CUSTOMS APPEAL BRANCH

Appeal No. C/479 /2008-480 /2008 - CU[DB]   Date **27/10/2011**

Assistant Registrar
C.E.S.T.A.T, New Delhi

To : SHRI AMARNATH JHUJNJHUWALA, PROPRIETOR
M/S KRISHNA IMPEX INTERNATIONAL,
79, SHAMNATH MARG,DARYA GANJ,
DELHI-110002.

SHRI AMARNATH JHUJNJHUWALA, PROPRIETOR   Appellant

Vs

C.C. (PREVENTIVE) AMRITSAR   Respondent

I am directed to transmit herewith a certified copy of **Final order No.C/463-464/ 2011 CU[DB]** dated 21.10.2011 passed by the Tribunal under **Section 129, (B) of the Customs Act,1962 & Financial Act 1994 relating to Service Tax**

Assistant Registrar
(Customs Appeal Branch)

Copy to :

1. Respondent
C.C. (PREVENTIVE) AMRITSAR
CUSTOM HOUSE, CENTRAL
REVENUE BUILDING, THE MALL,
AMRITSAR 143001.

2. Adv. / Consult
MR.ANANT RAM,ADV
C-7, FIRST FLOOR,
SECTOR 40, NOIDA

3. C.D.R
4. Bar association. CESTAT. New Delhi
5. Director Publications. Customs. Excise. I.P. Estate. New Delhi
6. M/s Centax Publictions Pvt Ltd., 1512-B, Bhishm Pitamah marg, Opp. ICICI Bank of Defence Colony, New Delhi -
7. Company Law Institute of India Pvt Ltd.,No.2(Old No. 36), Vaithyaram Street, T. Nagar,Chennai -17
8. Taxmann Allied Service Pvt Ltd.. 59/32. New Rohtak Road. New Delhi - 110005
9. Easy Service Tax Online Dot Com Pvt.Ltd.407A,Iscon Mall,Above Star India Bazar,Satellite Road, Ahmedabad-15
10. LAWCRUX Advisors Pvt Ltd. LAW House.1-8.Sector - 10. Faridabad 121003 (Haryana)
11. TaxIndiaOnline.com Pvt Ltd., Unit No.1, 2nd Floor,Vasant Arcade,Nelson Mandela Road, Vasant Kunj, New Delhi - 110070
12. Office Copy
13. Guard file
14. SHRI INDER PRASAD NEGI, PROP.
M/S DONGCH INTERNATIONAL, NAMGYA,
TEHSIL POOH,DISTT- KANNAUR (H.P.)

Assistant Registrar
(Customs Appeal Branch)

IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL, NEW DELHI PRINCIPAL BENCH, COURT NO. III

Customs Appeal No. 479 - 480 of 2008

[Arising out of Order-in-Original No. 1/Cus/08 dated 25.2.2008 passed by the Commissioner of Customs, Amritsar]

For approval and signature:
Hon'ble Ms. Archana Wadhwa, Member (Judicial)
Hon'ble Mr. Rakesh Kumar, Member (Technical)

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1. Whether Press Reporters may be allowed to see the Order for publication as per Rule 27 of the CESTAT (Procedure) Rules, 1982? : No

2. Whether it should be released under Rule 27 of the CESTAT (Procedure) Rules, 1982 for publication in any authoritative report or not? : No

3. Whether Their Lordships wish to see the fair copy of the Order? : Seen

4. Whether Order is to be circulated to the Departmental authorities? : Yes

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M/s. Amarnath Jhujnjhuwala
Shri Inder Prasad Negi
Appellants

Vs.

Commissioner of Central Excise
Respondent
Amritsar

Appearance:

Shri Anant Ram, Advocate for the Appellants
Shri Amrish Jain, DR for the Respondent

CORAM:

Hon'ble Ms. Archana Wadhwa, Member (Judicial)

Hon'ble Mr. Rakesh Kumar, Member (Technical)

Date of Hearing : 21.09.2011
Date of Pronouncement : 2011

Final **ORAL ORDER NO . C/463-464/11**

Per Archana Wadhwa (for the Bench):

Vide his impugned order Commissioner has confirmed Customs duty of Rs.1,07,41,818/- in respect of raw silk imported by the appellants by availing the exemption in terms of Notification No. 38/96 Cus dated 23.7.96. In addition, the imported goods stands confiscated with an option to redeem the same on payment of redemption fine. Penalty of identical amount stands imposed on the importer in terms of Notification No. 114A of the Customs Act, 1962. In addition, penalty of Rs.5 lakhs stand imposed on Shri Inder Prasad Negi, in terms of Section 112 of the Customs Act, 1962.

2. As per the allegations of the Revenue, M/s. Krishna Impex International, the proprietary firm of Shri Amarnath Jhujnjhuwala imported raw silk from China by using the name of one M/s. Dongch International, a proprietary firm of Shri Inder Prasad Negi. According to the Revenue, the import of Chinese raw silk could be made only by the persons residing along the border and the exemption notification No. 38/96-Cus dated 23.7.96 was available only to the local persons residing along with the border area. As such, revenue entertained a view that M/s. Krishna

Impex International has wrongly availed the benefit of the exemption in question by showing import under the name of a local firm M/s. Dongch International.

3. Accordingly, proceedings were initiated against them proposing demand of duty, confiscation of goods and imposition of penalty. The said show cause notice so issued to the appellants culminated into impugned order passed by the Commissioner.

4. Without going to the details of the developments, during the period of investigations, we find that the short issue involved in the present appeal is as to whether the import of Chinese raw silk is entitled to the benefit of notification No. 38/96, irrespective of the fact as to whether the importer is a border resident or not. The adjudicating authority while holding against the appellants has not disputed the fact that all the conditions of the notification i.e. the route through which the goods were imported stand satisfied. However, the only reason for confirmation of demand is that the import of the appellant cannot be considered to be as border trade in terms of Memo of Understanding entered into between China and India. The adjudicating authority has also relied upon various instructions and clarifications issued from various field formations laying down that Notification No. 38/96 was an essentially and primarily issued to enhance and promote the trade ~~beyond~~ in terms of the contract issued between two Countries and these facilities were not available to the persons who are not residing

along the border area. For better appreciation of the reasoning adopted by Commissioner we reproduce the relevant portion from the impugned order:-

> *"(vi) The above instructions/ directions issued by the Central Board of Excise and Customs and 'Department of Commerce bring out the unquestioned fact that the legislative intent of this notification is derived from the M.O.U. There is no doubt that Board's Circulars/ instruction issued by CBEC wherein some clarifications were given either in a case referred by the Department or in general in the public interest is binding upon the Department in day to day working. There is no need of any addition of words in the Notification as pointed out by the noticee supported by the judgements when the notification itself is guided the MOU instructions etc. issued in the matter. The revenue is bound by instruction/circulars and cannot be permitted to take a stand contrary to the instructions issued by the board. Needless to emphasize that CBEC instructions are binding on the department and any action taken in defiance to the said instructions are bad in law."*

5. As is seen from the above, the main and basic ground for the revenue is that the Memo of Understanding entered into between India and China for extension of border trade across Shipkila-

Namgaya pass, signed on 7.9.93, is indicative of the fact that same was to promote the trade between the two countries along the border and such goods are not further diverted or disposed of.

6. We find that identical issue was considered by us in case of Krishna Singh Garbyal (Appeal No. C/26-28/ 2008) . Vide Final Order No. C 323-325/11 dated 14.7.11, it was held as under:

> *16. Having observed that there is no such condition in the notification, which stands allegedly contravened by the importer and this fact having been accepted by the Revenue also, we proceed to deal with the objections which have been made the basis for denial of the benefits of notification by the adjudicating authority. The MoU entered into by the two countries is an international obligation and has to be converted into domestic law to operationalize the same. , The said MoU is required to result in enactment of law for giving an effect to the same. To deny the benefit of notification, which admittedly does not refer to any border trade, on the basis of the said MoU, without there being any corresponding Act or Notification, is neither justified nor warranted. The notification in question was issued in 1996 i .e. after the MoU was arrived at on 13.12.1991. If the imports through Gunji land route was meant to be only between the residents of the border areas, the notification could have spelt the same. There being nothing in the said notification, we are very clear*

that the MoU arrived at between the two countries, cannot be made the basis for denial of benefit of notification in question. The Commissioner has also placed reliance on ITC Public Notice No. 33/92-97 dated 17.7.1992. We have seen the said ITC Public Notice which only gives a list of items allowed to be imported freely on border trade with China. Admittedly, silk is one of the specified goods. It is contended by the appellants that when the said notice was issued, the import of raw silk was restricted under the trade policy and was allowed only against a license or in accordance with the public notice issued in this behalf. It was in these circumstances that the said public notice was issued so as to allow the import of the raw silk as border trade with China, without a condition of license. However, when the raw silk was imported by the appellants, new Foreign Trade Policy was in place and raw silk was freely importable. As such, he said that ITC Public Notice had, become redundant at the material time of import of goods by the appellants. Apart from above, we also note that the border trade stands nowhere defined and the said public notice allowing import of silk under border trade is not a part of notification No. 38/96. As such, in our views, reliance on the said public notice by the Commissioner is erroneous.

17. We also agree with the learned advocate appearing for the appellants that such public notices do not have the sanction of law inasmuch as they are not in the form of any enactment or an order of the Government of India, duly published in the official gazette, as required under Section 11 of the Customs Act 1962 and Section 3(2) of the Foreign Trade Development and Regulation Act, 1992. The Ministry of Finance, telex F.No. 554/7/91-LC dated 03.7.1992 and Department of Commerce OM No. 2/9/2005-FT(NEA) dated 02/5/2005 and Department of Revenue's letter F.No. 554/02.5005-LC dated 12.08.2005, can at the most reflect upon the intention of the Government but cannot take the place of legislative enactment so as to have the force of law. There being no such condition in the notification itself, the view as expressed in the letters cannot take the place of such conditions so as to require the importers to adhere to the same. In the case of Intercontinental vs. UOI - 2003 (154) ELT 37, it was observed that if the notification has not provided for any condition, subsequent circular cannot impose such condition as the same would tantamount to re-writing the notification or in other words legislation - by circular, which is not permissible in law. Admittedly a notification issued under the provisions of a particular ;pct require publication in the *official gazette as well as requires tabling before both the houses of the Parliament and if that exercise has been carried out without condition being imposed in the notification, it would not be permissible to permit Revenue to impose such conditions by way a circular. The letters of Ministry of Finance and of Commerce relied upon by the Commissioner are internal correspondences between the departmental officers and the same are not a part of the legal enactments. The same cannot be used to curtail the benefits otherwise available to the appellants under the notification. If there was any such intention on the part of the Revenue to impose restriction on border trade, nothing prevented them to introduce such a condition in the notification itself.*

18. At this stage we may refer some of the internal correspondence made between the department which stands placed on record by the appellant. In letter a dated 13.09.2005, written by Commissioner of Customs (Preventive), Lucknow to the Joint Secretary, Customs, CBEC, it stands recorded that though there are detailed guidelines provided in the telex dated 03.7.2005 but still ambiguity remain therein, which needs to be clarified. A reference was made to Notification No 38/96-Cus dated 23.6.1996 vide which the exemption of duty of customs and additional duty of customs leviable thereon under Section

3 of the Act was provided. The Commissioner observed that in the said notification the nature of trade or any other condition in this regard has not been mentioned. Absence of any specific requirement should therefore also amount to that all importers irrespective of their place of residence in India, are eligible to import through land customs station (LCS), Gunji. He also expressed his opinion that the Government of India's directions in respect of border trade meant for local residents ~~te~~ on both the side of border cannot be implemented as such in the absence of any such express mention in the notification. The provisions of MoU of 1991 between India and China are at the most international obligation of India but are not *enforceable without being incorporated into domestic legislation like the notification or Foreign Trade Policy. He accordingly, made a request to the Joint Secretary, Customs that the persons eligible to trade through LCS, Gunji should be spelt out clearly in the notification so as to remove the ambiguity whether residency in any particular part of India as condition precedent for importing/ exporting the goods.*

19. Reference can be made to another letter dated 10.04.2006 made by the Commissioner of Customs, Lucknow to the Authority of Advance Rulings, which is to the effect that Ministry of Commerce may be requested to issue statutory *clarification/ public notices to give strength to the argument that the subject import was not allowed under the MoU so that Notification No 38/96-Cus dated 23.7.1996 is not misused by the importer. Another letter dated 01.09.2005 issued by the Ministry of Commerce is to the effect that in view of the hardships being faced by the importers at Gunji, duty free import of silk through land route from China, should not be discouraged. All these correspondences reflects upon one fact that though the Government's intention in allowing border trade were clear but the same were not incorporated in the notification in question. The Commissioner, Lucknow expressed his apprehensions about the same and also requested the Government to introduce such condition in the notification itself and that having not been done, reliance on such internal correspondence by the adjudicating authority to hold against the appellant, is not appropriate.*

19.1 At this stage we may refer to Advance Ruling dated 29.08.2006 given in the case of one Shri Akash Jain. It stands held in the said ruling, while dealing with the scope of notification No. 38/96-Cus dated 23.7.1996, that there is no condition except limiting the import of such goods from China through a specified land customs station and along the specified land routes, for getting the benefit of exemption of *duty under notification. It was held that the exemption notification has no actual user condition after the specified goods are imported. As such, the objections of the Commissioner that the silk was not actually imported by M/s. Krishna Enterprises under the proprietorship of Shri Krishna Singh Garbyal but the owner of the same was M/s. Elegant Industries, thus disentitling the importer from claim of the exemption notification, does not carry any weight. The Commissioner has dealt with the said plea of the appellants and has observed that the applicant in that case had sought advance ruling in the following questions :-*

(a) Are we allowed to import through these stations in view of Notification No. 63/42?

(b) If we import wool from these station, i.e. Gunji inUttaranchal or Village Namagla Shipkila in H.P., will we get the benefit of duty free import under Notification No. 38/96?

(c) Is there any limitation under these notifications regarding the actual user of the goods so imported. Means, if we import duty free wool from these station, can be sell the surplus in open market, if so desired?

The Commissioner has thus observed as under:-

"The Authority for Advance Rulings in this case of Mr. Akash Jain has given their ruling in respect of (b) & (c) but dropped

the question (a) above considering it not covered in their jurisdiction. The authority of advance ruling in its order have nowhere observed that the conditions/ restrictions imposed by any other law for the time being in force, shall not be applicable, in respect of the goods when imported into India from China through LCS Gunji but has categorically stated that this ruling does not preclude the concerned authorities from verifying/ satisfying themselves as to compliance of requirements under other Acts/Rules.

19.2, We however, note that the advance ruling in the above case has clearly held that the benefit of notification is available in respect of imports made from China through Gunji route and there is no restriction of the actual user of the goods so imported. Having held that importer has not violated any other condition of the notification, the above ruling by the Advance Rulings Authority, clearly support the appellant's contention. In fact, we note that the Hon'ble High Court of Uttaranchal, in their interim order dated 18.11.2005 passed on the writ petition filed by M/s. Krishna Enterprises, observed that there is no stipulation in the said notification that exemption from excise duty can be claimed only by the traders/ tribals living in the border area, and as such, prima facie there was no justification for the seizure of the goods. Though we agree that these observations were made by the

Hon'ble High Court while passing an interim order for release of the seized goods, but such observations support the view which we have already arrived at. As such, we find no reasons to deny the exemption notification in question irrespective, of the fact whether M/s. Krishna Enterprises is the actual importer or imports stands financed by M/s. M/s. Elegant Industries."

7. The ratio of law as declared in the above decision is clearly applicable to the facts of the present case with the only difference that the raw silk was imported in that case through Gunji Route whereas in the present case the importation is from shipkila pass. Undisputedly, both the routes are specified routes and nothing turns on the same. The Commissioner in the present impugned order refer~~s~~red and relied upon the same Memo of understanding between India and China, the same circular and same clarification letters issued from various field formations. The Tribunal in the above referred decision of Krishna Sing Garbyal having held that such memo of understanding, clarification and circulars etc. cannot lay down the law contrary to the normal wor~~k~~dings of the notification which nowhere puts any restriction to the import ~~and~~ of raw silk through the route in question, and therefore, the benefit of the notification cannot be denied to the appellants.

8. As such by following the decisions in the above referred case, we set aside the impugned order and allow both the appeals with consequential relief to the appellants.

(Pronounced in the open court on 21/10/11

(Archana Wadhwa)
Member(Judicial)

(Rakesh Kumar)
Member(Technical)

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