CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL MUMBAI

REGIONAL BENCH – COURT NO. 2

CUSTOMS APPEAL NO: 86162 OF 2015

[Arising out of Order-in-Original No. 01/2015-16/COMMR. NS-I/JNCH dated 15th April 2015 passed by the Commissioner of Customs (NS-I), JNCH, Nhava Sheva.]

DEE Pearls (India) LLP … ***Appellant***
Village Athal, PO Opposite Price Pipe,
UT of Dadra Silvasa – 396235.

versus

Commissioner of Customs (NS-I) ***…Respondent***
Jawaharlal Nehru Custom House, Nhava Sheva
Tal: Uran, Dist: Raigad – 400707.

APPEARANCE:

Ms Anjali Hirawat, Advocate for the appellant

Shri D S Mann, Deputy Commissioner (AR) for the respondent

CORAM:

HON'BLE MR C J MATHEW, MEMBER (TECHNICAL)
HON'BLE MR AJAY SHARMA, MEMBER (JUDICIAL)

FINAL ORDER NO: 85400/2024

DATE OF HEARING: 17/10/2023
DATE OF DECISION: 08/04/2024

PER: C J MATHEW

The limited issue in this appeal of M/s Dee Pearls (India) LLP, against order[1] of Commissioner of Customs (NS-I), Jawaharlal Nehru Customs House, Nhava Sheva, is the non-compliance with the remand order of the Tribunal in the earlier round of litigation. The dispute pertains to import of 2117.74 metric tons of 'rough marble blocks', valued at ₹ 2,74,19,409.38, *vide* thirteen bills of entry between June 2007 and August 2007.

2. Citing notification no. 24/2005 dated 31st August 2005 of Director General of Foreign Trade (DGFT) mandating compliance with conditions stipulated in policy circular no. 35/2005-09 dated 30th August 2005 which, *inter alia*, specified possession of 'special licence' approved by EXIM Facilitation Committee (EFC) of the Directorate General of Foreign Trade (DGFT), the impediment to clearance from lack thereof was brought to the notice of the importer. It is on record that intimation of having applied for licences from the competent authority was communicated in letter dated 27th August 2007. It was also on record that the importer had, in their written submission resisting the objection to import, waived the right to be issued with show cause notice and to be heard in person. Notwithstanding these circumstances, the Commissioner of Customs hastened to confiscate the impugned goods for lack of licence warranting recourse to section 111(d) of Customs Act, 1962 but allowed redemption on payment of fine of ₹ 1,29,18,926 under section 125 of Customs Act, 1962 and

[1] [order-in-original no. 01/2015-16/COMMR NS-I/JNCH dated 15th April 2015]

imposed penalty of ₹ 12,87,000. Appeal[2] against that order[3], in challenge before the Tribunal on several grounds, was disposed off by final order[4] remanding the matter back to the original authority as noted thus

> *'6. The Hon'ble CESTAT in its order dated 23.02.2012 observed that,*
>
> *"We have seen the licence issued by the competent authority permitting the appellant to import a quantity of 2117.74 MT of Rough Marble Blocks;, The said licence though dated 30.06.2008, clearly states that it is valid for goods already cleared by the Customs against undertaking/bond against 13 Bills of Entry as mentioned in the Undertaking dated 12.06.2008. Inasmuch this licence was not produced before the adjudicating authority, the matter needs to be remanded back to the adjudicating authority for reconsideration of the matter afresh in the light of the licence now obtained. Accordingly, we set aside the impugned order and remand the matter back to the adjudicating authority for consideration afresh after giving reasonable opportunity to the appellant to make submissions in their defence."'*

in the impugned order and it is also on record that stay order dated 24th October 2007 of the Tribunal had allowed the impugned goods to be cleared on deposit of ₹ 25,00,000.

3. It would appear that the interim order and order of remand of the Tribunal was substantially influenced by the issue of licence covering

---

2 [C/913/07-Mum]
3 [order-in-original no. 83/2007 dated 28th September 2007]
4 [A/229/12/CSTB/C-I dated 23rd February 2012]

not just the value of the imported goods but also specifically referring to the goods under import that were impugned in proceedings for confiscation. Notwithstanding that development, the adjudicating authority reiterated the predecessor order thus

> *'16. I find that the Import of Rough Marble Blocks was restricted for importation under Foreign Trade Policy 2004-2009 as per DGFT Notification No. 23/2005, dated 31.08.2005. It was allowed for import into India subject to the conditions laid down in Policy Circular No. 24(RE-05)/2004-2009 dated 30.08.2005.As per Policy No 24/2005-09 dated 30.08.2005, import of Rough Marble Blocks was restricted and subject to import licensing procedures which include the application for Licence to import Rough Marble Block. I find that there is no documentary evidence put forward by the importer that they have made application to DGFT for obtaining a licence for the impugned goods prior to the shipment/import of the impugned goods. I do not find any categorical evidence which correlates that application was made to DGFT prior to the shipment/import of impugned goods. Therefore, the import was in contravention of Section 3 (2) of the Foreign Trade (Development & Regulation) Act, 1992 read with the Exim Policy and thus, the goods were liable to confiscation under Section 111(d) of the Customs Act, 1962 and importer was liable for penal action under Section 112(a) of the Customs Act, 1962.*
>
> *I am confined to re-adjudicate the case with respect to the validity of import of the said goods under the Licence produced before me in terms of the Hon'ble Cestat's remand order.*

ORDER

17. I refrain from deviating from anything passed in earlier order vide order in Original No. 83/2007 dated 28.09.2007.

(i) I order confiscation of the impugned goods under Section 111 (d) of the Customs Act, 1962. However, in exercise of the powers conferred on me under Section 123 of the Act ibid, 1 allow give the importer an option to redeem the same on payment of fine, in lieu of confiscation. B/E wise as per Column 4 of the table below. This option must be exercised within a month of the receipt of this order. While deciding the quantum of redemption fine, due note has been taken of the margin of profit on the value of the impugned goods which was found out to be about 47% to 50% of the value.

(ii) I also impose penalty under Section 112 (a) of the Act ibid as indicated against each B/E in column 5 of the table below:-

xxxxxx'

even though cognizance of developments and direction of the Tribunal was taken note of thus

'10. The present case has been remanded back by Hon'ble CESTAT on limited issue to decide the case after considering the DGFT Licence dt. 30.06.2008 granted to the Noticee for the goods in question i.e. imported under the 13 Bs/E, which was not available before the original adjudicating authority while deciding the case. Hon'ble Tribunal directed the present Adjudicating authority to decide the case after giving a hearing to the Noticee.

xxxxxxx

12. The Noticee has contended that they have obtained the license for import of the entire quantity of 2117.74 MT and

> *accordingly, there is no prohibition that is applicable in the present case warranting confiscation of goods under Section 111(d) and that this is more so in view of the fact that the goods were cleared from customs area, and hence imported in terms of the Customs Act, 1962 only after the applications were approved and the licenses were granted. I have checked the fact of the case. I find that Para 2.12.2 of the relevant Handbook of Procedures stipulates that the validity of an import licence/certificate is decided with reference to the date of shipment/dispatch of the goods from the supplying country. The impugned goods were shipped between 13.06.2007 to 06.08.2007. The Noticee was not in possession of valid import licence between the above mentioned period. The licence dated 30.06.2008 was granted by DGFT after almost a year after importation and hence it cannot be said to be a valid import Licence as the Noticee was not in possession of the Licence from the date of Shipment of the impugned goods.'*

4. Learned Counsel for appellant submitted that the impugned order had erred in recording that there was no evidence of application having been made well before import inasmuch as they had preferred it as early as 30th September 2006 to cover imports of 2006-07 and licence no. 0550001165 dated 30th June 2008 was issued in pursuance thereof. It was further contended that the adjudicating authority had rendered erroneous finding by misconstruing their application of 1st August 2007 for 2007-08 for which licence no. 0550000891 dated 22nd August 2007 had been issued. It was contended that the first of the licences covered the impugned goods as evident from the contents of the condition sheet attached thereto.

5. It was further submitted that licence, issued subsequent to imports but intended for already executed transactions, has been judicially held to be valid by the Tribunal in *Zazman Exports v. Commissioner of Customs, Chennai [2000 (119) ELT 688 (Tribunal)]* and in *Michigan Engineers Pvt Ltd v. Commissioner of Customs (Import), Mumbai [2009 (245) ELT 586 (Tri-Mumbai)]*. Reliance was also placed on the decision of the Tribunal in *Rama Newsprints & Paper Ltd v. Commissioner of Customs, Kandla [2000 (122) ELT 473 (Tribunal)]* which held that

> *'7. Whatever be the speculations on these aspects or the conclusion of the licensing authority, our decision cannot be guiding by it. The fact remains that the licence was amended by the authority competent to do so validating import of the goods made, and send by the Directorate of Revenue Intelligence. It is not possible for us to accept either on principles of law or in terms of the Policy that this amendment will not operate retrospectively. The provision of the policy pointed out by the advocate for the appellant, which we have noted in paragraph 4 above clearly permitted the licensing authority to relax any of the conditions of paragraph 28 of the policy. The licensing authority therefore had the right to issue an amendment. It is not possible to agree this right cannot be exercised retrospectively. It is no doubt true there is nothing specifically in the policy which permits retrospective application. At the same time, however, there is nothing in the policy which militates against the view that a licence cannot be issued with retrospective effect i.e. for goods already arrived for shipping. The Tribunal in its judgment in Ester Industries Ltd. v. CC, New Delhi - 1995 (75) E.L.T. 635 has accepted the*

valuation on an amendment made to an import licence which has retrospective application.

8. Nor is it possible for us to accept the reasoning of the Commissioner that because cancellation of licence only operates from the date of cancellation it must necessarily follow the amendment to a licence must only be operative from the date of that amendment. The Supreme Court in its judgment in East India Commercial Corporation - 1983 (13) E.L.T. 1342 (S.C.) = 1963 (3) SCR 338 taken the view, later affirmed in its judgment in UOI v. Sampat Raj Dugal that applying the same principles of contract to grant of an import licence, such a licence ceased to be valid only when it was cancelled and goods imported prior to its cancellation would be validly covered by that licence. On applying the same principles, the result is contrary to what the Commissioner concludes. It has to be held a retrospective amendment is valid to cover the goods which have been imported before the amendment was made.

9. The policy which is framed in terms of section 3(1) of Act of 1992, itself empowers the licensing authority to relax the conditions contained in it. Condition 1 of the licence which makes applicable the policy up to the date of issue of the licence, itself provides for contingencies when this would not apply by incorporating in the conditions the words "unless specified otherwise". The contention that the amendment to the licence cannot be made to ratify an otherwise illegal act is really a piece of circular reasoning. The act was illegal, only because the condition in the policy the observations of which has been dispensed with, by the amendment was not complied with. Once the dispensation to that condition is granted there is no illegality. We have concluded above that there would be *no difference between such a dispensation granted earlier, and one granted subsequent to import.*

10. We have to take note of the fact that the customs authorities cannot question by the refusal to accept it, a permission for import on the ground that such permission is contrary to the policy, or refuse to intimate the authority of import licence was any of the condition thereon. The licence has been granted by the authority who has jurisdiction to do so. It is not open to the department not to accept it on its perception that the licence was not issued in accordance with the policy. The observation of the Bombay High Court in Lokash Chemical Works v. CC, Prev. making a distinction between the function of the licensing authority and the customs authority and emphasizing that one cannot trespass upon the area occupied by the other are relevant. It is relevant to note here the amendment to licence was made nine months before issue of the notice to show cause 28-11-1994 and therefore could not have said to confirm the exercise of discretion and adjudication proceedings in force.

11. The observation of the Supreme Court in Sampat Raj Dugar that the licence is valid to cover import of goods till it is cancelled is relied upon by the departmental representative in this case. We have already dealt with this holding that the revenue's contention does not necessarily follow.

12. The judgment of the Bombay High Court which the departmental representative cites expressed the view that in deciding the quantity of goods permitted to be imported, the licencing authority could not depart from the claims between exported and imported product specified in the import policy and act arbitrarily. The judgment does not indicate whether there was a contention raised that this could be done if the licensing authority had the discretion to do so.

> *13. It has therefore to be held that the import of the goods is covered by licence issued and confiscation of clause (d) of section 111 and imposition of penalty under 112 are contrary to law. The appeal is therefore allowed and impugned order set aside. Consequential relief.'*

It was contended that confiscation and imposition of penalty by the adjudicating authority was not in accord with judicial discipline.

6. Learned Authorised Representative took us through the adjudication order and submitted that, notwithstanding grant of licence subsequent to import, the appellant was not entitled to clear the goods in the absence of licence at the time of import.

7. It appears to us, from the records, that the jurisdictional Commissioner of Customs was bent upon demonstrating statutory superiority over other agencies of the State as the final arbiter of national interest. This is evident from the refusal to await outcome of application pending before the Directorate General of Foreign Trade (DGFT) and proceeding to penalise the import and importer. Even after the altered factual situation had been highlighted by the Tribunal in remand order and necessity of considering this as relevant to the outcome implicit in the remand order, the adjudicating authority remained obdurate. The authority has even gone to the extent of denigrating superior appellate authority by insisting on restoration of the order discarded by the Tribunal. This is not a happy state of tax

administration and which the supervisory authority cannot but take congnizance of. It is patent lack of refresher episodes in the course of upward mobility of officers that encourages megalomaniac disregard for horizontal and vertical components of governance. Such defiance of appellate directions suffices to invalidate the impugned order.

8. Needless to say, the cocooned existence of tax administration, amply evinced in the attitude of this adjudicating authority, is manifest in refusal to acknowledge the limits of statutory empowerment. This was not a dispute over duties of customs but the implementation of prohibition to be overcome only with licence issued by Directorate General of Foreign Trade (DGFT) in pursuance of its mandate to administer the trade policy enforced through the agency of customs administration. Quantitative restrictions, implemented through special licence regime, is the exclusive remit of the licencing authority. By its very nature, the date of issue of licence is not to material to quantitative restriction; its relevance to the impugned goods alone is. On that there has been no controverting either in the impugned order or in submissions of Learned Authorised Representative.

9. It is also surprising that the adjudicating authority, and perhaps in ignorance, has placed such emphasis on the adherence to chronological correspondence. It has not been unknown for the Department of Revenue to issue *ad hoc* exemption, in exercise of

empowerment under section 25 of Customs Act, 1962 and long after goods have been imported and cleared, to regularise such imports in public interest. Sauce for the goose is sauce for the gander too. The findings in the impugned order are not in consonance with the statutes as legislated and law as judicially determined. The exercise of authority by the Directorate General of Foreign Trade (DGFT) is beyond the oversight afforded to officers of customs under Customs Act, 1962. This is evident from the decision of the Tribunal in *re Rama Newprints & Paper Ltd.*

10. We, therefore, see no reason for such illegality, as articulated in the impugned order, to survive. The impugned order is set aside to allow the appeal.

(Order pronounced in the open court on 08/04/2024)

(AJAY SHARMA)
Member (Judicial)

(C J MATHEW)
Member (Technical)

**/as*