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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

CUSTOMS APPEAL NO.11 OF 2005

Commissioner of Customs(Import) ..Appellant
-***Versus***-
M/s. Gautam Diagnostic Centre ..Respondent

....

Mr. A. S. Rao a/w Jitendra B. Mishra for the Appellant.
Mr. J. C. Patel a/w Prasad Paranjape a/w Mr. Jas Sanghavi, Ms. Niyati Hakani i/b. PDS Legal for the Respondent.

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CORAM: S.C. DHARMADHIKARI
AND
SUNIL P. DESHMUKH, JJ.

DATE :- 23rd JANUARY, 2015.

P.C.:

In Customs Appeal No.11/2005 it is admitted that the Revenue has challenged the order passed by the Customs, Excise and Service Tax Appellate Tribunal dated 20th August, 2004. The Appeal has been admitted on the following substantial questions of law. That reads as under:

> "(i) Whether in the facts and circumstances of the case, the Tribunal was right in law in setting aside the order for imposition of penalty on the importer and the proprietor?
>
> (ii) Whether in the facts and circumstances of the case, the Tribunal was right in law in setting aside the order for confiscation of the goods?

> (iii) Whether the importers are liable to pay duty which has arisen not merely because the goods have been confiscated but also because the conditions of the notification have been violated and also when the importers have utilised the imported items for their full life?"

2] It is conceded before us that all the questions which have been framed as substantial question of law by this Court and while admitting this Appeal could not have been framed and considered at all. That is simply because the Revenue is aggrieved by the order of the Tribunal passed on the Assessee's Appeal. The Assessee was aggrieved by the order of confiscation of the goods and levy of penalty. The demand for duty was not even confirmed by the Commissioner while adjudicating the show cause notice. That part of order passed by the Commissioner has not been questioned by the Revenue before the Tribunal. In such circumstances, question no.3 is deleted. However, we will note the arguments of Mr. Rao based on question No.3 to support the ultimate finding and conclusion of confiscation and penalty in the Commissioner's order.

3] The facts necessary to decide these questions in brief are that:-

The Respondent-Assessee has a Diagnostic centre. It is the importer in question. It imported the consignment of medical equipments comprising of "Ampulatory ECG Model 43420 A" valued at Rs.5,75,514/-

and "Page Writer Multi-Channel Recorder for Cardio-electro Physiology Computerised Analysis System" valued at Rs.18,110/-. The Bill of Entry 9232 dated 25th July, 1990 was filed for clearance of these goods. The importer sought the clearance of the imported goods duty free relying upon Notification 64-Cus dated 1st March, 1988. While claiming clearance of these goods on duty free basis the importer relied upon the certificate styled as Custom Duty Exemption Certificate dated 30th March, 1990 and 28th December, 1988 produced at the time of clearance. These goods were, therefore, allowed to be cleared duty free on the strength of this Notification.

4] Later on, the Director General of Health Services passed an order on 17th December, 1997 withdrawing the certificate issued, namely, Customs Duty Exemption Certificate. That was withdrawn by holding that M/s. Gautam Diagnostic Centre (the importer) was only a Diagnostic centre, not having indoor patient facilities. It, therefore, does not fulfill the conditions stipulated in the Notification dated 1st March, 1988 for availing and retaining the exemption.

5] In view of this letter/communication from the Director General of Health Services, New Delhi, the inquiries were conducted by the Officers of the Customs and imported medical equipments were seized under section 110 of Customs Act, 1962. The seizure is effected on 21st January, 1998. Later on, the statements were recorded and the documents scrutinized. A show cause notice was issued on 19th May, 1998 to Shri M. J. Gandhi, Proprietor of the Respondent-Assessee. That came to be adjudicated. Pertinently, that also claimed duty but essentially it was adjudicated for the confiscation and penalty. After giving a hearing to the Respondents, an order was passed by the Commissioner of Customs dated 31st December, 1998. That order and to the extent relevant reads as under:-

> *"I, therefore pass the following order:*
> *a). I confiscate the seized goods valued at Rs.5,93,624/- u/s 111(o) of Customs Act, 1962. However, I allow these goods to be redeemed on payment of Redemption fine of Rs.5,93,624/- under the provisions of section 125 ibid.*
>
> *b). I also impose a penalty of Rs.5,12,672/- on the Importers M/s. Gautam Diagnostic Centre for non-fulfillment of the conditions of the notification no.64/88 dated 1.3.88 u/s 112(a) of Customs Act, 1962.*
>
> *c). I further impose a penalty of Rs.2,96,812/- on Dr. M. J. Gandhi, proprietor of M/s. Gautam Diagnostic Centre, Mumbai u/s 112(a) of Customs Act, 1962.*
>
> *d). I caution the DGHS Authorities to be more vigilant while dealing in such type of case in future.*
>
> *The above order is passed without prejudice to any other action or actions likely to be contemplated against the said*

importers under the provisions of the Customs Act, 1962 or any other law for the time being in force.

Sd/-
(V. P. SINGH)
Commissioner of Customs,
ACC, Sahar, Mumbai-99."

6] This order was challenged by the Respondent before the Tribunal and the Tribunal has reversed it. In reversing it, the Tribunal relied upon the fact that the importer need not be a hospital so long as it falls within the explanation to the Notification granting exemption from payment of customs duty. Secondly, the Director General of Health Services may have withdrawn the entitlement certificate but that is with effect from 17th December, 1997. The import which has taken place more than 10 years back is, therefore, unaffected by this withdrawal or cancellation. Therefore, the ingredients of section 111(o) of the Customs Act, 1962 are not satisfied. In these circumstances, the confiscation was not upheld by the Tribunal and it set aside the penalty.

7] Mr. Rao, learned counsel, appearing on behalf of the Revenue submits that this view taken by the Tribunal is contrary to law. A consistent view of such Exemption Notifications and taken by the Hon'ble Supreme Court is that the authorities have a duty to monitor the fulfillment of the conditions of the Exemption Notification. That is a continuing act. Therefore, the authorities have a duty in law to insist on satisfaction of the conditions of the exemption notification based on which the exemptions are earned and the import is made. Even if these conditions are violated or breached subsequent to the import, the authorities are empowered to recall the exemption and claim not only the duty component but resort to all such measures including confiscation of the goods and imposition of penalty. In regard to this, Mr. Rao relies upon several judgments and rendered by this Court and the Hon'ble Supreme Court. He relies upon the Notification. He also relies upon the judgment of the Hon'ble Supreme Court in the case of ***Mediwell Hospital and Health Care Pvt.Ltd. V/s. Union of India reported in 1997 (89) E.L.T. 425*** and the judgment of the Hon'ble Supreme Court in ***Sri Sathya Sai Inst., High Medi. Sciences V/s. Union of India reported in 2003 (158) E.L.T. 675.*** Mr. Rao has also relied upon the judgments rendered in further cases including ***Faridabad CT Scan Centre V/s. D. G. Health Services reported in 1997 (95) 161 and Commissioner of Customs (Import), Mumbai V/s. Jagdish Cancer & Research Centre reported in 2001 (132) E.L.T. 257.*** He submits that there is a recent judgment of the Hon'ble Supreme Court rendered in the case of ***Bharat Diagnostic Centre V/s. Commissioner of Customs reported in 2014 (307) E.L.T 362***. Further, reliance is strongly placed on a judgment in the case of

Commissioner of Customs (Import), ACC, Sahar V/s. Wockhardt Hospital & Health Inst. reported in 2006 (200) E.L.T. 15.

8] On the other hand, Mr. Patel, learned counsel, appearing on behalf of the Respondents submits that the reliance placed by the Revenue on the judgments of this Court and Hon'ble Supreme Court is entirely misplaced. Revenue is now aggrieved and dissatisfied with the fact that the duty which was exempted on the imported goods is not allowed to be collected and recovered. The Commissioner's order does not permit any such course. To that part of the Commissioner's order there is no challenge from the Revenue. The only issue is whether confiscation of the goods was permitted and relying on a subsequent development. The Tribunal has taken a view that the cancellation of the customs duty exemption certificate by the Director General of Health Services is with effect from 17th December, 1997, that cannot be quite effective from a prior date and particularly from the date of importation. The reason for this is that even a Diagnostic Centre falls within the purview of this Exemption Notification by virtue of explanation inserted therein. The Diagnostic Centre may not have a facility to treat the patients and indoors. In that regard the view taken in the case of ***Surlux Diagnostics Ltd. V/s. Collector of Customs, Bombay reported in 1994 (71) E.L.T. 569 (Tribunal)*** is relied upon by

Mr. Patel. That view has been adopted in the case of ***Gujarat Imaging & Research Institute V/s. Collector of Customs, Bombay reported in 1996 (85) E.L.T. 97 (Tribunal).*** The Special Leave Petition from the order passed in the case of ***Gujarat Imaging & Research Institute (supra)*** has been dismissed by the Hon'ble Supreme Court according to Mr. Patel. Relying upon all this, it was held that there is no justification for confiscating the goods and which have been imported in terms of the notification long time back and by an entity who was otherwise entitled to import it. Therefore, confiscation and penalty has been set aside and the Revenue's Appeal is restricted to that aspect. For these reasons, he submits that the Appeal deserves to be dismissed because the Tribunal's view is possible and plausible bearing in mind the peculiar circumstances.

9] With the assistance of the counsel appearing for both sides, we have perused the memo of Appeal and the annexures thereto. In the show cause notice, according to the Revenue, a demand was raised and that was on the footing that the Director General of Health Services, New Delhi, by a letter dated 17th December, 1997 withdrew the certificate issued to the Assessee. The withdrawal was on the ground that the Assessee was only a Diagnostic Centre not having indoor patient facility and, therefore, does not fulfill the conditions stipulated in the Notification

No.64/88 for availing and retaining the certificate. However, the Bill of Entry is dated 25th July, 1990. The clearance have been effected relying upon the notification of 1988 and the Customs Duty Exemption Certificate issued on 28th December, 1988 and 30th January, 1990. The seizure has been effected in 1998. The statements were recorded and later on the show cause notice came to be issued. The show cause notice was replied and extensively to justify that even a Diagnostic Centre could import the medical equipments. The findings of the Commissioner are that the Customs, Excise and Gold (Control) Appellate Tribunal had earlier held that Diagnostic Centre falls within the purview of the notification granting exemption. The notification specifically sets out facilities to be extended to the indoor patients irrespective of whether it is Diagnostic Centre or conventional hospital. The Commissioner held that it has to be interpreted for what it contains and for what it otherwise intends. In these circumstances, he relied upon the judgment in case of M/s. Mediwell Hospital and Health Care Pvt. Ltd.(supra) and ordered confiscation and imposition of penalty. The whole argument and before the Commissioner as also the Tribunal centred around section 111(o) read with section 122 of the Customs Act 1962. The Commissioner held that the confiscation is justified and more so because no duty can be demanded under section 28 as the import is more than 5 years old. That is how only confiscation was possible and imposition of penalty.

10] He, therefore, passed the above order and which came to be challenged before the Tribunal to this limited extent by the Assessee. The Tribunal concluded that if the Director General had withdrawn the certification with effect from 17th December, 1997, then, confiscation by the Customs with effect from 21st January, 1998 was completely uncalled for. The whole emphasis was that the confiscation is because the Assessee was only a Diagnostic Centre and not a hospital. However, there was a certain view held by the Tribunal as well that a pure Diagnostic Centre which may not have any indoor facility would be eligible for benefit of the subject notification. Such being the case, this was not a matter where confiscation and that too after nearly 8 years of the importation was called for.

11] We are of the view that in this limited controversy no wider questions or issues need to be answered. Mr. Rao may have justified all this by relying upon the terms and conditions of the Exemption Notification and interpreted by the Hon'ble Supreme Court. However, we are not required to go into the same. The import must be in consonance with the notification and of the goods permitted thereunder so also of the description set out therein. The further conditions are imposed and in larger public interest. The exemption itself is granted in public interest and with an intention to obtain medical equipment which may be state of the Art and ultra modern for proper and correct diagnosis and treatment of complicated medical ailments. The poor and down trodden section of the society also requires medical aid. Therefore such medical aid with the assistance of these equipments should be extended and with that purpose and object the conditions have been imposed. The fulfillment of these conditions have to be monitored and that is the duty of the customs authority. With that principle none can quarrel as that binds us. The question is whether the confiscation was justified and after such a long duration? The Tribunal found it to be unjustified simply because the import was sanctioned relying upon the notification and the certification of the Director General of Health Services. That certification enabling the Assessee to claim exemption from customs duty was withdrawn after more than 7 years and 9 years of the Import. That was not effective from a prior date. In such circumstances, it was doubtful as to whether the same could have impacted in any manner the importation already done. In these circumstances and the additional doubt created by the view taken by the Tribunal that even a Diagnostic Centre would qualify for exemption that in this case the Tribunal did not uphold the Commissioner's view and set aside the adjudication order. We do not find anything erroneous or patently illegal in such a course. It is not perverse either. Given the peculiar facts and circumstances and the long time gap, the Tribunal has taken this view. We do not think that setting aside of the confiscation order and imposition of penalty, in these circumstances, really gives rise to any substantial question of law. We do not, therefore, make any observations on the broad contentions raised by Mr. Rao. The question no.3 was strictly not required to be framed. Even with regard to question no.1 and 2 the findings of fact are based on the materials produced before the Tribunal and the Commissioner. The undisputed factual material enabled the Tribunal to take the abovenoted view. It being possible, even on these two questions, we are not inclined to interfere with the order of the Tribunal. As a result of the above discussion, this Appeal fails. It is accordingly, dismissed. No order as to costs.

(SUNIL P. DESHMUKH, J.) **(S.C. DHARMADHIKARI, J.)**

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