

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED :: 06-06-2019

CORAM

THE HON'BLE DR.JUSTICE VINEET KOTHARI
AND
THE HON'BLE MR.JUSTICE C.V.KARTHIKEYAN

C.M.A.No.626 of 2016

Airports Authority of India,
Rajiv Gandhi Bhavan,
Safdarjung Airport,
New Delhi - 110 003.

...Appellant/Appellant

-vs-

1. Commissioner of Customs (Port -Export)
Customs House,
No.60, Rajaji Salai,
Chennai - 01.

2. Customs, Excise and Service Tax Appellate Tribunal,
South Zonal Bench,
Sastri Bhavan,
Chennai- 600 006.

...Respondents/Respondents

Appeal against the order, dated 25.09.2015, passed in Final Order No.41254 of 2015 in Appeal No.C/109/2009-DB by the Customs, Excise and Service Tax Appellate Tribunal, South Zonal Bench, Chennai.

For Appellant : M/s.R.Parthasarathy & V.Muthuraman

For Respondent 1 : Mr.V.Sundareswaran

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JUDGMENT
(By Dr.Vineet Kothari, J.)

Airports Authority of India, a statutorily created Undertaking under a separate enactment, is the Appellant before us, aggrieved by the order passed by the learned Customs, Excise and Service Tax Appellate Tribunal, South Zonal Bench, Chennai, on 25.09.2015, denying them the benefit of payment of Custom Duty partly in the form of Scrips, which they got under a Scheme

known as ''Served From India Scheme (SFIS)'' under the Foreign Trade Policy during the year 2004-05.

2. The Appellant-Assessee viz., Airports Authority of India, in short, 'AAI', was entitled under the provisions of the said Foreign Trade Policy to utilise the said Scrips or licence issued to them by the Office of Director General of Foreign Trade (DGFT) in lieu of exports made by them and earning foreign exchange by providing services to the International Airlines. One such Scrip is illustratively produced as part of Paper Book, which was issued on 04.04.2006 for a period of 24 months entitling the Assessee to claim credit against custom duty payable for import of any capital goods, including spares, office equipment, professional equipment, office furniture and consumables related to the main line of business of the Appellant.

3. The Assessee imported during the relevant period 2007 the items such as Primary Surveillance Radar with Antenna Accessories, Airport Navigation Equipment with lower power DME including all Accessories, RC Cable Remote Units, Compete Dual LP DME System Distance Measuring Equipment, Parts of Radar Equipment etc., and against the payment of custom duty thereon on import, the aforesaid Scrips under SFIS were denied to be adjusted as payment by the Assessing Authority by the Order-in-Original passed on 31.01.2009 on the ground that on the date of import of these restricted items, the SFIS stood amended and the Scrips in question could not be used, because the import of these items was not freely importable as per the amended provisions of the said Scheme, by which amendment, the only words added in the relevant clause were that such goods were 'otherwise freely importable under ITC (HS) EXIM Code'.

4. The Authority also imposed penalty and the Redemption Fine on the Assessee.

5. The Assessee took the matter further before the learned CESTAT i.e., Tribunal, which only partly allowed the appeal filed by the Assessee and, while reducing the quantum of penalty to some extent, the Tribunal granted relief to the Assessee regarding the Redemption of Fine to the extent of Rs.3,42,30,000/-. The penalties were reduced from Rs.50.00 lakhs to 5.00 lakhs and from Rs.7.00 lakhs to 70,000/- and a minimum penalty of Rs.5,000/- was retained. Aggrieved by the said order of the Tribunal, the Appellant-Assessee/AAI has approached this Court by way of the present Appeal.

6. Mr.R.Parthasarathy, learned counsel for the Appellant-Assessee, has urged before this Court that the Scrips in question were issued after a period of about one to two years

against the export earnings made by giving the export services to the International Airlines for which it received earnings in foreign currency and even though the Scrips in question were issued after the amendment under SFIS by incorporating the aforesaid words 'otherwise freely importable under ITC (HS) EXIM Code', the said Scrips in question could be used in the mode of payment of custom duty imposed on the Assessee on the import of radar items enumerated above. He submitted that the said amendment could not be technically construed to restrict the mode of payment by the Appellant-Assessee, as the import of the items in question was always restricted and the said items were never freely importable and but for the import licence granted to the Appellant-Assessee, the items like Radar could not have been imported by the Assessee at all. The learned counsel further submitted that the Scrips in question were issued by the competent authority of DGFT under the Foreign Trade Policy itself and was a valid document throughout and they were never cancelled or modified to deny the benefit of its being availed as a mode of payment against the custom duty within the stipulated time frame, but the Assessing Authority, in the present case, not only took the said Scrips and cancelled or debited the same by way of adjustment against the custom duty paid by the Assessee, but also denied the said claim later in view of the aforesaid amendment of SFIS. He also submitted that the said amendment has no material effect on the Assessee at all as far as the mode of payment in the form of Scrips by the Assessee was concerned and, therefore, both the authorities below have erred in denying the said benefit to the Assessee.

7. On the question of Redemption Fine, the learned counsel submitted that though the learned Tribunal has granted the desired relief, it erred in only reducing the quantum of penalty, which he submitted that there was no justification at all for imposing the penalty on the Assessee, who was a statutory body under a separate enactment and, therefore, no personal interest could be attributed to the Assessee in evading any kind of custom duty and, on the contrary, it was their legal right to avail the said mode of payment under SFIS so long as the Scrips in question are held valid and remain unchallenged.

8. Per contra, Mr.V.Sundareswaran, learned Standing Counsel for the Respondent-Revenue, submitted that since the law stood amended and on the date of import of the Radar equipments in question in the year 2007, admittedly those items were not freely importable items; therefore, the benefit of SFIS, as it stood amended with effect from 01.04.2006, could not be availed by the Assessee and, as such, the authorities below are justified in denying the said benefit to the Assessee. However, on the question of Redemption of Fine and Penalty, learned counsel for the Revenue could not substantiate much of the

reasoning given by the learned Tribunal for the same.

9. Having heard the learned counsel for the parties, we are of the opinion that the present Appeal filed by the Assessee deserves to be allowed in toto. The Scheme SFIS only envisaged the submission of the Scrips in question as a mode of payment in lieu of cash payment of the custom duty in question payable by the Assessee on the import of Radar equipments and other items in question. They were always in the list of 'Restricted Items' for import. They were never freely importable items. It is against the foreign earnings of the Assessee which provides services to the domestic as well as international airlines that the Airports Authority of India earned foreign exchange for the country from the international airlines, to which it provides services in question and a part thereof was given to them as an incentive in the form of Scrips in question to be availed as payment of custom duty, which may be payable on the future imports made by them. They imported the restricted items in question, such as, Radar equipments in the year 2007. The Scrips in question were never modified or cancelled by any competent authority. Therefore, in our opinion, the amendment in SFIS w.e.f. 01.04.2006 by insertion of the words 'otherwise freely importable under ITC (HS) EXIM Code' did not really affect the Assessee's case at all, because, the items in question were always in the Restricted List. The mode of payment of custom duty against the future imports thus were still available to the Assessee in the present case either in the form of cash or by the Scrips in question. The authority in question seems to have not only used these Scrips by debiting or cancelling the same against the custom duty obligation of the Assessee, but took further cash payment from it for the discharge of the custom duty obligation of the Assessee on such imports. Thus, there has been a double jeopardy or double whammy on a public statutory authority like Airports Authority of India by another wing of the Central Government Department, namely, Customs Department.

10. While the law does not make a distinction between a public body on the one hand and an ordinary Assessee on the other hand, a fair and more dispassionate consideration of the facts and circumstances of the case in the cases of public bodies or statutory undertakings can definitely be expected from the departmental authorities while dealing with such cases. It only results in wastage of public money and public man-hours in case the public bodies are embroiled in litigation, initiated by the pro-revenue approach taken by the Revenue against such public bodies, resulting in wastage of public time in Courts. While a similar treatment is also expected for the private Assesseees as well, a reflection on the background of such public bodies is all the more expected by the Revenue authorities.

11. Leaving aside this aspect of the matter also, we are of the opinion that the Scrips in question earned by the Assessee against its export earnings, which document continues to remain a valid document, even after amendment of SFIS, could have been validly allowed by the respondent authorities for discharge of the custom duty obligation of the Assessee in the present case. The insertion of the words 'otherwise freely importable under IT0C (HS) EXIM Code' could not have any effect on the Assessee in the present case, as the items in question, which were imported by the Assessee, were always in the Restricted Goods Category. Therefore, this amendment did not adversely affect the case of the Assessee at all.

12. In this view of the matter, the learned Tribunal and also the Original Adjudicating Authority have erred in denying the said benefit to the Assessee. This Appeal, on this ground, therefore, deserves to be allowed and the same is, accordingly, allowed. Once the appeal on merit of the claim of the Assessee is allowed, the question of penalty for the alleged misuse of the Scrips cannot hold the field. Consequently, all the penalties in question also fall to the ground.

13. The Appeal is, accordingly, fully allowed. No costs.

Sd/-

Assistant Registrar(CS III)

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Sub Assistant Registrar

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To

1. Commissioner of Customs (Port -Export)
Customs House, No.60, Rajaji Salai, Chennai - 01.
2. Customs, Excise and Service Tax Appellate Tribunal,
South Zonal Bench, Sastri Bhavan, Chennai- 600 006.
3. The Airport Authority of India,
Rajiv Gandhi Bhavan, Safdarjung Airport, New Delhi-110003.

+1cc to Mr.Lakshmi Kumaran, Advocate, S.R.No.45496
+1cc to Mr.V.Sundareswaran, Advocate, S.R.No.45494

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PVS (CO)
CS/08/08/2019