2013 (3) ECS (133) (Tri-Del)

CUSTOMS EXCISE & SERVICE TAX APPELLATE TRIBUNAL,
WEST BLOCK NO. 2, R.K. PURAM, NEW DELHI
COURT-1

Date of hearing: 15.03.2013
Date of decision:29.04.2013

Mangilipalli Pradeep Ramu & Others

Versus

CC, New Delhi

Custom Appeal No. 108 of 2008

Arising out of the Order - in - Original No. 60/07 dated 28.12.2007 passed by the Commissioner of Customs, ICD, Tughlakabad, New Delhi).

Mangilipalli Pradeep Ramu & Others Appellants

Versus

CC, New Delhi Respondent

Appearance:

Appeared for Appellant : Ms Kanchan Kaur Dhodi, Advocate
Appeared for Respondent : Shri K. P. Sigh, A.R.

Coram:

Hon'ble Ms. Archana Wadhwa, Member (Judicial)
Hon'ble Shri Mathew John, Member (Technical)

Misc Order No. C/M/126/12 – Cus
FO-56380 – 56382/2013

"There is no dispute that the country of manufacture of the car was USA and no export was made from USA. It is admitted fact that import was made from Thailand which was the port of landing and port of destination was India. Import policy had mandate that the import of the car should be from the country of manufacture. Section 2 (39) of Customs Act 1962 says that am act or omission rendering the goods liable to confiscation under section 111 or section 113 thereof declares the goods to be "smuggling goods". The meaning of import given by section 2 (23) of the said Act says that brining of goods into India from a place outside India is import. This makes unambiguously clear that the car came into India from "Thailand" but not from USA establishing the import from Thailand u/s 2 (23) of the above Act." [Para 35.1]

"When the export was not made from land locked country, but made from Thailand, that cannot be said to be country of manufacture. Therefore, adjudication made holding the import illegal and made in contravention of the provisions of the policy as well as Customs Act 1962 is justified warranting confiscation and imposition of redemption fine and penalty. Ld. DR. for Revenue is right in his submissions recorded above. [Para 35.5]"

Per Mathew John, Mr.:

1. In this proceeding three appeals are being considered. They arise out of different orders, but involve the same issue and hence are being considered together. We propose to examine the first appeal in detail and then state the facts of the other appeals to the extent the facts are different. The facts are different only to the extent that the car imported is of different makes with different values. Otherwise there is no change in material facts.

Appeal No. C/108/2008 filed by Mangilipalli Pradeep Ramu

2. The first appellant Mr. mangilipalli Pradeep Ramu, imported a motor car of Cadillac Excalade model, valued at US$ 61500/- and filed Bill of Entry dated 29.11.2007. The assessable value of the car was worked out at Rs. 24,76,282.

3. The motor car was manufactured in USA but was invoiced by a dealer in Dubai and shipped from Thailand. The import policy in relation to cars stipulated various conditions. One condition, as per para 2 (II) (a) (iv) in the import policy to Chapter

87 of the ITC HS Policy, was that the vehicle should have been imported from the country of manufacture. This condition was not complied in this case.

4. Another condition, as per para 2 (II) (c), was that the vehicle should have a "homologation certificate". This condition was also not met by the importer.

5. Yet another condition was that the importer was required to produce "Type Approval certificate / Certificate of Conformity of Production (COP)". This condition was also not complied with.

6. Since the car was imported in contravention of the conditions specified in the Import Policy of the Government of India, as indicated above, the car was confiscated under section 111 (d) of the Customs Act 1962 and allowed to be redeemed on payment of a redemption fine of Rs. 4,00,000/-. Further a penalty of Rs. 2,00,000/- has been imposed under section 112 of the Customs Act on the importer. Aggrieved by the order the appellant has filed this appeal.

7. The submission of the Appellant is that all the main conditions for import of such cars specified in Import Policy have been complied with. They classify the following conditions as the important conditions:

(a) The car should be Right Hand Drive (right hand steering & controls)
(b) It should have photometry of the headlamps to suit kept left traffic.
(c) The speedometer should read / indicate the speed in Kilometers.
(d) The value should be USD 40,000/- FOB or more.
(e) The engine capacity should be more than 3000 CC for petrol.
(f) It should be shipped from the country of origin of goods (where it has been manufactured)

8. The submission of the appellants is that they received documents from the supplier which showed shipments of vehicle originating from USA to UAE and from UAE to Thailand and Thailand to India and that should be good enough to meet the first requirement. Further the requirement that cars should be imported from the country of manufacture was waived by amendment of the policy by the Government by Notification No. 74 (RE - 2008)/2004 – 09 dated 30.12.2008 in respect of cars costing more than an FOB value of US$ 40,000/-.

9. As regards Homologation Certificate and Type Approval Certificate the argument of the appellants is that GOI had not notified the International Accredited Agency in USA which should have issued such certificates though GOI had notified

names of such agencies for a few other countries. The appellants contacted the manufacturer in USA and the manufacturer certified that the type was in conformity with ECE Regulations and that should be good enough to meet the requirements of the conditions laid down in the policy. The appellants submit basically the conditions regarding Homologation Certificate and Certificate of COP from an international accredited agency in USA was an impossible condition to be met in the case of cars manufactured in USA because there was no such agency in USA and the appellants cannot be asked to meet impossible conditions.

10. The appellants plead that the appellants had no intentions to evade payment of any customs duty or avoid any import regulation and hence the confiscation of the goods, the redemption fine and penalty imposed are not warranted.

11. The appellants rely on the decision of this Tribunal in Customs Appeal Nos. 412 – 413 of 2007 – SM dated 26.12.2007 in J S Gujral and Other vs. CC. This decision was challenged by the Revenue before the Hon. High Court of Delhi and the High Court upheld the view of the Tribunal in the matter of Type Approval Certificate as may be seen para 6 of the decision of the Hon. High Court in CC vs. J. S. Gujral and Anr. Cus. A.C. 46/2008 dated 15.10.2008. The said paragraph is reproduced below:

> "In these circumstances, The Tribunal was of the view that since the importers had filed their bills of entry only after applying to the International Accredited Agency and only after the agency had replied that they would not be in a position to issue the certificate as required, insisting on the condition stipulated in the said Import Policy would, therefore, amount to asking the importer to do the impossible. The Tribunal placed reliance on the maxim – lex non cogit ad impossiblia which means that the law cannot ask a person to do the impossible. We agree with these observations and views of the Tribunal. As per the Import Policy the importers were required to obtain the Type Approval Certificate / COP from the international accredited agency of the country of origin of the goods. In this case the cars have been imported from Japan and, therefore, it was only the Ministry of Land, Infrastructure and Transport which would have issued the Type Approval Certificate / COP. The respondents had applied to said Ministry for the Type Approval Certificates / COPs but the Ministry had flatly refused in so many words. In such a situation the respondents could not be expected to submit the Type

Approval certificate / COP from the said agency. We are, therefore, not inclined to interfere with the impugned order passed by the Tribunal."

12. The Ld AR for Revenue submits that this is a case where the import was made in contravention of the condition that the car should have been imported from the Country of Origin. The argument that the goods were shipped from USA to UAE to Thailand and then to India and hence the condition is complied with meaningless. For any goods, if the country of manufacture and place of shipment are different there will be evidence that the goods have come from the country of manufacture to the country of shipment. To argue that such proof is enough for complying with the condition virtually renders the condition redundant.

13. In the case of Homologation Certificate and Certificate of COP his submission is that the importers are expected to import cars only from those countries where the condition could be met. The simplest way of complying with the condition was not to import car from USA. It is not a matter of life and death or a situation where the individual was returning from USA and the car was already in his use, that the importer had to import the car from USA and the condition could not have been met and hence it should have been relaxed. He says that the Commissioner has rightly confiscated the goods and the redemption fine and penalty imposed are very reasonable considering the nature of contravention. According to him there is no case to interfere with the order of the Commissioner.

14. We have considered arguments on both sides.

15. The relevant provisions in Import policy relating to import of cars are reproduced below:

"2 (II) The import of new vehicles shall be subject to the following conditions:

a. The new vehicle shall –

(i) have a speedometer indicating the speed in Kilometers per hour;
(ii) have right hand steering, and controls (applicable on vehicles other than two and three wheelers);
(iii) have photometry of the headlamps to suit " keep left " traffic; and
(iv) be imported from the country of manufacture.

b. In addition to the conditions specified in (a) above, the new vehicle shall conform to the provisions of the Motor Vehicles Act, 1988 and the rules made thereunder, as applicable, on the date of import.

c. Who ever being an importer or dealer in motor vehicles who imports or offers to import a new vehicle into India shall,

(i) at the time of importation, have valid certificate of compliance as per the provisions of rule 126 of Central Motor Vehicle Rules (CMVR), 1989, for the vehicle model being imported, issued by any of the testing agencies, specified in the said rule;

(ii) be responsible for all the provisions assigned to the manufacturer as per Rules 122 and 138 of CMVR, 1989 and for issuing Form 22, as per provisions of CMVR, 1989; and

(iii) give an undertaking in writing that the proof of compliance to conformity of production as per rule 126 A of CMVR shall be submitted within six months of the imports. In case of failure to do so, no further import of new vehicle of that model shall be allowed thereafter.

d. The import of new vehicles shall be permitted through the Customs port and Nhava Sheva, Kolkata, Chennai, ICD Tughlakabad and Delhi Air Cargo, Mumbai Port.

e. The provisions of this notification will not apply to the imports of new vehicles:

(i) for the purpose of certification as per para c (i) above.
(ii) for the purpose of defence requirements; and
(iii) for the purpose of R & D by vehicle manufacturers."

"(7) import of new vehicles having an FOB value of US $ 40,000 or more and engine capacity of more than 3000 cc for petrol run vehicle and more than 2500cc for diesel run vehicles by;

(a) individuals, (b) Companies and firms importing under the EPCG Scheme and (c) OEMs (Original Equipment Manufacturers – who have manufacturing and service network in India) will be exempt from the conditions at Sl.No. (2) (II) (c)

above. However, at the time of Customs clearance, a Type Approval Certificate/COP of an international accredited agency from the country of origin, including a notarized English translation, thereof, shall be furnished. This type Approval shall stipulate that the vehicle to be imported complies with all the ECE Regulations for the complete vehicle. The accredited agencies have been notified vide Policy Circular No. 26 dated 9.2.2004."

16. We are not in agreement with the contention that proving the path of the goods imported is sufficient to meet the condition that the goods should have been imported from the country of manufacture. It is not for the Tribunal to guess the reason behind the condition and order what would be sufficient compliance with the policy. The import Policy is formulated having regard to various trade considerations of the country and international obligations. It is not for Tribunal to look into the merits and demerits of the import policy because the Tribunal does not have before it all the facts and constraints that result in a policy. We are also not able to agree with the contention that since the policy has been amended in December 2008, the amended position should be applicable for imports made in 2007. This argument if accepted will also lead to considerable difficulties to the Government in the matter of implementation of import policies from time to time which changes depending on various factors.

17. In the matter of Certificate of COP there is some merit in the argument of the Ld. AR that there was one way of complying with the policy by not importing the car of USA make at all. But this matter is already decided by the Delhi High Court to be a case of lex non cogit ad impossibilia. So we respectfully follow the decision of the Hon High Court and hold that there is no reason to confiscate the car on this ground.

Appeal no. Cus – 109/2008 filed by Rehman Shaikh

18. In this case the car imported was "Hummer H2" and the price of the car was US $ 55000 (CIF) with assessable value at 2224777.50. The Bill of Entry was dated 09.10.2007. The redemption fine was Rs. 4,00,000/- Penalty as Rs. 2,00,000/-. The goods were supplied by Dollar Auto Dubai. The goods were shipped from Thailand to India.

Appeal No. Cus – 110 / 2008 filed by Jorawar Singh Sehmbi.

19. In this case the Car Imported is "Hummer H2" and the price of the car was US $ 55000 (CIF) with assessable value at 2294215/. Bill of Entry was dated

21.09.2007. The car was supplied by Dollar Auto Dubai and shipped from Thailand.

20. Thus in all the three cases we are of the view that the cars were imported in contravention of the condition that the car should have been imported from the country of manufacture and the cars were rightly confiscated under section 111 (d) of the Customs Act. However in view of the fact that the contraventions of the other two conditions are held to be no contravention in similar set of facts by the Delhi High Court we reduce the redemption fine to Rs. 2,00,000/- (Rs Two Lakhs) in each case. The penalty under section 112 of the Customs Act also is reduced to Rs. 1,00,000/- (Rs. One lakh) in each case.

21. Thus the three appeals are allowed partially.

Per: Archana Wadhwa, Ms.:

22. After having gone through the order proposed by my Ld. Brother, I proceed to record a separate finding.

23. The imported cars stands confiscated with redemption fine and imposition of penalties on the ground of violation of condition 2 (II) (a) (iv) of the Import Policy. The said condition is to the effect that the vehicles to be imported from the 'country of manufacture'. As the cars in question have been routed through Dubai and Thailand, it stands considered by the authorities below that the vehicles have not been imported from the country of manufacture, thus violating the condition of Import Policy resulting in confiscation of the same and imposition of penalties on all the importers.

24. As the facts in all the three cases are identical, detailed reference to only one of them is being made. The appellants have strongly contented that the vehicles in question have admittedly been shipped from USA. Copy of bill of lading dtd. 14.04.07 showing shipment from Jackson Ville, Florida, USA stands placed on recording showing the shipment of the vehicles to UAE. Copy of DEC (form of bill of entry), dtd 15.05.07 issued by Dubai, Customs showing import of vehicles into UAE for re – export stands placed on record. Further, Dubai, Customs have

issued a certificate dtd. 15.06.07 showing export of the said vehicles to Thailand. Copy of bill of lading dtd. 16.06.07 showing vehicles on board for shipment from UAE to Thailand stand placed on record. Car fax history report is also placed. Copies of bills of lading issued by M/s Dollar Auto, Dubai, UAE are also placed on record.

25. The above evidences showed that vehicles were originally shipped from USA and reached India via Dubai and Thailand. As such it can be safely concluded that the export of the vehicles originated from 'country of manufacture' and the same have undergone transhipment. The policy terms do not ban such transhipment. The time gap between the original shipment of the vehicles from USA, i.e., on 14.04.07 and the ultimate landing of the vehicles in India in November, 2007 is not on the higher side and it is seen from the documents placed on record that vehicles were on move, during in most of the period thus excluding any occasion for the same to be used elsewhere.

26. The policy requires the vehicles to be imported from country of manufacture. The question required to be decided is as to whether the shipment from the country of manufacture routed through other countries can be said to be an importation not from the country of manufacture. It is noted that the said condition nowhere uses the expression "directly", i.e., directly imported from the country of manufacture without any transhipment. In my views, it is not permissible to introduce the expression "directly" in the said condition so as to read the same as "be imported directly from the country of manufacture". It is well settled law that while interpreting a legal provision neither any word can be introduced nor deleted and the effect to the language as used, has to be given. Further, wherever two interpretations are possible, one beneficial to the assessee has to be adopted. By invoking the above two principles for interpretation of statutes, I am of the considered view that in the absence of use of any expression in the policy language, it cannot be held that import of the vehicle has to be directly from the country of manufacture. It is sufficient if the vehicle stands imported from the country of manufacture and reaches the country via transhipment through other countries, especially when it is not the revenue's case that vehicles were used for considerable time in the countries of UAE and Thailand. In as much as there is no doubt about the vehicles having been shipped from the country of manufacture, i.e., USA and having reached India through UAE and Thailand, it cannot be held to be violation of the policy condition.

27. The appellants have also drawn our attention to the written submissions filed before adjudicating authority by referring to the import of vehicle Ferrari by M/s

Super Cassettes Industries Ltd. (hereinafter referred to as SCI), Noida. In the said case, SCI were permitted by the office of DGFT to allow the import of the said vehicles from the country and tranship them through the country other than the country of manufacture and transhipment was permitted as per decision arrived at during the Policy Relaxation Meeting No. 02/07-08 held on 28.06.07. similarly, the appellants have submitted in the said written submissions that in PRC meeting No. 5/07 held on 07.08.07, the said condition of the Import Policy was clarified and shipment from country other than the country of manufacture was permitted provided documentary evidences in the form of bill of lading etc. are available so that the link of the country of manufacture to the place of shipment is established. In the present case, I find that there is sufficient documentary evidence available in all three cases in the shape of form of bill of ladings, import export certificate from Dubai, Customs, car fax, customs documents at Thailand showing movement of the goods originating from USA upto the landing of vehicles in India. If that be so, it cannot be held, in my views, that the vehicles does not stand imported from country of manufacture. If that be so, confiscation of the same and imposition of penalty on the appellants is not called for.

28. Apart from above, I also note that the policy was relaxed in the subsequent year. Though I agree that the policy provisions as available on the date of importation of the vehicles are required to be taken into consideration for deciding the dispute but the said relaxation reflects upon the legislative intent and can be adopted as a support to the view adopted by me. In any case having held that the policy does not require direct importation from the country of manufacture and there being sufficient evidences on record to show that the vehicles stands imported from the country of manufacture, though via UAE and Thailand, I consider it fit to set aside the confiscation of the vehicles.

29. In any case, I find that there is no malafide established on the part of all the three appellants. The issue involved is bonafide issued of interpretation of legal provisions and the appellants could be under a bonafide belief that as the cars are being imported from the country of manufacture, there would be no violation of provisions of the policy. As such, I am of the view that imposition of penalties upon the importers are neither warranted nor justified. The same are accordingly set aside.

PER: D.N. PANDA

30. In all these three appeals when the appellants came in appeal against the adjudication orders 28/12/2007 challenging imposition of redemption fine and penalty difference in opinion arose between Members in deciding the appeal. While ld. Technical Member opined that the car in question was not imported from Country of manufacture and export thereof was made in contravention of Car Import Policy, ld. Judicial Member opined that even though the cars were imported by all the three appellants from a country different form the country of manufacture, those shall be treated as imported form Country of manufacture and such import does not warrant confiscation as well as imposition of penalty. It was also opined that since the policy was relaxed in subsequent year there was no requirement of importation of the car from the country of manufacture for which adjudication shall not stand.

31. For the aforesaid difference in opinion of both members following question arose for reference to third Member: -

(1) Whether confiscation of the vehicle is required to be upheld with an option to the appellant to redeem the same on the payment of redemption fine of Rs. 2.00 Lakhs in each case as held by Member (Technical) or the confiscation is to be set aside in Toto as held by Member (Judicial)?

(2) Whether penalties of Rs. 1.00 Lakh each has to be imposed on all the three appellants as held by Member (Technical) or the same are to be set aside fully as held by Member (Judical)?"

32. Supporting the opinion of ld. Judicial Member, it was submitted on behalf of the appellants that even though the cars came from a different place other than the place of manufacture, it cannot be said that the car was not imported from the country of manufacture. When the country of origin was USA and that moved to UAE with full proof of movement and further moved from UAE to Thailand where the international Dealer of the manufacture existed, there was no contravention of the policy provision. The car having come from International Dealer of UAE to Thailand and Thailand to India under proper custom exit certificate and shipment document as well as bill of lading, para 2 (II) (a) (iv) of the policy no way deprives the appellant from the policy benefit as the car was imported from country of manufacture.

33.1 Revenue submitted that contention of the appellant that the car in question imported to India from a dealer abroad was import thereof from country of manufacture is ill founded and is violative of Policy frame work disentitling the

appellant to the notification benefit. When no import was made from the country of manufacture that defeats the object of import Policy. Para 2 (II) (a) (iv) of the policy specifically mandates that import was to be made from the country of manufacture to avail notification benefit. Policy specifically required that the exporting country should be the country of manufacture but not from a different country. The Notification No. 2 (RE)/2006/04/2009 dated 7.4.2006 in terms of para 2 (ii) (g) says that in case a country of manufacture is a "landlocked country" and the shipment takes place from another country, the export would be deemed to have been made from the country of manufacture provided there are supporting documents to track the vehicle from the country of manufacture to the port of landing and from there to the port of destination. Land locked country means a country which is entirely enclosed by land or whose only coastline lie the enclosed areas. There are 48 land locked countries in the world. No land locked countries are found in North America, Australia and inhospitable Antarctic Countries.

33.2 According to ld. DR in case of land – locked country that being cut off from sea resource the notification contemplates that a landlocked country manufacturer may make the export for shipment for another country situated in the land locked region itself where the port of landing exists to export to the port of destination. Such an important aspect was overlooked by the ld. Judicial Member to reach to a conclusion that export of the car from a country other than country of manufacture and not situated in the land locked country is equal to export of the car from manufacturing country. Such conclusion is erroneous in view of geographical situation of USA not in a land locked country. There is a wide difference between the country of manufacture and country other than the country of manufacture by public policy and such a mandatory condition of policy cannot be given go bye. Further, later notification can not operate as retrospective since fiscal benefit is granted at the cost of people of India and lateral notification operates from the date when that comes to see the light of the day following the ratio laid down by Apex Court in the case of Sunwin Technosolutions Pvt. Ltd. vs. Commr. Of Central Excise,Ranchi reported in 2011 (21) STR 97 (SC).

33.3 Submission of ld. DR was that mere tracking of the car shall not serve the purpose of the appellant as USA was not land locking country and legistature intended that the import should be from the country of manufacture for various political and economic reasons as policy stems from political and economic decisions of legislature. Ld. Adjudicating Authority had made a clear finding that the bill of lading was from Thailand while country of manufacture was USA and

para 2 (II) (a) (iv) of the import licensing note of Chapter 87 on ITC (HS Policy) has laid down the condition that the vehicle should be imported from the country of manufacture. This is mandatory condition. Therefore, import made from Thailand is a violation of policy condition for which confiscation of the vehicle was warranted under law. So also when the vehicle was imported improperly the adjudication was bound to be made with the consequences flowing there from and ld. Technical member was right to hold that the appellant was disentitled to the policy benefit.

34. Heard both sides and perused the record.

35.1 There is no dispute that the country of manufacture of the car was USA and no export was made from USA. It is admitted fact that import was made from Thailand which was the port of landing and port of destination was India. Import policy had mandate that the import of the car should be from the country of manufacture. Section 2 (39) of Customs Act 1962 says that am act or omission rendering the goods liable to confiscation under section 111 or section 113 thereof declares the goods to be “smuggling goods”. The meaning of import given by section 2 (23) of the said Act says that brining of goods into India from a place outside India is import. This makes unambiguously clear that the car came into India from “Thailand” but not from USA establishing the import from Thailand u/s 2 (23) of the above Act.

35.2 Section 11 of the Customs Act 1962 throws light that if the Central Govt. is satisfied that it is necessary to so to do for any of the purposes specified in sub section (2) Section 11 of Customs Act, 1962, it may, by Notification in official Gazette prohibit either absolutely or subject to such conditions (to be fulfilled before or after clearance) as may be specified in the Notification, the import or export of goods of any specified description. Sub – section (2) (u) specifies that contravention of any law for the time being in force may be prevented by the Customs.

35.3 The car import policy being the law of the land which was subject matter of scrutiny by Customs and Import having been made under that policy, contravention of that law is prevented by Customs. The appellant having contravened policy without the import being made from the country of manufacture defeats the spirit and object of the policy. That made the car confiscable and the car became smuggled goods liable to penal consequence of law of customs.

35.4 Perusal of the import condition as per policy clearly throws light that legislature intended import of car to enjoy notification benefit only if such import is made from the country of manufacture. The landing port should be the port of export and if it is in a land locked country, that may be imported from the adjoining country situated in the land locked country of coastal line from which export was permissible. When the car in question came from USA to UAE, it was exported from USA to UAE and there after export was from UAE to Thailand. India was third destination and USA not being land locked country which remained undisputed, no inference can be drawn to equate the import from Thailand into India as import from USA into India.

35.5 When the export was not made from land locked country, but made from Thailand, that cannot be said to be country of manufacture. Therefore, adjudication made holding the import illegal and made in contravention of the provisions of the policy as well as Customs Act 1962 is justified warranting confiscation and imposition of redemption fine and penalty. Ld. DR. for Revenue is right in his submissions recorded above.

35.6 It is surprising that ld. Adjudicating Authority imposed very mild penalty and redemption fine while there was an attempt made by appellants to be enriched at the cost of the country in violation of import policy. Such a mild dose of fine and penalty sends message to the society that there is a weak administration in customs and the officers holding high posts in Customs which is very sensitive place act to the detriment of interest of the country. It is high time that Board should appropriately issue guideline to the Customs Authority to properly deal with the smuggled goods under law of customs without any lenient consideration to safeguard the economy.

36. In view of the aforesaid discussions it is proper to answer the reference stating that confiscation of the vehicles was justified and option granted to redeem the same on payment of redemption fine and penalties as suggest by ld. Technical Member should be upheld in the cases referred by common order of reference.

37. Registry is directed to place the file before the appropriate Bench to pass appropriate order.

(Pronounced in the open Court on 29.4.2013)