

2014 (3) ECS (254) (Tri -Ahd.)

In The Customs, Excise & Service Tax Appellate Tribunal
West Zonal Bench, Ahmedabad

M/S. GLOBAL EXIM

Vs.

C C KANDLA

Date of Hearing/Decision:28.05.2014

Appeal No.C/11701/2014-DB (Application No.C/Stay/12773/2014, C/
Early Hearing/12772/2014)
(Arising out of: Letter F.No.VIII/48-359/MISC/Global Exim/MP &
SEZ/13-14, dt.28.03.2014 Passed by: Assistant Commissioner (Import), CH
AP & SEZ Mundra.)

Appearance:

Shri Hardik Modh, Adv.

Dr. Jeetesh Nagori, Addl. Commissioner (AR)

For the Appellant

For the Respondent

CORAM:

Hon'ble Mr.M.V. Ravindran, Member (Judicial)

Hon'ble Mr. H.K. Thakur, Member (Technical)

Order No. A/11163 / 2014, dt.28.05.2014

"In the instant case, the lower authority has taken the impugned decision on the basis of the amended Customs Notification, which is against the grant of exemption. There may be force in the argument of the appellant regarding the fact that the purpose of Notification issued by the Central Government through Ministry of Finance was only to give effect to the amendment in the FTP by Central Government through Ministry of Commerce; however it is not for us to look into this aspect. The Respondent lower authority as well as this Tribunal are creature of Statute, and cannot take any decision contrary to the same, on considerations of equity or justice. We cannot even sit in appeal over correctness or otherwise of a Customs Notification. If the Appellant is aggrieved by the correctness of the Customs Notification the remedy lies elsewhere, and we surely have no jurisdiction to entertain any such challenge directly or indirectly."(Para 7)

Per: M.V. Ravindran:

1. The instant Appeal involves question relating to eligibility for exemption from Antidumping Duty against a Transferable DFIA license, in view of certain amendments carried out by way of

Notifications which were issued subsequent to issuance of the DFIA License.

2. The brief facts of the case are as follows-
 - 2.1 The Appellant imported a consignment of Soda Ash and filed B/E No.5004853 dated 25.03.2014 seeking duty free clearance under Notification No.98/2009-CUS dated 11.09.2009, including exemption from levy of antidumping duty, by presenting a Transferable Duty Free Import Authorization (DFIA) No. 0310699143, which was issued on 19.06.2012 as per the provisions of Foreign Trade Policy in force on that date.
 - 2.2 There is no dispute on the fact that on the date of issuance of the said License i.e. on 19.6.2012, the DFIA scheme as per Foreign Trade Policy permitted exemption from Anti-dumping duty, and so did the Customs Notification, irrespective of whether the import is by the Authorization holder or by a Transferee.
 - 2.3 After completion of export obligations thereunder, the exporter applied for issuance of Export Obligations Discharge Certificate (EODC), which was issued to the exporter. Consequently on 14.06.2013, the said DFIA was made transferable as per para 4.26 of the Foreign Trade Policy read with para 4.36A of the handbook of
 - 2.4 On 18.04.2013, an amendment was made in the Foreign Trade Policy, wherein exemption from antidumping duty and safeguard duty on materials imported against transfer of DFIA licence, was withdrawn by inserting para 4.2.6 (d) in Foreign Trade Policy in Chapter IV of Foreign Trade Policy, vide Notification No.2 (RE-2013) / 2009-14 dated 18.04.2013.
 - 2.5 Consequently, vide Notification No.24/2013-CUS dated 18.04.2013, the earlier Customs Notification No.98/2009-CUS was amended, wherein the exemption from antidumping duty and safeguard duty on materials imported against transfer if DIFA license was withdrawn.
 - 2.6 Thereafter, by further Notification No.45/2013-CUS dated 17.09.2013, it was notified that exemption from antidumping duty and safeguard duty shall not be available on materials imported against DFIA's, which have been transferred on or after 18.04.2013.
 - 2.7 On presentation of B/E dated 25.03.2014, since the transferability was endorsed on 14.06.2013 i.e. after cut off date 18.04.2013, the exemption from antidumping duty was denied to the Appellant with the approval of the Commissioner of Customs, Kutch Commissionerate, Kandla.
2. Aggrieved by the same, the Appellant has preferred the above

appeal seeking benefit of exemption from levy of antidumping duty.

3. It is submission of the appellant that -
 - 3.1 The exemption notifications issued by the Central Government Ministry of Finance, were to give effect to the exemption conferred by the Central Government through Ministry of Commerce, under the Foreign Trade Policy.
 - 3.2 Since on the date of issuance of DFIA, the uniform policy of the Government permitted exemption from levy of inter alia antidumping duty, irrespective of the date of endorsement of transferability, the application for DFIA licence was made and the same was issued accordingly. A promise was therefore attached with the issuance of the licence to confer the benefit of exemption from levy of antidumping duty, irrespective of the date of endorsement of transferability. As per Para 4.2.2(b) of the Policy a DFIA is issued as per the policy and procedure in force on the date of issue of authorization.
 - 3.3 The license issued by the Ministry of Commerce through DGFT was in the nature of a Contract, which on the date of its execution, i.e. on the date of issuance of license, permitted exemption from, inter alia, antidumping duty.
 - 3.4 The question, therefore, would be whether any subsequent amendment in Foreign Trade Policy and corresponding amendment in customs notification would necessarily amount to amendment to the licence by taking away the benefits promised thereunder, unilaterally.
 - 3.5 The denial of exemption by the Respondent appears to be on the line of some authorities such as judgment dated 31.3.2010 of Hon'ble Bombay High Court in the matter of Kingfisher Airlines Ltd., Vs. Competition Commission of India and Others, in Writ Petition No.1785 of 2009, wherein it was held that though the transactions and agreement may be prior to coming into force of the Act, it stands covered by the Act on the date the Act came into operation. Thus, even if an Act introduced is not retrospective, it would cover all the agreements covered by the Act though entered into prior to the commencement of the Act and sought to be acted upon.
 - 3.6 The Appellant relied on judgment of Hon'ble Apex Court in Purbanchal Cables & Conductors (P) Ltd. Vs. Assam SEB (2012) 7 SCC 462 and submitted that such a view, as taken by the Hon'ble Bombay High Court, is erroneous and stands overruled by implication. The Hon'ble Supreme Court, in the said judgment, was pleased to hold that benefit of supply contracts executed

- prior to commencement of 1993 Act of Small Scale and Ancillary Industrial Undertaking Act, 1993, cannot be made available, even if the delivery of goods and payment of principal amounts were completed after commencement of the Act. It was further held that unless expressly provided for in the statute itself, only a procedural or declaratory law operates retrospectively, as there is no vested right in procedure.
- 3.7 In the instant case, the contractual obligations under the licence stood fulfilled, so far as the licence holder was concerned. Thus, even if there is any subsequent change in Policy by way of an "insertion" to take away the benefit earlier conferred under the policy, the operation of such amendment would only be "prospective", i.e. in respect of licences issued on or after the date of such amendment. The Foreign Trade (Development & Regulation) Act, 1992 does not confer any power for retrospective amendment. It is settled law that a license is issued as per the Policy prevailing on the date of issue and that any change in the Policy can be made only with prospective effect.
 - 3.8 The corresponding Customs Notification would also be required to be read necessarily in this light alone. If so read, the Appellant is definitely entitled for exemption, dehors the amendment in the Customs Notification.
 - 3.9 The amendment in the custom notification is merely a vehicle to transmit the change announced in the Policy, and hence the impact of the amendment to custom notification has necessarily to be the same which can be obtained by applying the change introduced through insertion of Para 4.2.6(d) in the FTP. There is no dispute that exemption is not denied to imports against the DFIA's transferred prior to 18.04.2013. Thus, instead of the date of issuance of the licence, erroneously the date of transferability is being considered as the relevant date for the eligibility for the benefits under the licence.
 4. The Departmental Representative on the other hand submitted that the Customs Notification shall be strictly interpreted for grant of exemption. There is no ambiguity on the fact that as per plain language of the Notification the appellant is not entitled to the benefit of the exemption. He submitted that the view taken by the lower authority was legal and proper.
 5. Both sides were heard at length.
 6. We find that in *Union of India vs Asian Food Industries, 2006(204) ELT8(SC)*, the Hon'ble Supreme Court was pleased to hold as follows-

"48Prohibition promulgated by a statutory order in terms of Section 5 read with the relevant provisions of the policy decision in the light of sub-section (2) of Section 3 of the 1992 Act can only have a prospective effect. By reason of a policy, a vested or accrued right cannot be taken away. Such a right, therefore, cannot a fortiori be taken away by an amendment thereof."

Further in *Soubhik Exports Ltd, 2007(214)ELT 334(Cal.)* the Hon'ble High Court also on the same lines held that-

"19. Section 5 of the Foreign Trade (Development and Regulation) Act, 1992 does not authorize the Central Government to amend the Export and Import Policy with retrospective effect...."

Thus, in exercise of the powers conferred under section 5 of the FTDR Act, the Policy can be amended however any oppressive amendment to the Policy is applicable only prospectively. The judgment of Hon'ble Apex Court in *Purbanchal Cables & Conductors (P) Ltd. Vs. Assam SEB (supra)* also supports the argument of the Appellant, and in view of the same, the view taken by the Hon'ble Bombay High Court in *Kingfisher Airlines Ltd (supra)* would have to be ignored. The subsequent law would not affect the contractual obligations of contracts already existing, can be a view in given facts of a case.

7. However, in the instant case, the lower authority has taken the impugned decision on the basis of the amended Customs Notification, which is against the grant of exemption. There may be force in the argument of the appellant regarding the fact that the purpose of Notification issued by the Central Government through Ministry of Finance was only to give effect to the amendment in the FTP by Central Government through Ministry of Commerce; however it is not for us to look into this aspect. The Respondent lower authority as well as this Tribunal are creature of Statute, and cannot take any decision contrary to the same, on considerations of equity or justice. We cannot even sit in appeal over correctness or otherwise of a Customs Notification. If the Appellant is aggrieved by the correctness of the Customs Notification the remedy lies elsewhere, and we surely have no jurisdiction to entertain any such challenge directly or indirectly.
8. The appeal is dismissed accordingly.
(Operative portion of the order pronounced in Court)