

CASE NO.:
Appeal (civil) 465 of 2002

PETITIONER:
Zuari Industries Ltd

RESPONDENT:
Commissioner of Central Excise & Customs

DATE OF JUDGMENT: 29/03/2007

BENCH:
S. H. Kapadia & B. Sudershan Reddy

JUDGMENT:

J U D G M E N T

KAPADIA, J.

This statutory appeal is filed by the assessee-Zuari Industries Ltd. under section 130 E of the Customs Act, 1962 directed against Order dated 15.11.2001 passed by Customs, Excise & Gold (Control) Appellate Tribunal ("CEGAT") in appeal No. C/277/01-Bom denying the assessee the benefit of exemption under Notification No. 11/1997 dated 1.3.1997. The appeal involves the issue as to the rate of duty applicable to the imports made for expansion of a Fertiliser Project.

Assessee is the manufacturer of fertilizers at their facility at Goa. It obtained registration of all their imports required for expansion of their fertilizer project under the provisions of the Project Import Regulations, 1986 (for short "the PIR"). In respect of the said expansion, the goods imported were entitled to the benefit of Project Import Assessment under Heading 98.01 of the Schedule to the Customs Tariff Act, 1975 and correspondingly the company was entitled to the benefit of customs exemption Notification No. 11/97 dated 1.3.1997. The said notification specified nil rate of duty in respect of "goods required for fertilizer plant". Ministry of Chemicals and Fertilisers was the duly constituted Sponsoring Authority under the said PIR. The said Ministry had issued a certificate dated 22.10.1997 (Essentiality Certificate) to the effect that the import of capital goods for expansion of the fertilizer project stood examined and the list of goods annexed to the certificate had been attested from the essentiality angle by the Deputy Secretary to the Government of India. At this stage, it may be noted that in their application for issuance of essentiality certificate, the assessee had stated that on account of load shedding in the concerned area, a Captive Power Plant was essential for the substantial expansion of the fertilizer project. By the said essentiality certificate dated 22.10.1997, the sponsoring Ministry requested the Customs to exempt the customs duty on import of equipments by the assessee vide Notification No. 11/97. The said certificate indicated vide item nos. 14.a and 14.b, a 6 Mega Watt Captive Power Plant. The essentiality certificate 'recommended' the said Captive Power Plant as part of the entire capital goods required by the assessee-company for substantial expansion of the fertilizer project.

As stated above, the dispute which arises in the present case is the rate of duty applicable to the imports made by the assessee for the fertilizer project. According to the Department,

the goods imported under serial nos. 14.a and 14.b of annexure 'A' to the essentiality certificate did not fall under serial no. 226(i) of the said notification no. 11/97 and, therefore, the assessee was not entitled to the benefit of nil rate of duty in respect of 6 MW Captive Power Plant. According to the Department, items 14.a and 14.b fell under serial no. 226(iii) which stated that Captive Power Plants of 5 MW or more are liable to duty at 20% + 2% and additional duty of 13%. By the impugned order of adjudication, the Adjudicating Authority held that 6 MW Captive Power Plant imported under Heading 98.01 as part of the fertilizer project, in terms of the essentiality certificate, cannot be given the benefit of nil rate of duty, which was available only to fertilizer projects. In other words, according to the Department, the fertilizer project and the Captive Power Plant are two distinct and separate projects as far as the rate of duty was concerned. This contention of the Department has been accepted by all the authorities below. It has been confirmed even by the CEGAT vide the impugned judgment dated 15.11.2001.

Heading 98.01 is a specific entry. It is not a general entry. It is not a residuary entry. It finds place in the exemption notification no. 11/97. Project imports fall under this entry. It is for this reason that Entry 98.01 is said to be a specific entry.

We quote hereinbelow the relevant entry of the Notification No. 11/97.

"S
No.
Chapter
or
heading
No. or
sub-
heading
no.
Description of goods
Stan-
dard
rate
Addl.
Duty
rate
Con-
dition
No.

226
98.01
Goods required for

i) fertilizer projects;

ii) coal mining
projects;

iii) captive power
plants of 5 MW or

more;

iv) power generation projects including gas turbine power projects (excluding captive power plants set up by projects engaged in activities other than in power generation);

v) power transmission projects of 66 KV and above;

vi) Other industrial plants or projects."

Nil

20%

20%

20%

20%

20%

Nil

Nil

13%

Nil

10%

13%
70

We also quote hereinbelow the Essentiality Certificate dated 22.10.1997 along with the attested copy of list of capital goods to be imported for the expansion of the fertilizer project.

"No. 15027/1/97-FP-III

Government of India
Ministry of Chemicals & Fertilisers
Department of Fertilisers.

Dated 22nd October, 1997

To
The Assistant Commissioner of Customs,
Mormugao, GOA-803

Subject: Customs duty exemption for import of capital goods for substantial expansion of existing NPK Plant by M/s Zuari Agro Chemicals Ltd. At Zuarinagar, Goa.

\005

Sir,

I am directed to say that M/s Zuari Agro Chemicals Ltd. has proposal for the Substantial Expansion of existing NPK Plant at Zuarinagar, Goa. To implement the project, they require to import capital goods. The matter has been examined in the Department. The list of goods has been attested on essentiality angle by Shri S. Chandra, Deputy Adviser (F), who is equivalent to the rank of Deputy Secretary to the Government of India. The attested copy of list of goods valued at a CIF of US \$ 544359.60 + FF 4760042.80 + FM 12764000 (C&F Mumbai) is sent herewith.

2. You are requested to exempt the customs duty on import of equipments being made by M/s Zuari Agro Chemicals Ltd. under Custom Notification No. 11/97 dated 01.03.1997.

Yours faithfully,
Sd/-
(A.K. Sinha)
Development Officer
Tel:3383829

Encl: Attested list is enclosed.

Copy to: M/s Zuari Agro Chemicals Ltd., 505 Surya Kiran, 19,
Kasturba Gandhi Marg, New Delhi-110001

Sd/-
(A.K. Sinha)
Development Officer"

"LIST OF GOODS AND SPARES TO BE IMPORTED FOR EXPANSION OF NPK PLANT

S.No.

Description

Vendor

Qty.

Total C&F

Price US \$

Total C&F

Price FF

Total C&F

Price FM

(Finish

Marks)

1.a)

Microprocessor

based Dot

Printing

Recorder with

Battery

backup

M/s

Yokogawa

Electrical

Corpn,

2-9-32

Nakacho,

Musahino-

Shi,

Tokyo 180,

Japan

3

Nos.

5183.00

1.b)

Spares for
above.

- do -

1 Lot

518.30

2.a)

Current to

Pneumatic

Signal

Converter (1/P

Converted)

- do -

13

nos.

7582.00

2.b)

Spares for
above

- do -

1 Lot

758.20

3.a)

Magnetic Flow

meter (Remote

Type)

Assembly with
Converter &
Signal cable.

- do -

6

nos.

18026.00

3.b)

Spares for
above.

- do -

1 Lot

1802.60

4.a)

Vibrating
Screen
complete with
static dust
casting motor
& other
accessories

M/s

Chauvin

S.A.,

13a 25 Rue

Alfred De

Vigny,

BP 2426-

38034

Grenoble,

Cedex 2,

France.

4

nos.

1076250.00

4.b)

Spares for
above.

- do -

1 Lot

107625.00

5)

Centifugal
Pump with
motor, flexible
coupling
mounted on
common
frame.

M/s A.R.

Wilfley and

Sons, Inc

Post Box No.

2330,

Denver,

Coloradi

80201,

U.S.A.

136425.00

5.a)
Phosphoric
acid (H3P04)
supply pump.

- do -

2
nos.

5.b)
Scrubber
Effluent Pump

- do -

2
nos.

5.c)
Fumes
Scrubber
Liquor pump

- do -

2
nos.

5.d)
Dryer
Scrubber
Liquor pump

- do -

2
nos.

5.e)
Molten Urea
pump

- do -

2
nos.

5.f)
Spares for
above.

- do -

1 Lot
13642.50

6.a)
Ammonia

Sparger
M/s Maguin
S.A. 2, Rue
Pierre
Semard,
02800
Charmes,
France
1 no.

2313320.00

6.b)
Dryer Kocker
- do -
5
nos.

6.c)
Oversize
Crusher with
Motor, Base
frame and
Remote
Control
- do -
2
nos.

6.d)
Scrubber
Liquor Sprayer
- do -
1 no.

6.e)
Spares for
above
- do -
1 Lot

231332.20

7.a)
Butyll Rubber
Panels with
Polyster
Polyamide
Carcass
M/s Welby
S.A., Z.I.
Voie No. 5,
10, Rue
Claude
Chappe, BP-
53, 76302
Sotteville,
Les Routen
Cedex,

France
24
nos.

91718.00

7.b)
Spares for
above.
- do -
1 Lot

9171.80

8.a)
Dryer pipe
Reactor (Dual
pipe cross
Reactor)
M/s Situb
S.A.,
76430
Tancarville,
St. Romain-
De-Colbose,
B.P. 123,
France
1 no.

357000.00

8.b)
Spares for
above
- do -
1 Lot

35700.00

9.a)
Link Chain No.
6859 R with
attachments
M/s Jeffrey
Chain
Corporation,
2307 Maden
Drive,
Morristown,
Tennessee
37813,
U.S.A.
900
Ft.
40100.00

9.b)
Link Chain No.
9118 P with
attachments
- do -
550
Ft.

58150.00

9.c)
Link Chain No.
698A with
attachment
- do -
1225
Ft.
170850.00

9.d)
Sprockets
- do -
8
nos.
42050.00

9.e)
Spares for
above.
- do -
1 Lot
31115.00

10.a)
Ball Lift check
valve
M/s
Guichon
International
S.A.,
Industrial
Valves, Rue
De Choudy-
BP 401,
73104 Ax
Les Bains
Cedex,
France
10
nos.

64294.00

10.b)
Spares for
above.
- do -
1 Lot

6429.40

11.a)
Control Valve
M/s Dresser
Products
Inds. Ltd.,
Division
Masoneilan,
4, Place de

Saverne,
92971 Paris
La Defense
Cedex,
France.
9
nos.

199769.00

11.b)
Spares for
above.
- do -
1 Lot

55875.00

12.a)
Flap Valve
M/s Vrac
SA,
Zacles
Gatins, 3
AV-Du
Garigiliano,
France,
2
nos.

192324.00

12.b)
Spares for
above.
- do -
1 Lot

19232.40

13.a)
Bulk Solid
Recycle Flow
Measurement
M/s
Ramsey,
Sydney
Office,
Sydney Box
RA, Teren
Point, NSW-
Australia
2229
1 no.
16507.00

13.b)
Spares for
above.
- do -
1 Lot
1650.00

14.a)
Equipment for
6 MW Power
Plant
consisting One
(1) Wartsila
Vasa
18V32LN,
Diesel
Generating set
with auxiliary
equipment.
M/s
Wartsila
Diesel,
Wartsila
Diesel Oy.,
P.O. Box
252, Fin-
65100,
Vaasa,
Finland
1 Lot

11382000.00

14.b)
Spares for
above.

- do -
1 Lot

1382000.00

Total without the spares

494873.00

4294677.00

11382000.00

Total Spares

49486.60

465365.80

1382000.00

Total with Spares

544359.60

4760042.80

12764000.00

This is to certify that the above goods are most essential for the substantial expansion of the NPK plant of Zuari Agro Chemicals Ltd., at Zuarinagar, Goa and are hence eligible for nil rate of Customs Duty under Customs Notification No. 11/97 dated 01.03.1997.

For ZUARI AGRO CHEMICALS LTD.

Sd/-

(Resident Director)

For ZUARI AGRO CHEMICALS LTD.

Sd/-

(S.K. Chatterjee)
Vice President-Technical"

There is no dispute regarding other items mentioned in

the list. Regarding those items, the Department has accepted that they have been attested by the Sponsoring Ministry. According to the Department, the only dispute is with regard to the Captive Power Plant. According to the Department, Captive Power Plant needs to be segregated from the fertilizer project on the ground that the fertilizer project can work even without the Captive Power Plant and that the output from the fertilizer project can be produced even without the Captive Power Plant. According to the Department, the power plant is a separate project by itself. According to the Department, the power plant is not a component or an integral part of the fertilizer project. According to the Department, 6 MW Power Plant consisted of a generating set which operated on diesel. According to the Department, even if on the technical side a Captive Power Plant constituted an aid to the working of the fertilizer project still for the purposes of chargeability one has to go by the strict interpretation of the exemption notification no. 11/97 under which the rate of duty is nil for the fertilizer project whereas it is 20% for the power generation project. According to the Department, since fertilizer project and power generation project are two different and independent projects, the assessee was not entitled to claim nil rate of duty in respect of 6 MW Captive Power Plant.

On the other hand, on behalf of the assessee, the case put up before all the authorities was that, once an Essentiality Certificate was issued by the Sponsoring Ministry, it was not open to the Revenue to go behind that certificate. According to the assessee, an essentiality certificate constituted a proof of fulfilment of the eligibility conditions by the importer for obtaining the benefit of exemption notification. According to the assessee, project imports fell under a specific Heading 98.01. According to the assessee, the import of capital goods indicated in the list annexed to the essentiality certificate showed that the sponsoring Ministry cleared the project on the footing that, in this particular case, looking to the ground reality in the area in which the plant was located, in which there was paucity of electricity, 6MW Captive Power Plant was an essential requirement for expansion of the fertilizer project. According to the assessee, the essentiality certificate along with the attested list constituted a proof of the need to expand the fertilizer project and for that Captive Power Plant was an essential part. According to the assessee, it was not open to the Revenue to say that the Captive Power Plant was not an essential requirement for the expansion of the fertilizer project, once an essentiality certificate stands issued by the sponsoring Ministry. In this connection, reliance is placed by the assessee on the judgment of this court in the case of Commissioner of Customs (Imports), Mumbai v. Tullow India Operations Ltd. reported in (2005) 13 SCC 789. Reliance is also placed by the assessee on the judgment of the Calcutta High Court in the case of Asiatic Oxygen Ltd. v. Assistant Collector of Customs reported in 1992 (57) ELT 563.

We find merit in this civil appeal filed by the assessee for the following reasons.

Firstly, on the facts we find that the assessee had given to the sponsoring Ministry its entire Project Report. In that report they had indicated that for the expansion of the fertilizer project they needed an extra item of capital goods, namely, 6MW Captive Power Plant. In their application, the assessee had made it clear that the fertilizer project was dependant on continuous flow of electricity, which could be

provided by such Captive Power Plant. Therefore, it was not open to the Revenue to reject the assessee's case for nil rate of duty on the said item, particularly when the certificate says so. In the judgment of this Court in the case of Tullow India Operations Ltd. (supra), this Court held that essentiality certificate must be treated as a proof of fulfilment of the eligibility conditions by the importer for obtaining the benefit of the exemption notification. We may add that, the essentiality certificate is also a proof that an item like Captive Power Plant in a given case could be treated as a capital goods for the fertilizer project. It would depend upon the facts of each case. If a project is to be installed in an area where there is shortage of electricity supply and if the project needs continuous flow of electricity and if that project is approved by the sponsoring Ministry saying that such supply is needed then the Revenue cannot go behind such certificate and deny the benefit of exemption from payment of duty or deny nil rate of duty. To the said effect is the judgment of the Calcutta High Court in the case of Asiatic Oxygen Ltd. (supra) in which it was held that the object behind the specific Heading 98.01 in Customs Tariff Act, 1975 was to promote industrialization and, therefore, the heading was required to be interpreted liberally. It was further held that, once an essentiality certificate was issued by the sponsoring authority, it was mandatory for the Revenue to register the contract.

Secondly, before us, it has been vehemently urged that although the essentiality certificate stood issued by the sponsoring Ministry, there is non-application of mind by that Ministry with regard to the list of items appended to the certificate. According to the Department, the said list has not been countersigned by the competent authority in the sponsoring Ministry. We do not find any merit in the said contention. The list consists of 14 items. The Department has accepted 13 out of 14 items as capital goods required for the fertilizer project, therefore, it cannot be said that the sponsoring Ministry had not applied its mind to the list appended to the essentiality certificate. This point needs further clarification. The power plant in the conceptual sense or in the technical sense is certainly different from the fertilizer plant. However, when we come to Heading 98.01 of the Customs Tariff Act, 1975, the assessment is for the Project. As stated above, Heading 98.01 is the specific entry applicable in the case of the Project Imports. An item like a power plant could be in a given case an independent Plant. Generally, it is a stand-alone equipment. However, when it becomes a part of the entire Project/System, the same power plant can also become one of the items of capital goods. The essentiality certificate given by the sponsoring Ministry has treated Captive Power Plant, in this case, as "capital goods" along with 13 other items. The assessee has also treated the Captive Power Plant as one of the capital goods required for the expansion of the fertilizer project. In the above circumstances, all the items in the list annexed to the certificate have been certified and recommended by the sponsoring Ministry as the entire capital goods required for the substantial expansion of the fertilizer project. Therefore, in our view, the assessee is right in its contention that, in this case, 6 MW Captive Power Plant is one of the items out of 14 items constituting capital goods required for the substantial expansion of the fertilizer project, and, therefore, it fell under serial no. 226(i) as goods required for the fertilizer project entitled to the benefit of nil rate of duty.

Before concluding, we may point out that, on behalf of

the Department, a large number of authorities were cited on interpretation of entries in the Customs Tariff Act, 1975. It is not necessary to examine those authorities on interpretation. Suffice it to state that, Heading 98.01 is a specific entry. It is not a general entry. It is not a residuary entry. It needs to be liberally interpreted as it deals with industrialization. It has to be read in the context of the above Notification No. 11/97.

In the case of Appraiser, Madras Customs v. Tamil Nadu Newsprint Papers Ltd. reported in 1988 (36) ELT 272 it has been held that Heading 84.66 (now 98.01) is not a residuary heading or a general heading relating to any class of goods. It is the specific entry introduced with a purpose and it relates to goods imported for initial setting up of a unit or a substantial expansion of an existing unit. It was held that when an importer registers a contract under the specific entry no. 84.66 (now 98.01), all the goods imported by him under that contract will be subjected to duty only as per that entry and it will not be open for the Revenue to pick out some of the goods imported under that contract and impose a different rate of duty on the footing that they are covered by a different heading. If the conditions prescribed under Heading 84.66 are satisfied, the duty shall be imposed on the goods under the said Heading 84.66 as if the said goods formed the composite unit. In that case there was another Heading 84.31 which referred also to 'paper making machinery'. The Department contended that duty was payable on the said item under Heading 84.31. It was held by Madras High Court that even if the rate of duty under Heading 84.31 was different from the rate of duty under Heading 84.66, still the rate applicable to the paper making machinery imported for producing papers under the PIR has to fall under specific Heading 84.66 (now 98.01) and not under Heading 84.31, even if paper making machinery came under both the headings. This is because once an item is imported under Project Imports then that item will fall under the specific entry because that item is imported as a part of composite unit (see para 10). In our view, the said judgment of the Madras High Court on interpretation of Heading 98.01 is squarely applicable to the present case, particularly on the interpretation of the entries in the Customs Tariff Act, 1975.

For the above reasons, we set aside the impugned judgment of the CEGAT dated 15.11.2001 in appeal no. C/277/01-Bom and accordingly the assessee's appeal stands allowed with no order as to costs.