

CASE NO.:
Appeal (civil) 5900 of 2004

PETITIONER:
Commnr. of Customs (Imports), Mumbai

RESPONDENT:
M/s. Tullow India Operations Ltd.

DATE OF JUDGMENT: 28/10/2005

BENCH:
B.P. Singh & S.B. Sinha

JUDGMENT:
J U D G M E N T
WITH
CIVIL APPEAL NO. 1882 OF 2004 AND
CIVIL APPEAL NO. 854 OF 2005

S.B. SINHA, J :

Interpretation of notification issued in terms of sub-section (1) of Section 25 of the Customs Act, 1962 being General Exemption No. 121 is in question in these appeals which arise out of judgment and order dated 9.12.2003 passed by the Customs, Excise and Service Tax Appellate Tribunal in Appeal No. C/1210/Mum & C/51/2002 Mum.

The relevant portion of the said general exemption notification dated 28.2.1999 is as under:

"In exercise of the powers conferred by sub-section (1) of section 25 of the Customs Act, 1962 (52 of 1962), the Central Government being satisfied that it is necessary in the public interest so to do, hereby exempts the goods of the description specified in column (3) of the Table below or column (3) of the said Table read with the relevant List appended hereto, as the case may be, and falling within the Chapter, heading No. or sub-heading No. of the First Schedule to the Customs Tariff Act, 1975 (51 of 1975) as are specified in the corresponding entry in column (2) of the said Table, when imported into India, -

- (a) from so much of the duty of the customs leviable thereon under the said First Schedule as is in excess of the amount calculated at the rate specified in the corresponding entry in column (4) of the said Table;
- (b) from so much of the additional duty leviable thereon under sub-section (1) of section 3 of the said Customs Tariff Act, as is in excess of the rate specified in the corresponding entry in column (5) of the said Table,

subject to any of the conditions, specified in the Annexure to this notification, the condition No. of which is mentioned in the corresponding entry in column (6) of said Table.

Provided that nothing contained in this

notification shall apply to goods specified against serial Nos. 174, 175, 176, 177, 178 and 179 of the said Table on or after the 1st day of April, 2000.

Explanation \026 For the purposes of this notification, the rate specified in column (4) or column (5), is ad valorem rate, unless otherwise specified."

The goods specified in Sl. Nos. 182, 184 and 231 of the Table of the Notification read as under:

"S.No.

Chapter or

heading No. or

sub-heading No.

Description of goods

182.

84, 85 or any

other Chapter

Goods specified in List 11

required in connection with

petroleum operations

undertaken under petroleum

exploration licenses granted

by the Government of India to

the Oil and Natural Gas

Corporation or Oil India

Limited on nomination basis.

184.

84 or any other

Chapter

Goods specified in List 11

required in connection with

petroleum operations

undertaken under specified

contracts

231.

49 or 85.24

The following goods,

namely:- (i) Information

Technology Software, and

(ii) Document of title

conveying the right to use

Information Technology

software

Explanation. \026 "Information

Technology Software" means

any representation of

instructions, data, sound or

image including source code

and object code, recorded in a

machine readable form, and

capable of being manipulated

or providing interactivity to a

user, by means of an

automatic data processing

machine.

Relevant portion of Condition Nos. 34 and 36 annexed to the said notification read as under:-

"34.If

(a) the goods are imported by the Oil and

Natural Gas Corporation or Oil India Limited

(hereinafter referred to as the "licensee") or a sub-

contractor of the licensee and in each case in connection with petroleum operations to be undertaken under petroleum exploration licences granted by the Government of India on nomination basis;

(b) where the importer is a licensee, he produces to the Assistant Commissioner of Customs, at the time of importation, the following, namely, certificate from a duly authorized officer of the Directorate General of Hydro Carbons in the Ministry of Petroleum and Natural Gas, Government of India, to the effect that the imported goods are required for petroleum operations referred to in clause (a) and have been imported under the licences referred to in that clause, and\005\005."

"36. If

(a) the goods are imported by an Indian Company or Companies, a Foreign Company or Companies, or a consortium of an Indian Company or Companies and a Foreign Company or Companies (hereinafter referred to as the "contractor") or a sub-contractor of the contractor and in each case in connection with petroleum operations to be undertaken under a contract with the Government of India;

(b) where the importer is a contractor, he produces to the Assistant Commissioner of Customs, at the time of importation, the following, namely:-

(i) a certificate from a duly authorized officer of the Directorate General of Hydro Carbons, in the Ministry of Petroleum and Natural Gas, Government of India, to the effect that the imported goods are required for petroleum operations referred to in clause (a) and have been imported under the contract referred to in that clause, and

(ii) a certificate, in the case of a contract entered into by the Government of India and a Foreign Company or Companies or, the Government of India and a consortium of an Indian Company or Companies and a Foreign Company or Companies, that no foreign exchange remittance is made for the import of such goods undertaken by such Foreign Company or Companies;\005."

M/s. Oil and Natural Gas Corporation Limited (for short "ONGC") is a Government of India Undertaking and is engaged in the business of exploration and exploitation of oil and gas on shore and off shore. With a view to find out the possibility of exploring oil/ gas, they carry out seismic survey wherefor the contracts are awarded to the companies specializing therein. It conducted 3-Dimensional Seismic Surveys in Heera, South Heera and Neelam areas of the international waters of the West Coast of India in course of exploration for oil.

M/s. Tullow India Operations Limited (for short "Tullow"), Respondent in Civil Appeal No. 5900 of 2004 also conducted such surveys in the Gulf of Kutch. The processes consisted of creating shock wave by means of controlled explosions which travel through the waters of the sea and the land mass beneath. The response to these waves indicates the probability of the presence of oil or gas deposits. The response to the surveys are recorded on magnetic tapes and converted to digital form and

thereafter processed at the Processing Centre using software applications named Seismos. The Central Processing Centre is located on Indian territory and, these tapes in the form of cartridges are imported by the assesses who claim exemption from customs duty in terms of the aforementioned exemption notification. The same tapes were claimed to be IT softwares.

It is not in dispute that ONGC awarded two contracts in favour of M/s. SEDCO Forex Int. Drilling Inc. to carry out the said seismic survey on or about 15.02.1999 and 9.03.1999 respectively for a consideration of US\$ 13,803,600/- and US \$ 2,96,230/- respectively. In pursuance of the said contracts, a seismic survey vessel, namely, M.V. GECO SAPHIRE was brought in India by the said contractor for carrying out seismic survey. The said seismic survey vessel carried out seismic survey during the period 22.05.1999 and 22.06.1999. The two bills of entry No. BOE NO. 12443 and 9888 were filed.

A notice to show cause was issued by the Customs Department, Mumbai asking the ONGC to show cause as to why:

"(a) 3-D seismic data tapes should not be classified under CTH8524.99 and charged to duty @BCD40% + 16%CVD+4%SAD and M.V. GECO SAPPHERE should not be classified under CTH 8905.20 and charged to duty @40% + 8%CVD + 4% SAD.

(b) Value of 3-D seismic data tapes should not be ascertained at US\$ 13,803,600/- + US\$2,968,230 = US\$16,771,830 = Rs. 72,11,886,90/- and value of the vessel M.V. Geco Sapphire be ascertained as US\$45,000,000/- = Rs. 193,50,00,000/- on the basis of contract provided by you under section 14 of Customs Act, 1962 read with Rule 4 with adjustments as provided under Rule 9 of Customs Valuation (Determination of Price of Imported Goods) Rules, 1988.

(c) Customs duty of Rs. 160,46,18,960/- on the assessable value should not be demanded from you under the provision of Section 12 of the Customs Act, 1962.

(d) 3-D seismic data tapes and M.V.GECO SAPPHERE and equipments valued at Rs. 72,11,88,690/- and Rs. 194,50,00,000/- respectively imported illegally should not be confiscated under section 111(m) and 111(o) of Customs Act, 1962.

(e) Penalty under section 112(a) of Customs Act, should not be imposed on importer."

In reply to the aforementioned show cause notice, ONGC filed a reply wherein the technical aspect of the matter had been stated in para 4.22 thereof. It was further contended that in a seismic vessel, there is no connectivity between the ship and the mother earth while the drilling rigs/ production platforms have.

However, it is also not in dispute that ONGC had applied for grant of exemption certificate before the Directorate General of Hydrocarbons in the month of April, 1999. The said essentiality certificate, however, could not be produced before the appropriate authority when importation took place as the same had not thence been granted as a result whereof a provisional clearance of the said tapes was made on 6th September, 1999. The appeal thereagainst before the Tribunal came to be dismissed in December, 2003. Essentiality certificate, however, was granted in favour of ONGC on 23.6.2004.

Tullow had also applied for grant of essentiality certificate. Whereas ONGC could not produce essentiality certificate before the Tribunal, Tullow did.

The Tribunal rejected the contention of the importer that the said cartridges would come within the purview of expression "IT Software" within the meaning of the said provision. The Tribunal, in its judgment impugned before us, despite holding that the benefit of exemption from duty on imported goods contained in the notifications should not be denied merely on the ground that the certificates were required to be produced at the time of importation only, dismissed the appeal of the ONGC on the ground that the same had not been produced even before it and allowed the appeal of Tullow and remitted the matter back to the Commissioner for his consideration as regards acceptability thereof and consequently upon the availability of the exemption and related matter.

ONGC and the Commissioner of Customs, Mumbai are, thus, in appeal before us.

ONGC before this Court filed an application for urging additional grounds before this Court that it may be permitted to rely upon the said essentiality certificate dated 23.6.2004.

It also filed an application before the Tribunal praying for recall of the said order dated 27.9.2001 relying on or on the basis of the said certificate, but the same was rejected on the ground that the matter is pending before this Court. An appeal has been filed thereagainst also by ONGC.

The learned counsel appearing on behalf of the ONGC would raise three contentions in support of these appeals.

(i) The value of services, which are rendered under a pure service contract cannot be subjected to customs duties on the ground that the results of seismic surveys are recorded in tapes or discs and, thus, would not be 'goods' within the meaning of provisions of Customs Act, 1962.

(ii) The exemption notifications having been issued for exemption of goods imported in India for petroleum exploration subject, of course, to filing of the essentiality certificate issued by the Directorate of Hydrocarbons and as such an essentiality certificate had been produced even before this Court, it is entitled to such exemption.

(iii) In any event, having regard to the fact that the Tribunal accepted such essentiality certificate in the case of Tullow, there is no reason why the same benefit would not be granted in its favour. In any event, as the tapes and discs are softwares within the meaning of Serial No. 231 of the Notification, it is entitled to the benefit of the aforementioned exemption notification No. 20 of 1989 having regard to the fact that the same has liberally been construed in terms of the explanation appended thereto.

Mr. V. Lakshmikumaran, learned counsel appearing on behalf of 'Tullow' relied upon a public notice issued by the Madras Custom House and would submit on the basis thereof, which reads as under:

"The following clarifications are hereby notified for information of importers, Clearing Agents and others concerned:

Sl. No.

Subject

Clarification

7.

Applicability of

various certificates
required under
different
notifications
issued after the
date of
importation
If the substantive clauses
of a notification are
fulfilled by an importer,
concessional assessment
should not be denied on
the ground of time factor."

Relying on or on the basis of said public notice, it was submitted that on the same reasoning production of the essentiality certificate even at a later stage could serve the purpose.

Mr. A.K. Ganguly, learned senior counsel appearing on behalf of the Commissioner of Customs (Imports), Mumbai, on the other hand, submitted that the exemption notifications are required to be construed very strictly and in view of the fact that a condition precedent has been attached thereto, namely, production of essentiality certificate at the time of importation, triggering event cannot be shifted to a later date. It was submitted that if it be held that production of such certificate at any point of time is considered to be sufficient compliance for the purpose of obtaining benefit under the said exemption notification, the same will have to be read in the manner that it was not necessary to be produced at the time of importation. Even if such a construction is possible, the learned counsel would contend that the same should be produced only within a reasonable time, particularly, in view of the fact that the exemption notification was valid for one year.

As regard public notice issued by the Madras Custom House, the learned counsel urged that one issued by a particular Custom house cannot be equated with the circular issued by the Board in exercise of its statutory power under Section 151A of the Customs Act. The exemption notification being a statutory one cannot be clarified by one custom house as the same must emanate from a notification issued by some authority.

Mr. Ganguly argued that the Customs Act makes a difference between the certificates which are conditions precedent and those which are conditions subsequent as would appear from Section 18 of the Act. Reliance in this behalf has been placed on Jindal Drilling and Indus. Ltd. Vs. Collector of Customs, Bombay [2001 (138) ELT 1335]. Our attention has been drawn to an order of this Court dated 11.05.2000 passed by this Court dismissing the SLP (Civil) CC No. 3364 of 2000 filed thereagainst by Modest Shipping Agency Pvt. Ltd. reported in [2002 (140) ELT A 95]

It was further urged that the public notice issued by the Madras Custom House refers to certificates which may be necessary to be produced within the meaning of the provisions of the Customs Act as, for example, certificate to prove country of origin or certificate to prove valuation, as may be necessary, by reason of the conditions imposed for import which are not conditions precedent or exemption notification.

Both the importers are licensees. Indisputably, they were entitled to the benefit of the exemption notification subject, of course, to the condition that they would produce the essentiality certificate granted by the Directorate General of Hydrocarbons at the time of importation of goods. Grant of essentiality certificate was not in the hands of the assesses. It was a function of a department of the Central Government. The essentiality certificate admittedly was not granted by the Directorate General of Hydrocarbons within a reasonable time. The importers could not be blamed therefor. It is possible that delay in granting the said essentiality certificate

was by way of default on the part of the authorities concerned.

The essentiality certificate granted in favour of ONGC refers to the notification, the relevant certificate number of the table, list 11 and condition number 34 or 36, as the case may be, of the notification. It even refers to the serial number of the consignments. The serial number of the tapes had also been mentioned therein. Except for the purpose of grant of benefits under the said exemption notification, the said essentiality certificate would not serve any other purpose whatsoever.

Construction of an eligibility clause contained in an exemption notification depends inter alia upon the purpose for which an exemption is sought to be granted. The exemption notification was issued by the Central Government in exercise of its power conferred upon it under Sub-section (1) of Section 25 of the Customs Act. An exemption thereunder is granted, if the Central Government is satisfied that it is necessary so to do in public interest. Such exemption can be granted either absolutely or subject to such conditions, as may be specified therein. Such conditions are required to be fulfilled before or after clearance as may be specified. Such exemption would be in relation to the goods of specified description from the whole or any part of duty or customs leviable thereon.

Serial Nos. 182 and 184 of the notification refer to the goods falling under Chapter 84 and specified in List 11 required in connection with petroleum operations undertaken by a licensee.

ONGC is a licensee for exploration of petroleum products. ONGC has specifically been mentioned at Serial No. 182 of the said notification. It is not in dispute that importation, if any, has been made in connection with petroleum operations to be undertaken under petroleum exploration licenses granted by the Government of India on nomination basis. The benefit of exemption notification would inter alia be available to the licensee if it is shown in terms of a certificate granted by the Directorate General of Hydrocarbons and the Ministry of Petroleum and Natural Gas that the imported goods are required for petroleum operation referred to in clause (a) of condition No. 34 and under the licence referred to herein.

The Directorate General of Hydrocarbons is under the Ministry of Petroleum and Natural Gas of the Government of India. The functions performed by it are public functions. The notification never contemplated that a public functionary, having regard to the importance of the subject matter and in particular when such importations are being made in public interest, would not dispose of the application for grant of essentiality certificate within a reasonable time so as to enable the importer to avail the benefit thereof. Applicants for grant of such certificates, having regard to their importance, should have been processed by the Directorate General of Hydrocarbons as expeditiously as possible but they did not choose to do so probably having regard to the fact that no time schedule therefor was prescribed. It is trite that when a public functionary is required to discharge its public functions within a time specified therefor, the same would be construed to be directory in nature. [See P.T. Rajan Vs. T.P.M. Sahir and Others, (2003) 8 SCC 498 and Punjab State Electricity Board Ltd. Vs. Zora Singh and Others, (2005) 6 SCC 776]

Both the Customs Department and Ministry of Petroleum and Natural Gas are departments of the Central Government. The substantive provisions which were required to be complied with for the purpose of obtaining the benefits under the said exemption notification have indisputably been complied with. It is not the case of the department that the assessee has anything to do with the grant of certificate except to pursue the matter to the best of its abilities. It is not in dispute that the importers were, but for production of the certificate, otherwise entitled to the grant of benefit in terms of the said notification.

The conditions referred to in Sub-section (1) of Section 25 as regard

time when such certificate is to be produced would, thus, mean those which were within the control and power of the importer. If it is not within the power and control of the importer and depends upon the acts of other public functionaries, non-compliance of such condition, subject to just exception cannot be held to be a condition precedent which would disable it from obtaining the benefit therefrom for all times to come.

It is no doubt true that the fiscal liability has to be certain. There cannot, however, be any doubt that in a case of this nature ONGC being a government company for all intent and purport was also certain that it would get the requisite exemption, subject of course, to its fulfilling the condition of obtaining such essentiality certificate.

There is no universal law, as was suggested by Mr. Ganguly, that fiscal liability cannot be deferred. In a statute where there is a provision for a provisional assessment and/ or provisional clearance, subject to compliance of certain conditions, such conditions may be fulfilled at a later stage, namely, at the stage of final clearance or final assessment.

The question may be considered from another angle. The Directorate General of Hydrocarbons was indisputably aware about the existence of such exemption notification. The certificate in accordance with law has not only been granted, the same expressly refers to the exemption notification, the entry of the table, the relevant clauses applicable therefor also the bills of entries dated 22.05.1999 and 22.06.1999. Indisputably, therefore, the Directorate General of Hydrocarbons was aware of all requisite requirements necessary therefor. It may presume that the department was also aware of the provisions of the Customs Act and the consequences likely to be suffered by the importer in the event of its inability to produce the same before the competent authority at the time of importation. The exercise undertaken by the said department, thus, was not to end in futility.

In almost a similar situation, the question came up before this Court in Commissioner of Central Excise Vs. M.P.V. & Engg. Industries [2003 (153) ELT 485] (wherein one of us, B.P. Singh, J. was a member) which was answered stating that an assessee although was otherwise entitled to obtain the benefit of an exemption certificate, the same should not ordinarily be denied to it because of any administrative delay over which he had no say in the following words:

"\005 In a case of this nature it is only reasonable to take the view that the benefit of exemption will accrue to a unit found to be a small-scale industrial unit from the date on which the application was made for the grant of registration certificate. Such a unit should not be deprived of the benefit to which it is otherwise entitled as a small-scale industrial unit merely because the authorities concerned took their own time in disposing of the application. We therefore, agree with the majority view of the Tribunal and hold that the benefit of exemption under the notification in question should be extended to the respondent with effect from the date on which the application for grant of registration was made by it before the competent authority."

The essentiality certificate, thus, must be treated to be a proof of the fact that the importers have fulfilled the conditions enabling them to obtain the benefit under the exemption notification.

The principles as regard construction of an exemption notification are no longer res integra; whereas the eligibility clause in relation to an exemption notification is given strict meaning wherefor the notification has to be interpreted in terms of its language, once an assessee satisfies the

eligibility clause, the exemption clause therein may be construed liberally. An eligibility criteria, therefore, deserves a strict construction, although construction of a condition thereof may be given a liberal meaning.

The decision of this Court in Jindal Drilling and Indus. Ltd. (supra), relied upon by Mr. Ganguly has no application to the facts and circumstances of the instant case.

It is true that ordinarily, the golden rule of literal interpretation must be given effect to. But it is also well-settled that where literal interpretation gives rise to an anomaly or absurdity, the same should be avoided. [See Ashok Lanka and Another vs. Rishi Dixit and Others \026 (2005) 5 SCC 598] Colgate Palmolive (India) Ltd. vs. MRTD Commission and Others \026 (2003) 1 SCC 129].

Furthermore, it is also well-settled that the Legislature always intends to avoid hardship. In a situation of this nature, the exemption notification cannot be construed in a way which would prove to be oppressive in nature. However, we do not intend to lay down a law that delay on the part of the authorities in granting such certificates would automatically enable an assessee to obtain refund. Each case has to be judged on its own facts.

We, however, do not agree with the contention of Mr. Lakshmikumaran that by reason of a public notice issued by a Custom House situate in a State, the effect and purport of statutory notification can be taken away. In terms of Section 151A of the Customs Act, it is only the Board which may issue instructions. Even under the aforementioned provision, the Board exercises a limited power. [See Pahwa Chemicals (P) Ltd. Vs. Commissioner of Central Excise, New Delhi (2005) 2 SCC 720].

Having regard to the facts and circumstances of this case, we are of the opinion that the Tribunal has committed no illegality in remitting the matter back to the Commissioner. Civil Appeal No. 5900 of 2004 is, therefore, dismissed.

We for the reasons aforementioned remit the matter to the Commissioner for similar purpose in the matter of ONGC for consideration of the matter afresh. The Commissioner is directed to send a copy of its order to this Court. Other contentions raised by the parties herein shall remain open. It is made clear that in the event the order of the Commissioner goes against the contentions of the assessee Tullow, it will be open to it to question the correctness thereof before an appropriate forum.

Civil Appeal Nos. 1882 of 2004 and 854 of 2005 are adjourned sine die. These appeals shall be listed as and when the order of the Commissioner is received.