SUPREME COURT OF INDIA

Commissioner of Customs, Mumbai

Vs

Messrs Toyo Engineering India Limited

Appeal (Civil) 2532 of 2001

(Ashok Bhan and Markandeya Katju, JJ)

31.08.2006

JUDGMENT

ASHOK BHAN, J.

Revenue has filed this appeal against the final Order No. 1813/2000-B dated 25.10.2000 in Appeal No. C/164/89-B2 passed by the Customs, Excise and Gold (Control) Appellate Tribunal (for short "the Tribunal") whereby the Tribunal has set aside the order in original as well as the order passed in the appeal and held that the machinery and equipment imported by the assessee-respondent was classifiable under Heading 98.01 of the First Schedule to the Customs Tariff Act, 1975 (for short "the Tariff Act") and granted the benefit of Project Import under the Project Import Regulation to the assessee. Facts:

Assessee-respondent (for short "the respondent") is engaged in the setting up of industrial unit such as fertiliser plant. M/s. Indian Farmers Fertilisers Cooperative Ltd. entered into a contract with their parent Company M/s. Toyo Engineering Corporation, Japan for designing, engineering, fabricating and commissioning an Ammonia Storage Package Unit and a Co-generation Plant. Their Parent Company in turn entered into an agreement with the respondent to carry out all the works, services, erection and commissioning of the project on turn key basis. The respondent filed an application on 17.03.1986 with the Contract Registration Cell for grant of the benefit under the Project Import Scheme read with Notification No. 72/85-Cus., dated 17.03.1985 in respect of goods sought to be imported. Respondent has imported various special construction equipments, available at their

overseas project at Kuwait, and filed eleven Bills of entry in March, 1986 for the clearance of goods, which were cleared on payment of duty under protest.

The Assistant Collector, under Adjudication Order No. S/5-Misc. 376/86-CC, dated 18.08.1987, rejected the request of the respondent for registration under the Project Import Regulation on the ground that the imported goods are the property of the respondent and even after execution and completion of the work, these goods would remain the property of the respondent and the ownership of the imported goods would not pass on to the Project Authority. It further held that as the goods could be used for other work elsewhere after the completion of the present project, the imported goods would not qualify for classification under Heading 98.01 of the Tariff Act.

Being aggrieved, the respondent filed an appeal before the Appellate Authority which was rejected. It was held that as per Heading 98.01 of the Tariff Act the items of machinery or component parts should go into the initial setting up of the unit and should not merely be used as an aid for the setting up of the unit or its substantial expansion. As the respondent could utilise the machinery elsewhere in the setting up of other plants, the impugned goods could not be classified under Heading 98.01 of the Tariff Act.

The respondent being aggrieved filed an appeal before the Tribunal which has been accepted by the impugned order. The Tribunal held that the grounds on which both the lower authorities have denied the facility of project import to the respondent were not sustainable in law. After detailed discussion the Tribunal set aside each of the findings recorded by the appellate authority and held that the respondent would be eligible to the benefit asked for.

Heading 98.01 of the Tariff Act reads as under:

"98.01 All items of machinery including prime movers, instruments, apparatus and appliances, control gear and transmission equipment, auxiliary equipment (including those required for research and development purposes, testing and quality control), as well as all components (whether finished or not) or raw materials for the manufacture of the aforesaid items and their components, required for the initial setting up of a unit, or the substantial expansion of an existing unit, of a specified:

(1) Industrial plant

,
(2) Irrigation project,

(3) Power project,

(4) Mining project,

(5) Project for the exploration for oil or other minerals, and

(6) Such other projects as the Central Government may, having regard to the economic development of the country notify in the Official Gazette in this behalf; and spare parts, other raw materials (including semi-finished material), or consumable stores not exceeding 10% of the value of the goods specified above provided that such spare parts, raw materials or consumable stores are essential for the maintenance of the plant or project mentioned in (1) to (6) above."

Heading 98.01 covers all the items of machinery including prime movers, instruments, apparatus and appliances; control gear and transmission equipment, auxiliary equipments besides components and raw materials required for the initial setting up of a unit or the substantial expansion of an existing unit of specified industrial plant. The industrial plant would include fertiliser plant as well, as it is designed to be employed directly in the performance of processes necessary for manufacture of fertiliser. Since the fertiliser plant is covered by the industrial plant specified in Heading 98.01 of the Tariff Act all the "auxiliary equipments" which are required for the initial setting up of the unit could be imported under the Project Import Scheme. As per Words and Phrases of Excise and Customs by S.B. Sarkar "auxiliary"

Means:

"giving additional help; supplemental or subsidiary; an item not directly a part of a specific component or system but required for its functional operation.

According to Black's Law Dictionary, sixth edition, 'auxiliary' means: "Aiding; attendant on."

According to the World Book Dictionary, 'auxiliary' means:

"a person or thing that helps; aid; syn; accessory".

Webster's Encyclopedic Unabridged Dictionary of the English Language, (1996 Edn.) "auxiliary" means:

"giving support; serving as an aid; helpful"

It is not disputed that construction equipments imported by the respondent were used in the initial setting up of the plant. The Assistant Collector and the appellate authority denied the facility of the project import as the ownership of the imported goods would not pass to the project authority and that the machinery imported could be utilized elsewhere in the setting up of any other plant. What is required under heading 98.01 Tariff Act is that the machinery imported should be required "for the initial setting up of a unit, or the substantial expansion of an existing unit". This heading specifically mentions and includes "auxiliary equipment". The "auxiliary equipment" has not been defined under the Tariff Act. As per Dictionary meaning, extracted above, it is an equipment which aids or helps.

Any equipment which aids or helps in the setting up of an industrial plant would fall and be covered under heading 98.01 of the Tariff Act. The mere possibility of its being used subsequently for other project would not debar the respondent from availing the facility of project import. If the contention of the Revenue is accepted, then resultant effect as put by the Tribunal would be:

"no equipment can be imported for projects like Konkan Railway Project, Road Development Projects of the National Highway Authority of India, etc. specified under Heading 98.01 of CTA."

We agree with this observation of the Tribunal. Counsel appearing for the appellant strenuously contended that the respondent could not be given the benefit of the project import under heading 98.01 of the Tariff Act in view of the decision of this Court in the Punjab State Electricity Board Vs. Collector of Customs, Bombay, 2 (SC).

We do not find any substance in this submission. In that case this Court did not consider the vehicles imported to be an item of auxiliary equipment required for setting up of an initial unit on the ground that it was used only in shifting of the transformers which would not constitute an integral part of the power project. The vehicles imported were required for transportation of the transformers from railway yards to the erection sites and had no relation to power generation or power project. After transporting the specified number of transformers to the site of sub-station the utility of the vehicles would be over at the end of such transport and thereafter the vehicles could certainly be used for other purposes of the assessee. That the vehicles, which are used in the shifting of the transformers, would not constitute integral activity of the project. In the present case goods imported by the respondent are hydle truck cranes, excavator, shovel loader, truck, forklift truck, power generators, diesel welder, welding rectifier, containers tools and tackles instruments, level Nako with tripod, theodlite nako with accessories & tripod besides window air conditioners, electric typewriter and camera with flash (the total cost of last three items is only Rs.70, 000/-, which is negligible). In fact, it was not disputed before the Tribunal or before us as well that the construction equipments imported by the respondent were used in the initial setting up of the plant. The goods imported by the respondent such as hydle truck cranes, excavator, shovel loader, truck, forklift truck, power generators, diesel welder, welding rectifier, containers tools and tackles instruments, level Nako with tripod and theodlite nako with accessories & tripod would certainly be auxiliary equipments which would help in the initial setting up of the industrial plant. The facility of the project import was denied to the respondent because the ownership of the imported goods did not pass to the project authority. Since it is not disputed that the construction equipments imported by the respondent were used in the initial setting up of the plant, then, as per the provisions of heading 98.01 of the Tariff Act the respondent could not be denied the benefit of the project import. Before the Tribunal learned departmental representative appearing for the Revenue had made various other submissions such as (1) that absence of a contract specifically registered for import of construction material; (2) that note (2) to Chapter 98 according to which Heading 98.01 would apply to goods which are imported in accordance with the Project Imports Regulations, 1986; (3) that under Regulation 4 the assessment under Heading 98.01 shall be available only to those goods which are imported against one or more specific contract which have been registered with the appropriate Customs House. In the absence of a specific contract being registered Heading 98.01 would not be applicable to the impugned goods imported by the respondent; and (4) that the benefit of concessional duty under Project Import was not available if the goods had arrived before the application was submitted for registration of the goods. All these submissions were not allowed to

be raised by the tribunal as these submissions had been made for the first time before the Tribunal. These submissions had neither been raised before the adjudicating authority nor the first appellate authority. It was held by the Tribunal that the Department could not be allowed to make out a new case at the appeal stage.

Learned counsel for the Revenue tried to raise some of the submissions which were not allowed to be raised by the Tribunal before us, as well. We agree with the Tribunal that the revenue could not be allowed to raise these submissions for the first time in the second appeal before the Tribunal. Neither adjudicating authority nor the appellate authority had denied the facility of the project import to the respondent on any of these grounds. These grounds did not find mention in the show cause notice as well. The Department cannot be travel beyond the show cause notice. Even in the grounds of appeals these points have not been taken. For the reasons stated above, we do not find any merit in this appeal. We agree with the findings recorded by the Tribunal. Accordingly, the appeal is dismissed, leaving the parties to bear their own costs.