Penalty Order Should Specifically Indicate the Precise Provision under which it is being Imposed

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Delhi High Court's decision in the matter of *DKM Cassette P. Ltd.* v. *Union of India (UOI) and Ors. Dated 21.10.2010* (MANU/DE/2949/2010)

Prior History: Petition against the order dated 22nd April, 1996 passed by the Additional Director General of Foreign Trade (ADGFT) holding the Petitioner guilty of contravening the provisions of Section 4-I of the Import & Export (Control) Act, 1947 (IEC Act) and Clause (8) of the Import (Control) Order, 1955 read with Section 20(2) of the Foreign Trade (Development& Regulation) Act, 1992 (FTDR Act) levying the penalty of Rs. 55 Lacs and order dated 12th August, 1997 passed by the Appellate Committee Cell (ACC) upholding the above order.

Case Background:

- The Petitioner applied to the Secretariat of Industrial Approvals (SIA), Department of Industrial Development, Ministry of Industry, Government of India in July, 1985 for setting up a 100 per cent export Oriented Unit (EOU) for the manufacture of video-cassette shells.
- By a letter dated 4th November, 1985, SIA permitted the Petitioner to establish a 100 per cent EOU with a capacity of 6 lac pieces of videocassette shells per annum.
- One of the conditions imposed was that the unit should achieve a value addition of 45 per cent with the value of imported capital goods being set at Rs. 30.08 Lacs and the entire production should be exported.
- The letter also set out the list of capital goods permitted to be imported.
- Based on the Petitioner's representation, SIA by a letter dated 30th January, 1987 reduced the value addition from 45 per cent to 31.7 per cent and enhanced the value of imported goods/capital to Rs. 50,16,000.
- Between October 1989 and August 1991 Petitioner manufactured and exported videocassette shells valued at Rs. 20,04,675.28 with a value addition of around 33 per cent .
- All the imported raw materials were used in the manufacture of the export products and there was neither any misuse nor mis declaration of the imported goods.
- In 1992, the Petitioner's unit started facing labour problems, which led to the closure of the factory, consequently, the Petitioner could not meet the export obligation.
- The Petitioner approached the Development Commissioner (SEEPZ) on 9th February, 1994 requesting him to recommend to the SIA that the Petitioner's unit should be withdrawn from the 100 per cent EOU scheme.
- On 24th May, 1994 the BOA in the Ministry of Commerce permitted debonding of the Petitioner's unit subject to the following conditions that:
  - the unit shall deposit a penalty of 10 per cent of the CIF value of the imported capital goods.
  - unit shall undertake an export obligation of 25 per cent of the annual production for a period of five years or for an amount equal to five times the cif value of the imports whichever was higher.
- The Petitioner stated that it had complied with the first condition and requested for a waiver of the second condition.

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- The request was accepted and the SIA informed the Petitioner that the condition regarding export obligation would be deleted as the Petitioner could not meet the export obligation after debonding.
- The Petitioner was granted the permission for debonding of raw material, semi-finished goods, finished goods and scrap and waste. The capital goods were also permitted to be cleared at depreciated value after payment of applicable rate of duty.
- Thereafter, the impugned order dated 22nd April, 1996 was passed by the ADGFT levying a penalty of Rs. 55 Lacs on the Petitioner for violation of Section 4-I IEC Act. The said order indicated that a show cause notice dated 17th August, 1995 had been issued to the Petitioner. In response to the above order, the Petitioner replied on 14th May, 1996 denying receipt of the show cause notice. Further it was pointed out that since a penalty of 10 per cent of the value of imported goods had already been imposed by the SIA no further penalty should be imposed by the ADGFT. The Petitioner then filed an appeal before the ACC in the Ministry of Commerce under Section 20(2) of the FTDR Act.

Contentions

The Petitioner contended that:

1. Penalty could not be imposed twice for the failure to meet the conditions upon which it was permitted to import the goods in question.

2. The permission letter allowing the Petitioner to import the goods in question was not a "licence" and, therefore, the provisions of IEC Act did not get attracted.

3. Guidelines and Circular dated 27th March, 1995 issued by the Government of India made it clear that prior to that date there was no question of two separate penalties being imposed for the non-fulfillment of the export obligation.

4. Impugned order passed by the ADGFT imposing a penalty did not indicate which particular offence as listed out in the sub-clauses of Section 4-I of the IEC Act was violated and therefore, the penalty order was on this ground alone bad in law.

Impugned order passed by ACC

1. All the submissions made by Petitioner were negatived, holding that the permission letter did amount to a licence to import the goods in question.

2. Levy of penalty by the SIA was independent of the penalty under the IEC Act.

3. Upon failure to meet the export obligation, the provisions of Section 4-I(1) of the IEC Act would stand attracted as non-fulfilment of the export obligation after making the import should be construed as a misutilisation and the misdeclaration of the imported goods.

Issues for Adjudication

1. Whether the provisions of the IEC Act applied considering what was issued to the Petitioner was a letter permitting import of capital goods and raw material.

2. Whether the impugned order of the ADGFT levying penalty of Rs. 55 Lacs on the Petitioner, which has been affirmed by the impugned order of the ACC is sustainable in law.

Judgment

Issue (1)

1. Petitioner and Government had entered into a formal agreement, the collective reading of the clauses thereof shows that:

(a) the letter dated 4th November, 1985 by which the Petitioner was permitted to make import was in fact accepted and acted upon by both parties as a licence to import.

(b) Ministry of Commerce also issued an order No. 23/88-91 being Open General Licence No. 23/88 under Section 3 of the IEC Act, which gave a general permission to all actual users approved by the Government as 100 per cent EOU for the import of raw materials, components etc.

(c) One of the conditions in the said OGL order inserted by a subsequent amendment further pointed that the failure to meet the export obligation in terms of the permission letter dated 4th November, 1985 would not only attract penalty as a result of such violation but under the provisions of the IEC Act as well.

(d) Consequently, there was held to be no error having been committed by the ACC which held that permission letter issued by the Petitioner should be construed as an import licence and for any failure to comply with the conditions attached thereunder action could be independently taken by the SIA as well as the office of the ADGFT under the IEC Act.

Issue (2)

1. Section 4-I IEC Act is a penal provision, which admits only of a strict construction. It sets out the circumstances under which the importer's liability to pay penalty up to five times the value of the import gets attracted.

2. The failure to fulfil an export obligation is not listed out expressly as an instance attracting the liability to pay penalty thereunder.

3. In the circumstances, if the ADGFT in the instant case intended to levy a penalty on the Petitioner under Section 4I IEC Act, it was incumbent on him to indicate which of the sub-clauses of Section 4-I(1) IEC Act stood attracted.

4. There was non-application of mind by the ADGFT. Nothing is discernible from his order dated 22nd April, 1996 as to which of the Sub-clauses of Section 4-I IEC Act, if any, was attracted. The order simply states that the offence is under Section 4-I. This is wholly insufficient for the purposes of imposing a penalty on the strength of Section 4I read with Section 4K of the IEC Act.

5. The need for a penalty order having to specifically indicate the precise provision under which the penalty is being imposed was emphasized by the Supreme Court in *Amrit Food* v. *Commissioner of Central Excise, U.P.* in the context of penalty imposed under Rule 173Q of the Central Excise Rules, 1944. It was observed that in the absence of any indication as to which particular clause of Rule 173Q had been contravened, the penalty could not have been imposed.

6. Section 4-I(1)(a) IEC Act is attracted when the goods have been imported under any licence and such goods have been used or utilised "otherwise than in accordance with the conditions of such licence or letter of authority." There was no finding by the ADGFT or ACC that the Petitioner has either misutilised or misdeclared the imported goods.

7. Orders of the ADGFT and the ACC unsustainable in law.

8. Impugned orders set aside and the Writ Petition allowed.