M/S. O.N.G.C. LTD. A

v.

COMMNR. OF CUSTOMS, MUMBAI

AUGUST 24, 2006

[S.B. SINHA AND DALVEER BHANDARI, JJ.] B

Customs Act, 1962—3-D Seismic Tapes—Custom duty on—Exemption from—By a Notification—Requirement of Essentiality Certificate for availing exemption—Possession of Petroleum Exploration Licence was pre-condition for grant of the Certificate—Late renewal of the licence, but from retrospective effect—Due to non-availability of licence, Certificate not granted—After grant of licence, fresh application for grant of Certificate in continuance of its earlier application—Exemption denied by the Authority as well as Tribunal in absence of the Certificate—Certificate produced before this Court after the same having been granted—Remission of the case to Tribunal for reconsideration in view of the Certificate—Tribunal denied the exemption, not accepting the Certificate—On appeal, held: Once licence was renewed and the Certificate was issued, conditions precedent for obtaining exemption in terms of the Notification, stood satisfied. C D

The appellant company was getting done seismic survey for finding out possibility of oil or gas through another company. The information was recorded in 3-D Seismic Tapes. The said Tapes were exempted from customs duty in terms of a Notification. For availing exemption, an Essentiality Certificate was required to be issued by Directorate General of Hydrocarbons. Pre-requisite for grant of such Certificate was a valid Petroleum Exploration Licence. E F

Appellant, even before expiry of the Petroleum Exploration Licence had applied for its renewal and the same was issued with retrospective effect i.e. from the date of expiry of earlier Licence. After issuance of Exemption Notification, appellant applied for Essentiality Certificate, but the same was not granted due to absence of the Licence. After grant of Licence, appellant again applied for grant of the Certificate with retrospective effect. It also sent several reminders. G

The said goods were cleared provisionally, but show cause notice, H

A denying the exemption, was issued in view of failure to produce the Certificate. Customs, Excise and Service Tax Appellate Tribunal decided the case against the appellant in view of failure to produce the certificate before the Tribunal. In appeal to this Court, appellant produced the certificate. This Court, remitted the matter to the Tribunal for reconsideration, holding that grant of the Certificate should be treated as B proof of the fact that appellant fulfilled the condition for obtaining the exemption.

Pursuant to the directions of this Court, Tribunal passed the order holding that the Certificate could not be accepted; that the appellant was C guilty of concealment of the fact of return of application for grant of the Certificate. Tribunal also attributed malice on the part of the Directorate General of Hydrocarbons in granting the Certificate. Hence the present appeals.

Allowing the appeals, the Court

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HELD: 1. The Appellant applied for grant of renewal of the Oil Exploration Licence before its expiry. The said renewal has been granted with a retrospective effect. In law, thus, the Appellant had been holding a valid licence continuously. The factual events of the present case clearly show that the appellant's application for grant of Essentiality Certificate E by the Directorate General of Hydrocarbons was not entertained in absence of renewal of the Licence. The application was returned only for that purpose. The appellant filed its application for grant of essentiality certificate within two days from the date of grant of the Licence with retrospective effect and thereafter sent several reminders. The conduct of F the appellant must, therefore, be judged from the factual matrix obtaining therein. Appellant did not make any misrepresentation before this Court or that the Directorate General of Hydrocarbons had shown any favour to it. Once it is held that the Ministry of Petroleum had renewed the Licence and the Directorate General of Hydrocarbons had issued the Essentiality Certificate, the conditions precedent for obtaining exemption G in terms of the exemption notification stood fully satisfied; the appellant is entitled to the benefits thereof. [323-C-H; 324-A]

Commissioner of Customs (Imports), Mumbai v. *Tullow India Operations Ltd.*, [2005] 13 SCC 789; *Tata Iron and Steel Co. Ltd.* v. *State of Jharkhand and Ors.*, [2005] 4 SCC 272; *Government of India and Ors.* v. *Indian Tobacco* H *Association*, [2005] 7 SCC 396; *Commnr. of Central Excise, Raipur* v. *Hira*

Cement, **JT (2006) 2 SC 369 and** *P.R. Prabhakar* **v.** *Commnr. of Income Tax, Coimbatore,* **(2006) 7 SCALE 191, relied on.** A

D. Nataraja Mudaliar **v.** *The State Transport Authority,* **Madras, AIR (1979) SC 114, referred to.**

2. It may be true that on the date when the goods were provisionally cleared, the appellant did not have the essentiality certificate with it, but this Court in its judgment had categorically held that in a case of this nature, unless a final order of assessment is passed, production of a delayed essentiality certificate may not come in the way of the importers obtaining the benefit of the exemption notifications. The Commissioner failed to notice the findings of this Court. It posed unto itself wrong questions. It did not address itself the issues required to be gone into. B C

[322-G-H; 323-A-B]

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 1882 of 2004. D

From the Final Order No. C-II/3218-19/WZB/2003 dated 9.12.2003 of the Customs, Excise and Service Tax Appellate Tribunal, West Zonal Bench at Mumbai in Appeal Nos. C/1210/01 Mum and C/51/2002 Mum.

WITH

Civil Appeal No. 854 of 2005. E

S. Ganesh, Shiv P. Pandey, Kamna Sarhar, Raj Kumar Tanwar and Rekha Pandey for the Appellant.

A.K. Ganguly, Rajiv Dutta, M.F. Humayunisa, K. Swami, P. Parmeswaran and B.K. Prasad for the Respondent. F

The Judgment of the Court was delivered by

S.B. SINHA, J. The Appellant before us is an undertaking wholly owned and controlled by the Central Government. It obtained the services of M/s. SEDCO Forex Int. Drilling Inc. for exploitation of oil and gas on shore and off shore. A contract was awarded by it to a company known as M/s. SEDCO Forex Int. Drilling Inc specializing in finding out the possibility of oil or gas by carrying out seismic surveys. The information gathered by reason of such survey was recorded in 3-D Seismic Tapes. G H

A question arose as to whether the same would attract the exemptions

A from payment of custom duty in terms of the entries contained in Sl. Nos. 182, 184 and 231 of the notification dated 28.2.1999.

For the aforementioned purpose, indisputably, an essentiality certificate was required to be issued by the Directorate General of Hydrocarbons. Pre-requisites for grant of such certificate also was a valid Petroleum Exploration B licence.

The licence granted by the Central Government in favour of the Appellant in that behalf was initially valid upto 14.11.1997. The Appellant applied for renewal thereof on 7.10.1997. An application for grant of C Essentiality Certificate was filed on 5.4.1999. The same was returned to the Appellant on 12.04.1999. By an order dated 18.08.2000, the said licence was renewed with retrospective effect from 14.11.1997 by the Central Government. Immediately, thereafter i.e. on 20th August, 2000, the Appellant filed an application for grant of essentiality certificate in continuation of its earlier application dated 5.04.1999. It also sent reminders therefor on 26.03.2001, D 13.04.2001, 27.12.2001 and 8.07.2003. The Appellant was asked to resubmit the application in a new format which requirement was also complied with by it on 25.03.2004. In the said application also, the Appellant categorically stated that the same was in continuation of its earlier application dated 5.04.1999 whereafter the essentiality certificate was granted on 26.03.2004.

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Admittedly, the said 3-D Seismic Tapes were treated to be the 'goods' within the meaning of the provisions of the Customs Act, 1962. The said goods were cleared provisionally but in view the fact that the Appellant had failed to produce the essentiality certificate, a notice to show cause was issued as to why the said data tapes should not be classified under CTH8524.99 F and charged to duty on the basis of the amount paid by the Appellant to the said SEDCO.

The matter ultimately came up before the Customs, Excise and Service Tax Appellate Tribunal which was heard along with a similar case of Tullow G India Operations Ltd. (Tullow). Whereas Tullow could produce the essentiality certificate before the Tribunal, the Appellant could not.

The matter came up before this Court at the instance of the Appellant. It filed an application for urging additional grounds *inter alia* relying on or on the basis of the said Essentiality Certificate granted in its favour on H 26.3.2004. This Court, opining that grant of essentiality certificate should be treated to be a proof of the fact that the Appellants had fulfilled the conditions

enabling them to obtain the benefits under the aforementioned exemption notification, remitted the matter to the Commissioner for consideration thereof afresh having regard to the similar directions issued by the Tribunal in the case of Tullow.

Pursuant to or in furtherance of the said directions, the Commissioner has passed an order dated 28.2.2006 holding:

> "I hold that the EC dated 26.3.2004 cannot be accepted and accordingly exemption under serial number 182 of notification no. 20/99-Cus dated 28.2.1999 (since rescinded), is not available on the data tapes imported by M/s ONGC vide Bills of Entry Nos. 9888 dt. 22.6.99 and No. 12443 dt. 28.5.99.
>
> I, therefore, confirm the duty demand of Rs. 49,68,70,160 on M/s ONGC. Since an amount of Rs. 25,00,00,000/- had already been paid by M/s ONGC towards the principal amount on 14.9.2004, the balance amount of Rs. 24,68,70,160/- is now payable by them.
>
> M/s ONGC are also liable to pay interest under section 28AB of the Customs Act, 1962, which comes to Rs. 25.06 crores as on 31.3.2006 after taking into account interest amounts already paid/ adjusted as indicated in the Annexure to this order."

The learned Commissioner in forming the aforementioned opinion proceeded on the basis that the Directorate General of Hydrocarbons cannot be faulted for not disposing of the Appellant's application for grant of the Essentiality Certificate within a reasonable time as the application therefor had been returned. It further proceeded on the basis that the Appellant is guilty of concealment of certain facts, viz., return of the said application in absence of a valid petroleum exploration licence granted in its favour by the Central Government.

The learned Commissioner further attributed malice on the part of the Directorate General of Hydrocarbons stating that such essentiality certificate was granted in order to facilitate the Appellant's case before this Court observing:

> "In the above background, the EC dated 26.03.2004 cannot be accepted because,
>
> (i) ONGC were not eligible for the EC on the date of import of

A the data tapes;

(ii) No application for the EC was pending with the DGHC on the date of import of the data tapes (in fact, the application had been rejected)

(iii) The EC dt. 26.3.2004 was a solicited document, solicited for
B the sole purpose of winning the case before the Supreme Court.

(iv) They had not raised this issue before the CESTAT which is the final authority for going into facts of the case, and

(v) ONGC have not approached the Hon'ble Apex Court with
C clean hands by not disclosing the full facts.

Another important point to note is that when the imports took place in the year 1999 the duty exemption could have been availed by M/ s ONGC on the strength of an EC as per the conditions of notification No. 20/99-Cus dt 28.2.1999 (Sr. no. 182). However, on the date of
D the present EC was issued, i.e. 26.3.2004, the notification was no longer in existence and had already been rescinded on 1.3.2000 by notification no. 22/2000-Cus dated 1.3.2000. A certificate issued under a rescinded notification can have no legal sanctity. When the relevant notification itself does not exist how can a certificate issued under the authority of the said notification have any legal validity? Action taken
E under a rescinded notification can be saved under a saving clause of appropriate legislation; but fresh action cannot be initiated or revived under a rescinded notification. (In the case of Tullow India, which was also a subject matter before the Apex Court in CA No. 5900 of 2004, the certificate was produced by them within the validity period
F of the Customs notification, though whether the certificate produced by Tullow India was proper/genuine/ valid/ applicable or not is a subject matter of separate proceedings)."

It further opined that another reason why the Appellant disentitled itself from grant of the benefit of the said exemption notification was that production
G of the essentiality certificate was necessary at the time of importation and not thereafter.

The Appellant is a public sector undertaking. The exemption notification *inter alia* was issued in its favour by the Central Government. It may be true that on the date when the goods were provisionally cleared the Appellant did
H not have the essentiality certificate with it, but this Court in its judgment

dated 28th October, 2005 since reported in [2005] 13 SCC 789 categorically held that in a case of this nature, unless a final order of assessment is passed, production of a delayed essentiality certificate may not come in the way of the importers obtaining the benefit of the exemption notifications. A

The Commissioner in passing the impugned order failed to notice the findings of this Court. It posed unto itself wrong questions. It did not address itself the issues required to be gone into. B

It may be true that grant of the essentiality certificate was itself dependent upon the question as to whether the Appellant was possessed of a valid oil exploration licence or not. It is, however, equally true that right to renewal of a licence is a valuable right. [See *D. Nataraja Mudaliar* v. *The State Transport Authority, Madras,* AIR (1979) SC 114] The Appellant applied for grant of renewal of the said licence before its expiry. The said renewal has been granted with a retrospective effect. In law, thus, the Appellant had been holding a valid licence continuously. The factual events as noticed hereinbefore clearly show that the Appellant's application for grant of essentiality certificate by the Directorate General of Hydrocarbons was not entertained in absence of renewal of the licence. The application was returned only for that purpose. The Appellant filed its application for grant of essentiality certificate within two days from the date of grant of the licence with retrospective effect and then thereafter sent several reminders. The conduct of the Appellant must, therefore, be judged from the factual matrix obtaining therein. We, therefore, are unable to agree with the opinion of the learned Commissioner that the Appellant made any misrepresentation before this Court or that the Directorate General of Hydrocarbons had shown any favour to it. Once it is held that the Ministry of Petroleum had renewed the licence and the Directorate General of Hydrocarbons had issued the essentiality certificate, the conditions precedent for obtaining exemption in terms of the exemption notification stood fully satisfied. C D E F

This Court, times without number, has construed such exemption notifications in liberal manner. [See *Commissioner of Customs (Imports), Mumbai* v. *Tullow India Operations Ltd.,* [2005] 13 SCC 789; Sec *Tata Iron & Steel Co. Ltd.* v. *State of Jharkhand and Ors.,* [2005] 4 SCC 272; *Government of India and Ors.* v. *Indian Tobacco Association,* [2005] 7 SCC 396; *Commnr. Of Central Excise, Raipur* v. *Hira Cement,* JT [2006] 2 SC 369 and *P.R. Prabhakar* v. *Commnr. of Income Tax, Coimbatore,* (2006) 7 SCALE 191] If, thus, the Appellant was entitled to the same, it should not G H

A be denied the benefits thereof. It is directed accordingly.

We, therefore, do not agree with the findings of the learned Commissioner.

In view of our findings aforementioned, we do not think it necessary
B to advert to the other contentions raised by the Appellant.

For the reasons aforementioned, the impugned order cannot be sustained which is set aside accordingly. The appeals are allowed. No costs.

K.K.T. Appeals allowed.