Uma Joshi Vs. Enforcement Directorate

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Court : Appellate Tribunal for foreign Exchange New Delhi

Decided On : Jan-03-2008

Judge : O.P. Nahar, Chairperson and R.N. Poddar, Member

Appeal No. : APPEAL NO. 183 OF 2006

Appellant : Uma Joshi

Respondent : Enforcement Directorate

Advocate for Pet/Ap. : Anil Arora for the Appellant. A.C. Singh for the Respondent.

Judgement :

O.P. Nahar, Chairperson. - This is an appeal filed against adjudication order No. ADJ/250/DZ/2005/AO(AKJ)/1800, dated 31-5-2005 passed by Additional Commissioner (CCU), Central Excise while working as Adjudication Officer, Enforcement Directorate imposing a penalty of Rs. 10,84,000 against the appellant for contravention of section 18(2) read with section 18(3) FER Act on the reasons that appellant after making exports by two GRIs of the value of Rs. 10,84,000 failed to take reasonable steps for repatriation of export proceeds within the prescribed period of six months or any other extended period by RBI. This Tribunal while disposing of application for dispensation of pre-deposit allowed full dispensation of pre-deposit of penalty by order dated 30-5-2007 passed by this Tribunal. Presently we are hearing this appeal on merits for final disposal.

2. We have heard Shri Anil Arora, Chartered Accountant on behalf of the appellant and Shri A.C. Singh, DLA for respondent. According to Shri Anil Arora, Chartered Accountant, the appellant exported by two GRIs two consignments on 30-4-1990 and 21-6-1990 of the value of Rs. 1,39,200 and Rs. 94,530 respectively to the foreign buyer named Fashion Destinations in Los Angeles, USA. Earlier the foreign buyer with whom the appellant was having trade relations made timely payments but price of the two consignments noted above are not paid. The appellant when pursued the matter further he came to know that bankruptcy is declared against the foreign buyer. In this situation, the appellant made a request for write off to the RBI in 1996 but RBI failed either to reject the request or accept the same. It is argued that in this factual scenario the appellant cannot be held guilty for not taking reasonable steps for repatriation of export proceeds in violation of section 18(2), read with section 18(3) of FER Act. Per contra Shri A.C. Singh, DLA argued that section 18(2) prescribes a period of six months for repatriation of export proceeds which the appellant himself declared in its declaration filed under section 18(1) FER Act. When the export proceeds were not received within six months an adverse presumption though rebuttable has arisen under section 18(3) FER Act. Therefore, the appellant is correctly held guilty and impugned order is liable to be sustained.

3. It is legally well-settled that exporter is obliged in law to take reasonable steps for repatriation of export proceeds whereafter he is absolved from imputation, if otherwise not guilty of misconduct in any other manner. The obligation is to make best endeavour appropriate in the circumstances for repatriation of export price but end result of receipt or no receipt of money is not the criteria. The receipt of price can at best throw light on total quantum of efforts, if they are reasonable in the circumstances. The law in this regard is contained in sections 18(2) and 18(3) FERA Act, 1973 which reads as follows:

Section 18. Payment for exported goods.-(1)** ** **

(2) Where any export of goods, has been made, no person shall, except with the permission of the Reserve Bank, do or refrain from doing anything, or take or refrain from taking any action, which has the effect of securing-

(A) ** ** **

(c) that payment for the goods -

(iii) is made otherwise than in the prescribed manner, or,

(3) Where in relation to any goods to which a notification under clause (a) of sub-section (1) applies the prescribed period has expired and payment, therefore, has not been made as aforesaid, it shall be presumed, unless the contrary is proved by the person who has sold or is entitled to sell the goods or to procure the sale thereof, that such person has not taken all reasonable steps to receive or recover, the payment for the goods as aforesaid and he shall accordingly be presumed to have contravened the provisions of sub-section (2).

4. Sub-section (3) of section 18 provides that if exporter does not receive payment of goods exported within the prescribed period, it shall be presumed that the exporter has not taken reasonable steps to receive the payment for the exports. Rule 8 of Foreign Exchange Regulations Rules, 1974 provides that the amount representing the full export value of goods exported shall be realized and be paid to the authorized dealer, on the due date for payment or within six months from the date of shipment of goods whichever is earlier. However, the presumption under section 18(3) is rebuttable and we are required to look at the facts with deep consideration if the steps taken can possibly displace the statutory presumption.

5. At this stage we are required to ascertain the meaning conveyed by word reasonable which is the prescribed standard of legal duty of the exporter and whether steps taken by appellants achieve that standard. In Advanced Law Lexicon by P. Ramanand Aiyar (3rd Edition, Vol. 4 Pages 3959 and 3968) the word reasonable has been described as follows :-

(iii) what is fair and proper under the circumstances.

(iv) the expression reasonable is not susceptible of a clear and precise definition. A thing which is reasonable in one case may not be reasonable in another. Reasonable does not mean the best, it means most suitable in a given set of circumstances.

(i) ** ** **

(ii) There is no point on which a greater amount of decision is to be found in Courts of Law and equity than as to what is reasonable.

It is impossible a priori to state what is reasonable as such in all cases. You must have the particular facts of each case established before you can ascertain what is meant by reasonable under the circumstances - Lord Romilly-M.R. Labouchere v. Dawson [1872], LR 13 Eq. CA325.

6. This is an admitted position that appellant exported the goods in 1990 under the cover of two GRIs. The first GRI is sent on 30-4-1990 and second GRI on 21-6-1990. However, on 9-8-1995 the appellant wrote a letter to US Bankruptcy Court, Los Angeles, California placing its claim of payment of the export proceeds. Thus it can be said that bankruptcy came into being or became a little bit feasible around or at the start of the year 1995. When we roughly count the period between the declaration of bankruptcy and export of the goods the total period roughly comes to 5 years. The first six months can be discounted towards appellant because the appellant has filed a declaration under section 18(1) for receipt of payment within six months. Thereafter adverse presumption under section 18(3) is raised when export proceeds were not received inasmuch as that the appellant has failed to take reasonable steps in repatriation of export proceeds. In the above situation, the appellant is required to displace the adverse legal presumption. There is nothing on record which can successfully displace the adverse presumption. The reliance of the appellant on the pendency of request of write off with RBI at the time when impugned order passed is hardly of any use to the appellant. Even today the appellant has not come out with a write off. Therefore, the reliance on the judgment in (i) Cosmique Exports Ltd. v. Director of Enforcement [1994] 76 Taxman 299 (FERAB) (Mag.), (ii) Taj Traders and Transport Co. Ltd. v. Director of Enforcement [1995] 80 Taxman 103 (FERAB) (Mag.) and (iii) Heeralal and Sons v. Director of Enforcement [1995] 71 Taxman (sic) cannot make a dent in the impugned order. Moreover this is not on the question of displacement of adverse presumption of not taking reasonable steps.

7. We agree with the arguments advanced by Shri A.C. Singh, DLA - that appellant has failed to take reasonable steps within or outside the period of six months till the foreign buyer reached bankruptcy after about more than 5 years. Therefore, the bankruptcy proceedings of the foreign buyer will also not come to the help of the appellant because it has come into being too late before which the appellant is well-expected to take reasonable steps. We do not find any error in the impugned order, hence, the impugned order is sustained and maintained.

8. For the reasons stated hereinabove, this appeal is dismissed having no merits. The penalty amount is just equal to the amount involved in contravention, hence, which cannot be termed as harsh and excessive any standards. The impugned order is sustained and maintained. The appellant is allowed to deposit the penalty within a period of 7 days from the date of receipt of this order failing which the Enforcement Directorate may recover the same in accordance with law.