

**Sai Enterprises Vs. Cc**

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**Court :** Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

**Decided On :** Mar-03-1999

**Reported in :** (1999)(83)LC319Tri(Delhi)

**Judge :** J Balasundaram, S T G.R.

**Appellant :** Sai Enterprises

**Respondent :** Cc

**Judgement :**

1. The above appeal arises out of the order of Commissioner of Customs, New Delhi by which he has confiscated 94,130 pieces of nail polish bottles collectively valued at Rs. 3,78,080/- under Section 113(d) of the Customs Act, 1962 with an option to redeem the goods on payment of a fine of Rs. 50,000/- and imposed a penalty of Rs. 10 lakhs only on the appellants. The goods have been held to be liable to confiscation on the ground of mis-declaration of particulars of quantity and value of export goods, resulting in contravention of Section 18(1)(a) read with Section 67 of the Foreign Exchange Regulation Act, 1973, read with Section 11 of the Customs Act, 1962.

2. The brief facts of the case are that the appellants had sought to export 1,20,000/-bottles of nail polish (15 ml) packed in 70 card board boxes vide Shipping bill No. 17211 dated 5.10.1995 to Hongkong declaring the FOB value as Rs. 40,40,400/-. The export was under the DEEC Scheme on value based advance licence. On the shipping bill, M/s Farina Chemical Works, Krishna Nagar, Delhi

was declared as the supporting manufacturer. Before the goods were examined, Shri M.L.

Chandra, Prop of M/s Sai Enterprises, requested under cover of letter dated 9.11.1995 for cancellation/withdrawal of the shipping bill and the Assistant Commissioner of Customs had ordered return of consignment to exporter after 100% examination of the goods. Packages No. 5, 30, 31, 50, 51, 27 were examined; in the first five packages, quantity of nail polish was found short and in the sixth package, 48 pieces were found in excess of the declared quantity and this package contained 628 pieces of empty glass bottles. Enquiries revealed that M/s Sai Enterprises had been closed for the past two to three months. The Prop of M/s Farina Chemical Works stated that they do not manufacture nail polish but only trade in the same. The Representative of the Customs House agent stated that the Prop, of M/s Sai Enterprises contacted him and told him that consignments of nail polish were to be exported to Hongkong. On 5th November, 1995, he visited Shri M.L. Chandra who asked him to prepare export documents as early as possible; that he sent the consignment to ICD on 3.11.1995; the goods were examined by the officers and found to contain less quantity than the quantity declared and that one package contained excess quantity, and empty glass bottles. The statement of Shri M.L. Chandra was recorded on 22.11.1995 in which he deposed inter alia that he had filed the shipping bill dated 5.10.1995 for export of nail polish bottles to Hongkong; that M/s Farina Chemical Works had expressed inability to supply the same and therefore, he purchased 60,000 bottles of nail polish from M/s. Butex International and 60,000 bottles of nail polish from M/s. Natural Cosmetics; he directed his CHA to lift the consignment from the factory of the supporting manufacturer; on 10.11.1985 (sic), he came to know that one factory owner had sent the wrong package and he immediately directed his CHA for withdrawal of the consignment (which was done on 10.11.1995). He further requested that the goods be examined 100% in the presence of his CHA.3. Examination took place on 22/23.11.1995 and out of a declared quantity of 1,20,000 bottles, 94,130 bottles were found and out of them, 32,448 were found empty; thus 25,870 bottles were found short.

Further the value assessed was Rs. 3,78,080/- (on the basis of statement of Shri M.L. Chandra) as against the declared value of Rs. 40,40,400/-. The shortage of empty bottles in the consignment was admitted by Shri Chandra in his statement of 4th December 1995. In his further statement recorded on 11.1.1996, Shri Chandra stated that in November 1995, he was sick and he was on bed rest and the entire business was being looked after by Shri Mohan Ram and he was not aware of the packing in which M/s Natural Cosmetics supplied the goods and he had not personally inspected the consignment and the goods were sent to the ICD in the same package in which they were received.

4. On the basis of the above, it was alleged that the appellants had violated the provisions of Section 18(1)(a) of FERA which inter alia prohibits export of specified goods unless the exporter furnishes to the prescribed authorities a declaration in the prescribed form stipulating the amount representing the full export value of the goods.

Any violation of Section 18(1)(a), is deemed to be a violation of the restriction under Section 11A of the Customs Act, 1962, under Section 67 of the FERA.5. Hence the department issued a show cause notice to M/s Sai Enterprises for gross over-valuation of the goods and mis-declaration as to quantity with a view to obtain undue export benefits under DEEC Scheme, alleging that the mis-declaration has made the goods prohibited goods in view of the relevant provisions of FERA read with Section 11 and Section 50(2) of the Customs Act, 1962 which has rendered the goods liable to confiscation under Section 113(d) and the appellants liable to penalty under Section 114(i) of the Customs Act. The notice was adjudicated by the Commissioner who confiscated the consignment with option to redeem and imposed penalty on M/s Sai Enterprises.

6. We have heard Shri J.S. Sinha, learned Advocate and Shri M.M. Dubey learned DR. The contention that the goods are not liable to confiscation under Section 113(d) as they are not prohibited goods, is not tenable-one of the requirements of export under the Customs Act, 1962 is compliance with the provisions of Section 50 which casts an obligation on an exporter to subscribe to the declaration on the presentation of a shipping bill or bill of export about the truth of the contents and

requirement of this declaration is to be read with declaration for export on the basis under Section 18(1) of the FERA 1973. Since there is a mis-declaration of value and quantity, contravention of Section 18(1) which in terms of Section 67 of the FERA is deemed to be a violation of the restriction under Section 11 of the Customs Act, is established. The above view has been expressed in the case of *Exotic Fashions v. CC Bangalore*. The decision of the Tribunal in the case of *Badri Prasad & Sons* relied upon by the learned Counsel in which it is held that when the goods are not prohibited goods for export, their confiscation is not sustainable and imposition of penalty is not justifiable, is distinguishable for the reasons that while the case of *Badri Prasad* (supra) relates to confiscation under Section 113(h), the present case is covered by Section 113(d) and further the department has been able to make out a case that the goods have been attempted to be exported contrary to a prohibition imposed by a law for the time being in force.

7. The other case law relied upon by the learned Counsel, namely the Tribunal's decision in the case of *Vikas Paul v. Collector of Customs, New Delhi* *Fitwell Exports v. Collector of Customs, New Delhi* 1999 (30) RLT 61 are also distinguishable-in the case of *Vikas Paul*, the Tribunal set aside the confiscation of goods under Section 113(d) on the ground that the Department has not been able to show any provision of law by which the goods sought to be exported are prohibited and in the second case, the Tribunal held that penal provisions were not attracted as the export of goods in question namely leather shoe uppers, was not prohibited at the material time, while in the present case, the Department has been able to show that the goods were sought to be exported contrary to provisions of law for the time being in force namely Section 18(1)(a) FERA read with Section 11A (sic) and Section 50(2) of the Customs Act, 1962. We therefore, uphold the confiscation of the goods.

8. Penalty has been imposed on Shri M.L. Chandra, Prop, of M/s Sai Enterprises on the ground that he illegally attempted to avail of the benefit of the DEEC Scheme which provides for duty free replenishment on fulfilment of export obligation. The explanation of the Prop, that it was due to sickness and due to misunderstanding on the part of his employee Shri Mohan Ram that mistake or

mix up took place, is not supported by any acceptable evidence. There is no statement or affidavit from Shri Mohanram regarding any mistake or mix up. The shipping bill was filed on 5th October 1995, as seen from the copy at page 40 of the paper book. The order for examination of package Nos. 5, 30,31,50 and 51 is dated 8.11.1995 and the request for cancellation/withdrawal of the shipping bill is dated 9.11.1995, from which it is clear that the appellant sought to escape detection by asking for cancellation as he knew that the examination would result in detection of the offence of attempt to export lesser quantity of goods on lesser value in order to obtain benefits available under the DEEC Scheme. Further the statement of Shri Ml. Chandra recorded on 22.11.1995 in which he has stated that he directed his CHA to lift the consignment of nail polish bottles directly from the factories of the supporting manufacturer belies the defence plea in the show cause notice reply dated 27.9.1996 that he sent his employee Shri Mohan Ram to arrange for empty bottles for supply to M/s Butex International; that 90,000 to 93,000 empty bottles were purchased from the market, 60,000 bottles were given to Butex International and the remaining were kept in the godown of Sai Enterprises; that thereafter Shri Mohan Ram went to M/s Natural Cosmetics to procure 60,000 pieces of nail polish bottles and these were kept in the same godown and that on 7.11.1995, Shri Mohan Ram came and informed him that 33,000 bottles had been packed in the consignment while bottles filled with nail polish had been left in the godown of M/s Sai Enterprises. In other words, the stand in the statement dated 22.11.1995 that the consignments were directed to be lifted directly from the factories of the supporting manufacturer is diametrically opposite to the stand in the reply to the show cause notice that bottles were procured and transported to godown of M/s Sai Enterprises and Shri Mohan Ram has not come forward to support the plea contained in the reply of M/s Sai Enterprises that nail polish bottles were transported from either M/s Butex International or M/s Natural Cosmetics to the godown of M/s Sai Enterprises. Further we find that Shri M.L. Chandra fell ill at the beginning of November 1995 and later advised bed rest and surgery but he was not suffering from ill health at the time of filing of shipping bill i.e. on 5.10.1995 and therefore, the plea that mistake or mix up of the consignment had taken place and that it was Shri Mohan Ram his employee who was responsible for the same, is not acceptable. We

therefore, hold that it is Shri M.L. Chandra, Prop of M/s Sai Enterprises who had inter alia mis-declared the exported goods thereby rendering the goods liable to confiscation and he is liable to penalty under Section 114 of the Customs Act, 1962. In the circumstances, we uphold the impugned order but however, reduce the penalty to Rs. 7 lakhs on a totality of the facts and circumstances of the case. The appeal is thus dismissed subject only to the above modification in the quantum of penalty.

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