Devendradas Nautandas and Co. and Vs. Cc

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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Mumbai

Decided On : Apr-21-1999

Reported in : (1999)(85)LC483Tri(Mum.)bai

Judge : J T J.H.

Appellant : Devendradas Nautandas and Co. and

Respondent : Cc

Judgement :

1. M/s. Devendradas Nautandas & Co. filed a bill of entry showing weight of dry dates imported in 500 bags as 30000 kgs. On weighment, an excess of 3500 kgs was found. The Managing Partner of the importing firm Shri Santramdas Makhija in his statement confessed that he had knowledge of the excess dates. He also confirmed that the clearing agents did not have any such knowledge. The clearing agents in turn denied his knowledge. A written show cause notice and personal hearing were waived. The Additional Commissioner confiscated the excess dates valued at Rs. l,05,000/-M.V. but allowed redemption on payment of fine of Rs. 17,000/-. He imposed a penalty of Rs. 10,000/- on Shri Satramdas Makhija and of Rs. 25,000/- on the firm. Against this order, the firm and the managing partner filed appeals. These were decided by the Commissioner (Appeals) vide the impugned order. Before the Commissioner (Appeals) the plea was taken that the excess was the result of moisture gain. It was also claimed that to compensate for tine dry dates, a small excess was packed by the supplier. It was claimed that the full consignment was not weighed but only a sample weighment was done. It was

claimed that waiver of show cause notice could be made only before the adjudicating authority and not before the investigating authority.

The plea was made that penalty could not be imposed both on the firm and the partner. Having made these submissions and claims, the advocate for the appellants pleaded that he would not press all these points provided imposition of penalty was dealt with as per law. The Commissioner (Appeals) observed that the moisture claim could not justify the extent of the excess weight. On this ground he upheld the orders of confiscation and fine. However, he held that in terms of the Tribunal's judgement in the case of Dedhia Jewellers , the firm not being a legal person, no penalty could be imposed upon the firm. On this contention he waived the penalty imposed upon the firm but sustained the penalty imposed upon the partner.

2. Against this order, the firm have filed the appeal against the orders of confiscation and the partner has filed the appeal challenging the penalty. These appeal Numbers are C/331 /92-Bom and C/332/92-Bom.

The revenue have filed appeal bearing No. C/319/94-Bom challenging the belief of the Commissioner (Appeals) that the firm being not a legal person, no penalty could be imposed upon it. These three appeals arising out of the same impugned order are being taken up for disposal vide this common order.

3. Shri Dhuru, the ld. Consultant argued that the details of the information leading to the seizure were not given to the present appellants. He claimed that it was not possible to weigh the entire consignment within one hour as disclosed in the panchanama. He claimed that the statement of the partner was taken under duress but conceded that it was not retracted thereafter. He also contested the belief of the Additional Commissioner that the importers had waived the issue of show cause notice as well as opportunity of being heard in person.

4. Shri V.K. Suman, the ld. DR intervened and cited a letter dated 22.12.1994, contra to the above contention.

5. I find that this argument cannot be raised at this stage. This claim should have been raised before the original adjudicating authority. His orders do not indicate that these were raised before him. Before the Commissioner (Appeals), although the same submissions were made, the advocate appearing for the present appellants before the Commissioner (Appeals) gave up this option to argue on this point provided the Commissioner (Appeals) concentrated on the legal arguments made relating to justification as to penalty on both the firm and the partner. At this stage, therefore, the various claims made by Shri Dhuru cannot be considered. The order of confiscation is sustainable.

6. Shri Dhuru contested the quantum of fine. From the finding in the impugned order, it appears that this issue was not agitated before the ld. Commissioner (Appeals). Even then, it is claimed that the fine was excessive and hence it is to be considered. Section 125 of the Customs Act, 1962 lays down the parameters determining the quantum of fine. It is for the aggrieved party to show that the fine imposed in each case was not in conformity with these parameters. Their claim that the fine is too high cannot be considered. On this ground I find no substance in the appeal filed by the firm.

7. Shri Dhuru made the claim that penalty could not be imposed both on the firm and partner at the same time. As far as the appeal filed by the firm x x x x is concerned, this claim has no merit but that I will consider this submission when dealing with the revenue appeal. As regards the penalty imposed on the managing partner viz. Shri Santramdas Makhija I find that in view of his direct admission as to the knowledge of the excess weight which admission was not retracted thereafter at any stage, the penalty sustains. Given the value of the excess goods, the penalty cannot be considered as excessive. On this ground, I find that the appeal filed by the managing partner lacks merit.

8. The appeal from the revenue states that the penalty was leviable both on the firm and the partner and that the Commissioner (Appeals) was wrong in setting aside the penalty on the firm. I have considered this submission and I have seen the relevant law. The Commissioner (Appeals) relied upon the cited judgement where the Tribunal held that the firm was not a legal person. This is no longer a

good law. In their judgement in the case of Poonam Leather , the Tribunal was dealing with a case where penalty was imposed on the partnership firm and also on one of the partners, where in the peculiar circumstances the penalty imposed on the partner was waived. In another judgement in the case of Waman Hari Pethe , the Tribunal upheld the penalty imposed on the firm but waived separate penalties imposed on the partners because there was no criminal intention shown on the part of the partners. The Kerala High Court in the case of India Sea Food had held that penalty under Section 112 of the Customs Act, 1962 could be imposed upon both the firm and the partners.

9. In view of this overwhelming law laid down, there was no justification for the Commissioner (Appeals) to hold that the firm not being a legal person, no penalty could be imposed upon it.

10. Shri Dhuru at this stage submits that the penalty is to be imposed for conscious act of a person. Even if it is accepted that the firm is a legal person, nothing in the proceeding shows that a conscious act was committed by the firm. Instead it has come in the proceeding that it was the managing partner who was conscious of the excess existing. I find that this case gets covered by the last cited judgement of the Kerala High Court. In that case the firm had placed orders for refrigeration compressors. The consignment imported was not according to the specification given in the purchase order. The adjudication proceedings resulted in the imposition of penalty on the firm as well as the managing partner. In such situation, the High Court observed that it is possible in such a case to find the firm guilty of an act or omission which renders the goods liable to confiscation and at the same time to find the partner thereof guilty of abetment in the doing or omission of such act. The High Court further observed that it was possible to hold the legal entity viz., the firm liable for the act or contravention and at the same time hold the human agency viz. the Managing partner also responsible for the same. I find the judgement covers the present appeal on all force. The appeal of the revenue' is, therefore, allowed. The orders of removal of penalty on the firm are removed and the orders of the Additional Commissioner imposing penalty of Rs. 25,000/- on the firm are reinstated. Three appeals are disposed of accordingly.