

Aero Exports Vs. Cc

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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

Decided On : Jun-08-1999

Reported in : (2000)(88)LC99Tri(Delhi)

Judge : A T V.K.

Appellant : Aero Exports

Respondent : Cc

Judgement :

1. M/s. Aero Exports have filed the present appeal being aggrieved with the order-in-appeal dated 24.11.1997 passed by the Commissioner (Appeals), New Delhi.
2. Briefly stated the facts are that M/s. Aero Exports, a merchant exporter, filed a shipping bill for export of 4184 dozen of Marble Composition Note Book weighing 19000 kgs. under Value Based Advance Licence Scheme (VBAL). On examination, the net weight of goods was found to be 13,556 kgs. which was admitted by Shri K.C. Dey, Manager of the appellants, who requested that the case be decided without issue of show cause notice and without any personal hearing. The Additional Commissioner, Customs, after hearing Shri Dey on 17.10.1996, adjudicated the matter and ordered confiscation of the goods under Section 113(i) and (ii) of the Customs Act with an option to the appellant to redeem the same on payment of fine of Rs. 1,00,000/- and imposed a penalty of Rs. 50,000/- under Section 114 of the Customs Act, holding that the appellants had attempted to fraudulently fulfil export obligation under DEEC by declaring excess

weight of 5144 kgs. valued at Rs. 2,09,423/- and also attempted to evade Customs duty Rs. 51,845/- on imported goods against short supplied goods by claiming excess drawback amounting to Rs. 17,693/-. On appeal, the Commissioner (Appeals) rejected the appeal holding that they had deliberately declared the weight of the consignment without bifurcating the same into net weight of paper and net weight of mill board/strawboard with the intention of claiming higher drawback on the total consignment because the rate of draw-back on paper is manifold as compared to the mill board/straw board; that Shri Dey and Customs House Agent were fully authorised to depose on their behalf; that by merely disowning Shri Dey, they could not absolve themselves of the offence.

3. Shri R.K. Kapoor, learned Consultant, submitted that the case was adjudicated without issue of a show cause notice and without grant of personal hearing; that Shri K.C. Dey is neither their manager nor does he represent them in any manner and as such he had no authority to make a statement on their behalf; that whether the Department verified that Shri Dey was duly authorised by them in this behalf; that as such principle of natural justice was not followed. He, further, submitted that the import licence did not specify an individual value limit for printing paper and graphic art film nor did the import specify any quantity of each item to be imported; that the export obligation was mentioned in terms of value as well as quantity expressed in dozens and not in weight; that as such declaration of weight could only be considered relevant for the purpose of drawback and it was in no way related to the export obligation; that accordingly there was no short shipment; that their future import entitlement would have been considered as per ITC licence; that they could not have imported excess quantity of goods permitted for import under the ITC licence as the limiting factor was the value; that, therefore, the allegation that they would have imported excess raw material and would have sold the excess quantity on a premium is not substantiated by facts of the case; that similarly allegation of evasion of customs duty is not based on any valid reasoning as they could not have imported excess quantity since weight was not the criteria for any purpose. He also contended that as import had not at all been made by them, they cannot be penalised for an offence which had not been committed; that the cause of action would have arisen had they imported excess quantity against the licence. He also mentioned that there was no mistake in declaring the net

weight as 19000 kgs; that they did not bifurcate the net weight into paper i.e. 13556 kgs. and weight of mill board/straw board i.e.

5444 kgs. for the purpose of drawback claim; that this lapse was not intentional as they were not aware that separate rates of drawback were admissible; that Customs Department could have guided them to show the weight differently and Customs Officer should have indicated the weight separately after examining the consignment. He referred to the decision of Collector (Appeals) in Re Nitco Marble and Granite Ltd. 1996 (85) ELT 203 Collr. Appeals : 1995 (58) ECR 96 (Bom) in which it was held that when the exporter makes a declaration, it is the duty of Deptt. to verify its veracity and if the goods are not found in accordance with declaration, suitable observation can be made on shipping bill and export can be allowed. He further mentioned that as per Rule 12 of Drawback Rules (DBK Rules), they were required to state on shipping bill the description, quantity and other necessary particulars for deciding whether goods are eligible for drawback claims; that the amount or quantum of Drawback is left to the Department and accordingly the variation in weight would not be considered as misdeclaration; that in case of payment of erroneous claim, the same is recoverable under Rule 16 of DBK Rules and recourse to action under Section 113 of the Customs Act was not warranted.

4. The learned Consultant further submitted that the net weight was 18074 kgs. as against declared net weight of 19351 kgs.; that as per Rule 13 of DBK Rules, the shipping bill is not a drawback claim and exporter has to lodge a separate claim for drawback; that as such any mistake in declaration of weight in shipping bill should not be viewed seriously and the mistake can be rectified at the time of examination.

He relied upon the decision in the case of Indian Handicraft v. Collector of Customs wherein it was held that when all other documents were in order and the Department clears the documents there is no misdeclaration. The penalty cannot be imposed on account of clerical error in filling the shipping bill.

5. He also contended that the Commissioner (Appeals) did not consider all the pleas raised by them, specifically the plea that the weight of the consignment had

no bearing on VBAL or the export obligation. He further said that as full value had been realized, no penalty is imposable and reliance was placed on the decision in *Shilpi Exports v. Collector of Customs* there was no wilful violation of the law, no penalty is imposable and reliance was placed on the following decisions: *Akbar Badrudin Jiwani of Bombay v. C.C. Bombay* 1990 (28) ECR 145 (SC) : ECR C Cus. 1695 SC (iv) *Mogul Line Ltd. and Ors. v. I.J. Dutt and Anr.* 1990 (26) ECR 100 (Bom.) *Badri Prasad & Sons v. Collector of Customs* 6. Countering the argument, Shri A.M. Tilak, learned D.R. submitted that there was a clear case of fraud as brought out by the Additional Commissioner in the adjudication order which has been confirmed by the Commissioner on appeal; that the copy of the licence filed along with appeal memorandum is not complete as it does not contain the sheet containing conditions subject to which licence was granted; that as the weight of paper used is mentioned in licence, the total weight of the consignment can be worked out and accordingly the wrong mention of weight in shipping bill is relevant. He referred to the impugned adjudication order in which it was mentioned by the representative of the Custom House Agent that the weight was mentioned as intimated by the exporter (i.e. Appellants). He also mentioned that the provisions of Section 113(i) of the Customs Act are applicable as the goods were entered for exportation under claim for drawback and accordingly penalty is imposable under Section 114 of the Customs Act. He relied upon the decision in the case of *Sreeram Drinks Pvt. Ltd. v. CCE, Bhubaneshwar* wherein the Tribunal held that penalty for tax delinquency is a civil obligation and that such a civil obligation is far different from the penalty for a crime or fine or forfeiture provided as punishment for the violation of criminal or penal laws. It was also held that "unless there is something in the language of a statute indicating the need to establish element of mens rea, it is generally sufficient to prove that a default in complying with the statute has occurred." He also referred to the Judgment of the Supreme Court in the case of *Indo-China Steam Navigation Co. Ltd. v. Jasjit Singh, Additional Collector* 1983 ELT 1392 (SC) : 1984 ECR 467 (SC) : ECR C Cus. 392 SC wherein it was observed that "it would be open to the Customs Authorities to take the view that the best way to check the spread of these illegal operations is to impose deterrent fines whenever these offences are discovered and proved." 7. In reply, the learned Consultant submitted that no other condition was specified in the

import licence; that the shortage is only 1277 kgs. which is merely 6% which may be on account of covers of the Note Book.

8. I have considered the submissions of both the sides. The admitted fact is that weight of the Note Book declared by the appellants in the shipping bill was more than the actual weight. However, there is a substance in their submissions that the export obligation was in terms of dozen and not in terms of weight. I also observe that the value mentioned in the invoice is U.S. \$ 5.60 per dozen and not according to the weight. Accordingly, the weight was not relevant for the purpose of meeting the export obligation under the Value Based Advance Licence Scheme. However, the rate of drawback is as per weight and the wrong mentioning of the weight will have the bearing on the amount of drawback admissible to the appellants. As the weight has been declared wrongly provisions of Section 113(i) of the Act, read with Rule 12 of the Customs & Central Excise Drawback Rules are attracted and the goods are liable for confiscation and the appellants are liable for imposition of penalty under Section 114 of the Customs Act. There is no substance in the contention that Drawback Rules contain provisions for recovery of Drawback claimed erroneously, and therefore, provisions of Section 113 of the Customs Act should not have been invoked. The provisions of the Act are for the purpose of confiscation of the goods and imposition of penalty for violation of provisions of the Act.

Separate provision for the recovery of the erroneous or excess payment of drawback will not take away the liability of the goods from confiscation and the liability of the exporter from imposition of the penalty. The appellants have also contended violation of principle of natural justice by the adjudicating authority as they have disowned Shri K.C. Dey who had represented himself as Manager of the appellants before the Customs authorities. The appellants have not substantiated their disowning of Shri Dey by adducing any evidence to the effect that it was not Shri Dey but someone else who had taken the relevant paper to their Customs House Agent, nor they have submitted any affidavit or statement of the Customs House agent to the effect that Shri Dey was not the Manager of the appellants. Further, I observe that the Collector (Appeals) has passed the impugned order after taking into considerations all the pleas made by them as well

as after affording the personal hearing to the appellants. Moreover, the fact of excess weight as declared on the shipping bill is not denied by the appellants. In view of these facts no prejudice has been caused to the appellants by not affording any personal hearing by the adjudicating authority. However, taking into consideration all the facts and circumstances of the matter and the fact that the excess amount of Drawback Scheme was only Rs. 17,693/- in view of the view that the redemption fine and the amount of penalty imposed are on the higher side. I, therefore, reduce the redemption fine to Rs. 20,000/- from Rs. 1 lakh. I also reduce the penalty to Rs. 5000/- from Rs. 50,000/-. The appeal is disposed of in the above terms.

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