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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

Decided On : Aug-11-1999

Reported in : (2000)LC524Tri(Delhi)

Appellant : Mvt International

Respondent : Commissioner of Customs

Judgement :
"In the light of above discussion I find that the contention of the unit that over valuation in exports is not an offence under FERA or Customs Act is untenable. A case of over-valuation has clearly been made out against the unit inasmuch as huge sums through two related persons are sought to be transacted by the channel of software export. I am also not convinced of the view that ERDCI is not competent to value software. As discussed, there is a violation of Section 18(1) (a) read with Section 67 of FERA. It is mandatory for the unit to furnish correct declaration under FERA before attempting any export and Section 48 of FERA requires that every declaration under FERA must be a correct declaration. A false declaration has contravened Section 18(1)(a) and hence attracts the provision of Customs Act. Goods in this case i.e. one CD containing software sought to be exported have become prohibited goods in terms of FERA, which prohibition is deemed have been imposed under Customs Act, 1962. Thus goods are liable to confiscation under Section 113(d) of Customs Act and unit liable to action under Section 114(1) of Customs Act, 1962.

I have carefully considered the facts. There is certainly a contravention of provisions of Section 113(d) as the goods have been attempted to be exported in violation of conditions/restrictions imposed under Customs Act, 1962 as the goods valued at Rs. 8,67,856/- have been invoiced for Rs. 38,05,350/-(FOB). I order confiscation of goods under Section 113(d) of Customs Act. However, having regard to facts and circumstances of the case, I allow the goods to be exported as per invoice, on payment of redemption fine of Rs. l,00,000/-(Rupees one lakh) since 80% of the invoice value has already been realised. I also impose upon M/s. MVT International a penalty of Rs. 50,000/-(Rupees Fifty thousand) under Section 114 of the Customs Act".

2. The facts of the case in brief are on 30-9-1988, the appellants filed a Shipping Bill for export of Computer-Software. During the processing of the Shipping Bill some doubts arose about the value of the software described as Software System for Resume Data Bank on Oracle Platform. The matter was referred to the Director, Deptt. of Electronics who in turn referred the same to Electronic Research and Development Centre of India who opined that the valuation of the software in question comes to Rs. 8,67,856/- as against the declared value of Rs. 38,05,350/-. A SCN was issued to the appellants asking them to explain as to why the compact disc containing computer software should not be confiscated under Section 113 of Customs Act read with Section 18 of FERA and why penalty should not be imposed under Section 114 of the Customs Act for over-valuation of the goods. The appellants in reply to the SCN submitted that over-valuation of goods meant for export is not in offence under under Section 132 of the Customs Act read with Sections 18 and 67 of FERA; that the unit has signed a correct declaration; that the software was neither dutiable nor prohibited; that punishment cannot be inflicted under Section 132 by the Customs Authorities; that under Section 18 of FERA only realisation of full export value is relevant; that in cases where value declared is more Section 18(1) of FERA shall not be attracted; that FERA is concerned with regulation of foreign exchange and not with export of any goods; that there was no offence prescribed under FERA for overinvoicing of exports; that Section 67 of FERA cannot be pressed into service to stop exports; that Section 18(1)(a) is not violated, therefore, the restriction imposed under Section 18(1)(a) cannot be deemed to have been meant under Section 11 of

Customs Act; that the goods were neither dutiable nor prohibited and therefore, the same cannot be confiscated under Section 113 or its Sub-sections and hence penalty cannot be imposed under Section 114. In support of their contention the appellants cited and relied upon the judgment of the Hon'ble Calcutta High Court in the case of Collector of Customs, Calcutta v. Lexus Exports Pvt. Ltd. and the judgment of this Tribunal in the case of Shilpi Exports v. Collector of Customs and Badri Prashad & Sons Pvt. Ltd. v. Collector of Customs, Delhi. After careful consideration of the submissions made, the ld. Commissioner decided the issue as indicated above. Being aggrieved by this order, the appellants have filed the captioned appeal.

3. Shri J.M. Sharma, ld. Consultant assisted by Shri A.S. Khan, ld.Consultant submitted that in the instant case goods are proposed to be confiscated under Section 113 read with Section 18 and penalty is proposed to be imposed under Section 14. He submitted that Section 18(1)(a) requires that exporter shall furnish to the prescribed authority a declaration in the prescribed form which among other things shall include the amount representing full export value of the goods.

He submitted that the Hon'ble Calcutta High Court in the case of M/s.

Lexus Exports Pvt. Ltd. Held "It is best a case of overinvoicing and not a case of under invoicing. Therefore, there is no violation of Section 18(1) (a) of FERA in the instant case".

Ld. Consultant further submitted that the relevant Section of FERA is Section 67 which provides: "The restrictions imposed by or under Section 13, Clause (a) of Sub-section (1) of Section 18 and Clause (a) of Sub-section (1) of Section 19 shall be deemed to have been imposed under Section 11 of the Customs Act, 1962 and all the provisions of that Act shall have effect accordingly" 4. Ld. Consultant therefore, submitted that since Section 67 of FERA provides the restriction imposed by Section 18(1)(a) of FERA be deemed to have been imposed under Section 11 of the Customs Act, 1962. He submitted that in the instant case there is no violation of Section 18(1)(a) of FERA then there is no violation of Section 11 of the Customs Act, 1962. He submitted that Section 18(1) (a) only restricts export, there is no other offence prescribed in the statute for such violation. He submitted

that once the full export value is mentioned, export cannot be stopped. He submits that there is no other misdeclaration and therefore, the goods cannot be confiscated. Ld.

Consultant submits that Section 113 of Customs Act, 1962 provides for confiscation of goods attempted to be improperly exported; that Section 113(d) provides that any goods attempted to be exported or brought within the limits of any Customs area for the purpose of export contrary to any prohibition imposed by or under this Act or any other law for the time being in force are lia-i ble to confiscation. He submits that there is no prohibition imposed in the instant case under the Customs Act, 1962; that none of the grounds mentioned in Section 11 of the Customs Act are applicable in this case. There is no prohibition imposed under FERA and therefore, confiscation under Section 113(d) was not warranted. Ld. Consultant therefore, submitted that the position being very clear the confiscation of the goods and imposition of penalty was not warranted and therefore, prayed that the impugned order may be set aside and the appeal may be allowed.

5. Shri T.A. Arunachalam, ld. DR submits that Shri Diwakar Mishra, Manager of the Unit in his statement recorded on 22-10-1998 stated that there was a manipulation to the extent of 20% and the software was over-invoiced to earn more profit, that their foreign client is a NRI a known associate and therefore, they had no problem in arranging foreign remittance. He submitted that when this statement is read with the expert opinion given by the Electronic Research & Development Centre, the misdeclaration is fully proved. He submits that misdeclaration in regard to value is an offence under Section 18(1)(a) of FERA. He submits that by virtue of Section 67 of FERA it becomes an offence under Section 11 of the Customs Act, 1962. He submits that since there was misdeclaration in regard to value in terms of Section 18(1)(a) of FERA, therefore, the goods become liable to confiscation under Section 113(d) of Customs Act and have rightly been confiscated and since the goods were confiscated, therefore, penalty was imposable which has been imposed and is sustainable in law. He, therefore, prayed that the appeal may be rejected.

6. Ld. DR submitted that issue is covered by the decision of the Hon'ble Calcutta High Court in the case of Tosh & Sons Pvt. Ltd. v.Asstt. Collector of Customs wherein the Hon'ble Calcutta High Court ruled that the particulars given in the declaration are not true and correct in all respects, therefore, Section 18 is attracted and there is violation of FERA. Ld. DR also cited and relied upon the decision of the Supreme Court in the case of South India Coir Mills v. Addl.

Collector of Customs in support of his contention.

7. On careful consideration of the submissions made by both the sides and the case law cited we find that the issue boils down to determine whether over-invoicing as is done in the instant case is an offence under Section 18(1)(a) of FERA. We find that two decisions have been cited by the appellants and two decisions have been cited by the respondent. In the decision cited by the appellants which was given by the Hon'ble Calcutta High Court we find that the Hon'ble High Court has ruled that over-invoicing is not an offence under Section 18(1)(a) of FERA whereas in the case relied upon by the respondent there is a decision of the Hon'ble Calcutta High Court in the case Tosh & Sons cited above, wherein it has been held that the particulars given in the declaration are not true or correct in all respects immediately under Section 18 is attracted and there is a violation of the said Act. We note that this decision cited by the respondent pertains to under-invoicing and therefore, is distinguishable inasmuch as the case which we are concerned pertains to over-invoicing. The other decision that has been relied upon by the respondent pertains to the old Foreign Exchange Act and not to FERA of 73 under which the present case comes.

In view of the Hon'ble Calcutta High Court ruling cited by the appellant we hold that overinvoicing as in the present case is not an offence under Section 18(1)(a) FERA and since it is not an offence under FERA, it does not become an offence under Section 11 of the Customs Act by virtue of Section 67 of FERA. In the circumstances, the confiscation of the goods and imposition of the penalty is not sustainable in law.

8. Having regard to the above findings, the appeal is allowed.

Consequential relief, if any, shall be admissible to the appellants in accordance with law.