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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

Decided On : Jul-29-1986

Reported in : (1987)(27)ELT121TriDel

Appellant : Jacson Thavera

Respondent : Collector of Customs

Judgement :

(a) the appellant was served with a notice dated 4-6-1982 (at P.57 and 58 of the Paper Book filed by the appellant) alleging, inter alia, (i) the clearance of the machinery imported under Heading No. 84.66 of the First Schedule to the Customs Tariff Act, 1975, on payment of duty at concessional rates as therein specified, after registration of the contract for supply of the machinery as a "Project Import" at the request and on the application of the appellant, (ii) failure of the appellant either to instal the machinery imported in their premises or utilize the same for the substantial expansion of their factory and consequent improvement in its output for export, contrary to the declared intent as set forth in the aforesaid application for registration as well as the Bill of Entry dated 12-11-1979, (iii) apparent misdeclaration in the application as well as the Bill of Entry which would necessitate a reassessment under S. 17(4) of the Customs Act, 1962 (hereinafter, the Act) on merits without the benefit of the concessional assessment earlier granted on the faith of the aforesaid misrepresentation, (iv) liability of the machinery to confiscation in terms of Section 111(m) and (o) and of the applicant to penalty under S. 112 of the Act, and requiring the appellant to show cause as to

why the proviso to S. 28(1) may not be invoked, the assessment revised, the machinery confiscated and the penalty levied; (b) in a reply dated 7-7-1982 to the aforesaid notice to show cause (signed by a partner of the appellant and appearing at P. 51-55 of the Paper Book) while denying the allegations in toto and in particular the allegations of suppression of facts or misdeclaration, it was alleged that the import was in full accord and compliance with all legal requirements and on payment of the requisite amount of duty. However, the ownership in the machinery had to be transferred and this was done according to law with the approval of all the authorities of the Government and the machinery had been utilized for the purpose for which it was sought to be imported and allowed. Utilization being in accord with the declaration, the change in ownership notwithstanding, there was no offence committed -that would warrant confiscation or levy of penalty. Once Project Import endorsement is made in the licence by the appropriate authority, and the conditions prescribed in the Project Imports (Regulation of Contract) Regulations, 1975, were fulfilled at the time of the clearance, the machinery was irrevocably entitled to the concessional duty in terms of the Heading 84.66 of the First Schedule to the Indian Tariff Act, 1975.

In any view, the Customs can hardly have jurisdiction to enquire into the question of subsequent change of ownership in the imported machinery as long as they serve the purpose of import. Nor can the case be judged, not by reference to the facts as they existed at the relevant time, but with reference to subsequent events. There was, in the circumstances, neither a misstatement nor suppression of facts; (c) by another notice issued on 17-6-1982, [P. 56 of the Paper Book] purportedly under the proviso to S. 28(1) of the Act, it was, inter alia, alleged that an amount of Rs. 2,00,000/- was short levied on account of the aforesaid misdeclaration and the appellant was required to show cause as to why the said amount should not be recovered. The notice was neither by way of, a corrigendum nor supersession of the earlier notice. While the earlier notice required the appellant to show cause to the Collector of Customs and Central Excise, this subsequent notice required the appellant to show cause to the Assistant Collector of Customs; (d) in a reply dated 12-7-1982 [P. 49-50 of the Paper Book], the misdeclaration or suppression of facts was denied and the applicability of the larger period of limitation in consequence thereof disputed. It was further contended that the matter was already subjudice

before the Collector and, hence, it was improper to proceed further with adjudication of the notice; (e) in adjudication of the earlier notice dated 4-6-1982, issued under S. 124 of the Act, as would appear from the internal page 3 of the Order in Original [at p. 22 to 28 of the Paper Book], the learned Collector of Customs and Central Excise recorded the submissions in the oral hearing to the effect that the appellants had sold all their assets and liabilities (including old machinery) to M/s Jacsons Veneers and Panels Pvt. Ltd. (hereinafter, the Company) in which some of the partners of the appellant were taken as directors; and although the licensing authorities refused to agree to the transfer, since the shipment had already taken place, the transfer by sale of the imported machinery was noted by them without any objection and approved by the Ernakulam District Industries Centre, Government of Kerala. It would also appear that it was admitted before him that a technical error was committed in stating that the machinery was meant for substantial expansion of an existing unit, since in actual fact, it was required for setting up a new unit for the company. However, since the main condition for the project import concession was fulfilled, the technical irregularity may be condoned. It was further submitted before him that the appellant partnership existed only on paper and not carrying on any manufacturing activities. Their export obligations were being discharged by the company; (f) in the memorandum of appeal or in any other paper filed before us, the admission recorded by the learned Collector in his order had not been controverted; (i) in the application for registration dated 21-11-1979, it was declared by the appellant that the machinery was meant for the substantial expansion of their existing plant which had then an installed capacity of 25,000 sq. mts. per annum. This was admitted in the reply to the notice to show cause as well. It was one of the partners of the appellant that signed declaration in the Bill of Entry on or about 12-11-1979; (ii) all this, notwithstanding an agreement dated 31-7-1979 itself (i.e., nearly three months twenty one days prior to the application) with the company for sale and transfer of all the assets of the appellant; (iii) on 21-7-1979, when they applied for registration, or on 12-11-79 when the Bill of Entry- was signed, the appellant had no intention to use the imported goods for substantial expansion of their existing unit. Consequently, their declaration in both the aforesaid documents was incorrect. Nor did they disclose the true state of affair's at the time of clearance.

The goods could not have been cleared at a concessional rate under heading 84.66 of the Schedule to the Customs Tariff Act, otherwise; (iv) the request for transfer of the licence in favour of the company on or about 24-10-1979 and its rejection on 26-11-1979 by the Deputy Chief Controller of Imports and Exports confirms that at the time of clearance of the goods, the appellant had no interest in the goods and the application for registration and the declaration in the Bill of Entry were made just for getting the goods assessed at a lower rate of duty; (v) assessment being the responsibility of the respondent, the subsequent approval that may have been granted to the transfer of ownership in the goods by the Ernakulam District Industries Centre (Government of Kerala) is irrelevant. So also is the failure of the licensing authorities to object to the transfer or take any action; (vi) it was, hence, ordered that the goods may be reassessed to duty under S. 17(4) read with the proviso to S. 28 of the Act, and since the goods, which became liable to confiscation under S. 111(m) and (o) of the Act, are not available, the appellant is liable to a penalty of Rs. 50,000/- (P. 22 to 28 of the Paper Book); 2. On 28-10-1985, when the appeal was taken up for hearing, Shri Gulati, the learned advocate, who appeared for the appellant was directed to file eight documents. It was noted on 1-1-1986, that in the place of the documents desired by the Tribunal, Shri Gulati filed a number of other documents including a "Supplementary Memorandum of appeal". Accordingly, Shri Gulati was told that if any of them were not already on record, he may have to file an application for their admission as additional evidence, if at all. Similarly, in regard to the "Supplementary Memorandum of appeal" as well, an application for amendment of the existing memorandum may have to be made (vide Tribunal's order dated 1-1-1986). On 14/15-1-1986 a miscellaneous application was filed for the admission of the new documents and also praying that "the appeal originally filed (reserving appellants rights to refer and rely on the facts and grounds set therein) be taken as amended by the supplementary memorandum of appeal, though, in fact, it is a recasting of the original appeal".

4. The documents sought to be admitted in evidence now would all appear to have been all along in the possession and power and custody of the appellant. It was not as if they could not have been produced despite due diligence before the Collector of Customs. However, since these documents were alleged to be

required to explain or refute the documents that were called for by the Tribunal, they are all admitted into evidence.

5. A "supplementary grounds of appeal" is unknown to civil procedure.

Grounds of appeal could be amended by an appropriate application. They are never "recast" wholesale. Nor, in the guise of recasting, some of the earlier grounds now thought to be inconvenient omitted, like e.g., Ground No. 4 in the memorandum of appeal originally filed and a few more new grounds added (grounds 1, 2, 3 of the "Supplementary affidavit"). Seeing, however, that the additional grounds were merely legal and the rest of the "Supplementary Grounds") a mere rehash of the facts of the case, we take it on record and consider it along with the original grounds of appeal, so that the appellant may not make a grievance of our rejection thereof.

6. On being required to do so at the end of the hearing, an affidavit was filed disclosing on oath the date of payment of the consideration for the transfer of the business of the appellant as a going concern to the company in terms, of the agreement dated 31-7-1979 (P. 31 to 36 of the Paper Book). It is stated that the consideration for the agreement in a sum of Rs. 38,587.52 was received by the appellant in the shape of 400 equity shares of Rs. 100/- each (total value Rs. 40,000/-) in the company on 5th October, 1985.

7. We heard Shri Gulati and Shri Gujral at considerable length. Apart from reiterating the submissions set forth in the replies to the notices to show cause, the grounds of appeal and the Supplementary Grounds of appeal, that had canvassed all the grounds that may possibly be taken up in an appeal, like e.g., amalgamation of the appellant with the company rather than dissolution of the former, non application of mind in the notices to show cause, adjudication without jurisdiction or in excess of jurisdiction, transferring a running business, not a dissolution of partnership, revision of assessment only by way of an appeal and not by the issue of a notice to show cause, verification of end-use not the business of customs etc. We do not propose to go into all these submissions seriatim regardless of their relevancy in the interests of brevity.

(a) in terms of the agreement dated 31-7-1979 (P. 31-36 of the Paper Book), the assets of the appellant agreed to be transferred (not merged with) to the company included not merely the import licences but leasehold rights in the premises of the appellant; (b) a transfer of such lease-hold right or any other right in the land occupied by the factory of the appellant cannot take place without the execution of a registered document in terms of Section 17 of the Registration Act on payment of the appropriate Stamp Duty, in a case where the value of the land exceeds Rs. 100/- as, presumably, it would have; (c) on a query from us, no satisfactory reply as to whether any such document was duly executed and registered was forthcoming from the appellant. Nor was the document, if any, produced, although we desired its production. It was stated at the Bar on 4-3-1986 that all documents that were required to be stamped were duly stamped and they were filed with the Deputy Chief Controller of Imports and Exports; (d)(i) the Import Licence dated 14-2-1979 obtained by the appellant was not transferable. It was expressly made subject to the condition that the goods imported thereunder should be used only in the licensee's premises at the address furnished in the application and for the purpose for which the licence was issued and "no portion of the goods shall be sold to any other party or utilized or permitted to be used in any other manner". The licensee was to fulfil certain export obligations to earn foreign exchange for a period of five years commencing from the eighteenth month after the commissioning of the plant on paying of payment of compensation in case of failure. The licensee was also to execute an agreement with the Deputy Chief Controller in terms of Para 14X5) of the Import Trade Control Handbook of Rules and Procedure 1977-78 to comply with the conditions of the licence and providing for compensation in the event of nonfulfilment thereof, before the clearance of the first consignment of the capital goods against the licence; (ii) our query as to whether such an agreement was executed, was answered in the affirmative. To our further query as to whether, in consequence of the transfer to the company, the agreement was novated so that the company may be bound by the conditions of the licence, there was no satisfactory reply. Nor was the agreement produced even though required by us; (iii) although at one stage, on 31-8-1979, (letter at P. 13 of the Paper Book) an application was made jointly by the appellant and the company for transfer of the licence in favour of the latter, when the request was

turned down by the Deputy Chief Controller of imports and Exports on 26-11-1979 (the letter at P. 17 of the Paper Book), nothing further by way of a novation of the agreement was done. The Deputy Chief Controller was merely informed on 4-2-1980 that the appellant was transferring the machinery to the company pursuant to the provisions contained in paragraphs 351 to 354 of the Handbook (P. 47 of the Paper Book) and he on his part, merely noted it (letter dated 26-2-1980) at P. 48 of the Paper Book); (iv) nor was the imported machinery ever installed in the premises of the appellant. The allegation to this effect in the notice to show cause was never controverted in the reply to the notice. From the amendment made in the certificate of registration as a S.S.I. unit the machinery would appear to have been installed in a place other than appellant's factory. This was also admitted during the course of the hearing.

9. In the facts and circumstances of the case, it would appear to us that - (a) concessional assessment of goods as meant for project is not a matter of right but subject to various conditions set forth not only in the relevant Heading No. 84.66 but the Project Imports (Registration of Contracts) Regulations, and the Import Licence as well; (b) the questions that arise in the appeal relate not merely to their contravention but to the contravention of the conditions of the Import Licence as well, the appellant's probable ineligibility or otherwise to the benefit of the concessional assessment, impropriety of the appellant's efforts to gain the benefit nevertheless, offence committed, if at all, in the context of the statements made on various occasions and the true facts and circumstances of the case and consequential action, if any, that could be statutorily initiated against the appellant or the goods that were imported; (c) while it may be that unless a document duly stamped and registered was executed, no transfer of any lease-hold right could have taken place, still, by virtue of the agreement between the appellant and the company and the undisputed delivery pursuant thereto, the appellant was effectively divested of possession and title thereof at least vis-a-vis the company in terms of S. 53A of the T.P. Act; (d) be that as it may, in so far as the imported goods were concerned, the change in ownership by delivery to the company for a consideration in a sum of Rs. 38,58,587.52 was complete and undisputed, notwithstanding that the conditions in the licence prohibiting any sale were breached and never adhered to. Not merely was the title to imported goods

transferred but the requisite undertaking in the agreement, if executed by the Appellant, was rendered ineffective and unenforceable against the transferee (the company) by the Appellant's failure to initiate and bring about a novation thereof in consequence of the transfer. The belated receipt of consideration allegedly on 5-10-1985, assuming to be true, does not have any effect of invalidation or postponement of the transfer; (e) the specific conditions of the licence take precedence and override any general conditions that may, if at all, exist in the handbook of Import-Export Procedures, 1979-80. The Appellant relied upon Paragraphs 347-354 of the aforesaid Handbook in support of the joint application dated 31-8-1979 for transfer of the licence in favour of the company, while the Respondent drew our attention to the contents of Paragraphs 384-387. Even if one were to assume that a sale of the imported goods could take place, notwithstanding the specific conditions in the licence categorically prohibiting it, still, in terms of paragraphs 347-354, the prior permission of the licensing or the sponsoring authority, as the case may be, will have to be obtained, depending upon whether the change in ownership of the goods takes place prior to import or after the import [Para 347(1) and (iii)]. In other words, if it were prior to import, the permission of the licensing authority and if after import, the permission of the sponsoring authority have, necessarily, to be obtained. As already observed, the permission of the licensing authority was applied for prior to import. It was never accorded (Pp. 13-14 and 17 of the Paper Book). Once such permission was not accorded, there is no question, obviously, of the sponsoring authority permitting such transfer after the import had taken place on 12-11-1979. Nor is there any such permission on record.

Similarly, there is no question of the licensing authority according permission after the import on 12-11-1979, even if it may be that the sponsoring authority recommends it on or about 20-11-1979 (P. 42 of the Paper Book)." When, therefore, the Appellant informed the licensing authority of the transfer by the letter dated 4-2-1980 [P. 19 of the Paper Book - the date is not 4-2-1979 as given in the Index] long after the import on 12-11-1979, his reply dated 26-2-1980 (P. 20 of the Paper Book) that it was noted cannot be read as a permission, seeing that he was incompetent, at that stage, to have accorded any permission whatsoever. Paragraphs 384-387 deal with amendments of licence once granted in case of

any. discrepancy therein and have thus no relevance; (f) the conclusion, in the circumstances, inevitably, is that not only was the transfer in flagrant violation of the conditions in the licence but even if such transfer could take place with prior permission of one or the other authorities, no requisite permission had ever been obtained for the transfer/sale of the imported goods; (g) the question then arises as to when exactly the unauthorised transfer had taken place. Not obviously prior to the import. There was only an agreement at that stage - an agreement for sale/transfer of goods in future and not exactly a contract of sale of goods *eo-presenti*. There is a clear distinction between the two. In a contract of sale, there is a transfer of ownership and property in the goods from the seller to the buyer. There is none in an agreement to sell [(1955) 1 S.C.R. 243 : AIR 1954 S.C. 459 Sales Tax Officer, Pilibhit v. Budh Prakash Jai Prakash]. The nature of the agreement and the tenure of its terms and conditions and even The joint application for transfer of licence dated 31-8-1979 leave no manner of doubt that it has to be performed in future and in so far as the imported goods are concerned, by delivery thereof. No delivery could take place unless the goods are cleared through the Customs by the owner thereof. Accordingly, the sale or transfer had taken place after 12-11-79 but prior to 4-2-80 when the licensing authority was told of it (P. 19 of the Paper Book). It would, hence, appear that at the time of import, the appellant continued to be owner of the goods imported; (i) it cannot be that there was any misdeclaration of the ownership of the goods in the Bill of Entry. The appellant continued to be the owner of the goods on 12-11-1979 when it was filed. The intent to transfer or sell the imported goods pursuant to the agreement may have been very much present. Mere intent is not performance and till the agreement was performed, there was no change in ownership. The learned Collector's finding that the Appellant had no interest in the goods was not correct, (ii) but that was not the only misdeclaration that was complained of. There was the misdeclaration in the application for registration of the contract for supply of the machinery as a "Project import" in terms of the Project Import (Registration of Contract) Regulations, 1975. The application was made on 21-11-1979. It was declared therein that the machinery was meant for the substantial expansion of the Appellant's existing plant. The agreement dated 31-7-1979 for transfer was already executed by that date. Contrary to the intent expressed in the agreement,

the Appellant could not have declared, as was done in the application, that the machinery was meant for the expansion of the appellant's existing plant. That an error was committed in such a declaration was even admitted in the course of the enquiry before the Collector and the admission never controverted, as already observed, (iii) even so, the goods could not have been confiscated under S. 111(m) of the Act, for the aforesaid misdeclaration seeing that the said provision concerns itself entirely with the misdeclaration in the entry made under the Act. As an entry is defined in terms of S. 2(16) of the Act, (in so far material), to mean an entry made in the bill of entry, shipping bill or bill of export only. The misdeclaration in the application for registration for project import is not comprehended within the ambit of S. 111(m); (iv) the confiscation of the goods under S. 111(o) of the Act was, however, another matter. The goods were partially exempted from duty subject to certain conditions incorporated in the Tariff heading 84.66 as well as in the Import Licence. Those conditions had to be fulfilled, since their non-observance, as already seen, had not been sanctioned by the proper officer. The conditions were cynically violated. The machinery was never installed for a substantial expansion of the specified industrial unit of the appellant but was diverted to another factory at a different location. Consequently, the goods would have been liable for confiscation under that provision, (v) once they were so liable to confiscation, the levy of a penalty under S. 112 is sustainable notwithstanding that the goods were not, in fact, confiscated, (vi) nor can it be seriously contended that the proviso to S. 28 of the Act (which provided for a period of limitation extending to five years for recovery of duty short levied) could not have been invoked. The factum of the intended transfer (and subsequently the actual transfer itself) was suppressed from the Customs. There was the mis-statement in the application for registration of project import, and the short levy on the application of a concessional rate of duty was the direct result thereof; (i) We see no merits in the contentions advanced for the appellant, since, (i) there is no question of acting without jurisdiction or in excess of jurisdiction in the issue of the notice to show cause or the adjudication pursuant thereto. Nor is it as if the Respondent is unconcerned as to what happens to the goods after their import.

Sub-section (o) of S. III of the Act would altogether become nugatory if that be the case. If the goods had to be confiscated for the contravention of any condition

subject to which they were allowed to be imported, and a penalty, levied, how can it be that the Revenue has no jurisdiction to adjudicate upon a dispute in consequence of a notice to show cause for that purpose; (ii) the performance of the conditions subject to which the licence was issued could, in their very nature, be only subsequent to clearance. The breach thereof can also be subsequent. It is erroneous, in the premises, to say that the case cannot be adjudged in the context of subsequent events; (iii) the question is not if the goods served the purpose for which they were imported. On the contrary, the question is if the conditions for the import had been scrupulously observed and adhered to; (iv) the requisite amount was not paid. It was actually evaded on the pretext that the import was a project import, and meant for the expansion of an existing unit. The short levy was the direct result of such mis-statement as well as the suppression of all material facts relating to the transfer of the imported goods to the company from the Respondent; (v) the penalty levied does not appear excessive if one were to take into account the duty sought to be evaded and the deliberate suppression and mis-statement indulged in by the Appellant.

10. In the premises, we see no reason to interfere with the order of the Collector. The appeal is, accordingly, dismissed.

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