Chetak Enterprises Vs. Commissioner of C. Ex. and Cus.

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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Mumbai

Decided On : Oct-31-2002

Reported in : (2003)(159)ELT407Tri(Mum.)bai

Judge : J Balasundaram, J T J.H.

Appellant : Chetak Enterprises

Respondent : Commissioner of C. Ex. and Cus.

Advocate for Pet/Ap. : Shri. Anil Balani

Judgement :

1. On hearing both sides on the application for waiver of pre-deposit of the duty and penalty, it appeared that the appeal itself could be taken up for disposal. Both sides agreeing, the prayer was granted and the appeal was taken up for disposal.

2. The appellants imported CVD players, perfumes, cordless phones, calculators and other miscellaneous goods and filed bills of entry No.118 on 7-5-2002. The goods were examined in the presence of DRI Officers and orders were made for verification of the prices declared in association with the Directorate of Valuation. The value of the goods was increased, the bill of entry was assessed and concurrently audited. Thereafter the statement of the proprietor of the importing concern namely, Kenya was recorded. He claimed to be a front man for others, which was one Rashid Shaik in the present consignment. He confessed ignorance about the aspect of valuation Rashid Shaik in his statement admitted under

invoicing. His brother in Dubai would pay full price in Dubai but would receive invoices showing lesser valuation. He confessed that earlier also goods imported vide bill of entry No. 485, dt. 26-4-2002 were under-valued. Both Kenya and Shaik waived issues of show cause notice as also the right to be heard in person. The Commissioner proposed to evaluate the VCD player and the telephones on the basis of the value of identical/similar goods in terms of Rules 5 and 6 of the Customs Valuation Rules, 1988. He proposed to evaluate the other goods per Rule 7 of the said Rules. He observed that an exercise had been done by the department and that he was adopting the valuation.

He not only increased value of the goods imported vide bill of entry No. 118 but also enhanced the valuation of goods imported and cleared in the case of earlier bill of entry dt. 26-4-2002. He confiscated the goods available but granted the redemption on payment of fine. He imposed penalties on both the appellants separately for rendering the goods imported under both bills of entry to confiscation. This appeal is filed against this order.

3. Shri Anil Balani ld. Counsel, appearing for the appellant made the grievance that in the case of bill of entry No. 114, the prices had been enhanced by the competent authority and by way of finalisation of the bill of entry, a valid order had been passed by the proper officer.

The Commissioner could not pass another order further enhancing value of the goods. In making this statement he relied upon Para 6 of the Larger Bench judgment of the Tribunal in the case of Collector of Customs, Cochin v. Arvind Export (P) Ltd. [2001 (130) E.L.T. 54 (Trib.-LB). His second grievance was that the material on which the value was proposed further to be enhanced, had not been disclosed by the department. He. stated that where the issue of a written notice was payable the importer was still entitled to know the charges against him and the grounds on which the charges was made. He stated that the Commissioner referred to certain work sheets, these were not shown to him before the order was passed. Subsequent to the receipt of the data, he found that even where the value of identical goods was available, the DRI officers had mutilated that entry and had adopted the value of another model of VCD. He stated that the entire exercise was done behind the back of the appellants.

4. As regards the confirmation of differential duty for the goods cleared under the earlier bill of entry No. 485, it was his claim that this being a case of duty short-levied the formal notice under the provisions of Section 28 of the Act had to be issued. He claimed that there was no scope for waiver of a notice under Section 28 of the Act.

5. To a specific query he clarified that the statements of both Kenya and Rashid had not been subsequently retracted. It was his claim that mere confessional statement was not sufficient to enhance the value in the absence of contemporary evidence of goods being cleared at higher valuation. It was his claim that the values, as have been declared by the appellant were declared by other importers for the same goods imported at Goa which had been accepted by the Customs without contest.

6. Shri Virag Gupta, DR, justified the beliefs; of; the Commissioner.

Citing the Supreme Court judgment in the case of Jain Shudh Vanaspati Ltd., he stated that where there was a fraud, the assessment could be reopened.

8. The impugned order covers two bills of entry. The goods imported under Bill of Entry No. 118 are in the custody of customs. The proposal made was of liability of the goods to confiscation on account of misdeclaration of value and of liability of the importers to penalty.

Section 124 of the Act which prescribes issue of notice, states that such notice may be oral if so desired by the noticee. Therefore where the issue of written show cause notice is waived it is mandatory on part of the adjudicating authority to disclose to the offender the action proposed as also the grounds on which the action is proposed. In the present case the material on which the escalation was proposed as also the quantum of escalation, was not disclosed to the appellants.

Therefore, the appellants were deprived of the opportunity to state their case. This denial of natural justice renders the orders of escalation of confiscation as also the imposition of penalty in the case of goods imported under Bill of Entry No. 118

untenable. This is laid down by the Tribunal in their judgment in the case of Hi-Tron Electronics v. Collector of Customs [1989 (42) E.L.T. 4 (Tribunal)].

The issue would have to be remanded to the Commissioner for readjudication.

9. As regards the orders made by the Commissioner with reference to the goods imported under bill of entry No. 485, dt. 26-4-2002, the situation is radically different. The situation is of short-levy of the duty. In that situation the demand could be made only under Section 28 of the Customs Act. In that section there is no provision for waiver of issue of a formal show cause notice. The demand in so far as this bill of entry is concerned, also, in addition, suffers from the same defects and drawbacks as were pointed out by us in the case of the other bill of entry No. 118, dt. 7-5-2002.

10. In the result we allow this appeal and set aside the impugned order. The proceedings are remanded to the jurisdictional Commissioner.

He shall issue a notice under Section 28(1) for recovery of short-levy of duty on the goods cleared under bill of entry No. 485, dt.

26-4-2002. He is free to invoke the provisions of Section 111(m) as also of Section 112(a) in the show cause notice regarding the liability of goods to confiscation and levy of penalty. At his discretion he may include in the show cause notice such liability to confiscation as also the proposal of escalation of the value of the goods imported under bill of entry No. 118 giving the grounds and reasoning, In the alternative, in view of the waiver of the written show cause notice, he may issue a memorandum to the appellant stating the grounds on which such action is proposed to be taken in connection with those goods.

11. In order to prevent damage and deterioration to the goods, we expect the Commissioner to complete the proceedings within two months of the receipt of this order. The appellants are directed to co-operate.