

Commissioner of Customs Vs. M. Vasi

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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Mumbai

Decided On : Nov-12-2002

Reported in : (2003)(151)ELT312Tri(Mum.)bai

Judge : J Balasundaram, J T J.H.

Appellant : Commissioner of Customs

Respondent : M. Vasi

Judgement :

1. These five appeals arise out of the single Order of the Commissioner of Customs, Bombay Airport. As the issue and parties are inter connected, these appeals are disposed of vide this single order.

2. 5 Mail packages addressed to Sunrise Enterprise, Shop No. 3, Building-1, Amrit Nagar, Jogeshwari (West), Bombay were intercepted on arrival by airmail. The goods were declared as 'Watch Modules'. The invoices for the goods were inside the mail packages. The goods were declared, as samples. The goods were seized in the belief that they were liable to confiscation. Subsequent investigations showed that at the address given M/s. Sunrise Enterprise did not exist. In the premises was a tailoring shop run by one Mr. A.R. Rahman. Two days subsequent to the seizure, one Mr. M.V. Shamsuddin claimed ownership and produced documents for claiming the goods imported. He furnished a Deed of Partnership between himself and one Mr. J.H. Abdulrahman for the firm Sunrise Enterprise and a certificate giving the Import Export Code Number. It was found that earlier

he had claimed another Import Export Code Number. He clarified that he had another company which was in possession of the IEC Number which he had wrongly given as that of M/s. Sunrise Enterprise. Mr. Shamsuddin stated that he did not know why the sender has described the goods as 'samples'. Subsequent enquiries showed that the Partnership Deed purported to be made in July 1998 was actually made subsequent to the import of the goods. J.H. Abdulrahman, the partner of M.W. Shamsuddin was the owner of the tailoring shop occupying the premises and was known to M.W. Shamsuddin for several years. He claimed that he had signed the Partnership Deed on 7-11-1998 in good faith. In further investigations the Stamp Vendor Mr. Mutta agreed to having back dated the stamp paper and having put a bogus serial number for money consideration. The Notary Shri Lambat stated that he had notarized the document on seeing the signature of Shri Pandey, the Advocate. He admitted that the partners were not before him when he notarized the document. He stated that the date was put later by someone else. Advocate Shri Pandey claimed that the signature on the notarized deed was not his.

3. Show Cause Notice was issued on 26-4-1999 proposing to increase the value of watch modules in terms of Rule 6 of the Customs Valuation Rules, 1988. It was alleged that the watch modules were liable for confiscation under Section 111(d), (f) & (m) of the Customs Act along with containers thereof and that the two partners, the Stamp Vendor, the Notary and Advocate were liable for Penalty.

4. After hearing the Noticees, the Commissioner passed the impugned Order. The Commissioner observed that the contested goods were freely importable. He observed that no provisions of law had been mentioned in the Show Cause Notice which required the importer to possess the documents such as lawful existence and IEC Number on the date of shipment. He referred to the clarification issued by the DGFT to the effect that goods which had arrived prior to obtaining IEC Number could also be cleared on later receipt of such number. He observed that the declaration as 'watch modules' was sufficient for the purpose of Section 82 of the Customs Act. Citing the procedure for clearance of post parcels, he observed that the goods could be cleared on perusal of the declaration and in case of doubt only the recipient would be called. He observed that on the face of the declaration there

was nothing found lacking and also there was no misdeclaration. He therefore declined to order confiscation of the goods or to impose any penalty on any of the noticees. He further directed that the value of the goods be determined in terms of the Customs Valuation Rules. The present appeals have been filed by the Revenue against this Order.

6. Shri M.W. Shamsuddin & Shri J.H. Rahman were represented by Shri Ravi Hirani., Shri Dwivedi was representing S/Shri Lambat and Pandey.

Shri Mutta was neither present nor represented.

7. Shri Gupta maintained that any goods imported by a non-existing firm were liable to confiscation. It was claimed that the consignee being non-existent the Customs Declaration was wrongly made and therefore the charge of misdeclaration would sustain. It was claimed that 'watch movements' being declared as 'watch modules' amounted to a misdeclaration. Declaring the goods as 'samples' was another dimension of misdeclaration. Charges of misdeclaration having been proved, he urged that the goods were liable for confiscation as also penalty was leviable on all the Respondents.

8. Shri Irani relied upon Tribunal Orders reported in 2001 (128) ELT 250 [Commr. of Cus., Vizag v. Shipping and Trading Associates (P) Ltd.] in which it is held that non-mention and non-possession of import export code number and licence at the time of import provided they were obtained subsequently did not render the goods liable to confiscation.

He also cited the Tribunal Order reported in 1999 (110) E.L.T. 935 [Laser Sight (India) Pvt. Ltd. v. Commissioner of C. Ex., New Delhi] with identical ratio. He made the grievance that while the appeal was pending finalisation in the Tribunal the Government had disposed of the goods. Request was made to direct relief on this ground.

10. When the goods are imported by Land, Sea or Air a Bill of Entry is filed for their clearance in terms of Section 46 of the Customs Act 1962 where the responsibility of making a truthful declaration is upon the declarant and where any

contravention or lapse can render the goods liable for confiscation and the declarant liable to penalty. In the case of baggage, as per Section 77 of the Customs Act the declaration is made by the passenger orally. Section 82 which deals with post parcels is entirely different in construction and in coverage. It does not require the importer to make a declaration. The declaration made by the exporter abroad is deemed to be an entry for the goods. This is a very important difference. Even if an entry is found to be wrong the responsibility of wrong declaration cannot be fastened upon the importer. It would appear that Section 111 of the Act takes cognizance of this situation. Clauses (1) and (m) Section 111 read as below : "(1) any dutiable or prohibited goods which are not included or are in excess of those included in the entry made under this Act, or in the case of baggage in the declaration made under Section 77.

(m) any goods which do not correspond in respect of value or in any other particular with the entry made under this Act or in the case of baggage with the declaration made under Section 77 in respect thereof or in the case of goods under transshipment, with the declaration for transshipment referred to in the proviso to Sub-section (1) of Section 54" 11. The phrase "entry made under this Act" comes from Section 46. In terms of Section 82 which reads as below no entry is made by the importer. That is why where as special mention is made of Section 77, there was no mention of Section 82 in the two clauses of Section 111.

"Section 82. Label or declaration accompanying goods to be treated as entry. - In the case of goods imported or exported by post, any label or declaration accompanying the goods, which contains the description, quantity and value thereof, shall be deemed to be an entry for import or export, as the case may be for the purposes of this Act." 12. Apart from this position in law, we have examined the declaration pasted to the parcel. There is no significant difference in the declaration between 'watch movements' and 'watch modules'. The value has been declared as per invoice. The fact that the value is contested and is to be redetermined does not make the original declaration as a deliberately wrong declaration. On these grounds the Commissioner was correct in not adjudging the goods liable to confiscation under these two provisions.

13. It was time and again claimed that the non-existence of the recipient firm amounts to misdeclaration. As the Respondents continuously maintained, this allegation is not made in the show cause notice.

14. We have considered this issue carefully. The premises where the importing firm was shown to exist were in occupation of one of the partners. The existence of the partnership cannot be doubted in law because the relevant law acknowledges the possibility of a Partnership existing by a word of mouth agreement.

15. It is quite correct and it is established that the partnership agreement was back dated. But this has no material bearing on the import of 'watch modules'. We have seen the ITC (HS) Classification which at the material time listed both 'watch modules' and 'watch movements' as freely importable items. Therefore the name of the person importing the watch movements was not at all material for the purpose of importation.

16. We have earlier noticed a communication from the DGFT to the Customs in response to a query in connection with the same case. It has been made clear that IEC Number could be obtained even subsequent to the importation of the goods. Therefore the fact that IEC Number was later obtained was immaterial.

17. As we have observed above the partnership could be an oral agreement which could at a later date be converted into a written agreement. The absence of written agreement cannot automatically establish the non-existence of the partnership.

18. As regards the liability to confiscation under Section 111(d) reliance is being placed on notification issued under Section 111. The notification merely requires a declaration to be pasted on the post parcel. Therefore on this ground there is no liability. As we have mentioned above the goods are freely importable and therefore confiscation under Section 111(d) of the Act was not warranted.

19. Thus we find that the Commissioner was right in holding that the goods were not liable for confiscation. Since Shri Shamsuddin and A.R.Rahman have not filed any entry which rendered the goods liable for confiscation, his Orders not

imposing penalty upon them also sustain and are upheld. For this same reason his refraining from imposing any penalty on the other Respondents S/Shri Mutta, Lambat and Advocate Pandey also sustains.

20. S/Shri Lambat, Mutta and Pandey were alleged to have aided and abetted the acting of the two partners. Abetment presupposes knowledge of the proposed offence and also presupposes benefit to be derived by the abettors therefrom. Even if the action of backdating of the agreement is improper (and perhaps illegal), there is nothing in the evidence to indicate that these three persons were aware that the backdated document was a cover up for an offence under the Customs Act, 1962. In the absence of conscious knowledge, penalty on charge of aiding and abetting would not sustain.

21. The first two Respondents had made a grievance on the action of the department in disposal of the goods. From the documents on record we find that the permission for disposal of the goods was obtained from the Special Metropolitan Magistrate on the date of seizure itself. The goods were marked for disposal in December 1998. The goods were disposed of on 23rd & 24th March 1999 even before the order of adjudication was passed. The effect of the order as upheld by us has restored the goods to the firm. In the absence of any cross-objections filed by the partners of the firm we would not make any orders as regards the sale proceeds. The concerned persons are at liberty to take the issue up with the proper Customs Officer.

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