

Commissioner of Cus. Vs. Padma Nutrients Pvt. Ltd.

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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Mumbai

Decided On : Dec-11-2002

Reported in : (2003)(152)ELT438Tri(Mum.)bai

Judge : K Kumar, S T C.

Appellant : Commissioner of Cus.

Respondent : Padma Nutrients Pvt. Ltd.

Judgement :

1. These four appeals have been filed by Revenue against a common Order-in-Original passed by Commissioner of Customs, Mumbai. Shri Ishwar Singh, learned JDR appearing for Revenue states that the impugned order has been reviewed by the Central Board of Excise and Customs under its Order No. 150-R/97, dated 30-6-1997. The departmental appeal has been filed as per the Board's finding that the impugned order passed by the Commissioner is not proper and legal for the reasons set out in Paragraph 9A to F of the said Order of Review. The learned JDR reiterates the said reasons as also the grounds of appeal contained in the departmental appeal. He, further emphasises the following:- (1) The Commissioner should have appreciated that the provisional assessment was done not on account of applicability of Notification No. 203/92, dated 19-5-1992 but on the ground of chemical test of the goods.

(2) The Commissioner was wrong in applying the principle of comity of courts is holding D.R.I. action as without authority of law.

D.R.I. officials have been empowered with the powers of officers of Customs under the Notification No. 19/90, dated 26-4-1990 and they were fully competent to conduct investigation, make seizure and issue Show Cause Notices, (3) In any case, the D.R.I. Show Cause Notice was made answerable to the said Commissioner of Customs who had jurisdiction to adjudicate the case.

(4) The Commissioner is totally unjustified in holding the Show Cause Notices as uncalled for and not imposing any penalty on such grounds, even though he has confiscated the goods.

(5) The Commissioner is also unjustified in imposing a very low fine of Rs. 4.50 Lakhs while the value of the goods was to the tune of Rs. 2.35 Crores.

He submits that the impugned order should be set aside and the case remanded for readjudication.

2. Shri S.N. Kantawala, learned Advocate appearing for M/s. Padma Nutrients clarifies that he is not the counsel for the main parties to the case viz, M/s. Cruford etc. He submits that though the Show Cause Notices were issued to his clients, no charges were laid against them.

He further states that his clients had no role in this case except that the seized goods were stored in their premises. He states that the department's appeal does not propose any action against his clients but fairly points out that the grounds of appeal are limited to action against M/s. Cruford etc. including demand of duty and interest from them.

3. We have heard the submissions made by the learned J.D.R. as well as the learned counsel for one of the respondents. There was no representation on behalf of other respondents despite adjournment granted earlier. We feel it necessary to extract the reasons set out in the Order of Review passed by the Board in some detail which has given rise to this appeal:- "A. The Commissioner has held that the goods in this case had been provisionally assessed on the presentation of the Bs/E in the Custom House and therefore the Show Cause Notice issued demanding duty on the goods cleared on provisional assessment is

not permissible. The Commissioner has relied upon the judgment of the Divisional Bench of the Bombay High Court in the case of M/s. Godrej & Boyce as reported in 1989 (43) E.L.T. 225 (Bom.) The Commissioner ought to have appreciated that the Bs/E were assessed provisionally not on account of the applicability of the Notification No. 203/92-Cus., dated 19-5-92 but because of the chemical testing of the goods. Therefore the ratio of the Mumbai High Court judgment in the case of M/s.

Godrej & Boyce is not applicable to the facts and circumstances of the case. The Show Cause Notice is therefore, not ab-initio void or impermissible.

B. The Commissioner has observed that the proper officers in the Bombay Custom House were already seized of the matter and had taken cognizance of the import and no final benefit of clearance under Notification 203/92-Cus., had been granted. The Commissioner by relying upon the principle of Comity of Courts as emanating from the judgments of:- has further held that the investigating agencies i.e. the DRI, should have passed on the material collected pursuant to their investigation to the concerned officers who were to assess the Bs/E in the quasi judicial capacity and there was no reason to detain and/or seize the goods imported. The Commissioner has held that the officer of Central Excise, Bombay-III, had no authority of law to detain/seize such imported goods and therefore their action is ab-initio void and without the authority of law. It is pertinent here to reproduce the relevant extract of the judgment of the Hon'ble Patna High Court which reads.

"(6) In my opinion the argument of Mr. P.R. Das is correct. If the statute is construed in its plain and grammatical sense there would be conflicting orders between two jurisdictions. Complications and difficulties would arise if the two authorities hold conflicting views as to proper way of dealing the trust properties. The petitioner cannot serve two masters at the same time and if there are conflicting orders the petitioner would be placed in an impossible situation. These results are so startling that I must reject the interpretation which leads to them. In a case of this description the rule of construction is well settled. It is a matter of great public importance that there should be as far as possible no conflict or clash

of jurisdiction between two equally competent authorities. The principle at stake is the principle of comity".

The ratio of judgments relied upon by the Commissioner are not applicable to the facts of the subject case, as the DRI cannot be considered as an authority having concurrent jurisdiction over the subject case in so far as quasi judicial powers are concerned. In terms of Notification 19/90-Cus. (NT), dated 26-4-90, Asstt.

Director, DRI is also Asstt. Commissioner of Customs. Therefore, Asstt. Director, DRI is having powers to seize the goods, investigate into offences committed and issue a SCN answerable to appropriate quasi judicial authority. In the aforesaid case laws referred by the Commissioner, there was a possibility of the emergence of conflicting view as Patna High Court and High Court of Calcutta were having concurrent jurisdiction over the said matter and High Court of Calcutta had already passed an order. Therefore, there was a possibility of conflicting orders if the two courts held conflicting views on the same subject matter. In the instant case, there is no such possibility as DRI is not vested with quasi judicial powers. The Ld. Commissioner failed to appreciate that the officers of the DRI are also the officers of Customs and operate within the powers vested under the Customs Act, 1962. The Ld.

Commissioner further failed to appreciate that the officers of DRI were not exercising quasi judicial function, while investigating the case and seizing the goods liable for confiscation under the provisions of the Customs Act, 1962. On conclusion of investigations, the DRI officers had issued Show Cause Notice, answerable to the Commissioner of Customs, New Custom House, Mumbai who had the jurisdiction to adjudicate upon the matter and there was no conflict in exercising the quasi judicial powers. The Ld. Commissioner had, therefore, wrongly applied the principle of comity of courts to this case.

C. In a related case law, UOI v. Sigma Electronics - 1996 (87) E.L.T. 26 (Cal), the Hon'ble Division Bench of Calcutta High Court has recently inter alia held that the assessment made by Dy.

Commissioner of Customs being Provisional assessment, the DRI is having authority to make further enquiry for assessing the duty thereon. The Commissioner, therefore, has grossly erred in holding that the seizure and the Show Cause Notices issued by DRI were ab-initio void and thereby proceeded on premises which are not legally sustainable.

D. The Id. Commissioner ought to have considered the ratio of judgment in the case of M.D. International v. Commissioner of Customs, Mumbai, order No. 87/95A in Appeal No. C/7772/92A CEGAT, New Delhi, wherein the Hon'ble Tribunal held that the Commissioner of Customs (Preventive) was right in assuming the jurisdiction and to adjudicate the proceedings in respect of the goods which were undervalued and which were not imported in accordance with the law.

While passing the said judgment, the Hon'ble Tribunal had taken into consideration of Ramnarayan Bishwasnath v. Commissioner of Customs, Calcutta, [1998 (34) E.L.T. 202 (T)]. The Id. Commissioner ought to have considered the judgment of Hon'ble Calcutta High Court in the matter of W.P. No. 1827 of 1995, dated 22-12-95, in the case of Bowreah Cotton Mills v. Commissioner of Customs, Calcutta which upheld the jurisdiction of Commissioner of Customs (P) on the goods seized within his jurisdiction. Further the Id. Commissioner ought to have followed the CEGAT judgment Order No. 2491-95/96-WRB, dated 16-1-96 in the case of Chemical De Universe v. Commissioner of Customs (P), Bombay wherein it was held that the Commissioner of Customs (P), is appointed to be Commissioner of Customs, for Bombay, Thane and Kolaba District, in the State of Maharashtra and no restriction is imposed as to exercise the powers, hence there could be no bar to his conducting adjudication proceedings and both the Collectors could be taken to be exercising concurrent jurisdiction.

Hence the searches, seizures and the investigation by the DRI were not voidable.

E. The Commissioner of Customs has in his order held that the Show Cause Notice was void ab-initio. He has however, confiscated the goods under Section 111(d) of the Customs Act, 1962 read with Section 3(3) of the Foreign Trade (Development & Regulation) Act, 1992 and allowed their redemption against a fine

of Rs. 4,50,000/- and has simultaneously denied the duty free benefits. He ordered the recovery of full duty involved on the goods. The Commissioner though confiscated the goods, did not impose any penalty on the ground that the Show Cause Notice issued was uncalled for, void and impermissible. The Commissioner's order is thus absolutely contradictory. Since the Commissioner had ordered the imposition of fine and the recovery of duty pursuant to the DRI's investigation only it was necessary that the penalty under Section 112, too should have been imposed. The very scheme of the Customs Act provides for the mandatory imposition of such penalty once the confiscation is ordered. The Commissioner, therefore, should have imposed the penalty also under Section 112 of the Customs Act, 1962.

F. The Show Cause Notice apart from demanding the recovery of the customs duty involved has also proposed the recovery of interest at the applicable rate on the duty involved. The Commissioner however has not ordered anything regarding the recovery of the interest. The Hon'ble Supreme Court in its judgment in the case of Agricultural and Processed Food Products v. Oswal Agro Furane Ltd., as reported in 1996 (85) E.L.T. 3 (S.C.), decided on 30-4-96, has dealt with the issue of the recovery of interest on revenue in detail as prevalent prior to 26-5-95. In the said case, it has been held that there was no exemption from payment of excise duty on the goods manufactured by a 100% Export Oriented Units which were cleared for sale in the domestic market under Section 3 of the Central Excise and Salt Act, 1944. However, the concerned party in this case got an erroneous order from the High Court by virtue of which it was not required to pay the relevant excise duty. The Hon'ble Supreme Court in this order has held that the party was required to pay not only the duty but also the interest @ 18% p.a. on the duty. The Hon'ble Supreme Court has reasoned that a litigant who obtains an incorrect order and does not pay the statutory dues should not be allowed to make any profit or gain from the infraction of law. The Hon'ble Supreme Court has observed that while dealing with the business houses or companies the commercial principles must be applied by the court while ordering payment of interest. The Court was of the view that by deferring the payment of duty due to the revenue, the party had gained undue benefits in the sense that the said amount instead of being deposited in the Government treasury had found way into the party's business.

The party has used the said amount without any charges which if it had borrowed from the bank would have been lent to it on interest. The Hon'ble Apex Court therefore, ordered that the payment of interest @ 18% p.a. would be just and proper in view of the facts of the case. The said decision of the Supreme Court has been passed in April, 1996, and the impugned order of the Commissioner by dated 5-8-96. The Commissioner, therefore, should have followed the Hon'ble Supreme Court's order which laid down a rule for the recovery of interest and was binding, being the law of the land." 4. We observe that the Commissioner has clearly erred in holding that the Directorate of Revenue Intelligence had no jurisdiction to seize the goods, carry out investigation and issue a Show Cause Notice merely because the appraiser in the Custom house had assessed the goods provisionally and that to only on account of pending test reports. It is not in dispute that the officials of DRI have been properly empowered under the statute and vested with powers of Customs officials. It is also not the case of the Commissioner that the DRI authorities have proceeded to adjudicate the case themselves. In fact, the impugned Show Cause Notice dated 9-2-1996 issued by DRI is clearly made answerable to the very Commissioner of Customs who has held it to be 'uncalled for'. Even if, as the said Commissioner suggests in his impugned order that the ADG, DRI should have passed on the material collected in his investigation to the concerned appraiser in the Custom house, eventually the Show Cause Notice issued by such appraiser would also have been also made answerable to the same Commissioner of Customs. Since the adjudicating officer was the Commissioner himself, a single authority, we find that the 'theory of comity of courts' applied by the Commissioner in his impugned order to hold the Show Cause Notice 'uncalled for' is totally unacceptable and without any legal basis. It would have been a different matter if the ADG, DRI who is also vested with the powers of the Commissioner of Customs had proceeded to adjudicate on the same issue while the Commissioner of Customs in the Customs House was also adjudicating the same. However, there is no such evidence. On the contrary, the DRI officials have merely investigated the case, seized the goods and issued the Show Cause Notice making it answerable to the Commissioner of Customs in the Custom House. They were fully justified in doing so as they were vested with the necessary powers under the Customs Act. There is also no evidence on record

that the Custom House had undertaken any parallel investigation. The mere fact of the appraiser in the Custom House provisionally assessing the consignment pending test report cannot be a ground for the DRI authorities not to investigate a serious customs offence relating to the consignment. The Commissioner should not have closed his eyes to the fact that premier investigation agencies like the DRI, CBI & CEIB etc. have been set up in the country and have been given parallel powers under the relevant statutes to investigate cases of serious fraud having either implications over more jurisdiction than one or more states than one or serious cases where the field officials have either been negligent or collusive. The Commissioner's order disregarding the jurisdiction of such premier agencies as DRI and requiring them to pass on the material available with them to the field officials will seriously undermine the functioning of such agencies apart from jeopardising the economic health and well being of the nation. The action of the Commissioner is clearly against the statutory provisions. He has also clearly erred in not imposing any penalty after confiscating the goods in question merely on the ground that the Show Cause Notice has been issued by DRI authorities. The DRI authorities had every right to step in when the officers working under the Commissioner himself had not taken appropriate action to book the case.

Redemption fine of Rs. 4.5 lakhs imposed by the Commissioner in a case involving goods worth Rs. 2.35 crores also requires reconsideration.

The Commissioner has also passed no order regarding payment of interest, though such interest is payable as pointed out in the Board's order-in-review in terms of the Apex Court decision.

5. We have, therefore, no hesitation in setting aside the impugned order and remanding the case back to the successor Commissioner to re-adjudicate the case afresh. The department's appeals are allowed by way of remand.

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