

Mitexco Vs. Commissioner of Customs (E.P.)

Mitexco Vs. Commissioner of Customs (E.P.)

SooperKanoon Citation : sooperkanoon.com/30311

Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Mumbai

Decided On : Mar-13-2003

Reported in : (2002)LC8Tri(Mum.)bai

Judge : J Balasundaram, J T J.H.

Appellant : Mitexco

Respondent : Commissioner of Customs (E.P.)

Judgement :

1. These 4 Appeals relate to and arise from the same Order passed by the Commissioner of Customs (E.P), Bombay. These are therefore disposed of vide this single order.

2. M/s. Mitexco and M/s. Mittal Enterprises exported garments vide 30 Shipping Bills dated 7-10-1997 to M/s. Commercial Shivam Impex Ltd., Chile. The value of the goods was declared in the Shipping Bills as Rs. 78,05,851/-. The goods were packed in a container. Drawback was claimed and taken of Rs. 13,95,466/-. Intelligence was received that these firms were floated by Shri Manoj Mittal and Shri Ram Avtar Mittal, who were indulging in bogus exports to avail undue entitlement of drawback by filing bogus Bills of Lading. Their premises were searched and their statements were recorded. The details of the above-mentioned shipments were revealed to the investigating authorities. The officers of the SIIB then recalled the said container which arrived in March, 1998. On examination the goods were valued at Rs. 11,91,705/-. M/s. SGS India Ltd., a reputed investigation

agency were also consulted. SGS after examination opined that the various items of clothing would fetch between US\$ 3.52 to US\$ 6.25 respectively. In the investigation the assistance of one Punjabi was also taken who had supplied some of the goods to the exporters. The valuation given by him was adopted by the department for the valuation.

3. The container along with the contents were seized by the officers of the Customs on 10-3-1998 under the powers vested in them vide Section 110 of the Customs Act, 1962. The ground for seizure as given in the Panchnama was that whereas the declared was approximately Rs. 80 lacs, the ascertained value was Rs. 13,54,250/-.

4. Show Cause Notice was issued on 8-9-1998 seeking to confiscate the goods, impose penalty under Section 114(iii) of the Customs Act and for recovery of drawback of Rs. 13,95,466/- already paid to them. Where the Panchnama had valued the goods at Rs. 13,54,250/-, the Show Cause Notice adopted their value at Rs. 11,91,705/-. The Noticees filed replies. The Commissioner noted that the SGS had given a range of price for the goods from Rs. 24,94,210.34 to Rs. 28,16,941/-. He took the via media price of Rs. 26,55,575.88 in the place of the declared price. He recalculated the drawback payable on this amount and directed repayment of Rs. 8,37,795/-. He ordered confiscation of the garments, allowing them redemption on payment of fine of Rs. 8 lacs and imposed Penalties as under:- 6. We have heard Shri Anil Balani, Advocate for the Appellants and Shri Hemant Kotikar for the Revenue.

7. Section 110 of the Customs Act under which the goods were seized in these proceedings reads as under :- "SECTION 110. Seizure of goods, documents and things - (1) If the proper officer has reason to believe that any goods are liable to confiscation under this Act, he may seize such goods:....." This provision has come under the scrutiny of the Courts and the Tribunal in a number judgments. In these judgments it has been held that the existence of reasonable belief was a pre-condition for a seizure to be made. Mere suspicion could not take the place of reasonable belief.

8. In the Judgment of the Hon'ble Patna High Court reported in 2000 (126) E.L.T. 425 (Pat.) (Kara Brothers v. M.L. Dey) the provisions of Sections 110 and 111 of the Customs Act were scrutinized. The Applicants Kara Brothers were dealers in silver. Old ornaments, etc.

were being sent by them to Calcutta in an Ambassador Car. On suspicion, the car was stopped by the Customs Officers. After about five days the goods were formally seized. In the meanwhile the Customs Authorities had threatened the occupants of the Car and had demanded money. Before the Court the Customs Authorities filed affidavit to the effect that the movement of the car aroused a suspicion in the minds of the officer that there was contraband in the car. The weight of the consignment was clearly the same as in the challan. On examination of the Challan the Customs Officers thought that it was bogus and on this ground claimed that reasonable belief that the goods were liable to seizure arose in their mind, The Court examined the previous case law including the case of Pukhraj v. D.R. Kohili [1983 (13) E.L.T. 1360 (S.C)] and M.G. Abrol and Anr. v. Amichand Vallamji and Ors. [2002 (149) E.L.T. 32 (Bom) = AIR 1961 Bombay 227] as also in the case of Bapalal Khushaldas Gosalia v. R. Prasad [AIR 1965 Gujarat 135]. The Court observed that there cannot be constant measure for determining as to whether or not at the time of seizing the goods the seizure had been made under a reasonable belief that the goods were liable to confiscation. It all depended upon the facts and circumstances of the case. The Court in para 11 of the Judgment after quoting the provision of Section 110 of the Customs Act observed as under :- "The seizure of the goods must follow only if the proper officer has reason to believe that the goods were liable to confiscation, not otherwise. The view expressed by the Bombay High Court in M.C. Abrol's case is a salubrious view. A reasonable belief must exist in the mind of the officer seizing the goods at the time of the seizure itself, and only then the seizure would be valid." "Reasonable belief is not a mere suspicion or a mere subjective satisfaction. It is something more than that. It is a belief which a prudent man on applying his mind judicially to the facts will arrive at." 10. The Hon'ble Court noted the affidavit that on examination of the challan the Customs Officer had reason to believe that the goods were liable to seizure. The Hon'ble Court expressed their views in the following words :- "It passes my comprehension as to how even without seeing the goods in the car

anybody could get a reasonable belief that the goods were liable to seizure and confiscation. Obviously, therefore, the reasonable belief till this stage was not concerned with the silver in the car, but with the fakeness of the challan. Such a reasonable belief will not give the respondents the jurisdiction to seize the silver in the car. As a matter of fact the respondents themselves state in paragraph 17 of the second counter-affidavit that the challan was not in respect of the goods in the car. That being so, the fakeness or genuineness of the challan will have no bearing on the nature of the goods in the car. In other words, till this time i.e., till the time when the respondents made outwards inspection of the car and also examined the challan, they had no reasonable belief about the goods in the car being liable to seizure and confiscation." "Thus on the own showing of the Respondents neither the secret information nor the bulk of the silver goods nor the challan nor any of the other factors gave them the reasonable belief as required under Section 110 of the Customs Act, at the time when they say they got the reason to believe and seized the goods." 12. The conclusion of the Hon'ble Court was contained in Para 17 which reads as follows:- 'On the facts and circumstances, which I have discussed above, obviously, when the silver goods were transferred from WMA to the jeep, the respondents did so only under suspicion. They did not have reasons to believe at that time that the goods which were transferred into their jeep were liable to confiscation under Section 111 of the Customs Act, and when they handed over the seizure list to the petitioners, seizing the silver goods and the car, has been interpolated. I have already referred to the decision of the Bombay case in M.G. Abrol and Another's case in which it has been held - "That reasonable belief must exist in the mind of the officer seizing the goods at the time of the seizure itself. Subsequent acquisition of such belief could be of no avail".

In the instant case if transfer of the goods from the petitioners' car to the jeep is taken as the seizure of the goods, clearly the respondents did not have the reasonable belief at that time that the goods which they were transferring into their jeep was liable to confiscation and when they handed over the seizure list to the petitioners, they had no further materials before them. Even at that time, as the facts discussed above indicate, they did not have the reasonable belie.' 14. The adequacy of belief before making a seizure came before the Patna High Court in

another case, namely *Angou Golmei v. Vizovolie & Chakha Sang* [1996 (81) E.L.T. 440 (Pat.)]. In this case on receipt of information of smuggling of cloves, Customs detained cloves in two wagons at a railway yard on 30-3-93. Traders opined the cloves to be of Zanzibar origin, on 16-4-93, when a formal seizure was made. The belief of Customs arose on the fact that such goods were not grown in North East India. The Hon'ble Court noted the opinion of the Govt. of India that such spices were grown in that area. The Govt. of Nagaland and Manipur also made the same claim. The Hon'ble Court cited the Bombay High Court Judgment in the case of *M.G. Abrol* (Supra) as to the definition of reasonable belief, and held that the totality of evidence was capable of creating mere suspicion and not reason to believe.

15. Using these judgments as benchmark it has to be examined whether there was a reason to believe in the minds of the officers of the Customs in the present case as to the liability of confiscation of the goods earlier exported.

16. The relevant Shipping Bills and the invoices were shown to us by Shri Balani. All these are dated 6-10-1997. The description and the FOB Value of the goods are as follows :- 17. In addition to these goods, the consignment included Aggarbat-ties valued at US\$ 4497.52.

18. The Show Cause Notice states that there was intelligence that the two Mittals were engaged in misdeclaration of the values etc., of the goods for availing undue entitlement of duty drawback and that they were showing bogus exports by presenting fraudulent Bills of Lading.

The intelligence is not in evidence. While information is generally in the written format intelligence may be passed on by word of mouth. The search of premises of Manoj Mittal was conducted on 2-12-1997. The Search List shows seizure of share certificates, photographs, etc. but it does not show anything relevant to the case although the documents are described in Show Cause Notice as "incriminating". Therefore no reason to believe could exist on the basis of the search in the minds of the Customs Officers.

19. Panchnama does not show where any search was made of the premises of Ram Avtar Mittal. Ram Avtar Mittal's statement was recorded on 2-12-1997. In this statement he claimed to be associated with both units. Their job was to buy garments in stock lots, subject these to ironing etc. processes and to export them. He claimed to have done exports for over 8 years. He admitted to buying clothes from Punjabi.

In this statement he gave the reference to the shipment exported in these proceedings. There is no admission in his statement of over-invoicing for sake of getting extra drawback. In fact there is a clear admission to the effect that he has no knowledge of drawback procedures at all. Para 3 of the Show Cause Notice reproduces the reference to 30 shipping bills. He referred to one Manisha who was the go-between the buyers and the sellers. There is no admission in the statement of Ram Avtar Mittal to sustain the intelligence referred to by the Customs, nor is the statement capable of arousing reason to believe in the minds of the officers of Customs.

20. Manoj Mittal's statements were recorded. The extract in para 4 of the Show Cause Notice states that he admitted to have forged and fabricated Bills of Lading to show bogus exports with intent to avail duty drawback in a fraudulent manner and that the exports had never taken place. He made the admission that Ram Avtar Mittal was also a party to this. His statement does not admit to any physical exports and therefore does not give cause for any belief to arise that in the shipments earlier exported there was any misdeclaration.

21. The earlier statement of Ram Avtar Mittal showed that the garments were purchased as surplus stock/reject lots from one Vijay Punjabi at the rate of Rs. 25 to Rs. 30 per piece. Punjabi in his statement admitted to having given 10,000 pieces of ladies garments at a total value of Rs. 2.5 lacs.

22. We have noted above that the garments in the consignment numbered 17,054 pieces. The consignment included men's garments also. It was therefore obvious that the consignment did not exclusively consist of garments supplied by Punjabi. Therefore on the basis of this statement also there would be no reason to believe that the goods already exported were overvalued.

23. The proceedings show that the goods on their return were examined on 9/10-3-98 and formal seizure was made on 9/10-3-98. However the process of seizure was started much earlier and that is on the date on which directions were made to the carriers by the Customs to fetch the container back when it was already reached the port of destination. The concerned Officers must have had reason to believe on that date that the consignment was mala fide and liable to seizure. On the basis of the documents and the confessional statements made before them, as brought out by us above, such belief was not at all capable of arising.

24. In the cited judgment of the Hon'ble Patna High Court, the Court accepted that there was ground for suspicion to arise in the minds of the officers. But in the present case the evidence before the officers was not enough even to arouse grounds for suspicion.

25. Let us move forward in time now to the actual inventory and valuation of the garments after they were received back. The Show Cause Notice in para 6 says the following : "The goods were valued at Rs. 11,91,705/- by the panel of examining officers on the basis of values given by the said Shri Vijay D. Punjabi, the supplier of the goods and on the basis of the admissions made by Shri Ram Avtar Mittal in his statement." 26. As we have observed above the gist of the statement of Ram Avtar Mittal disclosed in para 3 of the Show Cause Notice, contains no such admission. He was not on the present exports consignment but was narrating how his office used to acquire garments. As per para 5 of the Show Cause Notice, Punjabi had supplied 10,000 pieces of garments at the value of Rs. 2.5 lacs. If he was right in his first statement then there is no reason why later at the time of physical inspection he should give a much higher valuation of about Rs. 12 lacs.

27. The Panchnama reveals one more curious fact. Page 2 thereof shows that Punjabi identified 16 cartons as containing goods supplied by him.

These 16 cartons contained 718 pieces of garments. The total cartons numbered 468 and the total garments were 17,054/- and yet the Customs have relied upon the statement of Punjabi who initially had stated that he had given 10,000 pieces. In fact on the revelation that the goods claimed to have been supplied by

Punjabi earlier were not even found in the consignment, even the suspicion, if any in the minds of Customs should have ceased to exist, let alone become the reason to believe that the goods were contraband.

28. The Panchnama in para 7 says that whereas one container had said to contain garments, it contained Agarbatties, etc. One of the shipping bills, which shows the same buyer and the buyers order certifies existence of Agarbatties, etc. of value of US\$ 4497.52.

29. Apart from the dubious Shri Punjabi and the other undisclosed experts, the valuation was done by M/s. SGS India Ltd. also. M/s. SGS is an international agency, well-known and respected for their inspection and for valuation. Their professional attitude is disclosed in para 4 of the Panchnama where their representative refused to give a report on the spot but sought time for an enquiry. The sample was given to SGS. Their report dated 23-7-98 gives the following valuation: 30. It appears that not all the varieties exported were shown to SGS. Ladies Skirts, Ladies Rompers were not subjected to the valuation of the SGS. 31. When the SGS did not have the opportunity to evaluate all the varieties of the garments in the consignment, it is not understood how the value was extrapolated and made to appear between the range of Rs. 24,94,210.34 to Rs. 28,16,941/-.

32. Thus at every stage starting from the collection of the alleged intelligence to taking the decision of recalling the container there clearly existed no reason to believe nor could any such reason arise on the basis of the available evidence including the statements of the concerned persons, in the minds of the Customs Officers. In these circumstances, following the above judgment of the Hon'ble Patna High Court, we must hold that the seizure was invalid and therefore the subsequent actions also become without basis of law.

33. In spite of this, we proceed to examine the legality of the Order passed by the learned Commissioner.

34. We have shown above that the valuation made by Shri Punjabi, the undisclosed others as also by M/s. SGS could not be called to be accurate or

complete. The Commissioner adopts an entirely different valuation, recalculate the drawback from Rs. 13,95,466/- and directs recovery of Rs. 8,37,795/-.

"In the light of what has been stated above, it clearly appears that the correct market value of the goods under reference is Rs. 11,91,705/- as against declared value of Rs. 78,05,851 /-. It is observed that the exporters have claimed drawback to the tune of Rs. 13,95,466/-. Thus, it is evident that the drawback claimed by the importer is more than the market price of the goods in terms of Section 76(1)(b) of the Customs Act 1962, no drawback is payable in respect of any goods, the market price of which is less than the amount of drawback due thereon. Having called back the goods, there is no export in respect of these goods taking place and therefore in terms of proviso to Section 75 of the Customs Act 1962, no drawback is admissible where in respect of goods of which sale proceeds are not received by and on behalf of the exporter in India." 36. The first part of the charge is negated by the Commissioner in his Order when he finds and accepts that the export value was indeed more than the amount of drawback claimed. Since this was the only charge he had no authority to recalculate the amount of drawback on the basis of the valuation adopted by him. On this ground alone his Order of repayment of a part of drawback amount fails to sustain. The second part is a classic example how logic can become a tool of torture. It is not the exporters who recalled the goods. It is the Officers of the Customs who re-called the goods from the destination port. Now to say that since there is no export, no drawback is payable is a blatant travesty of justice. Sale proceeds would be received only when the importer abroad gets the goods. Documents were placed before us by Shri Balani to the effect that the importer abroad has threatened to sue the present Appellants as well as the indenting agents in Dubai at whose instance these goods were sent. Non-receipt of sale proceeds in this situation cannot be a ground for total denial of drawback. In this case second proviso to Section 75 cannot be invoked.

37. Before parting with this case it is necessary for us to express our thoughts on the valuation of export goods.

38. The Judgment of the Larger Bench of the Tribunal reported in the case of Om Prakash Bhatia reported in 2001 (127) E.L.T. 81 upheld the powers of Customs to challenge of valuation of export goods. In that Judgment the referral Order has been cited where the Appellant had claimed that the manner in which the valuation of exports were done was wrong (para 4). In a number of cases this plea is raised and the Tribunal on examination of facts has granted relief Brooks International [2002 (141) E.L.T. 547 (T)]; Reco Industries [2001 (131) E.L.T. 694 (T)]. Fashion garments do not subject themselves to normal rules of valuation. A shirt stitched from the same material would cost anywhere from Rs. 500/- to Rs. 1800/- depending upon the brand name attached thereto. In the case of cosmetics the value addition between the manufacturing costs to the brand name price is some time over 400%.

If one is to go by the cost of material and cost of manufacture plus a "reasonable margin of profit" then the value of every commodity would be much lower than the actual value in the market. In the case of readymade garments the profit margins are tremendous and the margin would depend upon many causes including on the skill of the seller and the gullibility of the buyer.

39. What is the effect of the over-valuation? The Government on one hand may have to give a higher quantum of drawback but at the same time the country is getting a significant amount of foreign exchange. Where the exports are suggestive of being intended for the purpose of hawala transactions, where the goods are not physically present or in cases where the sales proceeds are not realized penal action on the exporter would be justifiable. But merely by turning a blind eye on the capacity of the exporters in generating high profits on exports, it is the Government which is ultimately going to lose.

(1) That the seizure made by officers of Customs without having a reason to believe that the goods were liable to seizure is invalid and untenable and therefore the orders of confiscation of the goods are set aside;

SooperKanoon - India's Premier Online Legal Search - sooperkanoon.com