

Commissioner of Customs Vs. Select Impex Ltd.

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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

Decided On : Sep-11-2003

Reported in : (2003)(90)ECC316

Judge : K Usha, N T C.N.B.

Appellant : Commissioner of Customs

Respondent : Select Impex Ltd.

Judgement :

1. Challenge in these appeals at the instance of Revenue is against the order passed by Commissioner of Customs (Adjudication), Bombay dated 14-2-2001. The first respondent is the exporter and respondents No. 2 and 3 are Directors. The respondents No. 4 and 5 are Central Excise Officers who had inspected the goods brought for export. The dispute arising in this case is whether out of 1957 watches which were exported by the first respondent 1956 watches were pocket watches with gold chains and one wrist watch with gold strap or whether 1956 watches exported were wrist watches with gold chains/straps and one was a pocket watch with gold chain.

2. During the period January and February, 1999 M/s. Select Impex Ltd., the first respondent herein exported 1957 Quartz Analog Watches with 22 ct. Gold chain/straps to Hong Kong via Dubai under 31 Shipping Bills.

There was a claim for DEPB benefit. Before effecting exports Select Impex Ltd. had obtained permission from Bombay Customs for examination and stuffing of the goods into the container at its factory premises.

The first consignment after examination by Central Excise Officers were sealed in a steel trunk and brought to docks. In respect of the first lot of 27 watches since there was no examination report endorsed on the invoice by the Central Excise Officers the goods were examined at the docks by the Customs Officers. After examination 25 watches were allowed to be exported provisionally after detaining two watches, namely one wrist watch and one pocket watch for market enquiry to ascertain present market value. Second, third and fourth lot of watches were allowed to be exported without any examination by the Customs officers based on examination report endorsed on the reverse of the export invoices by the Central Excise officers. The last consignment of three Quartz Analog Watches sought to be exported under Shipping Bill dated 9-2-99 was detained on 10-2-99 by the DRI Officers. After detailed enquiry show cause notice dated 9-2-2000 was issued alleging misdeclaration of the goods with respect to their description and value. On 27-10-2000 an addendum to the show cause notice was also issued. Allegations in the show cause notice were that - (1) 1957 Quartz Analog Watches (except Design No. W-127 in Shipping Bill No. 1000 3571, dated 7-1-99) exported under 31 shipping bills are to be considered as pocket watches with a value of Rs. 730/- each and commodity code as 91029101 as per ITC (HS) classification.

(2) chains exported with the said 1956 watches should be considered as articles of jewellery with commodity code as 7113190109 ITC (HS) classification.

(4) 1957 watches already exported are liable to be confiscated under Sections 113(d) and 113(1) of the Customs Act.

Show cause notice also directed noticees to show cause as to why penalty should not be imposed on them under Section 114(1) of the Act.

As against noticees Nos. 1, 2 and 3 there is a proposal to levy penalty under Section 117 of the Act.

3. The Commissioner (Adjudication) after examining the reply submitted by the respondents and after hearing the parties dropped the charges against all the respondents herein. The Commissioner took the view that the allegation of misdeclaration of description of watches or the gold chains attached to them was not established by the Revenue. The above finding of the Commissioner is under attack in these appeals.

4. It is contended on behalf of the Revenue that the Commissioner has come to a wrong conclusion that the department had not discharged the burden to prove that 1956 watches out of 1957 Quartz Analog watches exported by the first respondent were pocket watches and that their gold chain weighed 15 gms. each. According to the Revenue, there was sufficient materials before the Commissioner by way of statements of persons involved in the transaction and also the statements of departmental officers who claimed that they have seen the pocket watches in the first consignment. The Revenue also submits that the department had adduced sufficient evidence which would go to show the claim of the first respondent that it had used 328.44 Kgs. of gold for manufacturing the chains or straps for 1957 watches was unsustainable.

There was no material before the Commissioner, submits the appellant, to show that gold alleged to have been purchased by the first respondent from Mangalore, Bangalore and Ahmed-abad had as a matter of fact reached Mumbai. It is further contended that the Commissioner has wrongly placed the burden on the department to prove that the first respondent had purchased 1956 pocket watches for being exported after fitting them with gold chains, 5. The appellant would submit that on the question of valuation also the Commissioner has erred in entering a finding that the department had not adduced any evidence that identical or similar watches were sold at lower value in international market or in the local market.

6. Before we go into a discussion in detail regarding the several grounds taken in these appeals, we may refer to certain admitted facts in this case noted by the Commissioner in the order impugned - (1) Export of 1956 Quartz Analog watches (alleged to be pocket watches) attached with gold chains is not disputed.

(2) One pocket watch detained as sample from the first consignment was examined by SIIB and its chain was found made of gold weighing 79.350 gms.

(3) SIIB did not ascertain the weight of the gold strap of one wrist watch detained as sample from the first consignment separately.

Total weight of the watch along with strap was found to be 132.9 gms.

(4) The consignment presented for export and which was seized and examined by DRI was found to be three wrist watches. The net weight of the wrist watches along with strap was found as 135.9 gms., 131.58 gms. and 135.62 gms.

The above factual position is not disputed before us by the appellant.

According to the allegation in the show cause, 1956 pocket watches with chains of gold weighing 15 gms. were exported. The learned Commissioner observes that even if all the 1956 watches exported were pocket watches, the evidence in the case would show that its gold chain weighed between 70 gms. to 80 gms. and not 15 gms. As mentioned earlier the chain attached to one pocket watch detained from the first consignment was examined by SIIB and it was found to weigh 79.350 gms.

If we go into the oral statements of the eye witnesses who claimed that the first consignment contained 26 pocket watches and one wrist watch, they do not speak to the correct weight of the gold chain attached to each pocket watch. According to one witness the weight could be between 20 to 25 gms. and according to other 15 to 20 gms. In the nature of the evidence as above, the Commissioner proceeded to observe that even if the allegation that it was pocket watches which were exported and not wrist watches, the weight of the gold chain attached to each pocket watch was to be taken between 70 to 80 gms. and not 15 gms.

7. A serious allegation has been made in the grounds of appeal against the Commissioner who passed the order impugned to the effect that he was prejudiced against the Revenue and has decided the case with undue haste. It is contended that on 22-12-2000 when the matter was being heard counsel for the noticee requested for time to file additional written submissions till 12-1-2001.

Such time was granted by the Commissioner and the additional submission was filed on 10-1-2001 and 11-1-2001 along with additional evidence in support of their defence.

It is alleged that the Commissioner who had reserved the case for orders on 22-12-2000 did not call for the comments from DRI on the additional evidence produced by the noticees and proceeded to pass the order. It is seen from the order passed by the Commissioner that on an earlier occasion when comments of the DRI were called for, the reply was that all relevant facts had been given in the show cause notice itself. The learned Counsel for the respondent would contend that DRI being not a party to proceeding, the Commissioner could not have called for their comments. In any view of the matter we find from paragraph 17.3(v) of the order impugned that the Commissioner has not taken into consideration the additional evidence adduced by the noticees after the final hearing as they were only to support the materials which had already been produced before the adjudicating authority. Therefore, we do not find any reason to interfere with the impugned order on the ground that the order was vitiated by mala fides on the part of the appellant.

8. It is contended on behalf of the appellant that the Commissioner has erred in holding that the allegation of misdeclaration of either description of watches or the gold contained in the straps/chains is not established. According to the appellant in the light of statement of Shri Dhiraj Shah of Time Avenue denying having supplied any watches to noticee No. (1) the Commissioner should have held that the noticee No. (1) had failed to prove its claim that except one piece all other pieces exported by him were wrist watches. The learned Counsel for the respondent would contend that the Commissioner has correctly placed reliance on the documentary evidence in this case in preference to statements made by officers and Dhiraj Shah of Time Avenue after the proceedings were initiated. It is not disputed that among the documents seized from the premises of 1st noticee there was only one bill of Ravraj Impex Ltd. relating to one pocket watch. On the other hand, the bills issued fay Shri Dhiraj Shah of Time Avenue would show procurement of only wrist watches. The respondents had contended before the Commissioner that the subsequent statement of Shri Dhiraj Shah cannot be relied

on as it was under threat and coercion by DRI. The Commissioner has observed that department has failed to adduce any evidence to show that the appellant had acquired pocket watches in large quantities. We are inclined to agree with the learned Commissioner that in the nature of documentary evidence adduced by the appellant, a mere denial in the oral statement of Dhiraj Shah would not help the department in discharging its burden to show that the respondent had acquired large quantities of pocket watches in order to justify the allegation in the show cause notice. There is no merit in the contention raised by the Revenue that since the noticees (1) to (3) had not revealed the source of pocket watches, an adverse inference has to be taken against them, when their specific contention is that they were exporting 1956 wrist watches. It is also relevant to note that even though the two Customs Officers in their statements at belated stage claimed that they have seen 26 pocket watches in the first consignment, they allowed clearance provisionally which was later finalised after market enquiries. In the shipping bills code number for wrist watches was given. If the Customs had noticed pocket watches in the first consignment they would have altered the code number in the shipping bill but as a matter of fact they did not do. It is also relevant to note that clearance was permitted under DEPB scheme in the subsequent consignment also. The learned Commissioner has noted that the statements were taken from the officers at a time when they were under vigilance enquiry. The learned Commissioner was fully justified in not relying on the statements given by the officers after they were put under vigilance enquiry. There is nothing to show that the investigations conducted by DRI with Consulates of Indian Mission abroad in Dubai and Hong Kong had revealed that the goods imported as a matter of fact were pocket watches and not wrist watches. Therefore, the Commissioner is fully justified in relying on the fact that the consignee in Hong Kong had confirmed receipt of 1956 wrist watches and not pocket watches. In the light of the above discussion, we hold that there is no merit in the contention of the Revenue that the Commissioner has erred in his finding regarding allegation of misdeclaration of description of watches.

9. We will now proceed to consider the contention relating to allegation regarding the gold contained in the strap/chain. The allegation in the show cause notice is that the noticees (1) to (3) have not received any gold from the sources disclosed

by them.

According to the noticees substantial quantity of the gold was purchased from Corporation Bank, Bangalore/Mangalore and the balance quantity from Ahmedabad. The Commissioner has come to a conclusion that the allegation regarding non-receipt of gold in Bombay from the sources claimed by the assessee is not established. In coming to the above conclusion he has relied on the documents seized from the premises of noticee (1). It is seen that going by the Bank records and the statements given by the officers of Corporation Bank Mangalore/Bangalore delivery of gold has taken place from the Bank on behalf of noticee No. (1). From the records seized from the premises of noticee No. (1) it is also seen that its representatives who took delivery of the gold had travelled to Bombay. There is also evidence to show that payment had been made for purchase of gold through normal Bank channel which evidence could not be discredited by the Revenue. We are not able to agree with the contentions raised by the Revenue that the plethora of documentary evidence regarding movement of gold to Bombay has to be rejected only for the reason that the persons who brought the gold to Bombay were not examined.

10. The noticees (1) to (3) had relied on statutory registers which would show the details of the gold used and the straps made therefrom.

The statutory records kept under the Central Excise Act and Rules are subjected to verification by officers of the Central Excise Department.

Therefore, the entries made therein are to be taken authentic unless it is shown otherwise by strong evidence. In this case there is no specific allegation in the show cause notice to the effect that statutory records kept by Noticee Nos. (1) to (3) under the Central Excise Act and Rules like Form IV Register and RG.1 Register are not genuine. None of the statements recorded by DRI would be taken as sufficient proof to discredit the claim made on the basis of the statutory records.

11. The statement of Mohan P. Shet cannot be relied on in view of the documentary evidence showing purchase of gold by Ravraj Impex Ltd. from Dhanlakshmi Jewellers. So also payment made by cheque for job charges and

vouchers seized from the premises of Arun Mehra would clearly show that no reliance could be placed on the statement of Arun Mehra sought to be made by the Revenue. He has no explanation to offer as to for what other purpose he received an amount of more than Rs. 50 lakhs from noticee No. (1). Taking into consideration the entire evidence in this case we are inclined to uphold the finding of the Commissioner that the allegation of misdeclaration regarding the gold content in the strap/chain made against the assessee is not established.

12. Now coming to the issue regarding valuation it is seen that except in the case of two sample watches detained in the first consignment and the three wrist watches under seizure in all other cases a uniform value per watch is adopted at Rs. 730/- on the basis of the single bill available in the records in respect of one pocket watch. Weight of the gold chain was assumed to be 15 gms. each and gold content was valued on that basis, noticees (1) to (3) contended that valuation is incorrect for more than one reason. Apart from the fact that it is wrongly assumed that all 1956 pieces were pocket watches and they were all identical with the same price of Rs. 730/- it was also assumed that the chains attached to such watches weighed 15 gms, each when as a matter of fact the gold chain attached to the pocket watch which was examined by SIIB was found weighing 79.350 gms. It was also contended that no relevance was given for charges incurred for converting the chains from running length into chains/strips at the factory and wastage involved in cutting. It was further contended that even in the case of three wrist watches seized and one wrist watch and one pocket watch which were detained as sample the method of valuation adopted was to determine the price of dial separately and value of the chain/strap independently and then to arrive at their value by adding the two elements. No evidence had been brought in to show that identical or similar watches were sold at such low value in the international market or in the local market. The noticees (1) to (3) further contended that enquiries conducted by Central Excise Officers showed that wrist watches with 18 ct. gold straps were being sold at over Rs. 80,000/- per piece in Tenishque show room in Bombay. The price list of Dubai Duty Free Shop would also show much higher value of watches with gold chain strap. According to the respondent, a watch with a gold strap/chain has to be valued as a whole. No attempt had been made to refer to any contemporaneous export invoice in the show cause notice in order to

establish that such or like goods were not ordinarily sold in the course of international trade at the place of exportation at prices declared by the noticees. Above all respondent submits that the show cause notice does not challenge the present market value of the exported goods.

13. The Commissioner after referring to the circulars issued laying down guidelines for verification of PMV in case of goods entered for export under DEPB Scheme observed that there is no allegation that PMV declared by noticee No. (1) was more than 150% of AR 4 price. Regarding of first consignment PMV was verified by SIIB and no objection was taken after conducting market enquiries. No evidence is also adduced on record to show that the domestic prices of export goods was lower than PMV declared by noticee No. (1). Reference is made by the Commissioner to a Circular No. 23/99, dated 11-5-99 where it is clarified as follows :- "3.....Where the Present Market Value declared by the exporter is not accepted a show cause notice shall be issued to the exporter as to why the PMV declared by him should not be rejected/revised."J.G. Exports v.C.C., Chennai, 1999 (105) E.L.T. 258 the Commissioner took the view that since the PMV declared by the exporter is not challenged by issuing a show cause notice, the department cannot proceed on the basis that there was over-valuation of the goods.

14. We do not consider it necessary to discuss in detail the arguments put forward by both sides in view of certain admitted facts in the case. As mentioned in an earlier portion of this order, on examination of the first consignment SUB found that the chain of a pocket watch weighed 79.350 gms. It is the case of the Revenue that out of 1957 pieces of watches exported 1956 pieces were pocket watches.

Over-valuation is alleged on the basis that the chain of the pocket watches weighed only 15 gms. But the Revenue has failed to establish that the one pocket watch examined by SIIB and found to have golden chain of 79.350 gms. attached to it is an exception and all other pieces of pocket watches were attached to golden chain weighing 15 gms.

each. Regarding the three wrist watches seized and the one taken as sample from the first consignment Revenue could not establish over-valuation. We, therefore, hold that the Commissioner was correct in his view that the Revenue has failed to prove the allegation of over-valuation against Noticees Nos. (1) to (3).

15. Since the charge of misdeclaration against Noticee Nos. (1) to (3) are found not sustainable, the charge of abetment against Noticee Nos.

(4) & (5) cannot survive.

16. We find no merit in the appeals filed by the Revenue. The appeals, therefore, stand dismissed. This disposes of the C.O. also.

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