

Dipen Enterprises Vs. Cc

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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

Decided On : Dec-09-2003

Reported in : (2004)(92)ECC78

Judge : S T Gowri, P Chacko

Appellant : Dipen Enterprises

Respondent : Cc

Judgement :

1. M/s Dipen Enterprises (appellants in Appeal No 534/96) are aggrieved by confiscation, by the Commissioner of Customs, of a consignment of 'Video Magnetic Tapes in Hubs' covered by Shipping Bill No. 426772 dated 8.4.94 (with option for redemption on payment of a fine of Rs. 50,000/-). They are also aggrieved by imposition of personal penalty of Rs. 1 lakh by the Commissioner. Shri Antubhai K. Sheth, partner of M/s Dipen Enterprises, is the appellant in Appeal No. C/535/96 wherein he challenges the personal penalty of Rs. 50,000/- imposed on him by the Commissioner of Customs.

2. The relevant facts of the case are that M/s Dipen Enterprises had imported 'Video Magnetic Tapes in pancakes' in terms of Advance Licence No. 0302672 dated 12.2.92 under the DEEC Scheme (DEEC Book No. 058442 dated 7.4.92) and cleared the goods free of duty under Bill of Entry No 8535 dated 25.2.94 for the purpose of manufacture of Video Magnetic Tapes in hubs, which were to be exported in discharge of export obligation under the said Scheme; that, in

discharge of the export obligation, they presented a consignment of what was declared as "Video Magnetic Tapes in hubs" for export under Shipping Bill No 426772 dated 8.4.94; that these goods were detained and examined, whereupon it appeared to Customs authorities that the consignment contained old used and junk video magnetic tapes in hubs of no commercial value and which did not appear to have been made out of the imported raw material (Video Magnetic Tapes in Pancakes); that the Custom House Agent of M/s Dipen Enterprises stated to the SIIB of the Custom House (who investigated the case) that they had filed the Shipping Bill at the instance of Shri Antubhai K. Sheth, partner of the exporting firm; that Shri Sheth, in his statements dated 25.4.94 and 8.11.94 under Section 108 of the Customs Act, admitted that the goods covered by the above Shipping Bill had been purchased by him from various suppliers of old and used hubs and tapes; that Shri Antubhai Sheth further admitted that he had sold off a part of the raw materials imported by his firm in October, 1993 and had thereby earned a profit of Rs. 180/- to Rs. 190/- per pancake; that Shri Antubhai K. Seth further admitted that neither his exporting firm nor his supporting manufacturers viz. M/s Dipen Textiles Private Ltd, Palghar, Thane had carried out any manufacturing activity and that the junk tapes alongwith hubs were only purchased by him; that the Central Excise officers who searched the premises of M/s Dipen Textiles Pvt Ltd recovered 63 packages each containing 320 Video Magnetic Tapes in hubs valued at Rs. 9,37,728/- and detained the same; that Shri A.K. Sheth admitted that the said quantity of Video Magnetic Tapes in hubs had been manufactured by M/s Dipen Textiles at Palghar in May 1994 out of the imported Video Magnetic Tapes in Pancakes; that it appeared to the Department that M/s Dipen Enterprises had removed the raw material from their premises to the premises of M/s Dipen Textiles Pvt Ltd; that Central Excise officers seized the above 63 packages (each containing 320 Video Magnetic Tapes in hubs) under panchnama dated 10.10.94 under Section 110 of the Customs Act; that the DGFT authorities by letter dated 17.10.94 informed the Customs that the Advance Licence and the DEEC book of M/s Dipen Enterprises had been cancelled; that, on account of the cancellation of Advance Licence and DEEC book, the Customs authorities considered the import of the raw material cleared free of duty under three Bills of Entry dated 22.2.93, 8.10.93 and 25.2.94 to be unauthorized as the

same were covered by the Negative List of import items under the relevant Exim Policy; that it appeared to the Customs authorities that M/s Dipen Enterprises had deliberately misdeclared the goods covered by Shipping Bill No 426772 dated 8.4.94 to make it appear that the said goods had been manufactured out of raw material (Video Magnetic Tapes in pancakes) cleared under Bill of Entry No 8535 dated 25.2.94; that the said authorities held the view that the misdeclared goods were liable to confiscation under Section 113(d) and (i) of the Customs Act read with Section 3(3) of the Export Trade (Control) Order, 1998; that M/s Dipen Enterprises and Shri A.K. Sheth had rendered themselves liable to penalty under Section 114(i) of the Act.; that, consequent upon cancellation of the Advance Licence and DEEC book, the imported Video Magnetic Tapes in pancakes, which were cleared without payment of Customs duty, became chargeable to duty to the extent of over Rs. 21 lakhs; that M/s Dipen Enterprises and Shri A.K. Sheth were also liable for penalty under Section 112 of the Act; that their CHA, M/s P.N.Shipping Agency, having aided and abetted the attempted fraudulent export of second hand goods by M/s Dipen Enterprises, had rendered themselves liable to penalty under Section 114(i) of the Act; and that a show-cause notice was issued to M/s Dipen Enterprises, M/s Dipen Textiles Pvt Ltd and Shri A.K. Sheth proposing to:- i) confiscate the goods covered by Shipping Bill No 426772 dated 8.4.94 under Section 113(d) of the Customs Act read with Section 3(3) of the Export Trade (Control) Order, 1998; ii) confiscate the Video Magnetic Tapes on Pancakes converted into Video Magnetic Tapes in Hubs at Palghar under Section 111(d) and (o) read with Section 120(1) of the Customs Act; iii) impose personal penalties under Sections 114(i) and 112(a) of the Act on the noticees; iv) recover duty of customs on the Video Magnetic Tapes on pancakes cleared under all the three Bills of Entry.

The CHA was also called upon to show cause why personal penalty should not be imposed on them under Section 114(i) of the Customs Act.

3. The Commissioner of Customs, after considering the written submissions submitted by the noticees in reply to the show-cause notice and after hearing their Counsel, passed the impugned order dated 27.6.96. As regards the raw material, the order held it not liable to confiscation and dropped the demand of duty. The

order also held M/s Dipen Textile Pvt Ltd and M/s P.N. Shipping Agency (CHA) not liable to be penalized. However, confiscation was ordered of the 63 packages containing 20160 Video Magnetic Tapes in hubs covered by Shipping Bill No 426772 dated 8.4.94 under Section 113(d) and (i) of the Customs Act with option under Section 125 of the Act for redemption of the goods on payment of a fine of Rs. 50,000/-. Moreover, personal penalties of Rs. 1 lakh and Rs. 50,000/- were also imposed on M/s Dipen Enterprises and Shri A.K. Sheth respectively under Section 114(i) of the Customs Act.

Hence these appeals of M/s Dipen Enterprises and Shri A.K. Sheth.

4. We have heard both the sides. The learned Counsel for the appellants submitted that Video Magnetic Tapes in hubs confiscated by the Commissioner were freely exportable as they were not mentioned in the Negative List of Exports in Chapter XVI of the Export Import Policy 1992-97. Section 113(d) and (i) of the Customs Act were not applicable to such a case where the goods were not dutiable. Clause 3(3) of the Export (Control) Order, 1988 was also not applicable to the goods which did not figure in Schedule I or Schedule III of the Export (Control) Order and were not governed by the Licensing Policy contained in the relevant Exim Policy. The goods, therefore, were not liable to be confiscated under Section 113(d) and (i) of the Customs Act. In this connection, the learned Counsel relied on the decisions of this Tribunal in the cases of Kakda Impex (P) Ltd v. CC [2001 (136) ELT 1398] and Mangtani Exports (I) Pvt Ltd v. CC [2001 (137) ELT 1010]. The Counsel argued that where there was no prohibition for exporting the goods, the goods were not liable to confiscation under Section 113(d) of the Customs Act. He relied on the Tribunal's decision in Shilpi Exports v. Collector [1996 (83) ELT 302], which was upheld by the Supreme Court [2000 (115) ELT A-219]. It was further submitted that, as the goods which were declared as Video Magnetic Tapes in hubs were found to be so on visual examination, there was no misdeclaration on the part of the appellants, nor had they any intention to misdeclare the goods. The confiscation of the goods and imposition of penalty on the appellants were, therefore, not sustainable. It was not possible to ascertain by mere visual examination whether the goods were old and used. Neither any test report nor any expert opinion was relied upon to establish that the goods were old

and used. The panch witnesses were only ordinary laymen with no technical knowledge or expertise to certify the nature of the goods. It was not correct on the part of the Commissioner to rely on the statements of panch witnesses as to the nature of the goods without giving the appellants an opportunity of cross-examining them. The Counsel added that the repeated requests made by the appellants for cross-examination of the panchas were only ignored by the Commissioner. The Department failed to discharge their burden of proving that the goods were old and used. The Counsel further submitted that the Commissioner had heavily relied on the confessional statements of Shri A.K. Sheth dated 25.4.94 and 8.11.94 which, according to the appellants, had been recorded under duress, coercion and threat. Though the statements were retracted subsequently, the retraction was ignored by the Commissioner.

5. The DR vehemently defended the order of the Commissioner by submitting that the appellants had confessed their guilt in unequivocal terms in their statements dated 25.4.94 and 8.11.94 and these statements were never retracted by them. In view of the admission, by the appellants, of their offence alleged in the show-cause notice, any further evidence was not required to prove the offence. The DR relied on the decision of the Calcutta High Court in *Collector v. Pankaj V. Sheth* [1997 (90) ELT 31(Cal.)] and submitted that the appellants had, by declaring the high FOB value of Rs. 10,14,949/- for the old/used Video Magnetic Tapes in hubs of no commercial value, had indulged in redeclaration of value (overinvoicing) which amounted to violation of Section 11 of the Customs Act, attracting the provisions of Section 113 of the Act. The DR pointed out that the decision of the Calcutta High Court had been followed by the Tribunal in the case of *Ramesh K. Agarwal v. Commissioner* [2002 (141) ELT 282]. He concluded by submitting that there was nothing wrong with the confiscation of the goods or with the imposition of penalties on the appellants.

6. In his rejoinder, the learned Counsel for the appellants argued that the judgment of the Calcutta High Court was not applicable to the instant case. According to him, the said judgment had been rendered by the consent of parties. The High Court had not examined the confiscability of any goods under Section 113(d) or (i) of the Customs Act. The observations contained in para 20 of the High Court's

judgment were in the nature of obiter dicta and did not provide any binding ratio. It was further argued that the view expressed by the High Court in para 20 of its judgment was contrary to the law laid down by the Supreme Court in Union of India v. Rai Bahadur Shreeram Durga Prasad [AIR 1970 SC 1597] which was followed by this Tribunal in the case of Modern Trade v. Commissionersf [Order No. C-1/3977-84/WZB/2000 dated 4.11.2000 in Appeal Nos. C/363-364/2000 Bom].

7. We have carefully examined the submissions. Admittedly, the Video Magnetic Tapes in hubs covered by Shipping Bill No 426772 dated 8.4.94 had been presented by the appellants through their CHA for export under the DEEC Scheme towards discharge of export obligation (under Notification No. 159/90-Cus dated 30.3.1990 under the said Scheme) vis-a-vis raw material (Video Magnetic Tapes in pancakes) which they had cleared earlier without payment of Customs duty on the strength of Advance Licence No. 0302672 and DEEC Book No. 058442. The said goods covered by the Shipping Bill for export were described as Video Magnetic Tapes in hubs. Visual examination of the goods showed that they were old and used ones. Shri A.K. Sheth, partner of the firm viz.

M/s Dipen Enterprises, in his statements dated 25.4.94 and 8.11.94, admitted that the goods had been purchased from various suppliers of old and used hubs and tapes. He also admitted that, under the DEEC Scheme, they should have exported new product. He further admitted that he had disposed of a part of the raw material imported earlier in the month of October, 1993, for monetary consideration and had thereby made an estimated profit of Rs. 180/- to Rs. 190/- per pancake. He also produced records showing sale of 879 pancakes at the rate of Rs. 660/- per pancake making net income of over Rs. 5.8 lakhs. He admitted that such unauthorized disposal of the raw material imported under the DEEC Scheme was illegal. Regarding the nature of the export goods, he stated that he was not aware as to whether they were in serviceable condition. He stated that neither the exporting firm nor their supporting manufacturers (M/s Dipen Textiles) had carried out any manufacturing activity in their respective premises in relation to the said goods. Shri A.K. Sheth admitted his guilt and prayed for a lenient view. These statements of Shri A.K. Sheth have been claimed to have been retracted by him. It

was claimed that the statements dated 25.4.94 and 8.11.94 were retracted on 26.4.94 and 9.11.94 respectively and that the 'retracting letters' were sent to the investigators (SIIB, New Custom House, Bombay) under certificate of posting. The impugned order says that there was nothing on record to show that the appellants had retracted the statements dated 25.4.94 and 8.11.94. We have also found no evidence of any 'retracting letter' having been received by the departmental investigators. None of the officers in the investigating team (SIIB) was examined by the appellants to prove their point. We are also at a loss to understand as to why the appellants did not resort to an effective mode of dispatch which was acknowledgeable by the addressee. Annexure 'J' to the memorandum of appeal is a 'certificate of posting' bearing the postal date-seal on which the date is not legible. It has been claimed by the appellants that this document is evidence of their retracting letter dated 26.4.94 having been sent to the SIIB. Annexure 'L' to the memorandum of appeal is another 'certificate of posting' which also carries a postal seal on which the date is not legible. It has been claimed that this document proves dispatch of the appellants' retracting letter dated 9.11.94 to the SIIB. By no stretch of imagination can a certificate of posting issued by postal authorities to the sender be considered as evidence of receipt of the postal article by the addressee. Therefore, in this case, there is no sustainable evidence of any retraction of the statements dated 25.4.94 and 8.11.94. The statements have been rightly relied upon by the adjudicating authority. Shri A.K. Sheth clearly admitted that the export goods covered by the shipping bill had not been manufactured by M/s Dipen Enterprises or even by their supporting manufacturers M/s Dipen Textiles Pvt Ltd and that the goods had been purchased from the local market. He never claimed that the goods were new and unused. On the other hand, he conceded that he did not know as to whether the goods were in serviceable condition. He even went to the extent of admitting that the suppliers of the goods had told him that the goods were old and used ones. Therefore, the fact that the Video Magnetic Tapes in hubs seized by the departmental officers had not been manufactured out of the raw material imported duty-free under the DEEC Scheme and were old/used second hand goods procured from the local market stands proved. The appellants were admittedly aware of the legal requirement that the export goods under the DEEC Scheme should be new and not old and used ones. The Shipping Bill

described the goods as Video Magnetic Tapes in hubs only. The FOB value (Rs. 10,14,949/-) of the old goods declared in the Shipping Bill was undisputedly that of new goods. The appellants have never had a case that old/used video magnetic tapes in hubs had any appreciable commercial value. For all these reasons, the case of the Department that the appellants had misdeclared and overvalued the goods has to be sustained.

8. It has been held by the Calcutta High Court in the case of Pankaj V Sheth (supra) that misdeclaration of value of goods by exporter amounts to violation of prohibition deemed to have been imposed under Section 11 of the Customs Act attracting the provisions of Section 113 of the Act. This view of the High Court is contained in para 20 of its judgment, which reads as under:- "Similarly, under the Foreign Trade (Regulation) Rules, 1993 which have been framed under the Foreign Trade (Development and Regulation) Act, 1992 Rule 2(i) provides that 'value' would have the same meaning as was assigned to it in Section 2(41) of the act. Thus the procedure for determination of value under Section 14 of the act is brought in for the purposes of the 1993 Rules. Rule 11 of the 1993 Rules clearly states that the value of the goods must be stated whether the goods are liable to duty or not and such statement must be certified as being correct. If therefore an incorrect declaration is made this would be a violation of Rule 11 of the 1993 Rules. If an incorrect declaration of the value is made this would violate Section 11 of the 1992 Act which forbids the export or import of goods in violation of the Rules. This in turn would attract the provisions of Sections 111 and 13 of the Act as goods imported or exported contrary to law and give the Customs Authorities the power to investigate the correct value of the goods in question and for that purpose utilize the method prescribed under Section 14(1)." The above ruling of the High Court has been followed by this Tribunal in the case of Ramesh K. Agarwal (supra). It was pointed out by the Counsel that the High Court's ruling was not followed by the Tribunal in the case of Rubber Plast Company v. Commissioner of Customs [2001 (137) ELT 916]. It was not followed in the case of Modern World Trade (supra) either. We find that, in both the cases, the Bench relied on the Tribunal's Larger Bench decision in J.G. Exports v. Commissioner [2000 (121) ELT 754]. But the view taken by the 3-Member larger bench in J.G. Exports has been overruled by a larger bench of Five Members of the Tribunal in the case of Om

Prakash Bhatia v. Commissioner of Customs [2001 (127) ELT 81]. The latter larger Bench relied on the Calcutta High Court's judgment in Pankaj V Sheth case and also distinguished the Supreme Court's decision in Collector v. Shilpi Exports [2000 (115) ELT A-219]. In the result, it is the decision of the Calcutta High Court that should be followed in the instant case. On a reading of the apex court's judgment in Rai Bahadur Shreeram Durga Prasad (supra) relied on by the learned counsel, we are unable to accept his argument that the Calcutta High Court's decision is hit by the said judgment of the apex court. In the result, we hold that the appellants had contravened Section 11 of the Customs Act (thereby attracting the penal provisions of Section 113 of the Act) by overvaluing the export goods in the Shipping Bill with an oblique purpose. The Commissioner has rightly invoked the provisions of Section 113 to confiscate the goods. In the facts and circumstances of the case, we do not find any reason to interfere with the quantum of redemption fine imposed by him under Section 125 in lieu of confiscation. Further, a personal penalty under Section 114 (i) of the Customs Act would be liable to be imposed on M/s Dipen Enterprises as they had rendered the goods liable to confiscation under Section 113 of the Act. The penalty of Rs. 1 lakh imposed on M/s Dipen Enterprises by the Commissioner, however, appears to be on the higher side in the facts and circumstances of the case. We reduce it to Rs. 50,000/-.

9. Shri A.K. Sheth is a partner of the exporting firm, M/s Dipen Enterprises. A separate penalty has been imposed on him by the Commissioner under the same provision of law. According to settled law, identical penalties on the firm and its partner on the same ground are unwarranted. Therefore, we set aside the penalty imposed on Shri A.K.Sheth.

10. In the result, Appeal No. C/534/96 is dismissed, but with a reduction of the quantum of penalty on the appellant to Rs. 50,000/-.

Appeal No. C/535/96 is allowed.

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