

Sil Exports Ltd. Vs. Cc

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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

Decided On : Jan-02-2004

Reported in : (2004)(92)ECC273

Judge : A T V.K., P Chacko

Appellant : Sil Exports Ltd.

Respondent : Cc

Judgement :

1. The appellants were a 100% Export-Oriented Undertaking (EOU) engaged in the galvanizing of M.S. Black Pipes falling under Chapter 73 of the Central Excise Tariff Act Schedule, for which they had the requisite permission from the competent authority under the Ministry of Industry, Government of India. They imported 1194.200 MTs of Hot-Rolled Steel Coils (sub-heading No. 7208.90} and presented a Warehousing Bill of Entry dated 20.12.97 at Mumbai Customs for the purpose of warehousing the goods without payment duty under the EOU Scheme. The goods were accordingly warehoused during the period 8.1.1998 to 18.1.1998. Under an agreement entered into between the appellants and M/s. Siddhartha Tubes Ltd., Indore under Section 59(3) of the Customs Act, the goods were cleared without payment of duty, to M/s. Siddhartha Tubes Ltd. under two ex-bond Bills of Entry dated 8.1.1998 and 20.1.1998 filed by the latter claiming exemption under Notification No. 80/95-Cus, dated 31.3.95 under the Duty Exemption Entitlement Certificate (DEEC) Scheme on the basis of Advance Licences and Advance Release Orders issued from the Directorate of Foreign Trade. The

Department found that the supply of HR Coils by the appellants to M/s. Siddhartha Tubes Ltd. in the Domestic Tariff Area (DTA) against the Advance Licences and Advance Release Orders was not in accordance with the provisions of EXIM Policy 1997-2002. They took the stand that the supply of the goods by the 100% EOU to the DTA unit should have been made only on payment of the applicable duties as well as upon production of import licence by the DTA unit. The duty recoverable on the goods was worked out at Rs. 65,24,017 and, by show-cause notice dated 1.7.98, the Superintendent of Central Excise and Customs, Shajapur Range, demanded the duty from the appellants under Rule 9 of the Central Excise Rules, 1944 read with the proviso to Section 11-A(1) of the Central Excise Act, 1944 and also proposed to impose penalty on them under Rule 209 of the Central Excise Rules, 1944. After the said show-cause notice was replied to by the party, the Superintendent issued a Corrigendum dated 9.2.2001 to the notice substituting provisions of the Customs Act for those of the Central Excise Act and the Central Excise Rules and altering the relevant pleadings accordingly. After this amendment, the demand of duty came to be under Section 28 of the Customs Act read with Section 68 of the said Act and Condition No. 5(b) of Notification No. 53/97-Cus dated 3.6.97 and the proposal for imposition of penalty came to be under Section 114-A of the Customs Act, 1962 on the ground that the noticee had contravened the said Section 68 and Condition No. 5(b). A reply was given to the corrigendum also. After considering the party's reply and personally hearing them, the jurisdictional Commissioner of Customs confirmed the demand of duty under Section 28 of the Customs Act together with interest on duty under Section 28-AB of the Act and also imposed a penalty of Rs. 25 lakhs on them under Section 112(a) of the Act as per order dated 25.9.2002. The present appeal is against this order of the Commissioner.

2. Heard both the sides. The Counsel for the appellants submitted that the corrigendum issued on 9.2.2001 had completely changed the complexion of the case made out in the original show-cause notice dated 1.7.98 and, therefore, it required to be treated as a fresh show-cause notice. If so treated, the demand of Customs duty was wholly barred by limitation. In this connection, reliance was placed on the Tribunal's decision in *Studds Ltd. v. CCE, Delhi-11*, 2002 (140) ELT 511.

Alternatively, drawing support from the Tribunal's decision in ESPI Industries v. CCE, Hyderabad, 2000 (115) ELT 811, Counsel argued that the demand of duty raised in the corrigendum was barred by res judicata. The Counsel further contended that, in terms of CBEC Circular No. 299/15/97-CX dated 27.2.97, the Superintendent had no authority to issue show-cause notice demanding any duty in excess of Rs. 20 lakhs and, therefore, the notice dated 1.7.98 demanding duty of over Rs. 65 lakhs was without jurisdiction. In the facts of the case, the matter should have been referred to the Board as per Circular No. 122/95/Cus.

dated 28.11.95. It was further argued that, if any customs duty was recoverable in respect of the goods, the duty should have been demanded from M/s. Siddhartha Tubes Ltd. only. Yet another contention raised by the Counsel is that the assessment of ex-bond Bills of Entry by the proper officer of Customs for duty-free clearance, for home consumption, of the goods had become final in the absence of departmental review under Section 129-D and, therefore, the subsequent demand of Customs duty was not sustainable. In this connection, the learned Counsel relied on the Tribunal's decision in the case of Priya Blue Industries Ltd. v. CCE, Ahmedabad, 2002 (148) ELT809 wherein a refund claim filed by the assessee was rejected on the ground that he had not challenged the earlier assessment of the relevant Bill of Entry. Reliance was also placed on the Tribunal's decision in Voltas Ltd. v. CCE, 2002 (149) ELT 1047 wherein assessment of RT-12 return was held to be appealable.

3. The DR submitted that the goods had been imported by the EOU by claiming the benefit of Notification No. 53/97-Cus but the exemption under the Notification was not available as the goods were cleared by the appellants to the DTA unit without payment of duty contrary to the provisions of para 9.18 of the EXIM Policy. The appropriate duty of customs was recoverable in respect of the goods. DR submitted that, where the 100% EOU was, for any valid reason, unable to utilize the imported goods, it could dispose of the goods in the DTA only on payment of applicable duties and on production of the requisite import licence by the DTA unit as per para 9.18 of the EXIM Policy 1997-2002.

In the instant case, though M/s. Siddhartha Tubes Ltd. (DTA unit) produced licence from the DGFT for the purpose of duty-free importation of raw material under the DEEC Scheme, the clearance of the material by the appellants to the DTA unit without payment of appropriate duty was in breach of the EXIM Policy. The DR further submitted that, as per the proviso to para 5 of the Notification, the DEEC exemption was also not available to the appellants. In this connection, he relied on the Tribunal's decision in Padmini Technology Ltd. v. CC, 2002 (150) ELT 615. It was finally argued that, where the conditions of an exemption notification were not fulfilled, the exemption was not available to the party concerned. Reliance was placed on the Supreme Court's decision in Mihir Textiles Ltd. v. CC, Bombay, 1997 (92) ELT 9(SC). The DR also relied on the Tribunal's larger Bench decision in CCE v. Avis Electronics Pvt. Ltd., 4. We have carefully considered the submissions. The demand raised on the appellants by the Department through show-cause notice dated 1.7.98 as amended by the corrigendum dated 9.2.2001 is for customs duty of over Rs. 65 lakhs on HR coils cleared by the party to M/s. Siddhartha Tubes Ltd. (DTA unit) without payment of duty under ex-bond Bills of Entry dated 8.1.98 and 20.1.98. It is not in dispute that the said Bills of Entry were filed by the DTA unit claiming duty-free clearance under the DEEC Scheme on the basis of Advance Licences and Advance Release Orders issued by the Directorate of Foreign Trade and that the clearance of the goods was allowed on duty-free assessment of the Bills of Entry. The appellants have argued that, when they were not able to utilize the imported material, they were permitted by the EXIM Policy to dispose of the goods in the DTA and accordingly they had disposed of the goods by clearing them to the DTA unit. According to the appellants, in so far as the DTA unit was concerned, the clearance was in the nature of import under the DEEC Scheme and, therefore, since all the conditions of import under that Scheme were fulfilled by the DTA unit, there was no need of payment of any duty of customs on the goods.

They have also contended that the liability to pay any duty of customs, if at all payable on the goods, was only on M/s. Siddhartha Tubes Ltd. But the Commissioner of Customs has observed that the Advance Release Orders were issued by the Directorate of Foreign Trade without any authority of law. He has not recognized the clearance of the goods by the appellants to the DTA unit as a case

of importation by the latter.

We think we need not discuss this aspect any further as we are of the view that this case could be best disposed of on more fundamental grounds raised by the appellants.

5. The original show-cause notice dated 1.7.98 was issued within the normal period of limitation under Section 11-A of the Central Excise Act by the Superintendent of Central Excise. That notice demanded Central Excise duty from the appellants under the above provision of law and also proposed to impose penalty on them under a Central Excise Rule. The party replied to the show-cause notice in August 1998 contending mainly that the show-cause notice was without jurisdiction.

After about two and a half years, the Superintendent issued a corrigendum dated 9.2.2001 which sought to transform the demand of duty and proposal of penalty from Central Excise to Customs. On a perusal of the appellants' reply to the show-cause notice dated 1.7,98, we observe that their reply contained enough material to make the department realize the mistake of having invoked the Central Excise Act and Rules.

It should have occurred to the Department at that stage that demand of duty should have been raised under the Customs Act. The Central Excise Act and the Customs Act are independent, self-contained statutes. The nature of duty leviable and the basis of a demand thereof under the Central Excise Act are different from those under the Customs Act.

Hence, a demand of certain duty raised under one Act cannot be transformed into demand of a different duty under the other Act through a corrigendum to the show-cause notice issued under the former Act, though it is open to the department to issue a corrigendum within reasonable time to amend a show-cause notice under a given statute without enlarging the scope of, or otherwise changing the complexion of the case made out in, the original notice. The fact that the authority for issuing show-cause notices under both the statutes is vested in the same officer is not a relevant factor in this context. We note that the amendments

brought about by a corrigendum to show-cause notice would normally date back to the notice itself and, therefore, as in the instant case, a belated corrigendum for demanding one kind of duty under one statute, to a notice issued earlier for demanding another kind of duty under another statute can be grossly prejudicial to the assessee's substantive right of pleading limitation under the former statute. An assessee's right to resist a demand of duty on the ground of limitation cannot be defeated by the Revenue in this manner. The DR has not shown to us any provision of law or cited any judicial authority in support of his defence of the corrigendum in question. We are of the considered view that the show-cause notice dated 1.7.98 as amended by the so-called corrigendum dated 9.2.2001 should be treated as an original show-cause notice issued on 9.2.2001 for demanding customs duty and imposing penalty under the provisions of the Customs Act. We also note that the larger period of limitation was not invoked for this demand. Obviously, the demand of customs duty raised on 9.2.2001 in respect of the raw material imported by the appellants during 1997-98 is barred by limitation under Section 28 of the Customs Act.

6. In the case of *Studds Ltd*, (*supra*) cited by the Counsel, a show-cause notice was issued on 2.2.1990 demanding Central Excise duty by denying SSI exemption to the assessee. A corrigendum dated 14.9.90 changed the Tariff classification of the goods and accordingly enhanced the quantum of demand. It was held that the corrigendum was, in effect, a new show-cause notice as a new ground for demanding duty was raised.

The demand was accordingly held to be time-barred with reference to the date of the 'corrigendum'. The instant case stands on a stronger footing for the reasons we have already recorded.

7. A jurisdictional objection was also raised by the Counsel, but that was with reference to the show-cause notice issued on 1.7.98 by the Superintendent demanding Central Excise duty. As the said notice did not survive beyond 8.2.2001, we think it is futile to examine the jurisdictional issue. Yet another ground raised against the demand of customs duty was that the duty-free assessment made by the proper officer on the ex-bond Bills of Entry under Section

47 of the Customs Act had become final and binding on the Revenue for want of review under Section 129-D of the Act. We think, in this case, it is not necessary to consider this contention either, as such a contention is available only to the proper assessee viz. Siddhartha Tubes Ltd. who filed the ex-bond Bills of Entry.

8. As for the penalty, we find that the Commissioner has imposed a penalty under Section 112(a) of the Customs Act whereas what was proposed in the show-cause notice dated 9.2.2001 was a penalty under Section 114-A of the Act. Any penalty beyond the scope of the show-cause notice cannot be sustained.

9. In the result, we set aside the impugned order and allow this appeal with consequential relief.

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