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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT

Decided On : Jan-23-2004

Reported in : (2004)(94)ECC214

Judge : G B Deva, M T K.C.

Appellant : international Cargo Agents and

Respondent : Cc

Judgement :

1. These two appeals are filed by M/s Jaycee Exports and M/s International Cargo Agents against Order-in-Original No.07/2000/Commr/Adjn. dated 22.2.2000 passed by the Commissioner of Customs, Bangalore.

2. The facts in brief are that M/s Jaycee Exports, Mumbai Filed two shipping bills No. 16048 and 16050 both dated 26.7.99 at Air Cargo Complex, Bangalore for export of non-metallic writing instruments under DEPB scheme by declaring FOB value of Rs. 56,73,889. It appeared that the export consignment was over-valued to seek benefit under DEPB scheme. Therefore, it was detained for conducting market enquiries. The shipping bills were filed by M/s International Cargo Agents on behalf of M/s Jaycee Exports. During investigation, statements of various persons were recorded and a representative sample of the detained/seized goods were also sent for ascertaining present market value from M/s Pointec Pens Pvt Ltd., Bangalore. On investigation it appeared that M/s Jaycee Export had filed shipping bills No.22184-22185 both dated 11.6.99 at ICD, Bangalore for export of

non-metallic writing instruments (ball pens) valued at Rs. 56,65,800 under DEPB scheme through M/s International Cargo Agents, Customs Agents. On enquiry being initiated by Customs officers, ICD Bangalore, regarding over-valuation of the consignment, these shipping bills were got cancelled by M/s Jaycee Exports and the same consignment was then presented at Air Cargo Complex, Bangalore under shipping bill No. 16048 & 16050 dated 26.7.99 showing FOB value of Rs. 56,75,800 under DEPB scheme. In the shipping bill, they made declaration that advance payment has been received in respect of the said export consignment.

Although on investigation it was found that M/s Jaycee Export could not correlate the inward remittances to the export values shown in the shipping bills. They also could not furnish documents for having received an export order. The export value declared was not commensurate with the goods attempted to be exported and it was admitted by the exporter that there has been over-valuation to avail excess DEPB credit. However, the goods were allowed to be exported and show cause notice was issued to M/s Jaycee Export proposing penal action under Section 114 of the Customs Act show cause notice was also issued to M/s International Cargo Agents for penal action as they have presented the pens for export at Air Cargo Complex, Bangalore knowing fully well that the said consignment was over-valued and they had not made any entry in the register required to be maintained as per Customs House Agents Licensing Regulations, 1984 in respect of the shipping bills filed at ICD, Bangalore for the same consignment. They also failed to furnish the copies of shipping bills filed at ICD which were subsequently cancelled. They also signed the declaration for exporter and contravened provisions of Rules 14 and 19 of the Customs House Agents Licensing Regulations, 1984 read with the relevant provision of the Customs Act, 1962. The case was adjudicated by the Commissioner of Customs. He determined the value of the pens exported as Rs. 6 per piece in terms of Section 14 of the Customs Act. The value was determined for the purpose of benefit under DEPB scheme. He also imposed a penalty of Rs. 5 lakhs on M/s Jaycee Exports, Mumbai under Section 114 of the Customs Act and a penalty of Rs. 50,000 on M/s International Cargo Agents, Bangalore under Section 114 of the Customs Act for aiding or abetting M/s Jaycee Exports in commission of offence.

3. On behalf of M/s Jaycee Exports, Shri B. Venugopal, Advocate and for M/s International Cargo Agents, Shri B.V. Kumar, Advocate appeared for hearing. Smt. Radha Arun, Ld. SDR appeared for the Revenue.

4. Shri B. Venugopal, the Ld. Advocate for M/s Jaycee Exports first started arguing the case with regard to under-valuation. When he was shown the various evidences, then he conceded that there has been under-valuation. He pleaded that for imposition of penalty under Section 114 of the Customs Act, the Ld. Commissioner invoked the provisions of Section 50 of the Customs Act and Section 18(1)(a) of FERA, 1973 which were not invoked in the show cause notice dated 14.12.99. The Show Cause Notice also does not mention the sub-section of Section 113 of Customs Act. The Ld. Commissioner has traversed beyond the allegation in the show cause notice while passing the impugned order and the appellants were not afforded an opportunity to represent the violations of the Foreign Exchange Regulation Act, 1973.

The Tribunal has held in catena of judgments that adjudicating authority cannot go beyond the allegation made in the show cause notice. He relied on the decision of Tribunal in the case of CCE v. Towers and Structural Pvt. Ltd., 1993 (102) ELT 687 (Tri); Hospita India Ltd. v. CC, New Delhi 1999 (30) RLT 15 (CEGAT); Modi Cement Ltd. v. CCE, Raipur 1998 (99) ELT 378; Brindavan Agro Inds. Ltd. v. CCE, Kanpur 1998 (98) ELT 284 (Tri); Modern Syntex (I) Ltd. v. CCE, Jaipur 1996 (84), ELT 209 (Tri). In the light of these decisions, he submitted that the impugned order passed by the Commissioner is liable to be set aside.

6. Shri B.V. Kumar, learned Advocate, appearing for M/s. International Cargo Agents, pleaded that the Commissioner has already restored the licence of M/s. International Cargo Agents which was suspended consequent to the case against M/s. Jaycee Exports under consideration in this appeal. In view of this, he stated that the penalty imposed on M/s. International Cargo Agents may be dropped. When he was asked whether the order restoring the licence was issued after the impugned adjudication order against M/s. Jaycee Exports and M/s. International Cargo Agents-or before it, he stated that the order restoring the licence was passed much after the adjudication order under dispute in these appeals. He also

reiterated the submissions made by the learned advocate of M/s. Jaycee Exports that Show Cause Notice does not indicate the sub-section of Section 113 of Customs Act, under which the impugned goods were liable for confiscation, nor the sub-sections of Section 114 of the Customs Act, 1962 under which the appellants were liable for penalty. He also pleaded that the Commissioner has wrongly observed that the appellants were not authorized by the Exporter (Jaycees) to give the declaration on behalf of the exporters. He stated that the Exporter, in his statement dated 2.8.1999, has clearly accepted that he inflated the price of pens to Rs. 18.50 per piece to enjoy undue benefit of DEPB Scheme, which he knew is illegal. From this, it is clear that the exporter himself admitted that he has mis-declared the value of goods in order to avail the benefit of the DEPB scheme. In none of the statements, the appellants (M/s.

International Cargo Agents) were implicated as one who had any knowledge of the illegal act of the exporter or was in any way concerned with the commission of the offence with the exporter. The appellants had neither committed any act of omission or commission to render the impugned goods liable for confiscation nor any act of abetment. The goods were neither prohibited nor dutiable for the purpose of export. As such these were not liable for confiscation under Section 113 of the Customs Act. Section 113 does not cover cases in which there were alleged infractions of procedure prescribed under DEPB scheme. Therefore, no penalty is liable to be imposed on the appellants (M/s. International Cargo Agents) under Section 114 of the Customs Act, 1962.

7. Smt. Radha Arun, learned SDR, appeared for Revenue, She stated that the Show Cause Notice clearly mentions that enquiries conducted reveal that M/s. Jaycee Exports were not able to correlate the inward remittance of the export values shown in the shipping bills; had declared the export value which was not commensurate with the actual value of goods attempted to be exported and had over-valued the export goods with an intention to avail of DEPB credit to the extent of 21% of the FOB value. Thus, the goods attempted to be exported are liable for confiscation under Section 113(d) of the Customs Act, 1962. Non-mention of sub-section of Section 113 of Customs Act, does not vitiate the SCN when the offence committed has been specifically mentioned. Regarding contravention of M/s.

International Cargo Agents, she stated that the Show Cause Notice clearly mentions that the provisions of Rules 14 and 19 of Customs House Agents Licensing Regulations, 1984 read with the relevant provisions of the Customs Act, 1962 were contravened by them.

8. She stated that the Commissioner, in his order, mentioned that Shri Jagdish Lakhani has failed to produce the documents pertaining to export order placed by the overseas buyer. In addition, he has mis-represented the facts and mis-declared the same in the shipping bill with an intention to avail undue benefit of the DEPB scheme. In view of the fact that, he has wilfully suppressed and concealed vital information in the shipping bills filed under Section 50 of the Customs Act, the goods are liable for confiscation under Section 113(d) of the Customs Act. The goods so mis-declared are to be considered as prohibited goods as they do not conform to the declaration filed under Section 50(2) of the Customs Act. As per Notification issued under Section 18(1)(a) of the FERA, 1973, the goods are to be treated as prohibited goods if the exporter does not furnish true declaration of all material particulars including the physical particular of the goods. She also referred to para 27 of the Commissioner's order and stated that the Commissioner has correctly given the findings that the procedure for determination of value under Section 14 of the Customs Act, 1962 is adopted for the Rules made under Foreign Trade (Development and Regulation) Act, 1962, irrespective of the fact whether the goods are liable to duty or not. Violation of Rule 11 would ipso facto amount to violation of the provisions of Section 11 of Foreign Trade (D & R) Act, which would in turn attract the provisions of Section 113 of the Customs Act since the goods would be exported contrary to law. She relied on the Supreme Court's decision in case of *Om Prakash Bhatia v. CC, Delhi*, 2003 (88) ECC 454 (SC) : 2003 (155) ELT 423 (SC) and stated that present case is squarely covered by this decision. She, therefore, stated that the order passed by the Commissioner is not beyond the scope of the Show Cause Notice as he has only given the reference of FERA and Section 50 of the Customs Act for establishing that the goods attempted to be exported are prohibited goods and the same are liable for confiscation under Section 113(d) of the Customs Act and consequently the exporters are liable for penalty under Section 114 of the Customs Act. She also pleaded that in respect of over-valuation, Commissioner has given clear findings that the fact of over-

valuation was known to the CHA, M/s International Cargo Agents and they had taken positive steps to get the consignment cleared after signing the documents. Therefore, M/s. International Cargo Agents have actively aided and abetted M/s. Jaycee Exports in the commission of the offence as they had reasons to believe that the goods were liable for confiscation and, therefore, penalty has been rightly imposed.

9. We have carefully considered the submissions made by both sides. We find that the main objection on the side of the appellants is that the show cause notice had not given the sub-section of Section 113 of the Customs Act which have been violated by them and the Commissioner has invoked the provisions of Section 50(2) of the Customs Act and Section 18(1)(1) of FERA, 1973 which were not disclosed in the Show Cause Notice. We find that the Show Cause Notice clearly mentions that the appellants M/s. Jaycee Exports have filed two shipping Bills No. 16048 and 16050 both dated 26.7.1999 at ACC, Bangalore for export of non-metallic writing instruments under the DEPB Scheme by declaring an FOB value of Rs. 56,73,885. The export consignment was over-valued in order to seek undue benefit under DEPB scheme. M/s. Jaycee Exports were not able to correlate the inward remittance of the export values shown in the shipping Bills. They had declared the export value which was not commensurate with the actual value of goods, attempted to be exported and had over-valued the export goods with an intention to avail of DEPB credit to the extent of 21% of the FOB value. Thus, the goods attempted to be exported appeared to be liable for confiscation under Section 113 of the Customs Act, 1962. Therefore, the clear cut offence has been mentioned in the Show Cause Notice. Non-mention of the sub-section of Section 113 does not vitiate the Show Cause Notice. Supreme Court in the case of Om Prakash Bhatia v. CC, Delhi, 2003 (88) ECC 454 (SC) : 2003 (155) ELT 423 (SC) has held that over-invoicing of export goods or not mentioning true sale consideration of the goods would amount to violation of the conditions for import/export of the goods and result in illegal/irregular transactions in foreign currency. It was also held that prohibition of importation or exportation could be subject to certain prescribed conditions to be fulfilled before or after clearance of goods. If conditions are not fulfilled, it may amount to prohibited goods. The Commissioner, in his order, has taken recourse to Section 50 of the Customs Act

under which shipping bills were filed, on the ground that the appellants M/s. Jaycee Exports had wilfully suppressed and concealed vital information in the shipping bills filed under Section 50 of the Customs Act as they have failed to produce documents pertaining to export order placed by the overseas buyers and had mis-represented the facts and mis-declared the value in the shipping bills with an intention to avail undue benefit under DEPB scheme and the goods so mis-declared are to be considered as prohibited goods as they do not conform to declaration made in the shipping bill under Section 50(2) of the Customs Act, 1962 and notification issued under Section 18(1)(a) of FERA, 1973. In para 27 of his order, the Commissioner has discussed various case-laws and he has also relied on the decision of the Tribunal in the case of Hitkraft India v. Collector of Central Excise, 1991 (55) ELT 348 (Tri) where the Tribunal has held that mis-declaration of quantity and value of export goods is a clear violation of Section 18(1)(a) of FERA, 1973 which in view of Section 67 thereof accounts to violation of Section 11 of Customs Act, 1962 attracting the provisions of Section 113(d) and 114 of the Customs Act, 1962. Thus, the provisions of Section 50 of the Customs Act and Section 18(1)(a) of FERA, even though not mentioning in the Show Cause Notice have not been considered by the Commissioner as the sections for imposition of penalty. He has only indicated these sections to show the declaration wrongly given in the shipping bill by over-valuing the goods amounts to violation of Section 113(d) of the Customs Act and the goods are liable for confiscation and the exporter is liable for penalty under Section 114 of the Customs Act. The various case laws relied upon by the appellant M/s Jaycee Exports are not applicable in the present case but the ratio of Supreme Court's decision in case of Om Prakash Bhatia v. CC, Delhi, 2003 (88) ECC 454 (SC) : 2003 (155) ELT 423 (SC) is squarely applicable in the facts and circumstances of this case. Therefore, we do not find any infirmity in the order of the Commissioner or in the Show Cause Notice by which the appellants were restricted to place their defence before the adjudicating authority.

The offences were clearly mentioned in the Show Cause Notice and, therefore, the Commissioner had correctly decided that the appellants have rendered the goods liable for confiscation under Section 113(d) of the Customs Act. Once the goods are liable for confiscation under Section 113 of the Customs Act, the appellants

M/s. Jaycee Exports were liable for penalty under Section 114(1) of the Customs Act. Therefore, the penalty has been correctly imposed by the Commissioner on the appellants M/s Jaycee Exports.

10. Regarding the defence taken by M/s International Cargo Agents, we find that they have deliberately suppressed the fact of presenting the consignment first at ICD Bangalore and when enquiries were started, then withdrawal of the shipping bills from there and again filing the shipping bills for the same consignment on enhancing the value at Air Cargo Complex, Bangalore. M/s International Cargo Agents, neither disclosed the fact of presenting the shipping bills at ICD, Bangalore, nor they produced the shipping bills filed and subsequently, withdrawn from ICD, Bangalore. The value shown in the shipping bills filed at ICD, Bangalore was Rs. 56,65,800 whereas for the same consignment, the value was shown as Rs. 56,75,800 when the shipping bills were filed at Air Cargo Complex, Bangalore. Since at both, the places the shipping bills were filed by M/s International Cargo Agents, they cannot claim their ignorance regarding changes in the values. The Commission in Para 30 of his order has given a detail account as to how M/s International Cargo Agents were aware that there have been over-valuation of the consignment. Therefore, the Commissioner has rightly concluded that M/s International Cargo Agents were aware that the goods being exported by M/s Jaycee Exports through them were liable for confiscation under Section 113(d) of the Customs Act and they had aided and abetted M/s Jaycee Exports in commission of offence of over-valuation of the export consignment. Therefore, penalty has been correctly imposed on M/s International Cargo Agents under Section 114 of the Customs Act.

However, considering the fact that the licence of M/s International Cargo Agents remained suspended for a considerable period of time, we are inclined to reduce the penalty to Rs. 25,000 to meet the ends of justice.

11. In view of our findings, we reject both the appeals, except the above modification in case of M/s International Cargo Agents.