

Pml Industries Ltd. and ors. Vs. Cce

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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

Decided On : Jun-18-2004

Reported in : (2004)(95)ECC393

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

Appellant : Pml Industries Ltd. and ors.

Respondent : Cce

Judgement :

1. Lest we should lose sight of the gravity of the case, we read the operative part of the adjudication order impugned in this appeal.

"80. Having regard to the above discussion and findings I pass of following order: (i) I demand duty Rs. 3,97,08,666 (Rs. three crores ninety seven lacs eight thousand six hundred and sixty six only) from M/s. PML Industries Ltd., Vill Behra, Derabassi Distt Patiala under Rule 9(2) of the Central Excise Rules, 1944 read with Section 11A(2) of the Central Excise Act, 1944 and direct them to pay forthwith; (ii) I direct M/s. PML Industries Ltd., Derabassi Distt, Patiala to pay interest on the amount of Rs. 3,97,08,666 (r) 20% per annum under Section 11AB of Central Excise Act, 1944 read with Notification No. 34/96-CE (NT) dt. 9.10.96 till the said amount is paid; (iii) The demand of the customs duty of Rs. 21,55,28,397 and Central Excise Rs. 9,76,682 involved on the capital goods imported duty free and procured indigenously without payment of duty as proposed in the show cause notice dt. 30.9.99 is not confirmed and M/s. PML Industries Ltd. Derabassi

Distt. Patiala are allowed to continue the capital goods bonded and work as 100% EOU till the decision of the Development Commissioner, NEPZ, Noida on the notice dated 7.7.99 for suspension of LOA and debonding of the unit of the noticee No. 1.

(iv) I confiscate duty free imported capital goods valued at Rs. 26,31,93,429 under Section 111(o) of the Customs Act 1962, but allow them to redeem the same on payment of token redemption fine Rs. 1,0,00,000 (Rs. Ten lacs only) as they intend to continue as 100% EOU. The goods if redeemed will continue to be bonded in the bonded warehouse of M/s. PML Industries Ltd., Derabassi; (v) I confiscate capital goods valued Rs. 81,31,335 procured indigenously without payment of duty by M/s. PML Industries Ltd. under Rule 9(2) read with Rule 173Q of the Central Excise Rules, 1944 and allow them to redeem the same on payment of token fine Rs. 50,000 (Rupees fifty thousand only) in lieu of confiscation as they intend to continue as 100% EOU. These goods, if redeemed will continue to be bonded in the bonded warehouse of M/s. PML Industries Ltd., Derabassi, (vi) I order that FBBM weighing 38,884 kgs. and 85,527 kgs. seized on 3.6.99 and 6.6.99 respectively and all valued at Rs. 55,36,290 is liable for confiscation under Rules 9(2), 151 and 226 read with Rule 173Q of the Central Excise Rules, 1944. But these goods are not available for confiscation as the same had been released provisionally to lawful owner in terms of Rule 206 (3) of the Central Excise Rules and on execution B-11 bond alongwith furnishing of the bank guarantee of Rs. 10 lacs of UBI, Mumbai. As the goods are not available for confiscation therefore, I Order to enforce the bond and appropriate an amount of Rs. 10,00,000 (Rupees ten lacs only) from the bank guarantee of Rs. 10 lacs the UBI, Mumbai furnished by the M/s. Allanasons Ltd., on account of M/s. PML Industries Ltd. (vii) I order that trucks No. HR-38-D 0470 and HR-38-C 6286 owned by M/s. Shallu Enterprises and M/s. S.K. Enterprises both of New Delhi respectively are liable for confiscation under Section 115 of the Customs Act, 1962 as made applicable to the Central Excise vide notfn. No. 68/63-CE dt. 4.5.63 but these trucks were released provisionally in terms of Rule 206 (3) of Central Excise Rules, 1944 to the lawful owners on the execution of the B-11 Bond (security) and furnishing of the bank guarantee of Rs. 60,000 of Corporation Bank, New Delhi by M/s. Shallu Enterprises, New Delhi and Rs. 60,000 of Punjab National Bank, New Delhi by Sh.

Gulshan Kumar S/o Asanand Sehgal C/o M/s. S.K. Enterprises, New Delhi. 1 order to enforce these bonds and appropriate amount of Rs, 60,000 (Rupees Sixty thousand only) out of the bank guarantee furnished by M/s. Shallu Enterprises and Rs. 60,000 (Rupees sixty thousand only) from the bank guarantee furnished by Sh. Gulshan Kumar on behalf of M/s. S.K. Enterprises.

(viii) I impose personal penalty Rs. 4,00,00,000 (Rupees four crores only) upon M/s. PML Industries Ltd., Derabassi under Section 11AC of Central Excise Act, 1944 read with Rules 9(2), 151, 209, 225 and 226 of the Central Excise Rules, 1944.

(ix) I also impose personal penalty Rs. 10,00,000 (Rupees ten lacs only) upon M/s. PML Industries Ltd. Derabassi under Section 112 (a) of the Customs Act, 1962 for the contravention of the provisions of Section 111(o) of the Customs Act, 1962; (x) I impose personal penalty Rs. 5,00,000 (Rupees five lacs only) each upon M/s. Agricom Foods Pvt. Ltd., Mumbai M/s. Allana Investment and Trading Co.

Mumbai and M/s. Frigario Conserva Allana Ltd., Mumbai under Rule 209-A read with Rule 225 of the Central Excise Rules, 1944. (xi) I impose personal penalty Rs. 5,00,000 (Rupees five lacs only) upon M/s. Allanasons Ltd. Mumbai under Rules 209 A read with Rule 225 of the Central Excise Rules, 1944.

(xii) I also impose personal penalty Rs. 1,00,000 (Rupees one lacs only) upon M/s. Frigorifico Allana Ltd., Sahibabad under Rule 209-A read with 225 of the Central Excise Rules, 1944; (xiii) I also impose personal penalty Rs. 5,00,000 (Rupees Five lacs only) upon Shri A.S. Bindra, Managing Director of M/s. PML Industries Ltd., Derabassi under Rule 209A of the Central Excise Rules, 1944 (xiv) I also impose personal penalty Rs. 50,000 (Rupees fifty thousand only) upon Shri Afzal Latif, Authorised Representative of M/s. Agricom Foods Pvt. Ltd. M/s. Allana Investment and Trading Co.

and Frigario Conserva Allana Ltd. all of Mumbai under Rule 209A of the Central Excise Rules, 1944; and (xv) I refrain from imposing penalty upon M/s. Shallu Enterprises, New Delhi and M/s. S.K. Enterprises, New Delhi has proposed a show cause notice dt. 30.9.99." 2. The proceedings culminating in the above order

emanated from the allegation that appellant M/s. PML Industries Ltd. (PML), Patiala failed to meet its export obligation (as a 100% EOU) and that part of the goods manufactured was sold in the domestic tariff area.

3. Very briefly stated the facts of the case are that the appellant PML is an approved 100% EOU and it imported capital goods valued over Rs. 26 crores duty free and also obtained some domestically produced machinery (without payment of excise duty) subject to the obligation that it will export its product, namely, Boneless Buffalo Meat and bye-product. The appellant's efforts met with only obstacles, the very first being a ban on the appellant's production by the State Government of Punjab. Though the appellant got over the ban through judicial intervention, the ban undermined its capacity to raise finances and to run the unit. As a solution to this problem, appellant got into an arrangement with M/s. Agrico Foods Pvt. Ltd., M/s. Allana Investment and Trading Com and M/s. Frigario Conserva Allana Ltd., where under these firms procured the cattle for slaughtering, appellant carried out the processing, received processing charge and the meat products were supplied to these parties for export. However, the customs authorities issued a show cause notice alleging that the appellant had let out its plant (which it could not have done) and that the supplies to these parties was only in the nature of domestic sale and could not be counted against export obligation and that the export of the goods had not been proved etc. The Commissioner while passing the impugned order, held in favour of the Revenue, except with regard to the allegation of letting out the plant. Based on the findings, the Commissioner demanded the duties, imposed penalties and redemption fines as indicated earlier in this order.

4. The very first submission of PML is that the appellant's export obligation was in terms of the approval granted by the Directorate General of Foreign Trade (DGFT) and that that authority has accepted the appellant's claim that the machinery have been put to production and the products exported through the three parties M/s. Agrico Foods Pvt. Ltd., M/s. Allana Investment and Trading Com and M/s. Frigario Conserva Allana Limited. During the hearing of the case, appellant has placed on record order dated 14th November 2002 passed by the Development Commissioner, Noida Export Processing Zone accepting the performance of

export obligation. The appellant points out that the acceptance of export obligation by the DGFT has knocked the bottom out of the charge to the contrary confirmed in the impugned order. Learned Senior Counsel for the appellant also pointed out that, contrary to the findings in the impugned order (that there was no export by PML and that the clearances to their buyers should be taken as domestic sales) the customs authorities are now accepting that the appellant's sales to three parties could be treated as export and that they are only disputing the actual figure of export as found by the DGFT. Reference in this connection has been made to letter dated 24.10.2003 of Asstt.

Development Commissioner, Ndida and appellant's reply dated 19.12.2003.

5. On merits also, the appellant has contended that the findings are not sustainable on available facts. It is being pointed out that according to the Revenue itself, appellant's production was being cleared to the three parties who transported the buffalo meat to the export warehouse of Allaha Investment and Trading Co., and thus, there is no evidence that the goods were being sold for domestic consumption.

It is further pointed out that the appellant had produced shipping bills in support of its claim that the goods sold to the three parties were exported from Mumbai Customs approved warehouse. However, these documents were erroneously rejected by the Commissioner mostly on the ground that the shipping bills did not contain the name of PML. The sales to the three parties were also not accepted as export sales on the ground that they were not authorised parties under the Export Policy. The appellant has pointed out that these parties are Export Houses/Star Trading house and that they are entitled to export of products of EOUs. It is further being pointed out that this arrangement of export through third parties was in the knowledge of the Development Commissioner (Export) and the Development Commissioner accepted those export through them as qualifying for satisfying the export obligation of the appellant.

6. With regard to the objection raised in the impugned order about appellant's name not figuring in Shipping Bills, the learned Sr.

Counsel has pointed out that this objection is not sustainable. He has in this connection, referred to the decision of this Tribunal in the case of Leela Scottish Lace Ltd. v. Commissioner of Customs, Bangalore, 2003 (156) ELT 548 that non-mentioning of EOU/EPZ unit as manufacturer/exporter in shipping bill did not amount to misdeclaration and that export through third parties also satisfy the export obligation of EOU. They have also relied on this Tribunal's Decision in the case of Alsa Marine & Harvests Ltd. v. CC, Visakhapatnam, 2003 (158) ELT 741 in support of the submission that short storage of the export goods before shipment is no ground for holding that they were not exported.

7. Learned SDR has pointed out that the impugned order has been passed because of several procedural lapses committed by the appellant. The goods had not been cleared under AR-4 or other prescribed documents and exports could not be correlated because of appellant's name being not mentioned in the Shipping bills.

8. We have perused the records and have considered the submissions made by both sides. The subject matter of this order was the subject matter of show cause notice by the DGFT authorities also. The impugned order itself has noted at para 17.5 that Development Commissioner, Noida has already issued show cause notice vide. F. No. 11/23/92-100% EOU-I Vol.

It dated 7.7.99 to M/s. PML Industries Ltd., asking them to explain the position about their letter of undertaking. Thus, on the very same issue of export obligation, Customs authorities are undertaking parallel proceedings and reaching opposite findings. This is not to be.

Multiplicity of proceedings only leads to confusion and harassment. The export obligation of an EOU is an obligation under the permission granted by the DGFT. An EOU is also bound by an undertaking to the DGFT in regard to export obligation. In these circumstances, it is necessary that the customs authorities stay away from investigation of export obligation. Action to recover customs duty on the imported goods or excise duty on goods supplied duty free can arise only upon a finding by the DGFT that the unit has failed to function as an EOU and therefore, it is to be debonded and subjected to duty in regard to imports or duty free receipt of

goods from domestic market. Such a restraint on the part of the customs authorities would have avoided these proceedings altogether, which have cost dearly in terms of wasted time and effort to Revenue. Also huge trouble to the present appellants.

9. The order is self contradictory and clearly brings out the confusion in thinking and ambivalence about jurisdiction. While under Sl. No.(iii) of para 80, the Commissioner has refrained from confirming custom duty on the imported capital goods and has allowed the appellant to continue to "work as 100% EOU till the decision of the Development Commissioner, NEPZ under notice dated 7.7.99 for suspension of LOI," under the very next Sl. No. (iv) the Commissioner has confiscated the very capital goods, which he allowed to be used for export production.

We are at a loss to understand how these orders could co-exist.

10. The present order also is not founded on any evidence. The allegation of sale in the domestic tariff area has been made and confirmed only on two grounds mainly. One that supplies to the three parties cannot be accepted as export supplies as they were not authorised Otherwise, it is accepted in the proceedings that the goods in question were transported in Refrigerated Vans to the bonded warehouse of the export house at Mumbai. There is no evidence whatsoever, nor is it the allegation, that there was actual sale for DTA consumption. The second objection is that PML does not figure as the exporter in the Shipping Bills. Both these grounds are not sustainable. The parties to whom supplies were made were eligible Export Houses/Star Trading House. This Tribunal has already held that non-mention of EOU's name in shipping Bills is no ground for not accepting the physical exports. Clearly there is no substance in the revenue's case though the enormous punishments imposed under the impugned order tends to create the opposite impression. The EOU's obligation was to put the duty free items to export production. That it has done. And the competent authority (Export Commissioner) has accepted it. Modalities of sale and export are secondary.

11. In view of what is stated above, we hold the findings in the impugned order to be not sustainable. The duty demands, confiscations, and penalties under the

order against the present appellants are set aside and the appeals are allowed with consequential relief, if any, to the appellants.

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