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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Tamil Nadu

Decided On : Nov-02-2004

Judge : P Chacko, R K Jeet

Appellant : Pals Trading Co. Ltd. and

Respondent : Cc

Advocate for Pet/Ap. : Shri. A.K. Jayaraj

Judgement :

1. These two appeals are directed against the order in original No.1523/2004 dated 17.2.2004 passed by the Commissioner of Customs (Exports), Chennai by which the Commissioner has held the goods imported as Men's Woven Shirts, Men's cotton woven Shirts, Men's Knitted Shirts, Cotton knitted Men's Shirts, Men's knitted T-Shirts, Men's cotton knitted Shorts, Men's Nylon woven Shorts, Ladies Leather sandals, Rubber Slippers, Cotton towels of three different sizes. The Commissioner has also fixed the total assessable value to the goods at Rs 34,30,133/- and has ordered confiscation of the goods under Section 111(1) & (m) of the Customs Act, 1962 with option to redeem the same on payment of fine of Rs 3,00,000/- (Rupees three lakhs) under Section 125(2) of the Act *ibid*. He has also imposed penalty of Rs 1,00,000/- (Rupees One lakh only) each on the appellants under Section 112(a) of the Act.

2. Brief facts of the case are that M/s Ashtalakshmi Marketing filed Bill of Entry No. 466198 dated 21.2.2003 under DEPB scheme through their CHA M/s Sea India

Freight Systems for the clearance of the goods declared as Rubber Slippers and Cotton Towels. The goods were stated to have been supplied by M/s Pals Trading Co. Bangkok. The importers and the CHA subscribed to a declaration regarding the truth of the contents of the Bill of Entry as provided under Section 46(4) of the Act.

Inspection conducted by the officials in Docks revealed that apart from the items declared in the Bill of Entry Viz. Rubber Slippers and 100% cotton towels of two sizes, undeclared items such as men's woven shirts, etc as mentioned in para 1 above were also found concealed behind the packages of Towels and Rubber slippers declared by the importer. After the mis-declaration was noticed, the CHA vide his letter No. SIFS 195/2003 dated 26.2.2003 submitted copies of letter dated 25.2.2003 from the importer addressed to the supplier and the reply dated 25.2.2003 received by the importer from the supplier. In the letter dated 25.2.2003 the importers have stated that what they had ordered for was 552 dozens of towels, 5000 dozens of napkins and 90 dozens of rubber footwear. In the reply dated 25.2.2003 furnished by the suppliers viz M/s Pals Trading Co, it was stated that there were chances that shirt packages would have got mixed up with the items viz.

Towel, napkin and Rubber footwear and that the mix up had happened because of wrong packages in the container and that it was very difficult to find out quantity of shirts in the packages. Out of the items found in the consignment, only three items were declared in the Bill of entry viz. Rubber Slipper, Towel 14 x 14 and Towels 27 X 54 and the rest of the items were undeclared. Vide their letter dated 31.5.2003 addressed to the Deputy Commissioner of Sea Port, SIIB Section, the importers inter alia stated that "On examination of the goods, it was realised by the Customs as well as by them, that the goods packed in the Container No. MLCU 392584-1 was NOT what was actually consigned by them and stated to have been supplied/shipped under the cover of Supplier's Commercial Invoice No. P 003/2003 dated 4.2.2003". They have also stated that they have no option but to abandon the garments found packed in the said container. It was in these circumstances that show cause notice was issued to the appellants which culminated in the order of adjudication passed by the Commissioner as noted

above.

3. Shri A.K. Jayaraj, learned Counsel for the appellants submitted that in the present case the importers of the goods on finding that the goods imported was different from what they had ordered for, abandoned the goods. He has further submitted that so far as the supplier was concerned, when the mix up was brought to their notice by the importers, they have admitted their mistake about the wrong packings and it was also stated in their reply to the importers that it was very difficult to find out the quantity of shirts inside the container and they have requested Department for allowing re-export of the goods.

However, their request for re-export was not allowed. The Counsel further submitted that identical case came up before this Bench in the case of M/s MV Marketing & Supplies v. CC, Chennai in Appeal no.,C/17/2004 and the Bench vide final order No. 861/2004 dated 8.10.04 has allowed re-export of the goods imported therein without payment of duty, but on payment of redemption fine. He has also invited our attention to the order of the North Regional Bench of the Tribunal in the case of CC, ICD, TKD, New Delhi v. Sewa Ram & Bros reported in 2003 (151) ELT 344 wherein the Tribunal held that penalty is not imposable in a situation where importer has abandoned the goods before clearance for home consumption. He therefore, prayed for allowing the appeals.

4. Smt R. Bhagyadevi, learned SDR appearing on behalf of the Revenue defended the impugned order and submitted that mis-declaration is admitted and the appellants have been rightly penalised. She has also submitted that request of the supplier for re-export has also been rightly denied in view of the judgement of the Hon'ble Supreme Court in the case of CC v. Grand Prime Ltd. reported in 2003 (155) ELT 417 (SC).

She, therefore, prayed for rejection of the appeals.

5. We have carefully considered the rival submissions and gone through the case records and perused the case laws cited. We observe that in this case, complete inventory of the goods imported was taken during examination proceedings on 21.5.2003 and 27.5.2003 and it was found that there were undeclared goods such

as men's woven shirts, men's knitted shirts, men's knitted T shirts, cotton knitted short, nylon woven shorts, ladies leather sandals and cotton towels along with declared items such as rubber slipper, cotton towels of two sizes as noted in para 10.1 of the order impugned. On 31.5.2003, the importers have intimated the Deputy Commissioner of Customs, that the goods supplied/shipped under Invoice No. P 003/2003 dated 4.2.2004³ were not actually ordered for by them and therefore they have no option but to abandon the goods. It is seen from the records that the importers have not made payment of the goods and the title to the goods have also not passed on to them and they have abandoned the goods. In this case, the Bill of entry was filed on 21.02.2003 and as soon as the misdeclaration was noticed, the importers have addressed communication dated 25.02.2003 to the supplier to the effect that what they have ordered was different from what they have been supplied and that they are abandoning the goods. Therefore, there is no reason to doubt the bona fide of the importers that the undeclared goods supplied to them was not ordered by them. It is also seen from the records that the supplier of the goods have also in response to the communication of the importers, that there were mix up in the packagings in the shipment and that it was very difficult to find out the quantity of shirts inside the packages. We further find from para 23.03 of the order impugned that the supplier viz. M/s Pals Trading Co. in reply to the show cause notice have intimated the Department that there was mistake in despatching wrong and unsolicited goods and that they own up responsibility for the lapse. They have also explained that the reason for the mix up was because of huge volumes of business conducted by them and that the lapse was made good by subsequent shipment. They have also stated that they are the rightful owners of the goods and they requested for permission to re-export the goods without fine or penalty.

6. In the background of the above factual position, we now proceed to deal with the request of the supplier for re-export of the goods. In the instant case as noted above, the goods were not paid for by the importers and the title to the goods have not passed to the importers and it remained with the supplier only. We note in a similar situation where there was mix up in the shipment of goods and where the importers and the suppliers have acted upon immediately on noticing the mix up, in the case of M/s MV Marketing v. CC, Chennai, this Bench vide final order No.

861/2004 dated 8.10.04, has allowed re-export of the goods on payment of fine and penalty. In the said case also the adjudicating authority relying on the judgement of the Hon'ble Supreme Court in the case of CC v. Grand Prime Ltd, reported in 2003 (155) ELT 417 (SC), held that re-export cannot be permitted and the goods were confiscated with option to redeem the same on payment of fine and penalty. The Tribunal in the said order has distinguished the facts from the cited case and dilated at length the aspect pertaining to allowing re-export of the goods in a situation where there was mix up in shipment of the goods and where the title to the goods have not passed on to the importers and have held that in view of the long standing practice of the department in allowing re-export and following judicial pronouncements allowing re-export in such situation, the prayer for re-export of the goods cannot be denied and allowed re-export of the goods. We see that the ratio of that order squarely applies to the present appeal also. Accordingly, following the ratio of the said order, we uphold the order of confiscation and allow the prayer of the supplier to re-export the goods without payment of duty, but on payment of a redemption fine of Rs 1,50,000/- (Rupees One lakh, fifty thousand). In the facts and circumstances of the case, we are inclined to think that interests of justice would be met if the penalty imposed on the supplier is set aside and we order accordingly. Thus appeal No.C/152/2004 is partially allowed to the extent indicated above.

7. Now, coming to the appeal filed by the importer, viz M/s Ashtalakshmi Marketing, we find that the adjudicating authority himself in para 30.0 has noted that the supplier had supplied wrong goods and did not take sufficient care. Further, in para 35.0. the adjudicating authority has found that it is not conclusively established that there was concealment of the goods. When the Department itself admitted that the charge of concealment against the importer has not been established and has also accepted the version put forward by the supplier as well as the importer that there was wrong shipment, the charge of alleged mis-declaration, in our view, cannot be taken too seriously. Further, on coming to know that the goods shipped were not as per their order, the importers abandoned the goods. We note that in the case of CC, ICD, TKD, New Delhi v. Sewa Ram & Bros reported in 2003 (151) ELT 344 (Tri-Delhi), the Tribunal had held that no penalty is imposable where the importers have abandoned the goods. Inasmuch as in the

present case, the importers have abandoned the goods as soon as the mix up came to light, we are of the considered opinion that the importers cannot be visited with penalty. We, therefore, following the ratio of the cited decision, set aside the penalty of Rs 1,00,000/- (Rupees One lakh only) imposed on them and allow their appeal.

8. Operative portion of this order allowing the appeal of the importer viz. M/s Ashtalakshmi Marketing and partially allowing the appeal of the other appellants was pronounced in the open Court on 2.11.2004.

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