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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

Decided On : Dec-20-2004

Reported in : (2005)(98)ECC591

Judge : J Balasundaram, Vice, A T V.K.

Appellant : Sunsui India Ltd.

Respondent : Cce

Judgement :

1. M/s. Sunsui India Ltd. and their Managing Director have filed these four appeals against Order-in-Appeal No. 88 to 97/2003 by which the Commissioner (Appeals) has upheld the enhancement of assessable value of the goods imported by them, upheld the demand of Customs duty and penalty imposed on the Appellant Company and reduced the penalty imposed on the Managing Director.

2. Shri Manik Chand, learned Consultant, mentioned that the Appellants manufacture electronic watches and clocks; that they imported parts of watches and electro micro circuits in January 1997 and September 1997; that based on the export declaration filed by their supplier with the Hong Kong Customs & Central Excise Department, the Customs Department in India has enhanced the assessable value of the goods imported by them. He mentioned that the Appellants are not challenging the demand of Customs duty as confirmed by the Commissioner (Appeals) in the impugned Order. In view of this we uphold the demand of Customs duty against the Appellants.

3.1 The learned Consultant submitted that as the imported goods had been cleared to them on payment of duty after filing the bill of entry in 1997 and the goods in question had never been seized by the Department, the question of confiscation of the goods and consequent their redemption on payment of fine does not arise. He relied upon the decision in the case of Ram Khazana Electronic v. C.C., Air Cargo, Jaipur,(T) and Prudential Pharmaceuticals Ltd. v.C.C., Chennai, 3.2 Countering the arguments, Shri S.M. Tata, learned SDR, submitted that as the assessable value of the imported goods was mis-declared the same were liable to confiscation under section 111 of the Customs Act and accordingly the Department is justified in ordering confiscation though the goods had already been cleared as the tainted nature of the goods does not go away by mere fact of their clearance. He relied upon the decision in Dadha Pharma Pvt. Ltd. v. Secretary to Govt. of India, 2000 (126) ELT 535 (Mad) wherein the Madras High Court has held that a careful reading of Section 111 of the Customs Act would clearly show that it is the liability to confiscation that is spoken to and not the actual confiscation. The High Court has held that "Merely because the department by reason of its inaction is not in a position to seize the goods, does not and cannot disable it adjudicating upon the liability for action under Section 111 read with Section 112 of the Act. Reliance has also been placed on the following decisions: (a) Chandrakant Seth v. Collector of Customs, 1993 (68) ELT 289 (Cal) - The liability to confiscation cannot be equated with the availability for confiscation.Weston Components Ltd. v.C.C., 2000 (67) ECC 201 (SC) : 2000 (115) ELT 278 (SC) wherein it has been held that the redemption fine could be imposed even when the goods were no longer in the custody of the Department.

4. We have considered the submissions of both the sides. Section 111 of the Customs Act describes the goods brought from a place outside India which shall be liable to confiscation for various actions or omissions.

Section 125 of the Customs Act provides that whenever confiscation of goods is authorized by the Customs Act, the adjudicating authority may, in the case of prohibited goods, and shall, in the case of any other goods, give to the owner of the goods option to pay fine in lieu of confiscation. In the present matters the goods imported by the Appellants were cleared out of Customs charge after

assessment of Bills of Entry and payment of duty. It was only through investigation conducted subsequent to the release of goods, the Department came to know about the under-valuation. However, the goods released to the Appellants were never seized. Thus, the goods though were liable to confiscation was never available with the Department for actual confiscation. If the goods are not available with the Department, the question of their confiscation and giving any option to the importer to pay fine in lieu of confiscation under Section 125 of the Customs Act does not arise. It is also not the case of the Revenue that the goods were seized and have been relased to the Appellants provisionally.

In view of these facts the Revenue cannot confiscate the goods and order the goods to be redeemed to payment of redemption fine. In the case of Weston Components Ltd., the goods were released to the party on an application made by it and on its executing a bond. In view of these facts, the Apex Court held that "if subsequently it is found that the import was not valid or that there was any irregularity which would entitle the Customs authorities to confiscate the said goods, then the mere facts that the goods were released on the bond being executed, would not take away the power of the Customs authorities to levy redemption fine." In the present matters neither the Appellants have made any application nor have they executed any bond. This Tribunal in the case of Ram Khazana Electronic has observed, while considering the ratio of the decision in Weston Components that "since the goods were released on a bond the position is as if the goods were available. The ratio of the above decision cannot be understood that in all cases the goods were permitted to be cleared initially and later proceedings were taken for under-valuation or other irregularity, even then redemption fine could be imposed." The Tribunal thus has set aside the redemption fine in Ram Khazana case. The facts of the present matter are similar to the facts in the case of Ram Khazana Electronic, the decision therein applies squarely to the facts of present matters. The decisions relied upon by the learned SDR are not applicable as the facts are different. In Mangala Textiles the goods were provisionally released.

The issue involved in Chandrakant Seth was whether the proceedings can be initiated under Sections 124 and 28 of the Customs Act once the goods had been

cleared. The Calcutta High Court has held that the submission of the petitioner "proceeds on a misconception that goods must be available before action can be taken under Section 124 or Section 28 of the said Act.....Section 124 deals with confiscation or penalty. The two are disjunctive and in any event, the liability to confiscation cannot be equated with the availability for confiscation." There is nothing in the decision about ordering payment of redemption fine. In Dadha Pharma P. Ltd., goods were released as show cause notice was not issued within 6 months of seizure of the goods and the goods were allowed to be re-exported to Nepal on bank guarantee submitted by the petitioner pursuant to a direction from the High Court. Thus, the facts are different. We, therefore, set aside the redemption fine imposed on the Appellant Company.

5. The learned Consultant finally submitted that no penalty under Section 112 of the Customs Act is imposable; that Section 112 provides for imposition of penalty on any person, who in relation to any goods, does or omits to do any act which would render such goods liable to confiscation under Section 111; that since the goods have not been confiscated in Appeal No. C/651/04-NB(A), penalty under Section 112 cannot be imposed; that the second Appellant has neither done anything or omitted to do anything deliberately with intent to evade payment of duty on the goods imported and as such no penalty can be imposed on him; that the charge of abatement was neither alleged in the show cause notice nor was held so by the Adjudicating Authority. He relied upon the decision in the case of Delco Precitone Jewellers (P) Ltd. v. C.C., 2000 (70) ECC 437 (T) : 2000 (124) ELT 1105 (T). We also heard learned SDR who reiterated the findings as contained in Orders passed by both the lower authorities.

6. The Appellants have not contested the confirmation of duty on account of enhancement of assessable value of the imported goods. Thus, there was mis-declaration by them with regard to value of the imported goods which makes the goods liable to confiscation under Section 11 (m) (sic) of the Customs Act. Penalty under Section 112 of the Customs Act is imposable on any person who, in relation to goods, does or omits to do any act which act or omission would render such goods liable to confiscation under Section 111 of the Act. As the mis-declaration of assessable value by the Appellant Company has rendered the goods liable to

confiscation, penalty under Section 112 of the Customs Act is imposable. The actual confiscation of the goods is not required for the purpose of imposing penalty under Section 112 of the Customs Act. The Madras High Court has held in Dadha Pharma Pvt. Ltd. "that the power to adjudicate upon for the imposition of penalty for improper importation, springs from the liability to confiscate, and not actual confiscation.

However, taking into consideration the facts and circumstances of the case we reduce the Penalty to Rs. 15,000 from Rs. 94,190 in Appeal No, C/257/04NB(A) and penalty to Rs. 5000 from Rs. 15,000 in Appeal No.C/651/04-NB(A). No specific act or omission has been attributed to Shri Mani Ram Bilwal, Second Appellant, except mentioning that total affairs of the company were managed by him. In absence of any specific act or omission alleged against him which has rendered the goods liable for confiscation, we set aside the penalties imposed on him.

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