Texcomash Export Vs. Commissioner of Customs

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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

Decided On : Mar-15-2005

Reported in : (2005)(185)ELT188TriDel

Judge : S Kang, Vice-, A T V.K.

Appellant : Texcomash Export

Respondent : Commissioner of Customs

Judgement :

1. M/s. Texcomash Export have filed this Appeal against Order-in-Original No. 56/2000, dated 28-11-2003 by which the Commissioner of Customs has disallowed the drawback claimed by them and has imposed a penalty on them under Section 114 (iii) of the Customs Act.

2. Shri A.K. Jain, learned Advocate, mentioned that the Appellants had made 29 export shipments of Children's garments through ICD, Tuglakabad, New Delhi during November, 1993 to June, 1994 and 9 export shipments of ladies garments through Mumbai Customs House during September, 1994 to October, 1994; that the proper officer at ICD New Delhi reduced the FOB value to Rs. 210/- per set of garments and granted drawback claims; that the Government of India, by Order No.406/99, dated 26-3-1999, has fixed the FOB value to be Rs. 242/- per set and has ordered that the amount of draw back be settled as per law.

The learned Advocate submitted that in the said Order, the Government of India has accepted the purchase price of Children's garments; that the findings in the impugned Order is factually incorrect in as much as that the earlier proceedings before the Government of India were the same pertaining to the correct ascertainment of the FOB value of the exported Children's garments; that once the Government of India has affirmed the FOB value of Rs. 242/- per set, no officer of the Department could overgo/nullify the same just by saying that in the earlier proceedings there was no allegation of fraud, forgery or manipulation, etc.; that the principle of stare decisis also applies to this particularly when all the evidences on the basis of which allegation of fraud, forgery, manipulation etc. have been made were already in the possession with the Department when the proceedings before the Government of India was going on; that even after the issuance of show cause notice dated 7-1-2000, the Government's Order dated 26-3-1999 had not been challenged before the High Court; that on the other hand when the said order dated 26-3-1999 was challenged by the Appellant in the Delhi High Court, the Government, in its counter affidavit, has accepted the value of Rs. 242/- for the purpose of their entitlement to draw back; that their writ is pending before the Delhi High Court. He, further, submitted that in respect of departmental Adjudication, the doctrine of res judicata very much applies. He relied upon the following decisions - Hope Plantations Ltd. v. Taluk Land Board - 1999 (5) SCC 590 wherein it has been held by the Supreme Court that "When the proceedings have attained finality, parties are bound by the judgment and are estopped from questioning it."CC & Central Excise, Ahmedabad v. Gujarat State Fertiliser & Chemicals Ltd.CCE, Indore v. Siddharth Tubes Ltd. - 2004 (170) E.L.T. 331 (T)Nestle India Ltd. v. CCE, Chandigarh - [2004 (176) E.L.T. 314 (T) = 2004 (63) RLT 586 (CESTAT)]Siddhartha Tubes Ltd. v. CCE, Indore 3. The learned Advocate mentioned that the draw back has been denied to the Appellants in respect of 9 consignments of ladies garments on the ground that the consignments reached Dubai instead of Russia; that the draw-back claim can not be denied simply on the ground that the shipments should have reached Russia and not Dubai; that under the Drawback Rules, there is no provision that in order to be entitled to drawback, the destination must remain the same as given in the Shipping Bills; that the Drawback Rules permit draw-back only when inward remittances have been

received by the exporter after the goods have left the Indian Port irrespective of the fact as to whether the goods reach the declared destination or not. He also mentioned that the Department does not dispute the goods having left the Indian shores and also their having reached a foreign port; that moreover it is always open to a foreign buyer whether he would take delivery of the goods at a Russian port or at a Dubai port because once the goods have been loaded on board the ship, he becomes the owner of the goods; that thus it is immaterial whether the goods reached Dubai or Russia. He also contended that it has nowhere been alleged in the findings that there was some understanding between the Russian buyer, the foreign buyer and the Appellants for diverting the goods to Dubai and that the Appellants were to gain anything unduly on that account; that this was precisely the reason that they had sought cross-examination of the representatives of the shipping companies to ascertain from them as to on whose direction, these goods were diverted to Dubai. He emphasised that the Commissioner has exonerated all the other persons whom the show cause notice was issued to for imposing penalty; that in such circumstances; it can not be alleged by the Department that there was any conspiracy hatched by the Appellants.

4. Countering the arguments Shri S.M. Tata, learned Senior Departmental Representative, submitted that the doctrine of res-judkata does not apply in respect of the 29 shipments of Children's garments since the earlier proceedings before the Government of India were not the same as all the documents now relied upon were not before it; that at the time of earlier proceedings there was no allegation of fraud and forgery, manipulation, etc. was made as the issue simply related to valuation of the product in question; that thus the issue in the present proceedings is altogether different; that the overwhelming evidence available with the Department clearly shows that the appellants had deliberately manipulated the export value with the intention of getting higher drawback claim. He contended that doctrine of res judicata does not apply to tax matters as held by the Tribunal in the case of Peico Electronics and Electricals Ltd. v. CCE, Pune, [1994 (71) E.L.T. 1053 (T)]; that it has been held by the Tribunal that competent Authority can issue a fresh notice if new facts come to light; that the Appeal filed against the said decision has been dismissed by the Supreme Court as reported in 2000 (116) E.L.T. A72 (S.C.). Reliance has also been placed on the decision in the case of

West Coast Paper Mills v.Superintendent of Central Excise [1984 (16) E.L.T. 91 (Kar.)] wherein the Karnataka High Court has held that the principles of res judicata are not applicable to Adjudication proceedings before the Revenue Authorities and decision in the case of J.K. Synthetics Ltd. v. Union of India - 1981 (8) E.L.T. 328 (Del.) wherein the Delhi High Court has held that an Authority can depart from his earlier stand for cogent reasons, such as fresh facts brought on record, etc. The learned Senior Departmental Representative reiterated the findings as contained in the impugned Order and contended that the Appellants had overvalued the goods with an intent to get drawback which was not due to them.

5. We have considered the submissions of both the sides. As far as 29 shipments of Children's garments are concerned, it has not been disputed by Revenue that these were the subject matter of Order-in-Revision No. 406/99, dated 26-3-1999 of the Government of India. It is seen from the show cause notice dated 7-1-2000 that the CIF value declared per garment was Rs. 1,432/- and the FOB value declared was between Rs. 1388/- and Rs. 1424/- per garment. The export was allowed provisionally as it was felt by the Customs Officers that the goods had been highly over-invoiced with the intention of claiming inflated amount of drawback. After conducting market enquiry, the Assistant Commissioner reduced the value to Rs. 210/- per set for the purpose of draw back. Their Appeal was rejected by the Commissioner (Appeals) and the Government of India, vide Order No. 466-467/95, dated 16-8-1995, remanded the matter for de novo consideration after making fresh enquiries in association with the Party's representative from reputed exporters within two months. After making fresh enquiries, the Assistant Commissioner again fixed the value at Rs. 210/- per set, under Order-in-Original No. 41/95, dated 16-11-1995 and their Appeal was rejected by the Commissioner (Appeals). However, the Government of India; vide Order No. 406/99, dated 26-3-1999 enhanced the FOB value to Rs. 242/- per set and ordered settlement of drawback as per law. The Government of India observed that as the FOB value declared by the Appellants was rejected as incorrect, "no option is left but to fall back upon the ascertained market price. The FOB (Free on Board), as a concept, signify a price which includes all costs including transport and other charges incurred upto the time that the goods are loaded on to ship for exportation." The

Revisionary Authority observed that the Appellants "have kept the difference of 14% to 16% between their cost price and declared FOB value. This difference can be said to include the profit margin, transportation and other charges incurred upto the time when goods are loaded on the ship for exportation. For the sake of calculation this difference may be considered at the average rate of 15%". Thereafter the following Order has been passed - "Government feels that treating the ascertained market price at Rs. 210/- per set as the cost price of the impugned goods and by adding the above arrived at difference of 15% on account of transportation and other expenditure, the amount so arrived should approximate FOB i.e. Rs. 242/-.

Government would accordingly fix the FOB of the impugned goods at Rs. 242/- per set and the amount of drawback thereon may be settled as per law." 6. It is thus apparent that the Government of India, in its power as Revisionary Authority, has accepted the market price of Rs. 210/- fixed by the Department after conducting market enquiries twice and the Government has fixed the FOB at Rs. 242/- per set after adding 15% in the market price on account of transportation cost and other expenses.

This fixation of FOB value has achieved finality as far as the Revenue is concerned as they have not challenged the same in an appropriate forum. Infact the averment of the Appellants that the Government has justified the determination of FOB price in the counter affidavit filed by it reply to the Writ Petition filed by the appellants in the High Court challenging the Order-in-Revision, has not been controverted by Revenue. In view of these facts, it is not open to the Department to start fresh proceedings regarding valuation of the goods exported by the Appellants and consequent sanction of draw back. There is no force in the submission of the learned Senior Departmental Representative that the documents on the basis of which the impugned show cause notice has been issued were not before the Revisionary Authority or the Department. We observe that the Revisionary Authority remanded the matter in August, 1995 for making fresh enquiries by which time already a preliminary report dated 21-6-1995 had been received by the Department from the Russian Customs which was followed by another report dated 24-7-1995 informing that the investigation by Russian

Customs concerning the delivery of Children's sets from Texcomash Export to Russia revealed violation of Indian and Russian Customs laws and that the investigations suggested two complete sets of commercial documents. There was nothing to prevent the Revenue to the new information received by them in determining the FOB value of the impugned garments. Now once the FOB value has been determined in quasi-judicial proceedings, the Revenue can not open the same without challenging the Order in the higher forum and deny the draw back claim to the Appellants. It has been held by the Supreme Court in Hope Plantation Ltd., supra, that "When the proceedings have attained finality, parties are bound by the judgment and are estopped from questioning it. They cannot litigate again on the same cause of action nor can they litigate any issue which was necessary for decision in the earlier litigation.... Again, once an issue has been finally determined, parties can not subsequently in the same suit advance arguments or adduced further evidence directed to showing that the issue was wrongly determined. Their only remedy available is to approach the higher forum if available. The determination of the issue between the parties gives rise to, as noted above, an issue estoppel." The Gujarat High Court in Gujarat State Fertiliser & Chemicals Ltd., supra, has held when the Revenue challenged the grant of refund amount to the assessee by the Tribunal instead of being credited to the Consumer Welfare Fund, that "so far as the impugned Order delivered by the Tribunal is concerned, it has become final. It is well known principle that finality of the judicial decision is one of the essential ingredients upon which the administration of justice must rest, and subsequent events do not affect the decision." "Even if the decision rendered by a competent court/Tribunal having jurisdiction is wrong, it is as much binding between the parties as a right one and may be superseded only by applying to higher forum or other procedure like review which law provides."CCE, Indore v.Siddharth Tubes Ltd. [2004 (170) E.L.T. 331 (T)], when the Department issued second show cause notice on same issue and period after gathering additional information/material, that "if the Revenue's contention is accepted, there will be no end inasmuch as if Revenue unearths some more material after their search and scrutiny on 4-12-1998 (say in the year 2000) which provides different ground, a third show cause notice can also be issued.... Department must have issued the show cause notice only after

conducting some enquiry/investigation.... As the matter stands adjudicated.... No new show cause notice for demanding duty can be issued by the Revenue.

"Similar views were expressed by the Tribunal in the case of Nestle India Ltd., supra, after relying upon the decision of the Bombay High Court in Jai Hind Oil Mills & Co. v. Union of India -1994 (71) E.L.T.902 (Bom.) and Tribunal's decision in Kwality Biscuits Ltd. v. CCE, Bangalore [2000 (117) E.L.T. 380 (T) = 2000 (38) RLT 318 (CEGAT)]. The Tribunal has held that "It is not open to the Revenue to issue another show cause notice for the same period and confirm the demand against the appellants." 7.2 The decisions relied upon by the learned Senior Departmental Representative do not hold that the show cause notice can be issued second time for the same period. In the case of Peico Electronics and Electricals Ltd., the notice did not pertain to the same period which had already been decided. It only partially comprised the same period.

The Tribunal has held that issues already concluded in earlier proceedings could be reopened in subsequent proceedings for another period of time if emerging fresh materials give a new dimension to the matter. In West Coast Paper Mills case, the issue to be decided was "that the Adjudication made by the third Respondent by his order dated 30-5-1962 precludes the Central Excise department from reopening the same question." The Karnataka High Court has held that "Principles of res judicata, therefore can not apply for adjudications made by Revenue authorities though they have to exercise their powers in a quasi judicial manner. It is well settled that in cases of assessment under the Income Tax Act, and decision made in one assessment year does not preclude the Income Tax Officer from arriving at a different conclusion in a subsequent year." This judgment is not an Authority for the proposition that the show cause notice can be issued for the same assessment year. This is apparent from the following observation of the High Court: "The learned Counsel for the petitioner has not placed before us any decision or Authority for his proposition that a prior decision concerning the classification of goods for purposes of taxation under the Act binds the Department for all times." 7.3 In J.K. Synthetics case also, the Delhi High Court has considered the effect of a decision in subsequent proceedings. The question put by the High Court was "Will it be open to the department, without any

cogent reasons and merely at its own caprice, to refuse to follow the conclusions reached on the earlier occasions and to take up a totally different stand in a subsequent year?" Thus the decisions relied upon by the learned Senior Departmental Representative does not hold that a different decision can be taken for the same period for cogent reasons.

Accordingly, it is not open to Revenue to take a different decision in respect of 29 shipments of Children's garments in these proceedings as the issue has been settled by the Government of India vide its Order dated 26-3-1999. We, therefore, set aside the impugned Order as far as it relates to 29 shipments of Children's garments.

8. Regarding shipment of a consignments of ladies garments, we observe that there is no separate findings in respect of these consignments in the impugned order. We, therefore, remand this aspect of the matter to the jurisdictional Adjudicating Authority to re-adjudicate the issue relating to 9 shipments of ladies garments after considering the submissions made by the Appellants and after affording them a reasonable opportunity of hearing.