Commissioner of Customs (Export) Vs. Unity Steel Ltd.

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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Mumbai

Decided On : Jun-24-2005

Reported in : (2005)(190)ELT469Tri(Mum.)bai

Judge : J Balasundaram, Vice-, A M Moheb

Appellant : Commissioner of Customs (Export)

Respondent : Unity Steel Ltd.

Judgement :

1. Intelligence was gathered by the Officer of Central Excise, Mumbai-III Commissionerate that M/s. Unity Steels Limited (hereinafter referred to as USL), a Baroda based company which had two manufacturing units, one at Halol at Panchmahal District and another at Bhavnagar both in Gujarat, which were closed for more than two years, had been importing chemicals such as Ferro Chrome, Ferro Silicon and Calcium Silicide duty free under Value Based Advance Licence (VABAL), and indulging in malpractice by selling the imported materials in the domestic market instead of utilising them in the manufacture of export goods as required under Notification No. 203/92-Cus. in respect of VABALs. USL had applied for VABALs in February 93 and June 93 after the production had ceased at Halol plant. Stainless Steel Hot Rolled coils imported by USL and lying in the Customs Bonded Warehouse at CWC, Vashi were seized.

2. The statement of Shri A.S. Bhattar, Managing Director of USL was recorded. In his statement, he stated inter alia that electricity connection to Halol plant of USL

was disconnected by the Gujarat State Electricity Board in September/October 1993 for non-payment of bills, that USL had account with Gulalwadi Branch of Bank of Baroda, which account was opened by him, that during the period August 1992 to December 1994, approximately Rs. 13.50 crores has been deposited in Gulalwadi Branch of Bank of Baroda and approximately Rs. 13.47 crores has been withdrawn from the account, that the money had been deposited into the account by Shri Jawahar P. Kanungo of M/s. Manek Metal Corporation, that he used to hand over blank cheques signed by him to Shri Jawahar P. Kanungo for withdrawal of amount from USL bank account, that DEEC licence dated 19-3-93 was issued in the name of USL, that the licence was utilised for import of raw materials such as Ferro Chrome, Ferro Silicon and Calcium Silicide etc., that he could not remember whether any record was maintained in respect of material under DEEC scheme for manufacture of export product at Halol, but he had seen the material after it had been received at Halol. He further stated that although in the Halol plant, the melting furnace had stopped functioning from January 1993 and other operations also came to a standstill from August 1993, USL did not inform DGFT regarding disconnection of electricity and Customs about non-fulfilment of export obligations.

3. The statement of Shri Jawahar Kanungo was recorded in which he admitted that money was paid to USL account by his firm and that he had associated himself with booking the material for import by USL.

Statements of employees of Jawahar Kanungo and USL were also recorded 4. Enquiries with Central Excise Authorities at Halol inter alia revealed that opening and closing balance of Calcium Silicide and Ferro Chrome in March, April and May 1993 was 0.062 MTS and 1.059 MTS respectively. It was also observed that lay off notice was given to the workers with effect from 1-11-1992 on the ground inter alia that electricity connection has been disconnected. Halol unit was under the control of Bank of Baroda for recovery of their dues.

5. Verification of stock at Halol unit by Bank of India did not result in identification of raw materials imported by USL under DEEC Scheme.

The transporter of the imported materials stated that such materials had been transported to Baroda, but no documents were produced to show the receipt of materials by USL and Shri A.S. Bhattar also could not furnish any documentary evidence to show the receipt and storage of the raw materials imported under advance licence dated 19-3-93.

6. On the above basis, the Department alleged that raw materials imported duty free under VABAL dated 19-3-93 had not been transported after Customs clearance to Halol plant of USL, that USL was not able to furnish proper account of such materials, that imported goods had not been utilised in the manufacture of export product viz S.S. Billets, that the said S.S. Billets had not been exported out of India in fulfilment of export obligations under VABAL and that the conditions of Notification No. 203/82-Cus. had been therefore contravened by USL.

7. In view of the above facts, show cause notice dated 27-10-97 was issued proposing (a) recovery of customs duty of Rs. 4,04,40,590/- on imported Ferro Chrome, Ferro Silicide and Calcium Silicon (b) confiscation of above goods (c) confiscation of seized Hot Rolled Stainless Steel Coils (d) levy of interest at the rate of 24% on customs duty calculated from the date of clearance of goods and (e) penalties on USL, Shri A.S. Bhattar, Shri Jawahar Kanungo and its employees, Transporters and other Director of USL and Customs House Agent.

8. The Commissioner of Customs adjudicated the notice dropping the proceedings on the grounds that show cause notice issued by the Additional Director General, DRI, Mumbai was without jurisdiction and also that the notice was pre-mature for the reason that the first consignment was cleared by USL on 8-7-93 and the twelve months period for fulfilment of export obligation available under Licensing policy would come to an end on 8-7-94 and USL had applied for extension of period for fulfilment of export obligation to the DGFT hence these appeals by the Revenue.

10. The Commissioner in his findings in Order-in-Original has held that : (1) The material imported by USL was cleared for Home Consumption but no evidence has been produced by USL as to how the material has been utilised for discharge of export obligation.

(2) There was and is no intention on the part of USL to utilise the goods for fulfilment of export obligation, as no evidence has been produced that the goods are utilised for discharge of export obligation as there is no proof of any export having been made consequent to the import has been produced.

(3) Contravention of the declaration and Proviso (VI) of Notification 203/92 is established.

(4) The show cause notice provides sufficient material to prove the incapacity of the importer to manufacture the goods using imported material.

(5) The importer has not contested the evidence of cessation of production or produced positive evidence of having utilised the goods.

(6) Absence of actual location of the consignment imported for home consumption can lead to the belief that the goods have been disposed off in some manner since no proof of actual utilisation for export is being produced by the importers.

(7) Condition (vi) of the Notification 203/92 has been contravened in respect of the goods, which cannot be located by the investigation or produced by the importer.

11. The Commissioner in his findings has noted that USL has no capacity to manufacture using imported material and export the resultant product in view of the following facts : (i) Gujarat Electricity Board had disconnected the electric supply to the Halol factory in January 1993.

(ii) RT-12 submitted with Central Excise shows that no production has been carried out in the factory with effect from March 1993.

(iii) RG-23A Register shows minimal stock of Ferro Chrome (1.059 MT) and Calcium Silicide (0.062 MT) has been received at the factory premises during the months of March to May 1993.

(iv) Workers in the Halol factory were laid off on 1-11-92 and hence no production activity could be carried out.

(v) The company has been proceeded against by Banks before BIFR-wherein the Bank officials have informed the BIFR Board that no production is being carried out in the Bhavnagar plant since December 1992 and at Halol plant since October 1992, due to closure.

(vi) Except for evidence of transportation of goods by Ashok Transport from Bombay to Halol, no evidence was produced to locate the same at the factory. No proof of actual utilisation of goods for export produced by the importers.

12. In the light of the above findings of the Commissioner, we agree with the Revenue that the Commissioner ought to have concluded that imported goods have been used for the purposes other than the fulfilment of export obligations. His findings that the show cause notice is premature for the reason that the application has been made by USL to DGFT for extension of period for fulfilment of export obligation is also dearly erroneous, since USL have net contested the evidence brought on record by the Department of the fact that USL had ceased the production in their factory during the relevant period and since USL did not produce any evidence that they have utilised the imported duty free goods in the manufacture of final product for export. The goods are admittedly not available for production of export goods or traceable by the Investigating Officers and USL has not disclosed their location and therefore, the question of USL utilising imported materials and fulfilment of its export obligation, if the period therefor is extended, does not arise.

13. We also hold that non-availability of the goods for confiscation is not sufficient to hold that the goods are not liable to confiscation under Section 111(o) of the Customs Act and hold that the goods are liable to confiscation for contravention of the condition of the Notification No. 203/92-Cus.

14. We also agree with the Revenue that the Additional Director General of the Directorate of Revenue intelligence was competent to issue show cause notice in the light of the decision of Larger Bench of the Tribunal in the case of Konia Trading Company - .

Therefore, we set aside the findings of the Commissioner in the impugned order that ADG, DRI had no jurisdiction to issue show cause notice.

15. We, therefore, hold that the duty demand of Rs. 4,04,40,590/- raised in the show cause notice against USL is sustainable. In respect of Hot Rolled Stainless Steel Rolls lying in the Customs Bonded Warehouse and seized, although show cause notice proposing confiscation under Section 111(o) of the Customs Act, as the validity period the DGFT licence for their import had expired was issued and the Commissioner has dropped the charge, there is no challenge by the Revenue regarding the seized goods. Therefore we are not called upon to record any findings of these goods. The penalty on USL is also warranted in view of the above, we impose a penalty of Rs. 50,00,000/- upon USL. Shri A.S. Bhattar is also liable to penalty as his complicity in the offence of import of duty free materials in contravention of the conditions of the Notification under which duty free import was permitted, is squarely brought out. In his statements he has admitted the closure of Halol and Bhavnagar units of USL, disconnection of electric supply and lay off of workers. He also admitted that he cannot remember the name of the person who received the imported goods in the Halol factory. On the other hand, Shri M.K. Shukla, Deputy Manager of USL has admitted that there was no movement of raw material and no production of final product since May 1993 after closure of Halol factory. Shri A.S. Bhattar has also admitted that for the period from August 1992 to December 1994, an amount of Rs. 13,53,75,208.84 has been deposited in total from time to time in the account of USL with Bank of Baroda, Gulalwadi Branch and that an amount of Rs. 13,47,45,758.08 has been withdrawn from time to time from this account. Although he stated that the amount deposited represents realisation of debts and short-term loans, this has not been disclosed to BIFR and this amount has also not been reflected in the Balance Sheet. He also failed to give particulars of so called debtors of USL. He also admitted that the details of raw material imported under DEEC have not been shown in the raw material stock account maintained at Halol factory as on 31-3-93, 31-3-94 and 31-3-95. He has also admitted that he had not informed the bank about the duty free imports of raw material made by his company which were covered by LUT. We, therefore, impose a penalty of Rs. 25,00,000/- upon him.

16. Shri Jawahar Kanungo is also liable to penalty, as his involvement in the offence is clearly established. He has admitted that as a Proprietor of M/s. Manek Metal Corporation and Director in M/s. Kanungo Trading & Metals Pvt. Ltd. and Manek Metal Trading Pvt. Ltd., he handled imports of USL, maintained liaison with M/s. H.G. Mehta & Company and M/s. Jabee & Co. for clearance of raw material imported duty free by USL and that he had directed M/s. Ashok Goods Transport to transport the raw material imported duty free by USL. He has also admitted that he had paid the Customs Duty and CHA charges from his company's account for the import by USL. He has operated the bank account of USL at Gulalwadi Branch of Bank of Baroda and paid Rs. 13,85,000/- from M/s. Kanungo Trading & Metals Pvt. Ltd. Rs. 46,51,000/- from M/s. Manek Metal Corporation and Rs. 2,82,650/- from M/s. Manek Metal & Trading (P) Ltd. into the USL account, but he could not provide any details for the reasons for doing so. He has admitted that during the period from April 1993 to December 1994 a total amount of Rs. 6.77 crores has been deposited in USL account, Rs. 3.43 crores was deposited from out of the accounts of his companies and these amounts have not been reflected in the account of USL. Shri A.S.Bhattar stated that nobody of USL was preparing the pay-in-slip and depositing the cheques/Demand Drafts/Banker's cheques in the account of USL, that he used to give blank cheques duly signed by him as authorised person to operate USL account in Bank of Baroda with Shri Jawahar Kanungo for withdrawals or issue as required from time to time and that Shri Jawahar Kanungo was depositing the money in this account.

The involvement of Shri Jawahar Kanungo is further brought out from the statement of Shri N.J. D'Costa, who is an employee of Jawahar Kanungo that he used to sign the letters of USL addressed to Customs House Agent and that he had signed the documents as Managing Director of USL.

He was also giving instructions to CHA, M/s. H.G. Mehta & Company for clearance of the goods on Kanungo's instructions. The proprietor of other CHA firm M/s. Jabee & Company admitted that Shri Jawahar Kanungo had approached him for clearance of consignments in the name of USL and documents for clearance were received from Shri Jawahar Kanungo or from his staff and Shri Jawahar Kanungo was giving them instructions for clearance and delivery of goods. The Power of

Attorney holder for CHA firm, M/s. H.G. Mehta & Company has also admitted that all the import related documents and correspondence in respect of USL were given to him by Shri Jawahar Kanungo and that the payments for clearance of goods were received by his firm from Shri Jawahar Kanungo either by cheque/demand drafts or in cash. Further, Shri Ashok Kumar Doshi, Proprietor of M/s. Ashok Goods Transport has admitted that he was making available the trucks in the docks area for transporting the goods imported by USL, on the request of Shri Kanungo. We, therefore, impose a penalty of Rs. 25,00,000/- upon Shri Kanungo.

17. Regarding other Respondents, material on record is not sufficient to bring out their involvement in the offence committed by USL so as to hold them liable to penal action under Section 112 of the Customs Act.

It has not been satisfactorily established that they dealt with the goods in any manner that rendered them liable to confiscation. We, therefore, hold that they are not liable to penalty and accordingly uphold the Commissioner's order dropping penalty proceedings against them. In the result, we hold as under : (b) The goods in respect of which the above demand is confirmed are liable to confiscation.

18. In the light of the above, the Appeal Nos. C/484/98 (USL), C/475/98 (Shri A.S. Bhattar) and C/483/98 (Shri Jawahar P. Kanungo) are allowed and other appeals are dismissed.