

Ramayan Impex Vs. Commissioner of Customs

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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Mumbai

Decided On : Aug-31-2005

Reported in : (2005)(189)ELT446Tri(Mum.)bai

Judge : J Balasundaram, Vice-, S T S.S.

Appellant : Ramayan Impex

Respondent : Commissioner of Customs

Judgement :

1. The appellants are regular exporters of goods and had filed 2 Shipping Bills both dated 6-3-2003 for export of 120 packages of fabrics declared as 100% polyester filament yarn/texturised yarn with or without embroidery under DEPB Scheme. The fabrics were wrapped around cardboard sheets rolled in the length of more than 20 yards per roll. The total FOB value declared was Rs. 75,65,471.29.

1.2 On 11-3-2003, through their Custom House Agent, they filed an application requesting the goods to be returned 'back to town'.

1.3 However, on 2-3-2003 the goods were examined by the Customs authorities and it was alleged that the said goods were rags/chindis instead of fabrics as declared and they were grossly overvalued as per the FOB declaration. Enquiries were conducted and statements were recorded and a show cause notice dated 13-7-2004 was issued calling upon the exporters to show cause : (i) Why the

goods covered under the two Shipping Bills should not be confiscated under Section 113(h)(ii) of the Customs Act, 1962? (ii) A penalty under Section 114 of the Customs Act, 1962 should not be imposed; (iii) Why the credit of DEPB benefit amounting to Rs. 8,32,200/- should not be rejected, as well as rebate claim amounting to Rs. 6,39,845/- should not be rejected, as they were inadmissible goods under DEPB Scheme and the claims were fraudulently made.

2. The Commissioner, after granting a hearing, rejected the contentions made by the appellants and arrived at a conclusion by himself examining the sample that: (a) The sample of the goods detained was irregularly woven warp and weft, which was defective weaving material which cannot be used as fabric, as per the personal assessment of the Id. Commissioner.

(b) Hence declaring the same as Dyed/Printed Synthetic fabric of FOB value Rs. 75,65,471.28 was clearly misdeclaration.

(c) The appellant was trying to push the same as fabrics for availing DEPB credit.

(d) From the time sequence, it appeared that the original material which was moved from the factory for export was not entered for export and was diverted and its place the rejected material of the weaving mills was entered for export for availing DEPB. And on this basis arrived at the liability to confiscation under Section 113(h)(ii) of the Customs Act, 1962 confirming the same, and offered a redemption fine of Rs. 5.00 lakhs with a penalty of Rs. 10.00 lakhs under Section 114 of the Customs Act, 1962 and further held that no DEPB or rebate would be allowed on the said goods. Hence this appeal.

(a) the question of applicability of and liability to confiscation under Section 113(h)(ii) of the Customs Act, 1962 cannot be upheld in the facts of this case, when Section 113(h)(ii) does not exist in the Customs Act; there is a Section 113(ii) which is applicable to export goods under claim of Draw Back which are found to be misdeclared & inadmissible Draw Back is claimed. Since the present exports are admittedly under DEPB Scheme, and not under claim of Draw Back, provisions of the Customs Act, 1962, 3(ii) or/& the invocation of Section 113(h)(ii) in the facts of this case as arrived cannot be upheld. (b) Examining the plea, that

there could be a typographical error or mistake in mentioning an incorrect Sub-section and calling for relating the liability to confiscation under Section 113(d) of the Customs Act, 1962, it is found that the issue of 'no confiscation liability to arise on DEPB exports under Section 113(d) of the Customs Act, 1962' is settled by this Tribunal in the case of M/s.

Prayag Exporters Pvt. Ltd. v. CC (EP), Mumbai - 2000 (121) E.L.T. 819 which has been upheld by the Supreme Court by their decision and a review petition filed by the Revenue against this dismissal by the Apex Court has been dismissed as and A114; this fact, as also that Om Prakash Bhatia v. Commissioner reason to uphold the confiscation under Section 113(d) of the Customs Act, 1962 for exports under DEPB Scheme.

(i) The Id. D.R. for the Revenue made efforts and drew our attention to apply the decision in the case of Yash Exports Inc. v. CC, Lucknow - wherein the Bench, after referring the decision in the case of Prayag Exporters Pvt. Ltd. (supra) held that in view of the decision of the Supreme Court in Om Prakash Bhatia v. CC, the confiscation under Section 113(d) of the Customs Act, 1962 in cases of export consignments under the DEPB Scheme could be upheld for the purposes of over valuation arrived and established by the Department.

(ii) We find from the perusal of this decision in Yash Exports, that the decision has been arrived at without considering the fact of the review petition in the case of Prayag Exporters Pvt. Ltd. which was filed by Revenue in the Supreme Court after the decision of the Supreme Court in Om Prakash Bhatia's case and the subsequent rejection by the Apex Court, of the review petition filed by Revenue. In this view of the matter, we are not persuaded to accept the contention of the Id D.R. to follow the decision in the case of Yash Exports Inc. and or find any reason to refer to a Larger Bench this issue, as we do not find any conflicting decision on this subject which need to be resolved by a Larger Bench, especially when the review petition was on the same arguments has been dismissed in the case of Prayag Importers Pvt. Ltd. by the Apex Court and on considering the submission of the Advocate that Section 113(d) has since been amended.

(d) The Id D.R's reliance on the case of Merchant Export Ltd. v. CC, Cochin - also will not help the Revenue's case and persuade us to hold a different view, since we find that the case of Merchant Export Ltd. was arrived at without considering the decisions in the case of Prayag Exporters Pvt. Ltd. While not accepting the plea of the Id D.R. and rejecting the same, we are reinforced in our views when we are shown para 5 of the decision in the case of Suresh Jhunjunwala v. CC - which "The Id. D.R. referred to the judgment in the case of Om Prakash Bhatia reported in 2001 (127) E.L.T. 81 which has been confirmed by Hon'ble Supreme Court in the judgment .

However, at this juncture the Id. Counsel immediately stated that the review petition filed by the Union of India against Supreme Court judgment in the case of Prayag Exporters Pvt. Ltd., had cited the Supreme Court judgment in the case of Om Prakash Bhatia and even then the Hon'ble Supreme Court dismissed the review petition filed by the Customs Commissioner (EP) in the case of Prayag Exporters Pvt. Ltd. Thus confirming the ratio that only the goods which are dutiable or prohibited will be liable to confiscation under Section 113 of the Customs Act, 1962. The Id D.R. reiterated the findings of the Id. Commissioner." (e) We find that the goods were declared and are found to be in rolls of in 20 yards and the goods have been found to be fabrics.

The question of declaration of quantum of value, is the only dispute, which has led to the present proceedings. There is an allegation of goods found to be rags/chindis. However, we find from the evidence arrived at by the Id. Commissioner that he has come to certain conclusion on physical examination of the samples himself that the goods under detention were irregularly woven warp and weft which were defective woven material and therefore could not be used as fabrics. This personal assessment of the Id. Commissioner, to impugn the description of the goods, cannot be upheld. The Commissioner may be an expert in Textiles but as an adjudicator he should bring in expert opinion/advice as to the nature of the goods so that the matter can be determined and appreciated in appeal by us. Since there is no material Test Report of an expert, to upset the plea, of the appellants, that the goods were not misdeclared in description, we find no reason to arrive at to uphold the confiscation liability under Section 113(h)(ii) as

arrived at by the Commissioner.

(f) When we find that there is no liability to confiscation of the goods, we find no reason to uphold the penalties as arrived at.

(g) In this case, arguments were advanced and reliance were placed by the Id. Advocate for the appellants on the Supreme Court's decision in the case of Principal Appraiser (Exports) v. Esajee Tayabally Kapasi and the findings reported by the Apex Court in para 9 of this decision. Reliance has also been placed on the case of Sripad Upadhyay v. CC, Chennai - 2001 (138) E.L.T. 768 (Tri-Chennai) wherein the Tribunal had held that goods being not presented to proper officer for clearance will not become 'export goods' and would not be liable to confiscation, after examining the provisions of Section 2(18) and Section 113(d) of the Customs Act, 1962.

In the facts and circumstances of this case, when we do not find a liability to confiscation under Section 113(d), and also, after considering the status of the goods brought to a Customs area, on a Shipping Bill, filed under Section 50, but wherein these goods have still not attained the status of Export Goods' to be loaded on the vessel under Section 39 of the Customs Act, inasmuch as Section 51 clearance was not observed, would induce us to come to a conclusion, that there was force in the appellants' request, through their CHA on 10-3-2003 of requesting the goods to be 'taken back to town, which should have been considered. Export is an admittedly series of operations, and that Section 51 for the goods having not been traversed the goods do not become Export Goods is the view held by the Supreme Court in Principal Appraiser (Exports v. Esajee Taya-bally Kapasi. In this case Section 51 requirements were not met and the request was made to take the goods back to town after filing the Shipping Bills and before loading the goods on a vessel. The goods are not exported and should have been allowed to be removed back to town as there was only on intention to export and there has been a change in intention by request dated 10-3-2003. In this view of the matter, we would permit unhindered back to town order on the subject goods as requested vide letter dated 10-3-2003.

2.2 The Id. D.R.'s submission that goods simplicitor when brought to Customs area, are liable to confiscation under Section 113(d) of the Customs Act, 1962 has been considered and we find that the goods under Section 113(d) would be liable to confiscation only when they are brought to a Customs area and when they are so brought contrary to a prohibition under the Customs Act, or any other Act for the time being in force. In the present case, since we have come to the conclusion that there was, only, if at all a preparation to export and not an attempt to export, the bringing of the goods simplicitor to the Customs area under a Shipping Bill filed by carting the goods after permission from the Port authorities, is not a cause for their liability to confiscation under Section 113(d), since no prohibition under the Customs Act, 1962 would be found by us in this carting of goods. The goods which are covered by a Shipping Bill as in this case, can be brought to and carted to the Customs area, they have not acquired the status of Export Goods till they traverse Section 51 stipulation and thereafter are ready to be taken on a vessel and therefore are not prohibited in any manner under the Customs Act, 1962. Examining the provisions under DEPB, it is found that in the case of Kobian ECS India Pvt. Ltd. v. CC, Mumbai - , the Tribunal had held that a declaration for DEPB is not a declaration which should be read as a prohibition under the Customs Act, 1962 read with Foreign Trade (Development and Regulation) Act, 1992 since that Scheme of DEPB has been announced under powers of Section 19 of the Foreign Trade (Development and Regulation) Act, 1992 and not under Section 2 of the said Act. Since the prohibitions under the Customs Act, 1962 and or any other Act could not be found, we find no merits in the plea of the Id.

D.R.2.3 In view of our findings hereinabove, the impugned order is set aside and the consignment is ordered to be removed back to town.

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