

Commissioner of Customs Vs. Shri Sunil Kumar and Shri Ram Nivas

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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Mumbai

Decided On : Jul-28-2006

Judge : K Kumar

Appellant : Commissioner of Customs

Respondent : Shri Sunil Kumar and Shri Ram Nivas

Judgement :

2. The Id. Counsel appearing on behalf of the respondents reiterated the order passed by the Commissioner (Appeals) and submitted that the Commissioner (Appeals) has passed a well reasoned order. He submitted that the seizure in the present case is illegal because the respondent has duly produced the necessary evidence and have proved with the help of bill of entry and other documents that the goods were legally acquired by them. He also submitted that the panchanama drawn does not show any making on the goods seized. He submitted that the original authority has miserably failed to notice that the case of D. Bhoormull relied on by him relates to prohibited goods whereas the present case on the appellant relates to non notified goods. The respondent duly filed three bills of entry one at Nhava Sheva and two at Delhi. The bills of entry and the goods are duly co-related. The respondents have submitted that the legal documents showing that the 20 packages were purchased legally were produced and as 35 packages concerned same were duly co-related and in compliance with the provisions of Base measurement Act. The Id. Counsel relied on the following case laws: (a) Hindustan Bearing Corporation reported in 1990 (50) ELT 91 (Tri.) wherein the

Tribunal has inter alia held that with regard to the non-notified goods the burden is on the department to prove that smuggled nature of non-notified goods cannot take place of prove in the absence of department discharging their liability to prove by direct evidence that the goods are of smuggled nature.

(b) In the case of Dinanath Maurya reported in 2001 (131) ELT 203 (Tri. Kol) also supports the contention of the Id. Counsel. The Revenue is required to produce positive evidence of illegal import.

Mere fact that goods are of foreign origin and failure of their possessor to show legal acquisition not sufficient to prove that the goods being of smuggled nature. He vehemently submitted that there is no material evidence with the Department to prove that the goods are of smuggled nature.

(c) In another case of J.P. Bearing Co. reported in 1999 (109) ELT 538 (Tri.) the Id. Counsel relied on submitted that the ball bearing seized by the Customs found to be new and of third country origin.

Consignor firm was found fictitious as the letter issued to their address as shown in invoice returned undelivered and the appellants could not name the broker. It was held that it is not sufficient to conclude that the ball bearings in question had been illicitly imported into India.

(d) Similarly the Id. Counsel relied on in the case of 2001 (133) ELT 182 wherein the Tribunal has held in para 5, 6 and 7 that once the goods on importation enter the stream of commerce, they would change hands frequently. Even a commodity like diamond which carry the burden of export change hands. The Customs Act does not control the manner of sale, the documentation or the manner in which the seller is to be compensated. This would be the prescription of other Acts such as Sales Tax Act or Income-tax act etc. Referring to the Supreme Court's judgment in para 6 the Tribunal has noted as under - It was argued that the goods are not liable for confiscation under Section 111(d) as there is no prohibition in the import policy against the goods. Indeed there is no prohibition under the Policy.

But Section 111(d) speaks of any prohibition under the Customs Act as well. The department's case is that the goods are smuggled into the country which means no duty has been paid, no Bill of Entry filed, no order of clearance has been given in respect of the goods in question. They are, therefore, certainly prohibited goods in terms of Section 111(d) of the Customs Act, 1962, they are therefore, liable to confiscation under that Section. I concede that no evidence exists that the said goods have been brought across the land border without payment of duty. I hold, therefore, that the goods are not liable to confiscation under Section 111(k) of the Customs Act, 1962. It is also observed that in para 9 that no evidence has been placed on record that the goods were illegally imported and the Tribunal allowed the appeals with consequential relief 3. The Id. JDR appearing on behalf of the Revenue has reiterated the order passed by the original authority.

4. These are the two appeals filed by the Revenue against the common order in appeal passed by the Commissioner (Appeals). The case relates to seizure of ball bearings in assorted sizes and makes. The Commissioner (Appeals) in his order have inter alia noted that the original authority before discussing the case states, "issue to be decided in this case is whether the seized goods of foreign origin totally valued at Rs. 12,30,610/- should be confiscated under Section 111(d), (f) and (j) of the Customs Act or not". He has noted that from this, it is clear that the original authority without even discussing, leave alone proving the foreign origin of the goods, has presumed that the goods seized were of foreign origin. Similarly how these were smuggled into India, he does not find it necessary to discuss and prove. How the seized goods can be confiscated without proving its foreign origin and smuggling into India. Before proceeding further in the case, the original authority is first required to establish that ball bearings are of foreign origin, if that is proved, then he has to prove that it was smuggled into India. Without establishing these 2 essential aspects, goods cannot be confiscated. If the department is allowed to work in this fashion, then they may even confiscate Indian origin goods also. All the ball bearings of foreign origin have some marks and nos. which gives the indication that it may be of foreign made, still the deptt. has to produce the evidence that such ball bearings are of foreign origin, because there is every possibility of such goods being manufactured in India and in order to sell the goods in the market at a premium, they may have given some marks just

to indicate that those were of foreign made. Therefore, it is the foremost duty of the original authority in such cases first to establish that goods are of foreign origin, then those were smuggled into India. Here, the original authority does not find it necessary to even to touch these issues and order was passed merely on presumption, hence order is liable to be set aside in this ground alone. The Commissioner has also noted that the burden lies on the department to produce the evidence that such goods were illegally imported as it is not the case of the deptt. that ball bearings are notified under Section 123 of the Customs Act. Referring to the Board's instruction No. 394/184/92 Cus/AS dt.

23.2.93, issued after de-notification of various goods from Section 23 and Chapt. IV A of the Customs Act. It has been clarified that the person found in possession of these goods will no longer have to prove to the Customs their licit import and it will be for the Customs to prove the smuggled nature of such goods. There is no dispute about the fact that such instructions are binding on the department, therefore, department cannot act contrary to the instruction issued by the Board.

However, the department has not produced even a single piece of evidence to prove that the ball bearings seized from the premises of the appellant were of foreign origin and smuggled into India without payment of duty. Instead the Department produce any evidence they asked the appellants to produce the evidence and whatever evidence was produced by them the same were rejected without assigning any logical reasons and the goods were confiscated merely on presumption that these were of foreign origin and smuggled into India. The Commissioner (Appeals) has referred to the decision relied on by the appellant in the case of Gudipati Papa Rao v. CCE, Guntur where the Tribunal observed that the goods appeared to be foreign origin would not clothe the authorities with any jurisdiction under the act to effect a seizure. In another case of Computer Aid v. CC, Allahabad 2001 (130) ELT 68 (Tri. Delhi) where it is held that the first and foremost requirement for holding the goods to be confiscated under Section 111 is a finding that the goods are of foreign origin. In the case of Dina Nath Maurya v. CC, Lucknow and Hindustan Bearing Corporation v. CC 1990 (5) ELT 91 where it was held that mere fact that the goods were of foreign origin is not sufficient to hold that they are smuggled goods and the failure of the possessor to show the

legal acquisition cannot be held to be a circumstances against the appellant. The revenue is required to produce positive and affirmative evidence showing illegal import of the goods. The Commissioner has also noted that the appellant has produced a copies of the Bills of Entry and invoices vide which the goods were legally imported and purchased locally, therefore, it cannot be said that they have not come with the explanation how the Commissioner came to possess the goods. However, relying on Supreme Court decision in the case of D. Bhoormull the Commissioner has noted that the burden of proving that the goods were smuggled is primarily on the Department. The Commissioner has also very clearly distinguishing relying on by the original authority has to how they are not applicable in the present case. He observed that Shri Ramnivas Aggarwal claimed the ownership of the 35 pkgs. Of ball bearing seized on 12.04.2004 and produced copies of bills of entry No. 394363 dated 16.12.2003 and No. 954050 dtd. 22.01.2004 for various sizes of ball bearings. In his statement recorded on 14.7.2004 and 14.9.2004, he inter alia stated he is proprietor of M/s. Goel Bearings and was also in impart business and submitted the photo copies of bill of entry No.394363 dtd 12.12.2003 issued in the name of M/s. Goel Bearings, new Delhi and bill of entry No. 954050 dated 22.01.2004 issued in the name of M/s. Ishant Overseas, New Delhi. M/s. Goel Bearings was the partner of M/s. Ishant Overseas, New Delhi and further stated that M/s. Ishant Overseas, was not present at the time of seizure of the ball bearings, therefore bill of entry No. 01002 dated 28.11.2003 issued in the name of M/s. Goel Bearing under which the aforesaid goods were imported, remained to be submitted along with the letter dated 7.5.2004. These documentary evidences produced by the appellant were not accepted by the department saying that there was no documentary evidence of sale and payment of said quantity of ball bearings between two concerns i.e.

Ramnivas Aggarwal, partnership viz. Ishant Oversees, New Delhi, proprietorship concern and further Mr. Aggarwal did not produce any documents in respect of entry of goods within the limit of Mumbai Municipal Corporation. What the appellant is required to prove for the charge of illegal importation is to show that the goods seized from their premises, were legally imported and for this basic and only document is the bill of entry, vide which goods were cleared. Whether those were sold to the appellant or not, whether any consideration was paid or not or

how the goods were transferred from Delhi to Mumbai are relevant to prove that those were illegally imported. After importation, such goods are freely tradable within the territory of India, for which there is no restriction imposed under the Customs Act, if that is so, deptt. cannot ask the appellant to produce evidence to show that goods were actually sold to them and how such goods entered into Mumbai Municipal area. Once it is established that goods were imported under the bill of entry on payment of appropriate customs duty and the description of the goods mentioned therein tallies, then such evidence cannot be discarded and such goods are to be treated as legally imported, beyond any reasonable doubt.

5. Shri Sunil Kumar Janardhan Aggarwal claimed the ownership of the 20 pkgs. Of ball bearings and in his statement dated 22.6.04 and 31.08.2004 he inter alia stated that he was the sole proprietor of M/s.

Bearing Distributors, Mumbai and submitted relevant purchase documents raised by M/s. Om Sai Central Cons. Co.op. W & R Stores Ltd. by cheque No. 369665 dtd 25.8.2004 drawn on Corporation Bank, A.R. Street, Mumbai and regarding payment in respect of 15,000 pieces of ball bearings purchased from M/s. Shakti Industrial Corp., it is still pending and further stated that ball bearings seized were legally imported on payment of duty and hence there was no contravention of Customs law. In respect of these documents produced by the appellant, deptt. has not said anything as to why it was not accepted. If the deptt. has nothing to say about the genuineness or correctness of these documents, then the goods purchased under these invoices are held to be legally acquired after importation. In view of these facts, it is held that both the appellants have produced the reliable evidence to show that the goods legally imported were acquired by them. On the other hand, the deptt. had not produced any evidence and the case was made on presumption when the facts placed on record clearly go in favour of the appellant. It would not be wrong to say here that show cause notice as well as order was passed without application of mind. Hence he submitted that set aside the order-in-original and allow the appeal filed by the appellants.

6. After hearing and perusal of the records and case laws relied on by the Id. Counsel, I find that there is no evidence on record to prove that the goods were

illegally smuggled into the country with Department has not brought out any evidence to show the smuggled nature of the goods. Therefore, following the ratio of the above decision relied on by the Id. Counsel, I do not hesitate in upholding the order passed by the Id. Commissioner (Appeals). The appeals filed by the Revenue are, therefore, dismissed.

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