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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Mumbai

Decided On : Jan-03-2007

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

Appellant : Quality Apparels Export P. Ltd.

Respondent : Commr. of Cus. (Export), Acc

Judgement :

1. The applicant M/s. Quality Apparels Export Pvt. Ltd. are engaged in the export of textile garments. On the basis of specific information gathered to the effect that textile rags were being exported unauthorizedly under drawback claim by misdeclaring the description of goods as Ladies Skirts by M/s. Quality Apparels Exports Pvt. Ltd., the officers of the department intercepted 5 consignments consisting of 700 pkgs. covered by 7 shipping bills which were earlier brought together at Air Cargo Complex, Mumbai, for the purpose of shipment for the export by the said company and also by M/s. Quality Exporters. On examination, the goods were found to be loosely stitched apparels in the form of rags which were consequently seized and separate proceedings were initiated in respect of the same.

2. As a result of the above seizure enquiries were also conducted in respect of the exports already effected by M/s. Quality Apparels Exports Pvt. Ltd. and it was gathered that M/s. Quality Apparels Export had made exports of 167 consignments in which the goods were declared to be readymade garments viz. Ladies Skirts, Scarves, Ladies Pants, Ladies Dresses, Ladies Tops, etc. covered

by 167 Shipping Bills out of which export consignments covered by two shipping bills were not found under drawback claim but in the remaining except two for which yet another separate proceedings have been issued the goods were exported under claim of drawback amounting to Rs. 14,07,45,861/-. Invoices recovered from the premises of M/s. Quality Export Apparels Pvt. Ltd. showed that the value declared in these invoices was ranging in the price of US\$ 0.25 - 0.30. Enquiries from Dubai Customs also revealed that the value declared by the importer at Dubai to the Customs was similar to the second set of invoices recovered from the premises of the exporter, showing value as US\$ 30 only. Further goods in respect of 47 consignments were not cleared by the importer at Dubai and no remittance was received but the exporter has already availed drawback in respect of 123 consignments which includes these 47 un-cleared consignments. Out of these 47 un-cleared consignments, two consignments were called back by the Customs authorities and these two consignments comprising of 95 packages were examined by the officers of Customs in the presence of independent witnesses, i.e. representative of Airlines and the Directors of the firm namely Shri C.D.N. Singh, Shri Aditya Singh, Shri Randhir Singh. Director of M/s. Freight Wings & Travles Ltd. CHA and their employees. The consignments were identified as being the same which were exported but on examination were found to contain 3590 pcs. of tubular stitched articles of old and used synthetic fabric, 235 pcs. of sub-standard quality of old and used shirts, tops, pajamas, apron, salwar, Barmudas, kurtas, and 1008 pcs. of skirts all of inferior and sub-standard quality. Since these fabrics were mis-declared at the time of export they were accordingly seized. The remaining 45 consignments were also got examined by the Dubai Customs which on examination were found to be mostly rags and unusable. Some consignments were found to be tubular pieces of different coloured materials, coarsely stitched, some of which were also found to be torn.

Enquiries also revealed that the foreign buyer had not ordered for such types of goods. In respect of these 163 consignments it was found that the exporters have already been sanctioned and received an amount of Rs. 8,96,16,202/- as drawback amount.

3. In view of above a show cause notice was issued to the applicants seeking to recover back the drawback amount Rs. 8,96,16,202/- which was already sanctioned to them and sought to deny another claim of drawback amounting to Rs. 4,54,22,767/- claimed by them and also sought to impose penalty on M/s. Quality Apparels Exports Pvt. Ltd. and its directors Shri C.D.N. Singh, Shri Aditya Singh, Shri Randhir Singh, Smt. Parimala Singh and Shri N.P. George Assistant. The case was adjudicated by the Commissioner who denied the above drawback claims and imposed penalty of Rs. 5 crores (Rupees five crores only) on M/s.

Quality Apparels Exports, penalty of Rs. 1 crore each (Rupees one crore only) on the four directors Shri C.D.N. Singh. Aditya Singh, Shri Randhir Singh Smt. Parimala Singh and Rs. 5 lakhs (Rupees five lakhs only) on Shri N.P. George employee of M/s. Quality Apparels Pvt. Ltd. who are the present applicants before us.

4. The Id. Advocate for the applicant raised a preliminary objection stating that the Commissioner who has adjudicated the cases was not competent to adjudicate the same as while the show cause notice was answerable to Commissioner of Customs (P) Bombay, later on corrigendum was issued making the same answerable to Commissioner Air Cargo which could not have been done without issue of a notification by the Central Government in terms of Section 4 of the Customs Act, 1962. In this regard he referred to the decision of the Tribunal in the case of Consolidated Enterprises v. Commissioner of Customs (Gen.), Mumbai 2001 (137) E.L.T. 1223, wherein it was held that the jurisdiction to adjudicate the case prima facie vests in the Commissioner before whom the show cause notice was pending or in the Commissioner to whom the case was properly transferred - Once the jurisdiction is specified in the show cause notice, it could not be altered except by an order utilizing the power derived from the Section 4 of the Customs Act, 1962 for which jurisdiction vests with the Central Government only. It was submitted that in this case the show cause notice was pending with Commissioner JNPT, Nhava Sheva. The Chief Commissioner transferred the case from CC (Adjudication) to CC (Preventive), the case was adjudicated by Commissioner of Customs (General) which was held as not permissible. Reliance was also placed on the CEGAT decision in the case of CM. Textile v. Commissioner of Customs,

Mumbai] who followed the decision of the Tribunal in the case of Consolidated Enterprises cited supra and here also it was held that when the show cause notice was made answerable to Commissioner of Customs Airport it cannot be adjudicated by Commissioner of Customs Adjudication who cannot have the jurisdiction to adjudicate unless the cases are transferred to him by a valid order passed under Section 4 of the Customs Act, 1962. It was submitted that Board has issued orders under Section 4 whenever such transfer of jurisdiction has taken place.

5. The next plea taken by Shri V.M. Doiphode was that in this case show cause notice seeks to impose penalty on the directors under Section 114(i) and 114(iii) of the Customs Act, 1962. It was submitted that the penalties can be imposed under Section 111(i) & 114(iii) only if it is established that they have committed some acts of omission and commission which have rendered the goods liable to confiscation under Section 113(d), (i)(ii) of the Customs Act, 1962. The show cause notice does not ask them as to why the goods which have already been exported should not be held liable to confiscation and therefore in the absence of the same penalties cannot be imposed on them.

6. The third objection taken by the Id. Advocate was that in spite of their repeated request they were not supplied the copies of the relied upon documents and therefore that has resulted in the denial of principles of natural justice and the order should accordingly be remanded back. On query from the Bench as to which documents were not furnished, the Id. Advocate laid great emphasis on the denial of 167 invoices said to have been recovered from them and in this regard drew our attention to the correspondence exchanged by them with the Commissioner. It was submitted that the copy of panchanamas drawn at the premises of M/s. Quality Apparels Pvt. Ltd. along with annexures and relevant export documents was not furnished to them in toto.

However when asked whether these invoices were specifically mentioned when the Commissioner has earlier given him an opportunity to indicate the relevant documents which were not furnished to him, Shri Doiphode submitted that there were mentioned specifically in their written submissions filed after personal

hearing and not before that.

7. Shri V.M. Doiphode also pleaded financial hardship and stated that the applicants companies are out of business since 2000 after the arrest and detention of the directors under COFEPOSA, that the premises of the company have been taken over by the competent authority under the Smugglers and Foreign Exchange Manipulators (Forfeiture of Property) Act, 1976 and therefore they have no income to deposit the amount. However, on being asked by the Bench to show their balance sheet and the income-tax returns, they submitted that since they have no business income they have neither filed any return nor prepared any balance sheet.

8. The Id. DR however submits, that as regards the jurisdiction, the Commissioner of Customs Air Cargo is the jurisdictional officer duly notified under Section 4 of the Customs Act, 1962 and therefore adjudication done by him cannot be faulted with. In this regard he referred to the decision of the Supreme Court in the case of Pahwa Chemicals Pvt. Ltd. v. Commissioner of Central Excise,. Delhi wherein it was held that the power of adjudication are based on the administrative direction of allocating different works to various classes of officers it cannot cut down jurisdiction vested in them by statute and may be followed by them at best as matter of propriety issuance of show cause notice or adjudication contrary to such directions could not be set aside for want of jurisdiction, especially as no prejudice is caused thereby to assessee/noticee.

9. We have considered the submissions. As regards the plea of jurisdiction, we find that under Section 4(1) of the Customs Act, 1962 Central Government (now Board) is competent to appoint such persons as it thinks fit to be officers of Customs. It is not in dispute that the Commissioner of Customs Air Cargo has not been appointed as Commissioner of Customs having jurisdiction over the area specified in the notification issued under Section 4(1) and has the power to adjudicate. The only grievance is that since Commissioner of Customs (P), and Commissioner of Customs Air Cargo both have the concurrent jurisdiction and once the show cause notice has been made answerable to Commissioner of Customs (P) the same can be changed only through a notification issued under

4(1). We are unable to agree to this proposition. Once the Commissioner of Customs Air Cargo is competent to adjudicate it is purely an administrative function of the department as to who should adjudicate the case and this does not require any notification. Such notifications have been issued in the case of Commissioner of Customs Adjudication who under Section 4(1) have been declared to be officers of Customs competent to adjudicate such cases as the Board made notify from time to time. Therefore every case to be adjudicated by them during the relevant time was required to be notified under Section 4(1). Though a contrary view has been taken in the case of Consolidated Enterprises cited supra, our view is supported by the Apex Court decision in the case of Pahwa Chemicals Pvt. Ltd. v. Commissioner of Central Excise, cited supra which was delivered in the year 2005 and is subsequent to the Tribunal decision and therefore overrides the same. Accordingly, the plea of jurisdiction is not upheld especially when there is no plea by the applicant that some prejudice has been caused to them by the change of adjudicating authority.

10. As regards the plea that the applicants have not been asked to show as to why the goods in respect of which the misdeclaration has been made in the shipping bills should not be held liable to confiscation and in the absence of liability to confiscation penalties cannot be imposed under Section 114 (i) & (ii) of the Customs Act, 1962, we find that Para 45 of the show cause notice very clearly states that the applicants have committed acts of omission and commission which have rendered the goods liable to confiscation and in Para 59 of the order there is a specific finding of the Commissioner that the directors are responsible for acts of omission and commission which acts have rendered the goods described in the shipping bills liable to confiscation and therefore when Paras 45 and 46 are read together along with other paragraphs of the show cause notice it leads to only one conclusion that they have been asked to explain as to why the goods already exported should not be held liable to confiscation and the proposal has been challenged by the appellants in their reply and there is specific finding of the Commissioner regarding the confiscability of the goods. The imposition of the penalties cannot therefore prima facie be faulted on this ground.

11. As regards the plea of non-supply of the 158 invoices, we find that the Commissioner has specifically held that these invoices were supplied by the Commissioner of Customs (Preventive) vide their letter dt. 29-8-2000 addressed to Shri Randhir Singh, Director of M/s. Quality Export Apparels and till 2005 they have never contested that the copies were not so furnished and it was only after the hearing was over that a mention was made. Since the copies were furnished vide letter dt.

29-8-2000 and were not questioned for a period of five years it cannot be said to have resulted in denial of principles of natural justice when no such grievances was made for a period of 4 to 5 years.

12. As regards merits, we find that there is sufficient evidence available with department in the form of examination of the goods recalled from the Dubai in the presence of concerned persons who confirmed that the goods were the same which were exported and were on examination found to be rags, examination of goods by Dubai Customs which also found them to be rags, non-clearance of 47 consignments by the importer, statement of the buyer (importer Shri Se-queria) that the goods received by him except for a few consignments (which were worth only US\$ 0.30 as against US\$ 9.25 declared by applicants) were rags only which he was supposed to clear and destroy and his submission that all the three directors Shri C.D.N. Singh, Shri Aditya Singh, Shri Randhir Singh, are wanted criminals in UAE and warrant have been issued against them and accordingly we hold that the applicant M/s. Quality Apparels and its Directors have deliberately mis-declared the description and value of the goods exported which were having almost nil commercial value to claim unauthorized drawback against to Rs. 8,96,16,202/-.

13. As regards the plea of financial hardship we find that the applicants have not been able to produce any documentary evidence in the nature Income-tax Returns and Profit and Loss Account, which under law, they are required to submitted even if they do not have any business income and the fact that they have already availed about Rs. 9 crores as drawback claim for worthless goods and have further received remittance of about Rs. 4.16 crores in respect of rags exported by

them, the same does not have much substance.

14. In view of the above, we hold that M/s. Quality Apparels Exports Pvt. Ltd. have not been able to make out a prima facie case in their favour and no new plea has been raised in respect of the directors who were also responsible for the mis-declaration of the goods and therefore looking into the totality of the circumstances including the financial hardship urged by them, we direct M/s. Quality Apparels Export Pvt. Ltd. to pre-deposit Rs. 1 crore (Rupees one crore only) as penalty and the four directors to Shri C.D.N. Singh, Shri Aditya Singh, Shri Randhir Singh, Smt. Parimala Singh to pre-deposit of Rs. 20 lakhs each (Rupees twenty lakhs only) within 12 weeks and on such deposit there shall be waiver of the pre-deposit of the balance amount of the penalties imposed on the applicants and stay recovery thereof till disposal of the appeals. Failure to comply with this direction shall result in vacation of stay and dismissal of appeal without prior notice.

15. As regards the application of Shri N.P. George, we prima facie find that no material has been brought to show that Shri N.P. George was in conscious knowledge that the goods were being mis-declared and find that he was only preparing the export documents as per the directions of his Directors. We, therefore, waive the pre-deposit of penalty imposed on Shri N.P. George and recovery there of stayed till disposal of appeal.

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