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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Mumbai

Decided On : Jul-08-1988

Reported in : (1989)(19)ECC233

Appellant : Ashoka Traders

Respondent : Collector of Customs

Judgement :

1. This is an appeal against the order No. S/10-119/87/SG 23/87 SUB dated 25-1-88 passed by the Collector of Customs, Bom bay. The facts of the case as narrated in the adjudication order indicate that there were two identical consignments each consisting of 41 bales declared to contain white tinted soft wool waste imported by M/s. Ashoka Traders.

The importers filed the Bill of Entry IGM No. 2034 item No. 161 for the clearance of 41 bales only. The said B/E was as sessed in the normal course under IInd check procedure and the party paid the import duty before physical examination of the goods. In the meantime, pursuant to the scrutiny of the IGM No. 2034, the officers of the Special Investigation Branch noticed another consignment of 41 bales of wool waste against item No. 178 of the IGM with same marks and numbers for the same importers. Hence both the lots were inspected by the SUB and noticed that one lot was wrapped in white plastic cover and the other lot was in black plastic cover. Since both the lots had the same import marks and it was difficult to allo cate lots item wise, Customs House agent was directed to arrange for the simultaneous examination of both the lots. Though both the lots had same import

marks as per IGM, the lot in white plastic wrapper was found to have an additional marks "L/C" besides the marks indicated in the IGM "MCO Bombay 1 -41". The examination reveals that the 41 bales wrapped in black plastic were found to be blended wool/synthetic soft waste. Out of the 41 bales in white plastic wrapper bales Nos. 1 to 23, on examination were found to contain blended wool/synthetic waste and on removing the same a small bale was found concealed in each of the 23 bales. The concealed 23 bales were in Id mill pack ing and found to bear the description "Polyamide Staple Fibre". On examination also the concealed bales revealed that they were found to contain Polyamide Staple Fibre. The other bale Nos. 24 to 30 and 34 to 41 were found to contain blended synthetics/wool soft waste. Bale Nos. 31, 32 and 33 were found to contain wool waste.

2 On searching the business premises of the importers, certain documents recovered which revealed that the importers have placed 2 indents on the same date viz. 4-5-87 indent Nos. 87195 and 87196 with M/s. Khurana & Co.. Ludhiana and the Bank of India, Ludhiana branch.

These documents were taken over. On questioning by the Central Excise officers, Shri Anil Kapoor, the partner of the firm stated that the L/C was opened on 6-5-87 against indent No. 87195 and that by his letter dated 28-5-87 he had informed M/s. Khurana & Co. about the cancellation of the indent No. 87196. He had also admitted that he had received intimation from Bank of India, Ludhiana on 27-7-87 advising payment against import documents received against indent No. 87196. Shri In derjit Khurana of M/s. Khurana & Co. in his statement dated 2-11-87 stated that both the indents were signed through them for import of 1,40,000 kgs. wool waste in each case by M/s. Ashoka Traders, Ludhiana from M/s. Mains & Co., U.K. He, however, stated that they did not receive any correspondence regarding cancellation of other indent from M/s. Ashoka Traders. When the Bank authorities were questioned regarding the cancellation of indent No. 87196, the Bank informed the Central Excise authorities, Lud hiana that M/s. Ashoka Traders had submitted to them a letter dated 4-8-87 by hand on 2-11-87 for return of the import documents to the supplier in respect of their consign ment under indent No. 87196 dated 4-5-87. The shed Supdt. and the Customs House Agent were also questioned in this regard, the shed Supdt. had stated that he had no material to

allocate the lot to any particular item of 1GM and in case it was held that the lot with white cover packing pertained to Bill of Entry 2034/161, his endorsement which has been made on the said B/E may be neglected. The Customs House agent also stated that he has received the import documents pertaining to 41 bales covered by item No. 161 of 1GM 2034 and he has not received any other documents from any other importers. He also admitted that the lot in black cover having the marks which are shown on the B/E and the other lot with white cover lying in the same shed was having marks "LC" in addition to 'MCO, B'bay.

3. An adjudication order has been passed by the Collector holding that the two consignments with identical marks had been imported one with the correct goods and the other with costly and higher duty items concealed inside the bales. Since the letter of credit was opened for the import of only one lot, the additional marking 'LC on the packages is definitely to indicate that the lot with the additional marking 'LC is pertaining to the lot covered by the letter of credit. The letter of credit is in respect of documents covered by B/E. No. 2034/161.

Second set of documents pertaining to other consignment also do not show additional marks 'LC". It was also held by the Collector that the import of 2 identical consignments with the same marks and the same quantity was intended to get the correct goods examined after retiring documents for one consignment and take delivery of other consignment wherein Polyamide Staple fibre was concealed from all sides by blended wool/synthetic waste and cleared the correct goods, The consignment covered by B/E No. 2034/161 covering fibre only shows that out of the two consignments this consignment is the one imported against L.C. On this basis the order of absolute confiscation of both the consignments viz. consignment in respect of No. 2034/178 under Section 111(d) and 119 and the consignment in respect of B/E No. 2034/161 under Section 111(d), 111(1), 111(m) and 119 of the Customs Act, 1962, had been passed by the Collector of Customs, Bombay. In addition, a personal penalty of Rs. 4 lakhs have been imposed on the importers.

The learned Collector of Customs is not justified in ordering absolute confiscation of 41 bales packed in black wrapper under Section 111(d) and 119 of the Customs

Act. The Ld. Collector is not justified in holding that the charges framed in the show cause notice had been established. The Ld. Collector has failed to consider and appreciate the evidence on record including the statements of Shri Navin Aggarwal, the shed Supdt. Shri Dhige and Shri Naresh Desai and other statements that the appellants have no connection with the other lot with additional marking of L/C, (MCO, Bombay 1-41 L/C) and as such there is no warrant for confiscation of lot of 41 bales bearing marks MCO-Bombay 1-41 imported by the appellants. The presumption raised in the show cause notice, although misplaced and untenable, has been rebutted by the appellants and as such the conclusion drawn by the Ld. Collector is uncalled for and erroneous. The appellants had imported only one consignment of 41 bales of wool waste with marks - "MCO, Bombay 1-41".

The lot imported and wrapped in black wrapper contained wool waste as per declaration in the B/E, and the lot wrapped in white wrapper as alleged is marked with additional marking MCO-Bombay-1-41 LC is distinguishable from their lot and the second lot was cancelled. The packing list and invoice clearly establish that lot imported by the appellants did not contain additional markings of 'LC. The appellants have no concern with the other lot with the marking L/C. The presumption raised regarding 'LC as additional marking is not only misplaced and untenable but it has been rebutted and disproved. There is no concealment of one lot by another lot as the markings are different and distinguishable and there is no possibility of concealment.

The wool waste imported by the appellants is legal, valid and in accordance with valid ITC Licence.

5. During the hearing, Shri Arora, advocate cited the documents below in their defence viz. B/E No. 2034/161 showing the markings as 'MCO Bombay 1-41' which is as per the invoice and indent dated 4-5-1987. He also invited our attention to the letter addressed to M/s. Khurana & Co. dated 28-5-1987 cancelling the indent No. 87196 dated 4-5-1987 and the undated telex from the suppliers to the effect that due to oversight their shipping department have sent 41 bales marked MCO/Bombay/LC 1-41 packed in white wrappers were shipped to Bombay and they have already contacted the shipping company to arrange

immediate reshipment of the goods. He also invited our attention to the undated letter from the suppliers confirming that indent No. 87196 dated 4-5-1987 was cancelled by mutual agreement in June and due to over sight in their shipping depart ment these 41 bales have been shipped.

Our attention was also drawn to their letters dated 4-8-1987 and 2-11-1987 addressed to the bankers for sending the documents back to the suppliers.

6. The departmental representative Shri Prabhu argued that the consignment of 41 bales with additional marking L/C could only relate to the one indent with L.C. since the other consignment indented was on D.A.P. basis. There could not be an addi tional marking L/C on account of over-sight as contended by the suppliers and the let ters produced from the suppliers and telex are undated and apparently has been obtained after the examination of both the lots to get over the situation. He, therefore, pleaded that the confiscation of both the consignments are well justified in law and im position of penalty also necessary because of the attempted clearance of concealed goods having higher rate of duty.

7. We have heard the arguments on both the sides. The main issues which are to be decided in this case could be identified as follows :- (i) Whether the adjudicating authority's conclusion that the consignment marked with additional marking L/C can be considered to be one which is covered by L/C opened by the importers and in respect of which B/E has been filed.

(ii) Whether the consignment of 41 bales which do not contain any incriminat ing materials concealed therein could be held liable for confiscation under Section 111(d) and 119 of the Customs Act.

(iii) Whether there had been any deliberate attempt to de-fraud the Govern ment revenue by mis-declaration warranting imposition of penalty of Rs. 4 lakhs.

8. The first issue to be considered is whether the Collector was justified in hold ing that the consignment with additional marking L/C relates to the goods in respect of which L/C had been opened and for which the B/E had been filed. It is not disputed that the importers had placed two indents for identical goods in 41 bales

each on the same date. It is also not denied that the said 2 lots came by the same vessel having the same markings. Even the package numbers run from 1 to 41. Normally, in the case of supplies of identical items under 2 indents, distinctive marks would be given or at least different package numbers would be given. There is no mention about the indents numbers on the documents or packages. The only distinction as found on the packages on examination is the additional mark 'L/C'. It is an admitted fact that only in respect of 41 bales, L/C had been opened and in respect of other 41 bales they have been imported on 'Document Against Payment' basis. In such circumstance, the department have rightly examined both the lots simultaneously since it is difficult to apportion which lot belongs to the B/E. filed by the importers. The importers in the normal course can be expected to file the B/E only in respect of that lot where financial commitment has already been made by opening the L/C. It is found that when on examination, the 41 bales marked with additional marking L/C, (they) were found to contain goods not declared. The importers have chosen to dis-own that lot and claimed only those which are free from mis declaration. Such a stand is not tenable especially when both the lots had been imported by the same importers on the basis of indents placed on the same date for identical goods for the same number of packages. Moreover, the documents produced by the importers viz. their letter to the suppliers cancelling one of the indents, their letter to the bankers for returning the documents in respect of one lot and the letter from the suppliers stating that the other lot was sent by mistake with marking L/C in order to establish the contention that the other lot was not imported by them do not carry conviction for the following reasons :- It has been brought on record that the indentors have not received any correspondence from the importers regarding the cancellation of the indent for the other lot. The bankers has also clearly indicated that they have received the letter from the importers asking them to return the documents only on 2-11 -87 though the letter is dated 4-8-87. The telex and the letter from the suppliers are undated and strangely these documents don't talk anything of the additional marking L/C and its significance. During the hearing the advocate for the importers raised the possibility that the additional mark 'L/C may denote 'L/C awaited'.

Such a contention cannot be accepted because of the fact that the other lot has been imported on DAP basis and no L/C was expected to be opened nor L/C is awaited in that case. In the absence of the effective rebuttal from the importers by production of evidence as to the significance of the additional marking 'L/C' any person will only come to the conclusion that the additional marking L/C denotes the consignment, for which the L/C had been opened. It is only in this consignment concealment of non-declared goods was noticed. The Shed Supdt. and the Customs House Agent had also clearly indicated that in the absence of clear importing documents, it would not be possible to apportion the goods to the B/E filed. In the circumstances, the Collector is well justified in holding that the importers had imported the 2 lots with identical marking only with a view to getting Polyamide staple fibre concealed in 23 bales out of the total of 82 bales by creating a camouflage.

9. The next issue to be considered is whether Section 119 could be invoked in the case of 41 bales wrapped in black wrapper in respect of which the goods imported are as per description in the documents.

According to the Concise Oxford Dictionary 'conceal' means - to hide completely or carefully - to keep secret - to disguise- to keep from telling. Under Section 119 of the Customs Act the object used for concealing is liable for confiscation. In a case like this where 2 identical lots one without contraband and another with contraband have been imported, the object of importing the other lot is to disguise the contraband to get it passed. In such a situation it cannot be envisaged that only the materials which have been physically used for covering contraband or hiding them are sought to be covered Section 119. In the context of dictionary meaning referred to above, the items which have been brought simultaneously along with the contraband goods to disguise and camouflage the contraband are also covered by the term 'concealment'. Even without going into this aspect, this lot is liable for confiscation under Section 111(d) of the Customs Act. In view of our findings that the lot with the additional markings 'L/C' is the one sought to be cleared under the B/E, the other lot for which a B/E has not been filed and no licence produced is liable for confiscation under Section 111(d) of the Customs Act. We, therefore, uphold the Collector's order of confiscation of both the lots.

10. Now coming to the question of penal liability it is observed that the im porters apparently have created documents after the examination and investigation commenced. The letters appear to have been written by them with back dates have either not reached the addressee or have been delivered subsequently. The letter and the telex from the suppliers are undated and appear to have been solicited. Moreover, the im porters had pre-plan to import the polyamide fibre concealed in some of the bales by placing 2 indents simultaneously on the same date and also importing them with same marks and numbers. It is also strange to note that the suppliers do not offer any explanation as to why the consignment contained polyamide fibre concealed in 23 bales. All these factors lead us to the conclusion that the importers' action is deliberate and can not be let off with leniency. However, taking into account the fact that removal of un declared goods has been timely arrested and both the consignments have been ordered for absolute confiscation, we consider that the penalty of Rs. 2,00,000/- (Repees two lakhs) would meet the ends of justice. Accordingly, we modify the Collector's order to this extent. The appeal is otherwise rejected.

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