

Commissioner of Customs Vs. Akshatt Forge

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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Tamil Nadu

Decided On : Feb-28-2007

Reported in : (2007)(117)ECC376

Judge : P Chacko, K T P.

Appellant : Commissioner of Customs

Respondent : Akshatt Forge

Judgement :

1. The respondents, M/s. Akshatt Forge, were holding three Quantity-Based Advance Licences (QBALs) issued by the office of the Chief Controller of Imports & Exports (licensing authority). After making some exports under the licences and obtaining transferability endorsements from the licensing authority, they sold their licences in the market, which were ultimately purchased by one M/s. Kunal Engineering Co. Ltd., Chennai (M/s. Kunal, for short). M/s. Kunal used the licences for duty-free import of raw material under Notification No. 204/92-Cus. dated 19.5.92. Subsequent investigations held by the department revealed that the respondents had availed Modvat credit under Rule 57A of the Central Excise Rules, 1944 on inputs used in the manufacture of the products exported under the QBALs, thereby disentitling themselves from transferring the licences. In other words, condition No. (vi) of the above Notification was found to have been violated by the respondents. The investigative results further revealed that, though the respondents had reversed the Modvat credit in respect of one of the licences for the purpose of obtaining endorsement of transferability from the licensing

authority, they had not done so in respect of the remaining licences. On the basis of these findings, a show-cause notice was issued to M/s. Kunal and the respondents denying the benefit of the Notification to the former in respect of the raw material imported by them and proposing penalty on the latter. The notice demanded Customs duty of over Rs. 20.00 lakhs with interest @ 24% from M/s. Kunal under Section 28 read with Section 111(o) of the Customs Act. The penalty proposed on the Managing Director of the respondents was under Section 112 of the Act. After considering the replies to the show-cause notice, learned Commissioner of Customs dropped the proceedings against the respondents after noting that they had reversed the entire credit and paid interest thereon by the end of March 1994 in respect of one licence and had done likewise after issue of the show-cause notice in respect of the remaining licences. Learned Commissioner was granting amnesty to the respondents in terms of a Circular dated 3.1.1997 of the Central Govt. issued in relation to Notification No. 203/920-Cus. The demand of duty was dropped as time-barred. The present appeal of the Revenue is against the decision of the Commissioner.

2. Learned SDR reiterated the grounds of the appeal. He submitted that the Commissioner's order had been reviewed by the Board in relation to the respondents only. He referred to the relevant provisions of Notification No. 204/92-Cus. dated 19.5.92 and submitted that the respondents had suppressed before the licensing authority the fact that they had availed input-stage credit in respect of the goods, which they had exported under the QBALs. The transferability endorsements of the said authority were obtained fraudulently and therefore the respondents' transferee (M/s. Kunal) was not entitled to the benefit of Notification 204/92-Cus. Condition No. (vi) of the Notification, which had laid down that, where exported goods were manufactured availing credit of Central Excise Duty or Additional Duty of Customs in respect of any inputs under Rule 56A or 57A of Central Excise Rules, 1944, the facility of transfer of materials or the licence would not be available, was violated and consequently the goods imported and cleared duty-free under the QBALs in question became liable for confiscation under Section 111(o) *ibid*. Learned SDR submitted that the respondents had a role in rendering the goods so liable, thereby inviting the penal provisions of Section 112 of the Act. He, therefore, prayed for setting aside the Commissioner's order insofar

as it related to the respondents. Nobody represented the respondents despite notice.

3. After examining the facts of the case and reading Notification No.204/92-Cus. *ibid*, we have to decide on the question whether the respondents are liable to be penalized on the ground of breach of Condition No. (vi) of the Notification, which reads as under: That where export goods are manufactured availing credit of Central Excise Duty and Additional Customs Duty, in respect of any of the materials permitted import under the said licence, under Rule 56A or 57A of Central Excise Rules, 1944, the facility of sale or transfer of materials or the said licence shall not be available.

The Notification granted exemption from payment of Customs duty on raw materials imported into India under a QBAL issued by the licensing authority, subject to certain substantive and procedural conditions.

The substantive condition was that export obligation in relation to the imported input be discharged within the period specified by the licensing authority. It was further stipulated that, in respect of the final product exported in discharge of such obligation, the facility under Rule 191A or 191B of the Central Excise Rules, 1944 had not been availed in respect of the imported materials and no refund or rebate had been obtained or claimed under Section 74 of the Customs Act or under the Customs and Central Excise Duty Drawback Rules, 1971.

However, there was no embargo on availment of Modvat credit on inputs used in the manufacture of the final product exported under the licence. In other words, for claiming the benefit of exemption under the Notification in respect of the imported raw material, it was not a condition for the importer not to have taken Modvat credit on the inputs used in the final products already exported by him (The position was different in respect of an importer claiming exemption under Notification 203/92-Cus. *ibid* in respect of raw material imported under a VABAL). Condition (vi) of Notification No. 204/92 was one that affected the transferability of a QBAL by the licence-holder who had already made exports thereunder. If, in respect of the goods so exported, he had availed input-stage credit under Rule 56A or 57A, he would not be entitled to transfer the licence. On the other hand, if

he had not availed such credit on inputs used in the manufacture of the goods exported by him, he would be entitled to transfer the licence after obtaining the requisite endorsement from the licensing authority.

4. In the present case, it is the case of the department that the respondents had obtained such transferability endorsements on the QBALs in question without disclosing to the licensing authority the fact that they had actually availed Modvat credit on the inputs contained in their export goods and therefore they should be penalized under Section 112 of the Customs Act. This case cannot be accepted inasmuch as it was not the business of the Customs authorities to punish the respondents for having fraudulently obtained transferability endorsements on their QBALs from the licensing authority. The proper officer of Customs could have preferred appeal to the appellate authority under Section 18 of the Foreign Trade (Development and Regulation) Act, 1992 against the transferability endorsements granted to the respondents by the licensing authority.

5. The proposal to impose penalty on the respondents under Section 112 is questionable from another angle also. A penalty under Section 112 of the Customs Act depends mainly on liability of imported goods for confiscation under Section 111 of the Act. In the present case, the show-cause notice held the materials imported by M/s. Kunal, to be liable for confiscation under Section 111(o) of the Act, apart from seeking to recover duty on such goods. But the proposal to demand duty from M/s. Kunal in respect of such goods under Section 28 read with Section 111(o) of the Act was dropped by the Commissioner and his decision has been accepted by the Board. Where the action proposed under Section 111 of the Customs Act stands dropped, there is no question of invoking Section 112 of the Act inasmuch as the penal liability of a person under Section 112 depends on the confiscability of the goods imported by him. In any case, the subject goods were not imported by the respondents and the same were imported by M/s. Kunal and proceedings against the latter have been dropped. In the circumstances, the plea of the appellant for imposing penalty on the respondents under Section 112 of the Customs Act in relation to the imports made by M/s. Kunal is untenable.

6. For the reasons stated above, we sustain the impugned order and dismiss this appeal.

(Operative portion of the order was pronounced in open court on 28.2.2007)

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