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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

Decided On : Nov-20-1989

Reported in : (1990)(26)ECC83

Appellant : international Computers Indian

Respondent : Collr. of Cus.

Judgement :

1. These appeals arise out of a common order dated 30-11-1977 passed by the Special Adjudicator in the Office of the Collector of Customs, Bombay. Facts in brief are that the head-office and factory premises of appellants International Computers Indian Manufacture (ICIM) and the residential premises at Bombay of appellant S. Mookherjee, the Commercial Manager and P.A. to the Managing Director of ICIM along with the premises of International Computers (India) Ltd. (ICL) at Bombay were searched under the Customs Act, 1962 between 4-1-1969 and 9-1-1969 and some goods and documents were seized. ICL is the sole distributor for sale and distribution in India of ICIM's products under an agreement. ICIM were licensed to produce certain types of data processing equipment for Indian market and surrounding countries. The production included manufacture, assembly, re-building and factoring.

ICIM get the components, spares, used machines and other raw material only from ICL which is the parent firm in U.K. The goods seized as a result of the search at Poona factory comprised of control panels, transformers, core store machines and tabulators as listed in the related Panchnama. The documents

seized consisted mostly of files and registers with correspondence amongst different units of ICL group in India and with the Government of India, Commerce Ministry as also with the Customs House. As a result of investigation, 32 Show Cause Notices were issued jointly and severally to ICL (India) to ICIM and to its employees S/Shri Mookherjee, Richford and Gonsalves in regard to action to be taken under Section 111 and Section 112 of Customs Act, 1962.

Twenty Show Cause Notices out of the above were issued to ICIM and the other appellants herein. The charges of contravention of the Customs Act, namely, III(d), 111(1) and III(m) alleged in the Show Cause Notices relate to certain series of importations by appellant ICIM during 1963 to 1968 of data processing equipment including components, accessories and spares and machines. These equipments and spares were owned by the parent company ICL and were their own manufacturers. They were imported mostly from U.K. and some from Australia, Italy, Germany, France and Canada. All these supplies were made by ICL to ICIM on sale.

The imports effected at Bombay port were against ITC licences obtained on application to the Chief Controller of Imports and Exports that these equipments were materials required for production of data processing equipment. The Customs House determined the value of the goods for assessment under Section 14(l)(b) of the Customs Act, 1962 treating them as imports where the buyer and seller are related to each other.

The allegations and the evidence in support thereof given in all the Show Cause Notices, the evidence in the form of letters and other documents cited by the department during the personal hearing and the conclusions, views and arguments of the department expressed during such hearings would show the sum and substance of the department's case against ICIM and its employees is as below: ICIM (which is a subsidiary of ICL) under the guise of importing used machines for re-building and manufacturing brought in various machines, particularly tabulators which were of different dates of manufacture and were all declared at a very low value. They also imported spares not belonging to these machines and some of the goods were not declared at all.

Due to the restrictive policy adopted by the Govt. of India in the issue of licences to import data processing equipment, ICL (India) at this stage thought of forming an intermediate company. M/s. ICL (India) submitted an application to the Govt. of India for a licence for permission to commence local manufacture of certain items from the range of D.P.M.S. which ICL (India) was marketing.

While the Hand punches, Hand verifiers and sorters were to be manufactured out of spares, the Govt. was given to understand that tabulators would be manufactured out of bare carcass imported from ICL.

They stated that they would be bringing 800 series tabulators for the first three years phased manufacturing programme and the machines to be imported will have no life in it unless re-built to new standards and will have a nominal book value of 50/- each. The import licences granted initially were for the spares for the aforesaid machines and for tabulators hulks at their book value.

However, what ICIM imported after the 1st year of the phased manufacturing programme was 900 series tabulators which had high book values and lot of life in it. These machines were imported by under-invoicing them at a ridiculously low value and to suit the percentage fixed by the Government so as to get future licences.

The Department's stand is that under-valuation, mis-declaration and non-declaration was also for bringing in as many of the data processing equipment and as much spares as possible within the licences given for the manufacturing unit of ICL group. In some cases it was alleged that such ready to use machines and parts thereof which would not have been allowed by the Government if asked for importation by the Trading Unit of this group, namely, ICL (India), were brought in by ICIM. Such mis-declaration and under-valuation resulted in heavy loss of duty to the Government apart from contravening the restrictions imposed under ITC. According to the department's estimate in the Show Cause Notice, the total loss of duty involved in the alleged offences is Rs. 50,99,244 and Rs. 2,05,40,673 worth of goods have been allegedly imported in contravention of ITC regulations.

The department says that an analysis of the inherent evidence in the shape of correspondence in the seized documents show that the invoice value declared is unreal, has not rational basis and appears to have been made merely for the sake of convenience so that the goods imported would come within the value limit on the licence. These documents also show that the amounts shown in the invoices and Bills of Entry as C.I.F. values are not the actual value in the transaction between ICL and ICIM in respect of all these imports. The deliberate mis-declaration/non-declaration of value and other material particulars resulted in the violation of ITC contravention and also loss of duty.

The goods were, therefore, liable to confiscation and the liability to confiscation was rendered by certain acts of commission or omission by the persons who at the material time were responsible in taking the decisions pertaining to all these imports. They were, therefore, liable to be penalised under Section 112 of the Customs Act, 1962.

On a detailed consideration of the replies to Show Cause Notices and after giving opportunity of personal hearing during which witnesses were examined, the Special Adjudicator passed the impugned order by which he ordered confiscation under Section III(d) and III(m) of Customs Act, 57 numbers control panels and 73 transformers out of the seized goods releasing the balance seized goods. He levied a fine of Rs. 10,000/-in lieu of confiscation. He exonerated the appellants in respect of charges in 3 out of the 20 Show Cause Notices issued to them. He further imposed personal penalty as follows on the appellants :-M/s. I.C.I.M. : Rs. 32,78,000/- for loss of duty Rs. 15,26,000/-for ITC contravention.Mr. Richford : Rs. 20,500/-Mr. S. Mookherjee : Rs. 30,500/-Mr. P.D. Gonsalves : Rs. 1,250/- 2. Shri B.M. Parikh, the learned counsel appearing for the appellants submitted that in this case, to begin with, the Tribunal may determine the issue relating to appellant firm ICIM of the imposition by the Special Adjudicator of two separate penalties on the firm, one for contravention of Import Trade Control Regulations, and the other for evasion of duty. The learned counsel contended that two penalties under Section 112(a) for the above reasons were unlawful because the adjudicating authority had held the goods to have been imported in contravention of prohibition on such imports, and, as such, the penalty on them can only be under Section 112(i) which

relates to prohibited goods, whereas the adjudicating authority had also imposed penalty for evasion of duty. This penalty is bad in law because penalty for evasion of duty on dutiable goods other than prohibited goods is separately covered by Section 112, Clause (ii) which is not applicable in their case as this department had held the import as that of prohibited goods. Therefore, it was argued that the separate penalty for evasion of duty is not sustainable and should be set aside. The learned counsel further submitted that if the appellants' submissions on this preliminary point were accepted, they were not inclined to press the rest of their appeal, for the reason that the matter was very old, and the offence alleged in the order under appeal relates to imports of 1963 to 1968 where Show Cause Notices were issued during 1969 and 1970 and the adjudication order was ultimately issued in 1979 during which period the appellant firm had also undergone considerable hardship and are in the circumstances, desirous of closing the issue. The learned SDR Shri Krish-namurthy, appearing for the department submitted that the point now raised regarding penalty was one of law raised for the first time, and since he had not received any instruction in the matter, he would leave it to the Tribunal to determine. It was, however, felt by the Bench that since the matter is very old and has been pending for long, it may be advisable to hear the appellants on merit also so that at the end, it may be possible to take a view in the matter either way. The learned counsel and the learned SDR had no objection, and hence the learned counsel proceeded the address on arguments on merits also. His arguments followed the lines on which the appeal memorandum was made, and the learned counsel also referred to the documents contained in the paper-books prepared in respect of each Show Cause Notice, and the learned counsel urged that the imports were validly made of the various machines and components and spares, whose value was also, according to the appellants, settled by negotiations bonafide and without any suppression. He also inter alia, referred to the evidence of Mr. C.J. Stronge, the expert Chartered Accountant Auditor of the parent firm in U.K. in this regard. As regards the other appellants, who are employees of the firm the learned counsel informed that appellant Gonsalves is no more, and hence personal penalty on him will abate with his death. Shri Mookherjee has paid penalty and it was pleaded that he was only an employee in the managerial cadre, now no more with the firm, but that a lenient

view may be taken. Similar submissions were also made for lenient view in the case of Mr.

Richford.

3. Shri Krishnamurthy, the learned SDR, appearing for the department supported the adjudication order and submitted that there is sufficient evidence in the volume of the correspondence, the invoices and packing specifications seized, and the Bills of Entry for these imports in the Customs House records, to establish the charges against them and that under the guise of importing used machines for rebuilding and manufacturing appellant ICIM brought in various machines particularly tabulators which were of different dates of manufacture and were all declared at a very low value. They had also imported spares not belonging to these machines and the learned SDR pointed out that some of the goods were not declared at all. The other appellants had also deliberately acted in effecting such unauthorised imports and the learned SDR urged that the quantum of personal penalty on them is commensurate with their respective roles in the offence.

4. The submissions made have been carefully considered. The learned counsel for the appellants had raised a preliminary legal issue in this case in respect of appellant ICIM which he submitted may be decided in the first instance because if the appellant's case were to be accepted on this issue, they will not be pressing the rest of appeal on merits due mainly to the long lapse of time and due to the various changes which had taken place in the appellant's firm itself during the period.

The argument put-forth is that the adjudicating authority had erred in law in imposing two separate personal penalties on this appellant under Section 112 of Customs Act, 1962 because having held the import to be in contravention of prohibition on such import under Import Trade Control Regulations, the learned counsel contended that their case would fall squarely under Section 112, Clause (i) of the Customs Act, 1962 which covers penalty in the case of prohibited goods and, ipso facto will not attract penalty under Clause (ii) of Section 112 also because that Clause refers to only penalty in respect of dutiable goods other than prohibited goods. To examine this contention, it will be useful to peruse the

provisions of Section 112 of the Act, which relate to penalty for improper importation of goods which runs as follows :- (a) who, in relation to any goods, does or omits to do any act which act or omission would render such goods liable to confiscation under Section 111, or abets the doing or omission of such an act, or (b) who acquires possession of or is in any way concerned in carrying removing, depositing, harbouring, keeping, concealing, selling or purchasing, or in any other manner dealing with any goods which he knows or has reason to believe are liable to confiscation under Section 111.

(i) in the case of goods in respect of which any prohibition is in force under this Act or any other law for the time being in force, to a penalty not exceeding five times the value of the goods or one thousand rupees, whichever is the greater; (ii) in the case of dutiable goods, other than prohibited goods, to a penalty not exceeding five times the duty sought to be evaded on such goods or one thousand rupees, whichever is the greater; (iii) in the case of goods in respect of which the value stated in the entry made under this Act or in the case of baggage, in the declaration made under Section 77 (in either case hereafter in this Section referred to as the declared value) is higher than the value thereof, to a penalty not exceeding five times the difference between the declared value and the value thereof or one thousand rupees, whichever is the greater; (iv) in the case of goods falling both under Clauses (i) and (iii), to a penalty not exceeding five times the value of the goods or five times the difference between the declared value and the value thereof or one thousand rupees, whichever is the highest; (v) in the case of goods falling both under Clauses (ii) and (iii), to a penalty not exceeding five times the duty sought to be evaded on such goods or five times the difference between the declared value and the value thereof or one thousand rupees, whichever is the highest.

It is clear that for purposes of imposition of penalty, the ceilings are prescribed in Clauses (i) to (v) of the Section. Goods in respect of which any prohibition is in force under the Customs Act, 1962 or under any other law is categorised separately under Clause (i), and penalty for dutiable goods other than prohibited goods is distinctly covered by Clause (ii). On a perusal of the Show Cause Notices issued to the appellants in this background, we find that the allegation is that the

goods have been imported in contravention of prohibition under Section 3 of Imports and Exports (Control) Act, 1947 attracting the prohibition under Section 11 of Customs Act, 1962 on the ground that the impugned goods had been imported without a valid import licence or had been imported without any licence at all. While mentioning the consequential liability to confiscation under Section 111 of the Customs Act, the Show Cause Notices has also mentioned that the goods are prohibited and dutiable. The Show Cause Notices then invoke Section 112, Clause (i) for the purpose of personal penalty. However, in the impugned order, the adjudicating authority states, "Wherever penalties have been imposed on the company, I have indicated separately the amounts adjudged for loss of duty and for ITC contravention...." But as we have seen from the provisions of Section 112 of the Customs Act, 1962, when once imported goods have been held to have been imported in contravention of ITC Regulations regarding import licence, the goods being in the nature of prohibited goods, penalty for such contravention has to be imposed under Clause (i) of Section 112 of the Act, which specifically prescribes penalty in the case of prohibited goods. More so, when, as we have seen, the Show Cause Notices also had alleged that prohibited goods had been imported and had further invoked Clause (i) of Section 112 of Customs act, 1962. In such a situation, imposition of a separate penalty with reference to the duty evaded is, in our view, not well-founded. We, therefore, find a lot of force in the counsel's submissions in this regard which are accepted and we, accordingly, set aside the separate penalty imposed on appellants - International Computers Indian Manufacturing Ltd. in the impugned order for evasion of duty.

Since the submissions of appellants ICIM relating to the separate penalty on them on two counts under Section 112, Clause (i) of the Customs Act, 1962 are found to be acceptable in facts and circumstances of the case and as per the submissions made by the learned counsel before us that in such circumstances, this appellant will not press the case on merits, we do not feel called upon to determine the other issues in the case on the facts and circumstances thereof argued before us in respect of the appellant ICIM. We may make it clear that the findings as above have been given having regard to the concession made by the learned counsel for the appellants and in the peculiar facts and circumstances of this case.

In respect of appellant Mr. Gonsalves, it has been informed by the learned counsel that this appellant is now no more. Since the penalty under Section 112(a) on him is a levy in rem, we are in agreement with learned counsel when he submitted that with his death, the penalty on Shri Gonsalves will abate. As regards the appellant Mr. Mookherjee, we observe that he was an employee in the managerial cadre the evidence on record would show that he cannot plead total ignorance of the decisions relating to the imports, and, in such a view of the matter, his liability to penalty is well founded. However, as regards the quantum thereof, considering the long lapse of time of over 9 years, we are of the view that a lower penalty would serve the ends of justice and, accordingly, the penalty on him is reduced to Rs. 10,000/- (Rupees ten thousand only) in the facts and circumstances of the case. As for appellant Richford, for the same reasons as in the case of Mr.

Mookherjee, the personal penalty on him is reduced to Rs. 5,000/- (Rupees five thousand only). The appeals are disposed of in the above terms.

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