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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

Decided On : Feb-06-1992

Reported in : (1992)(60)ELT406TriDel

Appellant : Anup Kumar Malik

Respondent : Collector of Customs

Judgement :

1. This is an appeal preferred against the Order-in-Original No.9/Cus/87 dated 2-3-1987 passed by the Additional Collector of Customs & Central Excise, Chandigarh.

2. The facts of the case, in brief, are that on 8-2-1985 the CIA (Police) Staff of Ludhiana searched from the godown of the appellant and recovered 786 Video Cassette tapes as per police seizure in connection with a case under Section 102 of the Cr. P.C. On intimation about the said recovery, the Customs staff visited the CIA office and examined the said goods recovered. On examination it was reasonably believed by the customs staff that these were contraband goods having been imported from a foreign country illegally and acquired possession unlawfully by the appellant in violation of the Import Control Restrictions and the provisions of Customs Act, 1962, Accordingly, these were seized and taken over by the Customs for further action under the Customs law. In a follow up action and in reply to the show cause notice during the adjudication proceedings it was contended among other grounds that the Cassettes were purchased in the name of M/s.

Maya Electronics in which he was a partner alongwith other two partners and they were equally liable for charges; out of 786 cassettes only 12 cassettes were of foreign origin supported by purchase invoices for personal use; remaining 774 were of Indian origin and onus was on the department to prove with positive evidence that they were of foreign origin, but such evidence was lacking. These contentions were negatived by the Additional Collector who adjudicated the proceedings but found that thirty seven (37) cassette tapes mentioned at Serial No. 9(j), (h) & (i) of Annexure of seizure memo dated 11-3-1985 which do not contain any markings about the country of origin or erasure of any markings and accordingly, they were released. Remaining 749 Video Cassette tapes were ordered for absolute confiscation under Section 111 of the Customs Act, 1962 in addition to imposition of personal penalty of Rs. 50,000/- on the appellant under Section 112 of the Customs Act, 1962. Hence, this appeal.

3. We have heard Shri Harbans Singh, learned Advocate for the appellant and Shri G. Bhushan, learned S.D.R. for the respondent.

4. Shri Harbans Singh first drew our attention to the Annexure of the Seizure Memo dated 11-3-1985 to show details of goods seized numbering to 786 Cassette tapes. He filed a Chart of the same broadly indicating number of tapes (i) with stickers Made in India and (ii) with Country of origin erased (iii) with mark Made in Japan, which is reproduced hereunder :-With Stickers 'Made in India' With Country of origin erased 591 1465. Esquire.

1 5. Fuji Brand.

6 ----- ----- TOTAL 591 TOTAL 146With mark 'Made in Japan' Released 12 37 He said in case of numbering 146 tapes, alleged to be erased, it was not known at what stage it was erased and by whom as there was no indication about the erasure in the Seizure Memo of police dated 8-2-1985 and since then the goods were lying without sealed sufficiently for a long time with the police, the police could have erased with a view to implicate the appellant in this false case. He said that except numbering 12 cassettes remaining cassettes are of Indian origin. Mere holding the brand name markings on cases of cassette tapes is itself not a conclusive point of foreign origin.

Further the cases of cassettes parts of the Video cassette tapes were allowed to be imported as per specified in Appendix 17 of the Import & Export Policy 84-85 as the import took place in Feb. 1985. The goods in question were freely available in India and the marking of trade name might have been done in India. He said that the Additional Collector has proceeded in respect of some of the cassette tapes on the marking of T120 as Trade marking of Japan, which is neither a Trade marking nor a foreign brand. He contended that burden squarely lies on the Department to prove the goods were of foreign origin and smuggled goods, but without discharging the burden concluded on mere surmises.

He argued that impugned order is not sustainable in the eye of law as show cause notice was initiated under Section 123 and findings also were without reference to Section 123 in the impugned order without proving with substantiated evidence that the goods in question were smuggled or forbidden. As regards penalty, he submitted that there was no categorical finding by the Adjudicating authority about the involvement of the appellant in importing contraband goods to attract personal penalty. Further penal action is not sustainable as it was not specified in the charge whether it was under sub-section 112(a) or (b) as it was not mentioned either in the Show Cause Notice or in the order. To a query from the Bench in respect of 12 Cassette tapes which were of foreign origin, he submitted that those 12 Cassette tapes were purchased in India by the appellant for his personal use and which were duly supported by purchase invoices and he was neither selling the goods nor there is any findings that he was selling the goods.

5. Shri G. Bhushan, learned S.D.R. while reiterating the findings given by the Additional Collector submitted that the goods in question were recovered from police as were not duly supported by valid documents. He said that bill produced by the appellants were not related to Cassettes in question but to distinct and separate items. He justified the action of the Additional Collector for confiscating 749 cassette tapes as they were of foreign origin and releasing 37 cassette tapes by giving benefit of doubt as no country of origin was found in respect of 37 Cassette tapes. He said that point of permissibility of importing parts of the Cassette tapes were not raised before the original authority, but first time it was raised by the appellant's counsel before the Tribunal. He argued that it is a clear

case of violation of Import Policy and is in clear contravention under Section 11 of the Act as the goods were notified under Section 11 of the Customs Act, 1962. He said that there was a mistake in mentioning Section 123 in the Show Cause Notice but charges and findings in the impugned order were with reference to Section 11. He drew our attention where charging provisions of Section 11C, 11D, HE and 11F were also mentioned in the Show Cause Notice.

6. We have considered the arguments advanced on both sides and perused the records. We observe that proceedings were initiated even under Section 123 in the Show Cause Notice and discussions and findings of the Adjudicating authority were with reference to Section 123 as it was rightly argued by the appellant's counsel. If the Department initiated to proceed with reference to Section 11, then it was incumbent on the part of the Department either to drop charges under Section 123 or to issue corrigendum but which has not recoursed to either of these actions, but proceeded to pass culminating contraventions under both Sections which resulted infirmity in the impugned order. Whenever the charges were framed alleging that goods were contraband and of foreign origin, the burden lies on the Department to prove with positive evidence that the goods in question are of foreign origin. In the present case when it was substantially shown that the parts viz., cases etc. are permitted to be imported under Import Policy and the like cassette tapes are available in India and the inference can be drawn that the goods in question might have been assembled in India, the Department ought to have proved by getting expert opinion or by recognised practice with positive evidence to prove that the goods in question were of foreign origin. Erasing or non-erasing of marking is not the criterion unless it is proved that substance is of foreign origin. We find that sufficient material evidence is not brought on record to prove the goods in question were of foreign origin for absolute confiscation and to impose personal penalty. As regards 12 cassettes, we observe that these, were duly supported by Bill No. 6052 issued by M/s. Salrang General Merchant, Delhi which Was not disputed by the Department. In view of the statement at the first instance by the party that it was meant for personal use and in the absence of finding by the Additional Collector that these goods were meant for sale, the benefit of doubt should be given to the party with reference to Section 11G of the Customs Act, 1962.

7. In the result, we allow this appeal with consequential relief.

Sd/- 8. With due respects to learned brother Member (Judicial) my order is as follows :- 9. I find that in this case the show cause notice dated 5-5-1985 was issued to 1. Shri Anup Kumar Malik (shown as "proprietor of Maya Electronics" in the Customs Seizure memo) Further the appellant has stated that he was one of the three partners of the firm M/s. Maya Electronics and the cassettes were purchased in the name of M/s. Maya Electronics and belonged to the firm M/s. Maya Electronics, whose partners were (1) Shri Rajinder Paul Kapoor, (2) Shri Varinder Kumar and (3) Shri Anup Kumar Malik (the appellant). He has further stated that M/s. Maya Electronics was a firm dealing in electronics but had also decided to run video library and these cassettes had been purchased for that purpose. He has filed a copy of the Registration certificate, a copy of the agreement and partnership deed of M/s. Maya Electronics, Ludhiana.

10. He has also filed photocopies of the rent receipt issued by the landlord of the godown. In short the appellant has claimed only 12 cassettes of foreign origin which were said to have been kept by him for personal use. The rest have been indicated as the property of the concern M/s. Maya Electronics.

11. The other two partners have on the other hand stated ... (in their reply dated 16-11-1986) that the firm M/s. Maya Electronics had been dissolved on 4-2-1985 i.e. 4 days before the date of seizure on 8-2-1985 and the learned Additional Collector has accepted this position.

12. It is however necessary to take note in particular of Para 7 of the "dissolution deed" which reads as follows :- "That all the liabilities of the firm regarding taxes such as income tax, sales tax and/or any other tax upto the date of dissolution which may arise after the date of dissolution but relating to period upto 4-2-1985 shall be borne by all the three parties to this deed in the ratio in which they shared the profit and loss as per the deed of partnership under which they had been working".

13. From this it is clear that the liabilities towards taxes relating to the period 4-2-1985 were required to be shared by the partners.

14. The "deed" does not clearly state the manner in which movable property was required to be disposed of or shared or the manner in which the liability if any in respect of any 'goods' was required to be dealt with, but it appears, prima facie, that for any violation of law in respect of goods purchased by the partners in the name of the firm which belonged to the firm on or before the date of 04-02-1985 all the three partners will have to be considered as jointly responsible in the absence of anything to the contrary in the deed. Once Shri Anup Kumar Malik had stated that the goods belong to the firm the statement of other two partners were also required to be recorded and the notices were also required to be issued to them.

15. While it is not clear from the records whether the notice was so issued to other partners, I do find from the records that the other two partners had also written letters to the Collector with reference to the show cause notice.

16. In these replies dated ... Shri Rajender Paul and Shri Varinder Kumar have stated as noted above that the firm was dissolved and the cassettes did not belong to the firm but to Shri Anup Kumar Malik, the appellant. Whereas in his reply Shri Anup Kumar Malik has denied that the firm was dissolved on 4-2-1985 and stated that the so-called dissolution deed was a forged document and no such deed was ever executed and the firm M/s. Maya Electronics was in existence at the time of seizure.

17. The appellant has also stated that he had requested that the opinion of a hand-writing expert may be obtained regarding the signatures appended on the deed but the opinion was not sought and the examination of the deed personally by the adjudicating authority was not sufficient to negative the contentions of the appellant.

18. The sum and substance of it all is that neither of the three persons who were admittedly the partners of the firm M/s. Maya Electronics, have claimed the goods in their personal capacity.

19. Shri Anup Kumar has further stated that except for 12 cassettes mentioned in Sl. No. A and B of the rest of the video cassettes had been assembled in India; And the said 12 cassettes were purchased vide Bill No. 6052 dated 16-10-1983

and were not meant for sale but for personal use.

20. It is also observed that in the show cause notice Section 123 has been invoked and the appellant have pleaded that Section 123 was not invokable; And the learned DR has conceded the same. There is however nothing to indicate in the order which would go to show that the adjudicating officer's mind was not influenced by the fact that Section 123 was invokable according to the show cause notice. On the contrary in the operative portion of the order he mentions that the appellant has failed to prove their importation. From this it is clear that the adjudicating officer has proceeded on the basis of that Section 123 was invokable and his decision and order is based on that fact. Therefore conceding at the Tribunal stage that Section 123 was not applicable does not help the cause of the department.

21. It is also noticed that the appellants had produced vouchers in support of their contention that they had purchased the cassettes locally in the normal course of business but in view of the brand names found on the cassettes the Additional Collector has not believed that these vouchers related to the goods in question. However merely because the word "assembled in India" has been written in bracket below brand name or identification particulars given in these vouchers, they could not be summarily dismissed and an effort was required to be made to show whether these vouchers can be co-related with the goods in question with reference to other particulars mentioned therein.

22. It was also required to be ascertained whether they had been really as sembled in India as claimed, with reference to some expert opinion or market enquiry, but there was nothing to indicate whether this was done.

23. I also notice that no categorical finding has been recorded as to whether cassettes in question were owned by Shri Anup Kumar Malik and were solely his personal property or belonged to the firm M/s. Maya Electronics at the time of their purchase and use prior to seizure.

This was important since in the seizure memo Shri Anup Kumar has been shown as the proprietor of the firm M/s. Maya Electronics whereas he and other two

persons had claimed that they are partners of the firm M/s. Maya Electronics. Since the show cause notice was issued against M/s. Maya Electronics also it means that the department was itself convinced at that stage that prima facie M/s. Maya Electronics also came into picture. Hence on both counts it was necessary to record a finding with reference to M/s. Maya Electronics which has not been done and no enquiry or effort seems to have been made to find out whether Shri Anup Kumar Malik or the other two partners were telling the whole truth. Further no order whatsoever has been passed with reference to M/s. Maya Electronics although as noted above a joint show cause notice was issued impleading the firm M/s. Maya Electronics as well.

24. Interestingly there is reference to the communication dated 16-11-1986 received from the other two partners of M/s. Maya Electronics but there is no mention thereof in the discussion or operative portion of the order and no finding has been recorded with reference to the same. In my opinion, a specific finding regarding the liability of the person(s) concerned was necessary as a penalty could be imposed only with reference to such a finding and not otherwise. In the circumstances, I consider that while the order was required to be set aside the matter was required to be remanded to the adjudicating officer for de novo consideration in accordance with law.

27. Arguing on behalf of the appellant, Shri Harbans Singh, learned counsel, submitted that the learned Judicial Member in his proposed Order has rightly given the benefit of doubt to the appellant and it is not a fit case where the case should be remanded, particularly when all the parties including the firm, namely, M/s. Maya Electronics, Ludhiana, were parties to the adjudication proceedings. He further submitted that Section 123 of the Customs Act, 1962 was wrongly invoked in the Show Cause Notice and at this stage, the Department should not be given an opportunity to fill up the gaps or lacuna in their case by remanding the matter, as proposed by the learned Technical Member. To top his arguments, he also submitted that the case is an old one and was started as a result of search and recovery of the subject goods effected on 8-2-1985. It is almost more than five years and no useful purpose would be served by remanding the matter and cited the case of Vijay Silicate & Chemical Works v. Collector of Central Excise, Meerut,

1987 (31) E.L.T. 935. In reply, Shri G. Bhushan, learned SDR, submitted that the Show Cause Notice was also issued to the firm, M/s. Maya Electronics of which the appellant and S/Shri Rajinder Pal Kapur and Varinder Kumar are partners, and in reply to the Show Cause Notice the said two partners S/Shri Rajinder Pal Kapur and Varinder Kumar denied their any involvement in the matter stating further that the said firm, M/s. Maya Electronics had ceased to be in existence prior to the date of occurrence and that they had no interest in the goods under seizure.

It was stressed by him that in his reply to the Show Cause Notice, the present appellant, Shri Anup Kumar Malik, also stated in paragraph 5 that he is not in any manner concerned with the video cassettes proposed to be confiscated. In his rejoinder, Shri Harbans Singh, learned counsel, submitted that the Additional Collector, who has passed the impugned Order, has held that the seized video cassettes 749 belong to the appellant and, therefore, at this stage, it cannot be said that the confiscated video cassettes belong to other than the appellant, Shri Anup Kumar Malik, adding that this dispute is of a civil nature which could be decided only by a Civil Court.

28. I have considered the submissions and since the detailed facts of the case have already been stated in the two separate orders proposed by the learned Members, I am not required to repeat the same herein again.

29. On a reading of the impugned order, it is clear that number of contentions were raised before the Adjudicating Authority, but he has not recorded his positive finding on each and every submission made by the appellant before him, as pointed out by my learned brother, Shri S.K. Bhatnagar, Technical Member (as he then was) in his proposed order. It is true that all the parties were before the Adjudicating Authority, as contended by the learned counsel for the appellant, but the fact remains that the Additional Collector has not recorded his positive findings regarding the liability of the person(s) concerned, as the penalty can be imposed only with reference to such a finding and not otherwise. The contention of the learned counsel for the appellant that by remanding the case, the Department should not be given an opportunity to fill up the lacuna is also not acceptable in the facts and circumstances of the case. To be terse, no question of filling up of any

lacuna arises. The facts and circumstances of the case of Vijay Silicate & Chemical Works, supra, cited by the learned counsel for the appellant is not apt to the present case. In that case the demand was found to be not sustainable because no Show Cause Notice was issued at all before confirming the demand and in this premises, it was held that even the case is remanded no useful purpose would be served because the maximum time limit of five years for raising the demand under Section 11A of the Central Excises and Salt Act, 1944 has already expired. This is not the case here. Thus, for the reasons mentioned by the learned Technical Member in his proposed Order, which I need not repeat here, since I am agreeing with him, I answer the question referred to me as follows :- "In the facts and circumstances of the case, the case requires to be remanded as proposed by Shri S.K. Bhatnagar, V.P. (J) (then Member-Technical)".

30. In view of the majority opinion, the matter is remanded to the adjudicating authority for de novo consideration in accordance with law and our observations.

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