Banswara Fabrics Ltd. Vs. Collector of Customs

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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Delhi

Decided On : Mar-28-1994

Reported in : (1994)(72)ELT772TriDel

Appellant : Banswara Fabrics Ltd.

Respondent : Collector of Customs

Judgement :
1. The above captioned appeals have been filed by the appellants being aggrieved from the common order passed by the Collector of Customs, Bombay-H. Four stay applications have also been filed. When the matter was called today, only stay application of M/s. Toshniwal was listed.

Shri Kamal Parasurampuria, learned Advocate has appeared on behalf of the appellants and pleaded that the other stay applications of M/s.

Banswara Fabrics Ltd. and Sh. B.L. Sharma are listed on 29-3-1994 and the stay application of Shri Murarilal Dalmia listed on 4-4-1994 may also be taken up today. He stated that all the stay applications emerge from a common order and pleaded that judicial propriety requires that these stay applications should be heard together which will save inconvenience to him as well as to the parties.

2. Shri Prabhat Kumar, learned Senior Departmental Representative who is present on behalf of the respondent fairly agrees with the request of the learned Advocate for hearing of all the stay applications today and as such he has got no

objection.

3. After hearing both the sides, we accept the request of the learned Advocate to which learned SDR does not object, and accordingly we proceed to hear all the four stay applications today.

4. Learned Advocate pleaded that the appellants M/s. Banswara Fabrics Ltd. imported 150 metric tonnes polyster filament yarn under OGL in 1982 and the goods were placed in the Warehouse. At the time of importation, the rate of duty was 200% and thereafter by Notification No. 248 of 1982-Cus. dated 23-11-1982 additional duty of Rs. 15 per kg.

was levied.

(a) Learned Advocate pleaded that the imposition of this additional duty, it was not a viable business proposition to use polyster filament yarn for our manufacture, and sell the same in the domestic market.

Accordingly after market study, the appellants decided to export the fabrics made out of the imported raw materials and for this purpose, out of 150 metric tonnes, 47 MTs. were cleared without payment of duty against an advance licence which appears on page 76 of the paper book.

(b) Learned Advocate pleaded that there is no ITC violation at the time of import. He further submitted that the facility for quality manufacture was not available with the appellant. Accordingly, the appellants had entered into agreement with two parties namely M/s.

Maruti Yarn Trading Company and Saree Niketan. The agreements appear on pages 133 and 140 of the paper book.

(c) Learned Advocate pleaded that the duty involved is Rs. 63,88,465 and the appellants have paid the full duty amount. Out of 150 MTs. of imported materials, 88 MTs. were cleared after the payment of duty and 15 tonnes were surrendered by the appellants as the business proposition was not viable and the valuation of the imported goods was about Rs. 6 lakhs.

(d) Learned Advocate pleaded that the goods cleared against the advance licence were sold by the appellants. They were actually used by the appellants for the manufacture of converted texturised yarn and as such there is technical violation, the only technical violation is instead of having the manufacturing process in the appellants' own factory, the process of manufacture was done in other person's factory. But the quality imported internationally viable was given a carry forward to process for the same.

(e) Learned Advocate pleaded that though bonafidely they had entered into an agreement but this agreement was never implemented. The appellants as a bona fide tax payer in spite of their financial contraint, had paid the full duty amount voluntarily from 1987 onwards till 1990 and the letter to this effect appears on page 197 of the paper book which has all the details of payments of duty. He pleaded that penalty proceedings are to be quashed and for the sake of any argument, if penalty was to be imposed, it has to commensurate with the offence. He pleaded that duty involved is at Rs. 64 lakhs whereas the penalty on the appellants' company has been imposed at Rs. 4 lakhs.

M/s. R.L. Toshniwal at Rs. 10 lakhs, Shri Murarilal Dalmia at Rs. 10 lakhs and Sh. B.L. Sharma at Rs. 50,000/-.

(f) Learned Advocate on the financial hardship has pleaded that the appellants' company has been declared as sick unit by the BIFR and the order to this effect appears on page 240 of the paper book. He pleaded that the appellants' unit is a loss-running unit. He argued that the total capital is about Rs. 15 lakhs whereas the total loss brought forward is to the tune of Rs. 5,74,54,2017- as on 31-3-1993. He argued that the loss for the year ending 31-3-1993 is at Rs. 54,90,901/-. He pleaded that in case the appellants' company is desired to deposit the amount it will amount to undue hardship.

(g) Coming to the imposition of penalties on M/s. R.L. Toshniwal, Murarilal Dalmia and Sh. B.L. Sharma, the learned advocate pleaded that the total capital of M/s. R.L. Toshniwal as per the balance sheet for the year ending 31-3-1993 is at Rs. 16,59,206.30. Out of this, his investment is to the tune of Rs. 12,61,455.00. He pleaded that the liquidity position of the applicant is not good and as such, he is not in a position to deposit Rs. 10 lakhs. As per the balance sheet of M.L.

Dalmia as on 31-3-1993, the learned advocate has pleaded that his total capital is at Rs. 16,02,610.42. Out of this, about Rs. 14 lakhs is his investment and the remaining is from borrowed capital. About Shri B.L.

Sharma, the Ld. Advocate argued that he is an employee earning about Rs. 4,000/-. He has to support his wife and his four children who are college going. He pleaded for the grant of stay.

5. Shri Prabhat Kumar, learned SDR who has appeared on behalf of the respondent pleaded that the appellants have taken the clearance against the advance licence and the clearance of the goods was issued and there was an obligation to export the goods by the importer himself and not from somebody else. He pleaded that it is a very clear case of violation of the terms of the advance licence read with the Notification No. 117/78-Cus., dated 9-6-1978. He argued that the mere fact that the appellant unit is a BIFR unit no exemption can be given and he referred to Para Nos. 18 & 19 of the Collector's orders and also other paras of the order which relate to involvement of individuals. He pleaded that the appellants have taken the shelter of a sick unit as declared by BIFR. He referred to the latest decision of the Tribunal in case of Maharashtra Tubes v. Collector of Central Excise in the Stay Order Nos. 15-17/94-A, dt. 25-1-1994. He pleaded that the facts of the present case are similar to Maharashtra Tubes. The only difference in Maharashtra Tubes is that the goods imported were straightway sold by them. He laid special emphasis on Para Nos. 33 & 34 of the Order-in-Original. He pleaded that as per balance sheet of the appellants as on 31-3-1993, there are reserve and surplus to the tune of Rs. 34,50,200.00 in cash and bank balance is at Rs. 3,55,975.00. He pleaded for the rejection of the stay applications.

6. Learned Advocate in reply, pleaded that though the appellants' unit is a running unit, it is a sick unit and the appellants are having big financial crisis. He further pleaded that the appellants are running the unit only for the maintenance of their staff and their dependents otherwise they will get un-emplayed. He again pleaded that the duty amount of Rs. 63,88,4657- has already been paid and the appellants are a bona fide tax payer. Ld. advocate makes the following offer for depositing

the penalty amounts: He further stated that since Shri B.L. Sharma is an employee earning about Rs. 4,000/- and has to support his family, he is not in a position to deposit any amount.

7. Shri Prabhat Kumar learned SDR, in reply to the offer made by the learned advocate stated that he has got no objection for the acceptance of the offer in view of the facts and circumstances stated by the learned advocate, 8. We have heard both the sides and have gone through the facts and circumstances of the case. It is an admitted position in the present matter that the goods imported by the appellants against the advance licence were sold by the appellants. The goods were actually utilized by the appellants in their own factory. The appellants had made an export obligation and as a bona fide tax payer. Ld. SDR had cited the decision of Maharashtra Tubes in the Stay Order Nos. 15-17/94-A, dt.

25-1-1994. We are very much aware of the said decision. In the said matter, the goods were raw materials imported by the appellants and sold in the market and the sale proceeds were not credited in their account books whereas the facts and circumstances of the present case are different. Penalty at Rs. 30 lakhs has been imposed on the appellants company and Rs. 10 lakhs each on M/s. R.L. Toshniwal and on Sh. M.L. Dalmia and Rs. 50,000/- on Sh. B.L. Sharma. It is a settled law that penalty is to be commensurate with the offence. Honourable Supreme Court in the case of Arvind Mohan Sinha, Appellant v. Amulya Kumar Biswas and Ors., respondent reported in AIR 1974 Supreme Court 1818 at Para No. 10 had held as under : "10. We are unable to accept the appellant's contention that the Probation of Offenders Act can have no application to offences consisting of the contravention of the Customs Act or the "Gold Control Rule" contained in Part XII-A of the Defence of India Rules, 1962. True, that these offences are fundamentally of a different genre and are calculated to involve consequences of a far-reaching character as compared with offences under the general law of Crimes.

These are mostly economic offences which in conceivable cases may pose a grave threat to the economy and the security of the country.

But every contravention of the Customs Act or the " Gold Control" Rule cannot, without more, be assumed to be fraught with consequences of national dimensions. The broad principle that punishment must be proportioned to the offence is or ought to be of universal application save where the statute bars the exercise of judicial discretion either in awarding punishment or in releasing an offender on probation in lieu of sentencing him forthwith. The words of Section 4(1) of the Probation of Offenders Act are wide and would evidently include offences under the Customs Act and the Gold Control Rules." 9. Now, coming to the financial position of the appellants company, we have looked into the annual report for the year 1992-93. There is a net loss of Rs. 54,90,901 /- and the profit before interest and depreciation for the year is at Rs. 2,88,792/- . The interest is to be debited in the profit and loss account after the net payable interests amounting to Rs. 57,79,693/-. Ld. advocate said that the company is having a heavy loss and no depreciation has been debited to the profit and loss account. The loss carry forwarrd is at Rs. 5,74,54,2017- .The Honourable Supreme Court in the case of Spencers Co. Ltd., Madras v.Union of India which was followed by the Tribunal in the case of Sonodyne Television Company v. Collector of Central Excise, Calcutta reported in 1985 (22) E.L.T. 582 (Tribunal) had held as under : 12. The question of balance of convenience will considerably depend on the liquidity position of the petitioner company. Before proceeding further, we think it relevant to cite the following observations of the Supreme Court made in Application No. 332/84 in Appeal No. 693/84 (M/s. Spencers & Co. Ltd. Madras v. Collector of Central Excise) "We are in agreement with the contention of the counsel for the petitioner that the expression 'undue hardship' occurring in the proviso to Section 35F of the Central Excises and Salt Act, 1944 would include consideration inter alia, of the aspect of liquidity possessed by the asses-see. We are not inclined to take the view that the impugned order gives any indication that aspect has been completely ignored as was contended by counsel. With these observations, the special leave petition is dismissed." Keeping in view the liquidity position of the appellants, we are of the view that if the appellants are desired to deposit Rs. 30 lakhs, it will amount to undue hardship. In these circumstances, we accept the offer made by the Ld. advocate for depositing Rs. 2 lakhs (two lakhs) in cash to which the learned SDR does not object. Accordingly, we accept the offer and order to deposit Rs. 2 lakhs (rupees two lakhs) in cash within four months from today by M/s. Banswara Fabrics Ltd. 10. Now coming to the stay application of M/s. R.L. Toshniwal, Shri ML.

Dalmia and Shri B.L. Sharma, keeping in view the totality of the facts and circumstances of the case and the liquidity position of the appellants in view of the decision of the Honourable Supreme Court, in the case of Spencers & Co. Ltd. v. Union of India which has already been reproduced above, we are of the view that if M/s. R.L. Toshniwal and Shri M.L. Dalmia are desired to deposit Rs. 10 lakhs each, it will amount to undue hardship. We accept the offer of the Ld. Advocate for depositing of Rs. 50,000/- each to which the learned DR has got no objection. Accordingly, we order the appellants namely, M/s. R.L.

Toshniwal and Sh. M.L. Dalmia to deposit rupees fifty thousand each in cash within four months from today.

11. Now coming to the financial position of Sh. B.L. Sharma, it is an admitted fact that he is an employee. He has to support his family. We are of the view that if the appellant is desired to deposit the penalty amount, it will amount to undue hardship. We dispense with the pre-deposit of penalty in the case of Shri B.L. Sharma. We further order that during the pendency of the appeal, the Revenue authorities shall not pursue the recovery proceedings for the balance amounts in the case of Banswara Fabrics Ltd. R.L. Toshniwal and M.L. Dalamia. The appellants shall report compliance of this order to the registry within five months from today. In case the appellants fail to comply with the terms of this order, the stay order shall stand automatically vacated.

In the result, the stay applications are partly allowed. The stay application of Sh. B.L. Sharma is allowed.