
(1996) 12 CAL CK 0011
In the Calcutta High Court
Case No : Writ Petition No. 672 of 1995

Collector of Customs

APPELLANT

Vs

Pankaj V. Sheth

RESPONDENT

Date of Decision : 20-12-1996

Acts Referred:

Customs Act, 1962 — Section 11, 111, 113, 114, 12
Foreign Exchange Regulation Act, 1973 — Section 18, 18(1), 67
Foreign Trade (Development and Regulation) Act, 1992 — Section 11, 3, 4, 5
Foreign Trade (Regulation) Rules, 1993 — Rule 11, 2
General Clauses Act, 1897 — Section 20
Imports and Exports (Control) Act, 1947 — Section 3
Income Tax Act, 1961 — Section 80HHC

Citation : (1997) 69 ECR 519 : (1997) 90 ELT 31

Hon'ble Judges : Sujit Kumar Sinha, J; Ruma Pal, J

Bench : Division Bench

Advocate : R.N. Bajoria and Bhaskar Gupta, Pranab Dutta and R.K. Chowdhury, for the Appellant; Sunil Chatterjee, for the Respondent

Final Decision : Dismissed

Judgement

Ruma Pal, J.—The basic issue involved in this appeal is whether the customs authorities have the right to refuse to endorse the exports made by an Exporter in the DEEC Book of export Part II after the export is effected by the Exporter.

2. The writ petitioner had exported plastic Flat Jet Nozzles made from HDPE Granules on 7th January, 1994 to a purchaser at Singapore. The FOB value of the Nozzles was declared as Rs. 48,46,850/-. The goods were examined by the Appraising Department of the Customs. Samples were drawn by them to verify the value of the Nozzles. The goods were suspected of being over invoiced. Pending enquiry the export was allowed provisionally against a bond. Assessment was made provisionally and an endorsement was made on the Shipping bill to this effect by the Customs Authorities. The Customs Authorities however refused to endorse the fact of export in Part II of the DEEC book of the writ petitioner.

Unless the Customs Authorities make such endorsement the writ petitioner cannot apply for transfer of the import licence for import of duty free goods to which the writ petitioner became entitled by reason of such export. It is the petitioner's case that the customs authorities were duty bound to make the endorsement of the export and they had no jurisdiction to question the valuation of the goods.

3. In this background of facts the writ application was moved by the writ petitioner on 24th March, 1995 inter alia for a direction on the customs authorities to record and certify the exports effected by the petitioner in the DEEC book of export Part II and to return the same to the petitioner. Interim relief was also prayed for in the same terms. By an order dated 24th March, 1995 the learned Single Judge directed the Customs Authorities to make the endorsement as prayed for by the writ petitioner and to return the DEEC Book after such endorsement to the petitioner within 12 days. Within the same period the respondents were also directed to extend the validity period of the writ petitioner's licence by a period of six months. The learned Judge was of the view that if the goods were not worthless the valuation of the petitioner must be accepted for the time being especially because the entire foreign exchange had already been received in India. It was also noted that the validity period of the writ petitioner's licence expired on 13th February, 1995; that the export had been completed long before and the foreign buyers had made their remittance long before and that the period of licence had been allowed to expire without serving a show cause notice and also without making of any endorsement. It was recorded in the order that a show cause notice dated 20th February, 1995 had been served on the petitioner. The parties were given the liberty to proceed with the same. It was clarified that the order passed on the writ application would be without prejudice to the rights and contentions of the parties. The writ application is still pending.

4. Being aggrieved by this order the Customs Authorities and the Union of India preferred this appeal on 6th April, 1995. The Appeal Court admitted the appeal and stayed the operation of the interim order dated 24th March, 1995. In the course of hearing of the appeal it appeared that the petitioner had not replied to the show cause notice. This Court accordingly directed the petitioner to submit a reply to the customs authorities without prejudice to his rights and contentions in the appeal. The customs authorities were also directed to dispose of the matter within a specified period with a reasoned order. Pursuant to such direction the respondent writ petitioner submitted his reply to the show cause notice. The Commissioner of Customs granted a personal hearing. On 19th April, 1996 an order was passed by the Commissioner of Customs holding that the FOB value of the export consignment covered by the shipping bill should be Rs. 92,000/- against the declared value of Rs. 48,46,850/-. It was also held that the goods were liable for confiscation u/s 113(d) of the Customs Act, 1962 (hereinafter referred to as the Act) read with Clause 3(3) of the Export (Control) Order, 1988 and Sections 3 and 4 of the Foreign Trade (Development and Regulation) Act,

1992. As the goods had already been exported a penalty of Rs. 20 lakhs was imposed on the writ petitioner respondent u/s 114 of the Act.

5. The matter thereafter appeared before this Court. The writ petitioner respondent was aggrieved with the finding of the Customs Commissioner. Liberty was given to the writ petitioner respondent to file a supplementary affidavit annexing the order of adjudication as well as setting out grounds of challenge to the order of the Commissioner of Customs as he might be advised. A supplementary affidavit was accordingly filed by the writ petitioner respondent challenging the order of the Commissioner.

6. When the hearing was resumed, it was conceded by the Customs Authorities that the order of the Commissioner could not be sustained and that it should be set aside and remanded back for re-adjudication after observing the principles of natural justice and in accordance with law. The learned Counsel for the writ petitioner respondent however submitted that he was willing to challenge the impugned order of the Commissioner by way of a departmental appeal and that the proceedings before this Court should be accordingly disposed of without disturbing the interim order dated 24th March, 1995.

7. Both the Customs Authorities as well as the Union of India however resisted this submission and contended that the Court should itself determine the jurisdiction of the Customs Authorities to determine the value of an export under the DEEC scheme before the matter was reconsidered by the Departmental Authorities and that the order under appeal should be set aside.

8. Although the appeal is from an interim order in a pending writ, in my opinion, by such order the writ petition has virtually been disposed of. To leave the matter for determination by the Departmental Authorities or by the Tribunal would not in the circumstances be proper. Besides, the issue involved is basic to the assumption of jurisdiction by the Customs Authorities and since there is no clear judicial authority on the point, it is appropriate that this Court should itself determine the cause on the merits.

9. The writ petitioner's argument is that the power of the Customs Authorities to assess the value of goods is limited to Section 14 of the Act. Section 14 provides inter alia that for the purposes of Customs Tariff Act, 1975, or any other law for the time being in force whereunder a duty of customs is chargeable on any goods by reference to their value, the value of such goods shall be deemed to be a price at which such or like goods are ordinarily sold, or offered for sale, for delivery at the time and place of importation or exportation, as the case may be, in the course of international trade, where the seller and the buyer have no interest in the business of each other and the price is the sole consideration for the sale or offer for sale. It is submitted by the writ petitioner that as no export duty was chargeable on the Nozzles in question the customs authorities could not determine the value u/s 14 of the Act or at all. According to the writ petitioner the jurisdiction of the customs authorities to determine the value was limited to

cases where duty is leviable and not in the instant case. Reliance has been placed on the following decisions in this context: *Shilpi Exports and Anr. v. Collector of Customs* -1996 (7) CXL 158; 1995 (80) ELT 900 and 1995 (76) ELT 48. Incidentally, the last two decisions are now the subject matter of appeals before the Supreme Court (Civil Appeal No. 6366-6367/95) and an interim order has been granted staying the grant of consequential benefits flowing from the orders under appeal. We are unable to accept the submission of the writ petitioner.

10. To appreciate the scope of the powers of the Customs Authorities it is necessary to consider the origin, nature and scope of the DEEC scheme. The DEEC or the Duty Exemption Entitlement Certificate scheme is a part of the package of incentives formulated by the Central Government for boosting exports. Briefly stated it envisages the grant of import licences to exporters for import of those materials duty free which were required for manufacture of the goods exported. The sale of such import licence or the materials imported duty free in the Indian market are other benefits to attract exporters to increase their exports. Another such beneficial measure for exporters is the total exemption from income tax on the export profits granted u/s 80HHC of the Income Tax Act, 1961.

11. The DEEC scheme in so far as it relates to exemption of import duty has its origin in the Act. u/s 12 of the Act duty of customs are leviable on all goods imported into or exported from India except as otherwise provided in the Act itself or in any other law for the time being in force. The Central Government has the power to exempt certain goods from the levy of customs duty by notification in the Official Gazette u/s 25(1) of the Act. On 19th May, 1992 in exercise of powers conferred by Sub-section (1) of Section 25 of the Act the Central Government published a notification being Notification No. 203/92-Cus., dated 19-5-1992 exempting materials imported into India against a value based advance licence issued in terms of Para 49 of the Export and Import Policy, 1992-97 from the whole of the customs duty leviable thereon and from the whole of the additional duty leviable thereon subject to diverse conditions including

"(i) that the materials imported are covered by a Value Based Duty Exemption Entitlement Certificate (hereinafter referred to as the said certificate), issued by the Licensing Authority in the form specified in the Schedule annexed to this notification;

* * * * * (v) that the export obligation is discharged, within the period specified in the said certificate or within such extended period as may be granted by the Licensing Authority, by exporting goods manufactured in India;

* * * * * (vi) where benefit of the notification is sought by a person other than licensee, such benefit shall be allowed against the said licence and the said certificate only if it bears endorsement of transferability by the Licensing Authority."

On the same date by Notification No. 204/92-Cus., dated 19-5-1992 also issued u/s 25(1) of the Act similar provisions were made for quantity based duty exemption entitlement certificates.

12. The Licensing Authorities in this case are the Respondents Nos. 2 and 3. The form specified in the schedule for Value Based Exemption Certificate (with which we are concerned in this case) consists of two parts. Part I relates to the particulars of import and Part II relates to the particulars of the export. Part II in turn consists of nine parts namely, Parts A to I. We are concerned particularly with Part F which requires the diverse particulars of exports to be entered into the certificate including the FOB value of the product in Rupees and US Dollars. Column 10 of the Part F requires the "signature of Customs Officer with name, designation and seal and remarks if any." At the end of the certificate the exporter has to sign a declaration that the information given in the statement are correct. The actual imports and exports are also required to be certified by a Chartered Accountant. Upon discharge of the prescribed export obligation and realisation of the sale proceeds the exporter is at liberty under Part I to apply for transfer of the licence and the DEEC to the licensing authority.

13. The requirement in Column 10 of Part II-F of the notification for the Customs Authorities to sign the declaration of value would appear to indicate that the Customs Authority would have to ascertain the correct value of the exports. If the Customs Authorities were merely to act as a rubber stamp on the value declared by the exporter there would have been no necessity for the customs authorities to separately make an endorsement in the DEEC. It must also be remembered that it is on the basis of the value that the exporter becomes entitled to import duty free materials.

14. This inference is supported by the provisions of the Duty Exemption Scheme itself. The scheme forms part of the Export and Import Policy for the period 1992-97 formulated in exercise of the powers u/s 3 of the Imports and Exports (Control) Act, 1947. The Imports and Exports (Control) Act has been replaced by the Foreign Trade (Development and Regulation) Act, 1992. The policy is now deemed to have been notified u/s 5 of the 1992 Act. The procedures laid down for implementation of the policy are contained in the Handbook of Procedures issued by the Ministry of Commerce, Government India for the period from 1-4-1992 to 31-3-1997. Chapter VII of the Handbook deals with the Duty Exemption Scheme. Para 119 incorporates the substance of the Notifications 203/92 and 204/92. The nature of the obligation of the customs authorities vis-a-vis Column 10 of Part II-F is clear from this paragraph. It requires "the details of the actual imports and exports made" to "be entered and authenticated by the customs authorities". The word "authentication" has been defined as to "to establish the truth of" (See : Shorter Oxford English Dictionary, 3rd Edn., The World Book Dictionary and Black's Law Dictionary, 6th Edn.). Given this meaning of authentication, the submission of the writ petitioner that the customs authorities have to accept the declaration of the exporter as to the value of the

goods as being correct is unacceptable.

15. The DEEC is in the form of a Book according to Appendix XX to the Handbook. The prescribed format is a substantial reproduction of Notification No. 203/92-Cus., dated 19-5-1992 and 204/92-Cus., dated 19-5-1992 with the same requirement of the signature of the Customs Officer.

16. The only method in which the Customs Authorities can discharge this obligation to authenticate the value is u/s 14(1) of the Act.

17. This follows from Section 20 of the General Clauses Act, 1897 which provides for the construction of notifications etc. issued under enactments and which reads :

"20. Whereas, by any Central Act or Regulation, a power to issue any notification, order, scheme, rule, form, or bye-law is conferred then expressions used in the notification, order, scheme, rule, form or bye-law, if it is made after the commencement of this Act, shall unless there is anything repugnant in the subject or context, have the same respective meanings as in the Act or regulation conferring the power."

[emphasis supplied]

As the DEEC scheme in fact incorporates the exemptions granted u/s 25(1) of the Act, the value must be determined with reference to the definition of the word in the Act itself.

18. The word value has been defined in the Act in Section 2(41) as follows:

"(41) "value", in relation to any goods, means the value thereof determined in accordance with the provisions of Sub-section (1) of Section 14"

Section 14(1) of the Act therefore merely lays down a method for the determination of the value of goods and does not limit the jurisdiction of the customs authorities to determine the value of [goods] only to cases of assessment of duty.

19. In fact Section 14 is utilised for determination of value under several other enactments where duty is not assessable at all. For example, under the Export Control Order, 1988 Clause 2-h also defines value as having the same meaning as in Section 14(1) of the Act. Clause 3(3) of the order also provides that if the value of the goods has been incorrectly declared by the exporter then the export of such goods is prohibited. The export of prohibited goods is impermissible u/s 11 of the Act. It is the customs authorities which will have to determine the question of value u/s 14(1) for the purpose of prohibiting the export of goods in question. This is independent of any question of assessability of the goods exported to duty.

20. Similarly, under the Foreign Trade (Regulation) Rules, 1993 which have been framed under the Foreign Trade (Development and Regulation) Act, 1992, Rule

2(i) provides that "value" would have the same meaning as was assigned to it in Section 2(41) of the Act. Thus the procedure for determination of value u/s 14 of the Act is brought in for the purposes of the 1993 Rules. Rule 11 of the 1993 Rules clearly states that the value of the goods must be stated whether the goods are liable to duty or not and such statement must be certified as being correct. If therefore an incorrect declaration is made this would be a violation of Rule 11 of the 1993 Rules. If an incorrect declaration of the value is made this would violate Section 11 of the 1992 Act which forbids the export or import of goods in violation of the Rules. This in turn would attract the provisions of Sections 111 and 113 of the Act as goods imported or exported contrary to law and give the Customs Authorities the power to investigate the correct value of the goods in question and for that purpose utilise the method prescribed u/s 14(1).

21. Finally, the Foreign Exchange (Regulation) Act, 1973 also provides in Section 18(1) that no goods can be exported unless the exporter furnishes to the prescribed authority a declaration in the prescribed form of inter alia the full export value of the goods supported by evidence. The prescribed authority u/s 18(1) is the customs authorities. u/s 67 of the 1973 Act, the restriction imposed by inter alia Section 18 "shall be determined to have been imposed u/s 11 of the Customs Act and all the provisions of that Act shall have effect accordingly." In other words, the correctness of the declaration may be investigated into by the customs authorities and for such purpose resort may be had to Section 14(1).

22. The argument of the writ petitioner overlooks the provisions of the notifications u/s 25(1) as also the Export Policy as contained in the Handbook of Procedures. Besides if goods are in fact over-invoiced, this means that the exporter is realising proceeds not really relatable to the export made. Yet by virtue of the exporter's declaration the excess amount would enjoy the benefit of the concessions to which they would otherwise not be entitled. This possibility cannot be ruled out at this stage.

23. In this case, according to the customs authorities, the writ petitioner had inflated the value of the Jet Nozzles 84 times so that the profit earned was 8,429 per cent. It is not unreasonable in the circumstances for the customs authorities to hold an enquiry into the proper value after an appropriate enquiry. This determination would be essential particularly in the case of value based license as exemption of duty would be granted on the goods imported corresponding to the export value. To compel the Customs Authority to make the endorsement on the DEEC certificate would be to deny the customs authorities' right and indeed their obligation to question the value of the exports made - an obligation which is not discharged only because the foreign exchange had been received on the invoiced amount. In fact the receipt of foreign exchange might in reality be a mirage. Apart from the public revenue being defrauded of large amounts of money both on account of income tax and on account of import duty by a false declaration, of value of exports by the exporter, no benefit would accrue to the

national exchequer at all as the foreign exchange earned would be used to purchase the duty free imported material.

24. To sum up : the Customs Authorities power to assess the value of goods is not limited to cases where the goods are assessable to duty. The Customs Authorities are to certify the correctness of the value of the goods under the DEEC Scheme and they cannot be compelled to accept the declared value as correct. For the purposes of ascertaining such correct value the Customs are required to follow the mode prescribed in Section 14(1) of the Act.

25. For the reasons stated the order under appeal cannot be sustained and is accordingly set aside. The order of the Commissioner of Customs which was passed during the pendency of the appeal is also set aside as it is not sought to be supported by any of the parties before us. The Commissioner will now re-determine the matter from the point of the issue of the show cause notice [See Guduthur Bros. Vs. The Income Tax Officer, Special Circle, Bangalore, and Dy. Comm. of Sales Tax v. C.T. Varghese -1991 (82) STC 24]. Any material relied upon by the department must be furnished to the petitioner and the Commissioner must decide the issue after giving the petitioner a reasonable opportunity of hearing.

26. There will be no order as to costs.

Sd/- Ruma Pal, J. 27. I agree.

Sd/- Sujit Kumar Sinha, J. 28. The parties are agreed that the only issue in the writ application being decided by this appeal, the writ petition itself may be disposed of in terms of this Judgment and Order.

29. The Writ petition is accordingly dismissed.

30. There will be no order as to costs.

31. Let xerox copies of this Judgment and Order, duly signed by the Assistant Registrar of this Court, be supplied to the parties upon their undertaking to apply for and obtain certified copies thereof upon payment of usual charges.

taking to apply for and obtain certified copies thereof upon payment of usual charges. taking to apply for and obtain certified copies thereof upon payment of usual charges. Sd/- Ruma Pal, J. 33. I agree.