

(2014) 11 MAD CK 0108

In the Madras High Court

Case No : Civil Miscellaneous Appeal No. 455 of 2008

Commissioner of Cus. (Exports)

APPELLANT

Vs

Pattu Exports Pvt. Ltd.

RESPONDENT

Date of Decision : 28-11-2014

Acts Referred:

Customs Act, 1962 — Section 11(o), 111, 111(d), 111(o), 112 — Imports and Exports (Control) Act, 1947 - Section 3

Citation : (2015) 317 ELT 663 : (2015) 33 GSTR 38

Hon'ble Judges : R. Sudhakar, J; Pushpa Sathyanarayana, J.

Bench : Division Bench

Advocate : Vikram Ramakrishnan, for the Appellant; S. Murugappan, for the Respondent

Judgement

R. Sudhakar, J.?This Civil Miscellaneous Appeal filed against the order dated 23-3-2007 made in Final Order No. 308 of 2007 [2007 (213) E.L.T. 545 (Tribunal)] passed by the Customs, Excise and Service Tax Appellate Tribunal was admitted by this Court on the following substantial questions of law:

"1. Whether the importer is liable for penalty under Section 112 of Customs Act, 1962 or not on failure to fulfill the conditions of Duty Exemption Entitlement Certificate Notification 80/95 read with under Section 111(o) of CA"62?

2. Whether the Hon"ble Customs, Excise and Service Tax Appellate Tribunal is right in holding that the importer is not liable to fulfill the conditions of Duty Exemption Entitlement Certificate Notification 80/95 read with under Section 111(o) of CA"62?"

The brief facts are as follows:

The respondent had imported Mulberry raw silk and Dupion silk under Advance Licence dated 25-7-1997 and filed two Bills of Entry for the clearance of the goods, claiming benefit of Customs Notification No. 80/95, dated 31-3-1995 under DEEC Scheme. As per condition No. (ii) of Notification No. 80/95, the

importer had executed a bond undertaking to discharge the export obligation within the period specified in the certificate or within such extended period. However, the respondent failed to discharge the export obligation and as a result, paid duty on the imported raw material with interest at 24% per annum. In view of the breach of condition No. (v) of the Notification stated supra, a case was adjudicated by the Additional Commissioner of Customs by waiving the issuance of show cause notice to the importer.

2. The importer pleaded that the goods were imported under valid licence and if there is any breach of condition of the licence, duty and interest alone are liable to be paid. They pleaded that no penalty or fine would arise. The importer laid emphasis on clause 7.28 of the Export and Import Policy 1997-2002.

3. After considering the submissions made by the importer, the Adjudicating Authority passed the following order.

"I, therefore, demand a sum of Rs. 4,25,963/- (Rupees four lakhs twenty five thousand nine hundred and sixty three only) being the duty and interest for failure of discharge of export obligation. I also impose a penalty of Rs. 1,00,000/- (Rupees one lakh only) on M/s. Pattu Exports under Section 111(o) of the Customs Act, 1962"

"Corrigendum

With respect to Order-in-Original No. 698/99-Gr. 7, line 6 of last para of Page No. 3 in the case of M/s. Pattu Exports will read as:-

Therefore, the goods are to be held liable for confiscation under Section 11(o) of Customs Act, 1962 and the importers are liable to penalty under section 112 of Custom Act, 1962. It is, however, seen that the goods are not available for confiscation and therefore, I refrain from imposing fine. In imposing the penalty, I have taken this factor into consideration.

The order portion will also read as:-

I, therefore, order that a sum of Rs. 4,25,963/- (Rupees four lakhs twenty five thousand nine hundred and sixty three only) being the duty should be paid along with appropriate interest for failure of discharge of export obligation. I also impose penalty of Rs. 1,00,000/- (Rupees ore lakh only) on M/s. Pattu Exports under Section 112 of the Customs Act, 1962."

4. As against the imposition of penalty of Rs. 1.00 lakh under Section 112 of the Customs Act by the Adjudicating Authority, an appeal was filed before the Commissioner (Appeals), who upheld the order of the Adjudicating Authority, which reads as follows:

"I have carefully gone through the records of the case and the submissions made by the appellant.

In the instant case, the import has been made under an Advance Licence in

terms of Notification No. 80/95, dated 31-3-95 . Among the conditions in this Notification is the condition that export obligation is to be discharged within the period specified in the Duty Exemption Entitlement Certificate or such extended period, as granted by the licensing authority. It is clear from the records that this condition of the Notification has not been satisfied. In terms of Section 111(o) of the Customs Act, 1962, "any goods exempted, subject to any condition, from duty or any prohibition in respect of the import thereof under this Act or any other law for the time being in force, in respect of which the condition is not observed unless the non-observance of the condition was sanctioned by the proper officer", shall be liable to confiscation. As such, since the condition of the Notification under which the goods were exempted at the time of import is not fulfilled, the goods have clearly been rendered liable to confiscation. The lower authority, while upholding the order of confiscation has observed that the goods are not available for confiscation. As a consequence of this liability, penalty of Rs. 1,00,000/- has been imposed. In terms of Section 112(a) of the Customs Act, 1962, any person 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 shall be liable to penalty. It is in terms of this provision that penalty has been imposed by the lower authority. I, therefore, find no infirmity in the order of the lower authority imposing the penalty for non-fulfillment of the condition of the exemption Notification No. 80/95, dated 31-3-95 ."

5. Aggrieved by the said order, the importer pursued the matter before the Tribunal and was relieved of the penalty. The Tribunal was of the view that if condition No. (ii) was complied with by the appellant by paying duty and interest, on breach of condition No. (v), i.e., failure to discharge post import condition, the matter rests and no penalty could be imposed. The Tribunal was also of the view that breach of condition No. (v) did not survive if the importer complied with condition No. (ii) of Notification No. 80 of 1995, dated 31-3-1995 . The Tribunal further held that if the importer paid duty and interest, there is no provision for penalty. In effect, they negated the confiscation under Section 111(o) and consequent penalty under Section 112(a) of the Customs Act. Aggrieved by the said order of the Tribunal, the Department is before this Court.

6. Learned Standing Counsel appearing for the Department pointed out to para 7.29 of the Export and Import policy, which clearly provides for action under Customs law without prejudice to any action that may be taken at any stage under the Customs Act, 1962.

7. Learned Counsel appearing for the assessee submits that the assessee had tried to discharge the export obligation in terms of 7.28 of the Export and Import Policy by surrendering Special Import Licence of a value equivalent to three times the CIF value of imports on pro rata basis. In this regard he submitted documents, such as redemption of advance licence letter dated 14-3-2000 and the letter dated 12-4-2000 issued by the Government of India, Ministry of Commerce, Office of Joint Director General of Foreign Trade, Chennai and the

redemption sheet dated 12-4-2000. He further submits that in view of the subsequent development, penalty should not be imposed.

8. Heard learned Standing Counsel appearing for the appellant and the learned Counsel appearing for the first respondent/importer and perused the materials placed before this Court.

9. Before going into the merits of the case, it is relevant to extract Notification No. 80 of 1995, dated 31-3-1995 , which reads as follows:

" Notification No. 80/95-Customs

In exercise of the powers conferred by sub-section (1) of Section 25 of the Customs Act, 1962 (52 of 1962) the Central Government, being satisfied that it is necessary in the public interest so to do, hereby exempt materials imported into India, against an Advance Licence issued on or after 1st April, 1995 (hereinafter referred to as the said licence), from the whole of the duty of Customs leviable thereon which is specified in the First Schedule to the Customs Tariff Act, 1975 (51 of 1975) subject to the following conditions namely:

(i) that the materials imported are covered by a Quantity Based Duty Exemption Entitlement Certificate (hereinafter referred to as the said certificate), issued by the Licensing Authority on or after 1st April, 1995 in the form specified in the Schedule annexed to this notification, in respect of the value, quantity, description, quality and technical characteristics:

Provided that where quantity, allowed for a particular description of materials cannot be imported within the specified value under the said certificate, the Collector of Customs may allow adjustment of individual value within total value;

(ii) that the importer at the time of clearance of the imported materials-

(a) omitted

(b) executes a bond with such surety or security and in such form and for such sum as may be specified by the Assistant Collector of Customs binding himself to pay on demand, an amount equal to the duty leviable on the imported materials but for the exemption contained therein, in respect of which the conditions specified in the notification have not been complied with together with interest at the rate of 24% per annum from the date of clearance of the materials.

.....

(iii).....

(iv).....

(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 or the Director General of Foreign Trade by exporting goods manufactured in India and the said certificate together with evidence of

discharge of export obligation to the satisfaction of the Assistant Commissioner of Customs or Deputy Commissioner of Customs is produced within 30 days of expiry of period allowed for fulfillment of export obligation or within such extended period as the said Assistant Collector of Customs may allow;

(vi) exempt materials shall not be disposed of or utilized in any manner, except for utilization in discharge of export obligation, before the export obligation under the said licence has been discharge in full.

...."

(emphasis supplied)

10. It is to be noted herein that for regularizing the bona fide default, the respondent/importer had to comply with the conditions in terms of para 7.28 of the Export and Import Policy, 1997-2002.

11. Para 7.28 of the Export and Import Policy 1997-2002 reads as follows:

"7.28 Regularization of bona fide default.

The cases of a bona fide default in fulfillment of export obligation may be regularized by the licensing authority in the manner indicated below:

A. Duty Free Licence.

(i) If the export obligation is fulfilled in terms of quantity but not value, the licence holder shall, for the regularization, surrender to the licensing authority Special Import Licences of a value equivalent to three times the CIF value of imports on pro rata basis.

(ii) If the export obligation is fulfilled in terms of value but there is a shortfall in terms of quantity, the licence holder shall, for the regularization, pay:

(a) To the Customs authority, Customs duty on the unutilized value of the imported material alongwith interest at the rate of 24% per annum thereon; and

(b) To the licensing authority, Special Import Licences of a value equivalent to five times of the CIF value of the unutilized imported material expressed in free foreign exchange. However, the provision of this sub-paragraph (b) shall not be applicable if the unutilized imported material was freely importable on the date of import.

(iii) If the export obligation is not fulfilled both in terms of quantity and value, the licence holder shall, for the regularization, pay:

(a) to the Customs authority, Customs duty on the unutilized imported material alongwith interest at the rate of 24% per annum thereon; and

(b) to the licensing authority, Special Import Licences of a value equivalent to five times the amount of CIF value of the unutilized imported material. However, the provision of this sub-paragraph (b) shall not be applicable if the unutilized

imported material was freely importable on the date of its import.

(c) to the licensing authority, a Special Import Licences of a value equivalent to three times the CIF value of import on pro rata basis.

(iv) In cases where the export obligation has been fulfilled in terms of quantity but there is shortfall in terms of value only to the extent of 5%, the licensing authority concerned may consider a request for reduction of the value of export obligation to that extent, for the purpose of regularization, if there is enough justification supported with documentary evidence from the licensee for non-achievement of prescribed export obligation, provided the value addition achieved does not fall below the minimum value addition prescribed.

(v) In case an exporter is unable to complete the export obligation undertaken in full and he has not made any import under the licence, the licence holder will also have an option to get the licence cancelled and apply for drawback after obtaining permission from the Customs authorities for conversion of white/green shipping bills to Drawback Shipping Bills.

B. Quantity based/Value based licenses issued as per Export and Import policy 1992-97, shall be governed, for the purpose of regularization, in accordance by the provisions of that Policy/Procedures."

12. This issue was also raised by the importer at the first instance before the Adjudicating Authority. However, we find that in the order passed by the Adjudicating Authority, a reference is made to para 7.28 of the Export and Import Policy and the Adjudicating Authority held as follows:

"A careful reading of the above provisions would imply that regularization is possible only if the default is bona fide. Whether there was a bona fide default or not, it is for the importer to substantiate the same. In this case, apart from stating that the export obligation could not be forwarded due to administrative inconvenience; no other evidence has been let in to substantiate the claim."

13. The subsequent event, namely, the documents now furnished, apparently was not produced before the Original Authority, is in line with the plea taken by the assessee before the Original Authority on the hearing on 25-10-1999, which is reflected in the order of the Adjudicating Authority. Therefore, there is every justification for the respondent/assessee to plead that there is no case for imposition of penalty. However, we feel that this vital aspect has not been properly considered by the Adjudicating Authority, First Appellate Authority and the Tribunal.

14. For better clarity, the letter dated 12-4-2000, issued by the Foreign Trade Development Officer with regard to redemption, reads as follows:

"Sub: Fulfillment of export obligation against Adv. Licence without AU Condition No. 0004012013, dated 25-7-1997 ? regarding.

Licence No. 0004012013, dated 25-7-1997

With reference to the above subject, I write to say that the documents submitted by you for discharge of export obligation against Adv. Licence without AU Condition No. 0004012013, dated 25-7-1997 for the CIF Rs. 1,274,832.00 have been accepted and LUT/BG is redeemed. Hence, the copy of the legal undertaking is cancelled and retained in this office as part of office records.

The advance licence in duplicate is retained with this office. This Certificate be treated as EXPORT OBLIGATION DISCHARGE CERTIFICATE (E.O.D.C.) for the purpose of Customs Authorities."

15. Consequently, the redemption letter of the Foreign Trade Development Officer dated 12-4-2000 makes the value of the licence "0". The said letter reads as follows:

"This REDEMPTION Sheet is attached exclusively to the Licence No. 0004012013, dated: 25-7-1997 by the Import & Export Trade Control Organization, the Custom Authorities and Licencee are requested not to make any endorsement on this Sheet.

The total CIF value of the Licence is read as Rs. 0.00/US Dollars 0.00

The total FOB value of the Licence is read as Rs. 0.00/US Dollars 0.00

Export Obligation met in full. BG/LUT Condition imposed in the licence as per para 7.15 of Handbook has been redeemed in terms of para 7.26 of Handbook of Procedures 1997-2002."

16. However, the plea of the Department placing reliance on para 7.29 of the Export and Import Policy appears to be a tenable argument as we find that despite the regularization of bona fide default in terms of para 7.28 of the Export and Import Policy, the Customs Department is entitled to take any action without prejudice to any other action that may be taken by the Customs authorities at any stage under the Customs Act, 1962 in terms of para 7.29 of the Export and Import Policy.

17. Para 7.29 of the Export and Import Policy reads as follows:

"7.29 Time period for depositing fines, Customs duty, etc.

The Customs duty with interest to be recovered from the licensee on account of regularization or enforcement of BG/LUT as the case may be, shall be deposited by the licence holder in relevant Head of Account of Customs Revenue i.e. "0.37 - Customs-I Import Duties (i) Revenue duties" in prescribed T.R. Challan within 30 days of the demand raised by the licensing/Customs authority and documentary evidence shall be produced to this effect to the licencing/Customs authority immediately.....

The payment of amount of duty, interest and any dues or surrender of Special Import Licence for regularization shall, however, be without prejudice to any other action that may be taken by the Customs authorities at any stage under

the Customs Act, 1962.

18. We, therefore, find that the policy itself enables the Customs Authorities to exercise its power for confiscation or for imposing fine and penalty. In this case, the goods are not available for confiscation under Section 111(o) of the Customs Act and hence, no fine was imposed, however penalty was imposed. The findings of the Adjudicating Authority is that there is no material to prove that there is a bona fide default, which fact is now being corrected by the respondent by producing statutory documents issued by the Office of the JDGFT. This aspect of the case requires to be re-considered by the Adjudicating Authority for the reasons stated earlier.

19. In view of para 7.29 of the Export and Import Policy, we have no hesitation to hold that the Tribunal is not justified in holding that no penalty can be imposed after payment of duty and interest as required by the Notification. The Tribunal did not look into the position of law as found in para 7.29 of the Export and Import Policy 1997-2002 and therefore, fell into error.

20. In the case of Sheikh Mohd. Omer Vs. Collector of Customs, Calcutta and Others, , it has been held as under:

"14.....It was urged on behalf of the appellant that expression "prohibition" in Section 111(d) must be considered as a total prohibition and that expression does not bring within its fold the restrictions imposed by clause (3) of the Imports Control Order, 1955. According to the learned Counsel for the appellant clause (3) of that Order deals with the restrictions of import of certain goods. Such a restriction cannot be considered as a prohibition under Section 111(d) of the Act. While elaborating his argument the learned Counsel invited our attention to the fact that while Section 111(d) of the Act uses the word "prohibition". Section 3 of the Imports and Exports (Control) Act, 1947, takes in not merely prohibition of imports and exports, it also includes "restrictions or otherwise controlling" all imports and exports. According to him restrictions cannot be considered as prohibition more particularly under the Imports and Exports (Control) Act, 1947, as that statute deals with "restrictions or otherwise controlling" separately from prohibitions. We are not impressed with this argument. What clause (d) of Section 111 says is that any goods which are imported or attempted to be imported contrary to "any prohibition imposed by any law for the time being in force in this country" is liable to be confiscated. "Any prohibition" referred to in that section applies to every type of "prohibition". That prohibition may be complete or partial. Any restriction on import or export is to an extent a prohibition. The expression "any prohibition" in Section 111(d) of the Customs Act, 1962 includes restrictions. Merely because Section 3 of the Imports and Exports (Control) Act, 1947, uses three different expressions "prohibiting", "restricting" or "otherwise controlling", we cannot cut down the amplitude of the word "any prohibition" in Section 111(d) of the Act. "Any prohibition" means every prohibition. In other words all types of prohibitions. Restriction is one type of prohibition. From Item (I) of Schedule I,

Part IV to Import Control Order, 1955, it is clear that import of living animals of all sorts is prohibited. But certain exceptions are provided for. But nonetheless the prohibition continues."

(emphasis supplied)

This proposition applies to Section 111(o) of the Customs Act as well.

21. In the case of Sheshank Sea Foods Pvt. Ltd., Karnataka Vs. Union of India (UOI) and Others, , the Supreme Court held as follows:

"7. For the reasons stated above, the Ministry of Law have advised that it may not be possible to take action under Section 111(o) with respect to the conditions of the licence relating to the use of goods after they are cleared from the Customs charge."

8. Section 111(o) is the sheet-anchor of the respondents case, it reads thus:

"111. Confiscation of improperly imported goods, etc.--The following goods brought from a place outside India shall be liable to confiscation - xxxx xxxx xxxx.

(o) any goods exempted, subject to any condition, from duty or any prohibition in respect of the import thereof under this Act or any other law for the time being in force, in respect of which the condition is not observed unless the non-observance of the condition was sanctioned by the proper officer."

9. Section 111(o) states that when goods are exempted from Customs duty subject to a condition and the condition is not observed, the goods are liable to confiscation. The case of the respondents is that the goods imported by the appellants, which availed to the said exemption subject to the condition that they would not be sold, loaned, transferred or disposed of in any other manner, had been disposed of by the appellants. The Customs authorities, therefore, clearly had the power to take action under the provisions of Section 111(o)

22. Thus, the above-said decisions clearly settles the issue relating to the power of the Customs Authority to take action in terms of para 7.29 of the Export and Import Policy 1997-2002. Hence, the finding of the Tribunal that no penalty is leviable is erroneous. Accordingly, we answer the first substantial question of law in favour of the Revenue and against the assessee.

23. In view of the subsequent event, namely, the documents now produced by the assessee showing that the assessee had discharged the export obligation for the purpose of regularizing the bona fide default, the matter requires to be re-considered by the Adjudicating Authority on the issue of confiscation and penalty. Accordingly, we remand the matter back to the Adjudicating Authority. We answer the second substantial question accordingly.

24. In the light of the above discussion, we pass the following order:

(i) The order of the Tribunal stands set aside;

(ii) We answer the first substantial question of law in favour of the Revenue and against the assessee;

(ii) With regard to the second substantial question of law, in view of the subsequent development, we remand the matter back to the Adjudicating Authority for considering the issue afresh.

In the result, this Civil Miscellaneous Appeal stands ordered as above. No costs.