(2010) 01 BOM CK 0101

In the Bombay High Court

Case No : Customs Reference No''s. 1-2 of 2001

Gupta Dyeing and Printing Mills APPELLANT

Vs

Commissioner of Customs RESPONDENT

Date of Decision : 13-01-2010

Acts Referred:
Customs Act, 1962 — Section 111, 113, 113(4), 114, 130(1)
Finance Act, 2003 — Section 113

Citation : (2010) 254 ELT 265

Hon'ble Judges : V.C. Daga, J;K.K. Tated, J

Bench : Division Bench

Advocate : V.M. Doiphode, for the Appellant; Ashokan, for the Respondent

Judgement

V.C. Daga, J.—The Customs, Excise and Gold (Control) Appellate Tribunal (CEGAT for short) has referred following three questions of law for the opinion of this Court vide its order dated 28th September, 2000 [2000 (122) ELT 765].

(1) Whether shortage in weight will attract the provision of Clause 3(3) of Export Trade Control Order No. 1/88 ETC? when as per this clause if in any case it is found that the value, sort, specification, quality and description of the goods to be exported are not in conformity with the declaration of the exporter in this respect or quality and specification of such goods are not in accordance with the terms of export Contract, the export of such goods shall be deemed to be prohibited?

(2) Whether the appellate Tribunal was correct in law in giving a liberal interpretation to the words value, sort, specification, quality and description use in Clause 3(3) of Export Trade Control Order (1/88 ETC) when the words weight are not incorporated in this Clause 3(3) of the Export Trade (Control) Order?

(3) Whether in the facts and circumstances of the case, confiscation of the subject goods and imposition of penalty on the applicant is correct in law?

Brief Facts

2. The brief facts as set out by the Tribunal while forwarding the statement of case reveal that the applicant had filed five shipping bills on 21st July, 1994, 5th August, 1993 and 6th August, 1993 for export of fabrics/sarees made from 100% polyester filament yarn declaring FOB value of Rs. 80,40,211/-. The export was under DEEC Scheme (Duty Exemption Entitlement Certificate). The Customs officers on examination noticed shortage of weight. The goods were provisionally permitted to be exported.

3. The Special Investigation Intelligence Branch (SUB) customs officers noticed shortage in weight on the examination of the consignment, which was claimed by the applicants as a normal shortage due to the wastage in the process of manufacture and absorption of moisture.

4. The Collector of Customs, Mumbai initiated proceedings on the ground that the exported goods were liable to be confiscated u/s 113(d) of the Customs Act for mis-declaration of the weight as goods became prohibited one under Clause 3(3) of the Export Trade Control Order (ETC) read with paragraph 4 of the Foreign Trade (Development and Regulation) Act 1992. The Commissioner of Customs ordered confiscation of the said goods u/s 113(d) of the Customs Act, 1962 and imposed penalty u/s 114(i) of the Customs Act and redemption fine of Rs. 10 lakhs in lieu of confiscation.

5. Aggrieved by the above order, appeals were preferred before the CEGAT contending that Clause 3(3) of the above ETC order does not bring within its sweep shortage in weight as such the export of goods will not be prohibited one even if the shortage in weight is noticed while exporting goods. Such goods would not be liable to be confiscated and no penalty shall be leviable.

6. The CEGAT after hearing the parties to the appeal did not find favour with the submission made. The CEGAT held that the objective of the above provision is to prevent or prohibit export of goods which did not tally in material particulars with the declaration made and went on to hold that the words value, sort, specification, quality, description must not be confined to narrow interpretation. That these words must be interpreted to give wide meaning to include shortage in weight so as to give effect to the said clause. It was thus held that there was a mis-declaration of the goods by the applicants referring to the facts that the export was under Duty Exemption Entitlement Certificate (DEEC) scheme and part E of DEEC book issued to the applicant contained details of the resultant products which were to be exported in terms of weight. However, Tribunal reduced the penalty.

7. Being aggrieved by the above order applicant prayed for making reference u/s 130(1) of the Customs Act to this Court to seek opinion on the substantial questions of law extracted in the opening part of the order. The CEGAT found favour with the prayer made and referred the subject questions for the opinion of this Court.

Submissions

8. Mr. V.M. Doiphode, learned Counsel appearing for the applicant and Mr. Ashokan were heard.

9. Mr. Doiphode, pressed into service Appendix 1 to Exports (Control) Order, 1988 issued by the Ministry of Commerce, Government of India, New Delhi styled as Exports(Control) Order,1988 and Paragraph 3 thereof in particular which reads as under:

3. Restrictions on export of certain goods:

(1) Save as otherwise provided in this Order no person shall export any goods of the description specified in Schedule I, except under and in accordance with a licence granted by the Central Government or by an officer specified in Schedule II.

(2) Notwithstanding anything contained in Sub-clause (1) goods specified in Schedule III may be exported on fulfilment of the terms and conditions specified therein.

(3) If in any case, it is found, that the value, sort, specification, quality and description of the goods to be exported are not in conformity with the declaration of the exporter in those respects or the quality and specification of such goods are not in accordance with the terms of the export contract, the export of such goods shall be deemed to be prohibited.

10. Mr. Doiphode submits that reading the aforesaid clauses, that are concerned difference in weight by itself cannot be a ground to hold that the goods are deemed to be prohibited since the word weight is not to be found in Clause 3.

11. Mr. Doiphode pressed into service the provision of Section 113 of the Customs Act, 1962 holding field at the relevant time and applicable to the facts of the present case which was reading as under:

113 : Confiscation of goods attempted to be improperly exported, etc.: The following export goods shall be liable to confiscation:

(a)....

(b)....

(c)....

(d) any goods attempted to be exported or brought within the limits of any customs area for the purpose of being exported, contrary to any prohibition imposed by or under this Act or any other law for the time being in force.

11. Mr. Doiphode submits that if the text of Section 113(a) is read and taken into account, it does not contain any words like material particulars so as to embrace the weight of the goods within its fold. Mr. Doiphode in order to support his above contention, relied upon amended Section 113(i) brought up on the statute book with effect from 14th May, 2003 reading as under:

113 (i) Any dutiable or prohibited goods (or goods entered for exportation which do not correspond in any material particular with the entry made under this Act or in the case of baggage with the declaration made u/s 77 in respect thereof;

(ii) any goods entered for exportation under claim for drawback which do not correspond in any material particular with any information furnished by the exporter or manufacturer under this Act in relation to the fixation of rate of drawback u/s 75;

He submits that the text from the pre amended and amended provision if considered then even if there is difference in weight, the goods cannot become prohibited goods because this aspect is sought to be covered under amended provision which was absent in unamended section. In support of this submission Mr. Doiphode relied upon the judgment of the Supreme Court in the case of Rib Tapes (India) Pvt. Ltd. and Another Vs. Union of India (UOI) and Others, , wherein the Supreme Court had an occasion to consider the difference between original Section 111(m) of the Customs Act and the amended text thereof. He thus prayed that the order of the Tribunal is based on erroneous assumption warranting question of law to be answered in favour of the appellant/assessee.

12. Mr. Ashokan, learned Counsel appearing for the Revenue while supporting the impugned order reiterated the reasons given in the impugned order and tried to support the same contending that shortage in weight means goods do not correspond to the material particulars disclosed.

Consideration:

13. The substantive question which needs consideration is:

Whether the goods will be deemed to be prohibited under the provisions of Sub-clause (3) of Clause 3 of the Export Trade (Control) Order if the export of goods are found short in weight?

14. Sub-clause (3) of Clause 3 of Export Trade (Control) Order refers to value, sort, specification, quality and description of the goods and not to weight of the goods.

15. The words do not correspond in material particulars sought to be relied upon by the Tribunal are neither present in Clause 3(3) of Export Trade (Control) Order nor Section 113(d) of Customs Act, 1962 but Section 113(i) of Customs Act, 1962 refers to dutiable or prohibited goods or goods entered for exportation under a claim for prohibited goods or goods entered for exportation under a claim for drawback which do not correspond to any material particulars with the entry made under this Act or in this case of baggage with the declaration made u/s 77 in respect thereof and Section 113(ii) refers to any goods entered for exportation under claim for drawback which do not correspond in any material particular with any information furnished by the exporter under this Act in relation to the fixation of rate of drawback u/s 75. Thus, when the words do not correspond in any material particular are not present in Clause 3(3) of Export

Trade (Control) Order it cannot be said that when there is a difference in weight Clause 3(3) of Export Trade (Control) Order would be attracted, when the words weight or do not correspond in any material particulars are conspicuously absent in Clause 3(3) of Export Trade (Control) Order or Section 113(4)(d) of Customs Act, 1962 at the relevant time when exports were made in July/August, 1993.

16. The Tribunal has interpreted that the objective of the introduction of this clause is to prevent export by prohibiting such export of goods which does not correspond in material particular with the declaration made therein. The Tribunal has borrowed words from Sub-section (i) and (ii) of Section 113 whereas Section 113(d) is invoked for confiscation and such words material particulars are absent in Section 113(d) of Customs Act, 1962.

17. As pointed out by Mr. Doiphode Section 113(i) was amended by Finance Act, 2003 with effect from 14th May, 2003 deleting the words dutiable or prohibited, thus from 14th May, 2003 Section 113(i) reads as under:

any goods entered for exportation which do not correspond in respect of value or in any material particular with the entry made under this Act or in the case of baggage with the declaration made u/s 77

18. Thus, after 14th May, 2003 any goods entered for export which do not correspond in respect of value or in any material particulars with the entry made under the Customs Act, 1962 will be liable to confiscation even if the goods may not be dutiable/prohibited. However, the exports are made in July, 1993 and the provisions of Section 113(i) cannot be applied retrospectively even though in the present case Section 113(i) is invoked. However, the Tribunal has erroneously read the words which do not correspond in any material particulars in Clause 3(3) of Export Trade (Control) Order under which is not permissible when such words are not incorporated while enacting Clause 3(3) of Export Trade (Control) Order.

19. The Apex Court had an occasion to consider more or less similar question in the matter of Rib Tapes (India) Pvt. Ltd. and Another Vs. Union of India (UOI) and Others, . Prior to 1973 Section 111(m) of Customs Act, 1962 read as under:

any dutiable or prohibited goods which do not correspond in material particular with the entry made under this Act....

after amendment by Act 36 of 1973 the provision reads as under:

in respect of value or in any other particular with the entry made under this Act....

Act 36 of 1973 was amended to include value and other material particulars. The Supreme Court held that difference in value could not be said to be a difference in material particulars within the meaning of Section 111(m), prior to amendment in 1973, that a penal provision has to be strictly construed, that the scheme of Section 111(m) as it stood then nowhere referred as difference in value as one of the ingredients which may attract the provisions of this section. In such a situation if it was not the specific intention of provisions, the difference in value could not be said to attract this provision and on that basis no penalty can be imposed.

20. In the present case even the words material particulars are not incorporated in Clause 3(3) of Export Trade (Control) Order under which the subject goods are held liable to confiscation and, therefore, shortage of weight found will not attract provisions of Sub-clause (3) of Clause 3 of Export Trade (Control) Order and consequently such export goods found less in weight are not liable to confiscation u/s 111(d) of Customs Act, 1962 since the goods are not liable to confiscation penalty is not imposable.

