
(2016) 06 BOM CK 0124
In the Bombay High Court
Case No : Customs Appeal No. 25 of 2015

IG Petrochemicals Ltd.

APPELLANT

Vs

Commissioner of C. Ex. & Cus., Belapur

RESPONDENT

Date of Decision : 06-06-2016

Acts Referred:

Citation : (2016) 338 ELT 17

Hon'ble Judges : S.C. Dharmadhikari and Dr. Shalini Phansalkar-Joshi, JJ.

Bench : Division Bench

Advocate : S/Shri Karan Adik with Hussein Bengali i/b M/s. Jayakar & Partners, Advocates, for the Appellant; S/Shri A.S. Rao with Jitendra B. Mishra, Advocates, for the Respondent

Final Decision : Dismissed

Judgement

1. This appeal by the assessee challenges the order passed by the Customs, Excise and Service Tax Appellate Tribunal dated 7th August, 2014. By the order under challenge, the Tribunal dismissed the appeal of the appellants and confirmed a demand of duty as also penalty.
2. In challenging such an order the counsel for the appellants would submit that the questions of law proposed at page 8 are substantial questions of law. It is submitted that the Tribunal could not have taken any cognizance of non-payment of customs duty as that cannot be made subject matter of proceedings under Section 11AC of the Central Excise Act, 1944. Secondly, and without admitting the above, the Tribunal should not have confirmed a penalty when there is an invitation by the appellant itself in writing so as to enable the Departmental officials to come and inspect the records and verify and scrutinize the same.
3. Thirdly and importantly what the Tribunal has failed to notice is that there was a clear argument of any lack of mens rea or deliberate or intentional act on the part of the appellants to evade customs duty. The appellants had cleared other capital goods imported by it under the EPCG Scheme on payment of concessional

duty and had intended to include the present capital goods also. However, bearing in mind the huge number of capital goods only a small portion was left out, that could not be taken to be a deliberate or intentional act so as to subject the appellants to penalty.

4. Reliance is placed in support of the above contentions on the judgments of the Hon"ble Supreme Court of India and this Court.

5. It is undisputed that the appellants were a 100% export oriented unit. They carried on business of manufacture of excisable goods and equally exported them. They applied for setting up another plant for manufacture and export of the product and they were granted permission. They commenced commercial production in the year 2000-2001 in which year they were granted a status as "Star Export House" by the Central Government. Thereafter, the appellants invoked clause 6.18 of the Foreign Trade Policy 2004-2009 and sought to de-bond from its 100% EOU status. The appellants addressed a letter to the Development Commissioner dated 4th June, 2008, followed by another letter signifying its intend to de-bond. The appellants while seeking such permission sought to debit their imported/indigenous goods as procured duty free into the EPCG/Advance Authorisation Scheme in terms of the Foreign Trade Policy. They state that they had made this fact known to the Development Commissioner.

6. The appellants do not dispute that pursuant to their applications for de-bonding, they were liable to pay customs/excise duty foregone on the capital goods procured by them duty free as a export oriented unit after taking into consideration the depreciated value vis-a-vis the fulfilled conditions for achieving that status.

7. Reliance is placed on certain letters addressed to the Assistant Commissioner of Customs and Excise.

8. After all these procedures were complied with, what the appellants are aggrieved by is the fact that they were called upon in terms of certain audit objections and report to show cause as to why the issue raised and the demands in the show cause notice should not be taken to their logical conclusion.

9. The order-in-original was passed in which what the adjudicating authority has done in terms of the appellants submissions is appropriation of the duty paid on imported capital goods against the total demand. That total demand of tax and interest was thus adjusted. Thereafter it was alleged that there was no occasion to impose any penalty as provisions of Section 11AC of the Central Excise Act, 1944, were not attracted.

10. However, the order-in-original, contrary to this, proceeds to levy and impose penalty and which the Tribunal has confirmed.

11. Having perused the Tribunal's order, we find that the essential controversy has been noted and correctly. The appellants did not challenge the demands that were confirmed under the Customs Act and the Central Excise Act. Upon a

composite show cause notice and the letters being addressed to the Assistant Commissioner of Central Excise and Customs, now it is too late in the day to urge that insofar as non-payment of customs duty is concerned, the authorities under the Central Excise Act could not have initiated any proceedings. The issue that remained before the Tribunal was of confirmation of that part of the order of the adjudicating authority where penalties were imposed. The same argument as has been canvassed, namely, there is no deliberate omission or suppression, came to be canvassed. The absence of mens rea also was an issue raised. In dealing with all this, the Tribunal found that the appellants did not give a complete list of capital goods which were procured without payment of duty and the items, including generating set. Now, it is impossible to assume that an item such as a generating set or a generator could be left out and without any intent or purpose. The omission, therefore, was found to be deliberate. It is only during the audit that the conduct of the appellant came to notice and that is why the mis-declaration was termed as an act which attracted penalty.

12. The Tribunal has assigned cogent and satisfactory reasons. The reasons are that appellants imported capital goods and they were imported without payment of customs duty. These goods went in manufacture and export of excisable goods. There were also certain materials procured indigenously without payment of duty at the time of de-bonding. These forgone duties were capable of being recovered and were recovered. However, the investigation reveals that the complete list of capital goods is not procured or not handed over at the time of de-bonding. It is only when the further steps were taken that the Department/Revenue noticed these serious lapses. Once the nature of the capital goods enabled the adjudicating authority and the Tribunal to arrive at a finding of fact that this was a deliberate or intentional act that we do not think that the appeal raises any substantial questions of law.

13. We do not find any substance in the contentions of lack of mens rea or deliberate or intentional act on the part of the assessee. The finding of fact is otherwise and which is in consonance with the materials produced. The reasons assigned in Paragraphs 6 and 7 of the impugned order do not suffer from any perversity or error of law apparent on the face of the record requiring our interference in further appellate jurisdiction.

14. The reliance on the judgment of the Hon'ble Supreme Court in the case of *Uniworth Textiles Ltd. v. Commissioner of Central Excise, Raipur* reported in 2013 (288) E.L.T. 161 (S.C.), is entirely misplaced. There the controversy was as to whether Section 28 of the Customs Act, 1962, is attracted only because of any non-payment of duties or there is something more which would enable the Revenue to invoke the extended period of limitation. The Legislature having employed certain words and with specific intent that the Hon'ble Supreme Court concluded that mere non-payment of duties is not equivalent to collusion or wilful mis-statement or suppression of facts. These were distinct contingencies and which would have to be established and proved by the Revenue if it wants to

invoke the extended period. They cannot be held to be equivalent to mere non-payment of duties. The Legislature having employed clear words they would have to be given their meaning.

15. We do not see how any judgment interpreting Section 28 in this manner will alone have any application to the facts and circumstances of the present case. This is not a case of any doubt being entertained by the Department or the assessee and that is why the act complained of is not deliberate or intentional. In the circumstances of the present case, the intentional and deliberate act is established and proved.

16. In the case of Commissioner of Central Excise, Thane-II v. Bright Brothers Ltd. reported in 2015 (322) E.L.T. 110 (Bom.), the issue was entirely different. The expression "shall also be liable to pay penalty equal to the duty so determined" in Section 11AC of the Central Excise Act, 1944, is in the nature of mandatory penalty and for that the prerequisite would have to be established or not was the argument considered. That was also in the peculiar facts inasmuch as the assessee before this Court was proceeded against on the basis of intelligence that it was not correctly discharging the duty liability. The assessee was carrying out manufacturing activities and under an arrangement with M/s. Tata Electric and Locomotive Company Limited. The activities are referred to in Paragraph 8 of the Division Bench judgment. The allegations in the show cause notice are also clearly indicated. In that the moulds developed by M/s. TELCO are the sole property of the assessee. That was reflected as assets in their books of account. Hence there is no question of taking the amortised cost with the assessable value of the moulded parts of plastic moulds by the assessee to M/s. TELCO. The reply thereto was also considered where the assessee indicated that the demand for lump sum recovery as mould development charges from various customers was confirmed by the Commissioner of Central Excise and this order was set aside by the Customs, Excise and Gold Control Appellate Tribunal. The entire tooling and development charges appeared to have been taken as an additional value for the purpose of demand by the Commissioner without reference to the Board's Circular on the subject. The costs of moulds were to be loaded on the assessable value. It is in these circumstances and when there were two views which were brought to the notice of this Court, that it was observed that mere amortising the cost of mould does not tantamount to misrepresentation and mis-statement of facts. The wilful and deliberate act must be established and that would precede the mandatory imposition of penalty. Such a finding being absent that this Court upheld the order of the Tribunal. We do not see how reliance can be placed on this judgment in the facts and circumstances which are peculiar to this case and quoted above. Hence the Revenue's appeal being dismissed in the case referred above, namely, Bright Bros. Ltd., is of no assistance to the assessee in the present case.

17. Lastly, the order passed by this Court in the case of Commissioner of Central Excise, Mumbai v. CEAT Ltd. reported in 2014 (311) E.L.T. 50 (Bom.), is of no

assistance. There, the Revenue sought to urge that there was a clear suppression which was alleged in the show cause notice and a detailed finding was recorded by the adjudicating authority. The Tribunal should not have interfered with such a finding.

18. In upholding the order of the Tribunal, the Division Bench found that the assessee had admitted the fact of claiming depreciation on capital goods but it was a bona fide error. There was no intention to evade duty. On realising the mistake, the assessee took steps to withdraw the claim of depreciation and since that did not materialize, he offered to pay duty with interest. It is in these circumstances that the Tribunal concluded that Section 11AC is not attracted. Once again a bona fide act on the part of the assessee being clearly referred that the Tribunal's order was upheld.

19. In the present case, when the Tribunal upheld the penalty it clearly referred to Section 11AC and the ingredients thereof that having been satisfied in this case and particularly clause (c) of sub-section (1) it is apparent that the Tribunal's finding cannot be termed as perverse or vitiated by any error of law apparent on the face of the record.

20. Consequently, the appeal fails and is dismissed.