(2008) 08 GUJ CK 0047

In the Gujarat High Court

Case No : Tax Appeal No. 434 of 2007 with Civil Application No. 97 of 2007

Kiran Fashions APPELLANT

Vs

Union of India (UOI) RESPONDENT

Date of Decision : 25-08-2008

Acts Referred:
Customs Act, 1962 — Section 108, 113, 114, 129, 13

Citation : (2009) 13 STR 502

Hon'ble Judges : Harsha Devani, J;D.A. Mehta, J

Bench : Division Bench

Advocate : H.D. Dave, for the Appellant; None, for the Respondent

Final Decision : Dismissed

Judgement

D.A. Mehta, J.—This appeal has been preferred challenging order dated 26-6-2006 made by Customs, Excise and Service Tax Appellate

Tribunal, Circuit Bench, at Ahmedabad (the Tribunal) dismissing the appeal filed by the appellant herein. The appellant has proposed the following

questions stated to be substantial questions of law.

(1) Whether the adjudicating authorities could have ignored evidence of comparative invoicing as available u/s 129 of the Customs Act, 1962

where they allowed similar exports at same or higher price?

(2) Whether the customs and adjudicating authorities could have alleged over invoicing in absence of any evidence on record?

(3) Whether the Customs and adjudicating authorities could have differed from the Government fixed cut off price as fixed by the AEPC?

(4) Whether retracted statements could be relied upon as the only piece of evidence at all?

(5) If so whether mere for not showing service upon customs could the affirmation and notarization, be, ignored of the same?

(6) Whether any penalty was justified in absence of any evidence under the provisions of Customs Act?

(7) Whether in absence of any actual export could the entire case have proceeded on mere assumption and presumption of alleged higher

drawback claim?

(8) Whether the customs authorities who never allowed actual export and rather damaged the consignment of the appellant exporter could be

allowed to impose further fine upon such heavy losses?

(9) Whether the customs authorities had one single ground to impose any liability on the appellant under Sections 13 and 114 of the Act as it

stands?

2. The case of the appellant is that vide bill dated 20-3-2001 towards export of 2640 pieces of mens'' cotton trousers at U.S. $ 8.8 (C.I.F. per

piece), the appellant is entitled to duty drawback. When called upon, the appellant had submitted cost structure at Rs. 372/- per trouser being the

purchase price in hands of the appellant. It is an admitted position that the trousers had been purchased from one M/s. Krishna Impex under

invoice No. 187 dated 20-3-2001. The said M/s. Krishna Impex had manufactured the trousers after purchasing the cotton fabric from one M/s.

Ankita Textile at Rs. 125/- per mtr under invoice No. 53 dated 14-2-2001. Upon inquiry, the adjudicating authority found that the cost of fabric

shown by M/s. Ankita Textile and the cost of manufacturing shown by M/s. Krishna Impex were on a higher side than the actual cost. For this

purpose, statements of various persons recorded u/s 108 of the Customs Act, 1962 (the Act) were relied upon. On 25-5-2001, the

Commissioner ordered confiscation of goods valued at Rs. 10,55,875/- (F.O.B.) u/ s 113(d) and Section 113(i) of the Act. A redemption fine of

Rs. 2 lacs was imposed along with penally of Rs. 50,000/- on the appellant and penalties of varying amounts on other persons.

3. Being aggrieved, the appellant carried the matter in appeal before the Tribunal. The Tribunal has, after hearing the learned advocate for the

appellant, noticed that one Shri Alakh Niranjan R. Saboo was the power of attorney holder of the appellant. That the appellant was a proprietary concern owned by Smt. Krishna A. Saboo, wife of the power of attorney holder. That the lady was also a partner in M/s. Krishna Impex. M/s.

Ankita Textile was owned by one Shri Ravikant R. Saboo, brother of the power of attorney holder. Hence, all the three concerns were found to

be interconnected. The Tribunal has furthermore found that the statement of Shri Alakh Niranjan R. Saboo, the power of attorney holder,

statement of Shri Ravikant and statement of Shri Alexender, the Manager of M/s. Krishna Impex clearly pointed towards inflation of the price

shown in the invoices for claiming higher duty drawback. The retractions stated to have been made by the deponents on 31st March, 2001 by

affidavits has not been accepted either by the adjudicating authority or the Tribunal. In paragraph No. 6 of the impugned order, the Tribunal has

given valid and cogent reasons for not accepting the subsequent retractions which were placed on record by a belated communication as against

evidentiary value of the contemporaneous statements. In paragraph Nos. 7 and 8, the Tribunal, after analyzing the facts and evidence on record,

assigned reasons as to why the Tribunal accepts the order made by the adjudicating authority. The contention regarding Export Promotion Council

having fixed the cut off price for exports has been dealt with by the Tribunal in paragraph No. 9 of its order and the learned advocate for the

appellant could not dispute the correctness of the findings recorded therein.

4. At the time of hearing, the learned advocate for the appellant contended that the Tribunal has ignored various pieces of documentary evidence

produced by the appellant before the Commissioner and the Tribunal ought to have called for the said evidence by directing the representative of

the department appearing before the Tribunal to produce the original file of adjudication before the Commissioner.

5. The aforesaid contention deserves to be stated only to be rejected. It is not the case of the appellant that the appellant had called upon the

Tribunal to make such a requisition, because the appellant was not in possession of the evidence. In the appeal filed by the appellant before the

Tribunal, the primary onus is always on the appellant and the Tribunal is not expected and cannot on its own undertake to discharge that onus by

calling upon the other side to produce the evidence in support of the appeal. The reason is not far to seek. It is the appellant who has the knowledge as to what were the documents produced by the appellant before the Commissioner and unless and until, the appellant points that out

to the Tribunal, the Tribunal cannot undertake such an inquiry. Even, otherwise it is not the duty of the Tribunal to establish the case of an

appellant, or for that matter, of any party. In absence of any specific pleadings pleaded and urged the Tribunal cannot be faulted with.

6. In the aforesaid set of facts and circumstances of the case, it is apparent that the order of the Tribunal impugned in the appeal is based on

appreciation of facts and evidence produced on record before the Tribunal and no case is made out to disturb the concurrent findings of fact

recorded by the Commissioner and the Tribunal. The appeal is accordingly dismissed in absence of any question of law, as proposed or otherwise,

much less a substantial question of law arising from the impugned order of the Tribunal.

7. In light of the order made in the appeal today, this civil application is rejected as having become infructuous.