(2016) 01 DEL CK 0392

In the Delhi High Court

Case No : Writ Petition (C) No. 861 of 1998 with WP(C) Nos. 1526 and 2634 of 1998

Maldhari Sales Corporation APPELLANT

Vs

Union of India RESPONDENT

Date of Decision : 27-01-2016

Acts Referred:

Citation : (2016) 334 ELT 418

Hon'ble Judges : S. Muralidhar and Vibhu Bakhru, JJ.

Bench : Division Bench

Advocate : Rajesh Rawal, Advocate, for the Petitioner; Kamal Nijhawan, Advocate, for the Respondent

Final Decision : Dismissed

Judgement

1. Writ Petition (C) No. 861 of 1998 is by Maldhari Sales Corporation (Petitioner No. 1) through its Sole Proprietor Mr. Kumud J. Dharaya (Petitioner No. 3), Maldhari Steel Pvt. Ltd. (petitioner No. 2) and Mek International (petitioner No. 4). W.P. (C) No. 1526 of 1998 has been filed by Mr. Subhash Gupta and W.P. (C) No. 2634 of 1998 by Mr. Janki Ram. The challenge in all three writ petitions is to a common order dated 29th October, 1997 passed by the Customs, Excise and Gold (Control) Appellate Tribunal (?CEGAT?) [now known as the Customs, Excise & Service Tax Appellate Tribunal] [2001 (137) E.L.T. 1120 (Tribunal)] whereby the penalties levied on the appellants by the orders-in-original of the Collector of Customs were upheld.

2. The facts leading to the filing of the present petitions is that the Directorate of Revenue Intelligence (?DRI?) received information that Asian Wire Ropes Limited (?AWRL?), Hyderabad was importing low/high carbon steel wire rods and electrolytes zinc free of duty under the Duty Exemption Entitlement Certificate (DEEC) Scheme by misdeclaring and undervaluing the goods and then disposing of the said imported goods in the local market for profit instead of using them in the manufacture of steel wire ropes for export.

3. Based on the said information, the residential, office and factory premises of AWRL and persons connected with it were searched in Bombay and Thane on 15th February, 1989. Searches also took place at the locations of various persons and entities at Hyderabad and Faridabad. As a result of the searches, incriminating documents were seized. It transpired that the goods imported free of duty under the DEEC Scheme by AWRL were unauthorisedly disposed of through M/s. Maldhari Steels by Mr. Kumud J. Dharaya. Documents also showed the payment of the differential value and commission to Mr. Vipin Gupta the brother of Mr. Subhash Gupta, one of the Directors of AWRL. The searches also resulted in recovery of certain quantities of steel wire ropes from the various locations that were searched. When the goods that were seized were examined, it conformed to EN-1A British specifications relating to leaded free cutting steel wire ropes. These were declared as steel wire ropes of Belgium origin with carbon content over 0.60% and had been assessed on that basis and allowed for clearance free of Customs duty. Since the description of the goods was found not matching with the description shown in the L/C and Licence, they were seized on 22nd June, 1989.

4. Broadly there were two sets of imports which form the subject matter of two show cause notices (SCNs) issued in the present case. One SCN concerned goods that were misdeclared/undervalued and cleared by the Customs but were available for confiscation. The other SCN concerned goods that were misdeclared/ undervalued and cleared but had already been diverted and sold in the market and, therefore, not available for confiscation.

5. The first SCN dated 8th August, 1989 issued by the DRI to nineteen entities and persons including the petitioners in these three petitions, concerned import of three consignments of steel wire ropes weighing 732.390 MT, 146.570 MT and 343.340 MT of declared CIF value of Rs. 52,99,324/-, Rs. 10,21,717/- and Rs. 24,28,707/- respectively. The first SCN specifically referred to bills of entry (?B/ E?) Nos. 3239/81 and 3239/84 both dated 27th December 1988 and IGM/Item No. 661/108. These three consignments were imported from West Germany by AWRL, Hyderabad under the DEEC Scheme.

6. Apart from the seized documents, files and materials, the details of which have been set out in the first SCN, the names of the persons whose statements were recorded during the course of investigation under Section 108 of the Customs Act, 1962 (?Act?) were also set out. In para 6 of the first SCN, names of 29 persons whose statements were recorded along with the dates of making such statements were also set out. Of these the significant statements were that of Mr. Janki Ram, Managing Director (?MD?) of AWRL and Mr. Subhash Gupta, Director of AWRL. The statements of Mr. Kumud Dharia, Agent of AWRL, Mr. T.N. Prahlad, Accounts Manager of AWRL and Mr. K. Satyanarayana, Import and Export Manager of AWRL were also recorded. In para 90 of the first SCN it was stated that the ascertained CIF value of the consignments imported under the B/ E worked out to Rs. 77,55,278/- as against the declared value of Rs. 63,21,041/-

and under the IGM/Item No. 661/108 worked out to Rs. 30,04,642/- as against the declared value of Rs. 24,28,707/-. This obviously meant that the goods were misdeclared and hence liable for confiscation under Section 111(m) of the Act. The first SCN also noted that the differential value had been paid to M/s. Salzgitter, Germany through Mr. Vipin Gupta in respect of 2395.66 MT EN-1A steel wire rods made during the years 1987-88 by AWRL. It was stated that AWL deliberately attempted to make a mockery of the DEEC Scheme by indulging not only in blatant misdeclaration of the correct and real value of the goods but also by "wholesale falsification of the records and accounts to show that the goods after clearance free of duty through the Customs were taken to their factory at Hyderabad." Further Mr. Kumud Dharia had been appointed an Agent of AWRL and he was permitted to sell the duty free material at a premium in the market. The sale proceeds were paid in cash to Mr. Jankiram and Mr. Subhash Gupta by Mr. Dharia and were also adjusted against his payments for the material supplied by him to AWRL.

7. The first SCN was adjudicated by the Collector of Customs and the Order-in-Original dated 28th June, 1991 was passed. The key findings in this order-in-original were that the Department has proved the various charges as set out in the first SCN. It was held that the imported goods, i.e., EN-1A leaded free cutting steel, were neither used as input by the importer in the manufacture of steel wire ropes, i.e., the exported product, nor could such free cutting steel be used at all for the manufacture of steel wire ropes. It was stated that no evidence had been produced by the noticees to prove that they had in fact used the imported steel wire rods for the manufacture of steel wire ropes. Further the evidence brought on record by the Department proved that the imported steel rods had been sold in the open market for profit. The import of EN-1A leaded free cutting steel wire rods against the advance licences under the DEEC Scheme was clearly unauthorized and the goods in question were liable for confiscation under Section 111(d) of the Act read with Section 3(2) of the Imports and Exports (Control) Act, 1947. Further the documents showed that they had deliberately undervalued of the goods making them liable for confiscation under Section 111(m) of the Act. The goods cleared against the two B/E made them liable for confiscation under Section 111(o) of the Act. However, "some of the goods sold like this are not available for confiscation, only the quantity which has been seized is available for confiscation." As far as penalty was concerned, detailed findings were recorded as regards the following noticees and penalties were imposed as indicated below :

(i)

AWRL

Rs. 25 lakhs

(ii)

Mr. Jankiram

Rs. 25 lakhs

(iii)

Mr. Subhash Gupta

Rs. 20 lakhs

(iv)

Mr. Kumud Dharia

Rs. 10 lakhs

8. The confiscation of the seized goods already cleared was ordered. AWRL was given an option to pay redemption fine of Rs. 15 lakhs in lieu of confiscation of the goods covered by IGM/Item No. 661/108 whose weight was 353.340 MTs. An option was given to the buyers from whose premises the goods were seized to pay fine in lieu of confiscation. The duty leviable on the goods which were not available for confiscation worked out to Rs. 41,27,560/- and it was directed that the said amount be paid by AWRL. Except for AWRL, Mr. Janakiram, Mr. Subhash Gupta and Mr. Kumud Dharia, the penal proceedings initiated in the first SCN against the other noticees were dropped.

9. The second SCN was issued on 11th March, 1992. The subject matter mentioned the following B/Es in relation to the import of steel wire rods and import of high grade zinc :

"(1) Import of Steel Wire Rods vide Bills of Entry Nos.

(i) 610/49, dated 12th March, 1987 (570.870 MT Rs. 23,49,638 CIF)

(ii) 1049/1, dated 22nd April, 1987 (429.7 MT Rs. 17,57,352 CIF)

(iii) 2910/57, dated 24th November, 1987 (694.63 MT Rs. 32,52,397 CIF)

(iv) 155/111, dated 25th January, 1988 (200.270 MT Rs. 17,07,206 CIF)

(v) 1817/79, dated 13th July, 1988 (234.850 MT Rs. 10,97,210 CIF)

(vi) 251/102 and 251/108 both dated 2nd February, 1988 (70.994 MT Rs. 6,04,436 CIF) and

(vii) 2017/74, dated 8th August, 1988 (196.480 MT Rs. 9,25,141 CIF)

(2) Import of High Grade Zinc vide Bill of Entry No.

(i) 3454/32, dated 25th January, 1988 (186.761 MT Rs. 19,65,332 CIF under DEEC Scheme by M/s. Ashish Wire Ropes Ltd., Hyderabad"

10. A reference was made in the second SCN to the fact that during the course of investigation into the unauthorized import of leaded cutting steel under the DEEC Scheme by AWRL, statements of various persons were recorded in which it was inter alia mentioned that Mr. Janakiram, MD of AWRL, explained that "in the past,

for import of wire rods of approximately 1000 MT (covered by the subject bills of entry No. 610/49 and 1049/1) the suppliers had quoted DM 900 per MT but after the personal negotiations of himself and Mr. Subhash Gupta with the suppliers they first reduced the same to DM 700 per MT and thereafter probably considering the relationship of Mr. Vipen Gupta, they ultimately reduced the price to DM 482 per MT." Mr. Janakiram submitted that the entire material was sold but he maintained that he did not know that it was sold since the imported goods were not useful for their products. Reference was made to the statements of Mr. Subhash Gupta and Mr. K. Subramanyam, both Directors of AWRL, Mr. M.R.N. Rao, the Chief Executive of AWRL, Mr. T.N. Prahlad, Accounts Manager of AWRL. Reference was also made to the statement of Mr. K. Satyanarayan, Import & Export Manager of AWRL and Mr. P.C. Pantulu, Finance Manager of AWRL.

11. Interestingly, whereas the first SCN was issued to 19 noticees, the second SCN was issued to 43 entities. The second SCN was adjudicated by the Collector of Customs by an order-in-original dated 31st August, 1994. This order also discussed at length the evidence produced. It was concluded that the case of the Department stood entirely proved. However, as regards the persons involved it was held that 28 of the noticees who were specifically buyers of the goods did not come within the scope of the persons/firms by whose actions the subject goods have become liable for confiscation. The penal proceedings against the said 28 noticees were accordingly dropped. The goods imported by AWRL weighing 186.761 MT valued at Rs. 19,65,332/- CIF under B/E 3454/32, dated 25th January, 1988 as well as the goods covered by the B/E enumerated hereinbefore were held liable for confiscation under Section 111(d), (m) and (o) of the Act. A penalty of Rs. 1 crore was levied on AWRL under Section 112(a) of the Act. Apart from AWRL being asked by an order to pay duty amounting to Rs. 2,19,01,589/- along with interest @ 18% per annum, a penalty of Rs. 50 lakhs each were imposed on Mr. Janakiram and Mr. Subhash Gupta and Rs. 20 lakhs each on Mr. Kumud Dharia, M/s. Beekay Industries, M/s. Maldhari Steel Pvt. Ltd. and Rs. 10 lakhs on M/s. Maldhari Sales Corporation.

12. Both these adjudication orders were appealed against before the CEGAT. By the impugned order dated 29th October, 1997 the CEGAT dismissed the appeals concurring with the findings of the Collector of Customs.

13. This Court has heard the submissions of Mr. Rajesh Rawal, learned counsel for the petitioners and Mr. Kamal Nijhawan, learned counsel for the respondents.

14. The first submission made by Mr. Rajesh Rawal, learned counsel for the petitioners, is that the second SCN was barred by limitation as well as the principles of res judicata. According to him, the entire facts regarding the B/E which is the subject matter of second SCN was already in the knowledge of the Department at the time of issuance of the first SCN. The very same quantity that was the subject matter of the investigation in the first SCN was again sought to be covered in the second SCN. The limitation for the purpose of extending Section 28 of the Act was to begin running from the date of knowledge of the

allegation of undervaluation as well as diversion of the imported goods by the petitioner. Therefore, according to Mr. Rawal, in terms of Explanation (1) to Section 28 of the Act, the relevant date would the date of knowledge of the contravention of the Act by the petitioner. According to him, therefore, second SCN could not be said to within the limitation period. He submitted that the same set of facts could not be split up into two SCNs for the purpose of availing the extended period of limitation under Section 28 of the Act. Mr. Rawal placed reliance upon the decisions in Nizam Sugar Factory v. Collector of Central Excise, A.P. - 2006 (197) E.L.T. 465 (S.C.) = 2008 (9) S.T.R. 314 (S.C.), M. Nagabhushana v. State of Karnataka - 2011 (271) E.L.T. 481 (S.C.) = 2012 (27) S.T.R. 81 (S.C.) and CCE v. Damnet Chemicals - 2007 (216) E.L.T. 3 (S.C.).

15. Mr. Kamal Nijhawan, in reply to the above submissions, pointed out that whereas the first SCN related to the three consignments only, the facts relating to other seven consignments, which form subject matter of the second SCN, came to light in the course of investigation into the three illegally imported consignments which formed the subject matter of the first SCN. Mr. Nijhawan pointed out that in terms of Explanation (1) to Section 28 of the Act, the extended period of limitation would begin from the ?relevant date? which would be the actual date of clearance of imported consignments by misdeclaration or undervaluation. He pointed out that the principle of res judicata would not apply as the subject matter of the two SCNs was different.

16. The Court finds no merit in the submission of learned counsel for the petitioner for the reasons that follow. At the outset it requires to be noticed that Section 28(4) of the Act provides for an extended period of limitation where any duty is not levied or has been short-levied by reason of (a) collusion; or (b) any wilful misstatement; or (c) suppression of facts by the importer. This extended period is five years from the ?relevant date?. The expression ?relevant date? has been defined under Explanation (1) to mean as under :

Explanation 1 - for the purposes of this Section, "relevant date" means -

(a) in a case where duty is not levied, or interest is not charged, the date on which the proper officer makes an order for the clearance of goods;

(b) in a case where duty is provisionally assessed under Section 18, the date of adjustment of duty after the final assessment or reassessment, as the case may be, thereof;

(c) in a case where duty or interest has been erroneously refunded, the date of refund;

(d) in any other case, the date of payment of duty or interest.

17. Even prior to the amendment to Section 28 of the Act by the Finance Act, 2011 (8 of 2011), the extended period of limitation of five years was available where duty had been levied or short-levied by reason of collusion or any wilful statement or suppression of facts by the importer. Explanation (1) to Section

28(1) of the Act is unambiguous that the period of limitation had to be calculated from the ?relevant date?. The relevant date in terms of clause (a) of Explanation 1 had to be calculated with reference to the date of order of clearance of the goods sought to be imported under a B/E. The misdeclaration or under valuation of the goods in the B/E would, therefore, relate back to the date of the clearance of the goods under a particular B/E.

18. In the present case the relevant date for the purpose of limitation would be the clearance of the B/E in question. The earliest of the B/Es forming the subject matter of the second SCN is 12th March, 1987 and the second SCN was issued on 11th March, 1992 which was within five years from the date of such B/E. The date of clearance of the consignment with reference to that B/E was obviously on a date after the date of such B/E. The contention of learned counsel for the petitioners that the limitation for the purpose of Section 28(4) of the Act for issuance of SCN will begin to run from the date of knowledge of the misdeclaration or undervaluation of the goods is contrary to the express language of clause (a) of Explanation 1 which makes it clear that limitation begins to run from the ?relevant date? which in the present case will be the date on which the goods were cleared by the Customs. For the purpose of Explanation 1(a) to Section 28 of the Act, it is not the date of knowledge of the misdeclaration that is relevant but the date of clearance of the goods under a B/E which contained such misdeclaration and/or undervaluation. Consequently, the second SCN in the present case was issued within the extended period of limitation in terms of Section 28(4) of the Act.

19. Further, there can be no manner of doubt that the subject matter of the two SCNs were two different sets of B/Es. Each B/E is separately assessed at the time of clearance of the imported goods. The B/Es mentioned in the first SCN are not the ones mentioned in the second SCN and vice versa. Therefore, the question of applicability of the principle of res judicata does not arise.

20. The decisions cited by learned counsel for the petitioners are clearly distinguishable on facts. In Nizam Sugar Factory (supra), what was sought to be made amenable to the levy of Excise duty was carbon dioxide emanating as a by-product in the process of fermentation of molasses. There were no two separate consignments of the excisable goods. The same product was the subject matter of two separate SCNs. In those circumstances, the Supreme Court held that the second SCN on the same or similar facts was bad in law. The decision in M. Nagabhushana (supra) generally explains the principle of res judicata and is not in the context of the Customs Act, 1962 or even Excise law. The Court fails to see as to how the said decision helps the case of the petitioner. The decisions in CCE v. Damnet Chemicals (supra) and Pushpam Pharmaceuticals Company v. CCE - 1995 (78) E.L.T. 401 (S.C.) also turned on its own facts.

21. Both the adjudication orders of the Collector of Customs have discussed extensively the evidence gathered by the Department. These have again been discussed in the impugned order of the CEGAT which has upheld those orders.

Learned counsel for the petitioners was unable to show any error, legal or factual, in the said adjudication orders which calls for interference by this Court in exercise of its writ jurisdiction under Article 226 of the Constitution.

22. For all the aforementioned reasons, the Court finds no error in either of the adjudication orders or the impugned order of the CEGAT. The writ petitions are dismissed and the interim orders passed by the Court stand vacated. The amounts deposited by the petitioners will be released forthwith to the respondent Department by the Registry together with any interest that may have been accrued thereon.

