

(2021) 11 CESTAT CK 0017

In the Customs, Excise And Service Tax Appellate Tribunal

Case No : Customs Appeal No. 75434, 76104 Of 2018

Monarch International And Anr.

APPELLANT

Vs

Commissioner Of Customs (Port), Kolkata

RESPONDENT

Date of Decision : 09-11-2021

Acts Referred:

Customs Act, 1962 — 2(34), 17(1), 17(4), 27, 28, 28(4), 50, 113, 113(d), 113(i), 114(i), 114AA, 124
Finance Act, 1994 — Section 51, 73
Central Excise Act, 1944 — Section 11A

Citation : (2021) 11 CESTAT CK 0017

Hon'ble Judges : P. K. Choudhary, J;P. Venkata Subba Rao, Technical Member

Bench : Division Bench

Final Decision : Allowed

Judgement

1. These two appeals assail the same Order in Original, Impugned Order dated 29 December 2017 passed by learned Commissioner adjudicating upon the Show Cause Notice, SCN dated 17 November 2014 issued by the Directorate of Revenue Intelligence, DRI under Sections 124 read with section 28(4) and erstwhile proviso to section 28 of the Customs Act, 1962, Act. Appeal No.C/75434/2018 is filed by M/s. Monarch International challenging the penalty of Rs. 10 lakhs imposed on it under Section 114(i) and Rs. 10 lakhs imposed on it under section 114AA. Appeal no. C/76104/2018 is filed by Shri Mahendra Kumar Sutar, Sutar proprietor of M/s. RC Metal Industries Ltd. Exporter, the exporter. The factual matrix which led to the issue of the impugned order is as follows.

2. M/s. R C Metal Industries Ltd., the exporter, filed Shipping Bill No. 849680 dated 18.11.2013 to export 'Nozzle filling compound'. DRI received information that the exporter has mis-declared the nature of the export goods and that the export consignment was, in fact, 'Chromium Concentrate' chargeable to export duty. DRI investigated the matter, recorded statements, collected prints of emails correspondence between the exporter and its overseas buyers and seized the

export goods. The seized goods were subsequently provisionally released on bond and a bank guarantee and exported. DRI also found that same exporter had, in fact, exported similar consignments through 15 shipping bills through Kolkata port and three shipping bills through Inland Container Depot (ICD) Durgapur falling under the jurisdiction of Commissioner of Customs, Central Excise and Service Tax, Bolpur. After investigation, DRI issued the SCN dated 17th November, 2014 answerable to Commissioner of Customs (Port) Kolkata and to the Commissioner, Bolpur with respect to the consignments exported/ attempted to be exported through the respective ports.

3. Central Board of Excise and Customs, CBEC has issued notification No. 53/2015-Customs (NT) dated 4th June 2015 appointing Commissioner of Customs (Port), Kolkata as the common adjudicating authority and accordingly, he issued the impugned order holding as follows:

"(i) The goods exported under Shipping Bill No. 8496980 dated 18.11.2013 valued at Rs. 1,39,12,356/- (FOB), goods exported under 3 Shipping Bills from Durgapur, ICD (Annexure - B of the SCN) having a total value of Rs. 2,49,48,069/- (FOB) and goods exported under 15 Shipping Bills from Haldia/ Kolkata Port (Annexure-C of the SCN) having a total value of Rs. 11,10,83,939/- (FOB) are to be classified under RITC/Customs Tariff Item No. 26100090 Export duty and Cess to be paid accordingly.

(ii) The 462.887 MT goods exported under Shipping Bill No. 8496980 dated 18.11.2013 valued at Rs. 1,39,12,356/- (FOB) (Rupees One Crore Thirty Nine Lakhs Twelve Thousand Three Hundred and Fifty Six only) are confiscable under Section 113(d) and 113(i) of the Customs Act, 1962. As they have been allowed provisional release, I impose Redemption Fine of Rs. 15,00,000/- (Rupees Fifteen Lakh only).

(iii) I confirm the demand of export duty amounting to Rs. 41,73,707/-(Rupees Forty One Lakhs Seventy Three Thousand Seven Hundred and Seven only) and cess amounting to Rs. 2,777/- (Two thousand Seven Hundred and Seventy Seven only) leviable on goods exported under Shipping Bill No. 8496980 dated 18.11.2013.

(iv) I order for appropriation of the deposit amount of Rs. 50,00,000/-(Rupees Fifty Lakhs only) made by M/s R.C. Metal Industries to the Central Government account towards the Export Duty and Cess amounts payable for the goods exported under Shipping Bill No. 8496980 dated 18.11.2013.

(v) I impose penalty of Rs. 10,00,000/- (Rupees Ten lakh only) on Shri Mahendra Kumar Sutar, Proprietor of M/s R.C. Metal Industries under Section 114(i) of the Customs Act, 1962 for rendering the export goods under Shipping Bill No. 8496980 dated 18.11.2013 liable for confiscation under Section 113(d) and 113(i) of the Customs Act, 1962.

(vi) I impose penalty of Rs. 10,00,000/- (Rupees Ten Lakh only) on Shri Ashok

Sawhny, Proprietor of M/s Monarch International under Section 114(i) of the Customs Act, 1962 for rendering the export goods under Shipping Bill No. 8496980 dated 18.11.2013 liable for confiscation under Section 113(d) and 113(i) of the Customs Act, 1962.

(vii) I impose penalty of Rs. 10,00,000/- (Rupees Ten Lakh only) on Shri Mahendra Kumar Sutar, Proprietor of M/s R.C. Metal Industries under Section 114AA of the Customs Act, 1962 for the mis-declared consignment under Shipping Bill No. 8496980 dated 18.11.2013.

(viii) I impose penalty of Rs. 10,00,000/- (Rupees Ten lakh only) on Shri Ashok Sawhny, Proprietor of M/s Monarch International under Section 114AA of the Customs Act, 1962 for the mis-declared consignment under Shipping Bill No. 8496980 dated 18.11.2013.

(ix) The bank guarantee amounting to Rs. 25,00,000/- (Rupees Twenty Five Lakhs) submitted as security for the provisional release is ordered to be encashed towards realization of Redemption Fine and Penalty.

(x) 5151.25 MT of export goods valued at Rs. 13,60,32,008/- (FOB) (Rupees Thirteen Crore Sixty Lakhs Thirty Two Thousand and Eight only) exported under 18 Shipping Bills as mentioned in Annexure - B and Annexure - C of the subject SCN are confiscable under Section 113(d) and 113(i) of the Customs Act, 1962. However, as they have been cleared they cannot be confiscated at this stage.

(xi) I confirm the demand of export duty amounting to Rs. 3,62,77,346/- (Rupees Three Crore Sixty Two Lakhs Seventy Seven Thousand Three Hundred and Forty Six only) and cess amounting to Rs. 30,909/- (Thirty Thousand Nine Hundred and Nine only) leviable on export goods under 18 Shipping Bills as mentioned in Annexure - B and Annexure - C of the subject SCN under the proviso to Section 28(1) since substituted by the Section 28(4) of the Customs Act, 1962 along with interest under Section 28AA of the said Act.

(xii) I impose penalty of Rs.3,62,77,346/- (Rupees Three Crore Sixty Two Lakh Seventy Seven Thousand Three Hundred and Forty Six only) on M/s R.C. Metal Industries under Section 114A of the Customs Act, 1962 for rendering the exported goods under 18 Shipping Bills as mentioned in Annexure- B and Annexure - C of the subject SCN liable for confiscation under Section 113(d) and 113(i) of the Customs Act, 1962.

(xiii) I impose penalty of Rs. 1,00,00,000/- (Rupees One Crore only) on Shri Mahendra Kumar Sutar under Section 114AA of the Customs Act, 1962 for the offences related to the 18 past export consignments."

4. Learned counsel for the appellants submits that the SCN itself has been issued without jurisdiction since ADG, DRI is not 'the proper officer' to issue an SCN demanding duty under Section 28(4) as held by the Larger Bench of Hon'ble Supreme Court in the case of Cannon India Ltd. vs. Commissioner of Customs, 2021 (376) ELT 3 (SC) This judgment was followed by the Hon'ble High Court of

Madras in Quantum coal, Quantum Coal Energy (P) Ltd. vs The Commissioner [Writ Petition (MD) 10186 10817/2014] and Hon'ble High Court of Karnataka in the case of in the case of Guvidivan, Givaudan India Pvt Ltd. vs Principal Commissioner of Customs, Bangalore (Writ Petition no. 10773/2018 and 4628/2018). More recently, it was followed by another larger bench of Hon'ble Apex Court in the matter of Agarwal Metals, Commissioner of Customs Kandla vs. M/s. Agrawal Metals and Alloys [Civil Appeal No. 3411/2020] and while dismissing Revenue's appeals it held as follows:

"Delay condoned.

In view of decision dated 09.03.2021 of three judge Bench of this Court in Civil Appeal No. 1827 of 2018 titled as "M/s. Canon India Private Ltd. vs. Commissioner of Customs reported in 2021 (3) SCALE 748. These appeals must fail as the show cause notice(s) in the present cases was also issued by Additional Director General (ADG), Directorate of Revenue Intelligence (DRI), who is not a proper officer within the meaning of Section 28 (4) read with Section 2(34) of the Customs Act, 1962.

Hence, these appeals stand dismissed."

In the present case also, the SCN was issued by DRI demanding duty under section 28(4) which is without authority and hence the impugned order adjudicating the SCN needs to be set aside. As far as the notice under section 124 proposing confiscation of goods and imposition of penalties is concerned, he submits that the confiscation under section 113 of the Act was only on the ground that there was mis-declaration in the Shipping Bill, i.e., modifying the assessment under section 28(4) and as this basis is not sustainable, the confiscation under section 113 which is based on such re-assessment of duty must fail too. Therefore, he prays that both appeals may be allowed and the impugned order may be set aside. As far as the current shipping bill is concerned, learned Counsel submits that the learned commissioner confirmed the duty of customs by reclassifying the goods under Customs Tariff Heading 2610090 which is not proposed in and hence is beyond the SCN. Consequently, the confiscation and penalties which are based on such re-classification also need to fail.

5. Learned Departmental representative supports the impugned order.

6. We have considered the arguments on both sides and perused the records. The issues to be decided in this case are:

- a) Is the demand of duty on the current shipping Bill confirmed in the impugned order based on the SCN issued by the DRI sustainable?
- b) Is the confiscation of goods in the current shipping bill and imposition of fines in the impugned order sustainable?
- c) Is the demand of duty on the past shipping Bills confirmed in the impugned

order under section 28(4) based on the SCN issued by the DRI sustainable?

d) Are the penalties imposed in the impugned order with respect to past shipping bills based on the SCN issued by the DRI sustainable?

Before answering these questions, we find it profitable to examine the relevant legal provisions and case laws.

Assessment and preventive functions of the customs department

7. Any tax department, including Customs has two broad functions- the first is to assess the tax/duty paid where someone has filed a return or, in case of Customs, filed a Bill of Entry for import or a Shipping Bill for export which is the assessment function. It is a quasi-judicial function and assessment orders can be appealed against. The second function is to catch those who do not file declarations and pay taxes which are the preventive functions; these include collecting intelligence, investigating, searching, seizing, arresting, recording statements, etc. as well as supervising some activities such as stuffing and de-stuffing of containers or loading and unloading of ships. These are in the nature of executive functions and are not appealable. A panchnama drawn during the investigation, for instance, is not an appealable document. If the investigations lead to discovery of evasion of duty or prohibitions and an SCN is issued, thereafter, it moves to the realm of quasi-judicial functions.

Assessment of duty and processing of export goods

8. One who wishes to export has to make an entry of the goods to be exported under Section 50 by presenting to the proper officer a Shipping Bill. In the Shipping Bill, the exporter has to self-assess the duty under Section 17(1) and this assessment can be verified and the duty can be re-assessed by the proper officer under Section 17(4) and if such re-assessment is contrary to the self-assessment by the exporter, unless the exporter accepts in writing the re-assessment, the proper officer has to issue a speaking order. If 'the proper officer' is satisfied that the export of the goods is not prohibited and the duty as assessed has been paid, he will issue an order under section 51 permitting clearance of the goods. Section 2(34) defines that 'Proper officer', in relation to any functions to be performed under this Act, means the officer of customs who is assigned those functions by the Board or the Principal Commissioner of Customs or Commissioner of Customs.

9. The process of making an entry under section 50 and self assessment of duty under section 17(1) happen simultaneously because the data required for assessing duty such as the nature of the goods, their classification under the Customs Tariff, rate of duty, exemption notification, quantity and value are in the Shipping Bill and once these data is fed into the Customs EDI system both self assessment of duty under Section 17(1) and filing of Shipping Bill under Section 50 are complete and the arithmetical process of calculating the duty is done by the system itself. The Shipping bill passes through the Customs Risk

Management System, RMS and it can then either be sent to an officer for re-assessment or the self assessment may simply be accepted and the shipping bill moves to the proper officer who permits clearance of goods. Thus, the proper officer to whom the shipping bill is to be presented under section 50 is also the the proper officer who assesses it under section 17. Usually, it is the Assistant Commissioner/ Deputy Commissioner in-charge of exports.

10. The process of permitting clearance of export goods under Section 51 is commonly referred to as issuing of Let Export Order, LEO. The proper officer who issues the LEO is different from the assessing officer and is usually posted in the Customs shed where he checks the documents and if required goods and issues the LEO.

11. Once an assessment is completed, the assessing officer becomes functus officio and cannot modify the assessment. The assessment order can, however, be appealed against to the Commissioner (Appeals) and then to CESTAT, High Court and Supreme Court.

12. Sometimes excess duty may have been paid either because it was paid in excess of what was assessed or it could have been paid because it was wrongly assessed to a larger amount (say due to wrong classification or valuation or not applying an exemption notification, etc.). The question which arises is if the duty was paid in excess due to incorrect assessment, can the refund be sanctioned or will it amount to changing the assessment. It has been held by the Hon'ble Supreme Court in the cases of Priya Blue Priya Blue Industries v. Commissioner of Customs 2004 (172) E.L.T. 145 (SC) and Flock India Collector of Central Excise, Kanpur v.Flock (India) Pvt. Ltd., 2000 (120) ELT 285 (SC) that the officer sanctioning the refund cannot sit in judgment over the assessment by the assessing officer. He can sanction refund only if it is due as per the assessment already done. If the assessment is found to be incorrect, then it can be appealed against before the Commissioner (Appeals) and only when the assessment is changed, can there be any consequential refund. It must be pointed out that during the relevant period, all assessments under section 17 had to be done by the 'proper officer'. Later, in 2011, section 17 has been amended and 'self assessment' by the importer/exporter was introduced. The importer or his customs broker files the Bill of Entry under section 46 and in the process also self assesses the duty payable under section 17. In many cases, the goods are cleared on the basis of self assessment and in some cases, the self assessment is examined by the proper officer and if necessary, it is re-assessed. The RMS of the Customs EDI system decides which cases should pass through the officer for examination and reassessment. In this changed legal system, if the Bill of Entry or Shipping Bill is only self-assessed and it is done wrongly (say, by not claiming an eligible exemption notification), can a refund be sanctioned under section 27 by the officer dealing with refunds? The Hon'ble High Court of Delhi held in Micromax India, Union of India & Ors. vs. Micromax Informatics Ltd. (2016) 335 ELT 446 (Del) that where there is no assessment by the proper officer, there is

nothing to be appealed against to the Commissioner (Appeals) and hence refund can be sanctioned if there is an error in self-assessment. The larger bench of Hon'ble Supreme Court has, disposing of a batch of Customs, Excise and Service Tax cases, in the case of ITC Ltd, CIVIL APPEAL NOS. 293-294 OF 2009 along with a batch of other appeals, reversed the view taken in Micromax and held that self-assessment is also an assessment and once it is completed, it can only be appealed against to the Commissioner (Appeals) and even in cases of self assessment, no refund can be sanctioned unless the assessment is appealed against and modified. This judgment is significant as it places self-assessment at par with assessment by the officer and holds that in both cases, there can be an appeal to the Commissioner (Appeals).

13. Assessments can also be appealed against by the Revenue. However, if duty is not levied, not paid, short levied, short paid or erroneously refunded, an SCN can be issued under section 28 by 'the proper officer' demanding the duty.

14. If every assessment is a quasi-judicial act which cannot be altered except through an appeal, the question which arises is what is the nature of demand under section 28? It has been held in Sayed Ali, Commissioner of Customs Vs. Sayed Ali And Others Civil Appeal Nos. 4294-4295 of 2002 (SC) that the power under section 28 is a re-assessment. The relevant extract is below:

16. In the present cases, the import manifest and the bill of entry having been filed before the Collectorate of Customs (Imports) Mumbai, the same having been assessed and clearance for home consumption having been allowed by the proper officer on importers executing bond, undertaking the obligation of export, in our opinion, the Collector of Customs (Preventive), not being a "proper officer" within the meaning of Section 2(34) of the Act, was not competent to issue show cause notice for re-assessment under Section 28 of the Act.

15. In Cannon India Ltd. the power under Section 28 has been held to be a power to review and reopen the assessment and reassess. The relevant paragraph is as follows:

"12. The nature of the power to recover the duty, not paid or short paid after the goods have been assessed and cleared for import, is broadly a power to review the earlier decision of assessment. Such a power is not inherent in any authority. Indeed, it has been conferred by Section 28 and other related provisions. The power has been so conferred specifically on "the proper officer" which must necessarily mean the proper officer who, in the first instance, assessed and cleared the goods i.e. the Deputy Commissioner Appraisal Group. Indeed, this must be so because no fiscal statute has been shown to us where the power to re-open assessment or recover duties which have escaped assessment has been conferred on an officer other than the officer of the rank of the officer who initially took the decision to assess the goods."

16. Thus, assessment is a quasi-judicial function and the assessed Bill of Entry/ Shipping Bill is an appealable order. Once the assessment is completed, it cannot

be modified to grant refund under section 27; it has to be appealed against first. However, a special power to review, reopen and reassess has been provided to the proper officer, i.e., the officer who has done the assessment in the first place or his successor in office under Section 28. This power, as can be seen from its text, is subject to three limitations:

- a) Who- only 'the proper officer' can issue an SCN;
- b) When- within the period of one year (or six months as applicable during the relevant period) and if the ingredients necessary to invoke extended period of limitation are available, within five years.
- c) Why- only if there is non-levy, non-payment, short levy, short payment or erroneous refund which needs to be recovered. This section doesn't provide for issuing an SCN for any other purpose. For instance, if the goods were assessed and exported and no duty is paid or payable but it was found subsequently, that the goods were undervalued which may result in lower remittance of foreign exchange or if a drawback is paid based on the value of the exported goods and it is later found that the goods were overvalued, section 28 does not provide for re-assessment the exported goods to a lower value.

17. Certitude in law, its application, adjudication of disputes, appeal, revision and review mechanisms are essential in fiscal laws which, on the pain of penalty, place obligations or restraints on individuals and entities. Insofar as the demands are concerned, use of 'the' (a definite article) instead of 'a' or 'an' (indefinite articles) or expressions such as 'any' or 'any of the' in the Sections brings in the certitude. Section 28 of the Customs Act empowers 'the proper officer' to issue a notice to demand duty while section 11A of the Central Excise Act and section 73 of the Finance Act, 1994 empower 'the central excise officer' to issue notices under those Acts. Even in the more recent law, the Central GST Act, 2017, demand under Section 73 can be raised by 'the proper officer'. This section also applies to demands under the Inter-State GST Act, 2017. State GST Acts, likewise empower 'the proper officer' to raise a demand. It is immaterial for this case as to who 'the proper officer' or 'the Central Excise officer' under these laws are. Suffice it to say that the Parliament has consistently ensured certainty by giving the power of raising a demand only to 'the officer' and not "officer" or "any officer".

18. Officers of DRI have been held to be NOT 'the proper officers' to issue a notice under Section 28 both in *Sayed Ali* and in *Canon India*. In the Customs Act, the Shipping Bill has to be filed with 'the proper officer' under Section 50 which can be re-assessed under Section 17 by 'the proper officer' and finally the clearance of goods under Section 51 is also to be given by 'the proper officer'. Current shipping bill

19. Insofar as this case is concerned, with respect to the current shipping bill, it was assessed provisionally after provisional release of the goods. However, the finalization of the Shipping Bill by reclassifying the goods in the impugned order

is not proposed in the SCN and the order has gone beyond the scope of the SCN and hence it needs to be set aside. Consequently, the confiscation of the goods and imposition of penalties based on such finalization of assessment must fail.

20. As far as the past consignments are concerned, the SCN was issued by ADG, DRI under section 28 and he is not the proper officer to issue such as notice as per Canon India and hence the impugned order confirming such a demand needs to be set aside and we do so. The confiscation of goods and imposition of penalties, require a notice under Section 124 to be issued which need not be issued by 'the proper officer'. Hence, it was within DRI's power to issue such an SCN. However, the basis for imposition of penalty is the confiscation of the goods under Section 113 on the ground that there were mis-declarations in the Shipping Bills which resulted from a determination under section 28 on the notice issued by DRI. As the goods were not available, the learned Commissioner has not ordered confiscation of the past goods. He, however, imposed penalties which also cannot sustain once the re-assessment of the exported goods under section 28 which forms the basis for the penalties fails.

21. We, therefore, proceed to answer the questions raised in paragraph 6 of this order as follows:

a) The demand of duty confirmed on the current shipping Bill confirmed in the impugned order is not sustainable as it was not proposed in the SCN and hence is beyond its scope.

b) Consequently, the confiscation of goods in the current shipping bill and imposition of fines in the impugned order also need to be set aside.

c) The demand of duty on the past shipping Bills confirmed in the impugned order under section 28(4) based on the SCN issued by the DRI is not sustainable as DRI officers are not 'the proper officers' as per Canon India.

d) Consequently, the penalties imposed in the impugned order with respect to past shipping bills based on the SCN issued by the DRI also need to be set aside.

22. In view of the above, the impugned order is set aside and the appeals are allowed with consequential relief, if any, to the appellants.

(Pronounced in open Court on 09 Nov. 2021.)