(2024) 12 CESTAT CK 1237

In the Customs, Excise And Service Tax Appellate, New Delhi

Case No : Customs Appeal No. 163 of 2012

M/s. Devanshi Textiles @APPELLANT @Hash Commissioner of Customs @RESPONDENT

Date of Decision : 17-12-2024

Acts Referred:
Customs Act, 1962 — Section 5, 12, 25(1), 28, 28AB, 54, 77, 108, 111(m), 111(o), 114A, 114AA, 125

Citation : (2024) 12 CESTAT CK 1237

Hon'ble Judges : Dilip Gupta, President (J);P. V. Subba Rao, Member (T)

Bench : Division Bench

Advocate : B L Narasimhan, Anurag Mathur, Saksham Garg, Rakesh Kumar

Final Decision : Allowed

Judgement

P.V. Subba Rao, J

1. M/s. Devanshi Textiles, Appellant filed this appeal to assail the Order in Original, Impugned order dated 31.01.2012 passed by the Commissioner of Customs, Jodhpur.

2. By the impugned order, the Commissioner decided the proposals made in the common Show Cause Notice dated 20.4.2011, SCN issued to 20 manufacturers including the appellant herein and to 20 individuals who were the proprietors/ partners/directors of the manufacturers. The Commissioner considered the submissions made by all the appellants together and passed an order denying the benefit of the exemption under the Export Promotion Capital Goods, EPCG scheme to the machinery imported by all the manufacturers, demanded duty under section 28 of the Customs Act, 1962, Customs Act along with interest under section 28AB of Customs Act, imposed redemption fines and penalties on the manufacturers, and imposed personal penalties under section 114AA of Customs Act on the individuals. With respect to this appellant, by the impugned order, the Commissioner:

a) Denied the benefit of EPCG authorisation issued by the Director General of

Foreign Trade, DGFT and ordered recovery of customs duty of Rs. 7,81,152 under section 28 of the Customs Act;

b) Ordered recovery of interest under section 28AB of the Customs Act;

c) confiscated the imported goods and imposed a redemption fine of Rs. 17,92,000/- under section 125 of Customs Act; and

d) imposed penalty of Rs. 7,81,152/- under section 114A of the Customs Act.

3. Aggrieved, appeals were filed by the manufacturers including this appellant and the individuals. When the appeals were heard in 2017, the jurisdiction of the Commissioner of Customs (Preventive) Jodhpur who had issued the SCN was in dispute. This Tribunal remanded all matters to the Commissioner with a direction to decide after final decision by the Supreme Court on the question of jurisdiction in the Special Leave Petition filed against the judgment of the Delhi High Court in Mangli Impex Limited vs Union of India, 2016(339)ELT 605(Del.).

4. Revenue had filed appeals before the Rajasthan High Court assailing the orders of this Tribunal remanding the matters to the Commissioner. In some cases, the High Court upheld the remand orders of this Tribunal and those cases have since been pending before the Commissioner to decide. In some other appeals, including in this, the High Court set aside the order of this Tribunal and remanded the matter to this Tribunal to decide.

5. With respect to this appeal, Revenue had filed Customs Appeal No. 9/2018 which was decided along with several other appeals by the High Court by a common judgment and order dated 22.8.2019. The operative part of this judgment is as follows:

8. Accordingly, the impugned orders in the appeals are hereby set aside and all the matters are remitted to the CESTAT which shall proceed to examine and decide the merits of appeals without being influenced by Mangli Impex (supra). At the same time, the final decision in Mangli Impex (supra), would bind all parties- on the issue of jurisdiction, so that there is no question of its having to be re-agitated all over again. Furthermore, this Court is of the opinion that till final decision is taken in Mangli Impex (supra), no coercive action should be taken against the assesses in the event of any adverse order, nor should any prosecution be launched against them. These too shall await the final outcome of Mangli Impex (supra).

6. However, after remand this appeal could not be decided by this Tribunal as the question of jurisdiction of the officer issuing the SCN was also under consideration of the Supreme Court in several other appeals. The question was finally answered by the Supreme Court in Review Petition No. 400 of 2021 in Civil Appeal no. 1827 of 2018 in favour of the Revenue. In this judgment, the Supreme Court set aside the decision of the Delhi High Court in Mangli Impex.

7. Hence, this appeal is listed. We have heard learned counsel for the appellant

and learned authorised representative for the Revenue and perused the records.

8. The facts of this case are that the appellant is a manufacturer of textiles. It had applied for and was issued a EPCG licence by the DGFT under the Foreign Trade (Development & Regulation) 1992, FTDR Act and the Foreign Trade Policy (2009-2014), FTP framed under it. EPCG is a scheme under which DGFT issues a licence which entitles one to import capital goods at NIL or concessional rate of duty and using the capital goods so imported, goods must be manufactured and exported of a certain value.

9. The appellant imported capital goods at concessional rate of duty of 3% using the EPCG licence after executing the necessary bond. Thereafter, it exported goods manufactured using the capital goods and exported them as required under the licence. Taking into account its exports made, the DGFT issued an Export Obligation Discharge Certificate, EODC.

10. Thereafter, receiving intelligence that 20 manufacturers including the appellant had mis-declared the description/make of the imported capital goods in order to avail benefit under the Technology Upgradation Fund, TUF (scheme) of the Ministry of Textiles, officers of the Commissioner of Customs initiated investigation. They examined the imported capital goods which were already installed in the appellant's factory with the help of experts and found that the actual year of their manufacture was 1995/1996, but it was mis-declared as year 2000. The year of manufacture on the machinery was tampered with and was changed to 2000.

11. A SCN was issued to the appellant herein and others proposing to deny the benefit of the EPCG exemption notification and recover the differential duty with interest and impose penalties. These proposals were confirmed through the impugned order.

Submissions on behalf of the appellant

12. Shri B. L. Narasimhan, learned counsel for the appellant made the following submissions:

i) The impugned order travelled beyond the SCN inasmuch as it held that as per paragraph 5.8 of the Handbook of Procedures, HBP, only new and technologically superior machinery or second hand machinery not more than 10 years old could be imported as per para 5.8 of HBP and TUF Scheme. No such allegation was made in the SCN.

(ii) The appellant had not violated any condition of the EPCG Scheme and discharged its export obligations fully.

(iii) Once DGFT issues the EODC, it is not open to the Customs Department to investigate if the goods were covered under EPCG licence or not.

(iv) The finding in the impugned order that EPCG licence was issued for import of capital goods manufactured in year 2000 is factually incorrect as the EPCG licence does not specify any year of manufacture of the capital goods to be imported.

(v) The year of manufacture of the capital goods is irrelevant to the EPCG scheme as neither the EPCG scheme nor the exemption notification places any restrictions on the year of manufacture of the capital goods.

(v) Denial of the benefit of exemption is contrary to the policy of the Government to promote exports.

(vi) TUF scheme under para 5.8 of the FTP is not applicable to the appellant as it had not opted for or applied for TUF.

(vi) The goods were not liable to confiscation under sections 111(m) and 111(o) of the Customs Act. Consequently, no redemption fine could have been imposed.

(vii) Penalty under section 114A could not have been imposed on the appellant.

Submissions on behalf of the Revenue

11. Shri Rakesh Kumar, learned authorised representative for the Revenue vehemently supported the impugned order.

Findings

12. We have considered the submissions advanced by the learned counsel for the appellant and the learned authorised representative for the Revenue and perused the records.

13. The case of the department is built on the premise that the appellant had mis-declared the year of manufacture of the capital goods so as to avail undue benefit under the TUF Scheme of the Ministry of Textiles.

14. The first question which, therefore, arises is whether the appellant had mis-declared the year of manufacture of the capital goods.

15. We find that the Bill of Entry (which is the declaration of the appellant made under the Customs Act) nowhere indicates any year of manufacture. Thus, there was no mis-declaration before the Customs.

16. The appellant sought and availed the benefit of the EPCG licence issued by the DGFT which also does not specify any year of manufacture. In other words, the appellant was free to import goods of any year of manufacture using the licence.

17. The appellant had applied to the DGFT for the EPCG licence in Ayat Niryat Form-4, ANF-4. Even in this application, the appellant had not declared any year of manufacture of the goods. Along with the application, the appellant had submitted a proforma invoice of the overseas supplier of the goods which does indicate the year of manufacture as 2000. Against S.No. 11B of the ANF-4, to the question as whether the imports are to be made are under TUF, the appellant

answered No.

18. Thus, the appellant had not imported the goods under TUF but imported only under EPCG. Even though the proforma invoice submitted by the appellant does indicate the year of manufacture of the goods as 2000, the EPCG authorisation did not place any restriction on the year of manufacture. The TUF scheme under which the alleged undue benefits were to be availed do not apply to the appellant because it had specifically not imported the goods under TUF.

19. The second question is whether the appellant had obtained any undue benefit under the TUF scheme of the Ministry of Textiles. The answer is in the negative.

20. Import of capital goods at concessional rate of duty of 3% under EPCG scheme is covered by the HBP paragraph 5.2, which, inter alia, states ‘Second hand capital goods, without any restriction on age, may also be imported under the EPCG scheme’.

21. Import of capital goods under EPCG with TUF is covered separately under paragraph 5.8 of the HBP.

22. The third question is whether there were any violation of the customs exemption notification no.103/2009-Cus which exempted the goods imported under an EPCG licence issued by the DGFT.

23. It needs to be pointed out that while DGFT formulated several schemes under which exemptions and concessions are given, the schemes of DGFT, by themselves cannot prevail over the charge of duty of customs under section 12 of the Customs Act, 1962. Therefore, for every scheme of DGFT, a corresponding exemption notification is issued under the Customs Act exempting goods imported under that scheme. Notification no. 103/2009-Cus issued under section 25(1) of the Customs Act provides for exemption from duty in excess of 3% on capital goods imported under the EPCG licence issued by the DGFT. Even this notification does not place any restriction on the year of manufacture of the goods which can be imported under EPCG.

24. The fourth question is whether the Commissioner of Customs is competent to read into the EPCG licence issued by DGFT some additional conditions such as the year of manufacture.

25. Section 5 of the Customs Act confers powers on the officers of Customs and it reads as follows:

“5. Powers of officers of customs.—(1) Subject to such conditions and limitations as the Board may impose, an officer of customs may exercise the powers and discharge the duties conferred or imposed on him under this Act.

(2) An officer of customs may exercise the powers and discharge the duties conferred or imposed under this Act on any other officer of customs who is subordinate to him.

(3) Notwithstanding anything contained in this section, a Commissioner (Appeals) shall not exercise the powers and discharge the duties conferred or imposed on an officer of customs other than those specified in Chapter XV and section 108.”

26. The Commissioner can exercise only such powers as are conferred on him under the Customs Act. While import of goods and duties and restrictions on them are under the Customs Act, the EPCG licences are issued by the DGFT under FTDR Act and the Foreign Trade Policy, FTP framed under it by the Government. Neither the FTDR Act not the FTP confers any persons as the Commissioner of Customs. On the other hand, para 2.3 of the FTP (2009-2014) specifically states that the decision of the DGFT shall be final and binding on all matters relating to its interpretation. It reads of follows:

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“2.3. If any question or doubt arises in respect of interpretation of any provision contained in FTP, or classification of any item in ITC (HS) or HBP v1 or HBP v2, or Schedule of DEPB Rates (including content, scope or issue of an authorization there under) said question or doubt shall be referred to DGFT whose decision thereon shall be final and binding.”

27. Neither the Customs Act nor the FTDR Act nor any other law gives the Commissioner of Customs any powers to either modify the licence issued by the DGFT or read something more into it. If investigations in any case indicate that a licence or authorisation has been obtained from DGFT by an importer or exporter wrongly by fraud, mis-declaration, etc., the Commissioner or other customs officer can pass such information and evidence to the DGFT who issued the licence so that he can take a decision. Customs officers, including the Commissioner, have no powers under the FTDR Act.

28. The fifth question is whether any alleged attempt to avail undue benefits under TUF scheme from the Ministry of Textiles would fall within the scope of the Customs Act.

29. We find no legal basis for such an action. If it emerges in any investigation, that anyone had availed or was attempting to avail undue benefits under a scheme of the Ministry of Textiles or some other ministries, the customs officers can convey the details to such ministry to consider and take appropriate decision. Even if one tried to avail ineligible benefit from Ministry of Textiles under TUF, that cannot be a ground, by any stretch of imagination, to demand duty, confiscate goods and impose penalties under the Customs Act.

30. The sixth question is whether the capital goods were liable for confiscation under sections 111(m) and 111(o) of the Customs Act.

31. These two sections read as follows:

“111. Confiscation of improperly imported goods, etc.—The following goods brought from a place outside India shall be liable to confiscation:—

(m) any goods which do not correspond in respect of value or in any other particular with the entry made under this Act or in the case of baggage with the declaration made under section 77 in respect thereof, or in the case of goods under transhipment, with the declaration for transhipment referred to in the proviso to sub-section (1) of section 54;

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(o) any goods exempted, subject to any condition, from duty or any prohibition in respect of the import thereof under this Act or any other law for the time being in force, in respect of which the condition is not observed unless the non-observance of the condition was sanctioned by the proper officer;"

32. Section 111(m) applies if the goods do not correspond to the entry made under the Act, i.e., the Bill of Entry. As we found that the Bill of Entry does not mention any year of manufacture at all, the imported goods do not have to be of any year of manufacture. Clearly, 111(m) does not apply to this case.

33. Section 111(o) applies if the goods are exempted subject to some conditions and such conditions were not fulfilled and the non-fulfilment of such conditions was not sanctioned by the proper officer. In this case, the capital goods imported under EPCG were exempted subject to the condition that the goods manufactured using them will be exported and the export obligation was met and the DGFT issued an EODC to the appellant. Therefore, section 111(o) also does not apply to this case.

34. The last question is if the penalty imposed under section 114A can be sustained.

35. This section reads as follows:

"114A. Penalty for short-levy or non-levy of duty in certain cases.—Where the duty has not been levied or has been short-levied or the interest has not been charged or paid or has been part paid or the duty or interest has been erroneously refunded by reason of collusion or any wilful mis-statement or suppression of facts, the person who is liable to pay the duty or interest, as the case may be, as determined under sub-section (8) of section 28 shall, also be liable to pay a penalty equal to the duty or interest so determined:

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36. This section applies to some cases where duty was not paid or short paid for certain reasons. Since we have found that there is no short payment of duty at all and the demand of duty cannot be sustained, penalty under section 114A also cannot be sustained.

37. To sum up:

a) the appellant had not declared or mis-declared the year of manufacture of the capital goods in the Bills of Entry or any declaration before the Customs;

b) the EPCG licence issued by the DGFT also does not place any restriction on the year of manufacture of the goods;

c) the EPCG scheme in para 5.3 of HBP under which the appellant was issued the licence specifically permits import of second hand capital goods without any restriction;

d) the Customs notification 103/2009-Cus which exempts the imported goods also does not place any restriction on the year of manufacture;

e) the appellant had not applied under the TUF scheme which has been referred to in the impugned order;

f) the Commissioner has no powers to modify the EPCG licence issued by the DGFT or read something more into it (such as restriction of the year of manufacture of the machinery);

g) the Commissioner also has no powers to demand customs duty even if any undue benefit was claimed or was attempted to be claimed from the Ministry of Textiles or any ministry under some scheme;

h) confiscation of the goods under section 111(m) cannot be sustained because there was no mis-declaration in the Bill of Entry;

i) confiscation of the goods under section 111(o) cannot be sustained because the condition of the exemption, namely, export of manufactured goods has already been fulfilled and an EODC has been issued by the DGFT.

j) Penalty under section 114A cannot be sustained because the demand of duty itself cannot be sustained.

38. For all the above reasons, the impugned order, which has been issued ignoring both the facts of this case and the legal provisions cannot be sustained and is set aside insofar as it pertains to the appellant.

39. The appeal is allowed with consequential relief (s).

[Order pronounced on 17/12/2024.]