(2021) 11 CESTAT CK 0022

In the Customs, Excise And Service Tax Appellate Tribunal

Case No : Customs Appeal No. 50927 Of 2020

M/s Exclusive Motors Pvt. Ltd. — APPELLANT

Vs

Commissioner Of Customs (Preventive) — RESPONDENT

Date of Decision : 11-11-2021

Acts Referred:

Customs Act, 1962 — Section 28(4), 28AA, 46, 47
Customs Tariff Act, 1975 — Section 3
Central Excise Act, 1944 — Section 4B, 11A

Citation : (2021) 11 CESTAT CK 0022

Hon'ble Judges : Delip Gupta, J;P. Venkata Subba Rao, Technical Member

Bench : Division Bench

Final Decision : Allowed

Judgement

1. M/s. Exclusive Motors Pvt. Ltd., the appellant has filed this appeal to assail the order dated 12.03.2020 passed by the Commissioner of Customs (Appeals), the Commissioner (Appeals), by which the order dated 30.10.2017 passed by the Additional Commissioner of Customs has been upheld and the appeal has been dismissed. The Additional Commissioner, by the aforesaid order dated 30.10.2017, had confirmed the demand of differential duty amounting to Rs.14,29,047/- from the appellant under the provisions of section 28(4) of the Customs Act, 1962, the Customs Act with interest and penalty.

2. The appellant is an authorised dealer and authorised service center of M/s Bentley Motors Ltd. and for servicing and repairs of Bentley vehicles, it imported spare parts from M/s Bentley Motors Ltd. UK, which was the parent company. This appeal concerns 110 consignments of spare parts through courier mode. The authorised courier agent, upon arrival of the goods in India, filed the requisite courier Bills of Entry based on the declaration given in the respective invoices by the foreign consignor and it is stated that after being assessed by the proper officer and payment of requisite duty, the goods were delivered to the appellant and the requisite duty was collected by the authorised courier agent

from the appellant.

3. A show cause notice dated 06.12.2016 was, however, issued to the appellant for the period 21.12.2012 to 25.05.2014 alleging that the appellant had cleared the said goods without disclosing the retail sale price, RSP and in this connection reference was made to two Bills of Entry which were adjudicated upon by an order dated 24.11.2014 after investigation. Further investigation revealed that the appellant had in all imported 110 small consignments through courier terminal at Delhi and the consignments were cleared through courier not on RSP basis. It, therefore, appeared that the appellant had short paid customs duty amounting to Rs. 14,29,047/- for the period 21.12.2011 to 24.05.2014 and details were provided in the calculation sheet, which is reproduced below:

CALCULATION SHEET

Year

UPS Jetair

DHL Express

Fedex

TNT

Total

2011-12 (after 20.12.11

204389

8345

67946

29864

310544

2012-13

412697

21578

23441

NIL

668716

2013-14

387663

NIL

6618

13840

408121

2014-15

41666

NIL

NIL

NIL

41666

Total-

1046415

29923

309005

43704

1429047

4. The show cause notice invoked the provisions of section 28(4) of the Customs Act and demanded the duty alleged to have been short paid. The relevant paragraphs of the show cause notice are reproduced below:

"17. Whereas it appeared that the importer has willfully not declared the RSP of the imported good i.e. that the Motor Vehicle Parts with an intent to evade payment of appropriate customs duty on the imported goods. Thus the differential customs duty Rs. 14,29,047/- is recoverable from the importer therefore, invoking extended period of limitation under section 28(4) of the Customs Act, 1962. Further, they had never taken any steps to rectify the mistake. Though they were aware that the goods under import were wrongly assessed by they never tried to stop this practice ro to pay the differential duty voluntarily. As per Section 28(4) of the Customs Act' 1962 where any duty has been short- levied by reason of (a) collusion; or (b) any wilful mis-statement; or (c) suppression of facts, by the importer, the proper officer shall, within five years from the relevant date, serve notice on the person chargeable with duty which has been so short-levied requiring him to show cause why he should not pay the amount specified in the notice.

18. The duty short paid i.e. Rs. 14,29,047/- by not disclosing the RSP of the goods as well as by not disclosing the fact that the goods has been imported for trading purposes and not for individual consumption, is recoverable from them under section 28(4) of the Customs Act' 1962. Along with interest under Section

28AA of the Customs Act' 1962."

5. The appellant filed a reply dated 09.08.2017 to the aforesaid show cause notice and amongst others, stated that the shipment of the consignments were made by the overseas suppliers for delivery at the doorstep of the appellant and, therefore, the matter was entirely between the overseas supplier and the concerned courier company and the appellant had no role whatsoever. In fact the appellant received the goods and paid whatever charges were claimed by the courier company and no objection was ever raised by the customs authorities for assessment of the goods. The appellant was, therefore, not responsible for the alleged non declaration of RSP of the imported goods, nor was there any intent to evade payment of customs duty as was alleged in paragraph 17 of the show cause notice. It was, therefore, stated that the provisions of section 28(4) of the Customs Act could not have been invoked since the factual basis for invoking the extended period of limitation had not been made in the show cause notice.

6. The Additional Commissioner, however, by the order dated 30.10.2017 confirmed the demand of differential duty with interest and penalty. The relevant portion of the order is reproduced below:

"27.2 Now the question is if they understood that the imported goods were subjected to CVD on the basis of RSP/MRP of the goods, then, being an honest tax payer, why they did not pay the duty on RSP while imported the goods through courier. It is true that it was also for the department to assess the bills of entry correctly but that does not mean that the importer has nto to declare that value as well as RSP as per bill of entry form prescribed vide Bill of Entry (Forms) Regulations, 1976. Thus the importer cannot escape from their statutory tax obligation, either on the lame excuse of ignorance of the law or by passing the buck on the assessing officer. Mere mentioning of the correct description of goods does not absolve the importer from his statutory obligation of declaring the correct value including RSP of the imported goods covered by the bill of entry.

27.3 Thus, from the above facts it can not be said that the importer was not in knowledge of MRP based levy of CVD on the said goods imported by them but they knowingly did not declare RSP of goods with intent to evade payment of appropriate customs duty. Thus, the importer has willfully contravened the provisions of Section 3 of the Customs Tariff Act, 1975, Section 46 of the Customs Act, 1962, Bill of Entry (Forms) Regulations, 1976 and Section 4A of the Central Excise Act, 1944 read with Notification No. 49/2008-CE dated 24.12.2008 as amended by not giving truthful declaration as regard to value including RSP of imported goods in bill entry with intent to evade payment of appropriate duty. Further, such an act of mis-declaration of the value of the goods was a wilful act on the part of importer, as they had the knowledge of MRP based levy of CVD on the goods imported by them. Hence, I am of the considered view that the extended period under proviso to Section 28(4) of the Customs Act, 1962 is invokable in this case for recovery of differential duty short paid on said goods imported by the importer.

(emphasis supplied)

7. Feeling aggrieved, the appellant filed an appeal before the Commissioner (Appeals), which appeal was dismissed by order dated 12.03.2020. The relevant portion of the order is reproduced below:

"5.3 xxxxx The charge of the Mis-declaration and suppression is justified as the appellant knowingly did not declare the RSP/MRP for imports through Courier despite knowing that they were chargeable to RSP/MRP based CVD as they were declaring RSP/MRP for similar imports at Air Cargo, Delhi.

5.4 The appellant has tried to come clean by shifting burden on the courier by stating that they had no role in assessment and the Courier never consulted them. This is a lame excuse as the Courier company acts as per information given by their clients and it was duty of the appellant to inform the Courier company that their products attracted MRP/RSP. The suppression of the facts is evident as the appellant had knowledge of this aspect in as much as they were declaring MRP/RSP for imports through Air Cargo, Delhi but choose not to inform Courier companies in this regard.

5.5 As regards citation of various case laws by the Appellant is concerned, I find that the same have no bearing on the facts and circumstances of the impugned case as the facts are different then that of the case in hand."

(emphasis supplied)

8. This appeal has been filed to assail the aforesaid order dated 12.03.2020 passed by the Commissioner (Appeals).

9. Shri Ashish Batra, learned counsel appearing for the appellant made the following submissions:

(i) The authorized courier agent upon arrival of the goods in India filed the requisite courier Bills of Entry based on the declaration given in the respective invoices issued by the foreign consignor. After being assessed by the proper officer and payment of requisite duty, the goods were delivered to the premises of the appellant and the requite duty was collected by the authorized courier agent from the appellant. As the goods were consigned by the foreign consignor through the courier agents appointed by them, the appellant had no role whatsoever in making any declaration to the Customs Authority. Furthermore, either prior to clearance of goods or later, the authorized courier agent did not take authorization from the appellant. Therefore, the appellant neither had any occasion to deal with the Customs Authority, nor file any declaration before them;

(ii) The extended period of limitation under section 28(4) of the Customs Act, in the facts and circumstances of the case, could not have been invoked as the appellant had no role to play in the assessment of the subject goods; and

(iii) The provisions of Standards of Weights and Measures Act, 1976 were not applicable as they were superseded by the Legal Metrology Act, 2009 w.e.f.

01.04.2011.

10. Shri Nagendra Yadav, learned authorised representative appearing for the Department however, supported the impugned order and contended that it does not call for an interference in this appeal. Learned authorised representative urged that the extended period of limitation contemplated under section 28(4) of the Customs Act was correctly invoked as section 46 of the Customs Act casts an obligation upon an importer to file Bills of Entry and make a truthful declaration of not only the nature and quantity of the goods, but also the value including RSP.

11. The submissions advanced by the learned counsel for the appellant and the learned authorised representative appearing for the Department have been considered.

12. To appreciate the submissions advanced on behalf of the parties, it would be appropriate to reproduce the relevant of provisions of sub-sections (1) and (4) of section 28 of the Customs Act and they are as follows:

"28(1) Where any duty has not been levied or not paid or short-levied or short-paid or erroneously refunded, or any interest payable has not been paid, part-paid or erroneously refunded, for any reason other than the reasons of collusion or any wilful mis-statement or suppression of facts,-

(a) the proper officer shall, within one year from the relevant date, serve notice on the person chargeable with the duty or interest which has not been so levied or paid or which has been short-levied or short-paid or to whom the refund has erroneously been made, requiring him to show cause why he should not pay the amount specified in the notice;

PROVODED that before issuing notice, the proper officer shall hold pre-notice consultation with the person chargeable with duty or interest in such manner as may be prescribed.

(4) Where any duty has not been levied or not paid or has been short-levied or short-paid or erroneously refunded, or interest payable has not been paid, part-paid or erroneously refunded, by reason of, -

(a) collusion; or

(b) any wilful mis-statement; or

(c) suppression of facts,

by the importer or the exporter or the agent or employee of the importer or exporter, the proper officer shall, within five years from the relevant date, serve notice on the person chargeable with duty or interest which has not been so levied or not paid or which has been so short-levied or short-paid or to whom the refund has erroneously been made, requiring him to show cause why he should not pay the amount specified in the notice."

13. A perusal of sub-section (1) of section 28 of the Customs Act shows that

where any duty has been short paid for any reason other than the reasons of collusion or any wilful mis-statement or suppression of facts, the proper officer shall within one year from the relevant date, serve notice on the person chargeable with the duty which has been short paid requiring him to show cause why he should not pay the amount specified in the notice. Sub-section (4) of section 28, however, provides that where any duty has been short paid by reasons of collusion, or any wilful statement, or suppression of facts, the proper officer shall, within five years from the relevant date, serve notice on the person, requiring him to show cause why he should not pay the amount specified in the notice.

14. In the present case, the period involved is from 21.12.2012 to 25.05.2014, but the notice was issued to the appellant on 06.12.2016. It was, therefore, clearly beyond the stipulated period of one year. The show cause notice has, however, invoked the provisions of sub-section (4) of section 28 of the Customs Act and it has been stated that the importer (the appellant) had not disclosed the true facts on the Bills of Entry filed under section 47 of the Customs Act, as it failed to declare that the motor vehicle parts were for trading purposes and not for individual consumption and if this fact was declared on the invoices, the Assessing Officer would have checked and asked for the RSP of the motor vehicle parts before clearing the parts for home consumption. The appellant had, therefore, wilfully not declared the RSP of the imported goods with an intent to evade payment of appropriate customs duty on the imported goods.

15. Learned Counsel for the appellant submitted that it was the courier agent who had, upon arrival of the goods in India, filed the requisite Bills of Entry based on the declaration given in the respective invoices of the foreign consigner and after being assessed by the proper officer, the requisite duty was paid by the courier agent, which duty amount the appellant paid to the authorised courier agent after receiving the goods. Thus, the appellant had no role in making any declaration to the Customs Authority nor the authorised courier agent had taken any authorisation from the appellant prior to the clearance of the goods or later.

16. Learned authorized representative appearing for the Department, however, supported the invocation of the extended period of limitation.

17. It is not in dispute that the Bills of Entry were filed by the courier agent on the basis of the invoices issued by the Foreign Consigner and after assessment by the proper officer, the requisite duty was paid by the courier agent, which duty the appellant paid to the courier agent on receiving the goods. The show cause notice, therefore, proceeded on an incorrect assumption that the appellant had not declared the RSP of the imported goods with intent to evade payment of customs duty on the imported goods. The order passed by the Commissioner (Appeals) also records a finding that the charge of mis-declaration and suppression is justified as the appellant did not declare the RSP for imports through courier despite knowing that they were chargeable to RSP. The Commissioner (Appeals) further recorded a finding that a lame excuse had been

setup by the appellant by shifting the burden to the courier, though it was the duty of the appellant to inform the courier that the goods attracted RSP. The goods were described as motor parts in the Bills of Entry and, therefore, it was the duty of the proper officer to assess them or seek further information before assessment. On assessment by the proper officer, the duty was paid by the courier agent.

18. It is this background that the contention advanced by learned counsel for the appellant regarding invocation of the extended period of limitation has to be examined.

19. The provisions of section 11A of the Central Excise Act, which are pari materia to section 28(4) of the Customs Act came up for interpretation before the Supreme Court in Pushpam Pharmaceuticals Company vs. Collector of Central Excise, Bombay, 1995 (78) E.L.T. 401 (SC). The Supreme Court observed that section 11A empowers the Department to reopen the proceedings if levy has been short levied or not levied within six months from the relevant date but the proviso carves out an exception and permits the authority to exercise this power within five years from the relevant date in the circumstances mentioned in the proviso, one of it being suppression of facts. It is in this context that the Supreme Court observed-

"2. ****** The Department invoked extended period of limitation of five years as according to it the duty was short-levied due to suppression of the fact that if the turnover was clubbed then it exceeded Rupees Five lakhs.

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4. A perusal of the proviso indicates that it has been used in company of such strong works as fraud, collusion or willful default. In fact it is the mildest expression used in the proviso. Yet the surroundings in which it has been used it has to be construed strictly. It does not mean any omission. The act must be deliberate. In taxation, it can have only one meaning that the correct information was not disclosed deliberately to escape from payment of duty. Where facts are known to both the parties the omission by one to do what he might have done and not that he must have done, does not render it suppression."

(emphasis supplied)

20. It is, therefore, clear that the suppression of facts should be deliberate and in taxation laws it can have only one meaning, namely that the correct information was not disclosed deliberately to escape payment of duty.

21. This decision of the Supreme Court in Pushpam Pharmaceuticals was followed by the Supreme Court in Anand Nishikawa Co. Ltd. vs. Commissioner of Central Excise, Meerut, (2005) 7 SCC 749 and the relevant paragraph is as follows:-

"27. Relying on the aforesaid observations of this Court in the case of Pushpam Pharmaceuticals Co. v. CCE we find that "suppression of facts" can have only one meaning that the correct information was not disclosed deliberately to evade payment of duty. When facts were known to both the parties, the omission by one to do what he might have done and not that he must have done, would not render it suppression. It is settled law that mere failure to declare does not amount to wilful suppression. There must be some positive act from the side of the assessee to find willful suppression. Therefore, in view of our findings made hereinabove that there was no deliberate intention on the part of the appellant not to disclose the correct information or to evade payment of duty, it was not open to the Central Excise Officer to proceed to recover duties in the manner indicated in the proviso to Section 11-A of the Act. We are, therefore, of the firm opinion that where facts were known to both the parties, as in the instant case, it was not open to CEGAT to come to a conclusion that the appellant was guilty of "suppression of facts."

(emphasis supplied)

22. In Easland Combines, Coimbatore vs. Collector of Central Excise, Coimbatore, (2003) 3 SCC 410, the Supreme Court observed that for invoking the extended period of limitation, duty should not have been paid because of fraud, collusion, wilful statement, suppression of fact or contravention of any provision. These ingredients postulate a positive act and, therefore, mere failure to pay duty which is not due to fraud, collusion or wilful misstatement or suppression of facts is not sufficient to attract the extended period of limitation.

23. The aforesaid decisions of the Supreme Court were relied upon by the Supreme Court in Uniworth Textiles Ltd. vs. Commissioner of Central Excise, Raipur, 2013 (288) E.L.T. 161 (SC) and the relevant portion of the judgment is reproduced below:

"12. We have heard both sides, Mr. R.P. Batt, learned senior counsel, appearing on behalf of the appellant, and Mr. Mukul Gupta, learned senior counsel appearing on behalf of the Revenue. We are not convinced by the reasoning of the Tribunal. The conclusion that mere non-payment of duties is equivalent to collusion or willful misstatement or suppression of facts is, in our opinion, untenable. If that were to be true, we fail to understand which form of non-payment would amount to ordinary default? Construing mere non-payment as any of the three categories contemplated by the proviso would leave no situation for which, a limitation period of six months may apply. In our opinion, the main body of the Section, in fact, contemplates ordinary default in payment of duties and leaves cases of collusion or wilful misstatement or suppression of facts, a smaller, specific and more serious niche, to the proviso. Therefore, something more must be shown to construe the acts of the appellant as fit for the applicability of the proviso."

(emphasis supplied)

24. The Supreme Court in Continental Foundation Joint Venture vs. Commissioner of Central Excise, Chandigarh, 2007 (216) E.L.T. 177 (SC) also

observed in connection with section 11A of the Central Excise Act, that suppression means failure to disclose full information with intention to evade payment of duty and the observations are as follows:-

"10. The expression "suppression" has been used in the proviso to Section 11A of the Act accompanied by very strong words as "fraud? or "collusion" and, therefore, has to be construed strictly. Mere omission to give correct information is not suppression of facts unless it was deliberate to stop the payment of duty. Suppression means failure to disclose full information with the intent to evade payment of duty. When the facts are known to both the parties, omission by one party to do what he might have done would not render it suppression. When the Revenue invokes the extended period of limitation under Section 11A the burden is cast upon it to prove suppression of fact. An incorrect statement cannot be equated with a wilful misstatement. The latter implies making of an incorrect statement with knowledge that the statement was not correct."

(emphasis supplied)

25. As noticed above, there is no mis-statement or suppression of facts by the appellant. The basic ingredients for invoking the extended period of limitation do not, therefore, stand satisfied. For this reason alone, the order impugned cannot be sustained and is liable to be set aside.

26. It would, therefore, not be necessary to deal with the other submissions advanced by the learned Counsel for the appellant.

27. The order dated 12.03.2020 passed by the Commissioner (Appeals) is, therefore, set aside and the appeal is allowed.

(Pronounced on 11.11.2021)

