(2021) 08 CESTAT CK 0058

In the Customs, Excise And Service Tax Appellate Tribunal

Case No : Customs Appeal No. 373 Of 2006

M/s. Intersales — APPELLANT

Vs

Commissioner Of Central Excise, Bangalore-II — RESPONDENT

Date of Decision : 24-08-2021

Acts Referred:

Customs Act, 1962 — Section 45, 47, 48, 112(a), 129B
Customs, Excise and Service Tax Appellate Tribunal (Procedure) Rules, 1982 — Rule 41
Customs Valuation (Determination of value of Imported Goods) Rules, 2007 — Rule 10(1)(b)

Citation : (2021) 08 CESTAT CK 0058

Hon'ble Judges : S.S. Garg, J;P. Anjani kumar, Technical Member

Bench : Division Bench

Final Decision : Allowed

Judgement

1. The present appeal has been received by way of remand by the Hon'ble High Court of Karnataka vide its order dated 29.1.2021 whereby the Hon'ble High Court has directed the Tribunal to decide the matter afresh specifically adverting to the issue of validity of confiscation proceedings and the consequent sale by the respondent and shall also decide the issue with regard to restitution of value of goods to the appellant.

2. The present appeal is directed against the de novo order passed by the Commissioner vide his order dated 4.5.2006 vide which he rejected the value quoted by the importer and fixed assessable value and also ordered for confiscation of the goods and also appropriated the sale proceeds towards the duty liability and also imposed penalty of Rs.2,00,000/- on the appellant under Section 112(a) of the Customs Act, 1962.

3. Briefly the facts of the present case are that the appellant is the holder of import export code and is engaged in the business of import and export of earth moving equipments. The appellant imported earth moving machinery parts from USA through Bangalore Airport and filed two bills of entry bearing No.004350

and 004354 dated 19.2.1993 for clearance through their customs house agent M/ s. Pavan Enterprises. However, the Officers seized the goods on 19.3.1993 on the allegation that the imported goods have been manufactured by KOMATSU in Japan and the appellant has failed to produce the country-of-origin certificate. The appellant thereafter filed a Writ Petition No.9028/1993 before Hon'ble High Court of Karnataka seeking a direction for release of goods seized during the course of investigation. Hon'ble High Court by an order dated 12.4.1993, ordered for release of goods on provisional basis on payment of appropriate duty determined within two weeks. However, it is the case of the appellant that the aforesaid order was not complied with, by the Department and the Assistant Commissioner of Customs, Bangalore vide communication dated 22.4.1993 determined the duty liability at Rs.29,67,700/- and asked the appellant to execute provisional duty bond for the differential duty of Rs.17,01,610/- with surety. However, no specific order was passed in respect of bills of entry for releasing of the seized goods.

3.1 The appellant vide communications dated 14.06.1993, 27.06.1993 and 30.06.1993 requested the Assistant Commissioner to release the goods immediately. However, no action in the matter was taken. Thereafter, two show-cause notices dated 19.5.1993 were issued to the appellant by the Commissioner of Customs, Bangalore proposing to reject the declared invoice value on the ground of mis-declaration. The appellant filed a common reply on 30.07.1993 in which the allegations in the show-cause notices were denied. The appellant thereafter submitted various documents received from the supplier in USA along with a communication informing that the supplier had extended the discount up to 60% for KOMATSU parts. The Collector of Customs, Bengaluru vide common order dated 4.10.1993 rejected the transaction value of the imported goods and thereby refixed the transaction value by enhancing the same by 50%. The Collector also ordered for confiscation of the imported goods and also imposed penalty of Rs.50,000/- on the appellant. Aggrieved by the order of the Collector, the appellant filed an appeal before the Appellate Tribunal. During the pendency of the appeal, the respondent auctioned the goods on 10.10.2000 for a lesser amount as against the value of goods mentioned in Mahazar which was Rs.28,00,000/- without any notice to the appellant and in violation of the directions issued by the Hon'ble High Court to release the goods in favour of the appellant on provisional basis. This Tribunal vide order dated 30.1.2002, remitted the matter with a direction to re-consider the issue afresh on the ground of not considering the issue of country of origin supported by the certificate issued by the distributors / suppliers. The appellant, after remand, field written statement on 2.4.2004. the Commissioner of Customs, Bangalore vide order dated 1.05.2006 upheld the earlier order and enhanced the penalty from Rs.50,000/- to Rs.2,00,000/-. The appellant being aggrieved by the order of the Commissioner, filed an appeal along with the application for stay before this Tribunal. The Tribunal vide order dated 5.10.2016 dismissed the appeal preferred by the appellant on the ground that the Tribunal has no power to order for compensation under the appellate jurisdiction. Thereafter, the appellant filed appeal challenging the Final Order of the Tribunal before the Hon'ble High Court of Karnataka and the Hon'ble Karnataka High Court vide its order dated 29.1.2021 remanded the appeal with a direction to decide the issue afresh by adverting to the issue of validity of confiscation proceedings and consequent sale by the Department and also decide the issue with regard to restitution of value of goods to the appellant.

4. Heard both the parties and perused the records.

5. Learned counsel for the appellant submitted that the impugned order is not sustainable in law and the same has been passed without properly appreciating the facts and the law and the binding judicial precedent on identical issue. He further submitted that the imported goods having been auctioned without prior notice to the appellant especially when the said goods were under the custody of the Customs Officer for assessment and clearances for home consumption, the question of payment of duty does not arise. Consequently, it is not necessary to deal with the issue of undervaluation in the present case except to decide the issue of refund of the value of auctioned goods. He further submitted that in terms of Section 45 of the Customs Act, 1962, the goods imported and unloaded in a customs area are in the custody of the customs officer until they are cleared for home consumption. Further as per provisions of Section 47 of the Customs Act, 1962 which provides for payment of duty only on assessment of goods by the proper officer whereas in the present case, the goods were not assessed and hence, the question of going into the issue of under valuation is uncalled for as the goods being not available for assessment and home clearance, the question of assessment does not arise. He further submitted that even if the duty is payable on the imported goods, the same should be adjusted from the value of the goods auctioned. In the present case, the department having determined the value of the imported goods at Rs.28,26,001/- without including the custom duty payable on it and having auctioned the goods without the knowledge of the appellant should refund the value as determined. He further submitted that merely because the department has auctioned the goods for lesser price that by itself will not disentitle the appellant from claiming refund of value of the goods. He also submitted that in normal circumstances where the goods are available for home clearance, the appellant would have paid customs duty in addition to the value of the goods determined and got the goods cleared for home consumption. But in the present case, the goods having been auctioned in terms of Section 48 of the Customs Act, 1962, the goods should have been auctioned not below the price determined plus the duty payable thereon considering the fact that the imported goods are neither perishable in nature nor have been auctioned after confiscation to appropriate the amount towards duty liability or penalty. In such circumstances, the entire value of the goods as determined by the Customs authority has to be refunded to the appellant without any deduction. In support of this submission, he relied upon the decision of the apex court in the case of Northern Plastics Ltd. vs. CC & CE reported in 1999 (113)

ELT 3 (SC). He also submitted that the department having auctioned the goods, it is deemed that the value of the goods auctioned should be treated as inclusive of duty as the value determined for the purpose of assessment by the adjudicating authority was without customs duty and the same is always payable by the importer only after assessment. He further made submission that the auction of the goods illegally for a lesser value will not entitle the department to recover or adjust the amount from the auctioned value as the auctioned value of the goods should always be the value of the goods determined plus the duty. He also submitted that the department having illegally auctioned the goods in contravention of the provisions of Section 48 of the Customs Act, 1962 is neither entitled for claiming duty nor the penalty for violation / contravention, if any, on the part of the appellant as the goods have never been assessed for any duty or penalty payable by the appellant. Hence, the appellant is entitled for return of the value of the imported goods as determined by the department along with interest. Learned counsel also made submissions regarding the allegation of undervaluation made by the department and submitted that there was no undervaluation of the imported goods as there was no examination or inspection report or Mahazar conducted on the goods nor was anything communicated to the appellant to prove the same and without such a document, the entire allegation of the department with regard to the origin of goods and consequent, allegation of undervaluation is highly unsustainable in law especially when the certificate of origin was subsequently produced and was accepted by the Tribunal while remanding the appeal back to the adjudicating authority to consider the certificate of origin. He further submitted that mere allegation of undervaluation would not be sufficient to prove the case as it is well settled law that the burden is cast on the department to prove its case and mere allegation in the show-cause notice would not be sufficient to prove undervaluation. He further submitted that the goods imported by the appellant are partly manufactured at USA and partly at Japan and the goods were supplied only from USA by M/s. Heldean Inc., USA and not from Japan which is further supported by the letter dated 15.9.1992 addressed from M/s. Roland Machinery Co., who is the authorised distributor of Komatsu Dresser Co., USA which reveal that the goods were supplied from USA. He further submitted that the learned Commissioner erred in rejecting the certificate of origin without verifying personally the goods and also without giving credence to the certificate of origin which has not been proved to be false. Further, adopting the price of BEML is highly unsustainable in law especially when BEML is engaged in manufacturing of Komatsu parts and their agreement is different from the appellant's transaction. He also submitted that the trade discount of 56% and 51% cleared is not comparable as in several decisions it was held that it is not unusual for a foreign supplier to give higher discount to an importer who is importing large quantity and merely because higher discount has been given, it cannot be said that there has been any undervaluation in the invoice. For this, he relied upon the following decisions:

? Zeneith Steel Pipes and Industries: 1995 (80) ELT 886

? CCE vs. STP Ltd.: 2003 (59) RLT 456

? Mirah Exports Pvt. Ltd. vs. CC: 1998 (98) ELT 3 (SC)

? Indian Farmers Fertiliser Co.op Ltd. vs. CCE, Bhubaneswar-I: 2010 (252) ELT 523 (Tri.- Kolkata)

? Exide Industries vs. CC (I), Mumbai: 2010 (252) ELT 447 (Tri.-Mum.)

? Eicher Tractors Ltd. vs. CC, Mumbai: 2000 (122) ELT 321 (SC)

5.1 Further, the learned counsel submitted that the Tribunal in the present facts and circumstances has the power to grant refund of auctioned goods. The goods worth Rs.28,26,001/- was seized on the allegation of mis-declaration of country of origin and undervaluation and the same has been auctioned by the department for Rs.20,000/- in a haste manner that too without prior notice and without seeking permission of the Tribunal where the appeal was pending on the date of auction. Since the issue was sub-judice as on the date of auctioning of the seized goods, the responsibility is cast on the department to refund the value of the imported goods as determined by the Department. He also submitted that it is settled law that once the goods are seized / confiscated and the proceedings against the same are pending before any authority or Court, then the only option available to the department is to obtain necessary permission from the Court before whom the proceeding are pending and also issue notice to the assessee (from whose possession the goods have been seized) before auctioning the goods. The learned counsel referred to the decision of the apex court as well as various courts which have held that once the goods have been auctioned during the pendency of the proceeding without prior permission and without issuance of notice to the assessee, then the assessee is not liable to pay any amount of duty, interest and penalty and on the other hand, entitled to get back the mahazar value as determined by the department of the original goods. In this regard, he has relied upon the following decisions:

? CC, Bangalore vs. Md. Yaseen: 2010 (255) ELT 50 (Kar.)

? Ship Impex vs. UOI: 2001 (128) ELT 54 (Del.)

? Northern Plastics vs. Commissioner: 1999 (113) ELT 3 (SC)

? Kailash Ribbon Factory Ltd. vs. CC & CE, New Delhi: 2002 (13) ELT 60 (Del.)

? CC, Amruthsar vs. Harinder Singh: 2008 (221) ELT 203 (P & H) affirmed by the Supreme Court in Commissioner vs. Harinder Singh: 2008 (227) ELT A31 (SC)

? Sufal Dutta vs. CC (Prev.), WB: 2004 (167) ELT 283 (Tri.- Kolkata)

? CC, Allahabad vs. Pidilite Industries Ltd.: 2007 (212) ELT 38 (Tri. - Del.) affirmed by the Allahabad High Court in CC, Uttarpradesh & Uttaranchal vs. Pidilite Industries Ltd.: 2014 (309) ELT 598 (All.)

? Rang Birajgi Sarees (P) Ltd. vs. ADC: 2011 (265) ELT 26 (Cal.)

? Bhogilal Mehta vs. Union of India: 2004 (164) ELT 239 (Cal.)

? Commissioner vs. Ratan Kumar Saha: 2005 (189) ELT 11 (Cal.)

5.2 Learned counsel also submitted that this Tribunal has got enormous power in terms of Section 129B of the Customs Act, 1962 read with Rule 41 of the Customs, Excise and Service Tax Appellate Tribunal (Procedure) Rules, 1982 to order for refund of the mahazar value / value as determined by the department under the appellate jurisdiction by virtue of the inherent powers conferred under the provisions of Rule 41 of the CESTAT (Procedure) Rules, 1982. For this submission, he relied upon the decision of the Tribunal in the case of Golden Hind Shipping (India) Private Limited vs. Collector of Central Excise reported in 1993 (65) ELT 613 (Tribunal) and B. Arun Kumar & Co. vs. Commissioner of Customs reported in 2005 (180) ELT 152 (Cal.).

6. On the other hand, the learned Authorised Representative reiterated the findings of the impugned order and she further submitted that in the present case, the importer could not produce the country-of-origin certificate as required under Rule 10 Clause 1(b) of the Customs Valuation Rules. She further submitted that after the decision of the Hon'ble High Court dated 12.4.1993, the department informed the importer to get the goods cleared by executing a PD Bond but the party did not respond to the same despite High Court order. She further submitted that the Tribunal vide its Final Order No.129/2002 dated 31.1.2002 remanded the matter back to the original authority to examine the issue afresh with regard to the country of origin and the same was dealt with by the Commissioner in the de novo order dated 1.5.2006. Regarding the sale / auction by the department, the learned AR submitted that in spite of their best efforts they could not find out the records pertaining to the auction / sale of the seized goods and in the absence of the records, she is unable to submit as to whether the procedure was followed or not. Regarding restitution of value of the goods to the appellant, the learned AR submitted that on account of space constraint, the department had no other option but to sell the seized goods and in the absence of records, the circumstances leading to disposal cannot be ascertained and the veracity of party's claim, that the department sold goods without intimation and without approval, cannot be ascertained. She also referred to certain decisions and tried to distinguish the decisions relied upon by the appellant.

7. After considering the submissions of both the parties and perusal of the material on record and the various decisions relied upon by both the parties, we find that in the present case, since the goods have been auctioned during the pendency of the appeal before the Tribunal and the said seized goods are not available for redemption, therefore, at this stage, the question of going into the issue of undervaluation is not required as the goods being not available for assessment and home clearance, hence the question of assessment does not arise. Precisely, for this reason, the learned counsel for the appellant has even though made submissions on undervaluation but did not press the issue of

undervaluation and has only confined to the restitution of value of the seized goods along with interest. This is the third round of litigation before the Tribunal and in the first round of litigation, the Tribunal vide Final Order No.129/2002 dated 31.1.2002 had categorically observed the contention of the appellant with regard to the goods of mixed origin which should be verified by the certificate of country of origin submitted by the appellant and remanded the matter back to the original authority to decide the issue afresh. Further, we find that it is not in dispute that the goods worth Rs.28,26,001/- seized on the allegation of mis-declaration of the country of origin and undervaluation have been auctioned by the department for Rs.20,000/- in a very haste manner and that too without prior notice and without seeking permission from the Tribunal when the appeal was pending before the Tribunal on the date of auction. Further, we find that it is a settled law as held in various decisions relied upon by the appellant cited supra that once the goods are seized or confiscated and the proceedings against the same are pending before the authority / Court then the only option available to the department is to obtain necessary permission from the court before whom the proceedings are pending and also to issue notice to the assessee from whose possession goods have been seized before auctioning the goods. In this regard, I rely upon the decision of Shilp Impex vs. UOI: 2001 (128) ELT 54 (Del.) wherein it has been held that the assessee is entitled to receive the value of the goods as fixed by the department when the goods have been auctioned / sold by the department without notice at much lesser price than the one declared by the assessee and much less than the value of the goods adjudicated by the authorities. This decision of the Tribunal has been upheld by the Hon'ble apex court in Shilp Impex vs. UOI: 2002 (140) ELT 3 (SC). Further, in the case of CCE, Allahabad vs. Pidilite Industries Ltd.: 2007 (212) ELT 38 (Tri. - Del.), the Tribunal set aside the order of confiscation of the seized goods without issuing the notice to the assessee. The said decision of the Tribunal was upheld by the High Court of Allahabad as reported in 2014 (309) ELT 598 (All.) wherein in para 6 and 7, the Hon'ble High Court has held as under:

"6. It may be mentioned that Hon'ble Supreme Court in the case of Northern Plastics Ltd. v. Collector of Customs & Central Excise - 1999 (113) E.L.T. 3 (S.C.) as well as in the case of Shilp Impex v. U.O.I. - 2002 (140) E.L.T. 3 (S.C.) held that during the pendency of the appeal confiscated goods could not have been auctioned without prior permission of the appellate court.

7. In the instant case, the matter was sub judice before the appellate court, but the Department in a haste manner has disposed of the goods without seeking permission from the appellate court where the matter was sub judice. Thus, the Department has committed a serious blunder by auctioning the goods which was a subject matter of an appeal and without prior permission of the appellate court, is not permissible to sale the same, as per the case laws and the circulars which have already been discussed by the appellate authority in their orders."

7.1 Further, in the case of Northern Plastics Ltd. vs. CC & CE: 1999 (113) ELT 3

(SC) cited supra, the Hon'ble Supreme Court observed that the department cannot be permitted to take advantage of its own wrong especially when they have auctioned the goods during the pendency of the proceedings before the apex court. Consequently, directed the department to refund the value of the goods.

7.2 Further, we find that this Tribunal has inherent power under Rule 41 of CESTAT (Procedural) Rules, 1982 to pass any order or direction to secure the ends of justice and that power has also been upheld by various decisions cited supra by the appellant. Therefore, in view of the settled position of law as observed above, we are of the considered view that the impugned order is not sustainable in law and we set aside the same by allowing the appeal of the appellant and direct the department to pay the assessed value along with interest as prescribed under law till the date of refund. Since the issue pertains to the year 1993, we direct the department to quantify the interest within a period of three months and return the value of the imported goods as determined by the department along with interest. The appeal is accordingly disposed of.

(Order was pronounced in Open Court on 24/08/2021.)

