

(2024) 06 CESTAT CK 0009

In the Customs, Excise And Service Tax Appellate Tribunal

Case No : Customs Appeal No.40256 Of 2023

M/S. Scania Commercial Vehicles India Pvt. Ltd

APPELLANT

Vs

Commissioner Of Customs

RESPONDENT

Date of Decision : 07-06-2024

Acts Referred:

Central Excise Rules, 1944 — Rule 173Q
Customs Act, 1962 — Section 2(33), 11, 49, 112, 112(a), 111(d), 125, 125(1)
Imports And Exports (Control) Act, 1947 — Section 3
Central Excise Act, 1944 — Section 11A(2), 11AC

Citation : (2024) 06 CESTAT CK 0009

Hon'ble Judges : M. Ajit Kumar, Member (T)

Bench : Single Bench

Advocate : Ganesh Aravindh, M. Selvakumar

Final Decision : Dismissed

Judgement

M. Ajit Kumar, Member (T)

1. This appeal is filed by M/s. Scania Commercial Vehicles India Pvt. Ltd. against Order in Appeal Seaport C. Cus. II No. 118/2023 dated 2.3.2023 passed by the Commissioner of Customs (Appeals – II), Chennai (impugned order).

2. Brief facts of the case are that the appellant have an automobile manufacturing facility at Narasapura, Karnataka. The appellant is specialized in manufacture of truck, bus, automobile engines etc. The appellant filed Bills of Entry (BE) for import of eight diesel engines and one industrial engines for home consumption and deposited customs duty of Rs.36,59,136/- which was self-assessed provisionally in view of the import being from a related party supplier. The imported engines were found not to be supported by Type Approval Certificate and the Certificate of Conformity of Production as prescribed under the Environmental Protection Rules, 1986 (EPR 1986). Since the appellant could not furnish the certificates from the supplier, they vide their communication dated 30.3.2022 opted for amendment of the BE from home consumption to

warehousing in terms of section 49 of the Customs Act, 1962 (CA 1962) and requested for re-export of the diesel engines. The appellants vide letter dated 30.5.2022 requested the adjudicating authority to adjudicate the subject issue and waived issuance of Show Cause Notice. After due process of law, the adjudicating authority confiscated the 8 diesel engines and one industrial engine imported vide Bill of Entry dated 4.12.2021 and allowed redemption of the said goods on payment of fine of Rs.8 lakhs for the purpose of re-export as requested within a period of 60 days. The adjudicating authority also imposed penalty of Rs. 3 lakhs on the appellant. The appellants paid the redemption fine and penalty under protest as they were incurring heavy demurrage charges. The appellants filed an appeal before Commissioner (Appeals) who vide the impugned order rejected the appeal and allowed 30 days' time for re-exporting the goods. Hence the appeal before this Tribunal.

3. Shri S. Ganesh Aravind, learned counsel appeared for the appellant and Shri M. Selvakumar, learned Assistant Commissioner (AR) appeared for the respondent.

4. The learned Counsel for the appellant submitted that consequent to the issue of Order in Original dated 14.09.2022 they filed an appeal dated 09.11.2022 before Ld. Commissioner of Customs (Appeals) challenging the Order. Parallely, they vide letter dated 14.11.2022 requested the department to permit the export of the imported goods to an FTWZ warehousing and from there to M/s. Scania, Singapore. However, the department vide letter dated 28.11.2022 rejected their request and directed them to re-export the impugned goods from the port of import itself. An Appeal was filed against the letter dated 28.11.2022 also. The Ld. Commissioner (Appeals) passed two Orders-in-Appeal namely Order-in-Appeal No. 118/2023 dated 01.03.2023 and Order-in-Appeal No. 119/2023 dated 01.03.2023. With respect to Order-in-Original dated 14.09.2022, the Ld. Commissioner (Appeals) confirmed the imposition of redemption fine and penalty but permitted re-export of the imported goods within 30 days from the date of order of the Order-in-Appeal dated 09.11.2022. With respect to the Appeal filed against letter dated 28.11.2022, the Ld. Commissioner (Appeals) remanded the matter back to the adjudicating to decide on the request made by the Appellant to export the goods to an FTWZ. Pursuant to Order-in-Appeal No. 118/2023 dated 01.03.2023, the Appellant re-exported the goods vide Shipping Bill No. 8573371 dated 18.03.2023. He stated that it is a settled position of law that no redemption fine is imposable on the goods that are re-exported. Reliance in this regard was placed on;

(a) Siemens Limited v. Collector of Customs [1999 (113) E.L.T. 776 (S.C.)].

(b) Sankar Pandi v. Union of India [2002 (141) E.L.T. 635 (Mad.)], upheld by the Hon'ble Supreme Court in Union of India v. Sankar Pandi [2018 (360) E.L.T. A214 (S.C.)].

(c) Tribunal in the case of M.K.A. Chinnasamy Nadar & Sons v. CC, Tuticorin

[2021 (378) E.L.T. 511 (Tri. - Chennai)]

(d) M/s. Akshara & Co. v. CC, Chennai [2022 (3) TMI 825 – CESTAT CHENNAI]

(e) Royal Import and Exports v. CC, Tuticorin [2021 (377) E.L.T. 865 (Tri. - Chennai)]

(f) Selvam Industries Ltd., v. Commissioner of Customs, Tuticorin reported in 2021 (377) ELT 458 (Tri Chennai)

(g) Lalkamal Enterprises v. Commissioner of Customs, Chennai I reported in 2018 (364) ELT 856 (Tri Chennai)

He further submitted that when the goods have been re-exported, the question of confiscation of goods under Section 111(d) of the Customs Act, 1962 does not arise and when there is no question of confiscation, redemption fine under Section 125 and penalty under Section 112(a) cannot be imposed. For which he relied on;

(h) Skylark Office Machines v. Commissioner of Customs, Chennai [2020 (374) E.L.T. 99 (Tri. - Chennai)]

(i) M/s. SDS Ramcides Crop Science Pvt. Ltd. v. CC, Chennai II [2023 (7) TMI 891 - CESTAT CHENNAI]

He hence prayed that the impugned order may be set aside.

5. The learned AR supported the findings in the impugned order. He drew attention to the Larger Bench decision of this Tribunal in Hemant Bhai R. Patel Vs Commissioner Of Customs [2003 (153) ELT 226 (Tri-LB)], wherein it was held that the Adjudicating Authority had powers to impose redemption fine and penalty even when re-export was permitted. He hence prayed that the impugned order merits to be upheld.

6. Heard both sides. The question that needs to be answered is whether;

A) when the goods have been re-exported, the question of confiscation of goods under Section 111(d) of the CA 1962 arises.

B) no redemption fine is imposable on the goods that are re-exported.

B) no penalty under Section 112(a) can be imposed when goods are re-exported.

We shall examine the issues below.

When the goods have been re-exported, the question of confiscation of goods under Section 111(d) of the Customs Act, 1962 does not arise?

7. We find that this is a case where the appellant had imported eight diesel engines and one industrial engine on 04.12.2021. The imported goods being Diesel Engines were found not to comply with the provisions of Sr No 95 of Schedule I of the EPR 1986, as amended. Due to their inability to produce the

requisite certificates and comply with the mandatory provisions of import, the appellant requested that the matter may be adjudicated.

8. Para 10 and 11 of the adjudication order dated 14/09/2022 passed in the matter, which is self-explanatory are reproduced below;

"10. The Power Generating Engines (Generator Sets) which are imported vide the Subject Bill of Entry falls within the range of 225 kW to 257 kW which is covered by the GSR 771 (E) amended vide GSR 232(E) which mandates Type- Approval and COP certificates for the imported Generator Sets. However, the importer has not produced any Type Approval or COP certificates. Hence, I find that as per GSR 771(e) dated 11.12.2013 it is clear that import of diesel engine for genset application, manufactured or imported into India or, diesel genset assembled or imported into India requires Type Approval and needs to comply with COP of their product(s) for the emission limits as per Environment (Protection) (Third Amendment) Rules, 2013 under Environment Protection Act, 1986.

11. In view of the above, the goods namely, "Diesel Engines"/ "Industrial Engines" of assessable value of Rs.94,89,462/- imported vide under Bills of Entry Nos. 6529513 / 04.12.2021 are liable for confiscation under Section 111(d) of the Customs Act, 1962. The importer has requested for re-export of these goods and I give the option of re-export as the goods cannot be allowed to be cleared into the country."

9. Goods become liable to confiscation if the Importer or Exporter contravenes any of the provisions of the CA 1962 or any other Act for the time being in force in relation to the importation and exportation of goods. In this case the goods were imported in contravention of the provisions of the EPA, 1986. They were hence 'prohibited goods'.

10. The Hon'ble Supreme Court in M/s Om Prakash Bhatia Vs. Commissioner of Customs, New Delhi [(2003) 6 SCC 161], after examining the term "prohibited goods" as defined in Section 2(33) of the CA 1962, held as under;

"From the aforesaid definition, it can be stated that (a) if there is any prohibition of import or export of goods under the Act or any other law for the time being in force, it would be considered to be prohibited goods; and (b) this would not include any such goods in respect of which the conditions, subject to which the goods are imported or exported, have been complied with. This would mean that if the conditions prescribed for import or export of goods are not complied with, it would be considered to be prohibited goods. This would also be clear from Section 11 which empowers the Central Government to prohibit either 'absolutely' or 'subject to such conditions' to be fulfilled before or after clearance, as may be specified in the notification, the import or export of the goods of any specified description. The notification can be issued for the purposes specified in sub-section (2). Hence, prohibition of importation or exportation could be subject to certain prescribed conditions to be fulfilled before or after clearance of goods. If conditions are not fulfilled, it may amount to prohibited goods. This is also

made clear by this Court in *Sheikh Mohd. Omer v. Collector of Customs, Calcutta and Others* [(1970) 2 SCC 728] wherein it was contended that the expression 'prohibition' used in section 111 (d) must be considered as a total prohibition and that the expression does not bring within its fold the restrictions imposed by clause (3) of the Import Control Order, 1955. The Court negated the said contention and held thus:—

"... What clause (d) of Section 111 says is that any goods which are imported or attempted to be imported contrary to "any prohibition imposed by any law for the time being in force in this country" is liable to be confiscated. "Any prohibition" referred to in that section applies to every type of "prohibition". That prohibition may be complete or partial. Any restriction on import or export is to an extent a prohibition. The expression "any prohibition" in section 111 (d) of the Customs Act, 1962 includes restrictions. Merely because Section 3 of the Imports and Exports (Control) Act, 1947, uses three different expressions "prohibiting", "restricting" or "otherwise controlling", we cannot cut down the amplitude of the word "any prohibition" in Section 111(d) of the Act. "Any prohibition" means every prohibition. In other words all types of prohibitions. Restriction is one type of prohibition. . ."

11. In *Union of India v. Raj Grow Impex LLP* [2021 (377) E.L.T. 145 (S.C.)], the Hon'ble Supreme Court examined the issue of absolute confiscation of prohibited goods and stated as under;

"Whether the goods in question are liable to absolute confiscation?

69. Once it is clear that the goods in question are improperly imported and fall in the category of 'prohibited goods', the provisions contained in Chapter XIV of the Customs Act, 1962 come into operation and the subject goods are liable to confiscation apart from other consequences. Having regard to the contentions urged and the background features of these appeals, the root question is as to how the goods in question are to be dealt with under Section 125 of the Customs Act? The relevant part of Section 125 of the Customs Act reads as under :-

Section 125(1) of the Customs Act, 1962

"125. Option to pay fine in lieu of confiscation. - (1) Whenever confiscation of any goods is authorised by this Act, the officer adjudging it may, in the case of any goods, the importation or exportation whereof is prohibited under this Act or under any other law for the time being in force, and shall, in the case of any other goods, give to the owner of the goods or, where such owner is not known, the person from whose possession or custody such goods have been seized, an option to pay in lieu of confiscation such fine as the said officer thinks fit :

xxxx xxxx xxxx"

69.1 A bare reading of the provision aforesaid makes it evident that a clear distinction is made between 'prohibited goods' and 'other goods'. As has rightly been pointed out, the latter part of Section 125 obligates the release of

confiscated goods (i.e., other than prohibited goods) against redemption fine but, the earlier part of this provision makes no such compulsion as regards the prohibited goods; and it is left to the discretion of the Adjudicating Authority that it may give an option for payment of fine in lieu of confiscation. It is innate in this provision that if the Adjudicating Authority does not choose to give such an option, the result would be of absolute confiscation”.

(emphasis added)

Hence as stated by the Hon’ble Supreme Court due to a distinction made between ‘prohibited goods’ and ‘other goods’ under Section 125(1) of the CA 1962, while confiscation was a requirement of section 111(d), there is no compulsion to allow redemption of prohibited goods. This means that it is left to the discretion of the Adjudicating Authority that it may give an option for payment of fine in lieu of confiscation or it may confiscate the goods absolutely.

12. The question raised by the appellant that when the goods have been re-exported, the question of confiscation of goods under Section 111(d) of the CA 1962 does not arise, is like putting the cart before the horse. Confiscation of offending goods under section 111(d) is an action precedent to allowing the same to be redeemed under section 125 of the CA 1962. The permission for export of prohibited goods that have been confiscated and redeemed, is an administrative order emanating from the importers request for re-export of the goods and is not flowing from Section 125 of the CA 1962. It comes into operation only after the importer gets back title to the confiscated goods on paying the redemption fine. That the permission for re-export has been bundled and passed in a quasi-judicial order pertaining to the confiscation and redemption of goods is only for administrative convenience. Further it gives certainty to the action the importer is permitted to take post redemption of the goods. It also makes it easier for the importer, who does not have to file a fresh application for export post redemption of the goods and await an uncertain outcome. The exercise of such powers by the Proper Officer finds approval from the Apex Court. The Hon’ble Supreme Court in *Hirday Narain vs Income-Tax Officer, Bareilly* [1971 SCR (3) 683 / AIR 1971 SC 33] held that;

“If a statute invests a public Officer with authority to do an act in a specified set of circumstances, it is imperative upon him to exercise his authority in a manner appropriate to the case when a party interested and having a right to apply moves in that behalf and circumstances for exercise of authority are shown to exist. Even if the words used in the statute are *prima facie* enabling the Courts will readily infer a duty to exercise power which is invested in aid of enforcement of a right -public or private-of a citizen.

In *Julius v. Bishop of Oxford* it was observed by Cairns, L.C., at pp. 222-223 that the words "it shall be lawful" conferred a faculty or power, and they did not of themselves do more than confer a faculty or power. But there may be something in the nature of the thing empowered to be done, something in the object for

which it is to be done, something in the conditions under which it is to be done, something in the title of the persons for whose benefit the power is to be exercised, which may couple the power with a duty, and make it the duty of the person in whom the power is reposed to exercise that power when called upon to do so." Lord Blackburn observed in the same case at pp. 244-245 that the enabling words give, a power which prima facie might be exercised or not, but if the .object for which the power is conferred is for the purpose of effectuating a right there may be a duty cast upon the donee of the power to exercise it for the benefit of those who have that right when required on their behalf." (emphasis added)

13. When goods are imported in breach of statutory provisions, Section 111(d) of the CA 1962 squarely applies as the goods become offending goods liable for confiscation. Confiscation of goods in the situation of a statutory breach by imported 'prohibited goods', is not discretionary. Section 111(d) of the CA 1962 reads as under;

111. Confiscation of improperly imported goods, etc.

- The following goods brought from a place outside India shall be liable to confiscation:-

(d) any goods which are imported or attempted to be imported or are brought within the Indian customs waters for the purpose of being imported, contrary to any prohibition imposed by or under this Act or any other law for the time being in force;

In its judgment in *Zunjarrao Bhikaji Nagarkar v. Union of India* [1999 (112) E.L.T. 772 (S.C.)], the Hon'ble Supreme Court examined the meaning of the word "liable" in the context of section 11AC of the Central Excise Act, 1944 ("the person who is liable to pay duty as determined under sub-section (2) of section 11A shall also be liable to pay a penalty equal to the duty so determined :") and Rule 173Q of the Central Excise Rules, 1944, ("then, all such goods shall be liable to confiscation and the manufacturer, producer, registered person of a warehouse or a registered dealer, as the case may be, shall be liable to a penalty."), which are similar to the context in this case. The Hon'ble Court held as under;

30. . . . What is the significance of the word "liable" used both in Rule 173Q and Section 11AC? Under Rule 173Q apart from confiscation of the goods the person concerned is liable to penalty. Under Section 11AC the word "also" has been used but that does not appear to be quite material in interpreting the word "liable" and if liability to pay penalty has to be fixed by the adjudicating authority. The word "liable" in the Concise Oxford Dictionary means, "legally bound, subject to a tax or penalty, under an obligation". In Black's Law Dictionary (sixth edition), the word "liable" means, "bound or obliged in law or equity; responsible; chargeable; answerable; compellable to make satisfaction, compensation, or restitution.... Obligated; accountable for or chargeable with. Condition of being bound to

respond because a wrong has occurred. Condition out of which a legal liability might arise.... Justly or legally responsible or answerable.”

31. When we examine Rule 173Q it does appear to us that apart from the offending goods which are liable to confiscation the person concerned with that shall be liable to penalty up to the amount specified in the Rule. It is difficult to accept the argument of the appellant that levy of penalty is discretionary. It is only the amount of penalty which is discretionary. Both things are necessary : (1) goods are liable to confiscation and (2)) person concerned is liable to penalty.”

(emphasis added)

Hence there is no discretion with the Proper Officer, not to confiscate goods that are found liable to such action as per section 111(d) of the CA 1962. As per the discussion above the Customs Act only provides a distinction between ‘prohibited goods’ and ‘other goods’ under Section 125(1) of the CA 1962 for the purpose of allowing redemption of the goods.

14. From the discussions it is clear that an order permitting re-export of goods is sequentially a separate process which would come into play only after the importer redeems the confiscated goods. Simply because the decision is bundled along with a quasi-judicial order will not change the sequence of events. This being so confiscation of goods under Section 111(d) of the CA 1962 is a must before the administrative permission for the export of the said goods is given at the administrative discretion of the Proper officer. Appellants averment in this regard are hence rejected.

No redemption fine is imposable on the goods that are re-exported.

15. The appellant has stated that it is a settled position of law that no redemption fine is imposable on the goods that are re-exported. We find that once goods are imported in contravention of any provisions of the CA 1962 they are liable for confiscation. Any breach of a statutory obligation under the Customs Act is a blameworthy conduct by the assessee. In case the goods involved are ‘prohibited goods’ it is within the discretion of the Proper Officer to absolutely confiscate the goods or to allow it to be redeemed on payment of a fine. To release prohibited goods without imposing a fine is not a valid option. After the appellant informed the Proper Officer that they were not in a position to fulfill the conditions of EPR 1986, it was incumbent on the Officer to confiscate the prohibited goods imported in violation of the said Rules. Once the offending goods are confiscated the title of the goods comes to be held by government and the mechanism for the importer to get back possession of the goods is by paying a redemption fine as decided by the Proper Officer. Hence the goods can only be taken repossession of with title by the importer, if he pays a fine.

16. The appellant has stated that it is a settled position of law that no redemption fine is imposable on the goods that are to be re-exported. We have earlier seen that for the Proper Officer to allow the redemption of prohibited

goods is part of his discretionary jurisdiction. No court has laid down the law that prohibited goods, imported without authorization, are to be released for re-export without payment of redemption fine. Such a stance would only encourage importers smuggling / making improper import of goods, to take a chance with the law and if caught request for re-export of the offending goods without a fine. It would also be discriminatory that for the same offence the intended nature of clearance of the confiscated goods would determine the imposition of fine i.e. if the offending goods are cleared for home consumption fine is to be imposed and if the importer requests for its export, no fine can be imposed. The position is legally untenable. The offence does not get cured by the intended destination of the goods. Confiscated goods can be redeemed either for home consumption / warehousing or for export only on payment of a fine. I find that the impugned order is legal and proper and no interference in the discretion exercised by the Proper Officer is called for. The Hon'ble Supreme Court in its judgment in Duncan Industries Ltd. and Anr Vs Union of India [AIR 2006 SC 3699 / 2006 (3) SCC 129] held as under;

"We are broadly in concurrence with the reasoning of the High Court that in matters of administrative discretion it is not open to the courts to interfere in minute details, except on grounds of mala fides or extreme arbitrariness. Interference should be only within very narrow limits, such as, where there is a clear violation of a statute or a constitutional provision, or extreme arbitrariness in the Wednesbury sense."

The appellants averments in this regard are hence rejected.

No penalty under Section 112(a) cannot be imposed when goods are re-exported.

18. A penalty is the result of a breach of statutory duty. The main object behind the imposition of penalty is deterrence. Re-export of the goods does not cure the breach of statutory duty already committed. While a fine is imposed on the redemption of offending goods imported in breach of law, a penalty is levied on a person responsible for the breach of statutory duty. No interfere should ordinarily be made by an appellate body, in the discretionary order passed by a lower authority, just because another view might be possible, except on grounds of mala fides or extreme arbitrariness. No such ground has been made out in this case. Hence this plea also does not have any merit and is rejected.

Judgments

19. We shall next examine the judgments cited by the appellant. Reliance is placed by them in this regard on the following judgments;

(a) Siemens Limited v. Collector of Customs [1999 (113) E.L.T. 776 (S.C.)].

(b) Sankar Pandi v. Union of India [2002 (141) E.L.T. 635 (Mad.)], upheld by the Hon'ble Supreme Court in Union of India v. Sankar Pandi [2018 (360) E.L.T. A214 (S.C.)].

(c) M.K.A. Chinnasamy Nadar & Sons v. CC, Tuticorin [2021 (378) E.L.T. 511 (Tri. - Chennai)]

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(f) Selvam Industries Ltd., v. Commissioner of Customs, Tuticorin reported in 2021 (377) ELT 458 (Tri Chennai)

(g) Lalkamal Enterprises v. Commissioner of Customs, Chennai I reported in 2018 (364) ELT 856 (Tri Chennai)

(h) Skylark Office Machines v. Commissioner of Customs, Chennai [2020 (374) E.L.T. 99 (Tri. - Chennai)]

(i) M/s. SDS Ramcides Crop Science Pvt. Ltd. v. CC, Chennai II [2023 (7) TMI 891 - CESTAT CHENNAI]

20. As regards the judgments, the appellant has stated that as per the decision of the Hon'ble Supreme Court in Siemens Limited (supra) and Sankar Pandi (supra), in a case of re-export, redemption fine or duty cannot be imposed. We find that the Hon'ble Supreme Court has not laid down any such law in the said case. Its decision to order refund of the redemption fine were based on the peculiar facts of the case. So also in the case of the Hon'ble High Court in Sankar Pandi. The other judgments cited by the appellant are based on decisions of the Tribunal. In this regards I propose to examine the Larger Bench decision in the case of Hemant Bhai R. Patel (supra), cited by Revenue, which is binding on a Bench of lesser strength. The question examined was that when re-export is permitted no redemption fine can be imposed, which is the same issue involved here. The Larger Bench of this Tribunal answered the question as under;

"Section 112 authorizes imposition of penalty. Section 125 contains the provisions enabling the Customs Officer to grant an option to the owner or the person from whose possession the goods have been seized to pay a fine in lieu of confiscation. In an adjudication proceeding as in the present case these are the provisions which would come into play. If the owner gets the goods released after payment of redemption fine, he may either clear it for home consumption or re-export the same subject to the relevant rules. A permission granted for re-export on the basis of a request made by the owner of the goods is outside the purview of the adjudication proceedings, as mentioned above. We, therefore, answer the questions referred in the affirmative and hold that it is open to the adjudicating authority to impose redemption fine as well as penalty even when permission is granted for re-exporting the goods. The reference is answered as above."

Judicial discipline requires that we follow the judgment of the Larger Bench. The appellant's plea is hence rejected.

21. For the reasons discussed, the impugned order is upheld and the appeal filed by the appellant is rejected and disposed of accordingly.