(2020) 11 CESTAT CK 0011

In the Customs, Excise And Service Tax Appellate Tribunal

Case No : Customs Appeal No. 86922, 86923 Of 2019

S P Associates @Hash Commissioner Of Customs, NS – V

Date of Decision : 25-11-2020

Acts Referred:
Customs Act, 1962 — Section 11, 111(d), 112, 112(a), 124, 125
Foreign Trade (Development & Regulation) Act, 1992 — Section 3(3), 11(8), 11(9), 18A
Foreign Trade (Regulation) Rules, 1993 — Rule 13(2), 15, 17(2)

Citation : (2020) 11 CESTAT CK 0011

Hon'ble Judges : Dr. D.M. Misra, J;C.J. Mathew, Technical Member

Bench : Division Bench

Advocate : N Viswanathan, Bhushan Kamble

Final Decision : Disposed Of

Judgement

1. The appellant herein, M/s SP Associates, having imported old and used â?? digital multifunction devices Canon with standard accessoriesâ??

against bills of entries no. 8936939/20.11.2018 and no. 9068448/30.11.2019 with declared value of Rs.14,65,823.55 and Rs.21,28,284.30 respectively, is

aggrieved by the impugned order for having directed the adjudicating authority to decide the matter afresh even while accepting their proposition of

incorrectness in imposing re-export of the confiscated goods as condition for redemption under section 125 of Customs Act, 1962. Learned Counsel

for the appellant concedes that there is no cavil with confiscation under section 111(d) of Customs Act, 1962 arising from non-production of

â??authorisationâ?? required for effecting imports of â??old and used goodsâ?? as prescribed in paragraph no. 2.31 of Foreign Trade Policy (2015-

20) notified under the Foreign Trade (Development & Regulation) Act, 1992. It is also on record that order-in-appeal no. 783 to 786 (Gr.V)/2019

(JNCH)/Appeal-II dated 24th April 2019 of Commissioner of Customs (Appeals), Jawaharlal Nehru Custom House, Nhava Sheva has, in addition to

disposing of the appeals of the said importer, considered the challenge mounted by customs authorities against the order of the original authority.

2. Narrating the background, Learned Counsel informed that the impugned goods had been subjected to examination, including that of approved

Chartered Engineer, and assessable value re-determined as Rs.25,80,130 and Rs. 31,32,672 respectively. It was pointed out that the original authority

had, in separate proceedings, confiscated the goods under section 111(d) of Customs Act, 1962 but allowed redemption thereof on payment of

Rs.1,40,000 and Rs.2,10,000 along with penalty of Rs.10,000 for each consignment under section 112 of Customs Act, 1962 conditional upon re-export

within three months failing which the goods were to be destroyed at the cost of the importer. He admitted that the importer, in view of not being in

possession of â??authorisationâ?? prescribed in the Foreign Trade Policy, had waived the right to be issued with show cause notice in the belief that

the goods would be permitted for import on payment of appropriate redemption fine and penalty.

3. Besides contesting the competence of the first appellate authority to remand disputes back to the original authority, it was also contended by

Learned Counsel that the impugned order has travelled beyond the scope of appeal by directing compliance with Hazardous Waste (Management,

Handling and Transboundary Movement) Rules, 2016 which was not a ground proposed by the original authority for proceeding against the imports.

He further argued that the imposition of condition of re-export, with absolute confiscation in default thereof, was contrary to the decision of the

Honâ??ble Supreme Court in Commissioner of Customs v. Atul Automations Pvt Ltd [2019 (365) ELT 465 (SC)] in which it has been held that

â??9. Unfortunately, both the Commissioner and the Tribunal did not advert to the provisions of the Foreign Trade Act. The High Court

dealing with the same has aptly noticed that Section 11(8) and (9) read with Rule 17(2) of the Foreign Trade (Regulation) Rules, 1993

provides for confiscation of goods in the event of contravention of the Act, Rules or Orders but which may be released on payment of

redemption charges equivalent to the market value of the goods. Section 3(3) of the Foreign Trade Act provides that any order of prohibition made under the Act shall apply mutatis mutandis as deemed to have been made under Section 11 of the Customs Act also.

Section 18A of the Foreign Trade Act reads that it is in addition to and not in derogation of other laws. Section 125 of the Customs Act vests

discretion in the authority to levy fine in lieu of confiscation. The MFDs were not prohibited but restricted items for import. A harmonious

reading of the statutory provisions of the Foreign Trade Act and Section 125 of the Customs Act will therefore not detract from the

redemption of such restricted goods imported without authorisation upon payment of the market value. There will exist a fundamental

distinction between what is prohibited and what is restricted. We therefore, find no error with the conclusion of the Tribunal affirmed by the

High Court that the respondent was entitled to redemption of the consignment on payment of the market price at the reassessed value by the

Customs authorities with fine under Section 112(a) of the Customs Act, 1962.

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11. Rule 13(2) provides the procedure for import of other wastes listed in Part D Schedule III. Item B1110 of the Schedule mentions used

Multifunction Print and Copying Machines (MFDs). Entry 4(j) lists out five documents required for import of used MFDs. The respondents

have been found to be substantially compliant in this regard and the requirement for the country of origin certificate has been found to be

vague by the High Court. Form 6 has rightly been held to be not applicable to the subject goods.

12. Rule 15 of the Waste Management Rules dealing with illegal traffic, provides that import of â??other wastesâ? shall be deemed illegal if

it is without permission from the Central Government under the Rules and is required to be re-exported. Significantly, the Customs Act does

not provide for re-export. The Central Government under the Foreign Trade Policy has not prohibited but restricted the import subject to

authorisation. The High Court, therefore, rightly held that the MFDs having a utility period, the Extended Producer Responsibility would

arise only after the utility period was over. In any event, the E-waste Rules, 2016 certificate had since been issued to the respondents by the

Central Pollution Control Board before the goods have been cleared.â??

4. He also cited the decision of the Tribunal in S R Enterprises and Digital Express [final order no. 21308-21309/2019 dated 20 th December 2019

disposing appeal no. C/20971/2019 and C/20974/2019 filed against order-in-appeal no. 126/2019 dated 18th September 2019 and no. 125/2019 dated

12th September 2019 of Commissioner of Customs (Appeals), Benguluru-I] which held that

â??9. On perusal of the records as well as the submissions of both sides, it would appear that an issue which has been disputed time and

again at various places in India, and can be said to have attained finality, is sought to be reopened within this jurisdiction. It is clear from

the decision of the Honâ??ble Supreme Court in re Atul Automations Pvt Ltd that the impugned goods are to be considered as â??other

wastesâ?? and the prohibition, applicable upon nonconformity with the conditions for import of â??hazardous wasteâ??, would not apply

to the impugned goods.â??

It is further contended that the goods had, by 7th May 2019, been excluded from the list of goods restricted for import.

5. Learned Authorised Representative contended that the issue of competence to remand vesting with the first appellate authority had been judicially

settled. It was further argued that, in the absence of â??authorisationâ?? and being non-compliant with conditions pertaining to hazardous waste, the

impugned goods were liable to absolute confiscation.

6. It is seen from the records that it was the appellant who had, in their appeal, albeit with different intent, raised the aspect of stipulations in relation to

import of hazardous waste. In the circumstances, the first appellate authority cannot be faulted for acknowledging the requirement for such

compliance. It is also admitted that the importer is not in possession of a valid â??authorisationâ?? and, hence, the liability to confiscation is not in

dispute. It would appear from the records that the attention of the first appellate authority had been drawn to the decision of the Honâ??ble Supreme

Court in re Atul Automations Pvt Ltd but, nonetheless, was disregarded.

7. The order of the original authority had restricted the options to that of re-export on redemption or of destruction at the cost of the appellants herein.

In determining the fate of the cross-appeals filed against that order, the first appellate authority was required to decide the competing claims for permitting clearance for home consumption or absolute confiscation as the exhaustive options available under the law. Neither the reviewing authority

nor the importer had favoured re-export. It is, indeed, moot if, in the absence of request from an importer and of authority conferred under Customs

Act, 1962 or any other law, the proper officer of customs was empowered to insist on such and in the proceedings leading to this appeal, it is only

Customs Act, 1962 that has been invoked. It is also moot if the default alternative of destruction could have been retained by the adjudicating authority

in proceedings that invoked only section 111 of Customs Act, 1962; the statute does not envisage destruction of goods and an order of destruction by

customs authorities may arise only from empowerment under some other law which has not been invoked in the present proceedings. We must also

take note that, in affording the option to redeem goods, absolute confiscation is the consequence of default thereof. From section 125 of Customs Act,

1962, it is seen that confiscated goods vest with the Central Government and, in the absence of authority under law, or by delegation, to destroy, the

adjudicating authority is required to protect such goods till appropriate disposition as prescribed by the Central Government.

8. As the orders impugned before the first appellate authority had not considered the principles laid down in re Atul Automations Pvt Ltd, including the

quantification of fine, as well as the restrictions imposed by law on treatment accorded to confiscated goods, we find no reason to disagree with the

remand ordered by the first appellate authority. Furthermore, with the right to be issued with notice under section 124 of Customs Act, 1962 having

been waived, the direction to consider all issues afresh cannot be faulted.

9. Learned Counsel submits that the goods have been pending for a substantially long period of time; this, undoubtedly, is a matter of concern and we

concur that needless prolonging of detention is to be avoided. Accordingly, we direct that the de novo proceedings be completed within eight weeks

from the date of receipt of this order by the original authority.

10. Consequently, we dispose of these appeals by remand to the original authority for deciding afresh on the scope for stipulating re-export in

circumstances of plea for clearance for home consumption with the direction that the time limit specified supra be adhered to.

(Pronounced in open court)