(2012) 09 BOM CK 0003

In the Bombay High Court

Case No : Customs Appeal (L) No. 62 of 2012

Sushil Agarwal APPELLANT

Vs

Commissioner of Customs (Import) RESPONDENT

Date of Decision : 18-09-2012

Acts Referred:
Customs Act, 1962 — Section 108, 111(m), 112(b), 114A, 28

Citation : (2013) 293 ELT 663

Hon'ble Judges : R.D. Dhanuka, J;J.P. Devadhar, J

Bench : Division Bench

Advocate : V. Shridharan, with Prakash Shah instructed by PDS Legal, for the Appellant; Pradeep S. Jetly, for the Respondent

Judgement

R.D. Dhanuka, J.—Whether the CESTAT was justified in directing the appellant-assessee to make pre-deposit of Rs. 1 crore for entertaining the appeal filed by the assessee, is the question raised in this appeal. It is the case of the appellant that in the year 1984-1985 he started the unit in the name of M/s. Ashok Industries Pvt. Ltd. and was engaged in the assembly and subsequent sale of colour/Black and White Televisions, Video Cassette Players and Video Cassette Recorders in the local market. The appellant used to import certain components required for the assembly. In the year 1999, the appellant created M/s. Aashna Electronics Pvt. Ltd. and his wife along with the Appellant were the directors. It is the case of the appellant that due to financial constrains in the year 2001-2002, M/s. Aashna Electronics Pvt. Ltd. entered into the business of assembling and trading of car cassette players, car CD Players, Car amplifiers, car stereo systems, Music system, VCD players, LCD screens etc. Till 2006, the said company was engaged in trading of electronic goods/parts. On 30th April, 2005, appellant ceased to be a working partner of Mr. Jayant Bachetta in respect of the partnership established in the name of M/s. Mytri Enterprise in April 2002. It is the case of the appellant that Mr. Jayant Bachetta had established a proprietary concern in the name of M/s. Parth Marketing. The Appellant undertook to sell goods imported by M/s. Parth Marketing in the Indian market. It is the case of the appellant that he had no interest whatsoever in M/s. Parth Marketing or M/s. Chinmay Corporation which was established by Mr. Pragnesh Shah.

2. On 3rd/27th November, 2007, the Directorate of Revenue Intelligence (for short "DRI") gathered information that M/s. Chinmay Corporation was evading payment of customs duty on account of undervaluation of imported electronic goods. Accordingly its office and godown premises were searched. The DRI recorded the statement of the appellant and various other persons u/s 108 of the Customs Act, 1962. The computers of the appellant were seized by the DRI in the anticipation that same contains incriminating evidence against the appellant. According to the appellant, the goods were imported by M/s. Parth Marketing and M/s. Chinmay Corporation and were seized on the ground of alleged undervaluation and duty evasion.

3. On 2nd May, 2008 the DRI issued a show cause notice and called upon various parties including the appellant. It was stated in the show cause notice that the appellant, director of M/s. Aashna Electronics Pvt. Ltd. was mastermind and the controlling person of the imports of M/s. Parth Marketing and M/s. Chinmay Corporation and had full knowledge about the undervaluation of the goods at the time of their importation and had knowingly and consciously failed to declare the correct value before the Customs Authorities at the time of import with the sole intention to evade payment of duty in connivance with the overseas suppliers. The appellant was called upon as to why penalty should not be imposed upon him in terms of Section 112(b) of the Customs Act, 1962 and to why duty on such import be not levied against the appellant. The appellant replied to the said show cause notice.

4. By an order-in-original dated 23rd November, 2010, passed by the Commissioner of Customs (Import), duty of Rs. 3,19,06,456/-, fine of Rs. 2,39,50,000/- penalty of Rs. 5,29,06,456/- was levied against the appellant.

5. Being aggrieved by the said Order dated 23rd November, 2010, the appellant filed an appeal (C/106/2011) before the Customs, Excise and Service lax Appellate Tribunal (for short "CESTAT") along with the stay application (C/ STAY/356/2011). By an Order dated 9th April, 2012 [2012 (283) ELT 377], the CESTAT directed the appellant to make a pre-deposit of Rs. 1 crore in addition to the amounts already paid at the time of investigation within a period of eight weeks and report compliance by 17th July, 2012.

6. Mr. V. Shridharan, the learned Senior advocate appearing for the assessee submitted as under:--

1. The appellant was not importer and thus no duty could be levied against the appellant.

2. The DRI has no jurisdiction to issue show cause notice.

3. CESTAT was not correct in holding that the Customs (Amendment and Validation) Act, 2011 validates the show cause notice issued by the DRI prior to

16th September, 2011 u/s 28 of the Customs Act, 1962.

4. The CESTAT shall be directed to hear the appeal on merits without imposing any condition of pre-deposit against the appellant.

7. The learned Counsel Shri Pradeep S. Jetly appearing for the respondents on the other hand strongly relied upon various findings given by the Commissioner of Customs (Import) holding that the appellant was mastermind in the entire import and was fully involved and had controlled over all aspects of the transactions for the goods. He submitted that CESTAT was justified in imposing the condition of deposit and this Court shall not interfere with such liberal order passed by the CESTAT against the appellant.

8. On the basis of the material on record, the Adjudicating Authority has arrived at the following findings which are impugned by the appellant before CESTAT:--

I. Gross undervaluation was resorted by the appellant in respect of various items imported in the name of M/s. Parth Marketing and M/s. Chinmay Corporation.

II. Buyers of various goods confirmed that the goods were purchased from the appellant in cash without any bill.

III. Packing instructions given by Mr. Suresh Pereira indicates that the complete unit of car CD Player and car DVD flayer purchased from the foreign supplier was to be dismantled abroad through persons like Mr. Suresh Pereira by removing the sticker from the cabinet and then packing the cabinet and the front panel separately for shipment to M/s. Chinmay Corporation and M/s. Parth Marketing respectively. The entire modus operandi related to the import of car CD player and car DVD player in SKD condition has been brought out in detail in the said order. In this case of imports in SKD condition, it will be in the fitness of things to demand the duty evaded from the appellant rather than from M/s. Chinmay and M/s. Parth who filed the Bills of Entry for import of cabinet and front panel respectively. It is held that appellant''s act of omission and commission have rendered the goods liable to confiscation u/s 111(m) of the Customs Act, 1962 and is liable to penal action u/s 114A for the fraud related to imports in SKD condition. It is held that the appellant had contravened the provisions of Section 46(4) of the Customs Act, 1962.

IV. The appellant had misdeclared the value of goods by wilful misstatement and suppression of the facts in contravention of various provisions of Customs Act and Rules made thereunder. V. The appellant was the mastermind and the controlling person of the imports made by M/s. Parth Marketing and M/s. Chinmay Corporation and had full knowledge about the undervaluation of the goods at the time of their importation and had knowingly and consciously failed to declare the correct value before the Customs Authorities at the time of import with the sole intention to evade payment of duty in connivance with the overseas suppliers. It has been corroborated by the e-mails retrieved from the seized computers, quotation of the overseas suppliers, etc.

VI. The appellant had adopted surreptitious method for selling imported goods in grey market. Each and every person knew either appellant or his employees, and none of them knew either Mr. Jayant, Mr. Pragnesh or Mr. Punderik which shows that appellant was the main beneficiary of the profit earned in the sales of car audit systems.

VII. In reply to the show cause notice appellant admitted under invoicing of the goods and did not retract his statement. In the impugned order passed by the CESTAT while directing the appellant to deposit Rs. 1 crore as pre-condition to entertain the appeal, the CESTAT has considered various findings given by the Adjudicating Authority and passed a detailed order directing the appellant to deposit a sum of Rs. 1 crore in addition to the amounts already paid at the time of investigation.

9. The CESTAT has taken a prima facie view that the proprietor of M/s. Parth Marketing and M/s. Chinmay Corporation were receiving only compensation for renting/lending their names and the transactions were undertaken by the appellant. It is observed by the Tribunal prima facie that the intention to evade duty by misdeclaration of goods is clearly discernible when one goes through the evidence on record against the appellant. In our view, this prima facie view of the CESTAT cannot be faulted.

10. In so far as the submissions made by the learned Senior Advocate Shri Shridharan that the appellant being not importers ant thus no duty could be levied against the appellant is concerned, we are of the view that the prima facie view of CESTAT that show cause notice issued by the Adjudicating Authority and the order-in-original indicate that the appellant was the mastermind behind the import of various goods and that the entire, activity of M/s. Parth Marketing and M/s. Chinmay Corporation were controlled and managed by the appellant through his staff and that the proprietor of M/s. Parth Marketing and M/s. Chinmay Corporation were receiving only monthly compensation for renting/ lending their names and the transactions were undertaken by the appellant cannot be faulted.

11. In so far as the submission of the learned senior advocate that CESTAT was not correct in holding that the Customs (Amendment and Validation) Act, 2011 validates the show cause notice issued by the DRI prior to 16th September, 2011 u/s 28 of the Customs Act, 1962 is concerned, the CESTAT has taken a prima facie view that the question challenging the vires of the retrospective amendment made to Section 28 of the Customs Act, 1962 for the period prior to 8th April, 2011 could not be gone into by the CESTAT.

12. In our view, the CESTAT is right in directing the appellant to deposit Rs. one crore as a condition to hear the matter on merits. For the reasons, we see no merit in the appeal and the same is hereby dismissed with no order as to costs.

13. Time to make pre-deposit is however, extended by eight weeks from the date of this order.

14. Tribunal is directed to hear and dispose of the appeal on merit after pre-deposit is made. CESTAT shall pass order without being influenced by this order.

