CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
SOUTH ZONAL BENCH
CHENNAI

Appeal No.C/40687/2018

[Arising out of Order-in-Appeal Sea.C.Cus.II No.75/2018 dt. 9.3.2018 passed by Commissioner of Customs (Appeals-II), Chennai]

Novel Impex — Appellant

Versus

Commissioner of Customs,
Chennai — Respondent

Appearance :

Shri N. Viswanathan, Advocate
For the Appellant

Shri K. Veerabhadra Reddy, JC (AR)
For the Respondent

CORAM :

Hon'ble Ms. Sulekha Beevi C.S. Member (Judicial)
Hon'ble Shri Madhu Mohan Damodhar, Member (Technical)

Date of hearing / decision : 13.04.2018

FINAL ORDER No. 41201 / 2018

Per Bench

The appellants imported unbranded imitation accessories and garments accessories of Chinese origin vide Bills of Entry No.3510385 and 3510483 both dt. 6.10.2017. The goods were ordered for first check appraisement and subjected to 100% examination on 26.10.2017 and found to be as declared in terms of quantity and description. However, goods were not released at the instance of the DRI who conducted re-examination of the goods on 01.11.2017. It appears that although the goods on re-examination were again found to be as declared in terms of quantity and value, the goods were detained and seized by the DRI vide seizure memo issued by DRI Zonal Unit, Ahmedabad. The appellants filed Writ Petition No.31762/2017 before the Hon'ble High Court of Madras for release of the goods. Vide an order dt. 21.12.2017, the Hon'ble High Court directed the department to consider the petitioner's (appellant's) application for provisional release and also consider the request of appellants for waiver of demurrages and detention charges as the consignment was detained at the instance of the department. Seizure memo dated 18.12.2017 was issued by DRI Zonal Unit, Ahmedabad for the impugned goods which were valued in the memo as Rs.1,45,44,853/-. Pursuant to the High Court order, the office of the Commissioner of Customs, Chennai-II vide a letter dt. 19.1.2018 informed the appellants that the impugned goods are allowed to be cleared provisionally on submission of Bond for full value of consignment, i.e. Rs.1,45,44,653/- and submission of Bank Guarantee of Rs.1 Crore. The appellant once again moved the High Court of Madras, who vide their order dt. 1.2.2018 disposed of the petition by directing the appellant to file appeal before Commissioner of Customs (Appeals) with directions to the said lower appellate authority to hear the appellants and decide the appeal on merits and in accordance with law. Accordingly, appellants filed an appeal before the Commissioner of Customs (Appeals) on 09.02.2018. Vide an order No.75/2018 dt. 9.3.2018 (impugned order), the Commissioner of Customs (Appeals) did not find any infirmity in the decision of the lower authority for provisional release of the goods on the terms as communicated and rejected the appeal. Aggrieved, the appellants are before this forum.

2. On the date of hearing, the appellants represented by Ld.Advocate, Shri N.Viswanathan made various submissions which can be broadly summarized as under :

(i) The impugned goods have been examined twice, once by the assessing officers and once by the D.R.I. However, the goods have been found to be tallying in quantity and description as declared in the respective Bills of Entry.

(ii) The goods are neither restricted or prohibited for export for import, clearance of goods is however pending since 6.10.2017 without any justifiable reason, incurring heavy container detention, demurrage and other incidental charges to date.

(iii) Appellants have made representation to DRI. However they have been only advised to approach the jurisdictional Commissioner of Customs for provisional release of the seized goods.

(iv) Seizure memo of the DRI although dated 18.12.2017 was actually posted only on 27.12.2017 after High Court of Madras had passed the order on 21.12.2017. Hence seizure memo was received by the appellant only on 28.12.2017.

(v) Against the declared value of Rs.43,58,948/-, DRI have alleged that the value of the goods should be valued at Rs.1,45,44,853/-. The only dispute concerning the goods pertains to correctness of value declared. In such a situation, the Customs authorities should have assessed and cleared the goods on a provisional basis as provided for under Section 18 of the Customs Act, 1962 read with the Provisional Duty Assessment Regulations, in terms of which only differential duty of 20% is required to be deposited in addition to payment of duty on the value declared and furnishing a bond for the said value without need for seizure of goods.

(vi) Even in the Circular No.35/2017-Cus. dt. 16.8.2017 issued by the Board, the discretion has been given to competent authority to increase or decrease the amount of security deposit as per para 2.3 of the circular.

(vii) They place reliance on the ratio of case law in *Nav Shakthi Industries Pvt. Ltd. Vs CC New Delhi* - 2011 (267) ELT 483 (Del.), where in a similar case involving seized imported goods having been unconditionally cleared by customs authorities in the first instance, the Hon'ble High Court ordered release of the goods of the appellants therein on their furnishing a bond of 20% differential duty. The said judgement was appealed to the Hon'ble Supreme Court and the Apex Court in their decision as reported in 2011 (269) ELT A146 (SC) directed that the goods shall be cleared on furnishing Bank Guarantee of 30% of the differential duty.

(viii) They also rely upon following case laws :

(a) *CC Tuticorin Vs Empire Exports*
2013 (287) ELT 41 (Mad.)

(b) *Bhaiya Fibres Ltd. Vs ADGRI*
2012 (281) ELT 396 (Del.)

(c) *Spirotech Heat Exchangers Pvt. Ltd. Vs UOI*
2016 (341) ELT 110 (Del.)

(ix) Ld. Advocate therefore pleads for setting aside the impugned order upholding the burdensome conditions put by the Customs authorities for effecting provisional release of the goods.

3. On the other hand, Ld. A.R Shri K. Veerabhadra Reddy supports the impugned order. He submits that in such cases where provisional release of imported goods are involved, the competent authority can very well order bank guarantee or security deposit to cover not only the entire amount of duty / differential duty, as also the amount of fine and penalties that may be levied. This practice has been reiterated in para 2.2 of the Board's Circular No.35/2017 dt. 16.8.2017. In the circumstances, the requirement of submission of bond of full value of consignment and submission of bank guarantee for Rs.1 Crore is very much justified and hence the impugned order does not call for any interference.

5. Heard both sides and have gone through the facts.

6. What comes to the fore is that the impugned goods have been subjected to 100% examination, once by the Customs assessing officers on 26.10.2017 and subsequently by the D.R.I on 1.11.2017. However, no discrepancy emerged *vis-a-vis* declared description and quantity of the items. Further, although in the first instance the Customs assessing officers had no quibbles with the value of Rs.43,58,498/- declared, the seizure memo dt. 18.12.2017 of DRI, Zonal Unit, Ahmedabad has alleged that value to be misdeclared and that the actual value should be Rs.1,45,44,653/-. It is interesting to

note that the seizure memo has enhanced the import value only based on a statement of one Shri Mahaveer Kumar who apparently stated "*that the goods were imported by him and that description in value was misdeclared*......" along with "documentary evidence" retrieved from hard disc of Shri Mahaveer Kumar by DRI. The threefold enhancement of the value arrived at thus appears to be based on only partial and incomplete investigations. We are distressed to note that none of these aspects appear have been taken cognizance of or considered by the Department in their communication dated 19.01.2018 to appellant, conveying the decision of the competent authority for provisional release and the conditions attached thereto. There is also no explanation on the *raison d'être* for ordering Bank Guarantee of Rs.1 crore, which translates to as much as 69% of the "enhanced value" even. We also note that the High Court's directions that "department should also consider the request for wavier of demurrage and detention charges as the consignment was detained at the instance of the department" has been given the go by and the request is refused by the competent authority vide another communication, also dt. 19.1.2018 merely intimating that the request "cannot be granted in this case of blatant mis-declaration of value of goods ....." At such a nascent stage of investigation, when the enhancement of value has been made by the D.R.I. Ahmedabad, Zonal Unit only on statements and data purported to have been retrieved from a hard disc, surely the final word is not yet out in respect of the valuation of the impugned goods. In such a scenario, we are at loss to understand why the High Court's directions have not been given the respect that they deserve and instead very peremptory orders of provisional release has been issued putting conditions which are onerous and oppressive.

7. We also find that the case laws, put forth by the Ld. counsel are very much applicable to the facts of this case at hand. In *Nav Shakthi Industries Pvt. Ltd.* (supra), on similar facts, the Hon'ble Delhi Court inter alia held that when duty is paid already on the declared value, adjudication proceedings and prosecution are still pending, the conditions to deposit 25% of value of goods by Bank Guarantee is not proper. This judgment was affirmed by the Hon'ble Apex Court as reported in 2011 (269) ELT A146 (SC). In *Bhaiya Fibres Ltd.* (supra), the Hon'ble High Court of Delhi held that demand of entire differential duty for provisional release of goods is contrary to Regulation (2) of Customs (Provisional Duty Assessment) Regulations, 1963 which postulates deposit of 25% of provisional duty. Closer home, the High Court of Madras, which is a jurisdictional High Court for this forum, in

Empire Exports (supra) following the Apex Court judgement in *Navshakti Industries Pvt. Ltd*. (supra) as well as other judgments of the High Court of Madras, in a case where Revenue valued the goods much more than the value declared by the assessee, has directed as follows :

(1) that importer should pay the duty as declared by them;

(2) to pay 30% of differential duty of admitted value and

(3) to execute a personal bond for the balance amount of 70% differential duty to the satisfaction of the concerned officer.

Following the ratio laid by the jurisdictional High Court, the impugned order upholding onerous conditions laid down for provisional release of the goods cannot then sustain and will have to be set aside, which we hereby do, and direct provisional release of the impugned goods on the following terms :

(1) Appellant-importer shall pay the duty on the declared import value, if not already done.

(2) Appellants shall pay 30% of the differential duty between the duty on the declared value and the duty on proposed enhanced value fixed by the department, in the form of a Bank Guarantee;

(3) Appellants shall execute a personal bond for value of balance of 70% differential duty to the satisfaction of competent authority.

(4) On fulfilment of above conditions, the goods shall be released provisionally to the appellants without undue delay.

(5) Demurrage and detention charges are waived in line with the observations of the Hon'ble High Court of Madras in their order dt. 21.12.2017 in W.P.No.31762/2017.

8. The appeal is disposed of on above terms.

9. Issue order '**dasti**'.

(operative part of the order pronounced in court)

(Madhu Mohan Damodhar)
Member (Technical)

(Sulekha Beevi C.S)
Member (Judicial)

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