CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI

PRINCIPAL BENCH, COURT NO. 1

CUSTOMS APPEAL NO. 51670 OF 2021

[Arising out of Order-in-Appeal No. CC(A)/CUS/D-II/Prev./NCH/486/2020-21 dated 29.06.2021 passed by the Commissioner of Customs (Appeal), New Delhi]

PRINCIPAL COMMISSIONER, CUSTOMS - NEW DELHI **Appellant**

Preventive Commissionerate,
New Customs House, Near IGI Airport,
New Delhi-110037

VERSUS

M/S OM SAI RAM TRADING **Respondent**

1/17, RukmaniVatika,
Main Rohtak Road, Nangloi
Delhi-110041

Appearance:

Present for the Appellant : Shri M K Shukla, Authorised Representative
Present for the Respondent: Shri Abhas Mishra, Advocate

CORAM:
HON'BLE MR. JUSTICE DILIP GUPTA, PRESIDENT
HON'BLE MR. P. V. SUBBA RAO, MEMBER (TECHNICAL)

FINAL ORDER NO. 57975 /2024

Date of Hearing : 03/07/2024
Date of Decision : 06/08/2024

P. V. SUBBA RAO:

1. Revenue filed this appeal to assail the Order-in-Appeal[1] dated 29.06.2021 passed by the Commissioner (Appeals) whereby he partly allowed the appeal filed by the respondent importer and modified the order-in-original dated 09.12.2019 passed by the Joint Commissioner. While upholding the classification of the imported goods made by the Joint Commissioner, the Commissioner (Appeals) set aside the

1 Impugned order

confiscation of the imported goods under section 111(m), imposition of redemption fine under section 125 and imposition of penalty under section 114A of the Customs Act, 1962[2].

2. The facts which lead to the issue of the impugned order are as follows:

3. M/s Om Sai Ram Trading[3] filed Bill of Entry No. 5322424 dated 16.10.2019 to clear "men's woven quilted/padded polyester polyfill (unpopular brands)", self-assessed duty of Rs. 10,47,058/- on the goods and also requested for first check for classification.

4. When goods are imported they are usually cleared through a process called "second check" or "second appraisement" in which the Bill of Entry is assessed based on the declarations in the documents and thereafter the goods are examined. In some cases-either on the request of the importer or as per the decision of the officer- goods are subject to "first check" or "first examination" in which the goods are first examined to see if they are as per the documents and thereafter based on the examination report, the Bill of Entry is assessed. In this case, the respondent filed the Bill of Entry self-assessing duty but also sought first check for classification. In other words, the respondent was not fully sure about the classification of the imported goods and therefore, wanted the goods to be examined first. After examination, the proper officer would have re-assessed the Bill of Entry either affirming the self-assessment or modifying it.

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2 Act
3 the respondent

5. Before the examination, the very next day of filing of the Bill of Entry, i.e., on 17.10.2019, officers of the Commissioner of Customs (Preventive) New Delhi received intelligence that the goods were mis-declared in this Bill of Entry with respect to their description and classification. The officers of Commissioner of Customs (Preventive) examined the goods under a panchnama and found that the number of pieces was the same as declared in the Bill of Entry. However, they felt that the goods were correctly classifiable under a different heading of the customs tariff. They drew samples and sent them for testing to the Textile Committee seeking clarification of:

(a) Nature and composition of fabrics of the jackets;

(b) Either the upper side of the fabrics of the jackets was impregnated, coated, covered or eliminated with plastics or some other materials and;

(c) proper classification (HSN) code of the jackets.

6. The Textile Committee gave its test report including its opinion on proper HSN classification of the imported goods. After recording statements and further investigation, the officers of the Commissioner of Customs (Preventive) felt that the respondent had mis-classified the goods which were therefore liable for confiscation under section 111(m) and that the respondent was liable to penalty under section 114A and differential duty amounting to Rs. 14,79,092/- was recoverable under section 28(4).

7. The respondent, by letter dated 29.11.2019, waived the requirement of show cause notice and personal hearing and agreed to pay duty under protest.

8. The Joint Commissioner of Customs (Preventive) passed the Order-in-Original re-classifying the goods, confirming differential duty and ordering its recovery under section 28(4) along with applicable interest, confiscated the imported goods under section 111(m) and allowed their redemption on payment of fine of Rs. 1,50,000/- under section 125. He also imposed a penalty under section 114A.

9. Aggrieved, the respondent filed an appeal before Commissioner (Appeals) who, by the impugned order, upheld the classification of the goods but set aside the confiscation of the goods, imposition of redemption fine and the penalty.

10. Revenue is aggrieved by the order of Commissioner (Appeals) and filed this appeal before this Tribunal. There is no cross appeal by the importer respondent. Therefore, the short questions to be decided by us are whether the Commissioner (Appeals) was correct in setting aside the confiscation, fine and penalty or not.

11. We have heard Shri M. K. Shukla, learned authorised representative appearing for the department and Shri Abhas Mishra, learned counsel for the respondent and perused the records.

12. The "grounds" in this appeal are numbered paragraphs 14 to 30. Of these, paragraphs 14 to 21 are a reproduction of revenue's reply in the appeal filed by the respondent before the Commissioner (Appeals). Needless to say, these are irrelevant to the appeal before us. Paragraphs 22 to 30 are the grounds of appeal before us.

13. Learned authorised representative submitted that the goods which do not correspond in respect of the value or any other particulars with the entry made and the Bill of Entry are liable for confiscation under section 111(m) and the Commissioner (Appeals) erred in setting aside the confiscation and redemption fine.

14. He also submitted that the differential duty was correctly confirmed and recovered under section 28(4) because the importer suppressed facts by not disclosing the correct description of the goods and their classification with an intent to evade duty. Since the importer wilfully suppressed the facts by not disclosing the correct classification of the goods with an intent to evade duty, penalty equal to differential duty was correctly imposed under section 114A of the Customs Act.

15. He, therefore, prayed that the impugned order may be set aside and the order in original passed by the Joint Commissioner may be restored.

16. Learned counsel for the respondent supports the impugned order and asserts that there is no case to impose penalty or confiscate the goods. He further submitted that this appeal also deserves to be dismissed on the grounds of monetary limits laid down by the Government. Further, he submits that Textile Committee's reports based on which the goods were re-classified, confiscated were also not supplied to the respondent.

17. Learned counsel for the respondent also contended that section 28(4) does not apply to this case as the goods had not yet been cleared for home consumption when the affairs of Commissioner of Customs

(Preventive) began the investigation and the respondent himself was unsure of the classification and sought examination of the goods on first check basis. Since section 28(4) does not apply to this case, no penalty under section 114A could be imposed on the respondent. He, therefore, prays that Revenue's appeal may be dismissed.

18. We have considered the submissions advanced by both sides and perused the records.

19. Admittedly, the respondent filed the Bill of Entry, self-assessed duty based on the documents, but had also sought first check so that classification could be done correctly. It is also recorded in the order of the Joint Commissioner that the respondent had provided reasons for seeking first check.

20. The Bill of Entry was filed on 16.10.2019. Before a decision on the request of the respondent for first check was taken by the 'proper officer' and the goods were examined, the officers of the Commissioner of Customs (Preventive) intervened "on the basis of intelligence" on 17.10.2019 that the goods were mis-declared and mis-classified in the Bill of Entry. It needs to be noted that this action was initiated by the officers of the Commissioner of Customs (Preventive) immediately after the Bill of Entry was filed and the importer had sought first check. In other words, before the assessment was completed by the 'proper officer' responsible for assessing the Bill of Entry at the Inland Container Depot, Ballabhgarh, where the Bill of Entry was filed, the officers of Commissioner of Customs (Preventive) intervened. The respondent importer was unsure of the classification of the goods and

the type of goods which were supplied and wanted the goods to be examined. Had the goods been examined by the examining officer, the nature of goods and the classification could have been ascertained and if necessary the Bill of Entry could have re-assessed by the 'proper officer' under section 17. After payment of duty the goods could have been cleared for home consumption. Instead of letting the examining officer examine the goods, the Customs (Preventive) Officers examined them under a Panchnama.

21. It needs to be noted that the total number of jackets found during the examination was 10,559 which was exactly what was declared in the Bill of Entry.

22. Although the classification of the goods itself is not assailed by the respondent, we find that the manner in which the classification was done certainly is not correct. The Joint Commissioner classified the goods based on an "advice given by the Textile Committee". The Textile Committee is an expert organisation on textiles. It can give expert opinion on the nature of the goods, composition of fabrics, etc. but not their classification. Classification of the goods is a part of assessment which is defined in section 1(2) of the Customs Act as follows:

> **Section 2: Definitions**: —In this Act, unless the context otherwise requires,—
>
> .....
>
> (2) **"assessment" means determination of the dutiability of any goods and the amount of duty**, tax, cess or any other sum so payable, if any, under this Act or under the Customs Tariff Act, 1975 (51 of 1975) (hereinafter referred to as the Customs Tariff Act) or under any other law for the time being in force, **with reference to—**

> **(a) the tariff classification of such goods as determined in accordance with the provisions of the Customs Tariff Act;**
>
> (b) the value of such goods as determined in accordance with the provisions of this Act and the Customs Tariff Act;
>
> (c) exemption or concession of duty, tax, cess or any other sum, consequent upon any notification issued therefor under this Act or under the Customs Tariff Act or under any other law for the time being in force;
>
> (d) the quantity, weight, volume, measurement or other specifics where such duty, tax, cess or any other sum is leviable on the basis of the quantity, weight, volume, measurement or other specifics of such goods;
>
> (e) the origin of such goods determined in accordance with the provisions of the Customs Tariff Act or the rules made thereunder, if the amount of duty, tax, cess or any other sum is affected by the origin of such goods;
>
> (f) any other specific factor which affects the duty, tax, cess or any other sum payable on such goods, and **includes provisional assessment, self-assessment, re-assessment** and any assessment in which the duty assessed is nil;
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> **(emphasis supplied)**

23. Assessment should be done by either the importer himself [as a part of self-assessment under section 17(1)] or by the proper officer during re-assessment [under section 17(4)] or by any appellate authority in an appeal assailing the assessment. The Textile Committee is neither the importer nor the proper officer nor the appellate authority and it has no *locus standi* or authority under Section 17 in deciding the classification of the goods.

24. The Textile Committee is an expert body on textiles and is not an expert on classification of goods under the Customs tariff. If at all, there are any experts in classification it will be the appraisers or the Assistant Commissioners or Deputy Commissioners in the group in the Custom House or ICD who deal with the classification of the goods day in and day out.

25. The Joint Commissioner classified the goods in Order-in-Original only on the basis of "expert opinion of textile committee on classification". Classification of goods under the Customs Tariff has to be based on the nature of goods, the Customs Tariff and the General Interpretative Rules for interpretation of the Tariff. It cannot be based on some expert opinion. While experts can give test reports on the nature of the goods, type of material, etc., classification, which is a part of assessment, has to be done by the proper officer. The Joint Commissioner also concluded that since the respondent had not classified the goods in self-assessment in conformity with the views of the Textile Committee, it had mis-classified the goods.

26. Further, he concluded that by mis-classifying the goods the appellant had rendered the goods liable for confiscation under section 111(m). This section reads as follows:

> **"Section 111(m)** any **goods which do not correspond in respect of value or in any other particular with the entry made under this Act** or in the case of baggage with the declaration made under section 77 in respect thereof, or in the case of goods under transhipment, with the declaration for transhipment referred to in the proviso to sub-section (1) of section 54;"

27. The 'entry made under this Act' in respect of imports, refers to the Bill of Entry. Goods will be liable to confiscation under section 111(m) if they do not correspond to the Bill of Entry filed either in respect of value or in any other particular. Evidently, the expression 'goods correspond to entry made' can only mean correspond on any facts. In addition to various facts such as the nature of the goods, quality, quantity, etc., the Bill of Entry also contains some particulars such as the classification of the goods, exemption notification

applicable, etc. which are a matter of opinion. The importer, for instance, may classify the goods under a particular heading and the proper officer may classify them under a different heading during re-assessment and further appellate authorities from Commissioner (Appeals) all the way up to Supreme Court may hold different views on the classification. Nothing in section 111(m) indicates that the goods can be confiscated if they are classified by the importer and such classification is not in conformity with the views of any officer or any expert. The Joint Commissioner clearly misunderstood the scope of section 111(m). We, therefore, find that the Commissioner (Appeals) was correct in setting aside the confiscation of the goods under section 111(m) and the consequential imposition of redemption fine under section 125.

28. The duty liability is not in dispute in this case and it has already been paid but the question to be decided if it is a case of assessment under section 17 or a case of demand of duty under section 28(4). Duty has been demanded and confirmed by the Joint Commissioner under section 28(4) and consequential penalty was imposed under Section 114A.

29. A perusal of Section 28 shows that it deals with those cases where duty was not levied, not paid, short levied or short paid. However, it does not mean section 28 can be applied as soon as any goods are imported. The importer has to file the Bill of entry, self assess the goods and pay duty as per his self-assessment and if the proper officer re-assesses the duty, the importer has to pay the differential duty. If during examination any discrepancy is found, the proper officer

may again re-assess the duty and the differential duty may be paid. This process of assessment and re-assessment and payment of duty under section 17 comes to an end once the goods are cleared for home consumption under section 47. Section 47 reads as follows:

> **"47. Clearance of goods for home consumption**.—
>
> (1) Where the proper officer is satisfied that any goods entered for home consumption are not prohibited goods and **the importer has paid the import duty, if any, assessed thereon and any charges payable under this Act in respect of the same, the proper officer may make an order permitting clearance of the goods for home consumption:**
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> ******"

30. Once the goods are cleared for home consumption under 47, they cease to be 'imported goods' and 'dutiable goods' and no duty can be assessed on them and even the person who imported the goods ceases to be the importer. Sections 2(14), (25) and (26) are reproduced below which clarify this legal position:

> **"Section 2 Definitions**
>
> (14) **"dutiable goods'** means any goods which are chargeable to duty and **on which duty has not been paid**;
>
> (25) **"imported goods"** means any goods brought into India from a place outside India but **does not include goods which have been cleared for home consumption**;
>
> (26) **"importer", in relation to any goods at any time between their importation and the time when they are cleared for home consumption**, includes any owner, beneficial owner or any person holding himself out to be the importer;"

31. After an order for clearance of goods for home consumption is given under section 47, the assessment can be modified either by an appeal to the Commissioner (Appeals) or by the proper officer issuing

a notice under section 28. A notice under section 28 is in the nature of review of the assessment. It pre-supposes that the assessment was completed and some duty escaped assessment. For this reason, the relevant date to calculate the limitation under section 28 is the date on which the goods have been cleared for home consumption. Before the process of assessment under section 17 is completed and goods are cleared for home consumption under Section 47, there is no question of any demand under section 28.

32. In this case, assessment under section 17 and the issue of order clearing the goods for home consumption under section 47 were not completed. Since all the events in this case happened before the goods were cleared for home consumption, it was still a process of assessment even though the Joint Commissioner did the assessment instead of letting the proper officer do it in the normal course. The respondent did not challenge before us through any cross appeal the assessment of duty. In fact, the respondent also paid duty as per the assessment.

33. Since section 28(4) does not apply in this case neither would be the imposition of penalty under section 114A. In a nutshell, this is a simple case of assessment on first check basis on the request of the respondent importer but before the proper officer could get the goods examined and complete the re-assessment in the normal course, the Customs (Preventive) Officers intervened, took over and the Joint Commissioner (Preventive) completed the assessment. It is certainly not a case where the officers of Commissioner of Customs (Preventive) detected any fraud or mis-declaration. Section 28(4), section 111(m) and section 114A do not apply to this case at all. The Commissioner

(Appeals) was correct in setting aside the confiscation and penalty through the impugned order.

34. In view of above, we uphold the impugned order and dismiss the appeal filed by the Revenue with consequential relief, if any, to the respondent.

(Order pronounced in open court on **06.08.2024**)

(JUSTICE DILIP GUPTA)
PRESIDENT

(P. V. SUBBA RAO)
MEMBER (TECHNICAL)

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