IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL,

WEST BLOCK NO.2, R.K. PURAM, NEW DELHI-110066

BENCH-DB
COURT –I

Customs Appeal No.C/50671,50795,50847-50849/2015-[DB]
[Arising out of Order-in-Appeal No. 11-2014 dated 22/23.12.2014 passed by the CC Jodhpur]
Customs Appeal No.C/50884-50889/2015-[DB]
[Arising out of Order-in-Appeal No. 11-2014 dated 22/23.12.2014 passed by the CC Jodhpur]
Customs Appeal No.C/51863-51864/2015-[DB]
[Arising out of Order-in-Appeal No. 11-2014 dated 22/23.12.2014 passed by the CC Jodhpur]
Customs Appeal No.C/50856, 50960,51085,52417/2015-[DB]
[Arising out of Order-in-Appeal No. 11-2014 dated 22/23.12.2014 passed by the CC Jodhpur]
Customs Appeal No.C/50282/2016-[DB]
[Arising out of Order-in-Appeal No. 09-2015 dated 17.12.2015 passed by the CC Jodhpur]

The Thar Dry Port …Appellant(s)
Purushotam Gupta
Rajendra M Purohit
Ripudaman M Purohit
Ripudaman Singh
Manish Paliwal
Ramavtar Pareek
Gajendra Soni
Pradeep Poddar
Subhash Pareek
Devendra Soni
Surendra Khator
Chandrahans Brothers
Kasa Infra Ltd.
R R K Mathur
S K Singh
P F Foils
M M Vasava
Thar Dry Port

Vs.

C.C. Jodhpur … Respondent(s)

Present for the Appellant : Mr. Somesh Arora, K. Gurumurthy, Dhruv Matta, D.K. Rana, Surabhi Sinha, Jatin Singhal (Advocates)
Present for the Respondent: Mr. R.K. Manjhi (DR)

Coram: HON'BLE JUSTICE (DR.) SATISH CHANDRA, PRESIDENT
HON'BLE MR. B. RAVICHANDRAN, MEMBER (TECHNICAL)

Date of Hearing: 15/06/2017
Date of Decision: 05/07/2017

FINAL ORDER NO. 54604-54621 /2017

PER: B. Ravichandran

All these appeals are against common impugned order dated 23.12.2014 passed by Commissioner of Customs (Jodhpur). Three appelants – M/s Chandrahans Brothers, M/s P.G. Foils and M/s Kasa Infra Ltd. are in appeal against demands of customs duty and of penalties. All other appellants are against imposition of penalties under various provisions of Customs Act, 1962.

2. The brief facts of the case are that Ms. Chandra Hans Brothers (Main Appellant) had exported 100% polyester fabrics during period 11.08.2008 to 25.10.2008 under the claim for DEPB benefit. The Revenue entertained a view that these goods which were exported were substantially over valued in order to avail inadmissible benefit under DEPB scheme. Investigations were carried out and finally SCN dated 27.08.2013 was issued to 17 persons to demand customs duty and to impose penalties. The case was adjudicated and the impugned order was issued. The original authority rejected the declared FOB value for exported goods and re-determined the same to Rs. 3,44,34,882/- instead of 31,18,43,803/- declared by the exporter. DEPB benefit to the extent of Rs. 27,95,614/- has been canceled. Customs duty forgone by utilizing the DEPB scripts attributable to such overvalued exports was demanded.

3. The main appellant contested the original order on various grounds. The main points are as below:

a) At the time of export of the impugned goods, samples were drawn, inquiries were conducted to ascertain PMV and the export was duly allowed by the officers.

b) The goods of the main appellants cannot be compared with goods of other exporters as those are materially different. The appellants exported dyed and printed polyester fabrics whereas the goods with which comparison is made were dyed fabric either American crepe or georgette.

c) The request of the main appellant to have a proper comparison with similar goods was not accepted.

d) The determination of export value by the original authority is without any basis of law. Simply relying on exports made by some other exporters allegation of overvaluation was sought to be sustained.

e) Cross examination of various witnesses were not allowed by the Commissioner. He held that there is no fundamental right of cross examination in adjudication proceedings.

f) Denial of cross examination had affected the due process and resulted in denial of natural justice.

g) The order of the original authority to recover customs duty from more than one persons/ companies, jointly or severally, is legally untenable.

h) There is no concept of treating a person as deemed importer to demand customs duty. Section 28AAA was introduced in the

Customs Act only w.e.f. 28.05.2012. As such prior to that date for DEPB related cases duty cannot be demanded from exporter.

4. On behalf of Ms. P.G. Foils it is contended that they have purchased DEPB scripts from Ms. Chandrahans Brothers. First of all there can be no demand of customs duty jointly and severally, from more than one persons. Further, they have purchased DEPB scripts which are duly issued by the competent authority and as such they cannot be held to have been involved in any fraudulent activity. No duty or penalty can be imposed on them.

5. Ms. Kasa Infra Ltd. submitted that they have purchased DEPB scripts from Ms. Chandrahans Brothers and used the same for import of goods. They have bonafidely entered into these transactions. There is no provision to demand duty from more than one persons, jointly and severally.

6. Sh. M.M. Vasava (Asstt. Commissioner), Sh. Purushotam Gupta (Asstt. Commissioner), Sh. S.K. Singh (Superintendent) and Sh. R.K. Mathur (Inspector) working as customs officers during material time and having handled the export consignment in their capacity as officers incharge, were imposed with penalties under Section 114(iii) of the Customs Act, 1962 holding that they have facilitated M/s Chandrahans Brothers in overvaluing the export goods and consequently getting ineligible DEPB benefit. All these appellants contested the penalties imposed on them. It was submitted there is no allegation of abetment in the SCN and there is no evidence to the effect that the appellants working as officers have committed an act or omitted to do any act which will tantamount to abetment. They have

acted during the course of their official duties. Even if it is considred that there could be a case for negligence or inefficiency, the same cannot be ground for holding the charge of abetment in order to invite penalty under the provisions of Customs Act, 1962. There is no evidence or documentary proof that the officers have knowingly abeted any illegal transaction of the exporter.

7. The other appellants contested the imposition of penalties of different amounts, imposed on them.

8. We have heard the Ld. Counsels representing the appellants and the Ld. AR on behalf of Revenue.

9. The present appeals are on the main issue of over valuation of export items in order to claim ineligible DEPB benefits. First of all we noticed that the demands of Customs duty have been made under two categories. The demand of Rs. 45,36,699/- was made from M/s Chandrahans Brothers who were actually the exporters, holding them as deemed importer. We find force in the claim of the main appellants that the legal provision regarding the demand of duty from the person who is the beneficiary of the instrument issued by the authorities under Foreign Trade (Development and Regulation) Act, 1992 has been introduced only w.e.f. 28.05.2012, as Section 28AAA in the Customs Act, 1962. Introduction of such provision in the substantive law itself makes it clear that there is no legal sanction prior to that date to hold the person to whom, the instrument was issued as a person liable to Customs duty. Connected legal issues were discussed at length in the order of Tribunal in Sumit Wool Processors and others 2015-TIOL-2090-CESTAT-MUM.

10. Further customs duty of Rs. 1,13,106/- and Rs. 4,08,961/- have been demanded by the original authority from M/s Chandrahans Brothers and M/s Kara Infra Ltd./ M/s P.G. Foils Ltd. respectively, jointly and severally. We note that to demand customs duty it is necessary to identify the person who is liable to pay such duty. While, deciding the dispute relating to such demands for duty jointly and severally, the Tribunal in various cases held such demands are not legally sustainable. Reference can be made to one such case in Rimjhim Ispat Ltd. 2013 (293) ELT 124 (Tri. Del), the Tribunal examined various decided cases and the legal question and concluded that duty cannot be confirmed jointly and severally against multiple persons. We note that it is necessary for the officer adjudicating the customs duty liability to identify the importer/ person who is liable to such duty in terms of the provisions of Customs Act, 1962. The present order in so far as it relates to confirmation of Customs duty jointly and severally on more than one person is accordingly, not legally sustainable.

11. We find that the whole issue came up mainly on the ground of availing ineligible benefit of customs duty concession, it is necessary to determine such liability correctly. The main appellant strongly contested the rejection of FOB value originally assessed by the officers and comparing the value of different exporters to determine the FOB value of the main appellant. since we find that the original authority has not properly arrived at, the identity of the person from whom, duty demand can be confirmed and ordered recovery of such duty jointly and severally, we set aside the impugned order and remand the matter back to the original authority to first examine this legal issue to

fix the liability, if any, on the identified persons specifically. Since the matter is remanded, all issued are kept open without expressing any opinion.

12. At the time of fresh adjudication it is necessary for the original authority to provide opportunity for the noticees to present their side of the case. We note that the cross examination sought for by the appellants have not been accepted by the original authority on the ground that the same is not a fundamental right. We note that it is a well settled legal principle that the cross examination of witnesses whose statements are admitted as evidence has to be considered in terms of section 138B of the Customs Act. The said provisions are identical to the provisions of Section 9D of the Central Excise Act, 1944. In this connection reference can be made to the decision of Hon'ble Bombay High Court in the case of Nirmal Seeds Ltd. 2017-TIOL -627-HC (Mum-Cx) and the decision of Hon'ble Punjab & Haryana High Court in the case of G. Tech Industries 2010(339)ELT 209 (P&H).

13. This aspect also requires to be considered afresh by the original authority.

14. M/s The Thar Dry Port filed appeal contesting the penalty imposed on them. It is conducted that they are appointed as custodian of ICD in Jodhpur. They have not committed any statutory or procedural violation inviting penal action. The original authority has not appreciated the factual background of the case. The original authority recorded that they have connected in a careless manner and facilitated the export of overvalued goods. It is strongly contended

that there is no evidence of the custodian acting beyond their statutory obligation with any malafide motive.

15. The Thar Dry Port have also filed another appeal against imposition of penalty under Regulation 12(8) of Handling of Cargo in Customs Area Regulation, 2009. It is contended that they have not violated any provisions of the said regulation. There is no need for the custodian to collect or keep any document relating to period prior to the receipt of export at the ICD. They have maintained all the required records regarding receipt of the goods. In fact inquiry officer concluded that no penal action was warranted in this case.
On careful consideration of appeal record, we find that no act or omission on the part of the custodian has been brought out in the impugned warranting penalties either under Customs Act or Regulation of 2009. As such these two appeals by The That Dry Port are allowed. For the reasons recorded, the other cases have to go back to the original authority for fresh adjudication in line with observations made. Adequate opportunity shall be provided to the appellants to present their side of the case.

16. All the appeals are disposed of in the above terms.

[Pronounced in the open Court on 05/07/2017]

(B. RAVICHANDRAN)
MEMBER (TECHNICAL)

(JUSTICE (DR.) SATISH CHANDRA)
PRESIDENT

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