CUSTOMS EXCISE & SERVICE TAX APPELLATE TRIBUNAL,

West Block No.2, R.K.Puram, New Delhi

COURT-I

Date of hearing: 11.09.2017
Date of Pronouncement:_ 27.10.2017

Appeal No. C/3017-3022/2012-CU[DB]

[Arising out of the Order-in-Original No. RT/ACE/189/2012 dated 03.07.2012, passed by the Commissioner of Central Excise, New Delhi]

M/s Hind Industries Limited
Dr. Naseem Qureshi
Shri Anil Vanjani
Shri Kaleem Khan
Shri Md. Nisar Ahmed
Shri Mazar … Appellant

Vs.

C.C. New Delhi ... Respondent

Appearance:
Present Shri V. Lakshmikumaran & Shri Hemant Bajaj, Advocate for the appellant
Present Shri Govind Dixit, DR for the respondent

Coram: **Hon'ble Mr. Justice (Dr.) Satish Chandra, President**
Hon'ble Mr. V. Padmanabhan, Technical Member

FINAL ORDER No. 57415-57420 /2017

Per V. Padmanabhan:

The present appeals have been filed against the order No. 189/2012 dated 03.07.2012.

2. Brief facts of the case are that the appellant M/s Hind Industries Limited is engaged in the export of fresh chilled meat, the export of which is free under the ITC export policy. However, there is a condition attached to such export that Government appointed Doctor would issue a certificate ante mortem and post mortem of animals at the time of slaughter.

The investigation conducted by the Revenue revealed that certain blank certificates duly signed by the Doctors were found in the appellant's factory at the time of the search and it is also a matter of record that Veterinary Doctors available in the Country were not sufficient to carry on said ante mortem and post mortem investigation. Ld. DR submits that it is not only the blank signed certificates of the Doctors which was found in the factory but the same were filled with complete details alongwith the stamps, which were found in the factory. Thus appellants were not fulfilling the said condition of ITC Policy. So, the duty demand was raised, and penalty was imposed on the other concerned appellants. Being aggrieved, the appellants have filed the present appeals.

3. With this background, we heard Sh. V. Lakshmikumaran, ld. Advocate for the appellant and Sh. Govind Dixit, ld. AR for the Revenue.

4. Sh. Lakshmikumaran, Ld. Counsel submits that the appellants were engaged in the export of chilled meat. It is the submission of the ld. Counsel that Section 28AAA came into effect w.e.f. 28.05.2012 so the same is not applicable in the instant case. For this purpose, he relied on Explanation 2 of Section 28AAA where it was mentioned that –

> "*The provisions of this sub-section shall apply to any utilisation of instrument `so obtained by the person referred to in this sub-section on or after the date on which the Finance Bill, 2012 receives the assent of the President, whether or not such instrument is issued to him prior to the date of the assent*".

5. He further submits that equally Section 28 is not applicable in the assessee's case. For this purpose, he relied on the ratio laid down by the Tribunal in the case of ***The Thar Dry Port & Ors. vs. CC, Jodhpur -2017-VTL-681-CESTAT-DEL-CU*** wherein para 9 it was mentioned that-

> "9. ....*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*."

6. It is the submission of the ld. Counsel that in the instant case the demand was raised prior to the period 2010. The demand is not leviable on the exporter of meat. To support his argument, he relied upon the ratio laid down in the case of ***CC (E.P.) vs. Jupiter Exports – 2007 (213) ELT 641 (Bom.)*** wherein it was observed that-

> "23. *With regard to the third question of law, namely, "whether the license holder or the transferee of the license obtained by manipulation and forging the documents for creating false records are entitled to import validly and legally and exempted from payment of duty?"*
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> *This question relates to the transferee. As such it cannot be allowed to be raised in this application, since the Commissioner has held that the transferees of the license were entitled to import and no import duty could be recovered from them. However, held that the import duty could be recovered from the respondent-petitioner. The Tribunal negative this and correctly held that duty under Section 28 could only be recovered from "a person chargeable to duty" and that such a person would be that the importer in the case of import and the exporter in the case of exports. The definition of the term "importer" under Section 2(26) of the Customs Act defines the term "importer" and does not cover a person who has not caused*

> *the import of the goods and who does not hold himself out to be the importer or the owner of the imported goods. As the respondents are not the importer. It cannot be made chargeable to duty as the demand for duty has to be based on law and not on equity or moral considerations. The Tribunal rightly held that it was open to the department to proceed against a person who had obtained a license by fraud or mis-declaration in accordance with law*".

7. Further, he relied on the decision of the Tribunal in the case of ***Swati Industries vs. CC, Amritsar – 2009 (248) ELT 191 (Tri. Del.***) where it was observed that-

> "3.1.1 *........If the allegation of export over-invoicing is upheld and the DGFT, the authority to issue, cancel or modify the DEPB scrips, cancels the scrips or reduces their value, the duty can be recovered only from the users of the DEPB scrips for duty free imports, not from the exporter against whose exports the DEPB scrips had been issued. There is no provision in the Customs Act, 1962 to recover the wrongly taken DEPB benefit in cash from the exporters, if he has sold/ transferred the DEPB scrips to someone else. We find that other than Section 28 for demand of non-levied, short-levied or erroneously refunded duty or non-paid, short-paid or erroneously refunded interest on duty, Sections 28AA and 28AB for demand of interest on non-paid, short-paid or erroneously refunded duty for the period of delay in its payment, Section 72 for demand of duty and interest on warehoused goods, Rule 16 read with Rule 16A of Customs and Central Excise Duties Drawback Rules, 1995 issued by the Government under Section 75 of Customs Act, 1962 and Section 37 of the Central Excise Rules, for demand of erroneously paid drawback on export or for recovery of drawback paid which the exporter has to pay back as the sales proceeds have not been realised within the period stipulated in Foreign Exchange Management Act and Section 75A(2) for demand of interest on wrongly paid drawback for the period of delay in its payback, there are no other recovery provision in the Customs Act, 1962*".

8. To conclude his arguments, ld. Counsel submits that the department is also in dilemma whether the duty imposed can be demanded from the importer as mentioned in para 74 of the impugned order. Lastly, he submits that Section 28 of the

Customs Act, 1962 is not applicable in the instant case. Hence, demand is illegal and the same may be set aside.

9. On the other hand, Shri Govind Dixit, ld. AR for the Revenue supported the impugned order. He submitted that in the instant case, show cause notice was issued on 30.05.2011 with a corrigendum dated 09.09.2011. The ratio laid down in the case of ***The Thar Dry Port*** (supra) is not applicable for the reason that in that case the notice was issued much later where the show cause notice was issued on 27.08.2013 when the relevant amendment in Section 28AAA was already in existence w.e.f. 28.05.2012. So, he distinguished the ratio laid down by the Tribunal in the case of ***The Thar Dry Port*** (supra). It is the submission of the ld. AR that in other similar cases the notices were issued prior to Section 28AAA. Ld. AR further submits that in the instant case, Section 28 (sub-section 1) was rightly invoked by the adjudicating authority. He justified the impugned order. To support his argument, he relied on the ratio mentioned in the impugned order in the case of ***Sravani Impex Pvt. Limited vs. Additional Director General, DRI – 2010 (252) ELT 19 (A.P.***) and ***Tejwant Singh vs. Commissioner of Customs, New Delhi – 2010 (252) ELT 253 (Tri. Del.)***. The said cases have already been discussed by the adjudicating authority in the impugned order.

10. To counter, Sh. Lakshmikumaran submits that the appellant during the relevant period was exporting chilled meat. He submits that the meat was to be supplied on short notice as

and when space in the aircraft was available. He submits that in the certificate only two columns were left blank, namely the name of the importer and details of vessel. Rest formalities were fulfilled by the concerning division. He submits that as the meat will have to be exported on short notice unfilled columns were completed. It is his submission that only one Inspector was posted in the district and it is not possible for entire supply boneless buffalo meat from the factory to be inspected by the Inspector. According to the ld. Counsel, the department has observed that certificate is not correct. DGFT is the competent authority for granting or cancelling the license which was never done till today inspite of the recommendation made by the department. The exporter as well as DGFT and all importers are happy except the department. He submits that the demand is totally illegal, baseless and may be set aside. He also submits that at the relevant time fee was not payable and necessary clarification was already given to the adjudicating authority.

11. On the other hand, Sh. Govind Dixit supported the impugned order by mentioning that Sh. Nishar Ahmed, who was the incharge, in his statement submitted that no inspection fee was ever paid. He further submits that in the said certificate not only two columns were blank but other details such as the Veterinary Doctor, owner, date of production, batch number etc. For this purpose he read out para 151.

12. We have heard both the parties and perused the record.

13. At the outset we take up discussion of the legal argument that Customs Authorities are not entitled to invoke the provisions of section 28 of the Customs Act for issuing a demand for repayment of the DEPB credit. In the present case, the appellant has exported chilled meat and procured DEPB/VKGUY scrips issued by DGFT. The allegations made in the SCN by customs Department are that such scripts where procured by undertaking export of chilled meat in contravention of the relevant provisions of the Foreign Trade Policy (FTP). It is the argument of the Ld. counsel for the appellant that Section 28AAA came into effect w.e.f. 28.05.2012 empowering the Customs Department to recover the duty relatable to the utilization of an instrument (Such as DEPB scrips) which has been procured by means of collusion, willful mis-statement or suppression of facts from the person to whom such instrument has been issued even if the import under the instrument has been made by another person to whom such instruments were transferred. It is his further submission that there was no legal sanction prior to the date of introduction of this section to recover customs duty from the person to whom the instrument was issued. In the present case such demand of customs duty has been made under section 28 from the person to whom such scrips were issued even for the period prior to 28.5.2012. Hence he has argued that the demand cannot be sustained. He has also placed on record several case laws to support his contention specifically he has referred to the following cases:

i. ***The Thar Dry Port & Ors. vs. CC, Jodhpur -2017-VTL-681-CESTAT-DEL-CU***

ii. ***CC (E.P.) vs. Jupiter Exports – 2007 (213) ELT 641 (Bom.)***

iii. ***Swati Industries vs. CC, Amritsar – 2009 (248) ELT 191 (Tri. Del.)***

14. In the above case laws it has been held that the Customs Department cannot demand such duty under section 28 from the license holder who has already transferred such license to others who in turn have undertaken imports duty free.

15. The ld. DR on the other hand has sought to distinguish the above cases. He has relied on the following cases:

i. Sravani Impex Pvt. Ltd. Vs. Addl. DIR General Chennai 2010 (252) ELT 19 (AP)

ii. Tejwant Singh Vs. CC New Delhi 2010 (253) ELT 273 (Tri-Del)

16. After considering the above case laws and perusal of the appeal record, we find that the relevant period involved in the present case is 01.04.2006 to 31.10.2010 and the show cause notice has been issued on 30.05.2011 to the person to whom such scrips were issued.

17. In the case of ***The Thar Dry Port & Ors. (Supra)***, the show cause notice has been issued on 07.08.2013 when the section 28AAA was already in existence w.e.f. 28.05.2012. Hence the show cause notice has covered the period both prior to introduction of the new section and subsequent to that. We

also note that in that case the matter has been remanded to the adjudicating authority for re-determination of the demand. Hence, we are of the view that the case law is distinguishable from the facts of the present case.

18. In the case of ***Sravani Impex Pvt. Ltd. (supra)***, the Hon'ble High Court of Andhra Pradesh had occasion to consider an identical question which has arisen in the present case. The Hon'ble High Court observed as follows:

> *"38. Under Section 28(1) of the Customs Act, when any duty has not been levied, or has been short levied, the proper officer may serve a notice on the person chargeable with the said duty requiring him to show cause why he should not pay the amount specified in the notice. Section 28(1-A) relates to levy of interest under Section 28AB and levy of penalty equal to 25%. DEPB scrips are Customs duty exemption benefits in as much as they are utilized for import of goods and, to the extent of credit available in the DEPB scrips, goods can be imported without payment of import duty on such goods. As Customs duty was not paid, to the extent of credit available in DEPB scrips issued on the basis of fraudulent over-invoicing of export goods, the Customs Officer is entitled, under Section 28(1) of the Customs Act, to demand payment thereof. As the DEPB scrips have, admittedly, been sold to third parties, the only course open to the Customs Officers is to demand repayment of DEPB credit (i.e., Customs (Import) duty) from the petitioner. Exercise of power to make such a demand is referable to Section 28(1) of the Customs Act. The impugned show cause notices, which propose a demand for repayment of DEPB credit under Section 28(1) as it was availed by resort to fraudulent over-valuation of export consignments, cannot be said to have been issued without jurisdiction.*
>
> *41. Section 25 of the Customs Act relates to the power to grant exemption from duty. Under sub-section (1) thereof, if the Central Government is satisfied that it is necessary in the public interest so to do it may, by notification in the Official Gazette, exempt generally, either absolutely or subject to such conditions to be fulfilled before or after clearance as may be specified in the notification, goods of any description from the whole or any part of the customs duty leviable thereon. In exercise of the powers conferred by Section 25(1) of the Customs Act, 1962, Customs Notification No. 45/2002 dated 22-4-2002 was issued i.e.,*

"Customs Exemption notification for DEPB". Under the said notification, the Central Government exempted certain goods from customs duty subject to the condition that the importer was issued a DEPB by the licencing Authority at the rate notified by the Government of India for the products exported and that the DEPB is produced before the Customs officer for debit of the duties leviable on the goods but for the exemption contained in Notification No. 45 of 2002. Under the proviso, exemption of duty was not to be admissible if there was insufficient credit in the DEPB for debiting the duty leviable on the goods but for the exemption. It is evident that the DEPB Scheme, as covered by Customs Notifications dated 22-4-2002, is a customs duty exemption notification. The power to exempt would include within its ambit the power to demand duty in the event such exemption is misused.

42. Under Section 11(2) of Act 22 of 1992, where any person makes or abets or attempts to make any export or import, in contravention of any provision of the Act or the rules, he shall be liable to a penalty and under Section 11(5), in cases where the provisions of the Act or the rules are contravened, the goods are liable to confiscation by the Adjudicating authority. Section 12 of Act 22 of 1992 provides that no penalty imposed or confiscation made under the said Act shall prevent the imposition of any other punishment to which the person affected thereby is liable under any other law for the time being in force. While Section 11(5) of Act 22/92 makes the export goods liable for confiscation, by the DGFT (adjudicating authority), for contravention of the provisions of Act 22 of 1992 or the rules made thereunder, a similar power of confiscation is available under Section 113(i) of the Customs Act also. The mere fact that Section 11 of Act 22 of 1992 empowers the DGFT to confiscate the goods or impose penalty would not, in view of Section 12 of Act 22 of 1992, denude Customs officers of the powers of confiscation under Section 113(i) of the Customs Act or to demand, under Section 28 of the Customs Act, repayment of the Customs duty benefits extended earlier to the petitioner on the erroneous premise that the fraudulently over-invoiced goods represented the true value of exports made by them."

19. The Hon'ble Andhra Pradesh High Court has held that the Customs Authorities had the power to issue show cause notice under section 28 for repayment of credit which was availed by resort to fraud. The Hon'ble High Court has taken the view that though DEPB scripts are issued by DGFT, the relevant

notifications are for customs duty exemption notification. The Hon'ble High Court has further held that the power to exempt would include within its ambit the power to demand in the event such exemption is misused. The High Court went on to make a fine distinction between the powers of DGFT for adjudication and such powers conferred upon the customs officers.

20. We also note that the case of ***Sravani Impex Pvt. Ltd. (supra)***, is far more recent than the other cases relied upon by the appellant except that of the case of ***The Thar Dry Port & Ors. (Supra)***, which we have already distinguished as above. By respectfully following the judgment of the Hon'ble Andhra Pradesh High Court, we conclude that the show cause notice issued under and Section 28 in the present case cannot be held to be without jurisdiction for the period prior to the introduction of section 28 AAA.

21. Now we turn to the merits of the present case. The case of revenue is that the appellant has undertaken export of chilled meat without following the relevant conditions to be fulfilled for such export. After investigation into the affairs of the appellant, the Department has opiend that the Foreign Trade Policy specifies that the government appointed doctor would issue a certificate ante mortem and post-mortem of animals at the time of slaughter. The investigation has revealed that certain blank certificates duly signed by the doctors were found in the appellant's factory at the time of their search along with the relevant seals. The allegation is that the veterinary doctors never

supervised such slaughter and hence, all such certificates were not valid but only an empty formality.

22. The Ld. counsel for the appellant has argued that the chilled meat is often cleared for export on short notice after the availability of space in the air craft is known. The certificates were signed by the veteran Doctor with only 2 columns left blank, viz. the name of the importer and the details of the vessel. He contended that all the rest of the formalities were fulfilled. It is further been argued that DGFT is the competent authority for granting or cancelling the license which has never been done till date.

23. We note that the main evidence obtained by customs Department in the investigation are the blank certificates found with the signature of the veterinary doctor. From record we find that the appellant has sought cross-examination of the veterinary doctors whose certificates where recovered during such proceedings. Revenue has also taken the view that these doctors were not authorized to issue such certificates during the relevant period. Specifically they have sought the cross-examination of Dr. Jeevan Singh, Animal Husbandry Dept, UP and Dr. Abdul Majid, Veterinary Officer, Talipur, Aligarh.

24. We find that cross-examination has not been allowed by the adjudicating authority before passing the impugned order. 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).***

25. We also consider that cross-examination of the above witnesses will be particularly necessary since the case of revenue is based on the certificates said to have been issued by these doctors.

26. In view of the above, we are of the view that the matter is required to be remanded to the adjudicating authority to pass fresh orders after allowing the cross-examination of the above witnesses.

27. In view of the above discussions, we uphold the legal validity of the show cause notice issued under Section 28 but set aside the impugned order and remand the matter to the adjudicating authority to pass orders on merit after cross-examination and extending effective hearing to all the appellants. Additional evidence may be admitted as per law.

[Order Pronounced in the open court on **27.10.2017**]

(Justice Dr. Satish Chandra)
President

(V. Padmanabhan)
Technical Member

Bhanu