IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL, NEW DELHI, PRINCIPAL BENCH NEW DELHI

Date of Hearing:30.10.2017
Date of Decision:01/12/2017

Customs Appeal No.57374/2013 (DB)

[Arising out of Order-in-Appeal No.CC(A)Cus/Prev/78/2013 dated 19.02.2013 passed by the Commissioner of Customs (Appeals), New Customs House , New Delhi]

CC (Preventive), New Delhi — Appellant

Vs.

M/s.Shriya Textiles — Respondent

Appearance

Rep. by Shri R.K. Majhi, AR for the appellant.
Rep. by Shri Kumar Vikram, Advocate for the respondent.

Coram: Hon'ble Shri S.K. Mohanty, Member (Judicial)
Hon'ble Shri B. Ravichandran, Member (Technical)

Final Order no.58142/2017

Per B. Ravichandran:

The Revenue is in appeal against order dated 20.02.2015 of Commissioner (Appeals), Customs, New Delhi. The brief facts of the case are that the respondents exported Polyester Fabrics through ICD, Rewari, Haryana during September, 2004 under Duty Entitlement Pass Book Scheme (DEPB). The whole dispute in the present case relates to the date of export of these goods. The respondent based on documents showing export on 21.09.2004 obtained DEPB Scrips from JDGFT, New Delhi having benefit of 10%. The Revenue contended that the date of export is 24.09.2004 with relevant applicable benefit of 5.5 % only. The respondent filed four shipping bills and claimed DEPB benefit of Rs.18,97,007/-.

2. Based on certain verification of records and inquiry, the Revenue initiated proceedings against the respondent by issuing show cause notice dated 15.06.09.

The case was adjudicated by order dated 26.02.2010. The Original Authority held that the goods were exported only on 24.09.2004 and as such, confirmed differential excess duty available as per DEPB originally issued considering the date of export as 21.09.2004. Penalties were imposed under Section 114 and under Section 114 AA of the Customs Act, 1962. On appeal, the said order was confirmed by the Commissioner (Appeals) vide order dated 7.6.2011. On further appeal, the Tribunal vide order dated 9.11.2011 remanded the matter back to the Original Authority for a fresh decision. The direction of the Tribunal was to decide the case afresh after affording reasonable opportunity of personal hearing to the party. The case was re-adjudicated by the Original Authority vide order dated 29.10.2012. The Original Authority affirmed the view of the Revenue that the goods were exported on 24.09.2005 and not on 21.09.2004. Accordingly, he confirmed customs duty liability of Rs.18,82,875/-. He imposed penalty of equivalent amount under Section 114 A with a further penalty of Rs.7 lakh under Section 114 AA of the Customs Act, 1962. On appeal vide the impugned order, the Commissioner (Appeals) set aside the original order and allowed the appeal by the respondent. Aggrieved by this, the Revenue preferred the present appeal.

3. The ld. AR elaborating the grounds of appeal submitted that the present order by the Commissioner (Appeals) is contrary to the earlier findings by the very same authority in the first round of litigation. No reason is recorded for change of view. The Commissioner (Appeals) cannot take contrary view on the same set of facts.

4. Further, during the course of argument as well as in further written submissions, ld. AR reiterated that the copies of the bills of lading covering shipping bills clearly indicate the date as 24.09.2004. Copies of the shipping bills

bear signature of Customs Officers dated 24.09.2004. The container stuffing sheet in respect of the goods covered by these shipping bills maintained by Haryana Warehousing Corporation at ICD, Rewari signed by the Port Manager and Inspector of Customs is dated 24.09.2004. The BRCs submitted by the respondent contains various corrections and re-writings and the export date wrongly mentioned as 21.09.2004. The DEPB register, shipping bill, register and export cargo register at ICD, Rewari show the date of shipment as 24.09.2004. Shri Manish Oberoi in his statement dated 28.11.2007 clearly stated that the goods were examined at ICD, Rewari on 24.09.2004 and the let export order was given on 29.09.2004. All the evidences relevant to the case were examined in detail by the Original Authority. As such, the impugned order has not appreciated these documentary evidences in proper perspective. He prayed for setting aside the impugned order and for restoring the original order.

5. Ld. Counsel for the respondent submitted that the goods were exported through ICD, Rewari on 21.09.2004. The shipping bills have been countersigned by the Customs officer as per law. The date of signature by both the Inspector and the Superintendent was clearly indicated in the shipping bills as 21.09.2004. The date stamp of ICD, Customs affixed on these shipping bills also bears the date as 21.09.2004. The document submitted by the Revenue has no evidentiary value as these are internal records not relevant to decide the date of export. Further, the ld. Counsel contended that the DEPB scrip was issued by the competent licensing authority, JDGFT, New Delhi on the basis of the verification report given by the jurisdictional Customs officers. In fact, the verification report dated 14.03.2005 given by the Superintendent of Customs, ICD, Rewari addressed to the FTDO, New Delhi clearly states that the shipping bills dated 21.09.2004 are genuine.

6. Ld. Counsel for the respondent submitted that the only ground mentioned by the Revenue in the appeal, is that the Commissioner (Appeals) cannot take a contrary view in the same case in two different orders. It is submitted that in the first round of litigation, the matter was decided ex parte. In remand directions, the Tribunal instructed the Original Authority to provide due opportunity to the respondent before deciding the case. As such, the decision in the impugned order cannot be questioned on the ground that this is contrary to the earlier finding. The earlier finding does not exist as the same has been set aside by the Tribunal. No other ground is mentioned by the Revenue in the appeal. However, later in written submissions, the Revenue made certain allegations with reference to the correctness of the date of export. It is the case of the respondent that when the DEPB scrip was issued by the competent authority, any variation or cancellation of licence has to be done by the issuing authority only. The customs officers are not competent to hold any license issued by the competent authority of DGFT as invalid or improper. The DEPB scrip has not been utilized by the respondent and the same has been transferred to third party. As no duty concession has been availed by the respondent, no duty demand will arise against them. Ld. Counsel for the respondent relied on various decided cases in support of his above submission.

7. We have heard both the sides and perused the appeal records.

8. The only point for decision is the correct date of export of goods by the respondent. The respondent claimed that the exports were made on 21.09.2004 and the Revenue claimed the same is done only on 24.09.2004. We have perused the various documents submitted by both the sides. Admittedly, the copies of the shipping bills submitted by the respondent clearly show the date stamp as 21.09.2004 along with the signatures of Inspector and the Superintendent of

Customs dated 21.09.2004. The Revenue claims that the documents were forged and fabricated. The Revenue relied on another set of copies of shipping bills warehousing register, etc. to contend that the shipment date is only 24.09.2004. On close examination of these documents, were are convinced that contrary claims were made on the basic fact of date of shipment based on the documents, which bear the signature of customs offices. Though during the course of argument and written submissions, the Revenue made various assertions regarding manipulation and correctness of the documents by the respondent, the only ground agitated in the appeal filed by the Revenue is that the Commissioner cannot arrive at a different finding when the very same authority passed an order in favour of the Revenue in the first round of litigation. We note that the ground relied on by the Revenue in this regard is legally not sustainable. It is clear that the proceedings in the first round of litigation concluded and merged in the final order of the Tribunal. The Tribunal, after setting aside the order of the Commissioner (Appeals), remanded the matter to the Original Authority for a fresh decision. Hence, it is not tenable to submit that the Commissioner (Appeals) in the second round of appeal should arrive at the same conclusion as done in the first round of litigation.

9. In the impugned order, the Commissioner (Appeals) records as below:-

> "16. I find that it is alleged by the department that the appellant had filed SB NO. 39-42, all said to be dated 24.09.2004 and the date appeared to be overwritten to make it 21.04.2009. all the four SBs were registered at Rewari said to be on **24.09.2004** as per entry in DEPB Register and the date of entry appeared to be tempered with to show the date as 21.09.2004. But the file C.No. VIII/ICD/RE/Shriya/DEPB/13/05 containing correspondence and note sheet relating to issue of Release Advices against the DEPB Licenses No. 0510155316 dated 08.04.2005 and 0510155532 dated 12.04.2005 of the appellant, contained **SBs Nos. 39-42 all dated 21.09.2004** (original/duplicate/quadruplicate); invoice cum

packing lists, all dated 30.08.2004; Bills of Lading No. SUN/DEL/DEXB/057 dated 05.10.2004; ARE-1's No. 75-78 all dated 23.06.2004, issued by the Superintendent, Central Excise, Raigad Division; Release Advices 02 & 03 dated 25.04.2005; Bank Realization Certificates for SBs No. 39-42 all dated 21.09.2004, etc. It was alleged that the said SBs were fake and forged.

17. The appellant has submitted the copies of Shipping Bills No. 39-42 all dated 21.09.2004. From the perusal of theses SBs, I find that all the four SBs bear the seal-stamp by the department as "ICD Customs Rewari, S.Bill No. 0039 to 0042" and all the four stamps are dated 21 Sep, 2004. I also find that all the said four shipping bills were processed by Inspector and Superintendent of Customs under their signatures all dated 21.09.2004. There is nothing in the impugned order to show how these shipping bills were processed on 21.09.2004 when they all were alleged to be dated 24.09.2004 as held by the adjudicating authority. Further the appellant has also submitted the copy of letter issued by the Superintendent of Customs, ICD, Rewari, bearing C.No. VIII/ICD/Re/Misc/2/05/27 dated 14.03.2005 addressed to The Foreign Trade Development Officer, 6-7, Asif Ali Road, B.K. Roy Court, New Delhi, which read as under:-

"Please refer to your office letter F.No. 05/18/51/4379 AM05/CLA/DEV-IV/5751 dated 07.03.05 on the subject above.

In this connection, it is submitted that Shipping Bills No. 0039 and 0040 both dated 21.09.04 have been issued from this port and are genuine."

The above said letter has been provided to the appellant by the adjudicating authority vide letter C.No. VIII(SB)10/48/50/GAMMA/Adj/2012 dated 9578 dated 17.8.2012.

This proves the genuineness of the SBs. There is nothing in the impugned order to show that when the above said letter was on record and the adjudicating authority himself had supplied the same to the appellant, why it was discarded by the adjudicating authority. In the facts and circumstances discussed above the said shipping bills cannot be held to be dated 24.09.2004 merely on the basis of over writing in the internal records of the department

> and which are maintained by the department alone and not by the appellant. Hence the whole case against the appellant fails, as a consequence."

He further records that there is no case of non-levy or short levy of customs duty against the appellant to make a demand under Section 28. The DEPB credit is not covered by Section 28. The respondent is not an importer and did not claim any concession of customs duty. The DEPB scrip has been transferred to a third party. We find analysis is made in the impugned order based on the ratio of the decision by the Hon'ble Supreme Court in the case of **East India Commercial Co. Ltd. – 1983 (13) ELT 1342 (SC), Sampat Raj Dugar – 1992 (58) ELT 163 (SC)** and **Sneha Sales Corpn – 2000 (121) ELT 577 (SC).** Since the respondent did not import any goods, there is no question of recovering any duty from them. The various judicial decisions followed by the Commissioner (Appeals) in the impugned order were not contested or distinguished in the appeal by the Revenue.

10. One more important aspect is that when the respondent produced various documents bearing signature of customs officers dated 21.09.2004, it is necessary for the department to enquire as to how such documents were presented and in case of questioning their bonafideness, to conduct further inquiry with reference to the alleged forgery. We are not informed of any such inquiry conducted internally by the Department to support the allegation of manipulation or forgery of these documents signed by the officers. Even a preliminary assertion that signature and the stamp of the customs on the documents were forged requires certain supporting evidence. Instead of making simple allegation, it is necessary to indicate that the concerned officers, whose signature is figuring in these documents have not signed them at all. Such assertion with evidence is lacking. It would appear that documentation in the present case has not been probed by the Revenue to its

logical end to find out any possible collusion of the officers, which resulted in the different types of entries/stamps having different dates. Above all, if the documents submitted by the respondent were not bonafide, the correct course of action is to get the DEPB scrip cancelled by the competent licensing authority. No such action has been taken by the Revenue as per the record.

11. In view of the above analysis, we find that there is no reason for us to interfere with the findings recorded in the impugned order. Accordingly, the appeal by the Revenue is dismissed.

[Order pronounced on 1.12.2017.]

(S.K. Mohanty)
Member (Judicial)

(B. Ravichandran)
Member (Technical)

Ckp.