

IN THE CUSTOMS, EXCISE & SERVICE TAX
APPELLATE TRIBUNAL,

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

BENCH-SM

COURT -IV

Customs Appeal No.C/137-138/2009-CU [SM]

[Arising out of Order-in-Original No.32/MKG/2008 dated 31.12.2008 passed by the Commissioner of Customs (Import & General), New Delhi]

**M/s. Friendly Video Vision
Shri Rakesh Kumar Bhagat
Vs.**

...Appellant

C.C. (Import & General), New Delhi... Respondent

Present for the Appellant : Mr.A.R. Jain, Advocate

Present for the Respondent: Mr.P. Poddar, D.R. & Mr.S. Nunthuk, D.R.

Coram: HON'BLE MRS. RACHNA GUPTA, MEMBER (JUDICIAL)

Date of Hearing : 11.12.2019

Pronounced on : 07.03.2019

Final ORDER NO. 50324-50325/2019

PER: RACHNA GUPTA

The appellant is a 100% Export Oriented Unit and is engaged in the import of Video tape for manufacture and export of blank video cassettes out of it. The Department got a specific intelligence that video cassettes manufactured by the appellant are out of old and used tapes instead of the brand new tapes imported duty free fallen under the 100% EOU Scheme and the container of such tapes bearing No. CRXU 2689406 which had already been dispatched to Bombay on 12.09.1998. The Officers of Customs (Preventive) Branch, New Delhi reached Bombay in presence of Mumbai Port Trust

got examined the said container on 30th September 1998. After breaking open four seals (intact) 640 cartons were recovered. 60 were randomly selected and examined. Each of those sample was found to contain 200 spools of video magnetic tapes packed in 46 (each set of 5 spools) and to have 850 feet tape. The Customs Officers drew samples from 12 cartons (five spools from each carton) and took the shipping bill No.1032006 dated 07.09.1998 covering the above consignment into their possession vide Panchnama dated 30.09.1998 drawn on the spot. It is after subsequent investigation in the form of searches and recording the statement of all concerned that the impugned goods were seized on 19th November, 1998 and a show cause notice under Section 124 of Customs Act, bearing No.5606 dated 19.03.1999 was served upon the appellant calling him to explain as to why the seized goods i.e. 630 cartons containing Rs.1,26,000/- pieces of video magnetic tapes shall not be confiscated and that the duty amounting to Rs.19,83,883/- as deposited by the proprietor of the appellant on 16.10.1998 (Rs.18,00,000/-) and on 08.10.1998 (Rs.1,83,883/-) may not be adjusted against the duty of customs foregone by the appellant on the import of the goods alongwith the imposition of penalty upon the appellant.

1.1 The said Show cause notice was adjudicated by Commissioner of Customs (General) vide order No.36 dated 02.08.2000 against the appellant. An appeal was filed before

CEGAT. Vide Final Order No.459 dated 27.03.2002 the Tribunal remanded the case to the adjudicating authority for a fresh adjudication after allowing the cross-examination of Station Engineer, Doordarshan Kendra, New Delhi (who tendered his report about tapes) and after affording a reasonable opportunity of hearing to the appellant, it is thereafter that the matter was re-adjudicated vide Order-in-Original No.43 dated 03.12.2004 vide which the impugned goods were confiscated alongwith the appropriation of the duty amount herein. However, an option to get redeem the said goods on payment of fine of Rs.10.00 Lakhs was given. In addition, the penalty was also imposed. An appeal was again filed against this order, which was decided vide Final Order No.249 dated 20.03.2007 of CESTAT upholding the order of Original adjudicating authority. However, against this order and also against the Final Order of CEGAT No.459 dated 27.03.2002 that the civil appeal was filed in Supreme Court, which was decided vide order dated 02.09.2008 remanding the matter on the question of limitation, as the matter was already been remanded by the Tribunal to the Commissioner for fresh decision on merits. It is thereafter that the order under challenge i.e. Order No. 32/2008 dated 31.12.2008 was announced confirming the demand of the impugned show cause notice after holding the show cause notice well within the period of limitation. The appellants still being aggrieved have preferred the impugned appeal.

2. It is submitted on behalf of the appellant that appellant was 100% EOU and the magnetic tapes which were imported by the appellant were used to be stored in its bonded warehouse under the supervision of Central Excise authorities. The finished goods i.e. the spools of these tapes and the cassettes were also under the lock and key of the Central Excise Authorities. Hence, the Commissioner, Customs had no authority to issue the show cause notice. The order under challenge has failed to consider this aspect, despite the matter being remanded time and again. It is impressed upon that the customs authority do not qualify to be called as, "proper officer", as required under the statute, to issue the notice specially when "let-export" order was issued by Central Excise Officer. It is further submitted that the goods were detained on 19.09.1998 at Mumbai. The show cause notice issued on 19.03.1999 and served on 28.03.1999 was beyond the limitation as the period had to reckon from the date of detention itself but the adjudicating authority has committed an error while distinguishing detention from seizure. The Id. Counsel has relied upon **Ferro Alloys Corporation Ltd. Vs. Collector of Appeals, Bhubaneswar – 1995 (77) ELT 310 (L.B.)** and on **Pharma Chemicals reported in 2005 (181) ELT 339 (S.C.)**. It is also submitted that no demand of duty can be ordered without issuance of SCN. Reliance is placed upon:

- **CC Calcutta Vs. Tin Plate Co. Of India Ltd. 1996 (87) E.L.T. 589 (S.C.).**
- **Raju Fabrics Vs. CC, Ahmedabad 2004 (166) E.L.T. 468 (T)**
- **Nath International Corp Vs. CC, Mumbai 2003 (152) E.L.T. 430 (T)**

It is also submitted that reliance is placed upon:

- **Uma Rajeshwarrao Patra Vs. UOI 1999 (109) E.L.T. 123 (Cal.)**
- **UOI Vs. Kanti Tarafdar 1997 (91) E.L.T. 51 (Cal.)**
- **Kantilal Somehand Shah and Anr. Vs. CC & CCE, West Bengal and Anr. 1982 (10) E.L.T. 902 (Cal.)**

3. With respect to the merits of the case, it is submitted that the decision is solely based upon the test report from Doordarshan, but there have been doubts as to the fairness of the testing for the reason that there was no test memo prepared by the Department. The samples were obtained in the form of spools but as per the report these were the video cassettes which have been examined. It has specifically been admitted by Doordarshan Kendra vide letter dated 28.04.2006 that the Kendra has no testing laboratory for testing VHS video tapes nor they have the equipments to carry out physical tests on the video nor even any machine to assemble the video tapes from hub form to cassettes form. Thus, the report cannot be looked into and there remains no other reason for ordering confiscation of the seized goods of the appellant nor there was any reason for imposition of penalty. The order

under challenge is accordingly prayed to be set aside. Reliance is placed upon:

- **York Exports Vs. CC (Exports) 2004 (169) E.L.T. 175 (T)**
- **Nanavati Engineering Co. (P) Ltd. Vs. CCE 2000 (40) RLT 240 (T)**
- **Hari Kewal Vanaspati Mills Vs. CCE 2010 (262) E.L.T. 331 (T)**

4. While rebutting these arguments, it is submitted by the Department that present case is not covered by **Ferro Alloys** case because irrespective of duality of control of Excise Commissionerate as well as Customs Commissionerate, in case of 100% EOU, but the moment manufactured goods leave the premises under the control of Excise Commissionerate, Customs Commissionerate acquires jurisdiction. Notification No. 27 dated 07.07.1997 has been relied upon and it is submitted that Commissioner, Customs was the competent officer/the proper officer to issue the impugned show cause notice.

4.1 With respect to the limitation issue, it is submitted that Mumbai Customs received a letter dated 28.09.1998 about the impugned consignment to be restrained for the purpose of examination. It is in furtherance thereof that the goods were detained on 28.09.1998 itself and were examined on 30.09.1998. It is after this examination that the goods were seized on 19.11.1998. Resultantly, the show cause notice as issued on 27.03.1999 is well within the period of 6 months.

Limitation issue has rightly been adjudicated against the appellant by the order under challenge.

4.2 With respect to the merits of the case, it is submitted that the proprietor of appellant Mr. Rakesh Kumar Bhagat himself vide his voluntary statement dated 05.10.1998 admitting entire incrimination against him confessing that the video tapes which were imported by him vide bill of entry No.111376 dated 09.10.1997 were sold by him in the local market in India. He also admitted for purchasing old and used video cassettes from the local market and export the same packed in 630 cartons vide shipping bill No.1032006 dated 07.09.1998. There is no retraction of this admission which otherwise is the best evidence against the appellant, except Mr. Bhagat's Counsel letter dated 23.11.1998. It is impressed upon that said letter has rightly been ignored by the adjudicating authority while confirming the confiscation, appropriation of duty and imposing the penalty. It is further submitted that at the first round of litigation, the appellant was allowed to cross-examine the Engineer from Doordarshan Kendra. Nothing cogent in favour of the appellant could come on record out of the said cross-examination as may support the appellant.

5. Thus, the order under challenge has no infirmity. Appeal is accordingly prayed to be dismissed.

6. After hearing both the parties and perusing the entire record, we observe and hold as follows:-

Appellant has raised two issues, one about jurisdiction of the officer who issued SCN and another about the said SCN being hit by principle of limitation. I deal with these issues separately as:

6.1 JURISDICTION

6.1.1 The Issue to be decided is as to whether the Commissioner, Customs had competent jurisdiction to issue a show cause notice proposing confiscation, to a 100% EOU under the supervision of Central Excise Officers.

6.1.2 The appellant is impressing upon that the Commissioner, Customs is not the proper officer for the purpose and he has placed reliance upon **Ferro Alloy (supra)** case. Perusal of this decision shows that the Tribunal was of the opinion that in a situation of clearance of warehoused goods, the jurisdiction for raising demand for short levy or refund on re-assessment will be with the proper officer under Central Excise Act granting ex-bond clearance. Thus, it becomes clear that jurisdiction of a Custom House in case of 100% EOU has been barred by this decision for such short levy or refund on re-assessment where the goods were assessed on an "into-bond" bill of entry for the purpose of being warehoused or on "ex-bond" clearance from said warehouse.

6.1.3 But the fact of the present case is that the goods manufactured in the EOU of appellant had left the warehouse

and had reached Mumbai Customs after having been given "Let Export Order" by Delhi Customs and it was an intelligence by Delhi Customs only on the basis of which the goods were intercepted detained and subsequently seized. Thus, I am of the opinion that above referred case law is not applicable, facts being distinct.

6.1.4 In the case of EOU there is duality of jurisdiction. The proper Officer of Excise has jurisdiction till the goods are warehoused and are released for clearance, but beyond this stage, the proper officer is the one under Customs Act. Otherwise also, in case of exports, the Customs procedure finds conclusion at the Customs because thereafter the goods actually leave the Indian Territory. Notification 27 dated 07.07.1997 as impressed upon by the Department is perused vide entry No.7 of the said Notification Commissioner of Customs, Delhi has been declared as the proper officer to carry out Customs Procedure. Thus, the moment the manufactured goods enter the precincts of Customs Commissionerate they have to be dealt with by them and Notification No. 27 has to come into play. This stands clarified from Section 69 of the Customs Act, which speaks about clearance of warehoused goods for export, Section 2 (34) of the Customs Act define proper officer in relation to any functions to be performed under this Act to mean the officer of Customs. Stage clearance of warehoused goods onwards is a function under Customs Act, the proper Officer is definitely the Officer of Customs. The

situation stands clarified vide Circular No.126 dated 12.12.1995 stands modified vide Circular No.27 of 10.05.1996. It has been clarified that there is no overlapping of jurisdiction but a clear cut demarcation of function to be performed by Central Excise Commissionerate and Customs formation. Since in the present case, the goods were intercepted at Mumbai Customs area. They had already reached into the jurisdiction of Customs Commissionerate. To my opinion, the Commissioner, Customs was the competent /"proper Officer" to issue the impugned show cause notice. The issue of jurisdiction is therefore decided against the appellant.

6.2 LIMITATION

Whether the show cause notice dated 19.03.1999 is within the period of 6 months in terms of Section 124 of the Customs Act.

6.2.1 The appellants' plea is that the goods were detained on 30.09.1998 itself. Hence, the period of 6 months as mentioned under Section 124 of Customs Act has to reckon from this date. It is emphasized that detention and seizure has no different meaning. However, the Department has rebutted the arguments. To adjudicate, I observe that seizure is made under Section 110 (1) of the Customs Act which says that if the proper Officer has reason to believe that any goods are liable for confiscation under this Act, he may seize such goods. From the bare reading, it becomes clear that prior seizing the goods, the proper Officer has to do such act which

may give him a reason to believe that the goods are liable for confiscation. Thus, the seizure under Section 110 connotes something different from the simple and mere detention of the goods for the examination thereof for sake of reason as mentioned in Section 110(1) of Customs Act.

6.2.2 It was way-back been clarified by Hon'ble High Court of Kolkata in the case of Collector vs. **Hindustan Motors reported in 1979 (4) ELT 313** that mere direction of the proper Officer asking the owner of the goods to not to remove them except with the permission may be a simple prohibitory order but when there is an overt act that amounts to exercise of dominion over the goods that it becomes an act of seizure of goods. **Hon'ble Allahabad High Court in State of Uttar Pradesh vs. Lavkush Kumar** has also made a distinction between detention and seizure stating that detention can be for the purpose of enquiries without making seizure. It was clarified by Hon'ble High Court of Madras in another case of **Promusical vs. Joint Commissioner of Customs (Preventive) Mumbai** that at the time of enquiry the assessee has all opportunity to produce the documentary proof in order to establish the correctness. If the documents prove bonafide, the goods detained shall be returned with immediate effect without any formal procedure to be followed. But in case those documents are not sufficient to satisfy the objection raised by the Competent Officer, it is at this stage that the control of goods shall be taken by the Department and

loss of complete domain over the goods and the technical order of the competent authority about something called as seizure is announced.

6.2.3 This distinction is sufficient for us to hold that the detention is a case prior of acquiring conviction that seizure is required and hence is different from seizure. As per Section 124 of Customs Act, period of 6 months has to reckon from the date of seizure. Resultantly, I am of the opinion that the show cause notice is well within the limitation period. In view of above discussion and the quoted law, the case law as relied upon by the appellant is not applicable.

7. Now coming to the merits of the case, it is impressed upon by the appellant that the statement of Mr. Rakesh Kumar Bhagat dated 05.10.1998 as is relied upon by the adjudicating authority to confirm the demand and impose the penalty was retracted vide letter dated 23.11.1998, since it amounts to withdrawal of admission, if any, the same cannot be read against the appellant. The order confirming the penalties is therefore, liable to be set aside.

7.1 The submission is rebutted on the ground that retraction has come beyond 45 days and that the appellant had already deposited the duty and the value of confiscated goods that too voluntarily.

8. In the light of these submissions and perusing the record, I observe that the Proprietor of appellant vide his first

statement had admitted about the discrepancy, as noticed by the Department, to have been committed by him that he was manufacturing blank video cassettes out of the raw-material (tape) imported vide Bill of Entry No. 111376 dated 09.10.1997 and was releasing them to the bonded warehouse. Also that he sold those cassettes in the open market in India. He also admitted about purchasing old and used video cassettes from the local market and about manufacturing 126000 pieces of Video Tapes on single hubs of 850 feet length for 3 Hours duration and subsequently exported the same packed in 630 cartons vide shipping bills No.1032006 dated 07.09.1998. I also observe that on the very next date of this statement, he deposited duty amounting to Rs.18.00 Lakhs and remaining Rs.1,83,883/- were deposited on the next date without taking any protest about the statement to be got recorded under pressure, threat or coercion. This act of the appellant to my opinion is sufficient corroboration to the admission of appellant's guilt. Had that been the fact, there was no compulsion on the appellant to deposit the duty confirmed.

8.1 Though there has been a letter dated 23.11.1998 retracting the said admission but to our opinion same is not sufficient, in view of above discussed circumstances and also for the reason that the retraction came not from the horses mouth but by the appellants' Counsel that too vide a letter. Hon'ble High Court of Madras in the case of Collector of Central

Excise vs. V.K. Ranganathan as decided in the year 1995 has held that the admissions made before the statutory authorities are binding upon the person concerned in the Departmental proceedings a retraction of confession that too belated is not withstanding. In view thereof, the Counsel's letter is not opined to be sufficient withdrawal of the admission which was already acted upon without any protest. I therefore, find no infirmity in the order while relying upon the confessional statement of the proprietor of the appellant for confirming the impugned demand.

9. Finally coming to the grievance of the appellant about the test report as prepared by Doordarshan about the impugned samples, I am of the opinion that to test the veracity of the examiner thereof, the appellant was granted the opportunity of cross-examination. Perusal thereof shows that the test report mentioned the initials AKM i.e. of Mr. Anil Kumar Mangli, who was Station Engineer, Doordarshan Kendra, Delhi and was competent to conduct the impugned test.

10. It was admitted by the witness that Doordarshan Kendra had tape recording maintenance unit and all those tests were carried out by the said unit. With respect to no use of testing equipment it was deposed that the physical condition of video tapes were so bad that no such equipment was required. From the physical appearance itself, the tape had scratches and

wrinkles on the edges i.e., the condition was such as no new tape could have. Further deposed that the test clarified that the tapes have erased characteristics as such no further elaboration was required to hold that the tapes of the samples recovered by impugned Panchnama were the old and used tapes. The reply of Doordarshan Kendra dated 28.04.2006 as impressed upon by the appellant is opined to have no significance in view of the above deposition as made by the witness, who prepared the test report. The entire above evidence also falsifies any need for Department to investigate the scrap vendors from the local market from whom the appellant admittedly purchased the old video cassettes.

11. In view of entire above discussion, we do not find any infirmity in the order under challenge. Same is accordingly, upheld. Appeal stands dismissed.

[Pronounced in the Open Court on 07.03.2019]

(RACHNA GUPTA)
MEMBER (JUDICIAL)

Anita