CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
REGIONAL BENCH AT HYDERABAD

Division Bench
Court – I

Customs Appeal No. 2918/2011

(Arising out of Order-in-Original No. 1/2011 (Customs)-Commr., dt.10.08.2011 passed by CCCE & ST, Hyderabad)

Commissioner of Customs, Central Excise & Service Tax, Hyderabad - I
Kendriya Shulk Bhavan, L.B. Stadium Road,
Basheerbagh, Hyderabad, Telangana – 500 004 **......Appellant**

VERSUS

M/s NOVOPAN Industries Ltd
IDA, Phase-II, Pathancheru,
Medak District – 502 319, Telangana **......Respondent**

Appearance
Shri N. Bhanu Kiran, AR for the Appellant.
Shri R. Raghavendra Rao, Advocate for the Respondent.

Coram:
HON'BLE MR. P. VENKATA SUBBA RAO, MEMBER (TECHNICAL)
HON'BLE MR. P. DINESHA, MEMBER (JUDICIAL)

FINAL ORDER No. A/31017/2019

Date of Hearing: 16.09.2019
Date of Decision: 05.11.2019

[Order per: P. VENKATA SUBBA RAO]

1. This appeal is filed against Order-in-Original No. 1/2011 (Customs)-Commr., dated 10.08.2011 by the revenue.

2. The facts of the case in brief are that the respondent herein are holders of Customs Private Bonded Warehouse License No.1/98 issued by the Asst. Commissioner, Hyderabad-D Division. They are engaged in manufacture of plain particle board and melamine finished particle boards. They imported base paper for impregnation without payment of Customs Duty and warehoused it in the Customs private bonded warehouse situated inside their factory premises. As per the procedure when the goods have to be cleared the respondent has to file Ex-bond bill of entry with the Jurisdictional Central Excise Range Officer, pay appropriate customs duty and take the goods out from the warehouse and utilize in the manufacture of the final products.

3. The officers of Anti-Evasion Section, Hyderabad-I Commissionerate visited the factory on 16.04.2010 and found that they had removed 509 reels of base paper of various varieties from the warehouse without filing an Ex-bond bills of entry and without paying customs duty. During the course of investigation, the respondent paid the customs duties along with interest. After investigation, a show cause notice was issued to the respondent demanding the customs duties under section 72 read with section 28 of Customs Act, 1962. It was proposed to appropriate the amount of duty paid by them. It was further proposed to demand an interest of Rs.3,03,828/- under section 28 and demand interest on the short paid amount of customs duty of Rs.31,977/-. Further, it was proposed to impose penalty under section 72 read with section 114A of the Customs Act, 1962 and confiscate the goods under section 111(j) of Customs Act, 1962 and impose penalty under section 112(b) of the Customs Act, 1962. After following due process, learned Commissioner upheld the demands of duty and interest and imposed penalties as proposed except for confiscation of the goods under section 111(j) of the Customs Act, 1962. Revenue's appeal is against this non-confiscation of the goods and non-imposition of penalty under section 112(b) of the Customs Act, 1962 on the following grounds:

a) The Commissioner has erred in holding that the goods were not available for confiscation and hence they cannot be confiscation at all. In fact, the records would show otherwise. In their reply dated 23.12.2010 to the SCN the assessee has, interalia, submitted that the 509 reels of base paper have been taken out of the bonded warehouse but they are available in the factory premises. Therefore, it is wrong for the original authority to state that they were not available. Further, in his statement Shri Shiv Kumar Mishra, Dy. General Manager of assessee has also confirmed that the base paper was available in their factory premises. This fact was further reiterated by Shri Shiv Kumar Mishra and Shri K.V. Rama Raju, who appeared for personal hearing before the Commissioner. Clearly, this finding of the Commissioner was factually incorrect. Consequently, dropping of confiscation proposal based on this incorrect finding is incorrect too.

b) Even otherwise, physical availability of the goods is not always pre-condition for imposing redemption fine. The Hon'ble Apex Court in the case of Weston Components Ltd [2000 (115) ELT 278 (SC)] has categorically held that redemption fine is imposable even after release of goods on execution of bond. In the case of Munjani Bros [2011 (265) ELT

396 (Tri-Mumbai)] where the goods imported by a party were allowed to be cleared under bond and where such goods were eventually found to be liable for confiscation under section 111 of the Customs Act, it would be open to the adjudicating authority to impose find in lieu of confiscation. Accordingly, it was prayed that the matter may be remanded to the original authority for passing necessary orders in respect of confiscation of goods and imposition of fine and penalty.

4. Learned departmental representative forcibly reiterated the above arguments and would draw the attention of the bench to the judgments of the Hon'ble Supreme Court in the case of Weston Components Ltd (supra), the judgment of Hon'ble High Court of Karnataka in the case of Shilpa Trading Company [2014 (309) ELT 641 (Kar)] and the Ho'ble High Court of Gujarat in the case of Kay Bee Tax Spin Ltd [2017 (349) ELT 451 (Guj)] to assert that physical availability of the goods is not an essential requirement for confiscation of goods or imposition of redemption fine. He further submits that there is also a factual error because all records show that the goods were available for confiscation and the Commissioner has erred in holding that they were not available for confiscation in his order. Therefore, the matter may be remanded to the original authority for deciding on the confiscation of the goods.

5. Learned counsel for the respondent, on the other hand, submits that no redemption fine can be imposed when the goods are not available for confiscation at all. He would argue that section 125 pre-supposes that the goods are confiscated and are available with the department and on payment of redemption fine the assessee can redeem the goods. Where the goods are not available for confiscation there is no question of their redemption. Further, he would submit that section 125 is only an option given to the assessee for redemption of goods. If the assessee chooses not to redeem the goods the confiscation can continue. Therefore, in a situation where there are no goods which can be confiscated the question of imposition of redemption fine does not arise. He relies on the case laws of Finesse Creations Inc. [2009 (248) ELT 122 (Bom)], Shiv Kripa Ispat Pvt Ltd [2009 (235) ELT 623 (Tri-LB)], Bhagyanagar Metals Ltd [2016 (133) ELT 395 (Tri-LB)] and Atul Ltd [2017 (356) ELT 467 (Tri-Mumbai)]. When specifically questioned about these cases and the case laws cited by the learned DR, learned counsel would argue where the goods have been seized and provisionally released on bond it is open for the department to impose redemption fine. Where the goods are not available at all

for confiscation, the question of confiscation or allowing redemption of the goods after such confiscation does not arise. He would submit that on confiscation, the title of the goods passes to the Government of India and the Government of India can on payment of redemption fine release the goods to the assessee. In cases where the goods are not available for confiscation at all there is nothing to be redeemed and hence the redemption fine does not apply. Consequently, penalty under section 112 also does not apply. He would therefore, assert that the impugned order is correct and legal and calls for no interference and the revenue's appeal may be dismissed.

6. We have considered the arguments on both sides and perused the records. We find that there is an inherent contradiction and ambiguity in the impugned order itself. The impugned order was passed on 10.08.2011. In para 13 (iii) of the order, learned Commissioner has recorded that assessee has stated, even during the personal hearing, that the goods were available in the factory premises. Relevant portion is as below:

> *"(iii) Because of repairs to the shutter of bonded premises, they had to keep the 509 reams of bases paper outside the bonded premises, though they were kept within the factory premises. Reference in this regard is drawn to the answer given to question no 4 during the course of recording of statement of Sri Shiv Kumar Mishra, DGM (Personnel) of the Unit under section 14 of the Central Excise Act."*

7. On the other hand, learned Commissioner recorded his finding in Para 17 as follows:

> *"17. <u>Regarding their contention that the impugned goods were available in the factory premises, it was found that the goods were not available in the bonded area and the assessee have not come up with any evidence to corroborate their above contention. In the absence of the same, one can only conclude that the goods removed unauthorizedly from the private bonded warehouse were either removed clandestinely or consumed in the factory of production</u>. While it is contended that the goods were removed from the warehouse because of some repair to the shutter, it was incumbent on their part to have kept the department informed and taken permission for removing the goods from the warehouse, which they have admittedly failed to do. It is not in dispute that the goods were removed from the bonded warehouse in contravention of the provisions of the Customs Act, 1962, a fact which came to light only based on the investigation by the officers of the department thus making the assessee liable for penalty under section 114A of the Customs Act. In terms of proviso to section 114A of the Act, where any penalty has been levied under this section, no penalty shall be levied under section 112 or section 114 of the Act, ibid. Accordingly, no separate penalty is imposable on the assessee under section 112(b) of the Act. <u>On the aspect of confiscation of the impugned goods under section 111(j) of the Customs Act, as proposed in the show cause notice, in the instant case it is seen that the goods have not been seized. In fact, the goods are not available at all for confiscation. In these circumstances, the question of confiscation does not arise</u>. In this regard, it would be pertinent to refer to the decision of the Hon'ble High Court of Bombay in the case of CC (Import), Mumbai Vs Finesse Creation INC [2009 (248) ELT 122 (Bom)], which was upheld by the Hon'ble Apex Court [2010 (255) ELT A120 (SC)], the relevant portion of which is reproduced as hereunder:"*

8. There is an inherent contradiction between the two findings. Para 13 records that the assessee was asserting that they were very much available. In Para 17, learned Commissioner records that since the goods were not available within the premises of the bonded warehouse, they are not liable for confiscation. In fact, if the goods were available within the bonded warehouse and have not been removed from there, they are not liable for confiscation at all. On this ground the goods will be liable for confiscation only if they have been removed from the customs bonded warehouse clandestinely without filing ex-bond bill of entry and without paying the customs duty. In such a case, if the goods are available outside the bonded warehouse, they are liable for confiscation. In this case, the assessee asserts in their statements recorded by the officers during investigation as well as in their submissions before the Commissioner that they were available in the factory premises. Therefore, such goods are liable for confiscation. In view of the contradictory stand taken by the learned Commissioner, we find it is a fit case to be remanded back to record the correct position regarding availability of goods for confiscation (not availability of goods within the bonded warehouse) and pass an order accordingly in the light of various case laws cited above.

9. Appeal is allowed by way of remand to the original authority.

(Order pronounced in the open court on 05.11.2019)

(P. VENKATA SUBBA RAO)
MEMBER (TECHNICAL)

(P. DINESHA)
MEMBER (JUDICIAL)

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