

**IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE
TRIBUNAL,
EAST REGIONAL BENCH : KOLKATA**

Appeal Nos.C/77296 & 77297/2018

(Arising out of Order-in-Original No.S60(VA&B)-264/2017A(Misc.) dated 15.06.2018 passed by the passed by the Commissioner of Customs (Port), Kolkata)

M/s. Opel Exports
M/s. R.K.Exports

...APPELLANT(S)

VERSUS

Commissioner of Customs (Port), Kolkata

...RESPONDENT (S)

APPEARANCE

Shri B.K.Singh, Advocate and Shri S.M.Akhtar, Advocate for the Appellant
Shri S.Guha, AC(AR) for the Respondent & Shri Sunil Kr. Jha, Intelligence Officer, DRI.

CORAM:

HON'BLE SHRI P. K. CHOUDHARY, JUDICIAL MEMBER
Hon'ble SHRI V.Padmanabhan, Member (Technical)

Date of Hearing : 27.11.2018

Date of Pronouncement: 06.12.2018

ORDER NO.FO/77037-77038/2018

Per Shri V.Padmanabhan :

These appeals have been filed by the importers against the Orders dated 15.06.2018 by the Commissioner of Customs (Port), Kolkata. These impugned orders were passed in respect of M/s. Opel Exports (covering 3 bills of entry No.3397549, 3397496, 3397497 all dated 26.09.2017) as well as M/s. R.K.Exports (covering 2 bills of entry no.3397498 and 3429621 dated 29.09.2017). The importers had filed Bills of Entry for clearance of certain imported goods. The DRI carried out investigation into these imports (along with many other Bills of Entry). The DRI found on examination that in addition to the goods declared in the Bills of Entry,

certain undeclared goods were also found. The valuation of the goods imported was also disputed. The goods were seized and further investigations were carried out. In the meantime the importers approached the Hon'ble High Court at Calcutta, who passed Orders in W.P.No.221 and 222 of 2018 dated 05.06.2018. The Hon'ble High Court directed the jurisdictional Customs Authorities to expeditiously consider the request for provisional release of seized goods. In compliance of the Orders passed by the Hon'ble High Court at Calcutta, the Commissioner of Customs passed two impugned orders in which he denied the request for provisional release made by the importers. These orders are under challenge in the present appeals.

2. The importers are represented by Shri B.K.Singh, Advocate and Shri S.M.Akhtar, Advocate and Revenue is represented by Shri S.Guha, AC(AR) & Shri Sunil Kr. Jha, Intelligence Officer, DRI.

3. Ld. Advocate submitted that the Ld. Commissioner has denied provisional release of the imported goods. He advanced the following main arguments and prayed for provisional release of the goods.

a) The reason cited for rejecting the request for provisional release by the Commissioner was mainly that the Bills of Entry have been filed in the name of M/s. Opel Exports (partner Shri Rajesh Roy) and M/s. R.K.Exports (partner Shri Sailendra Sigh). The investigation by DRI had indicated that these persons were only lenders of IEC Code No., the actual importer was one Shri Manoj Kumar Gupta. Ld. Commissioner had held that the goods imported were prohibited goods since they were imported by persons who did not hold a valid IEC Code no. granted under Section 7 of the Foreign Trade (Development and

Regulation) Act, 1992. Under Section 2(33) of the Customs Act, the Commissioner has concluded that the goods were prohibited.

b) He refuted the findings of the Id. Commissioner with the submission that the definition of the term "Importer" as per Section 2(26) of the Customs Act, includes any owner, beneficial owner or any person holding himself out to be an importer. As per this definition of the term "Importer", the Customs Authorities should release the seized goods in favour of Shri Manoj Kumar Gupta, since the DRI has alleged that he is the real importer who has financed these operations.

c) Ld. Advocate further submitted that the goods are required to be given provisional release in terms of Section 110A of the Customs Act. He cited the decision of the Tribunal in respect of certain other imports made by M/s. Opel Exports and M/s. R.K.Exports vide Final Order No.SO/75678-75679/2018 dated 11.06.2018. In similar circumstances, the Tribunal has ordered that the goods cannot be considered as prohibited goods under Section 111(d) of the Customs Act, 1962 on account of IEC Code lending.

d) In the above decision of the Tribunal reliance has been made to the decision of the Hon'ble Bombay High Court in the case of Hamid Fahim Ansari vs. Commr. Of Customs (Import), Nhava Sheva [2009(241) ELT 168 (Bom.)]

e) He further placed reliance on the decision of the Hon'ble Kerala High Court in the Writ Appeal No.956 of 2011, in which also the Hon'ble High Court has expressed a similar view.

f) While pressing his request for provisional release of the goods, the Id. Advocate also submitted that the valuation of the goods adopted by the Customs Authorities is unfairly high. Against the declared value of

about Rs.54.93 lakhs, the seizure value of the consignment has been recorded at Rs.4.02 Crores.

g) He further submitted that there was no sanction in law to value the goods at the market value, since seizure have been made within the customs area. He also submitted that goods may be valued as per with NIDB data and goods and ordered for provisional release.

h) He also brought to our notice that in alleged customs offence, DRI has completed the investigation and issued show cause notice to the importers and all other connected persons on 03.09.2018.

4. Ld. DR justified the orders passed by the Id. Commissioner. He also drew our attention to the written submission made in this connection on 15.11.2018. He emphasized the following points;

i) He strongly objected to the prayer made on behalf of the importers that Shri Manoj Kumar Gupta may be considered as the owner for the purposes of provisional release of goods. He referred to the findings of the Id. Commissioner and submitted that all relevant applications including the Bills of Entry have been made by the persons of who are holders of the IEC codes and as such Shri Manoj Kumar Gupta cannot be considered as owner for release of the goods.

ii) He further submitted that all the goods which were seized primarily consist of branded goods whose value were not found in NIDB data. The valuation has been adopted by DRI on the basis of the market price of such goods in the local market after allowing deductions for customs duty etc.

iii) He also submitted that invoices which were attached with the Bills of Entry were not genuine, as found during investigation, and hence value of the goods were required to be ascertained.

5. Heard both sides and perused the appeal records.

6. The appellants are aggrieved by the orders passed by the Commissioner, Customs, Kolkata rejecting the request of the appellants for provisional release of the seized goods under Section 110A of the Customs Act, 1962. Such rejection has been made by the lower authority by taking the view that the imported goods are to be considered as prohibited goods, since the actual importers (identified by DRI during investigation) did not have IEC Code No. Further, he has opined that the goods imported do not have any clear ownership, as such he has declined the request for provisional release.

7. Ld. Advocate for the appellant has referred to the order passed by the Tribunal in FO/75678-75679/2018 dated 11.06.2018 to support his argument that the imported goods cannot be considered as prohibited goods and hence, merit provisional release. The Tribunal has relied on the decision of the Hon'ble Bombay High Court in the case of Hamid Fahim Ansari vs. Commr. Of Customs (Import), Nhava Sheva [2009(241) ELT 168 (Bom.), the relevant portion of the order is reproduced below:

"5. In other words, imports have been done in the name of the petitioner but for some other person. In so far as respondents/Customs Authorities is concerned, they have not pointed out to us any provision under the Customs Act or any Rule or Regulation framed thereunder by which the person having valid IEC Number and having paid the custom duty is prevented from importing goods. At the highest, if the petitioner has obtained IEC number by misrepresenting the Ministry of Commerce and Industry and Director General of Foreign Trade, it is for that body to take action.

6. In these circumstances, in our opinion, petitioner having paid the customs duty is entitled to release of the goods. We,

therefore, direct respondents to release the goods within 48 hours from today.

7. Rule made absolute accordingly. No order as to costs."

8. The Tribunal's earlier order dated 11.06.2018 has been passed in connection with certain other bills of entry which were the subject matter of investigation by DRI in the same set of cases. As such this leads to the conclusion that the goods imported in the present bills of entry, also merit a similar dispensation. Ld. Advocate has also placed reliance of the Kerala High Court Order (Supra), which was also delivered in similar circumstances. The Writ Petitioner in that case has approached the Hon'ble High Court for provisional release of the goods seized by the Customs Authorities. The High Court disposed of the writ appeal with the following observations:

"15. Coming to the submission that the appellant is only a "name lender" for the import of goods by one Anwar, we shall presume for the time being that the appellant is only a name lender, but the actual beneficiary of the import is one Anwar. We called upon learned counsel for the respondents to place the relevant provision which prohibits such an activity on the part of an Import Export Code Number holder. Learned counsel for the respondents categorically made a statement that he is not able to place any such prohibition in law except Section 7 of the Foreign Trade (Development and Regulation) Act, 1992, which reads as follows:-

"7. Importer-exporter Code Number- No person shall make any import or export except under an Importer-exporter Code Number granted by the Director General or the officer authorised by the Director General in this behalf, in accordance with the procedure specified in this behalf by the Director General".

The expression "Import" occurring in the said section means bringing into India of goods as defined under Section 2 (e). There is nothing in the law which requires an importer to be either the consumer or even the buyer of the goods also. Even otherwise, we are of the opinion that it is a matter of common sense that no importer would consume all the materials imported. Necessarily, the goods imported are meant for sale to the consumer, in which case, if an importer, who enjoys the facility of I. E

Code imports certain goods in the normal course of business of the strength of a contract entered by such importer with either a consumer or a trader who eventually sells the imported goods to consumers. We do not understand what can be the legal objection for such a transaction especially where the import of such goods is otherwise not prohibited by law. At any rate, if the respondents have any tenable legal objection on that count, the respondents must pass an appropriate order indicating the legal basis on which the action is proposed and also the nature of the action proposed for such perceived violation of law on the part of the respondents after giving a reasonable opportunity to the importer to meet the case against him. Instead of proceeding to determine the duty leviable on the imported goods by following the appropriate procedure or passing an order of confiscation if they believe that they are justified in the facts and circumstances, the respondents, it appears, are indefinitely detaining the goods without any appropriate order being passed thereon. Such a course of action, in our opinion, is absolutely illegal.

16. *Coming to the submission of the appellant that the respondents are bound to release the goods under Section 110A of the Customs Act pending adjudication of the legality of the import, we are of the opinion that as rightly held by the learned Single Judge, Section 110A does not create an absolute right in favour of the importer, but vests a discretion in the customs authorities to follow such course in appropriate case goes without saying that it is only a discretion to be exercised in accordance with the well settled principles of law governing the exercise of a statutory discretion vested in a public authority, but not caprice. In either case the respondents are required to take a decision expeditiously either to make a regular assessment or a provisional assessment or a decision to confiscate the goods in question if it is permissible under law after following appropriate procedure or provisionally release the goods under Section 110-A of the Customs Act. As already noticed, even in a case where the goods are liable for confiscation, Section 125 of the Customs Act provides for redemption of goods on payment of fine so long as the goods are not goods falling under the category of prohibited goods for the purpose of import.*

In the circumstances, we are of the opinion that the appeal and the Writ Petitions are also required to be allowed directing the respondents to take a decision expeditiously, preferably within a period of two weeks from today and pass appropriate orders adopting any one of the courses indicated above."

9. It is to be noted that the investigations in the present case have already been concluded by the DRI, as evidenced by issue of show cause notice dated 03.09.2018 in which the seized goods have been proposed for confiscation under Section 111 of the Customs Act, 1962. The Kerala High Court in the above case has directed the Customs Authority to either finalise the assessment and take a decision on confiscation of the seized goods, if permissible under law or to consider provisional release under Section 110A *ibid*.

10. By following the above decisions we set aside the findings of the lower authority that the goods were prohibited goods. We also note that warehousing of the goods has already been allowed; hence the seized goods will not incur demurrage. Further, the show cause notice has already been issued. In these circumstances we direct the lower authority to complete the adjudication of the case within a period of two months from the date of receipt of this order, failing which he should pass order under Section 110A *ibid* for provisional release of the goods as permissible under law. The appellants are directed to cooperate without seeking unnecessary adjournments.

11. Appeals disposed of as above.

(Dictated and Pronounced in the Open Court on 06.12.2018)

S/d.

(P. K. CHOUDHARY)
MEMBER (JUDICIAL)

S/d.

(V.Padmanabhan)
MEMBER (TECHNICAL)