IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL, KOLKATA

REGIONAL BENCH – COURT NO.2

Customs Appeal No. 75285 of 2019

(Arising out of Order-in-Original No. KOL/CUS/COMMISSIONER/PORT/79/2018 dated 30.11.2018 passed by Commissioner of Customs (Port), Kolkata)

M/s Garg Trading Company
(Thorough Proprietor Shri Jai Narayan Garg
P O. Tikonia, 262905, Dist. Lakhimpur Kheri (UP))

Appellant

VERSUS

Commr. of Customs (Port), Kolkata
(Customs House, 15/1, Strand Road, Kolkata-700001)

Respondent

APPEARANCE :
Ms. Vrinda Bagaria, Advocate for the Appellant
Mr. Tariq Suliaman, Authorized Representative for the Respondent

CORAM:
HON'BLE MR. R. MURALIDHAR, MEMBER (JUDICIAL)

FINAL ORDER NO.75459/2024

Date of Hearing : 1st March
Date of Pronouncement: 13.03.2024

PER R. MURALIDHAR:

Based on certain specific information received by DRI, Show Cause Notices were issued to various parties including the Appellant, vide SCN No. S60(DE)34/92A dated 19/06/1992. While in the case of other notices, allegations were made on account of non-export of goods and getting the benefit of various export oriented schemes were made, in respect of the present Appellant, the only allegation was on the ground that because of his active connivance and participation of the Customs staff posted at Tikonia Land Customs Station, the Appellant has prepared fake documents showing fulfillment of Export Obligation in a fraudulent manner. The adjudication Order was passed, vide OIO No. KOL/CUS/COMMISSIONER/PORT/79/2018 dated 30/11/2018 imposing a penalty of Rs. 10,00,000/- on the Appellant. Being aggrieved, the Appellant is before the Tribunal.

2. The Learned Counsel appearing on behalf of the Appellant makes the following submissions:-

(i) M/s Garg Trading Co. ("the Appellant"), is engaged in trading of food grains.

(ii) By notice dated June 19, 1992, various importers were called upon to show cause as to why the benefit of exemption under the Advance Authorisation Scheme should not be denied to them, as the authorisations were allegedly obtained without actual exports. The allegation against the appellant was that in connivance with the customs authorities, he had prepared fake export documents. The allegations against the appellant was not supported by any oral or documentary evidence

(iii) After a long gap of 25 years, the notice has been adjudicated by Order dated November 30, 2018, by which a penalty of Rs. 10 lacs has been imposed under Section 112 (a)(ii) of the Customs Act, without any opportunity to the appellant to defend its case.

(iv) In the present case, the SCN was issued in 1992 and was taken up for adjudication after 17 years for the first time in 2009. Thereafter, on 11.02.2010, the SCN was transferred to the Call Book as per direction of Commissioner of Customs (Port), Kolkata and was finally adjudicated in 2018 after a delay of 25 years.

(v) In various rulings by the Tribunal and High Courts, it has been held that commencement of adjudication proceedings after an inordinate delay is untenable in law and any consequential decision or order based on such delayed adjudication is invalid and liable to be quashed. In this regard, reliance is placed on the following decisions:

- *Parle International Limited v. Union of India & Ors. [2021 (375) ELT 633 (Bom)];*
- *Commissioner of Central Excise, Bolpur v. Unnayak Prop. [2009 (243) ELT 212 (Tri-Kol)]*
- *Zodiac Clothing Co. Ltd. v. Union of India [2023 (384) ELT 175 (Bom.)],*

(vi) Section 124 of the Customs Act *inter alia* states that no order imposing any penalty shall be made unless the person is given an opportunity of making a representation in writing and is given a reasonable opportunity of being heard in the matter. However, the present order has been passed without providing any reasonable opportunity of hearing to the Appellant and is erroneous.

(vii) As per Impugned Order, personal hearing was scheduled on 09.09.2009 and 22.09.2009 by Commissioner of Customs (Port), Kolkata. However, the Appellant did not receive any communications/ letters including personal hearing notice etc. and no reasonable opportunity of furnishing a reply or making oral submissions was provided to the Appellant in 25 years. The Impugned Order has been passed *ex parte*, in gross violation of the principles of natural justice and is liable to be set aside on this ground alone.

(viii) The Appellant submits that there are no findings in the impugned order giving any reasons for imposition of penalty under Section 112(a) of Customs Act or specifying any act or role warranting such penalty.

(ix) The only allegation against the Appellant is that the Bills of Exports and the related documents relied upon by the main Noticees, were prepared by them in connivance with the Customs staff posted at Tikonia Land Customs Station. [Para 38 of the Impugned Order Pg. 43 of Appeal]. Moreover, the proceedings against the Customs officers have been dropped on the basis that there is no mention or evidence of the exact nature of the participation of the officers in fraud [**Para 46.16 @ pg. 59]**. Therefore, the only basis for imposing penalty against the Appellant has been set-aside. The penalty in the impugned order is liable to be dropped.

(x) The Impugned Order has failed to take into consideration that in respect of same exports, demand has been set aside by the Hon'ble CESTAT, Mumbai

(xi) The submissions made by the Respondents No. 1 to 7 that a show cause notice on identical facts was issued for the same exports by the Commissioner of Customs, Mumbai and was adjudicated in favor of the main Noticee [**Para 45.13 @ Pg. 51**] has not been considered. Since the demand against the main Noticee has been set-aside and penalty against the Appellant is not warranted.

(xii) In respect of the same exports, the Hon'ble CESTAT, Mumbai vide its order dated 29.05.2007, has dropped the demand [Annexure 3 @ Pg. 63 of Appeal] and the issue has attained finality in favour of the main Noticees. Since the SCN pertained to same exports, the matter is settled and Impugned Order is liable to be set aside on this ground alone.

3. The Order passed by Mumbai Tribunal on the same set of facts against almost all the present Appellants has been produced by the Learned Counsel. She submits that the impugned Order-in-Original imposing a penalty of Rs. 10 Lakhs on the Appellant should be set aside on merits.

4. The Learned AR reiterates the findings of the lower authority and justifies the confirmed demand.

5. I have perused the Appeal Papers and all the other documents submitted. The present Show Cause Notice was issued on 19/06/1992 (Para

40 of the OIO). As pointed out by the Appellant, adjudication proceedings were not taken up for the next more than 17 years. It is seen from the OIO Para 45.12 that PH was fixed on 14/6/2009, 28/06/2009 and on subsequent dates within the next one or two months. On 11/7/2009, the Advocate on behalf of Noticee No. 1 to 7 has appeared and has clarified that on same set of facts, the matter was decided in favour of the noticees by the Mumbai Tribunal. It is also informed that Revenue has gone on Appeal against this Tribunal's Order before the Hon'ble High Court of Mumbai which has remanded the matter to the Hon'ble Tribunal. From the OIO, there is nothing on record to show that any further Personal Hearings were granted to the noticee. As can be seen from the details given by the Appellant, they were informed that the SCN was transferred to Call Book on 11/2/2010. Thereafter the present OIO was passed on 30/11/2018.

6. This leads to many questions to be answered:

(a) The only P. H. conducted in the presence of the Advocate representing the other noticee was on 11.7.2009.

(b) The Order-in-Original does not clarify as to why the Show Cause Notice was transferred to Call Book in 2010 and as to why it was recalled from there in 2018.

(c) While the Adjudicating Authority has cited several fresh dates of Personal Hearings granted, he does not specify as to whether the Hearing Notices got served on the Noticees or not.

(d) He has decided the issue on ex-parte basis based on the submissions made before his processor on 11.7.2019.

(e) He has not given any finding on the submission made on 11.7.2009 with respect to the same issue being decided by CESTAT, Mumbai.

7. The very first reference about the present Appellant is appearing at Para 38 (Page 21 of the OIO) which reads as under:-

38) xxxxxx "These findings clearly showed that none of the goods in question were exported by the said various firms belonging to Rastogi family from Delhi to Nepal via Tikonia and the claim to that effect made on the basis of 208 Bills of Exports and related documents was nothing but a mere exercise on paper made possible by active connivance and participation of the Customs staff posted at 'Tikonia Land Customs Station and Shri Jai Narain Garg, in preparing the fake documents showing fulfillment of Export Obligations in a fraudulent manner." [Emphasis supplied]

8. Further it is seen that this OIO mentions about the summons being issued by DRI to the Inspector Shri R. K. Singh and Superintendent, Shri S. C. Gupta. The relevant portion of Para 39 of the OIO is reproduced below:-

39) "Summons had been issued by DRI in the name of Sh. R. K. Singh, Inspector and Shri S. C. Gupta, Superintendent Land Customs Station, Tikonia, for giving evidence regarding export of Zinc Oxide etc. by M/s. Rajendra Brothers, Delhi, M/s. N. S. Overseas, Delhi etc. to six consignees in Rajapur and Seti, Nepal during January 1991 to Nov., 1991 but they did not respond. On 16.04.1992 summons was issued to Shri Jai Narayan Garg of M/s. Garg Trading Co., Tikonia, but he did not respond to the said summons."

9. Coming to the findings of the Adjudicating Authority, the reason given for imposing penalty on many of the Noticees including the present Appellant is given at Para 46.13 which reads as under:-

46.13) Further, for their acts of commission and omission, which have rendered the seized goods liable to confiscation under Section 111(d), (m) & (o) of the Customs Act, 1962, M/s. N. S. Overseas, Delhi and its Proprietor Shri Narendra Rastogi, M/s. Rajendra Brothers, Delhi and its Partners Shri Ravindra Rastogi, M/s. Leena Rastogi, Smt. Shakuntala Devi and its executive Shri Narendra Rastogi; Shri Jai Narayan Garg; and Shri S. C. Gupta, Superintendent have rendered themselves liable for penal action under Section 112 of the Customs Act, 1962.

10. As regards the charges against the Departmental officers, the Adjudicating Authority has dropped the proceedings against them holding as under:-

> *46.16) As regards the charges against the departmental officers namely Shri R. K. Singh, Inspector and Shri S. C. Gupta, Superintendent the SCN does not have adequate details about their involvement in the fraud. There are no specific acts of fraud, forgery or dereliction of duty cited. The allegation against them is made in general terms, i.e. it is simply said that they actively connived and participated in the offence when they were posted in the Land Customs Station at Tikonia. However there is no mention or evidence of the exact nature of their participation and connivance in the fraud. In view of such unsubstantiated charged, I am constrained to find them not guilty. They may however be found guilty through other evidences not brought on record in this subject case.* [Emphasis supplied]

11. When the charges against the Appellant are observed, it is clear that only charge against the Appellant is towards preparing the fake documents showing fulfillment of Export Obligations in a fraudulent manner with the active connivance and participation of the Customs Staff posted at Tikona Land Customs Station. On the other hand, the Adjudicating Authority himself has held that no proper evidence is found towards their (Customs Officers) involvement in the fraud. In such a case, the allegation that the Appellant has actively colluded with the Customs officials cannot legally sustain. Therefore, on this ground, I set aside the penalty imposed on the Appellant and allow the Appeal.

12. I further observe that on the same set of facts, the matter has reached Mumbai Tribunal wherein the Notices were issued to other noticees including Shri S. C. Gupta, Superintendent of Central Excise (one of the noticee here) excluding the present Appellant. The Hon’ble Tribunal had decided the issue in favor of the Noticees. The Department had filed an Appeal before the

Hon’ble Mumbai High Court which had framed certain queries and directed the Tribunal the answer the same. The Appellant has produced copy of the Order dated 29/5/2007 passed by the Tribunal, answering the queries raised by the Hon’ble High Court.

13. I also find that the same set of facts were before the Hon’ble Tribunal wherein the present Appellant was not a Noticee at all. Therefore, it leads the conclusion that the present Appellant has been added merely based on certain presumptions and assumptions without any corroborative evidence by the Department. Even from the allegations given in the Show Cause Notice and the Findings in the OIO, as observed above, no case has been made out against the Appellant. Therefore, even on this count, I set aside the penalty imposed on the Appellant.

14. I allow the Appeal with consequential relief, if any, as per law.

(Order was pronounced in the open court on 13/03/2024)

Sd/-
(R. Muralidhar)
Member (Judicial)

Pooja