IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
WEST ZONAL BENCH AT MUMBAI
COURT No. I

APPLICATION No. C/Misc/86482/2012
APPEAL No. C/191/2011

(Arising out of Order-in-Original F. No. S/26-Misc-165/11 JCH // S/10-ADJ-EPCG-03/11 JCH dated 14.3.2011 passed by Commissioner of Customs (Export), Nhava Sheva)

Nayara Energy Ltd. **Appellant**
(formerly known as Essar Oil Ltd.)

Vs.

Commissioner of Customs (E), Nhava Sheva **Respondent**

Appearance:

Shri Shri Ramnath Prabhu, Advocate, for appellant
Shri B.Kumar, Assistant Commissioner (AR), for respondent

CORAM:

Hon'ble Mr. Ajay Sharma, Member (Judicial)
Hon'ble Mr. Sanjiv Srivastava, Member (Technical)

Date of Hearing: 30.10.2018
Date of Decision: 15.01.2019

ORDER No. **A/85078/2019**

Per: Sanjiv Srivastava

This appeal is directed against the order in original dated 14.03.2011 of the Commissioner of Customs (Export) JNCH Nhava Sheva. By the said order Commissioner has held as follows:

"7. I confiscate the said offended goods valued Rs 56 lakhs approximately under Section 111(m) of the Customs Act, 1962. Howvere, I permit the importer, M/s

Essar Oil Ltd to redeem the same on payment of a fine of Rs 1,00,000/- 9rs One Lakh only) of the Customs Act, 1962. I order for assessment of goods on payment of duty without benefit under EPCG scheme.

8. I also impose a penalty of Rs 50,000/- (rs Fifty Thousand only) on the importer, M/s Essar Oil Ltd, under section 112 (a) of the Customs Act, 1962."

2.1 Appellants filed a Bill of Entry No 686436 dated 28.01.2011 for clearance of "CR Engine with spares and accessories" at an assessable value of Rs 2,86,17,810.99/-. They also claimed benefit of EPCG scheme in terms of Customs Notification No 103/2009.

2.2 The B/E was assessed on IInd appraisement basis. At the time of examination the container was found to be stuffed with 15 drums containing chemicals like "Cetane, U-18, U-25, T-25, 80-Octane and Octane." Though these chemicals were reflected in the Invoice No 1399159 dated 16.11.2010, the appellants declared them as parts and accessories of machine instead of showing them separately. The benefit of EPCG License was not admissible in respect of the said chemicals as they were not part and accessory of machines. Same chemicals had earlier been cleared by the appellants vide B/E No 853385 dated 21.09.2010 by classifying them under Chapter 29 and without claiming benefit of EPCG License.

2.3 Appellants stated that they were under bonafide belief that all the goods under the invoice were eligible to benefit of EPCG License and hence had filed the B/E accordingly. They admitted the mistake and as these liquid chemicals were not entitled to benefit under EPCG scheme they paid the duty due on these goods.

2.4 Appellants waived of the requirement of Show Cause Notice and personal hearing and accordingly the matter was adjudicated by the Commissioner as per order referred in para 1 supra.

2.5 Aggrieved appellants have filed this appeal.

3.1 We have heard Shri Ramnath Prabhu Advocate for the appellant and Shri B Kumar Assistant Commissioner (Authorized Representative) for the revenue.

3.2 Arguing for the appellant leaned advocate stated that they had no intention to the claim the benefit of EPCG License in respect of these chemicals and they were under under bonafide belief that the benefit of EPCG License was admissible in respect of all the goods imported under the said invoice. Since they were under bonafide belief the action of Commissioner in confiscating the goods under Section 111(m) and allowing them to release on redemption fine of Rs 1,00,000/- cannot be justified. Similarly penalty imposed also is not warranted in case of such bonafide mistake. He relied upon the decision of Tribunal in aces of Sorento Granito Pvt Ltd Vs Commissioner of Customs Vishakhapatnam [2009 (245) ELT 657 (T-Bang)] wherein it has been held "3.1 …….*From the above, the misdeclaration is not an intentional and it has arisen due to a bona fide mistake. The facts indicate that the overseas supplier had inadvertently shipped the consignment of 'Single Feeder', along with the consignment of 'Hydraulic Press' to Visakhapatnam Port, when the same should have been shipped to Mundra Port. This fact is evident from the Import Invoice dated 8-5-2008, wherein the value of the Single Feeder has been included along with other equipment shipped to Mundra Port, without shipping the impugned equipment Single Feeder. Thus, from the facts, it is seen that there is absolutely no mala fide, but, however, in the Commissioner's order this facts have not at all been discussed. In view of this that order appears to be issued without application of mind and without appreciating the circumstances of the case. In these circumstances, the Commissioner ought to have agreed for reassessment. Instead of that he had taken penal action. In our view, the impugned order is not legal and proper. Hence, we set aside the confiscation and also the penalties imposed. Redemption fine, penalty imposed are very harsh, there* *is only a technical violation and when the circumstances of the case has been explained after enquiry from the supplier, the same should have been appreciated before taking a very harsh action on the appellants. In these circumstances, we set aside the impugned order and allow the appeal with consequential relief."*

3.3 Arguing for the revenue learned authorized representative submitted that by mis-declaring the goods as part and accessories of the engine for availing the benefit of exemption under EPCG scheme appellant have contravened the provisions of Custom Act, 1962. Accordingly the goods have been rightly helf to be liable for confiscation under Section 111 (m) of the Customs Act, 1962. The goods have been confiscated and allowed to be redeemed on payment of redemption fine of Rs 1 lakhs which is not excessive. For the contraventions done penalty of Rs 50,000/- has been imposed on the appellants which too is very justifiable. He stated the appeal be dismissed.

4.1 We have considered the submissions made in appeal and during the course of argument.

4.2 Appellants do not dispute that while filling the bill of entry the goods have been misdeclared and benefit of exemption was wrongly claimed. However they claim that the error committed by them while filing the Bill of

Entry was a bonafide one. Since the error was bonafide as per the appellants the action of Commissioner confiscating the goods and allowing them to be redeemed against redemption fine of Rs 1 lakh cannot be justified.

4.3 The facts leading to the present case clearly show that the said chemicals which have been shown as “CFR Engine with spares and accessories” were mentioned separately in the invoice No 1399159 dated 16.11.2010. Further the said goods have been separately indicated on the packing list dated 16.11.2010. The e-mail correspondences also show that the appellants were all the time aware about the goods being sought to be cleared. It also shows that they were also available that benefit of exemption against EPCG License was not available in respect of these goods. However while filing the checklist the all the items covered by the said invoice number were put together und one description “CFR Engine with Spares and Accessories” an benefit of exemption in terms of EPCG License claimed in respect of entire goods covered by the said invoice. The said check list has been generated on 21.01.2011 and the benefit of exemption claimed in respect of all the goods covered by the said invoice.

4.4 From the facts as narrated we do not find that the error/ mistake leading to misdeclaration of the goods was an “bonafide error”. Nothing has been brought on record to show the bonafides. Further Bombay High court has in case of I G Petrochemicals Ltd [2016 (3380 ELT 17 (Bom)] held as follows:

“12.*The Tribunal has assigned cogent and satisfactory reasons. The reasons are that appellants imported capital goods and they were imported without payment of customs duty. These goods went in manufacture and export of excisable goods. There were also certain materials procured indigenously without payment of duty at the time of de-bonding. These forgone duties were capable of being recovered and were recovered. However, the investigation reveals that the complete list of capital goods is not procured or not handed over at the time of de-bonding. It is only when the further steps were taken that the Department/Revenue noticed these serious lapses. Once the nature of the capital goods enabled the adjudicating authority and the Tribunal to arrive at a finding of fact that this was a deliberate or intentional act that we do not think that the appeal raises any substantial questions of law.*

13.*We do not find any substance in the contentions of lack of mens rea or deliberate or intentional act on the part of the assessee. The finding of fact is otherwise and which is in consonance with the materials produced. The reasons assigned in Paragraphs 6 and 7 of the impugned order do not suffer from any perversity or error of law apparent on the face of the record requiring our interference in further appellate jurisdiction.”*

4.5 In case of Bharat Forge [2013 (294) ELT 330 (T-Mum)] tribunal held:

"4. *......... Further, we also note that Rule 173QA(bb) of Central Excise Rules, 1944, under which penalty has been imposed, does not distinguish between wilful wrong availment and bona fide error. Penalty is imposable for wrong availment of credit also. Therefore, we do not find any merit in the contention of the appellant that no penalty is imposable."*

4.6 In case of Commissioner of Customs Kandla vs Essar Oil Ltd. [2004 (172) ELT 433 (SC)] Hon'ble Supreme Court has laid down-

"40. *Strong reliance was placed by learned Counsel for respondent no. 1 on Derry's case (supra). It was pleaded that respondent no. 1 had acted with reasonable belief about availability of fund. Merely because funds were not actually released, it cannot be held to be a mis-declaration. It is to be noted that it has to be factually in each case concluded as to whether fraud is established. It would depend on the facts of each case. In the present case even if respondent No. 1's stand is accepted at the most there was an assurance to provide funds. The same by no stretch of imagination, equated with funds already available. There is a gulf of difference between assurance to provide financial assistance and in reality providing finance assistance. In the latter case only there is availability of funds.*

41. *The word "reasonable" signifies "in accordance with reason". In the ultimate analysis it is a question of fact; whether a particular act is reasonable or not depends on the circumstances in a given situation. It is often said that "an attempt to give a specific meaning to the word "reasonable" is trying to count what is not number and measure what is not space". The author of "Words and Phrases" (Permanent Edition) has quoted from In Re :*

Nice & Schreiber 123 F.987-, 988 to give a plausible meaning for the said word. He says, "the expression "reasonable" is a relative term, and the facts of the particular controversy must be considered before the question as to what constitutes reasonable can be determined".

42. *From the factual scenario described it is clear that respondent no. 1 was aware that there was no fund available. In fact, from 3-3-1999 it accepted the position that there was no fund available and was asking for time to arrange funds. This according to us clearly indicated a fraudulent motive and the declaration given was certainly mis-declaration. Therefore, the CEGAT was not right in its conclusions about inapplicability of Section 51(1)(c) to the facts of the case. The demand of duty and order of confiscation by the Commissioner is clearly sustainable."*

4.7 We do find anything to hold that the error committed by the appellant was a bonafide error, it was a clear cut case of misdeclaration of goods to clear the goods without payment of duty under exemption. The goods valued around Rs 56 Lakhs (Rupees Fifty Six Lakhs) have been held liable for confiscation under Section 111 (m) of Customs Act, 1962 and allowed to be redeemed on payment of redemption fine of Rs 1,00,000/- (Rupees One Lakh Only) which is very reasonable. For the various contraventions leading to confiscation of goods, a penalty of Rs 50,000/- (Rupees Fifty Thousand only) under Section 112(a) is also reasonable and justified.

5.1 We do not find any merits in the appeal filed by the appellants and dismiss the same.

5.2 A miscellaneous application for change in cause-title has also been listed for hearing. We allow the said application and accordingly the cause-title as requested is amended.

(Pronounced in court on 15.01.2019)

(Ajay Sharma)
Member (Judicial)

(Sanjiv Srivastava)
Member (Technical)

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