CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL, MUMBAI
REGIONAL BENCH

Customs Appeal No. 86063 of 2020

(Arising out of Order-in-Original - Letter F.No. SG/MISC-238/2018-19/CIU/JNCH dated 13.06.2019 passed by Commissioner of Customs (General), Mumbai-II, JNCH, Nhava Sheva)

M/s. S.G. International **Appellant**
63, Kambekar Street, Gr. Floor,
Mumbai 400 003.

Vs.

Commissioner of Customs, Nhava Sheva-I **Respondent**
JNPT, Custom House,
Nhava Sheva, Raigad.

Appearance:

Ms. Chandni Tanna, Advocate, for the Appellant
Shri Manoj Kumar, Assistant Commissioner, Authorised Representative for the Respondent

CORAM:

HON'BLE MR. S.K. MOHANTY, MEMBER (JUDICIAL)
HON'BLE MR. SANJIV SRIVASTAVA, MEMBER (TECHNICAL)

FINAL ORDER NO. **A/85190/2021**

Date of Hearing: 19.01.2021
Date of Decision: 29.01.2021

PER: SANJIV SRIVASTAVA

This appeal has been filed by the Appellants against the communication made by Vasantha Sundaram, Supdt of Customs, CIU, JNCH Nhava Sheva, vide F No SG/MISC-238/2018-19/CIU/JNCH dated 13.06.2019. In the said communication following has been stated:-

"Sub:- Bond and BG amount for provisional release – reg

With reference to your letter dated 17.04.2019 regarding release of container called back No MSKU0011063 provisionally, it is to inform you that for provisional release of above said consignment, competent authority has decided bond amount for declared assessable value which is Rs 6,40,08,137/- and BG

(Bank Guarantee) amount of Rs 75,00,000/- (Seventy Five Lakh only).

In view of the above, it is informed that for provisional release of the said consignment you need to submit bond and BG amounting above said value."

2.1 Appellants had exported good as per the eleven shipping bills claiming drawback, IGST refund and ROSL indicated in the table below:

Table 1: Details of the Shipping Bills				**Amounts in Rs**	
S No	Shipping Bill No/ Date	Declared FOB	Drawback	IGST Refund	ROSL
1	8371039/ 20.10.2018	8654326.56	48867	1033674	11718
2	8371034/ 20.10.2018	6158294.38	6850	738995	0
3	8395903/ 22.10.2018	4911390.00	122785	245569	61392
4	8395902/ 22.10.2018	4552020.00	No Scroll	227601	56900
5	8397436/22.10.2018	4969615.20	124240	248479	69291
6	8397455/22.10.2018	5758022.16	143951	287900	80216
7	8397405/22.10.2018	5776164.90	144404	288808	79711
8	8397409/22.10.2018	5816675.70	145417	290833	80270
9	8397442/22.10.2018	5732277.63	143307	286613	79105
10	8397410/22.10.2018	5790169.44	144754	289508	85695
11	8397426/22.10.2018	5889180.73	147230	294458	87160
	Total	64008136.7	1171805	4232438	691458

2.2 The goods covered by the shipping bills were duly assessed and cleared for export by following the due procedure. The drawback, IGST refund and ROSL amounts as indicated in the table 1 above have been paid to the appellant after "Let Export Order" and shipment of the goods for export.

2.3 Subsequent to the clearance of the goods for exports, Commissioner (General) directed the manager CPS-JWR, Panvel to put on hold the goods exported by the appellants vide his letter dated 25.10.2018. However the goods were shipped by Maersk Line India Pvt Ltd., in container No MSKU0011063 on 30.10.2018. The shipping line was directed by the Commissioner vide letter date 7.11.2018, to call back the container. As directed by the Commissioner the container was called back by the Shipping Lines on 29.03.2019.

2.4 On 01.04.2019 appellants requested for the release of the goods presenting the copies of the purchase orders and Bank Realization Certificates.. On 10.04.2019 the goods were examined by the Custom Officers again and the samples were drawn. On 12.04.2019 appellants again requested for the release of goods as the consignee was awaiting the goods for nearly five and half months and was reluctant to pay the balance amount.

2.5 Investigations were made in the matter, and in order to avoid any further delay on 27.05.2019, appellants submitted the letter to Commissioner (General) for release of the without any personal hearing. By the impugned communication the appellants were communicated the decision of the competent authority for the provisional release of these goods.

2.6 Since appellants found the conditions of provisional release to harsh, they vide their letter dated 17.06.2019 and 27.08.2019 requested the concerned authorities to allow the goods to be exported without insisting on the conditions of Bank Guarantee or to reduce the amount of bank guarantee. Since department failed to consider the request of the appellants favourably the appellants approached Hon'ble Bombay High Court, by filing writ petition No 11061 of 2019. Hon'ble High Court has disposed of the writ petition vide its order dated 13.02.2020 stating as under:

"We have heard the learned counsel for the parties for some time.

2. Apart from contesting the matter on merits, the Respondents have taken a preliminary objection that the order dated 17 June 2019 annexed at Exhibit-H to the petition passed by the Superintendent of Customs is an order under section 110A of the Customs Act, 1962 and an appeal is maintainable against such order as held by this Court in the case of Commissioner of Customs, Import-I v. S.S. Offshore Pvt. Ltd. [2018 (361) ELT 51 (Bom.)]

3. The learned counsel for the Petitioner, on instructions, states that the Petitioner would file an appeal to the Appellate Authority in the light of the decision of this Court in the case of S.S. Offshore Pvt. Ltd. The Petitioner has sought to raise various legal questions such as authority of the Officer who passed the order under section 110A of the Act, the validity of the seizure under section 110 as also the issue regarding detention and demurrage charges. All these issues are open to be contended before the Appellate Authority.

4. Keeping all the contentions of both the parties open, we dispose of the petition as above with liberty to the Petitioner to file an appeal.

5. At this stage, the learned Senior Advocate appearing for the Respondents states that in case the appeal is filed within a period of two weeks, the Respondents will not raise an objection regarding limitation. The Tribunal will take note of this stand of the Respondents."

2.7 As per the order of the Hon'ble High Court, appellants preferred this appeal before the tribunal within two weeks time. Taking the note of Hon'ble High Court Order this appeal admitted and held maintainable by the tribunal vide its Order No I/07/2020 dated 27.10.2020. Subsequently by the Order No M/85281/2020 dated 08.12.2020, application for early hearing was allowed stating as under:

"Heard both sides

2. This miscellaneous application is filed seeking early hearing of the appeal on the ground that goods namely, readymade garments have been detained since March, 2019, which would deteriorate over a period of time.

3. Learned AR for the Revenue has no objection

4. Consequently, the miscellaneous application for early hearing of the appeal is allowed and appeal fixed for hearing on 06.01.2021."

3.1 We have heard Ms Chandni Tanna, Advocate for the appellants and Shri Manoj Kumar, Assistant Commissioner, Authorized Representative for the revenue.

3.2 Arguing for the appellants, learned Counsel submitted that, -

- Commissioner Customs Nhava Sheva, had no jurisdiction over the goods which have already sailed for export and the recall of the goods from the foreign port was exercise of his powers beyond the territorial jurisdiction conferred upon him in terms of Notification No 82/2017-Cus (NT) dated 24.08.2017. In support she relied upon decisions in case of Noble Asset Co Ltd [2006 (205) ELT 901 (T)] which has been upheld by the Hon'ble Bombay High Court as reported at {2008 (230) ELLT 22 (Bom)];
- No seizure memo as per Section 110 of Custom Act, 1962 has been served upon them till date, and hence the order for provisional release under Section 110A ibid, is bad in law and without any application of mind as has been held in case of A S Enterprises [2016 (337) ELT 321 (Mad)];
- They have availed the benefit of Rs 12,85,606/- only under the Customs Act, 1962 and hence the order of provisional release asking them to give the bank guarantee for Rs 75,00,000/- is arbitrary and bad in law.
- They have not been made aware of any cogent reasons for illegal and unlawful detention of their goods and no seizure memo in respect of these goods has been served upon them. They also have not been provided with the copy of Panchnama prepared for examination of the goods.

- In various decisions as follows the goods have been release only on execution of the bond, without any bank guarantee,-
  - Pallahan Industries [2015 (325) ELT 18 (P & H)]
  - Excel Export [2015 (323) ELT 476 (Guj)]
  - Veer Imp[ex {2016 (332) ELT 87 (Guj)]
- Due to illegal detention made by the department they have suffered great financial hardship and losses. Since the goods are seasonal in nature any further detention will make the goods unmarketable.
- The detained goods are not prohibited goods and are freely tradable, hence as per CBIC instruction 30/2013-Cus dated 05.08.2013, the export goods should not have been detained so long. Further the procedure as per Circular No 01/2011-Cus, has not be followed nor the guidelines as prescribed by the Customs Manual has been adhered to.
- Due to continued illegal detention of the export goods, they have been forced to bear heavy demurrage in respect of these goods. They should not be subjected to these demurrage and detention charges due to failure of department to take timely action in the matter. Various courts have held that in such cases they are entitled to certificate for waiver of detention charges.

3.2 Learned Authorized Representative appearing for the revenue filed two communications (vide F No SG/Misc-237/2018-19 CIU JNCH dated 04.01.2021 and F No SG/Misc-237/2018-19 JNCH Pt—I dated 18.01.2021) received by him from countered the arguments of advocate stating as under,-

- Appellants have sought to export these goods by mis-declaring them in terms of value and also misclassified them to avail higher drawback and other export benefits as admissible in law.
- The appellants had waived of the requirement of Show Cause Notice in the matter vide their letter dated 27.10.2019. Investigation report after completion of investigations was issued to them 18.10.2019. Since the matter is pending for adjudication with the Additional

Commissioner of Customs, Export determination of fine and penalties.

- The provisional release order in the present case has been issued as per the CBEC Circular No 61/2011-Cus dated 4th January 2011.
- On the basis of the investigations undertaken the difference between the declared value and estimated re-determined value is about Rs 405.66 Lakhs.
- As per the Custom Act, 1962 Section 114 (iii) the penalties equivalent to the declared value of Rs 640 Lakhs can be imposed on the appellant and fine of Rs 39 lakhs for the alleged misdeclaration.
- Against these amounts the appellants have been asked to furnish bank guarantee of Rs 75 Lakhs only which is about 11.8% of declared value. Thus it can be seen that amount of Bank Guarantee sought is not excessive,-
- In respect of the waiver of detention charges revenue will follow Regulation 6 (1) (l) of the Handling of Cargo in Customs Area Regulation 2009.

4.1 We have considered the impugned communication along with the submissions made in appeal and during the course of argument on appeal.

4.2 It is the case wherein the appellants have seeking early disposal of the proceedings against them waived of the requirement of show cause notice vide their letter dated 27.05.2019 stating as under:

“Subject SCN waiver

Ref: F.No SG/MISC-237/2018-19

Sir,

In respect to the above file number, it is a request to please waive SCN and that we do not want a person hearing related to the said file.

The called back container has arrived in Nhava Sheva since two months. We request your high authority to release the said *container and expedite the process so as to enable us for recovery of our dues from the consignee as soon as possible.*

The grant of same would enable less use of manpower and the same shall facilitate us to put our energy into new ventures, we request you for the same for which we shall be grateful to you.

Thank You

Regards."

4.3 This letter is not in dispute and has been stated to be the reason for non issue of Show Cause Notice to the appellants within six months from date of detention/ seizure, as mandated by the Section 110 of the Customs Act, 1962. In their letter of 4.01.2021, filed during the course of hearing by the Authorized Representative, jurisdictional officers have at para 16, stated as under:

"16. The exporter had requested waiver of SCN vide letter dated 27.05.2019 and accordingly on completion of investigation the matter the investigation report was issued on 18.10.2019. The subject matter is pending for adjudication with the adjudicating Authority i.e. Additional Commissioner of Customs, Export for determination of fine and penalties."

4.3 Nearly fifteen months have elapsed since the issue of the investigation report on 18.10.2019, and matter has not still been adjudicated, when appellant has waived the requirements of Show Cause Notice and Personal Hearing. Can there be any explanation for such a delay in the adjudication proceedings, total failure of supervisory control to get the proceedings completed. Had the matter been adjudicated within time the entire litigation which went even before the Hon'ble High Court could have been avoided. Urgency shown by the appellant by waiving the requirement of show cause notice and personal hearing, is being used a defence by the revenue for not having followed the procedure prescribed by the Section 110 of Customs Act, 1962.

4.4 When we look at the impugned communication, which itself is dated 13.06.2019, is much after 27.05.2019 the date of communication by which appellant had waived of the requirement of Show Cause Notice and Personal Hearing, revenue has referred to a letter date 12.04.2019 of the appellant seeking provisional release of goods and has allowed the provisional release in terms of the conditions mentioned in the impugned communication. The text of the letter dated 12.04.2019 is reproduced below:

"Subject:- Release of container called back number MSKU0011063 provisionally.

Sb Numbers: 8397410, 8397426, 8397442, 8397409, 8397436, 8397405, 8397455, 8395902, 8371034, 8371039, 8395903 dtd. 22.10.2018/22.10.2018

Sir,

In respect to the above dated shipping bill numbers it may please be noted that the above container had been put on hold by the CIU on 24.10.2018 for which there was a communication done by email to JWR CFS and called back on 07.11.2018 after the sailing date of 30.10.2018. Maersk line had offloaded the container in Ghana, Tema for which there was again a problem caused by the shipping line for which an additional delay of 3 months was committed as mentioned in the attached correspondence.

The said container has been called back and returned to CFS on 29.03.2019, we have been constantly in follow up with the customs since then. We had visited along with the CIU for examination of the consignment to the CFS which was duly completed by the officers on 10.04.2019. The samples have been withdrawn.

We have now been badly delayed and the customer is anxious and upset on the said shipment for in spite of him having the original bill of lading the consignment did not reach the destination and down the line 512 months of waiting he might refuse to pay the balance of the payment, Please it is a request to help us in dismay and allow us the said shipment be provisionally released so as to save the business in a last attempt for which we shall ever be grateful to you.

We are ready to cooperate with the customs by providing any sufficient amount documents and evidence required further for the same. It is a humble and sincere request.fof which we shall ever pray."

4.5 The goods were examined by the departmental officers and the samples drawn on 10.04.2019, as stated by the appellants in their communication dated 12.04.2019, and not disputed by the revenue. In para 2 of their letter dated 04.01.2021, revenue sates as follows:

"2. In this regard, it is to inform that on the basis of certain intelligence goods being exported vide 11 shipping bill No 8371039 & 8371034 both dated 20.10.2018, 8395903, 8395902, 8397436, 8397455, 8397405, 8397409, 839442, 8397410 and 8397426 all dated 22.10.2018 filed by M/s S G International, were kept on hold at JWR CPS vide Hold No 47/2018-19 dated 25.10.2018 by the Central Intelli9gence Unit, JNCH. Subsequently, goods pertaining to above shipping bills were examined under Panchnama dated 10.04.2018 in presence of Shri Mohd. Sadique Muchhada, Power of Attorney holder of M/s S G International concern. At the time of time of examination representative samples were drawn and sealed for the purpose of testing and further investigation. On examination, ..."

4.7 From the above it is quite evident that goods could have been provisionally released to the appellants immediately after 10.04.2019, for which the appellant had made request on 12.04.2019. Vide Circular No 01/2011-Customs dated 4th January 2011, following clarification has been given by the Board:

"Subject: Provisional release of export - goods detained for investigation - reg.

Sir / Madam,

Attention is invited to the Board Circular No.33/2005-Customs dated 2.08.2005 which contains the instructions regarding provisional release of goods entered for exportation and is seized on the ground of mis-declaration in terms of quantity and value.

2. Instances have come to the notice of the Board that export consignments continue to be detained and not allowed clearance on provisional basis on account of pending test reports / investigations for alleged mis-declaration in terms of quantity, value and description of the goods. In one case it was reported that the detained goods were not allowed to be exported provisionally on the ground that Board's Circular referred above provides for provisional release of only the seized goods.

3. In this regard it is observed that inordinate detention of the seized goods entered for exportation results in delays in fulfillment of export order and at times cancellation of such orders. Detention of goods also adds to congestion in ports besides resulting in payment of demurrage charges to the Custodians. Accordingly, the matter has been re-examined by the Board with the view to ameliorate the aforementioned difficulties faced by exporters and to streamline the procedure of provisional release / exportation of seized goods / goods under investigation on account of mis-declaration in terms of quantity and value etc.

4. Seizure should be resorted to only when the Customs officers have a reason to believe that the goods in question are liable to confiscation under the Customs Act, 1962 and thereafter the provisions of Section 110A of the Customs Act, 1962 would come into play. However, there may be situations when the goods are to be detained for purpose of tests etc. to confirm the declaration. In such cases the endeavour should be to quickly undertake the necessary action (test / enquiry etc.) and take appropriate legal action thereafter so that the period of detention is kept to the minimum. Thus, the following course of action is prescribed in respect of goods entered for exportation:

(a) In case the export goods are found to be mis-declared in terms of quantity, value and description and are seized for being liable to confiscation under the Customs Act, 1962, the same may be ordered to be released provisionally on execution of a

Bond of an amount equivalent to the value of goods along with furnishing an appropriate security in order to cover the redemption fine and penalty.

(b) In case the export goods are either suspected to be prohibited or found to be prohibited in terms of the Customs Act, 1962 or ITC (HS), the same should be seized and appropriate action for confiscation and penalty initiated.

(c) In case the export goods are suspected of mis-declaration or where declaration is to be confirmed and further enquiry / confirmatory test or expert opinion is required (as in case of chemicals or textiles materials), the goods should be allowed exportation provisionally. The exporters in these cases are required to execute a Bond of an amount equal to the value of goods and furnish appropriate security in order to cover the redemption fine and penalty in case goods are found to be liable to confiscation. In case exports are made under any Export Promotion / Reward Schemes, the finalization of export incentives should be done only after receipt of the test report / finalisation of enquiry and final decision in the matter. The Bond executed for provisional release shall contain a clause to this effect,

(d) Export goods detained for purpose of tests etc. must be dealt with on priority and the export allowed expeditiously unless the prohibited nature of goods is confirmed. Continued detention of any export goods in excess of 3 days must be brought to the notice of the Commissioner of Customs, who will safeguard the interest of the genuine exporters as well as the revenue."

4.8 In view of the above clarification issued by the Board, there cannot be much justification for the delay in the issue of provisional release order vide the communication dated 13.06.2019, nearly two months after completion of examination of the goods and drawing of representative samples.

4.9 Let the things be as they are we are not in position to find any reason for the enormous delay in handling of the goods which were cleared for export and subsequently called back. Also we are unable to find any reason for this delay when the revenue itself contends the outflow of the drawback, ROSL and IGST Refund. Do these delays not hamper the interest of the revenue itself.

4.10 In our view the failure on the part of revenue to complete the proceedings early within the prescribed time frame has not only affected the interests of the exporters, but has also impacted the revenue interests.

4.11 In view of the discussions as above and to protect the interests of the exporters as well as revenue, we are of the view that revenue should finalize the proceedings against the appellants and adjudicate the matter at the earliest preferably within a period of one month from the date of this order. Principal Chief Commissioner JNCH, Nhava Sheva, should monitor and ensure that these proceedings are finalized and completed within the above time frame.

4.12 In case revenue is not in position to complete the entire proceedings within one month time, then they should allow the provisional release of the detained export goods immediately within a week from the date of receipt of this order, on execution of the bond equivalent to the value of the goods and security in form of Bank Guarantee of Rs 20,00,000/- (Rupees Twenty Lakhs only). While determining the amount of security we have taken the note of decisions of Hon’ble Punjab an& Haryana High Court and Hon’ble Gujarat High Court referred to by the counsel for appellant.

4.13 in respect of detention and demurrage charges in their letter dated 18.10.2021, revenue has stated as under:

“3. In regards to detention waiver, it is to that this office will follow Regulation 6(1)(l) of the Handling of Cargo in Customs Areas Regulations, 2009 which states that-

The Customs Cargo Service provider shall –

Subject to any other law for the time being in force, shall not charge any rent or demurrage on the goods seized or detained or confiscated by the Superintendent of Customs or Appraiser or

Inspector of Customs or Preventive officer or examining officer as the case may be:"

Taking the note of the above submission made by the revenue before us and admitting that these goods have been detained by them, we are of the opinion that these charges should be waived and proper certificate in this regards be issued by the concerned authorities.

5.1 In view of the discussions as above the appeal is disposed of as per our observations in para 4.11, 4.12 & 4.13, supra.

(Order pronounced in the open court on 29.01.2021)

(S.K. Mohanty)
Member (Judicial)

(Sanjiv Srivastava)
Member (Technical)

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