Customs, Excise and Gold Tribunal - Tamil Nadu
Well Knit Apparels (P) Ltd. vs Commissioner Of Customs on 23 October, 1998
Equivalent citations: 1999 ECR 90 Tri Chennai, 1999 (106) ELT 431 Tri Chennai
ORDER V.K. Ashtana, Member (T)

1. These three appeals are against Order-in-Original No. S-8/1/90-MEPZ/1306, dated 5-10-1990 passed by Collector of Customs wherein 6,021 sets of Cotton knitted to shape sweater panels have been confiscated and allowed redemption on payment of fine of Rs. 1,25,000/- penalty of Rs. 3,00,000/- has been totally imposed on the appellants; 16,472.205 Kgs of imported cotton yarn found in excess in the factory premises of the appellants valued at Rs. 13,62,575/- have been confiscated and allowed to be redeemed on fine of Rs. 1 lakh; and duty demand on the said quantity of cotton yarn has been ordered for payment which has not been computed in the said order.

2. The appellants raised three main issues :-

(i) misdeclaration in the 3 Shipping Bills in respect of quantity to be exported;

(ii) duty demand on 16,472.205 Kgs of imported cotton yarn found in excess in the factory premises as also redemption fine thereon; and

(iii) penalty of Rs. 2 lakhs on the earlier shipping bill.

3. Heard learned Advocate Shri R. Sashidaran and Mrs. Maithili, learned Advocate for appellants and learned JDR Shri S. Sankara Vadivelu for Revenue.

4. Appellants, unit is located in the Madras Export Promotion Zone (MEPZ) and the import entitlement of raw material is covered by Customs Notification No. 263/85 as amended. Learned Advocates submitted that with respect to the excess cotton yarn found in stock, the said yarn was imported legally under the said notification. In terms of the scheme under which the unit operates, all the export obligations have been met and the stock of cotton yarn found in the factory are remnants of the quantity totally imported. He submitted that no offence has been committed in respect of remnants stock found in their factory premises for the following reasons :-

(a) the said notification does not prohibit the appellants from buying or using indigenous cotton yarn in the goods exported and Keeping remnants stock with them upto a period of one year which period is not over at the time of commencement of these proceedings.

(b) the export obligations were met vide Export on 31-3-1990 and 2-5-1990 whereas the said yarn was imported between 12-2-1990 and 21-5-1990 and the show cause notice was issued on 26-6-1990. Thus, the one year provided for under the said notification had not expired and they had the option to account for and to re-export of excess stock during this period. The question of any duty demand would have been arisen only thereafter;

(c) as far as the question of accounts not maintained regarding excess stock, he submitted that this requirement under Clause 6 of the said notification is purely procedural; that there is no complaint from the Development Commissioner that the accounts have not been maintained (it is the Development Commissioner who is controlling this aspect in MEPZ); it is also not that no accounts were maintained because Annexure to Show Cause Notice gives the details which have been taken only from their accounts and in any case the entire goods are in stock, therefore, it is not the department's case that the goods have been diverted illegally for sale in the local market; the presence of the goods within the factory premises speaks for itself and no penalty should be levied for honestly keeping these goods rather than surreptiously disposed them of particularly when one year period provided for by notification was still available.

(d) Learned Advocate further submitted that page 15 of the impugned order deals with confiscation and duty liability of this excess stock and on page 16 records that there are two possibilities for this excess stock arising and further it goes to hold that the second possibility recorded therein is "Plausible". This shows that there is room for doubt. He submits that these findings are mere conjunctures and not based on any clear-cut findings.

5. With respect to second issue of confiscation of 6,021 numbers of goods being exported, learned Advocate submits that the findings in this respect in the impugned order are contained in pages 12 to 14 thereof. He further submits as follows :-

(a) the goods are confiscated under Section 111(d) of Customs Act, 1962 but this is not correct as there is no prohibition against export of these goods, they not being even dutiable at this stage. Therefore, Section 113(d) does not apply. This section is cited in the case of Ambalal reported in AIR 1971 Cal. 444, wherein it was held that Section 113(d) ibid will not apply when value has been misdeclared in relation to payment of duty. Also he draws support from an interim order of the Tribunal as reported in 1995 (79) E.L.T. 256;

(b) prohibition against goods is governed by Section 3 of the Import & Export Trade (Control) Act, and as per the notification in the Gazette thereunder, these goods are not covered under this prohibition;

(c) the Export Trade Control Order No. 1/77, dated 24-3-1977 (Clause 3) is to be read with the purpose behind the Customs Act, 1962 as is held in the case of Ambalal supra, otherwise a very wide power would be assumed by Customs. Therefore, there should be material misdeclaration which in this case do not exist;

(d) Section 113(h) of the Customs Act, 1962 is also not applicable since the goods are neither dutiable nor prohibited;

(e) Section 33(ii) of the Customs Act, 1962 defines "prohibited" goods. A perusal thereof shows that definition does not apply to the goods in question; and

(f) Finally, he prayed that both Redemption Fine and the Penalty is even otherwise excessive when compared to the value of the goods.

6. As far as the third issue of levy of penalty of Rs. 2 lakhs on earlier shipping bill is concerned, learned Advocate argued that the learned Collector had no jurisdiction to do so because those goods had been long ago cleared by Customs and later export order given by them. There is no evidence led by the department as well as recorded in the impugned order that these goods were not exported and therefore the impugned order is highly presumptious. In this connection, he cited the case of Ajay Exports, wherein it is held that Customs cannot reopen the exports except in a manner provided by law. The findings in the impugned order that it is plausible that similar fashion of misdeclara-tions were contained in earlier exports also is highly presumptious and not based on any facts. Therefore, the penalty requires to be set aside.

7. Learned JDR Shri S. Sankara Vadivelu submitted as follows :-

(A) The Export Processing Zone are themselves are 100% EOU aggregated and are titled as Warehousing Station under Section 9 of Customs Act, 1962 vide Notification No. 8/86, dated 18-1-1986 issued in respect of MEPZ. Therefore, all Warehousing provisions of Customs Act ibid apply to goods imported by units operating within MEPZ. Hence, the law requires them to maintain proper accounts, particularly because the units under MEPZ have been given many more concessions by Revenue. It is, therefore, not correct to say that maintenance of accounts is only a procedural requirement.

(B) The Notification No. 263/85 of Customs also specifically provides that accounts should be maintained as per Clause 6. This is necessary so that Condition 7(b) regarding non-utilisation can be effectively implemented. Therefore, non-maintenance of accounts has to be viewed very seriously.

(C) As far as shortages of quantity to be exported under 3 Live Shipping Bills is concerned, since this misdeclaration was of quantity, therefore, it was also one of value because the value is related to the quantity. It is significant that shortage was 75% of the total quantity declared and not a small shortage.

(D) Section 11 of Customs Act, 1962 links-up with the Import Trade (Control) Act, and Section ll(u) applies when there is contravention of any law when this is read with Section 33 of ITC Act. There is cross linkage between Customs Act and ITC Act and therefore the goods are deemed to be prohibited. In this connection, he submits that duty has been forgone and imported goods are prohibited goods and therefore the Customs Law is directly involved. He cited the case-law of Exotic Fashions v. CC, Bangalore as reported in 1995 (79) E.L.T. 256 (T) and that of K. Janardhanan Pillai v. CC as reported in 1988 (38) E.L.T. 647 (T) and submitted that the analogy of jurisdiction under FERA as applicable to Customs also holds goods for jurisdiction under ITC.

(E) With respect to the penalty on past exports, since the excess yarn is in factory, therefore it follows that short goods were shipped thereunder. The burden is on them to prove to the contrary.

(F) The excess stock of yarn found not accounted for attracts Section 111(o), as involved. Non-invocation of Section 111(d) and meagre redemption fine of Rs. 1 lakh and no penalty are evidence of a lenient view having been taken.

(G) No draw back would be available to MEPZ units as yarn was non-duty paid. Even if duty was paid, draw back of 15% would not be commensurate.

(H) Clause 7 of relevant notification leaves option open with Customs to either recover duty immediately or allow time of one year, as the two conditions are independent. Clause 7(b)(i) applies in this case.

8. Learned JDR hence concluded that there was no infirmity in the order and the appeals need to be dismissed.

9. Learned Advocate rose in rebuttal to submit that with respect of excess yarn, one yarn period for export was available as per the notification.

10. We have carefully considered the arguments on both sides as well as the records of the case.

11. With respect to penalty of Rs. 2 lakhs on the earlier exports, we find that the impugned order does not specifically discover any strong evidence. Merely because certain excess stock of yarn is available in the factory and because misdeclaration was noticed in a subsequent consignment, it does not ipso facto follow that earlier shipments duly checked and allowed by Customs, had sufferred from the same deficiency. It may raise suspicions but penalty cannot be levied on that basis, as no corroborative evidence is on record, such as a complaint from the foreign buyer or proportionately less bank remittances etc. Therefore, we find that this penalty of Rs. 2 lakhs is liable to be set aside.

12. With respect to the shortage of 22,264 pieces of goods as against declared quantity in Shipping Bill Nos. 504, 505 & 506, we find that it was the diligent examination of the consignment by Customs authorities that exposed this fact. Therefore, the exporter had misdeclared this quantity in the shipping bills. It is also significant to note that the deficiency was of a huge quantity and not marginal and was therefore intentional and not the result of any packing error. A declaration of export cargo is statutorily provided in the Customs Act. When it is challenged, as in this case, by way of 100% physical examination, then major inconsistency in that declaration is a serious lapse, as normally customs do not perform such a 100% count and instead rely on such a declaration. A gross misdeclaration on this Shipping Bill, of a tangible data of quantity in number of units, is therefore demonstrative of mala fide intention and is a breach of the trust inherent to the Customs examination procedures. A mis-declaration in quantity, furthermore, also involves a misdeclaration in value in this case, as value declared was for the full quantity, while actual quantity was found to be substantially short. We further find that the Section 2(33) of the Customs Act, 1962 defines prohibited goods as follows :-

"Prohibited goods" means any goods the import or export of which is subject to any prohibition under this Act or any other law for the time being in force but does not include any such goods in respect of which the conditions subject to which the goods are permitted to be imported or exported have been complied with."

13. We further find that as per Clause 3(3) of Export Control Order No. 1/88 ETC, dated 30-3-1988 under Section 3 of Imports & Exports (Control) Act, 1947, it is provided as follows :-

"If in any case, it is found, that the value, sort specifications, quality and description of the goods to be exported are not in conformity with the declaration of the exporter in those respects or the quality and specification of such goods are not in accordance with the terms of the export contract,.the export of such goods shall be deemed to be prohibited."

Applying these two laws to the facts of this case, we find that as both quantity and value were misdeclared in these shipping bills taken together, therefore these goods are hit by the aforesaid provisions and qualify as "prohibited goods" under the said order. Therefore, they attract the definition of 'prohibited goods' under Section 2(33) of Customs Act, 1962 because of their being prohibited goods under Imports & Exports (Control) Act, 1947 (supra). It is therefore clear that goods so misdeclared and tendered for export under shipping bills are "prohibited goods" under Customs Act, 1962.

14. The impugned order has held that being "prohibited goods", they would be liable to confiscation under Section 113(d) of Customs Act, 1962 which reads as under :-

"(d) any goods attempted to be exported or brought within the limits of any customs area for the purpose of being exported contrary to any prohibition imposed by or under this Act or any other law for the time being in force."

15. Learned Advocate however painfully but strenuously argues that "prohibited goods" is distinct from any goods whose...export is subject to any prohibition under this Act of any other law..." [Section 113(d)]. We are unable to agree with this interpretation. There is no difference between "prohibited goods" and goods "subject to any prohibition", because what is intended is that such goods fall in a category different from "free" or "untainted" goods - a category of prohibition for export. It is not anybody's case here to draw a distinction in law between "prohibition" & "restriction", as nowhere the words "restricted" or "restriction" are used in these statutes. Secondly, the case of Ambalal cited by ld. Advocate is distinguishable on facts as it concerned dutiable goods, whereas these are not so. Therefore, without acceding to such hair-splitting, we prefer to go by a plain reading of these statutes and are of the firm view that as prohibited goods are those which are subject to any prohibition by law (for import & export) therefore Section 113(d) has been correctly involved and applied in this case and goods so legally confiscated. We further find that the redemption fine of Rs. 1,25,000/- for goods confiscated of a value of Rs. 5,71,036/- is not unfair or excessive. We also find that for this gross breach of trust through misdeclaration in shipping bills, and thereby attempting to export prohibited goods confiscable under Section 113(d) of Customs Act, 1962, the penalty of Rs. 1 lakh under Section 114(i) ibid is quite fair and reasonable. On these counts,

therefore, we do not find any infirmity in the order impugned.

16. This leaves us to consider the third issue viz. dutiability and confis-cability of unaccounted excess stock of imported yarn found in stock. There is no dispute of the goods alleged to have been found in excess of recorded balance in whatever accounts were being maintained. There is also no dispute on the fact that they are apart of those imported duty free under notification 263/85-Cus. What is disputed is whether in terms of Clause l(7)(b)(i) of the said notification, whether duty is leviable on them or whether in terms of Clause l(7)(b)(i) the importers (appellants) have time of one year for their re-export etc. and that question of dutiability arises only thereafter. The relevant portion of the said notification reads as under :-

"(7) the importer shall pay, on demand, an amount equal to the duty leviable -

(a) on goods which are capital goods as are not proved to the satisfaction of the Collector of Customs to have been :-

(i) installed or otherwise used within the Zone or re-exported within a period of one year from the date of importation thereof or within such extended period as the Collector of Customs may, on being satisfied that there is sufficient cause for not using them within the Zone or for not re-exporting them within the said period, allow;

(ii) retained within the Zone after installation or use inside the Zone;

(b) on goods other than capital goods as are not proved to the satisfaction of the Collector of Customs to have been :-

(i) used in connection with the production or packaging of goods (within the Zone) for export out of India or with the promotion of export of such goods or re-exported within a period of one year from the date of importation thereof or within such extended period as the Collector of Customs may, on being satisfied that there is sufficient cause for not using them or for not re-exporting them within the said period, allow;

(ii) retained within the Zone in connection with the promotion of export goods;

(c) on goods so produced or packaged as have not been exported out of India and on unused goods (including empty cones, bobbins or containers, if any, suitable for repeated use) as have not been exported, within a period of one year from the date of importation of such goods or within such extended period as the Collector of Customs may on being satisfied that there is sufficient cause for not exporting such goods within the said period, allow;"

17. A plain reading thereof shows that in three different situations covered by Sub-clauses (a), (b) & (c) of Clause 7 the importer shall pay, on demand by Customs, an amount equal to duty involved. It is significant to note that what is payable is an amount (emphasis supplied) equal to duty leviable and not the duty itself. In this case, Sub-clause (a) which covers capital goods is not relevant, yarn

not being so. The dispute is between applicability of two alternatives of Sub-clause (b)(i) i.e., which one of the alternatives is to be applied in this case. Revenue seeks to demand aforesaid payments on the grounds that imported yarn found in excess, not being capital goods and having therefore not been used in connection with production of goods for export, should pay duty. Learned Advocate stresses on the word "or re-exported within a period of one year..." and submits that for one year the retained excess goods are untainted by any amounts to be paid. We find that the use of the words "or" here are significant. Upto one year, either alternative is available and the notification further gives discretion to Customs to even extend this period of one year for re-export. In such a situation where two alternatives are provided for by law in an exemption notification, the general principle under taxation law, that the alternative which is chosen as favourable by the importer is to be allowed. In this case, the importer's say is that he chose to wait for one year before either re-exporting the yarn or paying-up. Hence, we find considerable merit in this submission of the learned Advocate. We find that as the period of one year from date of export had not expired on date of issue of SCN for duty amount and confiscation etc., the said proposals therein were premature. We, therefore, find that the demand of paying an amount equal to duty in this case needs to be set aside and order accordingly. Keeping in mind all the facts and circumstances of the case, we order that the interests of justice would be met if these goods are re-exported within three months from the date of this order. However, we also order that if this re-export is not completed within the said time-limit ordered above, then the appellants shall pay the amount equal to the duty leviable thereon as confirmed in the impugned order, within seven days of expiry of this 3 months period. After such payment, the goods would be free for clearance towards home consumption. Since at the time of issue of show-cause notice, the amount equal to duty was not payable therefore the goods cannot also be confiscated. The order confiscating the goods and imposing redemption fine is also set-aside.

18. This leaves only the question fo non-accountal. We find that the order impugned had confiscated the goods for non-accountal but not levied any penalty. We find that non-accountal is not a mere procedural error in special situations like the MEPZ scheme where Revenue gives special and substantial duty concessions. Secondly, the said notification itself provides for proper accountal of imported goods, which has not been followed. But it is well settled law that in cases of goods found in excess in a factory (as per accounts), only penalty is leviable, but since goods are still within the limit of the zone confiscation thereof would be incorrect. The order impugned has not levied any penalty on this count. There is also no cross-appeal from Revenue for such an imposition. We have already ordered that confiscation is set aside. Therefore no other orders are required on this issue. However, we warn the importers that they shall be more careful in future to maintain immaculate accounts and also order them that the excess goods concerned shall be immediately taken on their prescribed account books pending its re-export or clearance on payment etc.

19. To sum-up the above orders, we order as follows :-

(a) The confiscation of 6,021 sets of 100% cotton knitted to shape sweater panels is confirmed as also the redemption fine of Rs. 1,25,000/-;

(b) The penalty of Rs. 1 lakh under Section 113(d) for these shipping bills is also confirmed;

(c) The penalty of Rs. 2 lakhs for earlier 43 shipping bills is set-aside;

(d) The confiscation and redemption fine on 16,472.205 Kgs. of imported cotton yarn found in excess is set-aside;

(e) The demand for an amount equal to duty confirmed on 16,472.205 Kgs. of this yarn is set aside. However, the importer shall re-export the said yarn within 3 months from date of receipt of this order and failing which shall pay within 7 further days the appropriate amount equal to duty leviable thereon. After such payment, importer shall be free to clear the goods for home consumption in the domestic tariff area.

20. The order impugned stands modified as per above and the appeal succeeds partially accordingly.