IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATE : 31.07.2015

CORAM

THE HONOURABLE MR. JUSTICE R.SUDHAKAR
AND
THE HONOURABLE MS. JUSTICE K.B.K.VASUKI

C.M.A.NO.1473 OF 2015
AND
M.P.NO.1 OF 2015

M/s.Masterstroke Freight
Forwarders Pvt. Ltd.
S.M. Plaza, Room No.10, No.93
45, Armenian Street
Chennai 600 001. .. Appellant/Appellant

- Vs -

1. The Commissioner of Customs (Exports)
Custom House
No.60, Rajaji Salai
Chennai 600 001.

2. The Hon'ble Customs, Excise &
Service Tax Appellate Tribunal
South Zonal Bench
Haddows Road, Shastri Bhavan
Chennai 600 006. .. Respondents/Respondents

Appeal filed under Section 130 of the Customs Tax Act against the order dated 26.5.2015 passed by the Customs, Excise & Service Tax Appellate Tribunal, South Zonal Bench, Chennai, made in Misc. Order No.40815/2015.

For Appellant : Mr. Hari Radhakrishnan

For Respondents: Mr. K.Mohanamurali for R-1

JUDGMENT
(DELIVERED BY R.SUDHAKAR, J.)

Mr.K.Mohanamurali, learned standing counsel for the first respondent is directed to take notice.

2. Aggrieved by the order of the Tribunal in directing the appellant to make predeposit, the appellant is before this Court by filing the present appeal, by raising the following questions of law :-

"i) Whether in the facts and circumstances of the case, the Hon'ble CESTAT was justified in ordering pre-deposit of Rupees Four Lakhs?

ii) Whether the Hon'ble CESTAT is justified in ordering pre-deposit without considering that mens rea is sine qua non to impose penalty on a person other than the importer under Section 112 (a) of the Customs Act, 1962, on charge of abetment?

iii) Whether the Hon'ble CESTAT is justified in ordering pre-deposit of the entire amount of penalty without analysing the factual scenario and without considering prima facie case, balance of convenience and pecuniary hardship?"

3. The facts, in a nutshell, are as hereunder :-

This is a case of import of Mulberry Raw Silk//silk yarn of 27020.93 kgs. of foreign origin valued at Rs.3,36,10,640/= from 9 bills of entry, which imports came under the scrutiny of the Directorate of Revenue Intelligence (for short 'DRI'). On further investigation, the DRI found that there has been misutilisation of these goods contrary to the advance authorisation scheme, whereby the goods were diverted to places other than the place of manufacture or supporting manufacture. On the basis of the above investigation, a search was conducted at the official/residential premises of various persons and documents were seized. Thereafter, show cause notices came to be issued and after receiving reply and hearing the aggrieved persons, the case was adjudicated by the competent Commissioner, who imposed a penalty of Rs.10 Lakhs on the mastermind, Ramanand Surekha, Rs.4,00,000/= on Lalit Kumar Jain, Rs.3,00,000/= on Swapnil Patel, Rs.26,00,000/= on Kalpesh Patel and Rs.4,00,000/= on Masterstroke Freight Forwarders Pvt. Ltd., the present appellant besides duty and penalty was also demanded and imposed on the so-called importers, many of whom were found to be operating in fictitious manner, thereby evading payment of customs duty by misutilising the advance authorisation scheme. The relevant facts, has been culled out from the order of the adjudicating authority by the Tribunal in its order, and the relevant portions of the order are extracted hereinbelow for better clarity :-

"17. Investigation discovered that imports of Mulberry raw silk/silk yarn of 27020.93 kgs. valued at Rs.3,36,10,640/- were made duty free using 3 advance authorizations of M/s.Kalp Impex of Surat by one Ramanand Surekha, owner of Goyal Enterprises of Bangalore. Customs was defrauded diverting the goods to Bangalore without that being transported to Surat for use in manufacture by Kalp Impex. There was deliberate intention behind such diversion of goods as per design of Ramanand Surekha with Vishal Agarwal and customs duty was evaded due to duty free clearance as was noticed by investigation.

18.1 Against the above consequences, only Lalit Kumar Jain, Swapnil Bababhai Patel, Kalpesh Patel and Masterstroke Freight Forwarders Pvt. Ltd. have come in appeal with their respective stay applications as listed below and others whether are in appeal or not is not informed by either side :-

S. No.	Appeal	Stay Petition	Appellant	Duty Levied	Penalty Imposed
1	2	3	4	5	6
1	C/41360 /2014	C/S/41646 /2014	Lalit Kumar Jain		4,00,000/-
2	C/41625 /2014	C/S/41875 /2014	Swapnil Patel		3,00,000/-
3	C/41626 /2014	C/S/41876 /2014	Kalpesh Patel	1,03,78,016 /-	26,00,000/ -
4	C/41142 /2014	C/S/41366 /2014	Masterstroke Freight Forwarders Pvt. Ltd.		4,00,000/-

18.2 The adjudication order No.24505/2014 dated 28.3.2014 reveals that DRI had intelligence that one M/s.Kalp Impex (IEC No.5206021181 - Proprietor Kallpesh B.Patel) of Surat obtained 3 advance authorizations bearing No.5210024634, 5210024635 and 5210024641 all dated 23.10.2008 obtained from JDGFT, Surat filing false certificates issued by Dipal J Shah, Chartered Accountant showing installation of plant and machinery at a false address. The advance authorizations were lent to one Ramanand Surekha of Goyal Enterprise by Vishal Agarwal to import silk yarn duty free and divert the same to Bangalore without the same being used in manufacture or supporting manufacturer at the address in Surat declared to JDGFT. False certificate of installation of machinery issued by the Chartered Accountant Dipal J.Shah was produced before JDGFT to get advance authorisation. Different accounts were opened in different banks in Surat in the name of benamidars under control of Vishal Agarwal. Intensive investigation was conducted to discover the truth behind import, routing of money, persons involved therein and extent of loss of Revenue caused by the fraudulent imports.

18.3 Investigation made on 25.3.2010 and 29.3.2010 into the premises declared by Kalp Impex showed that the said address belonged to a person called Surjan Interiors occupied by one Jasmine Patel since 2003. He was cousin of Shri Kalpesh Patel. from a computed existed in that premises, the data recovered pertained to imports by Kalp Impex owned by Shri Kalpesh B.Patel.

18.4 Search to residencial premises of Kalpesh Patel in Surat on 25.3.2010 resulted in recovery of income tax returns, application for obtaining advance authorization from DGFT and order from the overseas buyers pertaining to Kalp Impex. During search, Kalpesh Patel being absent, statement was recorded from his brother Swapnil Patel who was name lender proprietor of M/s.Star Textiles in Surat and acted under instruction of Vishal Agarwal to transact and route money of importers (high seas sellers) of Bangalore. He stated that his brother neither operated from the office address given to JDGFT nor the place of manufacture given by him. That turned out to be false.

18.5 The place of manufacture in Surat declared by Kalp Impex when searched on 29.3.2010 that was found to be occupied by one Shri Nilkanth Synthetics engaged in TFO of polyester yarn since 2007 and M/s.Kalp Impex was not at all operating from that premises. Shri Vallabhbhai Sindabhai Chautala, Proprietor of M/s.Nilkanth Synthetics stated that he has taken the premises on rent from the premises owner Shri Shiv Shankar Chauhan. That led the investigation to infer that there was no manufacture carried out by Kalp Impex in Surat nor any machinery installed there."

4. The Tribunal, considered in detail the order of the adjudicating authority, and held that the firm Kalp Impex, so-called importer, was a dummy concern created by Vishal Agrawal to benefit the racketeers, one of whom is Ramanand Surekha. The relevant portion of the order of the Tribunal is extracted hereunder :-

"18.10 Kalp Impex was merely a bubble as was noticed by investigation and a dummy concern on paper created by Vishal Agrawal to benefit the racketeers one of whom was Ramanand Surekha. Mulberry silk imported never went to Surat. Kalpesh Patel not being a man of means to investment on imports, imports were funded by Ramanand Surekha to make undue gain along with Vishal Agarwal at the cost of Revenue. there was duty evasion of Rs.1,03,78,016/- for which Kalpesh was arrested on 30.5.2010 and was produced before Judicial Magistrate. He stated that the documents seized by DRI were intimately connected to him. All the addresses shown by him were without any premises belonging to Kalp Impex and no business was carried out by him therefrom."

5. The Tribunal further noticed the role of the appellant in the clandestine import and misutilisation and the subsequent movement of the imported materials and recorded the same in its order, which is extracted hereunder:-

"18.15 R.Natarajan, Senior Manager and Authorised Signatory of M/s.Master Freight Forwarders Pvt. Ltd., stated on 13.7.2010 that he did not get any authorisation from M/s.Kalp Impex, Surat to clear the goods. But documents were given to him by the importer M/s.Goyal Enterprise and payment by cheque was made by that concern to clear the imports made under DEEC duty free. Upon clearance, those were sent to Bangalore through M/s.Patel Cargo, Chennai. He further stated that he does not know Kalpesh Patel except speaking him by phone in past. But he acted under instruction of Ramanand Surekha."

6. The Tribunal further found that there is a prima facie finding in the adjudication order that on account of conspiracy of several persons, including the present appellant, there was evasion of payment of duty on the import of Mulberry Raw silk yarn and utilisation of the same contrary to the advance authorisation scheme and, therefore, various persons were mulcted with penalty. However, on the issue of pre-deposit, the Tribunal, noticing the above relevant factors, by a common order, following the judgment of the Supreme Court in Banera Valves - Vs - CCE (2006 (204) ELT 513 (SC)), passed the following order :-

22.6 Following the above rationale and also ratio laid down by the Apex Court in Benera Valves - Vs - CCE - 2006 (204) ELT 513 (SC), the appellants are directed to make predeposit as under within four weeks from the date of receipt of this order and make compliance on 30.07.2015.

S. No.	Stay Petition	Appellant	Duty Levied	Penalty Imposed	Pre-Deposit Directed
1	2	3	4 (In Rs.)	5 (In Rs.)	6 (In Rs.)
1	C/S/41644/2014 in C/41358/2014	Lalit Kumar Jain		5,00,000/-	5,00,000/-
2	C/S/41645/2014 in C/41359/2014	Lalit Kumar Jain		5,00,000/-	5,00,000/-
3	C/S/41646/2014 in C/41360/2014	Lalit Kumar Jain		4,00,000/-	4,00,000/-

4	C/S/41873/2014 in C/41623/2014	Kalpesh Patel		2,00,000/-	50000/-
5	C/S/41874/2014 in X/41624/2014	Kalpesh Patel		2,00,000/-	50,000/-
6	C/S/41875/2014 in C/41625/2014	Swapnil Patel		3,00,000/-	50,000/-
7	C/S/41876/2014 in C/41626/2014	Kalpesh Patel	1,03,78,016/-	26,00,000/-	NIL
8	C/S/41662/2014 in C/41376/2014	Dipal J Shah		3,00,000/-	50,000/-
9	C/S/41663/2014 in C/41377/2014	Dipal J Shah		2,00,000/-	30,000/-
10	C/S/41366/2014 in C/41142/2014	Masterstroke Freight Forwarders Pvt. Ltd.		4,00,000/-	3,00,000/-
11	C/S/41841/2014 in C/41584/2014	Ramanand Surekha		10,00,000/-	10,00,000/-
12	C/S/41858/2014 in C/41585/2014	Prachi Silks	80,97,134/-	20,00,000/-	80,00,000/-

13	C/S/41843/2014 in C/41586/2014	Nupur Impex	1,48,47,512/-	37,00,000/-	1,50,00,000/-
14	C/S/41845/2014 in C/41587/2014	Meticulour Forwarders		15,00,000/-	10,00,000/-
15	C/S/41846/2014 in C/41590/2014	Prachi Silks	10,94,412/-	2,00,000/-	10,00,000/-
16	C/S/41848/2014 in C/41591/2014	Mahalzxmi Silk Trading	44,33,270/-	10,00,000/-	50,00,000/-
17	C/S/41850/2014 in C/41592/2014	Radhey Shyam Rander		5,00,000/-	5,00,000/-
18	C/S/41852/2014 in C/41593/2014	Goyal Enterprises	1,49,24,031/-	25,00,000/-	1,50,00,000/-
19	C/S/41854/2014 in C/41594/2014	Hemanth Kumar		5,00,000/-	5,00,000/-
20	C/COD/42026/2014, C/S/42025/2014 in C/41738/2014	Super Shipping Services		10,00,000/-	7,00,000/-

21	C/COD/42028/2014, C/S/41027/2014 in C/41739/2014	Manjunatha Shipping Services Pvt. Ltd.		5,00,000/-	3,00,000/-

7. Aggrieved by the said order of the Tribunal, the appellant is before this Court contending that the order of pre-deposit is passed in a casual manner and the role of the appellant, being only a clearing agent, has not been dealt with in a manner known to law and that no detailed or reasoned order has been passed with regard to the pre-deposit ordered to be paid by the appellant.

8. Heard Mr.Hari Radhakrishnan, learned counsel appearing for the appellant and Mr.Mohanamurali, learned standing counsel, appearing for the respondent and perused the materials available on record as also the order passed by the Tribunal.

9. Even at the very outset, we would like to state that we do not find any justification to countenance the argument as advanced by the learned counsel for the appellant. In the case on hand, we find that the Tribunal, while considering the application for pre-deposit, had applied its mind to the entire gamut of the transaction relating to the misutilisation of the advanced authorisation scheme, which clearly evidences the fact that by way of a conscious effort of several persons, including the appellant, with a view to defraud the Revenue, goods were imported duty free and, thereafter, diverted to places other than the place of manufacture and, thereby, resulting in evasion of duty. It is not a singular act of one person, but a concerted effort by many persons and masterminded by several operators in Bangalore and Surat. Such a serious case of tax evasion cannot be viewed leniently. However, even in such a matter, the Tribunal has taken a lenient view by partially modifying the order in relation to penalty by reducing the pre-deposit from Rs.4 Lakhs to Rs.3 Lakhs. By no stretch of imagination, could the said order be termed as perverse or unsustainable. The Tribunal has consciously applied the decision of the Supreme Court in Benera Valves case (supra) for the purpose of reducing the quantum of pre-deposit. This Court finds no justification to further reduce the quantum of pre-deposit in a case of such a magnitude and proportion, where fraud has been perpetrated on the Revenue by denying its lawful claim of duty.

10. For the reasons aforesaid, this Court finds no reason to interfere with the order passed by the Tribunal. Accordingly, this appeal fails and the same is dismissed. Consequently, connected miscellaneous petition is closed. However, in the circumstances of the case, there shall be no order as to costs.

GLN

Sd/-
Asst.Registrar (CS IV)

/true copy/

Sub Asst. Registrar

To

1. The Commissioner of Customs (Exports)
   Custom House
   No.60, Rajaji Salai
   Chennai 600 001.

2. The Customs, Excise &
   Service Tax Appellate Tribunal
   South Zonal Bench
   Haddows Road, Shastri Bhavan
   Chennai 600 006.

+1 C.C.to MR.K.Mohana Murali, Advocate in Sr.No.39159

+1 C.C.to MR.Hari Radhakrishnan, Advocate in Sr.No.39729

C.M.A. NO. 1473 OF 2015

VG(CO)
sd : 05/10/2015