IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 09.07.2018

CORAM

THE HON'BLE MR.JUSTICE S.MANI KUMAR
&
THE HON'BLE MRS.JUSTICE V.BHAVANI SUBBAROYAN

C.M.A.No.2107 of 2017

Commissioner of Customs (Air Customs)
Chennai Airport, Air Cargo Complex,
Meenambakkam,
Chennai - 600 027. ... Appellant/Respondent

Vs.

M/s.Motorola India Pvt Ltd.,
Motorola Excellence Centre,
415/2, Mehrauli-Gurgaon Roads,
Sector 14, Gurgaon 122 001,
Haryana. ... Respondent/Appellant

Civil Miscellaneous Appeal is filed under Section 130 of Customs Act, 1962, against the Final Order No.1005 of 2008 dated 18.09.2008 on the file of Customs, Excise and Service Tax Appellate Tribunal, South Zonal Bench, Chennai.

For Appellant : Mr.T.Pramodkumarchopda

For Respondent : Mr.Nishant Joshi

Judgment

(Judgment of the Court was delivered by V.BHAVANI SUBBAROYAN,J.,)

The Civil Miscellaneous Appeal has been filed, challenging the Final Order No.1005 of 2008 dated 18.09.2008 on the file of Customs Excise and Service Tax Appellate Tribunal, South Zonal Bench, Chennai.

2. The challenge is made on 4 substantial questions of law, which are as follows.

1. Whether on the facts and circumstances of the case the Appellate Tribunal is right in law in holding that the Show Cause Notice was bad in law as the same has not enumerated the various commissions and omissions made by the Respondent without considering paragraph 10 H of the SCN ?

2. Whether on the facts and circumstances of the case the Appellate Tribunal is right in law in holding that the SCN is bad in law by invoking the larger period of limitation without stating specific default committed by the Respondent in the SCN ?

3. Whether on the facts and circumstances of the case the Appellate Tribunal is right in setting aside the assessment when the Respondent admittedly exported different goods and is not eligible for Customs Notification No.51/2000 ?

4. Whether on the facts and circumstances of the case the Appellate Tribunal is right in the finding of the date that needs to be reckoned for invoking a demand under Section 25 of the Customs Act, 1962 - whether from the date of SCN culminating from an investigation or from the date of assessment, as no duty was payable under Advance license ?

3. The brief facts leading to the present case are that M/s. Motorola India Private Limited (hereinafter referred to as "MIL"), is a manufacturer of subassemblies of cellular phones. To fulfill the import and export obligation, MIL obtained ten advance licenses for duty free import of components and to export specific models of subassemblies of cellular phones. As per the said license, MIL was permitted to import of components and export specific models of subassemblies of cellular phones. These licenses had shown the export product, as subassemblies of DAO cellular phones where DAO was the name brand.

4. In respect of eight out of the ten licenses obtained, MIL approached the Joint Director General of Foreign Trade for closure of the 8 licenses, since the import and export obligations were fulfilled, and in respect of the remaining two licenses, MIL was required to export 29500 numbers of subassemblies of Dao model cellular phones, but, MIL has not discharged the export obligation for Dao model Sub assemblies and the actual position was as under:

Licence No. Date	Export Obligation	Actual Export	Models exported DAO/KRAMMER		Overall shortfall in the export of DAO model
0710006569/ 08.12.2000	10500	10250	5450	4800	5050
0710007492 26.02.2001	19000	14400	4100	10300	14900

5. MIL had exported 9550 numbers of Dao models and 19950 numbers of Krammer models of subassemblies. However, licenses were granted only for Dao models for the quantity of 29500 numbers, and hence, demand of duty and penalty, have been levied on MIL, alleging that they had not exported the specified finished goods as regards the quantity and description while claiming benefit under the scheme of duty entitlement certificate, which under the Notification No.51/2000-CUS, dated 27.04.2000 provided exemptions for import, under DEEC scheme. This exemption under the notification was subject to the condition, among others that, specified quantity of resulted products were manufactured and exported.

6. As per the DEEC license, the respondent was required to export 29500 numbers of subassemblies of Dao model cellular phones, but instead of that, the respondent exported 19950 pieces of Krammer model subassemblies, in fulfillment of the export obligations.

7. It is seen from the records that Show Cause Notice No.S/IV/31/2002 dated 20.06.2003, was issued against the respondent by the Director of Revenue Intelligence, Zonal Office, alleging that the respondent was required to utilise the duty free material for the purpose it was imported and export specific products. According to the Department, the respondent converted the unit from DTA to EHTP on 21.03.2001, operated as EHTP till 01.05.2001 and thereafter, sold to flextronics. It was the further allegation of the revenue intelligence that the components imported under the bills of entry other than those which were sold to M/s.Flextronics, were not utilised to export of DAO Model. Respondent had not fulfilled their export obligation under DEEC license, and hence, Customs Notification No.51/2000, was issued to the respondent, that they are liable to pay duty on the components which were not utilised by fulfilling the export obligations for the said two licenses, and subsequently, the respondent was called upon to the show cause notice by the Commission of Customs, as to why :-

i) The components listed in Annexure I and Annexure II totally valued at Rs.1,76,04,396/- should not be confiscated under the provisions of Section 111(o) of the Customs Act, 1962;

ii) duty amounting to Rs.61,08,176/- should not be demanded under condition (ii) Notification 51/2000 Cus dated 27.4.2000 read with proviso to Section 28(1) of the Customs Act, 1962;

iii) interest at the rate of 24% should no be demanded as per conditions of the said notification.

iv) penalty should not be imposed on MIL under Section 112 (a)/114A of the Customs Act, 1962;

Further, in the show cause notice, it was also called upon after the respondent as to why penalty should not be imposed.

8. It is seen from the materials on record that by an Order-in-orginal No.159 of 2005 dated 26.02.2005, held against the respondent and that they have to pay duty of Rs.51,92,566/- along with interest, at the applicable rate in terms of condition (ii) of Notification No.51 of 2000-Cus, dated 27.04.2000 read with proviso to Section 28(1) of the Customs Act, 1962. Further, the respondent was imposed with a penalty of Rs.51,92,566 along with the interest determined as per the above order under Section 114A of the Customs Act, 1962.

9. The Order-in-original, was challenged by the respondent before the Customs, Excise and Service Tax Appellate Tribunal, South Zonal Bench, Chennai, in C.No.283 of 2005 dated 18.09.2008, wherein, the Appellate Tribunal, set aside the order passed by the original authority, as against which, the present Civil Miscellaneous Appeal is filed by the Commission of Customs on various grounds with the Substantial Questions of Law.

10. Heard the learned counsel appearing for the appellant and learned counsel appearing for the respondent, and perused the materials available on record.

11. The issue to be decided in the present appeal is whether the Appellate authority in setting aside the Order-in-original No.159 of 2005 dated 26.02.2005, is correct or not, who held that the respondent liable to pay duty amounting to Rs.51,92,566/- along with interest and equal amount of penalty on the ground that the respondent did not discharge the export obligation to the extent of 19,950 numbers of DAO subassemblies and to the extent that respondent liable to pay duty for input materials, with applicable interest.

12. It is to pertinent to refer Customs Notification No.51 of 2000 dated 27.04.2000, which states that the Central Government, being satisfied on the powers conferred by Sub-Section (1) of Section 25 of the Customs Act, 1962, that exempts

materials imported into India, against the advanced license issued in terms of paragraph 7.2 of the Export and India in the Ministry of Commerce vide Notification No.1/1997-2002, dated 31.03.2000. These exemptions are duty leviable, subject to the conditions that the materials imported, are covered by Duty Exemption Entitlement Certificate issued by the Licensing Authority. Condition states that for import, a bond with such surety, specified by the Commissioner of Customs, has to be executed by the importer. The other condition in the Notification No.51 of 2000 - Customs, which is the root cause, for the present litigation, clause 5, which reads as follows:

> (v) The export obligation is discharged within the period specified in the said certificate or within such extended period as may be granted by the Licensing authority by exporting resultant products manufactured in India which are specified in Part 'E' of the said certificate (hereinafter referred to as resultant products) and in respect of which facility under rule 12 (1) (b) or rule 13 (1) (b) of the Central Exercise Rules, 1944 has not been availed in respect of materials permitted under the said license.

13. Clause VII of the said Notification No.51 of 2000-Cus, specifically states that the license and the materials, shall not be transferred or sold. But, the respondent is stated to have converted the unit from DTA to EHTP, and thereafter, sold the unit to flextronics. Revenue has contended that the respondent has not fulfilled the export obligation as per the said notification, but, contravened the same and therefore, the respondent is liable to pay duty and penalty levied against them.

14. In Clause 2 of the said Notification No.51 of 2000-Cus, there is a proviso which states that where the goods are found defective or unfit for use, the said goods may be exported back to the foreign supplier, within three years from the date of payment of duty on the importation thereof. As per the notification, MIL has not fulfilled its obligation and complied with the condition. Hence, a show cause notice dated 20.06.2003, was issued to the respondent and order in original came to be passed holding that the respondent is liable to pay duty escaped amount, and penalty for the same.

15. While passing the order, the Commissioner of Customs, in the Order-in-Original No.159 of 2005 dated 26.02.2005, has contented that in respect of two advance licenses, the respondent had not applied for export obligation discharge certificate. The advance license No.0710006569 dated 08.12.2000 was for the import of manufacture of "DAO" model cellular phones and the value of the import allowed was Rs.1,03,74,554.40. The exports were to be 10500 numbers of Sub assemblies of "DAO"

model Cellular phones for the value of Rs.1,13,50,500/-, whereas, the respondent had exported 1,650 Sub assemblies of "Krammer" model, under Shipping Bill No.4524 dated 27.02.2001, 4,800 Sub assemblies of "Krammer" model under Shipping Bill No.5717/17.03.2001 and 3,800 numbers of Sub assemblies of "DAO" model, under Shipping Bill No.4655 dated 01.03.2001. Thus, there was a short fall of export of 6,700 numbers of "DAO" Model Sub assemblies under the license.

16. Learned counsel for the appellant vehemently contended that the advance license was granted to the respondent as per the Notification No.51 of 2000- Customs, dated 27.04.2000 and as per the conditions of notification, the respondent should import the components for duty free and subject to the conditions that the export obligation is discharged within the period specified in the said certificate or within such extended period as may be granted by the licensing authority by exporting the resultant products manufactured in India which are specified in PART - E of the said licensing certificate, obtained by respondent MIL.

17. The further contention of the learned counsel for the appellant is that the components of the two models are distinct, cannot be interchanged and cannot be used in the manufacture of any other model, and therefore, cannot be termed as the raw materials/components of the "Krammer" model, which has also been exported and therefore, the respondent cannot qualify for exemption from payment of duty under Notification No.51 of 2000- Customs.

18. In reply to the said arguments, the learned counsel for the respondent argued that "DAO" model and "Krammer" model are technically and functionally identical characters and the only variation between the two models is that the DAO model has some additional features in it. The learned counsel for the respondent further argued that out of 14 components which were required for making DAO model Sub assemblies, 7 components were common to both Dao and Krammer models and hence, the buyer had no objection in accepting Krammer model cellular phones instead of Dao model cellular phones and therfore, bought 4,800 pieces of Krammer model cellular phones.

19. Infact, during the export at Bangalore, the respondent declared Krammer model Sub assemblies which was consciously allowed by the appellant, hence, it was reasonable to count Krammer Sub assemblies towards fulfillment of export obligation under Notification No.5 of 2000-Cus. These arguments were also raised before the Commissioner of Customs. Despite the same, the Commissioner of Customs held that the respondent had not discharged their export obligation to an extent of 19,950 numbers of Dao model Sub assemblies and to that extent, they were liable to pay duty, for the entire raw materials with

applicable interest, as per the Notification No.51 of 2000-Customs. But, while considering the objections and the arguments put forth by the respondent, the Appellate authority in the appeal, has already reversed the finding of the Commissioner of Customs, and the tribunal has confirmed the same, which is challenged before this Court by way of filing this Civil Miscellaneous Appeal.

20. While considering the case of the respondent in the appeal, the appellate authority had taken note of the scheme under notification of 51 of 2000-Customs in total, but not in part. Though the question of Jurisdiction raised by the appellant was held in his favour, the Appellate authority had set aside the order of the Commissioner of Customs on the ground of limitation, as well as, there was no allegations in the show cause notice that the respondent has made willful misstatement or suppression of facts.

21. It could be seen from the records that the Commissioner has accepted the claim of the respondent that it had exported 19950 krammer subassemblies. However, the demand was on the basis that the respondent had failed to fulfill the export obligation by not exporting 19950 pieces of subassemblies of DAO brand cellular phones.

22. Statement of the respondent is that "DAO" model has identical characteristics, technically and functionally, and out of 14 components required for making DAO Sub assemblies, 7 components were common to both DAO and Krammer models, and hence, they had accepted in importing of Krammer model instead of Dao model. Respondent has further stated that there was no allegations of diversion of duty free materials was made, in the show cause notice and if the export of Krammer Sub assemblies is taken into consideration, and specifically the export of 4850 pieces of Krammer Sub assemblies exported vide bill of entry No.1289/09.04.2001, 'inadvertently', omitted to be shown under DEEC Scheme, substantial requirements of the advance license scheme have been fulfilled by them in as much that they have utilised the inputs imported in the manufacture of export products, satisfying both quantity and value addition norms. The respondent has also stated that when substantial compliance had been made, a mere technical lapse on their part could be ignored. The respondent has also stated that what was transferred to Flextronics, did not include any DEEC Inputs, as export of Sub assemblies worth Rs.2.9 crores had been made as an EHTP unit and 4850 Sub assemblies not accounted for, should be treated as having been used for such manufacture.

23. The Tribunal while discussing the case, has observed that the Apex Court in Union of India Vs. Jain Sudh Vanaspathi case [1996 (86) ELT 460 (S.C)] ruled that Section 28 of the

Customs Act 1962 could be invoked to duties not paid/short paid by an importer without reversing the assessment order under Section 130 of the Act. The ratio of the Judgment was not, as claimed by the appellant, that such a course was open to the department only in a case, where goods imported had been cleared fraudulently. Even though, the Tribunal has stated that correctness of the claim of MIL that it had exported Sub assemblies of cellular phones, as an EHTP unit and also supplied inputs to another EHTP namely, Flextronics Ltd., and thereby completely fulfilled the export obligation cast on it, for importing components required for 19950 Krammer models Sub assemblies under Notification No.51/2000-Customs dated 27.04.2000, the Commissioner has raised the demand on inputs imported and not used in the resultant product, Dao Sub assemblies and exported as per the Notification No.51/2000-Customs.

24. The Tribunal has given a finding that the exempted claim of exporting 19950 numbers of sub assemblies in the impugned order in original that MIL had failed to fulfill the export obligation for 19550 numbers of Sub assemblies of cellular phones, is erroneous. The Tribunal has also held that the claim is barred by limitation.

25. The order of the Tribunal cannot be found fault with, for the reason that the show cause notice necessarily be put against the assessee to notice, specifically as to which of the various commission or omission stated in the proviso in Section 28(1) of the Customs Act 1962. The show cause notice has specifically omitted to indicate the particular commission or omission or collusion, which the respondent was found guilty.

26. It is not the case of the appellant revenue that the imported components have not been exported. However, indisputed facts remains that imported components have been converted into 29,500 numbers of "Krammer" model sub assemblies and exported. These facts were known to the departmental authorities that import of sub assemblies under the name of DAO were converted into Krammer Sub assemblies and exported within the knowledge of the said authorities when it was exported in Bangalore. While that being so, when the show cause notice does not clearly state about collusion or willful misstatement or suppression of facts by the importers, Section 28 of the Customs Act, cannot be invoked.

27. The Tribunal has come to the conclusion, based on the case of Aban Lloyd Vs Chiles Offshore Limited, wherein, the Apex court has held that when the material facts were known to the departmental authorities and when there was no conclusion, willful misstatement or willful suppression of facts by the importer was alleged in the show notice, it was not open to the

CEGAT to come to a conclusion that the appellant was guilty of 'Suppression of facts'. In Rattan Exports Ltd Vs CC, Calcutta [1987 (51) ELT 66 (SC)], it was held that the appellants therein would be entitled to exemption under the duty exemption scheme if they exported the imported 'attache cases', after fixing locks and handles, while ordering relief, as to penalty under Section 112 and fine in lieu of confiscation under Section 111 (d) of the Act for importing finished goods under the duty exemption scheme.

28. In view of the above discussion, the Tribunal has correctly set aside the Order-in-Original No.159 of 2005 and allowed the appeal against the Commissioner of Customs.

29. Under these circumstances, this Court finds no infirmity in the order passed by the Appellate Tribunal and the present appeal is deserves to be dismissed. Accordingly, the Civil Miscellaneous Appeal is dismissed, and the question's of law raised are also held against the appellants. No Costs.

Sd/-
Assistant Registrar(CCC)

//True Copy//

Sub Assistant Registrar

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To

1.The Customs, Excise and Service Tax Appellate Tribunal,
South Zonal Bench, Chennai.

2.The Commissioner of Customs (Air Customs)
Chennai Airport, Air Cargo Complex,
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C.M.A.No.2107 of 2017

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