In the High Court of Judicature at Madras

Dated : 16.08.2018

Coram :

The Honourable Mr.Justice T.S.SIVAGNANAM

and

The Honourable Mrs.Justice V.BHAVANI SUBBAROYAN

Civil Miscellaneous Appeal Nos.567 to 570 of 2017

M/S Glory Impex,
Plot No.C-85, 2nd Main Road,
SIPCOT Industrial Complex,
Madathur,
Tuticorin - 628 008 TN. ...Appellant in C.M.A.No.567/2018

M/s KTV Oil Mills,
Plot No.C-85, 2nd Main Road,
SIPCOT Industrial Complex,
Madathur Post,
Tuticorin - 628 008. ...Appellant in C.M.A.No.568/2018

M/s Crystal Traders,
Plot No.C-85, 2nd Main Road,
SIPCOT Industrial Complex,
Madathur Post,
Tuticorin - 628 008. ...Appellant in C.M.A.No.569/2018

M/s Jupiter Trading Corporation,
Plot No.C-85, 2nd Main Road,
SIPCOT Industrial Complex,
Madathur Post,
Tuticorin - 628 008. ...Appellant in C.M.A.No.570/2018

-vs-

1.The Commissioner of Customs,
Customs House, Tuticorin - 628 004.

2.Customs, Excise & Service Tax
Appellate Tribunal,
No.26, Sashtri Bhavan Annexe Building,
Haddows Road, Chennai-600 006. ...Respondents in all Appeals

APPEALS filed under Section 35(G) of the Central Excise Act, 1994 to set aside the Final Order Nos.41792/2016 to 41795/2016 dated 20.07.2016 arising out of Appeal Nos.C/396/2010, C/90/2011, C/91/2011 and C/92/2011, respectively on the file of the Customs, Excise and Service Tax Appellate Tribunal and allow the appeals.

For Appellants : Mr.S.Muthuvenkataraman
(in all Appeals)

For Respondent : Mr.A.P.Srinivas,
(in all Appeals) Senior Standing Counsel

COMMON JUDGMENT

[Delivered by T.S.Sivagnanam, J.]

Heard Mr.S.Muthuvenkataraman, learned counsel for the appellants and A.P.Srinivas, learned Senior Standing Counsel appearing for the respondents.

2.These appeals, by the assesses, are directed against the orders passed by the Customs, Excise and Service Tax Appellate Tribunal, dated 20.07.2016, in Final Order Nos.41792/2016 to 41795/2016.

3.The above appeals have been admitted on 01.06.2017, on the following substantial questions of law:-

> "(i) Whether the doctrine of Caveat Emptor would deem a victim of fraud, to be guilty of fraud and liable to penal consequences under Section 114A of the Customs Act, 1962?
>
> (ii) Whether extended period is invokable when the appellants have not been accused for suppression of facts, misrepresentationor fraud, collusion etc. with the proviso to Section 28(1) of the Customs Act, 1962?"

4.After elaborately arguing the matter, the learned counsel for the appellants submitted that the Court may consider waiving the penalty, as in similar cases, the Tribunal has waived the penalty in respect of other importers, who had utilized such licenses, which were found to be fraudulent. The decision in the case of K.I.International Ltd. vs. Commissioner of Customs, Chennai [2012 (282) E.L.T. 67 (Tri.-Chennai)] was referred to. The conclusion arrived at by the Tribunal in the said decision is as follows:-

"14.Conclusion

14.1 Enactments like Customs Act, 1962, and Customs Tariff Act, 1975, are not merely taxing statutes but are also potent instruments in the hands of the Government to safeguard interest of the economy. One of its measures is to prevent deceptive practices of undue claim of fiscal incentives. Evidence Act not being applicable to quasi judicial proceeding, preponderance of probability came to rescue of Revenue and Revenue was not required to prove its case by mathematical precision. Exposing entire modus operandi through allegations made in the show cause notice on the basis of evidence gathered by Revenue against the appellants was sufficient opportunity granted for rebuttal. Revenue discharged its onus of proof and burden of proof remained un-discharged by appellants. They failed to lead their evident to rule out their role in the offence committed and prove their case with clean hands. No evidence gathered by Revenue were demolished by appellants by any means.

14.2 Materials on record revealed that neither investigation nor process of investigation was challenged to be perverse. Modus Operandi of all the appellants proved to be mala fide due to various dubious practices adopted and secret arrangements made by them through fake TRAs presented to Chennai customs and clearance of imports were made without genuine DEPB scrips acquired. What was apparent was not proved to be real. Chain of evidence established nexus of the persons involved to serve their illwill. Investigation brought out entire deliberate acts and omissions of appellants to the fold of law. Nexus of each other and their close proximity came to light by cogent evidence gathered by DRI during investigation and very minutely evaluated and assessed by learned Adjudicating Authority in the adjudication process.

14.3 Crystal clear factual findings of the learned Adjudicating Authority and echoing evidence on record do not demonstrate that adjudications were made suspiciously or under surmise. All pleadings of the appellants were ill-founded. Show Cause Notice properly brought them to charge exhibiting civil and evil consequences for opportunity of rebuttal.

> Nothing was dealt behind their back. Investigation story was backed by evidence and not impeachable.
>
> 14.4 Corroborative and cogent evidence gathered by investigation directly and surrounding circumstances proved nexus of the appellants and does not make investigation story unbelievable. Looking to the entire genesis of the case, it can irresistibly be concluded that investigation has very successfully proved its case. Oblique motive of all the appellants to be enriched at the cost of Revenue was proved. They had defrauded Revenue. Fruits of forbidden tree being always forbidden, the importer appellants had no right to make gain out of fake TRAs covering DEPB scrips obtained fraudulently. They are, therefore, liable to pay the duty lost in the imports make by them, along with interest thereon.
>
> 14.5 In view of the above findings, we hold that the importer appellants are liable to pay the duty and interest adjudged against the imports made by them covered by the adjudications under appeal and the traders, brokers and sub-brokers of fake TRAs and DEPB scrips are liable to be penalised being instrumental in providing such instruments. We uphold the Orders-in-Original. However, in the fitness of the circumstances of the cases and to meet the ends of justice -
>
> (1) Penalties are set aside against the importer-appellants while confirming the duty and interest demanded from them.
>
> (2) We uphold the penalties imposed on appellant Shri Satish Mohan Agarwal in view of his pivotal role in the entire fraud beginning from making the fake, forged, false, fabricated and fraudulent DEPB scrips/TRAs.
>
> (3) Penalties against the following abettor traders/brokers/sub-brokers in appeal are reduced by half as indicated hereunder:-”

5.We have gone through the reasons assigned by the Tribunal, from which, we find that the Investigating Agency as well as the Adjudicating Authority have recorded a clear factual finding that there is sufficient material to show that fake TRAs were presented and clearance of imports were made without genuine DEPB. However, the Tribunal, after recording such a finding, has set aside the penalty against such importers/appellants. We are not fully convinced by the reasons assigned by the Tribunal for setting aside the penalties presumably because, the Tribunal pointed out certain negligence on the part of the officers. This finding is contained in paragraph 15 of the order, which reads as follows:-

> "15.Before parting with these cases, we may state that interest of justice demands the negligent officers involved in the aforesaid cause against the State need also be proceeded against with sternly so that it may serve as a lesson to others. A democratic Government does not mean a lax Government. The rules or procedure and/or principles of natural justice are not meant to enable the guilty to defeat objects of Customs Act, 1962. The wheels of Justice may appear to grind slowly but is the duty of all of us to ensure that they do grind steadily and grind well and truly. The justice system cannot be allowed to become soft, supine and spineless. Hence, we order a full investigation of these cases by the office of the DG (Vigilance), CBEC so that appropriate disciplinary action is taken against officials of the Custom House & DRI due to whose involvement or negligence such frauds could be perpetuated."

6.It is submitted that the decision of the Tribunal in K.I.International Ltd. (supra) has attained finality as the Revenue has not preferred any appeal against such order nor any order has been placed before us to show that the order passed by the Tribunal in K.I.International Ltd. (supra) has been interfered with or modified. Therefore, We are of the view that identical relief can be granted to the assessees before us.

7.Accordingly, without answering the substantial questions of law, framed for consideration and taking note of the decision of the Tribunal in K.I.International Ltd. (supra), wherein identical importers were granted the relief of penalty alone, we are inclined to adopt such approach in these appeals as well.

8.Accordingly, while confirming the finding of the Tribunal as well as the Order-in-Original, we allow the appeals in part, insofar as it levies penalty on the appellants and set aside the same. The appeals are allowed to the extent indicated above. No costs.

Sd/-
Assistant Registrar(CS-v)

//True Copy//

Sub Assistant Registrar

To

1.The Commissioner of Customs,
Customs House, Tuticorin - 628 004.

2.Customs, Excise & Service Tax
Appellate Tribunal,
No.26, Sashtri Bhavan Annexe Building,
Haddows Road, Chennai-600 006.

+ 1 cc to A.P.Srinivas, Advocate Sr.56599
+ 4 ccs S. Muthuvenkataraman, Advocate SR.56710

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EU(20/09/2018)