IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 29.01.2020

CORAM

THE HON'BLE DR.JUSTICE VINEET KOTHARI
AND
THE HON'BLE MR.JUSTICE R.SURESH KUMAR

C.M.A.No.618 of 2018

Orkayem Apparel Limited
A Proprietory firm rep.by its Proprietor
Shri A.Mahalingam, 47D, Kangeyam
Main Road, Minearvelan Hotel
Tiruppur - 641 604. ... Appellant

-Vs-

The Commissioner of Customs (Port-Export)
Customs House, No.60, Rajaji Salai
Chennai 600 001. ... Respondent

For Appellant : Mr.B.Sathish Sundar

For Respondent : Mr.M.Santhanaraman, Special Govt.Pleader (Taxes)

Prayer : Civil Miscellaneous Appeal under Section 130(1) of the Customs Act, 1961 to set aside the Final Order No.40361 of 2017 dated 28.02.2017 in Appeal No.C/362/2008-DB on the file of the Customs, Excise and Service Tax Appellate Tribunal, South Zoneal Bench, Chennai.

J U D G M E N T

(Judgment of the Court was delivered by DR.VINEET KOTHARI, J.)

This appeal has been filed by the Assessee aggrieved by the order passed by the Customs Excise and Service Tax Appellate Tribunal dated 28.02.2017 upholding the imposition of penalty on the Assessee. The short order passed by the learned Tribunal is quoted below for ready reference.

> "Appellant says that 584 machines were imported and out of such import, 12 machines were found to have been installed and 318 machines were found in the

premises of the appellant by the investigation team. Balance 254 machines could not be found by them in the course of investigation. Ld.Authority imposed duty of Rs.6,50,283/- on the lot of machines not installed and not found. So also the Authority imposed redemption fine of Rs.20,00,000/- and penalty of Rs.6,50,283/- for the default of the appellant.

2. Appellant says that they have discharged export obligation. It does not appeal to common cause as to the reason why 585 machines were imported when 12 machines were only required for the appellant being installed in its factory. When no installation was done, that itself raised doubt as to how the appellant fulfilled the export obligation. Installation of the machinery being the condition precedent of import, violation thereof is a breach of condition of the Notification No.55/2003 dated 01.04.2003. Once there is violation to the extent indicated above, the gravity is serious. Accordingly, there is nothing to interfere to the order passed by the ld.Commissioner for which appeal is dismissed"

2. Learned counsel for the appellant Assessee submitted that in the present case, parallel penalty proceedings were initiated by D.G.F.T. also and upon consideration of the facts, where the Assessee paid the due customs duty on account of the alleged sale of 254 sewing machines out of the imported lot of 554 machines, the D.G.F.T. authorities have reduced the penalty in question from Rs.32,00,000/- to Rs.10,000/-. He further urged that during the course of penalty proceedings under the Customs Act, this fact was brought to the notice of the concerned authority that the proceedings of the D.G.F.T., was also pending, but without waiting for the result thereof, the authorities under the Customs Act imposed a fine of Rs.20,00,000/- and penalty of Rs.6,50,283/-. He therefore submitted that the Assessee may be given liberty to approach the competent authority under the Customs Act viz., Commissioner of Customs to reconsider the issue of fine and penalty in view of the subsequent developments which have taken place with the D.G.F.T. authority.

3. Learned Special Government Pleader (Taxes) Mr.Santhanaraman, however supported the impugned order passed by the learned Tribunal.

4. Considering the facts and circumstances of the case, we are of the view that since two parallel proceedings were drawn against the Assessee on similar set of facts and one with the D.G.F.T., Department has resulted in favourable order at the

hands of the competent authority under the Foreign Trade Development and Regulation Act, 1992, those facts and circumstances of the case deserve to be taken into account by the competent authority viz., Commissioner of Customs under the provisions of the Customs Act, 1962.

5.Under these circumstances, we are inclined to direct the Commissioner of Customs to decide the issue of imposition of fine and penalty de-novo uninfluenced by the order passed by the learned Tribunal, taking into account the subsequent circumstances which had developed in the case. Therefore, without answering the substantial questions of law raised in the appeal, we dispose of the present appeal with the aforesaid directions. The appellant Assessee may file fresh application for waiver / reduction of the fine and penalty before the Commissioner of Customs, who may consider the same fairly and objectively in accordance with law. The Appeal is disposed of accordingly. No costs.

Sd/-
Assistant Registrar(CS)

//True Copy//

Sub Assistant Registrar

KST

To

1. The Commissioner of Customs (Port-Export)
Customs House, No.60, Rajaji Salai
Chennai 600 001.

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

+2ccs to Mr.B.Sathish Kumar , Advocate SR.No. 6526
+1cc to Mr.M.Santhanaraman , Advocate SR.No. 6745

C.M.A.No.618 of 2018

A.SK(28/02/2020)