IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated: 08.08.2024

CORAM

THE HONOURABLE **DR. JUSTICE ANITA SUMANTH**
and
THE HONOURABLE **MR. JUSTICE G.ARUL MURUGAN**

C.M.A.No.3912 of 2008
and
MP.No.1 of 2008

V.Sankaran
Partner
M/s Somanathan & Co.
307, Palayamkottai Road, Tuticorin. ... Appellant

Vs

1.The Commissioner of Customs,
Tuticorin.

2.Customs Excise and Service Tax Appellate Tribunal
South Zonal Bench, Shastri Bhawan Annexe,
1st Floor, 26, Haddows Road
Chennai-600 006. ... Respondents

PRAYER: Appeal filed under Section 130-A of the Customs Act, 1962, to consider the above substantial questions and allow this appeal by setting aside the impugned Final Order No.C/101/2008 dated 11.02.2008 passed by the Second Respondent.

For Appellant	:	Mr.M.Vaidyanathan
For Respondents	:	Mr.A.P.Srinivas Senior Standing Counsel

JUDGMENT

(Judgment of the Court was delivered by Dr.ANITA SUMANTH,J.)

One DCW Ltd., ('importer') had imported chemicals under 9 bills of entry on various dates between 08.04.2004 and 26.04.2004. The said bills of entry were assessed in terms of the Customs Act 1962 ('Act') accepting the claim of exemption in respect of Duty Entitlement Pass Book (DEPB). As a routine measure, some of the scrips were sent for verification which raised doubts in regard to their authenticity.

2.It was thus that the chain of command in respect of the procurement of the DEPB scrips came to be examined. It was ascertained that the scrips had been purchased from an agent by name R.Somanathan and Co. in Tuticorin and a raid was conducted in their premises, which resulted in the discovery of 23 other documents.

3.The documents found in the course of search revealed that the importer had purchased 9 other licences through V.Sankaran, the appellant. Statements were recorded from the Appellant who, in statement dated 08.07.2004, admitted that he had received a percentage of the licence value as commission.

4.His statement revealed the involvement of one B.R.Chandran, a retired Government Employee from Vellore, who had acted as a go-between for supply of DEPB licences from M/s.Paras International and M/s.Jyoti Enterprises, entities based in Kanpur.

5.All the aforesaid entities had been brought under the scanner, and statements recorded from their representatives. The Appellant, in statement dated 08.07.2004, had traced the genealogy of the DEPB scrips and the persons/entities to whom they had been supplied. He had thereafter acceded to the fact that the licences received from Paras International and Jyoti Enterprises, Kanpur, were fake. This finding of fact emanates from para 2.4 of the order of adjudication dated 03.05.2005.

6.The statement recorded from B.R.Chandran on 09.11.2004 sets out the modus operandi followed by him over the years for sale of fake DEPB licences. Inter alia, he states categorically, that it was the appellant, who used to procure fake DEPB licences and Telegraphic Release Advice (TRA) through one Mohammed Korsi. Those documents had not been issued by the office of the Director General of Foreign Trade. He had averred that the appellant was part of the fraudulent scheme even before he, B.R.Chandran, came into the picture. These facts emerge from paragraphs 2.9 and 2.10 of the order of adjudication dated 03.05.2005.

7.Explanations were called for from all the noticees, including the Appellant, by issue of show cause notices and after a detailed consideration of the matter, an order of adjudication came to be passed on 03.05.2005. In as far as the appellant is concerned, a sum of Rs.5 lakhs was imposed as penalty under Section 112(a) of the Act.

8.The appellant filed an appeal before the Customs Excise and Service Tax Appellate Tribunal ('CESTAT'/'Tribunal'), and the Tribunal, as a final fact finding authority, has gone into the facts in detail, ultimately showing leniency and reducing the quantum of penalty from Rs.5 lakhs to Rs.3 lakhs, finding the imposition of a sum of Rs.5 lakhs, harsh. It is as against the aforesaid order of the Tribunal dated 11.02.2008 that the appellant is before us raising the following substantial questions of law:

> *'1.Whether the Hon'ble Tribunal was justified in imposing a penalty of Rs.3 lakhs after holding that the penalty of Rs.5 lakhs imposed on the Appellant was harsh.*
>
> *2.Whether the Hon'ble Tribunal was justified in refusing to rely on the retracted statement of Shri. Chandran.*
>
> *3.Whether the Hon'ble Tribunal erred in imposing the penalty though no nexus had been established between the brokers and the goods imported by the importers.*
>
> *4.Whether the absence of a finding that the Appellant had acted in a fraudulent manner, the Hon'ble Tribunal was justified in upholding the imposition of penalty.'*

9. Mr.Vaidyanathan learned counsel appearing for the appellant argues that the sole basis for the levy of penalty is a statement recorded from

B.R.Chandran, which has subsequently been retracted. Mr.Vaidyanathan relies heavily upon draws certain findings in the adjudication order where the authority has delineated the roles played by each of the players in the fake DEPB scheme.

10.As far as the appellant is concerned, the authority finds that the amount of Rs.20 lakhs received from Paras International was returned to Glory Impex, immediately *'once he came to know that the licences were not genuine'*. According to learned counsel, this must lead to the conclusion that the appellant was innocent and had come to know of the fake licences only at the stage of adjudication. The money received had also been returned. He would thus argue that the Tribunal had proceeded on assumptions and presumptions and that the penalty levied either be cancelled or, at the least, further reduced.

11.Mr.A.P.Srinivas, who appears for the respondent vehemently supports the order of adjudication. He points out that the findings arrived at by the Tribunal are all based on evidences. In any event, those findings are factual in nature and there is nothing to indicate perversity therein. Hence there is no need for intervention on any score.

12.We agree with the stand of the Revenue. We find that the Tribunal has taken note of all the relevant facts. As regards the statement of

B.R.Chandran implicating the appellant, the statement has been recorded on 09.11.2004 when the deponent was in custody. The order of adjudication makes it amply clear that the statement was recorded, as per the order of learned Judicial Magistrate No.1, Tuticorin, before the Senior Intelligence Officer of the Department of Revenue Intelligence in the presence of the Superintendent of the Sub Jail, Tuticorin.

13.The adjudicating authority has applied his mind as to whether the procedure followed for recording of the statement was acceptable, noting specifically that the Superintendent of the Sub Jail is not a Police Officer and that the presence of multiple Officers in the Jail where the statement had been recorded would have protected against pressure, coercion or duress being applied on the deponent.

14. Even assuming for a moment that the statement had been recorded under pressure, there was nothing that prevented B.R.Chandran from retracing the same immediately or at least proximate to such recording. The date of retraction is unavailable but learned counsel for the Appellant confirms that the statement has been retracted only much later, after the deponent had been released from jail. In the above circumstances, we find no error in the conclusion of the Tribunal that the statement of B.R.Chandran adverse to the Appellant, is reliable.

15.That apart, admittedly it was the raid that had opened the can of worms revealing the events by which the DEPB scam had been unearthed. The findings of the CESTAT in regard to the modus operandi of the appellant are set out at paragraph 2 reading as follows:

> *'2.The appellant was engaged in trading DEPB licences. His modus operandi was to canvas buyers by showing them xerox copies of such licences obtained from vendors. The original licence was eventually delivered to the buyer. In the present case, M/s.DCW acted upon such licence purchased from the appellant, and obtained duty-free clearance of the goods covered thereunder. The department, later on, found that the licence was fake and accordingly a case was booked against the importer and other persons including the appellant.................'*

16. Paragraph 4 of the Tribunal's order which contains categoric findings of fact is relevant and extracted below:

> *'4.After giving careful consideration to the grounds of the appeal and to the submissions made by SDR, I find that it is not in dispute that the appellant had purchased the DEPB scrips in question from Shri B.Chandran and supplied the same to M/s.DCW. Admittedly, he also supplied TRAs to the importers. Again, it is not in dispute that these DEPB scrips and TRAs were fake. According to the original statement of Shri Chandran, the appellant knew at the beginning itself that the DEPB scrips and TRAs were fake. Though Shri Chandran retracted his statement it would still be admissible in evidence inasmuch as the retraction is too belated to be accepted. The appellant has not adduced evidence of any coercion having been used by the Customs authorities for obtaining the original statement of Shri Chandran. Hence the finding of fact that the appellant had, with knowledge of the fake nature of the DEPB scrips/TRAs, caused the same to be used by M/s.DCW for duty-free import of goods is well-founded. The documents obtained by M/s.DCW from the appellant and produced before the*

> *Customs authorities for clearance of the goods was not issued from the office of the Director-General of Foreign Trade (DGFT). These were fake documents and this fact was known to the appellant. Where the fake nature of these documents was within the knowledge of the appellant, it goes without saying that the 'confiscability' of the dutiable goods cleared duty-free under the DEPB scheme was also within his knowledge. In other words, the appellant abetted the importer's offence of having rendered the goods liable for confiscation under Section 111 of the Customs Act and consequently he rendered himself liable for penalty under Section 112(a) of the Act.'*

17. We reiterate that no material has been placed before us warranting intervention in the above factual findings. We also find no perversity in the conclusions arrived at by the Tribunal on the basis of the material on record. In fact, the Tribunal has, on appreciation of the facts, applied its discretion to reduce the penalty from Rs.5 lakhs to Rs.3 lakhs.

18.This Civil Miscellaneous Appeal is dismissed. No costs. Connected miscellaneous petition is closed.

(A.S.M.,J) **(G.A.M.,J)**
08.08.2024

Index: Yes
Neutral Citation : Yes
vs

To

1.The Commissioner of Customs,
Tuticorin.

2.Customs Excise and Service Tax Appellate Tribunal
South Zonal Bench, Shastri Bhawan Annexe,
1st Floor, 26, Haddows Road,
Chennai-600 006.

Dr.ANITA SUMANTH,J
AND
G.ARUL MURUGAN,J.

vs

C.M.A.No.3912 of 2008 and
MP.No.1 of 2008

08.08.2024