

2016 (5) TMI 80 - CESTAT NEW DELHI

Orbit Jewellers, Omkar Jewellers, Bharat Jamnadas Jagda, Sh. Mahesh Kumar Mool Chand Kothari And C.C., Air Cargo (Exports) , New Delhi Versus C.C., Air Cargo (Exports) , New Delhi, Omkar Jewellers, Orbit Gold, Mahesh Kumar Mool Chand Kothari And Komal Jain, Director

No.- Customs Appeal Nos.72, 73, 84-86, 158, 159, 183, 184 of 2011 & Misc Application No.56191, 56194, 56192, 56193 of 2014

Dated.- April 27, 2016

MS. ARCHANA WADHWA, JUDICIAL MEMBER AND MR. B. RAVICHANDRAN, TECHNICAL MEMBER

For the Petitioner : Shri C. Hari Shankar, Senior Advocate with Shri S. Sunil, Advocate.

For the Respondent : Shri Amresh Jain. A.R.

ORDER

PER ARCHANA WADHWA:

All the appeals are being disposed of by a common order as they arise out of the same impugned order passed by Commissioner of Customs, Air Cargo (Exports) vide which the adjudicating authority has demanded duty from M/s Omkar Jewellers, New Delhi and M/s Orbit Jewellers, Mumbai along with imposition of penalties upon him as also on the other appellants. In addition, gold jewellery recovered from the premises of the said Omkar Jewellers as also from the premises of Orbit Gold, Mumbai stand confiscated with an option to the appellants to redeem the same on payment of redemption fine and payment of duty. In addition, Indian currency recovered from the said premises of both the appellants stand confiscated in terms of provision of Section 121 of the Customs Act, 1962.

2. As per facts on record, searches were conducted by DRI officers at several places including the premises of M/s Omkar Jewellers and M/s Orbit Gold, Mumbai. Certain amount of jewellery along with Indian currency was seized from their premises. Subsequent to the search, detailed investigations were conducted and statements of various persons were recorded. As a result , Revenue entertained a view that M/s Omkar Jewellers , New Delhi as also M/s Orbit Gold, Mumbai were receiving smuggled gold jewellery from Shri Ajit Singh/Komal Jain, who were importing the same from Dubai free of duty, in violation of the SEZ Scheme. We are not going to the details of such allegation as also evidences involved inasmuch as M/s Omkar Jewellers as also M/s Orbit Gold, Mumbai have accepted the

allegations and have paid duty involved in the said transaction along with interest and 25% of the penalties.

3. The appellant's entire case rests on legal interpretation of the provisions of Section 28 (1A) of the Customs Act, which was introduced by the Taxation Laws (Amendment) Act of 2006. The appellant's entire case before the adjudicating authority as also before us is that the appellants having deposited the entire duty liability along with interest and 25% of the penalties, in terms of the said provisions, no further adjudication requiring any confiscation of the seized goods or imposing penalties on the other appellants, was called for inasmuch as the said provisions of law provided for deemed conclusion of the proceedings.

4. It is also seen that during pendency of the matter before the Commissioner, M/s Omkar Jewellers and M/s Orbit Gold filed writ petition before Hon'ble Delhi High Court. The order dated 16.9.2010 of the Hon'ble High Court of Delhi in respect of the said two petitioners is as under:

In the course of hearing of these two writ petitions, it is submitted by M/s C. Hari Shankar, learned Counsel for petitioners that he may be permitted to file an application before the Commissioner of Customs, Air Cargo Exports, New Delhi, respondent No.2 herein, as he is entitled to release of goods in view of total compliance of provisions of Section 28(1A) of Customs Act, 1962.

Regard being had to be aforesaid prayer, we are only inclined to direct, if an application is preferred within a week hence by the petitioners before respondent no.2, the respondent no.2 shall, after affording an opportunity of hearing to petitioners or its authorized representative, decide the matter as per law within a period of three weeks thereafter. Matter be listed on 18th November, 2010.

5. Thereafter, the matter was adjudicated by the Commissioner vide his impugned order dated 28.1.2011. By not agreeing with the appellant's contention that adjudication proceedings stand concluded in terms of Section 28(1A) of the Customs Act, he proceeded to pass the impugned order confirming demands, confiscating goods and imposing penalties on all the co-noticees. Hence the present appeals.

6. Revenue is also in appeal against the said order seeking 25% either imposition of penalties on some of the noticees or enhancement of penalties on others.

7. We have heard Shri C. Hari Shankar, Id. Senior Advocate appearing for the appellants and Shri Amresh Jain, Id. A.R. appearing for the Revenue.

8. The short point required to be decided in these present appeals is as to whether when the entire duty amount along with interest and penalties stand deposited by the assessee,

whether the proceedings would stand concluded in respect of all the issues involved in respect of all the appellants or whether it is still open to the adjudicating authority to decide on other associated issues like confiscation etc. For better appreciation of the provisions of Section 28(1A), the same are being reproduced below:

“(1A) When any duty has not been levied or has been short-levied or the interest has not been charged or has been part paid or the duty or interest has been erroneously refunded by reason of collusion or any willful misstatement or suppression of facts by the importer or the exporter or the agent or employee of the importer or exporter, to whom a notice is served under the proviso to sub-section (1) by the proper office, may pay duty in full or in part as may be accepted by him, and the interest payable thereon under Section 28AB and penalty equal to twenty five per cent of the duty specified in the notice or the duty so accepted by such person within thirty days of the receipt of the notice.

(2) The proper office, after considering the representation, if any, made by the person on whom notice is served under sub-section (1), shall determine the amount of duty or interest due from such person (not being in excess of the amount specified in the notice) and thereupon such person shall pay the amount so determined.

Provided that if such person has paid the duty in full together with interest and penalty under sub-section (1A), the proceedings in respect of such person and other persons to whom notice is served under sub-section (1) shall, without prejudice to the provisions of Section 135, 135A and 140, be deemed to be conclusive as to the matters stated therein.”

9. As is seen from above, the first proviso to Section 28(1A) provides deemed conclusion of the proceeding pending against noticee if the payment as regard the duty, interest and 25% of the penalty stands made by the noticee within a period 30 days of the receipt of the show cause notice. It is further seen that the said provision is applicable even in cases of demand having been arisen on account of collusion, willful misstatement or suppression, meaning thereby that the said law is applicable in respect of even illegal activity of assessee which stand accepted by him and the duty interest and part of penalty stand paid. Further, the said deposits should be within a period 30 days from the date of the receipt of the notice. In such a scenario , the proviso to the said Section 28(1A) provides for deeming status of conclusion of the proceeding except the proceeding in respect of Sections 135, 135A and 140.

10. In the present cases, the show cause notice was issued to the appellants on 4.2.2010 and thereafter on the application made by the appellant , document enclosed with the said show cause notice was served upon them on 8.4.2010. As such it can be safely concluded that the date of issuance of show cause notice is 8.4.2010.M/s Omkar Jewellers had

deposited the entire disputed liability along with interest and penalties on 4.5.2010 i.e. within period 30 days from the date of service of the show cause notice. Similar is the case in respect of M/s Orbit Gold. There is, in fact, no dispute about such factual position that the duty, interest and 25% of penalty stand deposited by the appellants within period 30 days from the date of service of the show cause notice.

11. In the writ petition filed by the said appellants before the Honble Delhi High Court, the plea was taken that appellant having deposited the entire dues in terms of the proviso to Section 28(1A) of the Customs Act, 1962, the proceedings would come to an end in terms of the first proviso to the said Section. The Honble Delhi High Court in their order dated 16.9.2010 reproduced above directed the said appellants to file an application within a period of one week before the adjudicating authority who would decide the matter as per law. Such an application stands made by the appellant.

The appellant's first grievance is that the proceedings do not stand adjudicated by the Commissioner within the period granted by the Honble High Court and as such the order having been passed in contemptuous compliance to the High Court order should be set aside on this ground alone. In the alternative, it stands strongly contended before us that the provision of Section 28(1A) stand wrongly interpreted by the adjudicating authority and in terms of the said Section read with Delhi High Court order, the proceeding should have been held as conclusive on the deposit of the amounts by the said appellants.

12. On going through the proviso to said Section, we find that the said section is a beneficial piece of legislation with intention to reduce the litigation proceedings where the noticee satisfies the condition of the said Section. As has already been observed that the said provision of law provides deeming concept of closure of the proceeding except the proceeding under provision of Section 135, 135A and 140 on full compliance of the main clause of Section 28(1A). There is no dispute about the fact that the appellants have satisfied the contents of the said Section. In such a scenario, the proceedings are required to be deemed as concluded thus not allowing the adjudicating authority to proceed ahead with the adjudication of the other aspects which may be involved in the proceeding. The language of the said Section is unequivocal in ordaining that in such scenario the proceeding in respect of such person and all other persons also, shall be deemed to be conclusive as the matters stated therein. The expression "proceeding" stands interpreted by the Hon'ble Supreme Court in the case of P L Kantha Rao and others vs. State of A.P. and others - (1995) 2 Supreme Court Cases 471 wherein it was observed that the word "proceeding" engrafted in Section 29 of the A.P. Administrative Tribunal must be understood in a broader perspective. The word "proceeding" would depend upon the scope of the enactment wherein the expression is used with reference to a particular context where it occurs. The proviso to Section 28(1A) uses the expression "proceeding" which in our view is required to be understood in broader manner keeping in view the legislative intention.

Legislative intent is clear from the Circular No.831/8/2006-CX dated 26.7.2006 issued by the Board. Relevant paragraph is reproduced below:

2. Section 11A of the Central Excise Act, 1944 has been amended to introduce an optional scheme for enabling voluntary payment of duty by assessees, in full or in part, in cases involving fraud, mis-statement etc. along with interest and 25% of the duty amount as penalty within 30 days of the receipt of the show cause notice thereby dispensing with the rigours of adjudication procedure. This is an additional facility given to the Trade to settle the dispute at an early stage to reduce litigation and also aid in collection of tax dues more expeditiously. The scheme is optional and not compulsory. The assessee has the further option of using the proposed facility in full or in part. In case of part payment, the remaining amount will be subject to regular proceedings as per the law.

As is clear from the above reproduced portion, the facilities stand extended to the assessees to deposit the dues within period 30 days so to as to settle the dispute at an early stage and to reduce further litigation. Though the said Circular stands issued in the context of the amended provision of Section 11A of the Central Excise Act, 1944, the same would equally apply to the identically amended provision of Section 28. We find that the Tribunal has taken note of the said provision as also the Boards Circular in various decisions and has categorically held that on compliance with the amended provision, as regards the deposit, no further proceeding can continue before the adjudicating authority. Reference can be made to the Tribunal decision in the case of Sonam Clock Pvt. Ltd. vs. C.C.E. Rajkot - 2012 (278) ELT 263 (Tri-Ahmd.) as also to another decision of of the Tribunal in the case of C.C.E. Vapi vs. Technovynyl Polymers Limited - 2013 (298) ELT 50 (Tri-Ahmd.). Further in the case of C.C.E., Raipur vs. Abir Steel Rolling Mills - 2013 (296) ELT 90 (Tri-Del.), it was held that facilities provided in terms of the provision of Section 11A were to settle the tax dispute immediately besides aiding in expeditious collection of dues. The proviso to Section 11A (2) of the Central Excise Act, 1944 is to the effect that proceedings in respect of "such person and other persons" to whom the notice is served, deemed to be conclusive on discharge of duty liability along with interest and 25% of penalty. By referring to the provision of Section 13 of General Clauses Act, 1897, it was observed that the words other persons used in said Section are to include co-noticees/persons linked with allegation of contravention of Central Excise Rules, 1944. By observing so, the Tribunal rejected the Revenue's stand that the proceeding for imposition of separate penalty under Rule 26 would continue. It was held that adopting Revenues stand would amount to making workds "other persons' redundant. The proceedings against the main noticee having been concluded , there was no sense in continuing proceedings under Rule 26 against other persons. To the same effect is another decision of the Tribunal in the case of C.C.E., Raipur vs. Jay Prakash Agarwal - 2013 (297) ELT 554 (Tri-Del.). By taking note of the Board Circular No.831/8/2006-EX, dated 26.7.2006 it was observed that the same clarifies intention of the legislature so as to give opportunity to

manufacturer to settle the duty dispute immediately on receipt of show cause notice thereby avoiding litigation.

13. Though we note that the above decisions were mainly in the context of the Central Excise provisions but Section 11A of the said Act is pari materia to Section 28(1A) of the Customs Act. As such, the ratio of the above decisions would squarely apply to the facts of the present cases also.

14. We further note that proviso to Section 28(1A) uses the expression "as to the matter stated therein". This will lead to simpliciter reference to all the matters stated in the show cause notice, including the proposal to confiscate the seized goods. The same would not survive once there is compliance with the provision of Section 28(1A). The said section makes exception only to the applicability of the Sections 135, 135A and 140 in which case the proceedings under the said Section can only be held as not concluded. To accept Revenues stand would amount curtailing the sweep of said proviso and by adopting artificial interpretation to defeat the statutory intention. It is well settled law that the legislative intent, extending certain beneficial provision to the assessee, should not be made frivolous by interpreting the provision in a particular manner other than the one which reflects upon such intent.

15. We find no justification for appreciating the example given by the Commissioner in the impugned order, referring to a case of import of horse with an infectious or contagious disease including anthrax etc., which requires destruction under Livestock Importation Act, 1898. Observation of the adjudicating authority that merely because the duty and fine is paid within time, the animal can not be released into the country with devastating effects on the local livestock. We are afraid that the said example given by the adjudicating authority is not appropriate to the present cases. We are only dealing with the provisions under Customs Act, 1962 and the proceedings for the confiscation of the jewellery were also proposed under Customs Act only. In the case of animal, if the animal requires to be destroyed under the Livestock Importation Act, 1898, the same would be proceeded by the competent authority. The provision of Section 28(1A) cannot be interpreted to the effect that all the proceedings against the importer under all the Acts would be deemed to be concluded. The said provisions are applicable only in respect of proceedings under Customs Act, 1962 and provides for conclusion of the proceedings under Customs Act only. The original authority's presumption that closure of proceedings under Customs Act may conclude all proceedings under other Acts also is fallacious. He is acting under the powers vested under Customs Act, 1962. While he may be vested with some powers under the provisions of allied Acts, his role comes from the Customs Act. Nothing prevents respective competent authority under other Act if there is any action warranted to be taken against any person for violation of provisions of specific law.

16. In view of our above analyses in as much as we agree with the Id. Advocate appearing for the appellants that M/s Omkar Jewellery and M/s Orbit Gold having deposited the full amount of duty, interest and 25% of the penalty, no further proceedings were required to be continued in terms of the provisions of Section 28(1A), the first proviso to Section 28(1A), the impugned order has no leg to stand. The same is accordingly set aside. All the appeals are allowed with consequential relief to the appellants.

17. As regards the Revenue's appeals the same are relatable to the non-imposition of penalties on some of the noticees as also by reducing 25% of penalty in respect of the other. Inasmuch as we have already held that proceedings were not required to be continued and have allowed the assessee's appeals on the said grounds itself, Revenue's appeals have become infructuous. The same are accordingly rejected. Misc. also disposed of.

(Pronounced in the open Court on 27/04/ 2016)