

(2024) 11 CESTAT CK 0019

Customs, Excise And Service Tax Appellate, New Delhi

Case No: Customs Appeal No. 52887, 52888, 52889, 52890, 52891, 52892 of 2019

M/s Hind Agro Industries Ltd.
and Ors.

APPELLANT

Vs

Commissioner of Customs
(Preventive)

RESPONDENT

Date of Decision: Nov. 19, 2024

Acts Referred:

- Customs Act, 1962 - Section 28, 108, 138B, 138B(1), 138B(1)(a), 138B(1)(b), 138B(2)
- Indian Evidence Act, 1872 - Section 3

Hon'ble Judges: Dilip Gupta, President (J); P. V. Subba Rao, Member (T)

Bench: Division Bench

Advocate: Bipin Garg, J. Kainaat, S.K. Rahman

Final Decision: Allowed

Judgement

P.V. Subba Rao, J

1. All these appeals have been filed to assail the common order-in-appeal dated 03.7.2019, impugned order passed by the Commissioner (Appeals),

whereby he upheld the Order in original, OIO dated 26.10.2016 passed by the Additional Commissioner in denovo proceedings deciding the proposals

made in the show cause notice, SCN dated 4.8.2011.

2. M/s. Hind Agro Industries Ltd., HAIL filed Customs Appeal No. 52892 of 2019 to assail the demand of an amount of Rs. 42,16,084/- being the

amount of duty foregone on account of the scrips of Vishesh Krishi and Gram Udyog Yojna, VKGUY issued to it under section 28 of the Customs

Act, 1962, Act read with their Letter of Undertaking. It is also aggrieved by the penalty of Rs. 20,00,000/- imposed on it.

3. Shri Anil Vanjani, Anil filed Customs Appeal No.52891 of 2019 to assail the personal penalty of Rs. 4,00,000/- imposed on him.
4. Shri Kaleem Khan, Kaleem filed Customs Appeal No. 52888 of 2019 to assail the personal penalty of Rs. 2,00,000/- imposed on him.
5. Shri Nisar Ahmad, Nisar filed Customs Appeal No. 52889 of 2019 to assail the personal penalty of Rs. 4,00,000/- imposed on him.
6. Shri Mazhar, Mazhar filed Customs Appeal No.52890 of 2019 to assail the personal penalty of Rs. 4,00,000/- imposed on him.
7. Shri Naseem Qureshi, Naseem filed Customs Appeal No. 52887 of 2019 to assail the personal penalty of Rs.3,00,000/- imposed on him.
8. HAIL was engaged in slaughtering animals and exporting their meat during the relevant period. It availed the benefit of VKGUY scheme of the DGFT under which exporters of agricultural and village industry products are given an incentive in the form of scrips issued by DGFT which can be either used by the person to whom they are issued to pay duty on imports or transferred or sold to others who can use them to pay duty on imports.
HAIL was issued scrips worth Rs.42,16,084/- which it had sold to others.
9. Although the scrips were utilised by others, as per the legal undertaking given by HAIL, it would pay the equivalent amount as duty if it was found that the scrips were obtained wrongly.
10. Acting on intelligence which indicated that HAIL was exporting meat with invalid Veterinary Health Certificates, Officers of the Customs (Preventive) visited the premises of HAIL on 30.10.2010 and recovered several documents under a Panchnama, including a bunch of blank Veterinary Health Certificates signed and stamped by the Government Veterinary doctor Dr. Shiv Kumar. These certificates were supposed to be issued by the Veterinarian after pre-mortem as well as post-mortem examination of the animals. Instead, these certificates were found without the details of the animals and the dates. HAIL could easily fill the details and use them. Effectively, the Veterinarian's certificates of the animals which ensure the health of the consumers of the meat were issued without any examination or even looking at the animal or even identifying the animal to be slaughtered.

11. The matter was further investigated and several statements were recorded and the Officers felt that HAIL had obtained the VKGUY certificates fraudulently by exporting meat violating the conditions of export by using invalid Veterinary Health Certificates.

12. Accordingly, a SCN was issued proposing to recover the duty foregone on account of VKGUY scrips issued to HAIL under section 28 of the Act read with its legal undertaking and also to impose penalties on HAIL and the individuals.

13. We have heard Shri Bipin Garg, learned counsel for the appellant assisted by Ms. Kainaat advocate and Shri S K Rahman, learned authorised representative for the Revenue and perused the records.

14. Several submissions have been made by both sides. The most important submission made by the learned counsel for the appellant is that while it is true that books containing several blank Veterinary Health Certificates signed and stamped by Dr. Shiv Kumar were recovered from the premises of the appellant, these would only show that the appellant could have used them to clear meat without the veterinarian examining the animals pre-mortem and post mortem and certifying it. The appellant could have filled in the details of the animal on the certificates which were already signed and stamped by the veterinarian. However, this recovery does not prove that the consignments of meat exported before the date of the panchnama were also exported under the cover of certificates issued by veterinarian without examining the animals pre-mortem and post-mortem. As far as the statements enclosed as relied upon documents in the SCN are concerned, they are not relevant to prove the case against the appellant because the mandatory procedure under section 138B of the Act was not followed by the adjudicating authority nor were they allowed to be cross-examined.

15. On this point, learned authorised representative submitted that it was established that the meat which was exported by the appellant before the panchnama was also exported using pre-signed and pre-stamped certificates of the veterinarian without examination of the animals pre-mortem or post-mortem. When the veterinarian who signed and stamped blank certificates was questioned, he explained this fact. His statement and the

statements of some other persons relied upon in the SCN prove beyond any reasonable doubt that the appellant had been exporting meat using pre-signed and pre-stamped certificates. As far as the procedure prescribed under section 138B is concerned, he submits that it applies to prosecution proceedings and only "so far as may be" to the departmental proceedings which means that it is open to the adjudicating authority to not follow the procedure under section 138B.

16. We have examined this issue first because if this issue is decided in favour of the appellants it will not be necessary to examine the other submissions by both sides.

17. The undisputed fact is that the recovered pre-signed and pre-stamped certificates were not used to export meat. The case of the department is built on the premise that previous meat consignments were also exported based on such certificates without actual inspection of the animals pre-mortem and post-mortem. After detailed investigation beginning on 3.10.2010 and culminating in the SCN issued on 4.8.2011, these allegations were made and actions against the appellant proposed. The SCN relied upon the following 22 documents numbered RUD-1 to RUD-22.

RUD 1- Documents resumed during investigation including large number of blank but signed and stamped Veterinary Health Certificates issued by Dr. Jeevan Singh.

RUD 2- Panchnama drawn at Sahibabad on 30.10.2010 RUD 3- Panchnama drawn at Aligarh on 30.10.2010

RUD 4- Panchnama drawn at the premises of CEO of the appellant.

RUD 5- Statement of Dr. S P Fonglan, Deputy General Manager, Production at Aligarh

RUD 6- Statement of Dr. Omvir Singh, Veterinary Doctor at Aligarh

RUD 7- Statement of Shri Mohd. Nissar Ahmed in-charge of export documentation recorded on 30.10.2010

RUD 8- Statement of Shri Mohd. Nissar Ahmed recorded on 15.06.2011

RUD 9- Statement of Shri Sanjay Agarwal DGM Exports, recorded on 30.10.2010

RUD10- Statement of Shri Mazhar Yasin on 12.11.2010 RUD 11-Statement of Shri Rajesh Kumar General Manager recorded on

12.11.2010

RUD 12- Statement of Shri Hasrat Ali, Deputy Manager recorded on 30.10.2010

RUD 13- Statement of Shri Anil Vanjani, CEO recorded on 15.03.2011

RUD 14- Statement of Shri Naseem Qureshi recorded on 27.04.2011

RUD 15- Statement of Dr. Jeevan Singh, recorded on 2.11.2010

RUD 16- Statement of Dr. Abdul Majid, Veterinary officer recorded on 24.11.2010

RUD 17- Statement of Dr. Shiv Kumar recorded on 30.11.2010

RUD 18- Statement of Dr. Rudra Pratap Singh, Director recorded on 21.01.2011

RUD 19- Letter written to The Secretary, Animal Husbandry, Government of Uttar Pradesh 10.11.2010

RUD 20- Letter from Director, Animal Husbandry dated 11.01.2011

RUD 21- A copy of the letter dated 1.2.2011 from CVO, Ghaziabad

RUD 22- Letter from M/s. HAIL with copies of applications submitted to APEDA

18. As many as 14 of the 22 relied upon documents are statements of various persons recorded during investigation by the Customs officers under

Section 108 of the Act. Of these, the statements of Dr Shiv Kumar, the veterinarian and a few others are said to establish the fact that the appellant

had exported meat in the past without actual examination of the animals by the veterinarian.

19. Any statement made before any gazetted officer of customs is relevant to prove the truth of the fact which it contains as per section 138B under

two situations- either the person is dead, cannot be found, is incapable of giving evidence or has been kept out of the way by the adverse party OR the

person is examined as a witness and the court is of the opinion that it should be admitted as evidence. There is no other section in the Act which

makes the statements relevant to prove the truth of the facts contained in them. Section 138B reads as follows:

138B. Relevancy of statements under certain circumstances.

(1) A statement made and signed by a person before any Gazetted Officer of customs during the course of any inquiry or proceeding under

this Act shall be relevant, for the purpose of proving, in any prosecution for an offence under this Act, the truth of the facts which it contains,-

(a) when the person who made the statement is dead or cannot be found, or is incapable of giving evidence, or is kept out of the way by the adverse party, or whose presence cannot be obtained without an amount of delay or expense which, under the circumstances of the case, the Court considers unreasonable; or

(b) when the person who made the statement is examined as a witness in the case before the Court and the Court is of opinion that, having regard to the circumstances of the case, the statement should be admitted in evidence in the interests of justice.

(2) The provisions of sub-section (1) shall, so far as may be, apply in relation to any proceeding under this Act, other than a proceeding before a Court, as they apply in relation to a proceeding before a Court. (emphasis supplied)

20. The question is what is the meaning of the term relevant. The answer to this can be found in Section 3 of the Indian Evidence Act, 1872 which defines "relevant" as follows:

"Relevant". "One fact is said to be relevant to another when the one is connected with the other in any of the ways referred to in the provisions of this Act relating to the relevancy of facts.

21. In this case, the fact that blank signed and stamped certificates of veterinarian were recovered from the appellant has to be linked to the fact that meat was similarly exported using pre-signed certificates in the past. The evidence which provides this link are, according to the learned authorised representative for the Revenue, the statements recorded by the Officers under section 108 of the Act and relied upon in the SCN. However, as per section 138B of the Act, they can be relevant only in one of the two situations indicated in 138B(1)(a) and (b). There is no evidence or assertion that the situation under section 138B(1) (a) of the Act was present and the adjudicating authority did not follow the procedure prescribed under section 138B(1) (b). He neither examined the persons who made the statements nor allowed the appellant to cross-examine them.

22. Learned authorised representative submitted that the procedure under section 138B(1) applies to only to court proceedings and in other proceedings, as per section 138B(2), it only applies “in so far as it may be” which means that the adjudicating authority has the discretion of following the procedure under section 138B or admitting the statements as evidence without following it. This submission cannot be accepted. The expression “in so far as it may be” only means that where certain terms in section 138B(1) do not apply to the proceedings referred to under 138B(2), such terms may be substituted. For instance, the term “court” will not apply to the adjudicating proceedings and it should be taken as the adjudicating authority. The procedure prescribed is mandatory. It is settled law that the procedure prescribed under section 138B of the Act is mandatory.

23. In this case, after extensive investigation spanning several years, the SCN was issued relying on as many as 22 documents including 14 statements of different persons recorded by the officers under section 108 of the Act. By not following the mandatory procedure under section 138B, the adjudicating authority brought to naught 14 of the 22 relied upon documents effectively destroying the case of the department. We do not find that the remaining 8 relied upon documents establish the fact that the appellant had exported meat using pre-signed and pre-stamped veterinary certificates. Once the case against HAIL is not established, the penalties on HAIL and other appellants also cannot be sustained. Therefore, the impugned order upholding the OIO cannot be sustained and needs to be set aside.

24. In view of the above, we set aside the impugned order and allow all appeals with consequential relief to the appellants.

(Order pronounced in open court on 19/11/2024.)