

(2014) 08 MAD CK 0225

Madras High Court

Case No: Civil Miscellaneous Appeal Nos. 656 and 1104 to 1121 of 2014

Commr. of Cus. (Export)

APPELLANT

Vs

Sri Venkateswara Enterprises

RESPONDENT

Date of Decision: Aug. 22, 2014

Acts Referred:

- Customs Act, 1962 - Section 112(a), 125

Citation: (2014) 310 ELT 433 : (2016) 36 GSTR 404

Hon'ble Judges: R. Sudhakar, J; G.M. Akbar Ali, J

Bench: Division Bench

Judgement

R. Sudhakar, J.

The Revenue has filed the above Civil Miscellaneous Appeals challenging the common order of the Tribunal, wherein the Tribunal declined to interfere with the order of adjudication passed by the respective Commissioner (Appeals), who reduced the quantum of redemption fine and penalty in the case of import of old and used digital multifunction printing machines/photocopiers, which came to be confiscated on the ground of restricted goods requiring licence. The respondent in all these cases imported old and used digital multifunction printing machines and filed bills of entry in respect of each machinery. The Revenue took the plea that as per the trade policy 2004-2009, import of photocopier machine was restricted and required import licence. The goods were subjected to verification by the customs authorities and according to the Revenue, the importers have admitted that they did not have any import licence and they requested for adjudication. In most of the cases, without issuing show cause notice, orders-in-original were passed, in which value was enhanced based on the Chartered Engineer's Certificate, whose value was accepted by the importers and the goods were thereafter confiscated and were allowed redemption of the goods on payment of fine and penalty. On appeal by the importers, the Commissioner (Appeals) reduced the quantum of fine and penalty. It appears that none of the importers have challenged the order of confiscation.

Aggrieved by the order of the Commissioner (Appeals), the Revenue challenging that portion of the order reducing the quantum of fine and penalty filed appeals before the CESTAT.

2. The Tribunal, by a common order (2014 (313) E.L.T. 234 (Tri.-Chen.)) dismissed all the appeals holding that the Revenue has not made out any case for enhancement of fine and penalty imposed and upheld the order of the Commissioner (Appeals).

3. As against the order of the Tribunal, the Revenue has filed the present Civil Miscellaneous Appeals raising the following substantial questions of law:

"1. Whether, in the facts and circumstances of the case, the Hon"ble Tribunal is right in holding that digital multifunction photocopiers/printers are not photocopiers and hence not covered under the restrictions imposed under Para 2.17 of the Foreign Trade Policy (FTP) by straight jacketing the term "digital multifunction" based on purely on classification and by ignoring the common trade parlance and the purport and object of the policy formulated by the Govt. of India, that too merely relying on the decision of the CESTAT, Bangalore Bench in such behalf without analyzing it in proper perspective and when the said decision of the CESTAT, Bangalore Bench has been appealed against by the Revenue?

2. Whether, in the facts and circumstances of the case, the Tribunal is right in not considering the fact that the imported or subject goods being old and used and second hand goods are otherwise also restricted for import in terms of the wordings of Para 2.17 of Foreign Trade Policy, that too by merely relying on the decision of CESTAT, Bangalore Bench?

3. Whether, in the facts and circumstances of the case, the Tribunal, Bangalore Bench was right in law by setting aside the order of confiscation in all these cases when the analog photocopier in the consignments were liable for confiscation?

4. Whether the order of the Tribunal confirming the reduction of fine and penalty, on the strength of the order of CESTAT, Bangalore Bench, is legally sustainable as the respondent-importer is a regular offender and when the order of CESTAT, Bangalore Bench has been appealed by the Department before the Hon"ble High Court at Kerala?

5. Whether the order of the Tribunal is sustainable in confirming to reduce the quantum of fine and penalty which is contrary to Board"s Circular No. 78/2003, dated 1-9-2003 which says that purpose of levying fine and penalty is to ensure that the importer is not allowed to make any profit in the imports made by violating any restrictions under FTP of other Rules and Regulations?"

4. We find that the above substantial questions of law are totally inappropriate.

5. Heard learned senior standing counsel appearing for the appellant and perused the materials placed before this Court.

6. The primary ground raised by the Revenue, which is relevant for the present case, reads as follows:

"The Tribunal has gone beyond the scope of the Appeal by discussing the importability of the Multi Digital Printing and Copying Machines vis-a-vis import license, while the main appeal itself was for reduction of "Fine and Penalty" only."

7. The Tribunal found that the Commissioner (Appeals) has reduced the fine and penalty based on the decision of this Court reported in 2008 (226) E.L.T. 486 (Mad.) (Commr. of Customs, Tuticorin v. Sai Copiers) and the decision of the Tribunal in Tribunal's Final Order Nos. 1149 & 1150/2008, dated 7-10-2008 in Appeal Nos. C/111 & 112/2004 in the case of Kangra Overseas and Surya International - 2009 (238) E.L.T. 665 (T). The plea of the Department is that the order of the adjudicating authority on fine and penalty should be restored on the ground that the restricted goods have been imported without any valid licence and that if the percentage of fine and penalty is reduced to 15% and 5%, it will encourage other importers to import restricted goods without licence, thus contravening the import policy.

8. Before the Tribunal, the importers relied upon the decision of this Court reported in 2008 (226) E.L.T. 486 (Mad.) (Commr. of Customs, Tuticorin v. Sai Copiers) and also the decision of the Kerala High Court in the case of Commissioner of Customs, Cochin v. Office Devices reported in 2009 (240) E.L.T. 336 (Ker.), wherein fine and penalty was reduced to 10% and 5% respectively on secondhand photocopiers. They also relied upon the decision in the case of Rajeshwari Graphics v. Commissioner of Central Excise, Tuticorin vide Final Order Nos. 442-450/2007, dated 18-4-2007, which was upheld by this Court. The importers also placed the other final orders of the Tribunal to emphasize that same analogy should be followed in the present case also with regard to imposition of fine and penalty.

9. The Tribunal, thereafter, placed reliance on the decision of the Tribunal in the case of 2012 (286) ELT 545 wherein, the Tribunal made a distinction between the photocopier and digital multifunctional print and copier machines and held that the Digital Multifunctional Print and Copier machines could not be termed as photocopiers so as to attract the bar of para 2.17 of the Foreign Trade Policy. The Tribunal in the case of M/s. Shivam International and M/s. Sree Maa Enterprises relied upon the Chartered Engineer's Certificate, Harmonised System of Nomenclature (HSN) notes to sub-heading 84.43 and the judgment of the Supreme Court in the case of [Xerox India Ltd. Vs. Commissioner of Customs, Mumbai](#), to come to a conclusion that the old & used digital multifunctional print and copier machines are not restricted items and therefore confiscation is not correct.

10. Placing reliance on the above-said decisions, the Tribunal, in paragraph No. 6, held as follows:

"In the light of the above decision, which is applicable on all fours to the facts of the present batch of cases, as the adjudicating authority has found that the machines in

question are capable of additional functions, such as printing, etc., when connected to a computer, although confiscation and penalty is to be sustained in the absence of any appeal by the importers against confiscation and penalty, no justification exists for enhancement in the quantum of fine in lieu of confiscation and penalty. Further, in all the cases relied upon by the importers, fine to the extent of 15% and penalty to the extent of 5% of the value of the goods has been confirmed. The case law relied upon by the learned DR is distinguishable - the judgment of the Hon'ble Bombay High Court in Commissioner of Customs, Mumbai v. Vaibhav Exports (2009 (244) E.L.T. 527 (Bom.)) deals with diamonds and it is a case where the importers produced forged licences and fraud and forgery vitiates everything. [Sophisticated Marbles and Granite Industries Vs. Union of India \(UOI\)](#), decision is also not applicable for the reason that the Hon'ble Bombay High Court did not exercise discretionary jurisdiction vested in it and has not laid down any law, and further, the goods are different. The Tribunal's order in the case of Commissioner of Customs, Chennai v. Sagar Enterprises 2011 (264) E.L.T. 101 (Tri.-Chennai)) does not take into account the orders passed by the Hon'ble High Court of Chennai, Sai Copier's case and Hon'ble Kerala High Court decision in Office Devices and the Hon'ble Punjab and Haryana High Court decision in Office Automation Private Limited and is, therefore, not required to be followed."

11. The question raised by the Revenue in the present case is that when the appeal itself was filed before the Tribunal only for enhancement of redemption fine and penalty, there was no need for the Tribunal to go into the merits of the case.

12. We find that the Tribunal in the present case has relied upon the various decisions including that of the decision of this Court reported in 2008 (226) E.L.T. 485 (Mad.) (Commr. of Customs, Tuticorin v. Sai Copiers) and the decisions of the Tribunal in the case of M/s. Shivam International and M/s. Sree Maa Enterprises - Final Order Nos. 405 to 416/2011, dated 27-6-2011, only to come to a prima facie conclusion that the case does not deserve enhancement of redemption fine and penalty. There was no appeal filed by the importers against the order of confiscation and therefore, those findings are not relevant for the purpose of deciding the merits of the case, except to the extent that the Tribunal has decided the issue with regard to the enhancement of quantum of redemption fine and penalty. We find from paragraph No. 6 of the order of the Tribunal that the Tribunal had made a very conscious decision not to entertain the appeal for enhancement of fine and penalty.

13. With regard to the calculation of margin of profit, taking into consideration the various parameters required under Section 125 of the Customs Act, 1962 and in the absence of any market enquiry conducted by the Department, the Tribunal came to the conclusion that the value has been fixed by the Chartered Engineer at the behest of the Department and therefore, no fault could be attributed to the assessee. The Tribunal in paragraph No. 6 of the order came to hold that the relevant factors have to be kept in view while fixing the fine and penalty, which has

been done by the lower Authority. Hence, the Tribunal did not find any reason to set aside the findings of the Commissioner (Appeals), as he had followed the earlier decision of this Court reported in 2008 (226) E.L.T. 486 (Mad.) (Commr. of Customs, Tuticorin v. Sai Copiers), wherein this Court held as follows:

"9. From the reading of the above provisions, it is clear that the statutory requirement is that the imposition of redemption fine shall not exceed the market price of the goods confiscated, less in the case of imported goods, the duty chargeable thereon. The language employed "shall not exceed" indicates that the authorities under Act are empowered to impose redemption fine less than the market price of the goods confiscated. Thus, a discretion is vested on the authorities with a rider that the imposition of redemption fine should not exceed the market price.

10. Likewise, under Section 112(a) also, the statutory prescription is in the case of goods in respect of which any prohibition is in force under the Customs Act, or any other law the penalty imposable shall not exceed the value of the goods or Rs. 5,000/-, whichever is greater. In respect of dutiable goods other than prohibited goods, the penalty could be imposed not exceeding the duty sought to be evaded on such goods or Rs. 5,000/- whichever is greater.

11. Here again, the maximum that could be levied is only prescribed. There is no statutory prescription that the penalty should not be reduced by the appellate authority. Before the Tribunal, the importers relied on the earlier order of the Tribunal in the case of Sri Venkatesh Enterprises v. Commissioner of Customs, Chennai, 2005 (192) E.L.T. 818, wherein the quantum of redemption fine imposed in lieu of confiscation of second-hand photocopiers valued at Rs. 17.7 lakhs was restricted to Rs. 2.5 lakhs and the quantum of penalty was restricted to Rs. 85,000/-. The same was followed in the case of the respondents also by the Tribunal. The fixation of the quantum of redemption is an exercise of discretionary jurisdiction of the authorities under the Customs Act. The Court can interfere only in the circumstances in which it was demonstrated before it that the order of the Tribunal is thoroughly arbitrary, whimsical and resulting in miscarriage of justice. As already stated, the Tribunal has followed its own earlier decision wherein the Tribunal has consistently imposed the redemption fine at 15 percent and penalty under Section 112(a) at 5 percent of the value of the goods, which factum has not been disputed by the counsel appearing for the Department. In the above said view of the matter, we find no question of law, much less a substantial question for entertaining these appeals. Hence, the appeals are dismissed. However, there is no order as to costs. Consequently, connected M.P. Nos. 1, 1, 1 and 1 of 2007 in C.M.A. Nos. 127 to 130 of 2008 are also dismissed."

14. The Department has not made out a case for enhancement of fine and penalty. The decided cases are applicable to the facts of the present case and hence, the above appeals lack substantial questions of law for consideration. For the foregoing

reasons, we find no question of law much less any substantial question of law arises for consideration. Accordingly, all the above Civil Miscellaneous Appeals are dismissed. No costs. Consequently, connected M.P.s are also dismissed.