

(2013) 08 CAL CK 0027

Calcutta High Court

Case No: G.A. No. 1013 of 2013 and CUSTA 2 of 2013

The Commissioner of Customs
(Port) Kolkata

APPELLANT

Vs

M/s. A.N. Impex

RESPONDENT

Date of Decision: Aug. 8, 2013

Citation: (2014) 1 CALLT 547 : (2014) 305 ELT 38

Hon'ble Judges: Indira Banerjee, J; Anindita Roy Saraswati, J

Bench: Division Bench

Judgement

Indira Banerjee, J.

This appeal is against an order No. S-853-855/A-554-561/Kol/2012 dated 9th August, 2012 passed by the Customs, Excise & Service Tax Appellate Tribunal, Eastern Regional Bench, Kolkata. The respondent M/s. A.N. Impex for which M/s. Gee Pee International was Customs House Agent filed a Bill of Entry No. 414051 dated 10th June, 2008 in respect of 873 Bales of old and used garments completely fumigated, imported from M/s. Al Liberty International Rags, Houston, U.S.A. The Customs Authorities assessed the duty on the said goods by enhancing the value to 0.60 U.S. dollar per kg. from the declared value of 0.417 U.S. dollars per kg.

2. The goods were examined by the Examination Committee. The break up of various articles of consignment found during examination was as under:--

3. According to the appellant, the assessee did not give a break up or full list of particulars of the various categories of clothing such as jackets, shirts etc. No detailed packing list was submitted indicating the specific items. The packing list and invoices did not contain any serial numbers or marks or the numbers of items.

4. The consignment had been assessed to duty by the customs authorities. However, as the import of worn clothing" is restricted in terms of Foreign Trade Policy the consignment was allowed to be stored in the warehouse of Central Warehousing Corporation at Mahestala, 24-Parganas (South), West Bengal u/s 49 of

the Customs Act, pending adjudication.

5. For the purpose of imposition of fine and penalty as directed vide Board's Circular No. 36/2000-Cus dated 18th May, 2000, the wholesale market prices of various "worn clothing" was ascertained by Customs House, Kolkata,

6. The margin of profit in respect of items such as sweaters and trousers were among the lowest while the margin of profit in respect of items such as jackets and shirts were the highest. Therefore, instead of Classifying the articles, the articles were all classified as "worn clothing".

7. The consignment was intercepted and re-examined by the Directorate of Revenue Intelligence on 10th February, 2009, 11th February, 2009 and 12th February, 2009 in the presence of the concerned Customs House Agent and two independent witnesses and a Panchanama was prepared after opening the concerned godown of the warehouse.

8. It is alleged that the examination revealed that all the bales bore some code words on their respective covers, for example, "LCP" for "Ladies Cotton Pants".

9. It was further found that the aforesaid bales had no sign of appreciable wear and seemed to be new clothes. However, 78 bales of Ladies Cotton Pant were found to be completely soaked and unfit for use.

10. During re-examination by DRI all the 873 bales of clothing were found to be packed by a process of hydraulic pressing which had subjected the contents to be pressed and packed by compression and then metallic strips were tied round the compressed bales.

11. The bales were re-examined by two methods. About 87 bales were burst open and the rest of the bales were examined by opening the strips whereby the nature of goods could be visually perceived behind the strips. On re-examination it was found that there were sweaters in only 34 bales against 560 bales reported in the Customs Examination Report and other costly items like jackets, shirts, ladies cotton pants, rayon pants, T-Shirts, Raincoats, nightwear etc. were found in 86 bales which did not at all feature in the Examination Report.

12. The bales having code "LCP (New)" were found to contain only Ladies Cotton Pants and not any other item of garments. The DRI during reexamination first inspected the bales and found the code word/phrase written on each bale. Thereafter on bursting open a few bales having the same code word/phrase the items in the bales were found to be those marked on the bales. About 10% of the bales were burst open and the rest were stripped open. It was patently clear that with a view to evade customs duty, brand new clothes had been declared as old and worn garments.

13. Pursuant to summons u/s 108 of the Customs Act one Sri Dipak Das of M/s. Ma Vabatarini Enterprise, a wholesale dealer of old and worn garments, also produced certain registers/documents maintained by him while doing business of purchase of such items like jackets, ladies cotton pant, shirts etc from the same importers and the records so produced indicated the purchase price of the items. One Umar Khan representing the importer and the CHA Gee Pee International admitted to have dealt with Sri Dipak Das of M/s. Ma Vabatarini Enterprise earlier.

14. A show-cause notice dated 31st July, 2009 being No. DRI F No. 127/Kol/APP/2008/AN Impex/2260 was issued to the respondent. The respondent filed its reply to the said show-cause notice.

15. By order dated 25th February, 2010, the Adjudicating Authority rejected the claim of classification of the goods covered under Bill of Entry No. 41405 dated 10.06.2008 under Customs Tariff Heading No. 63090000 of the First Schedule to the Customs Tariff Act, 1975 along with the corresponding HSN Explanatory Notes and directed classification of the goods covered under the said bill of Entry No. 414051 dated 10.06.2008 and having no sign of appreciable wear under respective Customs Tariff Heading Nos. of each type of item of the First Schedule to the Customs Tariff Act, 1975, in terms of Note 3 of Chapter 63 of the Customs Tariff Act, 1975 along with the corresponding HSN explanatory Notes.

16. The respondent appealed against the aforesaid order of adjudication. By an order dated 9th August, 2012 the learned Tribunal allowed the appeal and remanded the case to the adjudicating authority for fresh decision in the light of the findings of the learned Tribunal.

17. The learned Tribunal found that the consignment had not been subjected to 100% examination and no scientific method of sampling was followed and the sample test by DRI could not be appropriate.

18. Being, aggrieved the department has preferred this appeal. Mr. Arijit Chakraborty, appearing on behalf of the respondent opposite party has taken a preliminary objection to the maintainability of the appeal.

19. Mr. Chakraborty referred to section 130E of the Customs Act, 1962 which provides that an appeal shall lie to the Supreme Court from any order passed by the Appellate Tribunal relating among other things to the determination of any question having a relation to the rate of duty of customs or to the value of goods for the purposes of assessment.

20. In support of his submission, [Union of India \(UOI\) and Another Vs. Guwahati Carbon Ltd.,](#) , [The Commissioner of Customs Vs. Motorola India Limited,](#) , [Videocon Industries Ltd. Vs. The Commissioner of Customs,](#) .

21. Mr. Kapur, however, argued that the appeal is not directed against any order of assessment. Relying on the judgments of the Supreme Court in 1998 (97) ELT 32 (SC)

and Indian Bank v. K.S. Govindan Nair & Ors. reported in (2004) 13 SCC 697, Mr. Kapur submitted that the appellants were not questioning any assessment but were aggrieved by a remand.

22. Mr. Kapur submitted that the learned Tribunal should not have remitted the assessment to the Assessing Officer. In the case of Indian Bank v. K.S. Govindan Nair & Ors. {supra} the Supreme Court held that when materials were on record the High Court was not justified in remanding matter to the Trial Court on the ground of improper appreciation of evidence. The order of the Supreme Court in Indian Bank v. K S. Govindan Nair & Ors. {supra} was rendered in the particular facts of the case.

23. In Metal Extruders (India) Ltd. v. CEGAT (supra) the Supreme Court found that the order of the Tribunal did not show that it had gone into the question of whether the commodity was in coil form of straight length for the purpose of deciding whether it was wire or rod and had remitted the matter to the Tribunal to record a positive finding of fact, observing that it was desirable that the Tribunal record the finding of fact to answer the questions arising for determination in relation to payment of excise duty.

24. In Union of India v. Guwahati Carbon Ltd. (supra) the Supreme Court was dealing with Section 35G of the Central Excise Act, 1944 which provides as follows:--

35 G. Appeal to High Court ♦ (1) An appeal shall lie to the High Court from every order passed in appeal by the Appellate Tribunal on or after the 1st day of July, 2003 (not being an order relating, among other things, to the determination of any question having a relation to the rate of duty to excise or to the value of goods for the purposes of assessment), if the High Court is satisfied that the case involves a substantial question of law.

25. The Supreme Court found that section 35G provided that an appeal would lie to the High Court from any order passed in an appeal by the Appellate Tribunal on or after the 1st of July, 2003, if the order of the Tribunal did not relate, among other things, to the determination of any question having relation to rate of duty or to value of goods.

26. The judgment in Union of India v. Guwahati Carbon Ltd. [supra] is not strictly applicable in the instant case in as much as it relates to the Central Excise Act and not the Customs Act. However, section 35G of the Central Excise Act is similar to section 130E of the Customs Act. Section 130E specifies the matters cognizable by the Supreme Court. Any order passed by the Appellate Tribunal which relates to determination of any question having relation to the rate of duty or the value of duty or the value of goods for the purpose or assessment of duty is to be decided by the Supreme Court and not this Court.

27. The language of Section 130E is wide. Appeal to the Supreme Court lies not only from determination of duty or determination of valuation but determination of any

question having relation to the rate of duty of customs or to the value of goods. Thus any decision which is in any way related to determination of any question having any relation to the rate of duty of customs or to the value of goods for the purpose of assessment is appealable before the Supreme Court and not the High Court. The appeal is, therefore, dismissed.

Let photostat certified copy of this judgment and/or order, if applied for, be supplied to the learned advocates appearing for the parties expeditiously subject to compliance of requisite formalities.

Anindita Roy Saraswati, J.

I agree