IN THE CUSTOMS, EXCISE AND SERVECE TAX APPELLATE TRIBUNAL
WEST ZONAL BENCH, MUMBAI COURT No. I

Appeal No.C/925/2010

Arising out of Order-in-Original No. 21/2010 Dated: 31.8.2010
Passed by Commissioner of Customs (Export), JNCH, Nhava Sheva

Date of Hearing: 10.12.2018
Date of Decision: 10.12.2018

SCHLUMBERGER ASIA SERVICES LTD

Vs

COMMISSIONER OF CUSTOMS (EXP), NHAVA SHEVA

Appellant Rep by: Shri T Viswanathan, Adv
Respondent Rep by: Shri R Kumar, Assistant Commissioner (AR)

CORAM: S K Mohanty, Member (J)
Sanjiv Srivastava, Member (T)

Cus - Section 74 of the Customs Act, 1962 - Appellant had filed shipping bills for re-export of duty paid imported goods under claim of rebate - on examination, the goods were found to be different than that imported, therefore, investigation was conducted and which revealed that items which were presented for export could not be tallied with the items imported under the said Bill of Entries - statements were recorded and valuation of the goods was got done by Chartered Engineers M/s Bureau Veritas - alleging that the appellants had attempted to claim ineligible drawback to the tune of Rs.49,25,642/-, goods were seized and SCN came to be issued proposing confiscation of the goods and denial of the rebate claimed; imposition of penalty etc. - against order of Commissioner of Customs (Exports), appeal filed before CESTAT.

Held: On examination, it is noticed that the goods were not found to be tallying with the goods imported; that serial number mentioned on the items was changed and fresh serial number was chiseled on the said goods - *prima facie*, appellants have tried to manipulate the goods so as to tally them with the goods imported - reading of rule 4 of the Re-Export of Imported goods (Drawback of Customs duties) Rules, 1995 makes it evident that if there is any difficulty in establishing the identity, then the appellants should have approached the Commissioner and sought his intervention - having not done so, appellant has manipulated the marking and numbers on the goods - such approach is nothing but an act of mis-declaration which renders the goods liable for confiscation - since goods have been rendered liable for confiscation u/s 113(i), penalty follows u/s 114 of the Customs Act, 1962 - however, considering the circumstances of the case, the redemption fine and penalty are reduced to Rs.7,50,000/- each - appeal is partly allowed: CESTAT [para 5.3, 5.6, 5.7, 5.8, 5.9, 6.1]

Appeal partly allowed

FINAL ORDER NO. A/88313/2018

Per: Sanjiv Srivastava:

This appeal is directed against order in original No 21/2010 dated 31. 08.2010 (issued on 01.09.2010) of Commissioner Customs (Export) Nhava Sheva, By the said order Commissioner has held as follows:

"5.1 In view of above I pass the following order:-

5.1.1. I confiscate the impugned seized goods covered under the SB No.3000001023 and No.3000001024 both dated 30.05.2009 totally valued at Rs.2,24,95,570/- under the provisions of section 113(i) of the Customs Act, 1962. However, I allow an option to redeem the said goods for export on payment of fine of Rs.20,00,000/- (Rupees Twenty Lakhs only) under the provisons of section 125 of the Customs Act, 1962.

5.1.2. I also impose a penalty of Rs.20,00,000/- (Rupees Twenty Lakhs only) on the notice M/s. Schlumberger Asia Services Ltd., Mumbai under section 114(iii) of the Customs Act, 1962.

5.1.3. I reject the drawback claims of Rs.30,80,589.60 and Rs.18,45,052.00 respectively under Shipping Bills No.3000001023 and No.3000001024 both dated 30.05.2009, made by the notice M/s. Schlumberger Asia Services Ltd., Mumbai on the impugned goods under the section 74 of the Customs Act, 1962, as the identity of the goods as the imported and duty paid goods is not established.

5.1.4. This order is passed without prejudice to any other action and/or further action, on the aforesaid Noticee/company and/or on any other individuals/persons under the provisions of the Customs Act or any other Act for the time being in force."

2.1 Appellant had filed two shipping bills No 300001023 and 300001024 both dated 30.05.2009 for re-export of duty paid imported goods under claim of drawback in terms of Section 74 of the Customs Act, 1964.

2.2 On examination the goods presented for re-export were found to be different from the goods imported against the B/E as claimed by the appellants. Thereafter investigations conducted by the revenue in respect of the said goods revealed that items presented for export could not be tallied with the items imported by the said Bill of Entries.

2.3 Statements of the concerned persons were recorded and the valuation of the said goods presented for exportation was got done by Chartered Engineers M/s Bureau Veritas.

2.4 By doing so department was of the view that appellants had attempted to claim ineligible drawback to tune of Rs 49,25,641.60/-. Accordingly the

goods presented for export were seized as they were liable for confiscation under section 113(i) of Customs Act, 1962.

2.5 A show cause notice dated 31.12.2009, calling them to show cause as to why

i. the goods presented for export vide the two shipping bills be not confiscated under section 113(i) of the Customs Act, 1962;

ii. ineligible drawback of Rs 30,80,589/- and Rs 18,45,052/- sought to be availed vide SB No 300001023 dated 30.05.2009 and 300001024 dated 30.05.2009 respectively under section 74 should not be denied as the identity of goods cannot be established;

iii. penalty should not be imposed under section 114(iii) as the goods are liable for confiscation under section 113(i).

2.6 The matter was adjudicated by the Commissioner as per the order referred in para 1, supra.

2.7 Aggrieved appellants have filed this appeal.

3.1 In their appeal appellants have stated-

- Markings are not the only the way to identify the goods if documentary or other evidence proves identity, then such evidence should be accepted.

- There was no intention to falsify the goods as none of these goods are manufactured in India and substitution of one goods for another does not provide any gain to the appellants.

- Markings found on the goods were the markings that were present on the goods at the time of import.

- The goods entered for export by them are not liable for confiscation as the case in SCN is that the goods under export is not co-relatable or identifiable with the goods said to have been imported. Such case are not covered by section 113(i). Non establishment of the identity of the goods as those imported under a particular B/E based on documents cannot be a ground to hold that the goods entered for export are misdeclared attracting section 113(i).

- They have provided extensive evidence argument demonstrating that the markings on the goods indeed correspond to the goods in question and therefore these goods are not different from the goods imported.

- Since the goods entered for export are not liable for confiscation no penalty can be imposed on them under Section 114.

- In view of delay in shipment, they do not intend to export the said goods but would use them in subsequent projects, accordingly they request only for setting aside the confiscation and penalty.

4.1 We have heard Shri T Viswanathan Advocate for the Appellant and Shri R Kumar, Assistant Commissioner (Authorized Representative) for the revenue.

4.2 Arguing for the appellants learned Counsel, submitted that this case is not one covered under Section 113(i) as they have not made any misdeclaration in respect of the consignment entered for exportation. Since the consignments entered for exportation are as declared in the export documents, they are not liable for confiscation under section 113(i). Since the goods are not liable for confiscation no penalty can be imposed on them under Section 114.

4.3 Arguing for the revenue learned authorized representative submitted that the goods were not merely entered for exportation but were entered for export under claim of drawback under Section 74. Since the goods have been entered for exportation under claim of drawback under section 74, any mis-declaration in respect of claim for such drawback shall be covered by the provisions of Section 113(i) and the goods are liable for confiscation. Once the goods are mis-declared in any respect with intention to claim drawback, not otherwise admissible the charge of mis-declaration as envisaged under Section 113(i) is established and goods become liable for confiscation. Since the goods are liable for confiscation the penalty imposed under Section 114 is also justified.

5.1 We have considered the submissions made in appeal, and during the course of argument.

5.2 In the present case appellants have filed Shipping Bills as detailed in table 1, under claim of drawback under Section 74 of Custom Act 1962.

Table 1: Details of S/B filed claiming drawback under Section 74 of Custom Act					
Shipping Bill		Bill of Entry		Drawback 'Rs	Description
Number	Date	Number	Date		
300001023	21.05.09	640743	11.10.08	3080589.6	Oil Well Equipment MX4-AA 4.75 AZI Muthul Array Resistivity Compen (Sr No 059) (Old & Used)
300001024	21.05.09	808472	01.12.08	1845052.0	Oil Well Equipment MX W4D-AA 4,75 Drill Collar ASSFTY (Sr No FB85)

Total		**4925641.6**	

5.3 On examination the said goods were found not to be tallying with the goods imported by the Appellants against B/E's on which duty now claimed as drawback was paid. It was found that Sr No mentioned on the items was changed and fresh Sl No, chiseled on the said goods. Rule 4 of Re-Export of Imported Goods (Drawback of Custom Duties), Rule 1995 read as follows:

"4. Statements/Declarations to be made on exports other than by post.-

In the case of exports other than by post, the exporter shall at the time of export of the goods -

(a) state on the shipping bill or bill of export, the description, quantity and such other particulars as are necessary for deciding whether the goods are entitled to drawback under section 74 and make a declaration on the relevant shipping bill or bill of export that -

i. the export is being made under a claim for drawback under section 74 of the Customs Act;

ii. that the duties of customs were paid on the goods imported;

iii. that the goods imported were not taken into use after importation; OR

iii that the goods were taken in use;

Provided that if the Commissioner of Customs is satisfied that the exporter or his authorized agent has, for reasons beyond his control, failed to comply with the provisions of this clause, he may, after considering the representation, if any, made by such exporter or his authorized agent, and for reasons to be recorded, exempt such exporter or his authorized agent from the provisions of this clause.

(b) furnish to the proper officer of customs, copy of the Bill of Entry or any other prescribed document against which goods were cleared on importation, import invoice, documentary evidence of payment of duty, export invoice and packing list and permission from Reserve Bank of India to re-export the goods, wherever necessary."

5.4 In terms of the above rule 4 appellant were required to make declaration on the Shipping Bill not only in respect of goods entered for exportation and their value but also in respect of the drawback being claimed by them in terms of Section 74. Any misdeclaration in respect of the drawback claimed shall be construed as a mis-declaration. Section 113 (i) of the Customs Act, 1962 reads as follows:

"(i) any goods entered for exportation which do not correspond in respect of value or in any material particular with the entry made under this Act or in the case of Baggage with the declaration made under Section 77;"

5.5 Section 113(i), is not restricted to mis-declaration in respect of value or description of goods entered for exportation, but if the mis-declaration is

an respect of "any particulars with the entry made under this Act" then also goods liable for confiscation. The entries made on the shipping bill in respect of the details of import under Rule 4 referred above are definitely made under this Act, any misdeclaration of the same will attract Section 113(i).

5.6 In the present case the appellants have entered the goods with the Sr No chiseled on them. Prima facie appellants have tried to manipulate the goods so as to tally them with the goods imported. When the goods were found not to be in accordance with the goods imported by them against the B/E's referred they took recourse to other evidences and claimed that on the basis of computer records and other evidences they can establish the identity of the goods. However reading of rule 4 will make it evident if there any difficulty being faced by the Appellants in establishing identity the then appellants should have approached Commissioner and sought his intervention by establishing the identity with other records. Having not done so, they manipulated the marking and numbers on the good to establish the identity with the imported goods. Commissioner has in his order in para 4.12 to 4.15 recorded as follows:

"4.12. I also find that in the case of Collector of Customs vs. Jay Insulators [1992 (61) E.L.T. 506 (G.O.I.)] it was held - "that what is material under section 74 ibid whether description of goods imported tallies with the description of goods being exported. Only when the same is identical and "those very goods" (which were imported) are being reexported an exporter can get benefit under Section 74 (H.S. Mehra v. U.O.I. - A.1.R. 1968 Delhi 142 reiterated in In re Widia -1992 (57) E.L.T. 522 (G.O.!). As description between Bill of Entry and Shipping Bill in this case is different and it is not open to the Customs to go behind the manufacturing process and identify individual component in exercise of powers qua .section 74 ibid, benefit under section 74 of the Customs Act, 1962 is not available on such components."

4.13. The Hon'ble High Court of Judicature at Madras in the case of Perfect Van Melle India Pvt. Ltd. vs. Union of India reported in 2009 (243) E.L.T. 654 (Mad) has held that for claiming drawback under section 74 of the Customs Act, 1962 the identity of the goods is the prime criteria. The impugned goods are not identified as imported and duty paid on importation and as such are not eligible for drawback under section 74 of the Customs Act, 1962.

4.14. It is, thus established beyond doubt that the exporter has intentionally embossed/chiselled the serial number viz 059 and FB 85 on the impugned goods to establish the identity of the said goods to that imported under the said BE and import documents to substantiate his claim that the goods entered for export under the above said SBs are the same and fraudulently attempted to claim ineligible drawback. The exporter has thus forged the markings especially serial numbers on the impugned goods so as to corelate them with the marks and nos. declared

in the relevant BEs and SBs with sole intention to avail ineligible drawback under section 74 of the Customs Act, 1962. Therefore, the declarations made in the SBs are in contravention to the provisions of section 50(2) of the Customs Act, 1962.

4.15. From the foregoing, I find that the impugned seized goods, which were entered for export under the said two SBs have been grossly misdeclared in material particulars, i.e. the description including serial numbers and were misstated for the sole purpose of claiming ineligible drawback under section 74 of the Customs Act, 1962. This position emerges from the fact that the serial numbers of the impugned goods were found to be manually chiseled/embossed evidencing a forged identity of the goods. On this count, I find that the impugned goods entered for exportation do not correspond in any material particulars with the entry made under the ibid Act and hence are liable for confiscation under section 113(i) of the Act ibid. From the evidence before me it is clear that the description of the impugned goods including the serial numbers were misdeclared and misstated and the serial numbers were manually faked with a fraudulent claim that the goods were duty paid on importation and thus were eligible for drawback totally amounting to Rs.49,25,641/- under section 74 of the Customs Act, 1962. Hence, I find that the tampering of the serial number and misdeclaration of the material particulars of the impugned goods in the export documents is wilful and with ulterior motive of taking illegal benefit in the form of drawback by the notice. This omission and commission on the part of the notice that rendered the impugned goods liable for confiscation under section 113 of the provisions of the section 114 of the ibid Act and accordingly I hold the notice liable for penalty under section 114(iii) of the Customs Act, 1962."

5.7 In our view such an approach is nothing but an act of mis-declaration which render the goods liable for confiscation.

5.8 Since the goods have been rendered liable for confiscation under Section 113 (i) the penalty under Section 114 will follow.

5.9 However in facts and circumstance of this case the redemption fine of Rs 20,00,000/- and penalty of Rs 20,00,000/- imposed by the Commissioner is on higher side and is not justifiable, taking into account the fact the drawback claimed is also denied and appellants submission that because of delay they do not intend to export the goods and use them in future projects within India. Accordingly we reduce the Redemption Fine to Rs 7,50,000/- (Rupees Seven Lakh Fifty Thousand Only) and penalty to Rs 7,50,000/- (Rupees Seven Lakh Fifty Thousand Only).

6.1 In result appeal is partially allowed to the extent of reducing fine and penalty as indicated in para 5.9 above. But for the said modification the order of Commissioner is upheld, and appeal disposed accordingly.

(Pronounced in court)