

CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL SOUTH ZONAL BENCH

CHENNAI

S.No.

Appeal No.

Appellant

Respondent

Arising out of OIO passed by CC& CCE Coimbatore

1.

C/289/2009

Manasa Impex Services

CC & CCE Coimbatore

4/2009 Commissioner dt. 29.05.2009

2.

C/313/2009

Cargomar (CHA)

-do-

21/2009 Commissioner dt. 31.07.2009

3.

C/314/2009

Cargomar (CHA)

-do-

23/2009 Commissioner dt. 31.07.2009

4.

C/316/2009

Manasa Impex Services

-do-

15/2009 Commissioner dt. 26.06.2009

5.

C/317/2009

-do-

-do-

16/2009 Commissioner dt. 26.06.2009

6.

C/318/2009

-do-

-do-

17/2009 Commissioner dt. 26.06.2009

7.

C/319/2009

-do-

-do-

18/2009 Commissioner dt. 26.06.2009

8.

C/324/2009

Trans Asian Shipping Services (P) Ltd.

-do-

4/2009 Commissioner dt. 29.05.2009

9.

C/325/2009

-do-

-do-

4/2009 Commissioner dt. 29.05.2009

10.

C/328/2009

Manasa Impex Services

-do-

19/2009 Commissioner dt. 26.07.2009

11.

C/329/2009

-do-

-do-

20/2009 Commissioner dt. 30.07.2009

12.

C/330/2009

-do-

-do-

22/2009 Commissioner dt. 31.07.2009

13.

C/331/2009

-do-

-do-

25/2009 Commissioner dt. 31.07.2009

14.

C/332/2009

-do-

-do-

26/2009 Commissioner dt. 14.08.2009

15.

C/333/2009

-do-

-do-

27/2009 Commissioner dt. 26.08.2009

16.

C/522/2009

Trans Asian Shipping Services (P) Ltd.

-do-

23/2009 Commissioner dt. 31.07.2009

17.

C/523/2009

-do-

-do-

24/2009 Commissioner dt. 31.07.2009

18.

C/172/2010

Prasanna Kumar

-do-

29/2009 dt.28.10.2009

Appearance:

S/ Shri S.Murugappan, G. Derrick Sam,

Leejoy Mathew, Mansoor Elahi, Advocates

Ms. Minchu Mariam Punnoose, Advocate

For the Appellants

Shri A. Cletus, ADC (AR)

Sheri S.Govindarajan, AC (AR)

For the Respondent

CORAM :

Honble Ms. Sulekha Beevi C.S. Member (Judicial)

Honble Shri Madhu Mohan Damodhar, Member (Technical)

Date of hearing : 15.12.2017

Date of Pronouncement : 09.01.2018

FINAL ORDER No. 40048-40065 / 2018

Per Bench

All these appeals relating to the question of imposability of penalty under Section 114 (iii) of the Customs Act, 1962 on the Custom House Agents/Shipping Lines in respect of alleged drawback fraud committed by concerned exporters, are taken up for common disposal.

2. The facts of the case are that on intelligence gathered by the Directorate of Revenue Intelligence (D.R.I.), investigations were conducted in respect of various consignments of shoe uppers, ready-made garments etc. which had been exported through ICD, Tiruppur, ICD

Coimbatore. It appeared that concerned exporters had grossly over invoiced the value of the export goods with an intention to avail ineligible drawback benefits. It also appeared that this alleged fraud was facilitated by other persons, inter alia, the CHAs, shipping lines, freight forwarders etc. who are the appellants herein. Pursuant to the investigations, show cause notices were issued under Rule 16 & 16A of Drawback Rules, 1995 read with Section 75 (1) and Section 147 of Customs Act, 1962, which culminated in the impugned orders wherein, inter alia, recovery of the alleged fraudulently availed drawback amount was ordered by the adjudicating authority along with interest liability thereon. The confiscation of the offending goods was also ordered. Penalties were imposed on the concerned exporters as also on the appellants herein. The present appeals have been filed only by the concerned CHAs/shipping lines etc. who had been made noticees to the SCNs in respect of penalties imposed on them.

3. Today when the matter came up for hearing, the appellants were represented by the following Ld. Advocates:

Appeal Nos.

Name of the Appellant

Name of Advocate

C/289/2009

C/316-319/2009

C/328-333/2009

Manasa Impex Services

Shri S.Murugappan

C/313-314/2009

Cargomar (CHA)

Ms.Minchu Mariam Punnoose

C/324-325/2009

C/522-523/2009

Trans Asian Shipping Services (P) Ltd.

Shri Leejoy Mathew

C/172/2010

Prasanna Kumar

Shri G. Derrick Sam

On behalf of all these appellants, arguments were led by

Shri S. Murugappan, Ld.Advocate which were subscribed to and reiterated by the other counsels. These arguments can be broadly summarized as under :

- (i) All the SCNs proposing demand of drawback were issued by DRI under Rules 16 & 16A of the Drawback Rules read with Section 75 (1) of the Customs Act, 1962.
- (ii) The Tribunal in a recent decision in the case of Monte International Vs CC Amristar - 2016 (340) ELT 345 (Tri.-Del.) has held that show cause notices issued by D.R.I for recovery of erroneously granted drawback in terms of Rule 16 of the Drawback Rules cannot be held as valid show cause notices and that D.R.I officers have no jurisdiction to issue such SCNs.
- (iii) The proceedings in all these appeals will not sustain ab initio since the SCNs themselves are not valid.
- (iv) When the recovery of drawback itself in these SCNs is not sustainable, therefore the consequential proposals for imposition of penalty and confiscation also will not sustain.
- (v) In all the appeals filed by M/s.Manasa Impex (Appeal Nos.C/289/2009, C/318/2009, C/328/2009, C/331/2009) the concerned SCNs have also proposed recovery of the allegedly irregular availed drawback amounts from them jointly and severally.
- (vi) However, in respect of other appellants there have been no proposals in the concerned SCNs for recovery of drawback from them and there is only proposal to impose penalty against them. Without determination or decision on the recoverability of the drawback amounts, there can be no imposition of penalty on persons who are the exporters or the CHAs/ freight forwarders/shipping line.
- (vii) A single SCN cannot be held as invalid for one portion and valid for another portion.

4. On the other hand, Ld.A.R Shri A. Cletus supports the impugned order. He also made oral submissions which can be summarized as under :

(i) The decision of the Tribunal in the case of Monte International (supra) relied upon by the Ld. Advocate concerns the recoverability of irregular avilment of drawback from exporters by invocation of Rule 16 and where the SCNs have been issued by D.R.I. However, the said decision does not go into the aspect of whether penalties can be imposed under Section 114 / 117 of the Customs Act on CHAs and other persons who have facilitated the fraud.

(ii) In any case, the proposal for imposition of penalty on the appellants has been made in terms of Section 114 / 117 of the Customs Act. The proposal in the SCN is for imposition of penalty under Section 114 of the Customs Act and Section 117 for the acts or omissions of appellants in abetting and facilitating exporters in the said fraud.

(iii) Hence the action that has been proposed against the appellants herein and also imposition of penalties in the impugned orders is separate and therefore it cannot be said that just because a SCN is issued under Rule 16 for recovery of drawback, the proposal for imposition of penalties under different sections and provisions also should fail.

(iv) Section 113 & Section 114 are independent of any action under Rule 16 of the Drawback Rules, 1995. Penalties imposed in these appeals, except Manasa Impex, are not for recovery for drawback but for their other acts and omissions in facilitating fraud. Even in the case of Manasa Impex though show cause notice has proposed recovery of drawback from them also, jointly and severally, the penalties imposed are also for their other acts and omissions in facilitating fraud.

5.1 Heard both sides and have gone through the facts. The decision in the case of Monte International (supra) has categorically held that the SCN issued by DRI officers under Rule 16 & 16A of Customs and Central Excise Drawback Rules, 1995 is without jurisdiction and such SCN is ab initio void. In para 17 of the said decision, the Tribunal held as under :

"17. As such, the only question required to be decided is as to whether the present show cause notice of the DRI officer for recovery of erroneously granted drawback in terms of Rule 16 can be held to be valid show cause notice in the light of law declared by the Honble Supreme Court in the case of Syed Ali and subsequently followed in the number of decisions referred (supra). It is seen that after declaration of law by the Honble Supreme Court in the case of Syed Ali, the law was amended with retrospective effect conferring jurisdiction on DRI officers as also on Commissioner of Customs, (Prev.) for the purpose of issuance of Show cause notice in terms of Section 28 of the Customs Act with retrospective effect. However, no such amendment was made in respect of show cause notices issued under Rule 16 of Drawback Rules, 1995. Infact it is seen that even when the law was amended subsequently, on 6-7-2011 and Section 28 was

amended retrospectively with effect from 16-9-2011, the Boards Circular No. 24/2011 was issued on 31-5-2011, wherein the issuance of show cause notice in terms of Rule 16 of Drawback Rules was considered and the proper officers were specified only in relation to the monetary limits. In the said circular, DRI officers were never considered to be proper officers for demanding drawback under Rule 16. There was no retrospective amendment carried out in the said Rule 16 so as to confer jurisdiction on the DRI officer for issuance of show cause notices. Bombay High Court in the case of Tejus Proprietary Concern of Tejus Rohitkumar Kapadia v. Union of India reported as 2012 (275) E.L.T. 175 (Bom.) has taken a very serious note of the fact that Tribunal has not given due regard to the law laid down by the Apex Court and deference to Supreme Courts judgment is constitutional principle and the Tribunals Members were bound by rigorous/strict adherence to judicial discipline. CESTAT cannot refuse to apply such Supreme Court decision on grounds that it came after issuance of show cause notice or after passing the impugned orders or on the ground that issue of jurisdiction was not raised before adjudicating authority. We also took note of the Tribunals decision in the case of Nylex Traders v. Commissioner of Customs (Prev.), Mumbai [2011 (274) E.L.T. 71 (Tri.-Mum.)] wherein it was observed that the jurisdictional objection can be raised at a later stage also as it goes to the root of the case. Accordingly, by following the Supreme Courts decision in the case of Syed Ali, Tribunal struck down the show cause notice issued by Commissioner (Preventive).

As such, by applying the ratio of law, declared by the Honble Supreme Court in the case of Syed Ali and subsequently followed by various other High Court, it has to be held that DRI officer was not the proper officer for issuance of show cause notice for the purpose of demand of allegedly erroneously granted excess drawback. In fact, we find that after the above point was raised by the learned advocate, the matter was adjourned so as to give an opportunity to the learned DR to find out as to whether there was any retrospective amendment in terms of Rule 16 of the Drawback Rules, on the line of retrospective amendment in Rule 28. On the next date of hearing, learned DR very fairly agreed that there is no such amendment to Rule 16. As such, we are of the view that show cause notice having been issued by ADG, DRI Delhi, is without jurisdiction and consequently present impugned order become void ab initio and cannot be upheld. The same is liable to be set aside on the ground of jurisdiction itself. We order accordingly."

5.2 The facts in all these cases are that various exporters had allegedly over invoiced the value of export of goods with intention to avail ineligible drawback benefits fraudulently. The SCNs initiated against these exporters were issued by the Directorate of Revenue Intelligence (DRI) under Rule 16 & 16A of the Drawback Rules read with Section 75A (1) and 124 of the Customs Act, 1962. The impugned orders which have resulted in these appeals inter alia demands recovery of irregularly availed drawback amounts against the exporters. The exporters implicated in these cases are not parties before the Tribunal in these appeals.

5.3 The adjudication orders have also imposed penalties on the Custom House Agents, Steamer Agents, Shipping Lines, Logistics Services etc. on the grounds that they have not observed due diligence in verifying the correctness of information given by their clients and have or otherwise by their acts and omissions abetted fraudulent claims of drawback by the exporters concerned. Penalties have been imposed on these agents etc. under Section 114 (iii) and 117 of the Customs Act, 1962.

5.4 The common contention of all the appellants herein is that SCNs have been issued by the DRI under Rule 16 and 16A of the Drawback Rules and hence are not valid since the DRI officers have no jurisdiction to issue such notices. The Ld. Advocate for appellants have drawn our attention to Tribunal's decision in the case of Monte International Vs CCE Amristar (supra). The appellants have further contended that since the SCNs issued against the exporters are not valid, the very same notices also issued to the appellants herein proposing imposition of penalty under the Customs Act will also fail.

6. The issue whether SCNs issued by DRI for recovery of drawback under Rule 16 & 16A of the Drawback Rules is valid or not is decided by the Tribunal. On this score, we have no reason to deviate from the decision of the Tribunal in Monte International case cited by the appellant.

7. The issue to be adjudged in these batch of appeals is in a very narrow compass, i.e., when the recovery of allegedly fraudulently availed drawback amounts cannot sustain, on account of the show cause notices having been issued apparently without jurisdiction, whether penalties imposed on the Custom House Agents, Steamer Agents etc. who are co-noticees, can sustain nonetheless.

8.1. Now, the question that comes up for decision is whether for the same reasons, the SCNs will also be rendered invalid for noticees other than the exporters, like appellants herein (CHAs, shipping lines etc.). Revenue has argued that the proposal for imposition of penalty on the appellants herein has been made under Section 114 & 117 of the Customs Act, hence proposed demand of drawback under Rule 16/16A of the Drawback Rules, even if held as invalid, cannot adversely affect the proposal for imposition of penalties on the other co-noticees.

8.2 We are not able to subscribe to this line of argument. The Show Cause Notice has to be viewed in its entirety and cannot be vivisected as may be convenient for the Revenue. Thus, if a show cause notice is found as not valid or issued without jurisdiction in respect of the main protagonist, the very same SCN cannot be held as sustainable for other noticees like the appellants herein. Any attempt for such vivisection is akin to putting the cart before the horse. This is because the penal consequences on alleged abettors to the alleged offence under the Customs Act or the Rules made thereunder or will be directly proportional to the adjudication fortunes of the main players. Any contrary proposition would lead to a ludicrous situation

wherein the main offenders are left unscathed because of the SCNs being not valid or issued without jurisdiction, but other smaller players like the CHAs, shipping lines etc., who were also noticees in the same SCNs, getting penalized for alleged negligence or for abetting the main offender. This is certainly not the intention of the law. Moreover, when the Tribunal is hand tied to determine the liability arising out of the main offence, due to the SCN being void, the liability for abetting the offence cannot be adjudged or sustained.

8.3. In arriving at this conclusion, we are only following the legal maxim 'sublato fundamentis, cadit opus' which means in case a foundation is removed, the superstructure is bound to fall. Once the basis of a proceeding is gone, all consequential acts, action, orders would fall to the ground automatically.

9. In the light of the discussions above, we find that the demands of duty and / or imposition of penalties on the appellants herein which have been confirmed in the impugned orders cannot sustain. Hence the impugned orders to the extent of these appellants are set aside. All the appeals are allowed with consequential relief, if any, as per law.

(order pronounced in court on 09.01.2018)

(Madhu Mohan Damodhar)

Member (Technical)

(Sulekha Beevi C.S)

Member (Judicial)