

**IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
CHENNAI**

REGIONAL BENCH – COURT NO. III

CUSTOMS APPEAL No.40003 of 2023

[Arising out of Order dated 09.01.2022 issued under File No.CUS/APR/S49/534/2002-GR 3 by the Deputy Commissioner of Customs, Import Commissionerate (Group-3), Chennai-1]

M/s. Shiva Trading Co.,

Plot No.94, 3rd Floor,
Pocket-B-6, Sector-8,
Delhi-110 085.

: Appellant

VERSUS

The Commissioner of Customs,

Chennai-II Commissionerate
Custom House, No.60, Rajaji Salai,
Chennai 600 001.

: Respondent

APPEARANCE:

Mr. Prem Ranjan Kumar, Advocate
For the Appellant

Ms. Anandalakshmi Ganeshram, Superintendent (A.R)
For the Respondent

CORAM:

HON'BLE MS. SULEKHA BEEVI C.S., MEMBER (JUDICIAL)

HON'BLE MR. VASA SESHAGIRI RAO, MEMBER (TECHNICAL)

FINAL ORDER NO. 40142 / 2023

DATE OF HEARING: 03.03.2023

DATE OF PRONOUNCEMENT: 15.03.2023

Per: Ms. SULEKHA BEEVI C.S

The issue is with regard to the request for provisional release of the goods for the purpose of re-export only.

2. The Ld. Counsel Sri Prem Ranjan Kumar appeared and argued for the appellant. It is submitted that the appellant is engaged in import and trading of fabrics. The appellant placed orders for import of "Polyester Coated Fabric (Polymeric Compound) vide commercial invoices dt.16.08.2022 for approximate quantity of 281487.10 sq.mtrs for USD 33,778.45 and USD 11,049.50 for USD 13,325.94. The appellant filed Bill of Entry dated 04.09.2022 for clearance of the goods declaring the details as per the invoices, packing list and bill of lading provided by the supplier. The officers of DRI examined the consignment on 19.10.2022 and samples were drawn from both the consignment to send for testing.

3. Test reports were received from the Textile Committee, Chennai which reported the goods pertaining to Bill of Entry No.2299539 dt.04.09.2022 to be 'woven fabrics of varieties (i) dyed polyester with modified twill and (ii) dyed polyester fabric coated/laminated with Polyurethane. It was thus held that the goods are classifiable under CTH 54076190 and 59032090. With regard to the goods imported vide Bill of Entry No.2299520 dated 04.09.2002, the Textile Committee reported the goods are (i) dyed Poly vinyl chloride coated polyester fabric and (ii) dyed polyester fabric coated / laminated with Polyurethane and classifiable under CTH 59031090 and 59032090. The total area of fabric was found to be 6,38,603.74 sq.mtr as against the declared 2,81,487.10 sq.mtr as against Bill of Entry No.2299539 dated 04.09.2022 and 1,49,716.50 sq.mtr as against declared 1,11,049.50 sq.mtr. in respect of Bill of Entry No.2299520 dated 04.09.2022.

4. The DRI redetermined the classification, assessable value of the goods and the goods were seized as per seizure memo dated 19.10.2022. It was alleged in para 4 of the seizure memo that there was gross mis-declaration of description and quantity, and undervaluation of goods; therefore the goods were liable for confiscation under Section 111 (l) and 111 (m) of the Customs Act, 1962 and there was attempted evasion of Basic Customs duty and Anti-Dumping duty. The appellant made deposit Rs.50,00,000/- vide TR-6 challan dated 19.10.2022 towards the duty liability pending decision with regard to provisional release of the goods. The goods were permitted to be warehoused as per Section 14 of the Customs Act, 1962.

5. Ld. Counsel submitted that the appellant made enquiries with their overseas supplier and was informed that due to mistake wrong consignments were loaded from their factory. The said supplier also offered that the appellant either accept goods or re-export the same back to the supplier.

6. The appellant then vide letter dated 13.11.2022 made a request for provisional release of the goods. The appellant did not receive any reply. As there was no decision passed on the request and the department having re-determined the assessable value, it was unviable for the appellant to accept the offer of supplier to get the goods released for home consumption. The appellant then vide letter dated 10.12.2002 requested the department to permit to re-export the goods.

7. The adjudicating authority vide letter dt. 09.01.2022 issued under File No.CUS/APR/S49/534/2022-GR-3 rejected the request to re-export

observing that any request for re-export can be considered only at the time of adjudication and after the investigation is completed by DRI.

8. Being aggrieved by such order, the appellant has filed the above appeal. The Ld. Counsel submitted that the power to allow provisional release of the goods for home consumption also included the power to permit re-export of the goods as contemplated in Section 110A of the Customs Act, 1962.

9. The imported goods are neither prohibited goods or restricted goods. The appellant had filed the Bills of Entry under FIRST CHECK as the appellant was not sure about the correct classification, the exact meterage of the goods arrived. It was then incumbent upon the proper officer to check all parameters including classification prior to the assessment of the goods. The goods had to be sent for testing which shows the complexity of understanding the nature of the fabrics. There is no impediment in releasing the goods for re-export. The act of adjudicating authority is illegal and arbitrary as the samples of the goods have been drawn and the quantity (meterage) has also been ascertained. There is no justifiable reason to further keep the goods in custody.

10. The goods which are fabrics having coating are liable to be damaged and are therefore perishable in nature. The goods will lose its value totally, if detained for a long period.

11. The Ld. Counsel relied on the CBEC Circular No.22/2004-Cus. dt. 03.03.2004 to argue that in the matter of classification dispute, the consignment should be allowed to be cleared on provisional basis, unless

the goods are prohibited. The Ld. Counsel also relied on the following decisions:

- (i) *Rajkamal Industrial Pvt. Ltd. Vs CC Kandla* – 2019 (370) ELT 353 (Tri.-Ahmedabad)
- (ii) *Zip Zap Exim (P) Ltd. Vs UOI* 2018 (364) ELT 26 (Guj.)
- (iii) *B. Khokhani & Co. Vs CC Chennai* 2015 (320) ELT 189 (Mad.)
- (iv) *Kausalya Impex Vs Chief Commissioner of Customs, Chennai* - 2002 (140) ELT 66 (Mad.)

12. On behalf of the appellant, the Ld. Counsel submitted that the appellant has undertaken not to dispute the classification, the description, the value, the quantity or the identity of the goods. It was stressed that the samples already having been drawn and test conducted, no purpose would serve by detaining the goods further. He prayed that the appeal may be allowed.

13. The Ld. A.R Ms. Anandalakshmi Ganeshram appeared and argued for the department.

14. Heard both sides.

15. From the facts narrated above, it is clear that samples have been drawn and sent for testing to the Textile Committee. The report has been received on the basis of which the goods have been seized. There is misdeclaration of the goods as to their description, classification and quantity. The Ld. Counsel has submitted that the appellant has undertaken not to contest the classification, identity and quantity of the goods in the proceedings. The Ld. A.R has not been able to put forth any reason as to the necessity to still keep the goods in custody. The request

is to provisionally release the goods for re-export only. We also take note that the appellant has paid Rs.50 lakhs.

16. The Tribunal in the case of *Rajkamal Industrial Pvt. Ltd.* (supra) had occasion to consider a similar issue and it was observed as under :

“5. On careful consideration of the submissions made by both the sides and perusal of the record, we find that limited prayer of the appellant is for provisional release of the goods and that too for re-export of goods. We find that the investigating agency DRI has already drawn the sample of the goods to ascertain the nature of the goods. In such situation, we are of the view that the department has no need of the goods for the purpose of adjudication. By keeping the goods under seizure it is nobody's gain. The discretion for provisional release of the goods is legally provided under Section 110 of Customs Act and the same should be exercised lawfully and of course with safeguard of the Revenue's interest. If in each and every case the goods is not allowed to be released provisionally the purpose of Section 110 which is for provisional release will become redundant. The adjudicating authority heavily relied upon the decision of Larger Bench in denying provisional release in case of *A.K. Jewellers* (supra). On reading of the said judgment we find that in the said judgment it was not held that the goods cannot be released provisionally. On the contrary, the re-export of confiscated goods was allowed, therefore, the judgment of *A.K. Jewellers* does not help the Revenue. As regard, the Board Circular No. 35/2017, dated 16-8-2017, we find that the same is based on the Madras High Court judgment of *Malabar Diamond Gallery P. Ltd.* (supra). On reading of the said judgment we find that the Hon'ble Court has not laid down law that under any circumstances goods cannot be released provisionally. In the said judgment it was held that Court can only test satisfaction arrived by the competent authority as to whether goods seized and liable for confiscation can be released provisionally, pending adjudication and in that context, the role of the Courts, in exercise of the powers, should be confined only to testing discretion exercised by authority to be both on subjective and objective satisfaction. In the present case the adjudicating authority has denied the provisional release only giving reason that same cannot be released before adjudication of the case. There is no criteria that the goods cannot be released provisionally before adjudication of the case. If goods required for adjudication, it may or may not be allowed to be released. However, in the present case the sample were already drawn, thereafter, in our view the goods are not required for adjudication. As regard the safeguard of the revenue, the adjudicating authority can impose the condition of bond and bank guarantee as deems fit in accordance with law. In the present case the appellant's prayer is for provisional release for re-export of the goods and not for home consumption. We do not find any reason why the re-export of the goods can be denied particularly when the same is not going to adversely affect the adjudication process of the case.

As per the above discussion we are of the view that the provisional release of the goods for re-export can be allowed subject to the reasonable measures for safeguarding the Revenue.

7. Accordingly, the impugned order is set aside and appeal is allowed. Since, appellant has already suffered huge amount of demurrage charges and the same is recurring, in the interest of justice, the adjudicating authority is directed to order for provisional release of goods for re-export within a period of one month from this order.”

17. The Hon’ble jurisdictional High Court in the case of *Kausalya Impex* (supra) held that when the goods are freely importable, refusing the request to re-export is not legal or proper. The relevant para reads as under :

“21. Admittedly the goods imported by the petitioner are not contraband goods nor goods covered under the negative list either. The goods are freely importable and are imported under Open General Licence. As seen from the show cause notice as well as the counter affidavit of the respondents, the only allegation is that the goods have been undervalued. Even if it is considered as a mis-declaration so as to undervalue the goods, of course it is not the case of either side, I am of the considered view that these allegations cannot be a ground for refusing permission to re-export the goods. Whatever the action, the respondents are contemplating, it is very well open to the respondents to initiate and complete the same and such contemplated action does not have any bearing or relation to the goods which are sought to be re-exported, particularly when it is the admitted case of the respondents that the container was broken open, the sample had also been drawn from the container and the sample has been sent for analysis to various agencies including CLRI and reports have been received from them. Therefore, reserving the right of the respondents to take action against the importer, I do not think that there is any impediment in directing the re-export of the goods. The petitioner, would however, give an undertaking and personal bond, to subject themselves to any action that the respondents may initiate and also to bind themselves to the ultimate adjudication, of course subject to the right to challenge the said order as per the provisions of the Act.

22. The writ petition is accordingly allowed as prayed for. Consequently W.M.P. No. 1769 of 2001 is closed.”

18. As already discussed above, the goods in the present case are freely importable and not prohibited goods. The appellant has undertaken

not to contest the classification, description or quantity of the goods. The appellant has also made payment of Rs.50 lakhs. After appreciating these facts and following the ratio laid in the above decisions, we are of the considered opinion that refusal to provisionally release the goods for the purpose of re-export only is not justified.

19. In the result, the impugned order (letter refusing to provisionally release the goods for re-export) is set aside. The adjudicating authority is directed to consider the request of the importer-appellant for provisional release of the goods for re-export only within a period of one month from the date of receipt of this order, subject to reasonable conditions, if necessary, for safeguarding the revenue.

The appeal is allowed in above terms.

(pronounced in open court 15.03.2023)

Sd/-
(SULEKHA BEEVI C.S.)
MEMBER (JUDICIAL)

Sd/-
(VASA SESHAGIRI RAO)
MEMBER (TECHNICAL)