Customs, Excise & Service Tax Appellate Tribunal, West Zonal Bench : Ahmedabad

REGIONAL BENCH - COURT NO. 3

Customs Appeal No. 21 of 2010

[Arising out of OIO-29/COMMR/RKS/AHD-I/2009 passed by Commissioner of Central Excise-AHMEDABAD-I]

M/s Sunil Somani .... **Appellant**
C-706, 7th Floor, International Trade Center,
Majura Gate, Ring Road,
Surat, Gujarat-395002

VERSUS

C.C.E.–Ahmedabad-i ...... **Respondent**
C. Ex Bhavan, Nr Panjrapole &
Polytechnic, Ambavadi,
Ahmedabad,
Gujarat-380015

WITH

1. **Customs Appeal No. 16 of 2010 (Bhairavi Exim Pvt. Ltd)**
2. **Customs Appeal No. 132 of 2010 (Deepak Bajaj)**
3. **Customs Appeal No. 488 of 2009 (Sh. Vishnu Chotiram Bhatiya)**
4. **Customs Appeal No. 548 of 2009 (Yogeshbhai Viadya)**
5. **Customs Appeal No. 552 of 2009 (Nilesh Bansal)**
6. **Customs Appeal No. 557 of 2009 (Ilyas Kapadia)**

[Arising out of OIO-29/COMMR/RKS/AHD-I/2009 passed by Commissioner of Central Excise-AHMEDABAD-I]
[Arising out of OIA-29-COMMR-RKS-AHD-I-2009 passed by Commissioner of Central Excise-AHMEDABAD-I]

APPEARANCE:
Sh. Amal Dave, Sh. Raj Vyas (Advocate) & Sh. Gunjan Shah (CA) for the Appellant
Sh. T.G. Rathod, Joint Commissioner (AR) for the Respondent

CORAM: HON'BLE MR. RAMESH NAIR, MEMBER (JUDICIAL)
HON'BLE MR. RAJU, MEMBER (TECHNICAL)

FINAL ORDER NO. A/ 11528-11534 / 2019

DATE OF HEARING: 30.04.2019
DATE OF DECISION: 14.08.2019

RAMESH NAIR

These appeals are directed against Order in original No. 29/Commr./RKS/AHD-I/2009 dated 15/09/2009 wherein against all the appellants penalty under section 112 was imposed in connection with a case of illicit diversion of imported goods meant for 100% EOU by M/s Bhiravi Exim Pvt. Ltd. It is a case of department that all these appellants were indulged for one of other way to facilitate the illicit diversion of duty free goods.

2. Sh. Amal Dave, Sh. Raj Vyas Ld. Advocates with Sh. Gunjan Shah Ld. CA appearing on behalf of the appellant submits that in the matter of appeal filed by Nilesh Bansal, Ilyas Kapadia and Deepak Bajaj, they were not allowed cross examination of the witnesses. In all the appeals, a common submission was made that penalty was imposed under section 112 whereas sub clause of section 112 was not mentioned, therefore, the penalty merely by mentioning the section 112 without clause will not sustain as held in following judgments:

- B. Laxmichand 1983 (12) ELT 322 (Mad.)
- Amrit Foods 2005 (190) ELT 433 (SC)
- A.T.M. International Ltd 2007 (208) ELT 288 (T)
- Ghazanfar Basha 2010 (254) ELT 365 (T)
- P.P Dutta Wing CDR. (Retd.) 2013 (293) ELT 127 (T)

It was also submitted that considering the duty amount, the huge amount of penalty was imposed which is very harsh.

3. Sh. T.G. Rathod Ld. Joint Commissioner (AR) appearing on behalf of the Revenue reiterates the findings of the impugned order.

4. We have carefully considered the submissions made by both the sides and perused the records. We find that Ld. Commissioner has imposed penalty under section 112 of Customs Act whereas the Section 112 has clause (a) & (b) which is reproduced below:

> ***"SECTION 112. Penalty for improper importation of goods, etc.*** *—Any person,—*
> *(a) who, in relation to any goods, does or omits to do any act which act or omission would render such goods liable to confiscation under section 111, or abets the doing or omission of such an act, or*
> *(b) who acquires possession of or is in any way concerned in carrying, removing, depositing, harbouring, keeping, concealing, selling or purchasing, or in any other manner dealing with any goods which he knows or has reason to believe are liable to confiscation under section 111,*
> *shall be liable,—*
> *(i) in the case of goods in respect of which any prohibition is in force under this Act or any other law for the time being in force, to a penalty [216] [not exceeding the value of the goods or five thousand rupees], whichever is the greater;*
> *(ii) in the case of dutiable goods, other than prohibited goods, to a penalty [217] [not exceeding the duty sought to be evaded on such goods or five thousand rupees], whichever is the greater;*
> *[4] [(iii) in the case of goods in respect of which the value stated in the entry made under this Act or in the case of baggage, in*

the declaration made under section 77 (in either case hereafter in this section referred to as the declared value) is higher than the value thereof, to a penalty [219][not exceeding the difference between the declared value and the value thereof or five thousand rupees], whichever is the greater;]
[(iv) in the case of goods falling both under clauses (i) and (iii), to a penalty [220] [not exceeding the value of the goods or the difference between the declared value and the value thereof or five thousand rupees], whichever is the highest;]
[(v) in the case of goods falling both under clauses (ii) and (iii), to a penalty [221] [not exceeding the duty sought to be evaded on such goods or the difference between the declared value and the value thereof or five thousand rupees], whichever is the highest.]"

5. From the reading of above Section 112, it is clear that clause (a) & (b) prescribes different act which is liable for penalty. Without mentioning of clause of section 112, it is not proper to ascertain the penalty. It is also observed that the penalty is also prescribed under clause (i) to (iv) but in the adjudication order, it is not mentioned that under which sub clause penalty was imposed. Apart from this deficiency, the appellants also pointed out that the cross examination in some of the cases were not allowed. We are of the view that when the statements are relied upon as evidence, the witnesses who have given the statements should be examined/cross examined, without which passing of adjudication order is in violation of principle of natural justice.

6. Due to above deficiencies, in our considered view, the matter needs to be re-considered only in respect of penalty imposed on the present appellants, therefore, we dispose of all the appeals by way of remand to the adjudicating authority for passing afresh order by keeping in mind our above observation.

(Pronounced in the open court on 14.08.2019)

(Ramesh Nair)
Member (Judicial)

(Raju)
Member (Technical)

Seema