

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
WEST ZONAL BENCH AT AHMEDABAD**

REGIONAL BENCH – COURT NO. 01

CUSTOM Appeal No. 11010 of 2014-SM

[Arising Out Of OIA-486/COMMR-A-/JMN/2013 Dated- 16/12/2013 Passed By Commissioner of CUSTOMS-JAMNAGAR(PREV)]

Sandeep Garg & Company

584, Sector-15,
Part-I, Gurgaon, Haryana

.....Appellant

VERSUS

C.C.-Jamnagar(prev)

Sharda House...Bedi Bandar Road,
Opp. Panchavati, Jamnagar
Gujarat

.....Respondent

APPEARANCE:

Shri. Vikas Mehta, Consultant for the Appellant

Shri. Himanshu P Shrimali, Superintendent (AR) for the Respondent

CORAM: HON'BLE MEMBER (JUDICIAL), MR. SOMESH ARORA

FINAL ORDER NO. A / 11518 /2023

DATE OF HEARING:22.06.2023

DATE OF DECISION:14.07.2023

SOMESH ARORA

1. The appellant is a Pre-Shipment Inspection Agency owned by its proprietor Shri Sandeep Garg, having offices in several countries including USA.

2. Their Houston (USA based) office issued 02 Pre-Shipment Inspection Certificates Nos. UK- IN 101811-62769 dated 18.10.2011 and UK-IN 092611-62170 dated 29.06.2011 for inspection of 04 & 17 containers respectively of Cast Iron Scrap of UK origin certifying, inter alia, that the

consignment does not contain any type of arms, ammunition, shells, cartridges or any other explosive material in any form. These containers were imported into India by M/s. Alang Metal Exim Pvt. Ltd. On import into India and an examination by Customs Pipavav, a total of 10 bomb shells were found in consignments. Shri Kapil Aggarwal, Manager & Authorized Person of appellant, in his statement, informed the officers that their Inspector Mr. Bob Rushton, a citizen and resident of UK had examined the cargo in UK and the Certificates were issued by their Houston (USA) office during investigation it was recorded that it was human error of Mr. Bob Rushton which led to the offending import. Penalty was proposed against the appellant under Section 112 (without specifying sub- clause) and 114AA of Customs Act, 1962. Same was dropped by lower authorities for Section 114AA, but upheld for Section 112 to the extent of Rs. 10 Lakhs by Commissioner (Appeals) after reduction from Rs. 15 Lakhs. Vide its written submissions dated 05.07.2023 advocate for the appellant submitted that the Hon'ble Tribunal has held in the case of P. P. Dutta Wing CDR (Retd.) v/s Commissioner of Customs, New Delhi, 2013 (293) ELT 127 (Tri-Del.) that show cause notice issued without mention of clause or sub-clauses of Section 112 of Customs Act, 1962 cannot be sustained.

3. Ld. Adjudicating Authority held that appellant was liable to penalty under Section 112 (a) as well as 112 (b). It dropped the proposal invoking Section 114AA by observing that there is no evidence to show that the appellant had knowingly and willingly issued incorrect Certificates. A corollary to this would render invocation of Section 112 (b) by the department unsustainable, since it had found that the ingredient of knowledge which is basic for invocation of Section 112 (b) was absent. Hence, the limited point on which penalty is imposed on appellant's proprietorship firm is lack of diligence or negligence (on the part of its employee, i.e., Mr. Bob in the course of examination of cargo at the time of loading of containers in UK) and not the appellant by itself.

4. It was submitted that Mr. Bob examined the goods in UK (outside India). The Pre- Shipment Inspection Certificates were issued in USA (outside India). Hence, the act of 'omission' had taken place outside India. The jurisdiction of Customs Act, 1962 was extended to offence or contraventions committed outside India by virtue of The Finance Act, 2018 with effect from 01.04.2018. In this case, offence had taken place in 2011. Hence, the Show Cause Notice is without jurisdiction, as the offender was not an Indian national

4.1. It was submitted that the allegation regarding lack of diligence or negligence against appellant is mis-directed inasmuch as appellant is based in India whereas goods were examined in UK by their employee Mr. Bob. Hence, omission or commission, if any, in failing to detect the bomb shells could be on the part of Mr. Bob and not the appellant. Hence, appellant is not liable to penalty under Section 112 (a) of Customs Act, 1962.

4.2 Without prejudice to above, reliance was placed on the following decisions of Hon'ble Tribunal wherein it was held that lack of due diligence/negligence, if any, by itself cannot bring in penal consequences under Section 112 (a) of Customs Act, 1962, unless intention to violate Customs law is proved:

(1) P. N. Shipping Agency v/s Commissioner of Customs, Nhava Sheva-1, 2019 (369) ELT 1560 (Tri.-Mumbai).

(ii) Rajesh Maikhuri v/s Commissioner of Customs, New Delhi, 2018 (363) ELT 274 (Tri.-Del.)

(iii) Success Engineering v/s Commissioner of Customs, Kandla, 2007 (215) ELT 220 (Tri.- Ahmd.)

(iv) C. Ashok Kumar v/s Commr. of Cus. (Export-Seaport), Chennai, 2010 (262) ELT 321 (Tri.- Chennai)

(v) Air Freight Ltd. v/s Commissioner of Customs (Airport), Mumbai, 2004 (172) ELT 229 (Tri.-Mumbai)

4.3 In the case of Express Kargo Forwarders Pvt. Ltd. v/s Commr. of Cus., Bangalore, 2002 (143) ELT 128 (Tri.-Bang.), Hon'ble Tribunal set aside penalty imposed on the main persons in-charge of the Company sitting in HQ under Section 112 (a) on the ground of negligence for want of preconcert or knowledge on their part. In the case of Unison Clearing Pvt. Ltd., 2014 (308) ELT 160 (Tri,-Del.) Hon'ble Tribunal has set aside penalty imposed on appellant under Section 112 (a), where employees were involved. Decision of Hon'ble Tribunal in the case of Neptune's Cargo Movers Pvt. Ltd., 2007 (219) ELT 673 (Tri.-Chennai) was also cited to be of the same effect.

5. On the above basis, it was submitted that penalty imposed on appellant under Section 112 of Customs Act, 1962 is not tenable and hence, the same may be quashed and set aside.

6. Department on the other hand, justified the penalty pointing out that the appellant is a specified pre-shipment inspection agency under the Handbook of Procedures (HBP) of Foreign Trade Policy, 2009-14 (FTP), engaged in inspection of metal waste & scrap imported into India in accordance with the procedure laid down. The appellant is a proprietorship concern having offices in United States of America, The Gambia and India. The officers located abroad are recruited as qualified persons, who, at the request of overseas supplier or Indian importer, as the case may be, would carry out visual inspection of the consignments of metal waste & scrap meant for import into India with reference to the requirement of HBP and FTP and based on their inspection report, the respective branch head/authorized signatory of the branch would issue the pre-shipment inspection certificate to the overseas supplier or Indian importer for

submission in accordance with the procedure prescribed in the HBP. In the normal course of business, the U. S. A. based office of the appellant issued two pre-shipment inspection certificate bearing No. UK-IN 101811-62769 (in respect of 98.520 MT of cast iron scrap that was thereafter loaded in 4 containers) and certificate bearing No. UK-IN 092611-62170 (in respect of 429.540 MT of cast iron scrap that was thereafter loaded in 17 containers) consigned to M/s. Alang Metal Exim Pvt. Ltd., India. Based on visual inspection at the time of loading & spot radiation testing using a hand held monitor carried out by London-based inspector Shri Bob Rushton at the scrap yard at Kenninghall Road, London, the U.S.A. based office of the appellant had issued the aforesaid certificates stating that the consignment did not contain any type of arms, ammunition, mines, shells, cartridges, or any other explosive material in any form, either used or otherwise. On import of the above consignments at Pipavav, M/s. Alang Metal Exim Pvt. Ltd. filed two bills of entry bearing Nos. 5144502 dated 9.11.2011 and 5423747 both dated 9.12.2011 with Custom House, Pipavav for clearance. The goods were examined by the Custom officers of Pipavav, who found 10 live bomb shells in the consignments. Accordingly, both the consignments were placed under seizure by the Custom officers and statements of importer, manager & authorized person of the appellant company, were recorded under section 108 of the Customs Act, 1962. It was clarified on behalf of the appellant that the goods were loaded at London scrap yard by grabs which lifted the scrap from big heaps and dropped it into the containers that were vertically placed with door open to sky, that containers were loaded in the presence of Shri Bob, inspector, who had carried out visual inspection after completion of 25%, 50% and 100% loading of the containers and had also checked the radiation level; that on enquiry with Shri Bob, he informed that owing to loading the scrap through grabs, shells having rusty and dusty look may have escaped his notice. On this basis, it was clarified that it was a human error and may be condoned. On 4.4.2012,

one show cause notice bearing No. VIII/10- 56/JC/0&A/2011 was issued proposing confiscation of the seized goods under section 111 (d). 1), (m) and (o) of the Customs Act, 1962 and imposition of penalty under section 112 ibid on the importer & shipping agent and penalty under section 112 & 114AA on the appellant. The appellant participated in the adjudication proceedings by way of filing a detailed reply and by attending personal hearing through authorized representative and urged upon the Ld. Adjudicating Authority to drop the proceedings initiated against the appellant. The Ld. Adjudicating Authority considered the submissions advanced by the appellant insofar as imposition of penalty under section 112 and imposed penalty of Rs. 15,00,000/- against the appellant under section 112 (b) of the Customs Act, 1962, but it dropped proposal of penalty under section 114AA. The appellant preferred appeal before Ld. Commissioner (Appeals), Jamnagar. Ld. Commissioner (Appeals) rejected the appeal filed by the appeal except for reducing the quantum of penalty from Rs. 15,00,000/- to Rs. 10,00,000/-. The learned AR thus justified imposition and quantum of penalty on the basis of reasoning of the lower authorities.

7. Learned AR while reiterating findings as contained in Order-In-Appeal, also brought to the notice of this Court para 2.3.2.2B of Hand book of procedure of the exim policy as was existing during relevant time. this para is reproduced below:-

"2.32.2B Responsibility and Liability of PSIA and Importer

(a) In case of any mis-declaration in PSIC, PSIA would be liable to pay a penalty upto Rs. 10 Lakhs (if the agency is based in India) or up to US \$20,000/- (if the agency is based in foreign country), in addition to suspension/cancellation of recognition.

(b) The importer would also be responsible for import of any material in contravention of the declaration as required under Para 2.32.2 of HBP Vol. I and would be liable to pay penalty upto Rs. 10 Lakhs."

8. Disputing the above position, the Learned Advocate for party submitted that the appellant is a resident of India. The goods in question were inspected by Shri Bob in London and the certificates were issued by the U.S.A. office on the basis of inspection report sent by Shri Bob from London. Thus, the appellant had neither inspected the goods nor issued the certificates. Therefore, the conduct of the appellant does not satisfy the requirement of clause (b) of section 112 of the Customs Act, 1962 and hence, the appellant is not liable for penalty under section 112 (b) of the Customs Act, 1962. To support this plea, the appellant placed reliance on the decision of Hon. Tribunal in the case of D. Ankineedu Chowdry v/s Commissioner of Customs, Chennai, 2004 (178) ELT 578 (Tri-Chennai), wherein, it is held as under:

"5. ...However, whether the above penalty was liable to be imposed on the appellant would depend on whether his conduct satisfied the requirement of Clause (b) of Section 112 of the Act. This clause reads as under :-

"(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....."

In order that a person is penalised under the above provision, it has to be established that he acquired possession of or was in any way concerned in carrying, removing, depositing, harbouring, keeping, concealing, selling or purchasing or in any ether manner dealing with any goods which, he knew or had reason to believe, were liable to confiscation under Section 111 of the Act. Ld. DR has harped on the expression underlined above and submitted that the appellant had dealt with the goods by associating himself with the

modus operandi of clearance of the goods. Ld. Counsel has opposed this argument. We find that no physical act of the appellant in relation to the goods in question has been brought out to justify the penalty. The expression in any other manner dealing with has to be understood ejusdem generis with the preceding words/expressions in the clause in terms of the Apex Court's ruling in Thakur Amar Singhji v. State of Rajasthan (AIR 1955 SC 504]. The Court held thus :-

"the true scope of the rule of 'ejusdem generis' is that words of a general nature following specific and particular words should be construed as limited to things which are of the same nature as those specified and not its reverse, that specific words which precede are controlled by the general words which follow."

According to the above doctrine, the meaning of the expression in any other manner of dealing with should be understood in a sense similar or comparable to how the preceding words viz. carrying, removing, depositing etc. are understood. In other words, "any other manner of dealing with the goods is also some physical manner of dealing with the goods. In the impugned order, there is no finding that the appellant physically dealt with the goods in question, nor was any allegation to this effect raised against him in the relevant show cause notice. Therefore, the provisions of Section 112(b) were not applicable to the case. It would follow that the penalty imposed on the appellant is not sustainable on facts or in law."

It was submitted that in the facts and circumstances of the case where both the events, viz. inspection of goods and issuance of the pre- shipment inspection certificates have been place outside the territorial limits of India, the decision of Hon. Tribunal in the case of C. K. Kunhammed v/s Collector of Central Excise & Customs, 1992 (62) ELT 146 (T) would squarely apply to the case. Consequently, Ld. Adjudicating Authority has erred in imposing

penalty on the appellant under section 112 (b) of the Customs Act, 1962. In the case of C, K. Kunhammed, Hon. Tribunal has observed as under:

"6. I have carefully considered the submissions made before me. So far as appellant C.K. Kunhammed is concerned, admittedly he was abroad not only at the alleged time of commission of offence but also continued to be there even later to the commission of offence and till date. Assuming for the purpose of argument that appellant C.K. Kunhammed had entrusted the gold biscuits in a foreign country, Doha that would not be an offence coming within the mischief of the Customs Act, 1962. The provisions of the Act extend only to the whole of India and not beyond India. Apart from it, the Collector of Customs & Central Excise, Cochin also has no jurisdiction under law to try a person in respect of something which was committed beyond India and in a foreign country which will not come within the mischief of the provisions of the Customs Act, 1962. I have given my anxious consideration to the plea of the learned D.R. for remitting the matter, Inasmuch as inherent want of jurisdiction and also non-applicability of the provisions of the Customs Act, 1962 go to the root of the matter, no purpose will be served by remanding this issue, as the legal position is well-settled and does not admit of any doubt or controversy. In this context I may usefully refer to Sections 3 and 4 of the Indian Penal Code where express provisions have been incorporated extending the applicability of the provisions of the IPC to any citizen of India beyond India and also the power of Indian Courts to try them for offence committed beyond India in the same manner as if such acts have been committed within India. I should like to note that similar provisions under the Customs Act, 1962 are conspicuous by their absence. Therefore, on this legal question I hold that penalty on appellant C.K. Kunhammed is not sustainable under law and the same is accordingly set aside and his appeal allowed."

It was further submitted that the lower authorities have failed to give due consideration to the specific plea advanced by the appellant that in the absence of any act or omission shown as attributable to the appellant in person, imposition of personal penalty under section 112 of the Customs Act, 1962 is not sustainable in the eyes of law. As a matter of fact, there is no evidence on record to establish that the inspection agency (owned by the appellant) had knowingly and willingly issued the certificates. On this basis, Ld. Adjudicating Authority was pleased to drop the proposal to impose penalty under section 114AA of the Customs Act, 1962. Similarly, Ld. Commissioner (Appeals) has also held in the impugned order that no evidence is found on record to establish that the appellant had knowingly,

willingly and intentionally issued the pre-inspection certificates. Therefore, having already held that there is no evidence regarding presence of knowledge on the part of appellant in issuing the certificates under consideration, Ld. Commissioner (Appeals) could not have sustained personal penalty on the appellant under section 112 (b) or 112 (a) of the Customs Act, 1962. In this case, having already held that the certificates were issued without knowledge or willingness or intention of the appellant to do so, imposition of penalty on the appellant under section 112 (b) of the Customs Act, 1962 is not sustainable in the eyes of law. It was submitted that imposition of personal penalty under section 112 (b) of the Customs Act, 1962 on the appellant who had neither inspected the goods nor issued the certificates, is mis-directed and therefore, the same was not sustainable in the eyes of law.

It was further submitted that the lower authorities have erred in failing to appreciate that personal penalty under section 112 (b) of the Customs Act, 1962 was proposed in the notice on the proprietorship firm of the appellant without even recording the statement of the appellant, who is the proprietor of the firm. Therefore, the entire proceedings are void ab initio and accordingly, the impugned order was liable to be quashed and set aside.

9. This Court has considered the adversarial submissions as above. Devoid of unnecessary details, the issue falls within the narrow compass as Commissioner (Appeals) has already dropped penalty under Section 114AA of the Customs Act, 1962, as neither the investigation nor the charge made by the department against the appellant attributed any knowledge on the part of the appellant who is the employer and approved Inspection Agency by DGFT authorities. . Shri Bob Inspector who failed to check and detect the rusty bomb shells due to his stated human error. As the material relied upon by AR indicates, the agency is subjected to discipline by D.G.F.T authorities. This Court is only concerned with penal proceeding under Section 112(a). Shri. Bob Inspector was located in London which was at the

relevant time not a territory, within the purview of penalty proceedings under Indian Customs Act, 1962, as being a person who commits any omission outside India. However, for the purposes of present proceeding this may not be a relevant consideration as the penal proceedings have been directed against the present appellant in its capacity as an employer for lack of diligence on the part of its employee and itself. The concept of vicarious liability in penal proceedings, is not completely unknown in the Customs Act proceedings, as number of such cases between CHA and its employees have been dealt with under purview of Section 117, which is in the nature of residuary penal provision, and is applicable when no other express penalty provision is available. In the instant case, this Court is concerned with penalty which was initially purposed under Section 112 without quoting any sub-clause. However, same was later confirmed under Section 112(a) of Customs Act, 1962. The Hon'ble High Court of Gujarat being a jurisdictional High Court in this context, in the matter of RAMA NAGAPPA SHETTY Vs. COMMISSIONER OF CUSTOMS as reported in 2020 (374) ELT 683 (Gju.) has held as follows:-

"18. *In view of the above dictum of law with regard to the statement recorded under Section 108 of the Act coupled with concurrent findings of fact arrived at by the adjudicating authority and the CESTAT, we are not inclined to interfere as no perversity is pointed out in such factual findings arrived at by the both the authorities. For the foregoing reasons and considering Section 112(a) of the Customs Act which provides that penalty against person 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, penalty can be imposed not exceeding the value of the goods or five thousand rupees whichever is greater. Therefore, invoking such provision would require mens rea on part of the appellant which is duly established on record." **(emphasis supplied)***

9.1 In view of the forgoing and due to a uncontested finding on record about lack of knowledge emerging both from investigation as well as Order-In-Original which is reproduced below:

para "22.3.....no evidence was found on record to establish that the Inspection Agency had knowingly and willingly issued the subject incorrect PSIC. Hence I hold that penalty under Section 114AA (sic-read as 'does not get attracted') against the Inspection Agency."

This finding was never challenged by the department and which was duly endorsed even by the Commissioner (Appeals) in para 13 of his findings. Hence, it is held that nothing has been brought on record as to show, how due diligence on the part of the employer (located miles away, from employee) is lacking, specially when it has prescribed percentage checks provided radiation detecting equipments as has been indicated by the investigation and also employed qualified persons. Considering all the above and the definite finding of the Hon'ble High Court of Gujarat, that the invoking of Section 112(a) requires *mens rea* to be established on record. This Court is of the view that penalty as imposed does not sustain both in law and in the facts of the matter.

10. In view of the above, the appeal is allowed with consequential relief of wavier of penalty under Section 112(a) as imposed. Appeal allowed.

(Pronounced in the open Court on 14.07.2023)

(SOMESH ARORA)
MEMBER (JUDICIAL)