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

REGIONAL BENCH – COURT NO. 02

CUSTOMS Appeal No. 11044 of 2018-DB

[Arising out of Order-in-Original/Appeal No MUN-CUSTM-000-COM-15-17-18 dated 07.02.2018 passed by Commissioner of CUSTOMS-MUNDRA]

Ashutosh Container Services Pvt Ltd **...Appellant**
Container Freight Station, Survey No. 169/42,
Opp. Adani Wilmar, Village-Dhrub,
Mundra,
Gujarat-370421

VERSUS

C.C.-Mundra **...Respondent**
Office Of The Principal Commissionerate Of Customs,
Port User Buld. Custom House Mundra, Mundra
Kutch
Gujarat-370421

APPEARANCE:
Shri Vikas Mehta, Consultant appeared for the Appellant
Shri Rajesh Nathan, Assistant Commissioner (AR) for the Respondent

CORAM: HON'BLE MEMBER (JUDICIAL), MR. SOMESH ARORA
HON'BLE MEMBER (TECHNICAL), C.L MAHAR

FINAL ORDER NO. A/ 12080 /2023

DATE OF HEARING:11.09.2023
DATE OF DECISION: 21.09.2023

SOMESH ARORA

Appellants are a licensed Container Freight Station licensed to operate as such for facilitating import and exports through containers. In one of the matters in their jurisdiction intelligence was gathered by Special Intelligence and Investigation Branch (SIB) Officers, Custom House, Mundra, that two Containers No. IALU 4562327 & TALU 44561001 stuffed with cosmetics items mis-declared as Baby diapers in IGM were going to be cleared from Mundra Custom House, the same was continuously tracked and monitored through EDI System after arriving at the Mundra port. It came to notice that both the containers were removed clandestinely by way of generating & producing bogus Custom documents viz. Bills of Entry, Invoice, Packing list on

16.09.2015. Taking cognizance of same, immediate action was taken and both the said containers were intercepted by the officers of SIIB, Custom House, Mundra at Palsana Chokdi, Surat, Gujarat on 18.09.2015. The said containers were found laden on Trailer No. GJ-12 BT 0492 & GJ-12 AY 8910 respectively.

1.1 Enquiries revealed that both the containers were imported in the name of M/s Season International Pvt. Ltd, having address at Venkatesh Chambers, Prescot Road, P. B. No. 714, Fort, Mumbai-400 001, (IEC No. 0494026693) as per Vessel CHICAGO, Voyage No. 002 vide IGM 2119446 (Line No. 76) dated 11.09.2015 & M/s Intec Poly Pvt. Ltd. having address at 48, Mangaldas Road, Lohar Chawl, Mumbai, (IEC 0409001851) as per Vessel Inter Mumbai, Voyage No. 041 vide IGM no. 2119407 (Line No. 14) dtd. 10.09.2015. The details of the goods as per the Import General Manifest (IGM) were declared as Baby Diapers.

1.2 On further enquiry with the driver, it was learnt that both the containers were taken out of M/s Ashutosh Container Services Pvt. Ltd. (CFS), Mundra, at around 19:05 hours & 20:00 hours on 16.09.2015. On being asked to produce the Customs clearance papers covering both the containers, the drivers produced the Consignment Note, copies of Bills of Entry No. 2564071 dated 11.09.2015 & 2569697 dated 12.09.2015, Commercial Invoice pertinent to Bills of Entry, Transport Builty & Form 402 etc. On further enquiry, both the drivers informed that containers were to be delivered in Mumbai.

1.3 Bills of Entry numbers were then immediately forwarded to SIIB Section, Custom House, Mundra by officers for further verification of genuineness of documents and after verification from ICES EDI V 1.5 system, it was found that the status for both the Bills of Entry in system showed invalid/inactive i.e. such Bills of Entry did not exist in system. It was also learnt that no Bill of

Entry had been filed in respect of both the containers and therefore documents were ingenuine. Further, both the containers laden on trailers were moved to weigh bridge for weighment of goods. The seal was found intact in respect of both the containers and seal number found as declared in respective Bills of Lading No. JEAMUN044004 dated 05.09.2015 & JEAMUN04405 dated 05.09.2015. The weighment of both the containers was done at Gujarat Heavy Bridge at P.O. Palsana, Surat and after weighment, both the containers were moved to the nearest Custom Station for further examination of goods. Hence the officers of SIIB, Custom House, Mundra informed Deputy Commissioner of Customs, ICD, Sachin, Surat vide letter dated 18.09.2015 for seeking permission to gate in both the containers and to make necessary arrangement for examination of goods.

1.4 During the course of examination of goods in containers vide panchnama dated 18.09.2015. it was noticed that the alleged bogus/fake Bills of Entry No. 2564071 dated 11.09.2015 & 2569697 dated 12.09.2015 inscribed the name of M/s Season International Pvt. Ltd., Mumbai (IEC 0494026693) and M/s Intec Poly Pvt. Ltd., Mumbai (IEC 0409001851) as importers name, Custom Broker as M/s M/s Briano Marine, PAN based CB (AETPR2783QCH001) respectively for import of goods as declared "Baby Diapers". The Seal No.012050 in Container No. IALU4561001 and Seal No. 012017 in Container IALU4562327 were found in intact condition as per the Seal No mentioned in respective Bill of Lading. The Seals of containers were then cut and goods were de-stuffed in the warehouse located at ICD, Sachin, Surat. Further examination of goods, it was found that the cartons stacked in front rows were only containing Diapers, while the cartons stacked behind the front rows were noticed containing Cosmetics of reputed brands viz. Nivea Body Lotion, Lomani Brand Deo Spray, Dove Brand Beauty Cream, Revlon Brand Colour Silk Beautiful Colour, Eskinol Natural Lemon Facial Cleanser. For detailed examination of goods by Customs, Mundra, both the containers were re-sealed with Customs Bottle Seal No. 2996 and 2997 respectively at ICD, Sachin, Surat under panchnama dated 18.09.2015 and, both the containers were escorted from ICD Sachin, Surat by the officers of SIIB on 19.09.2015 brought back to All Cargo Global Logistics Ltd. CFS, Mundra on 20.09.2015. Meanwhile, on inquiry with the staff of M/s Ashutosh, CFS, they furnished copies of Bills of Entry No. 2564071 dated 11.09.2015 & 2569697 dated 12.09.2015 and copies of Out of Charge (OOC) Order No. 2016421340 & 2016432420 in respect of both the containers. It was further ascertained that both the containers bearing No. IALU 4561001 & IALU 4562327 were arrived at Mundra port under IGM No. 2119407 dated 10.09.2015 & 2119446 dated 11.09.2015 respectively describing goods as 'Baby Diapers' and no Bills of Entry have been filed for the same and copies of Bills of Entry and Out of Charge Order furnished by the CFS staff appear to have been fabricated and the signature of Custom Officer were also found forged.

1.5 The said containers were brought back to Mundra Port and 100% examination of goods was carried out by the officers of SIIB, Custom House, Mundra vide Panchnama dated 20.09.2015 drawn at M/s All Cargo CFS, Mundra. On opening the container No. IALU 4561001, cartons stacked in the front rows only were found as baby diapers, while the rest of the cartons stacked/stuffed in except of front row of the container were found containing Cosmetics & Cigarettes and detailed inventory was as per Annexure-I to the Panchnama. Approx. 43 lakhs of Sticks of Gudang Garam Brand Cigarettes found stuffed in 298 cartoons in the said containers. Further, on opening the Container No IALU 4562327 only a few cartons stacked in the front rows were containing baby diaper while the rest of cartons were having cosmetics of reputed brand. The detailed inventory of goods is per Annexure-II to the Panchnama. Further, the said containers along with Trailer No GJ-12 BT 0492

& GJ 12 AY 8910 were handed over to M/s All cargo CFS, for safe custody. The goods containing in both the containers were seized under Section 110 of the Customs Act, 1962 under the reasonable belief that same are liable for confiscation under the provisions of Section 11 (e), (f),(j) of the Customs Act, 1962, vide seizure memo dated 21.09.2015. Various statements during course of investigation were recorded.

1.6 From the investigation conducted, evidences collected and the statements of the accused persons recorded, it was evident that Suresh Makwana, Sunil Jungi, Sanjay Patyane, Linesh Rane, Nilesh Chavan and Arif Mohammad Shaikh all were knowingly concerned in this organized smuggling of cosmetics and cigarettes by way of filing bogus Bills of Entry and further clearing the same fraudulently resulting into huge loss of government revenue. They had cleared totally 18 containers from Mundra Customs by adopting the same modus operandi the details of which is given below:

Sr. No	Bogus Bills of entry	Bogus BE date	Container No.	Desp. Of Goods declared in bogus bill of entry	CFS from where containers wre removed	Declared Assessable Value in Bogus BE (Rs.)	Actual Market Value (Rs.)	Decl. Duty in Bogus B/E (R.s)
1	6223981	23.07.2014	FCIU3552493 (20)	Coco Powder	Ashutosh CFS Mundra	825931	Not Known	472449
2	6491570	20.08.2014	CRXU9828946 (40)	Coco Powder	Exim Yard APSEZ, Mundra	825931	Not Known	472449
3	7907097	06.01.2015	CRSU1271404	Cold Drink	Mundra CFS, Mundra	1500159	Not known	432823
4	8256797	11.02.2015	LALU4563175 (40)	Tenderizer For sea food	Ashitosh CFS Mundra	1500159	Not known	432823
5	8963079	18.04.2015	LALU2244538 (20)	Tenderizer For sea food	Ashitosh CFS Mundra	1500102	Not known	414809
6	9255071	14.05.2015	GESU5913922 (40)	Spare parts	Ashitosh CFS Mundra	1500102	Not known	414809
7	9513977	15.05.2015	LALU2256375 (20)	Tenderizer For sea food	Ashitosh CFS Mundra	1500102	Not known	414809
8	9527514	19.06.2015	LALU2120394	Pencils & crayons	Ashitosh CFS Mundra	983812	Not known	250165
9	9527596	19.06.2015	CLHU2333194 (20)	Tenderizer For sea food	Ashitosh CFS Mundra	1081021	Not known	311895
10	9983789	22.07.2015	SEGU1092633 (20)	Footwear of plastic sole	Ashitosh CFS Mundra	491906	Not known	125083

11	2182970	10.08.2015	PAAU2001137 (20)	Baby diaper	Ashitosh CFS Mundra	491906	Not known	125083
12	2257947	17.08.2015	LALU2127188	Containing gypsum board	Ashitosh CFS Mundra	491906	Not known	125083
13	2255579	17.08.2015	LALU2127188 (20)	Tenderizer food	Ashitosh CFS Mundra	1070318	Not known	311895
14	2405907	28.08.2015	LALU4561402 (40)	Baby diaper	Ashitosh CFS Mundra	1397048	Not known	125083
15	2358689	25.08.2015	LALU2127423 (20)	Tenderizer for sea food processing	Ashitosh CFS Mundra	1490572	Not known	O (by inserting notify Benefit)
16	2448482	02.09.2015	LALU4561526 (40)	Calculating machine	Ashitosh CFS Mundra	1356406	Not known	229734
17	2564071	11.09.2015	LALU4562327 (40)	Baby diaper	Ashitosh CFS Mundra	1460577	90,21,164	1,25,083/-
18	2569697	12.09.2015	LALU4561001 (40)	Baby diaper	Ashitosh CFS Mundra	1540257	3,81,08,436	1,55,082/-

1.7 It is pertinent to mention here that the previous 16 consignments were cleared under the same modus operandi, the contents are to the department.

1.8 In view of the foregoing, SCNs was issued to the present appellants, who are container freight station at Mundra, proposing why penalty should not be imposed on them under Section 112A of Customs Act. After considering various submissions including of the appellant which were as follows for the present appellants (exclusively):

> ***"Defence Reply filed by M/s Ashutosh Container Service Pvt. Ltd., (CFS), (Noticee No.07) dated 23.08.2016.***
>
> *53.1 M/s Ashutosh Container Services P. Ltd vide their reply dated 23.08.2016 submitted that the employees of CFS have followed the prevailing instructions prescribed by the jurisdictional Custom House at the material time. Unfortunately, the employees as well as the CFS has fallen a collective victim to the fraud perpetrated by the miscreants; they invited attention of the Public Notice No. 24/2007 dated 31.05.2007 ("Public Notice") issued by the then Commissioner of Customs, Kandia, laying down the procedure for Customs clearance at the CFS, considering that at the time of commencement of CFS operations, Mundra was under jurisdiction of Custom House, Kandla and argued that the SCN does not allege deviation from the procedures laid down in the above Public Notice; that the entire basis of the Show Cause Notice is a fraud committed by the miscreants; that the bills of entry were fabricated and signatures of officers were forged. Consequently, the employees*

of CFS before whom these forged papers were tendered took them for real and acting as per Public Notice as well as verbal instructions of Custom officers posted at the Custom House from time to time, they have ensured that after completion of delivery of imported goods, the duplicate copy of all the bills of entry is invariably sent to Custom House for post-clearance verification. Accordingly, the duplicate copy of all the bills of entry, including the incriminating bills of entry listed in the SCN, were unfailingly submitted to Custom House, Mundra, every month for conducting post-clearance verification. The regular submission of the details along with copies of bills of entry to the Custom House by the CFS is sufficient to establish that employees of CFS were not careless in discharging their duty; that the Custo Brokers, whose names were mentioned in the fabricated and forged bills of entry, are duly Briano Marine as as Power of Attorney holder of M/s. Venjoh Logisties Pvt. Ltd., in their registered with Custom House, Mundra. These facts were duly admitted by the Proprietor of M/s. respective statements recorded during investigation. Therefore, it cannot be said of the employees of CFS that they had given failed to check the requirement and the status of "out of charge" order given on any particular bill of entry from ICEGATE and the guidelines containing steps to be taken in the event where ED! system is not functional or the status of any particular bill of entry is not updated or not displayed, was introduced for the first time by Custom House, Mundra vide Public Notice No. 27/2015 issued on 28.09.2015. Owing to this, they submitted that employees of CFS who were following the procedure laid down vide earlier Public Notice issued in 2007 and were providing Custom House with details of all bills of entry where out of charge order was given and delivery was completed, for post-clearance verification on a regular basis, that they cannot be faulted; that the allegations of careless attitude, etc., levelled against CFS are also not sustainable on the ground that the CFS have deployed strictest possible measures to keep record of not only all the transactions involving delivery of imported goods but also of the persons involved in such transactions; that bills of entry and all other documents presented to CFS for taking delivery were retained by the CFS. Not only this, the CFS also followed the practice of collecting particulars of vehicle (truck) registration number, driving license details, photographs of vehicles & drivers, contact numbers of drivers, etc. giving the delivery. The CFS is equipped with CCTV cameras and like with all others, the transactions involving the incriminating documents were also recorded; that on 21.09.2015, when Custom officers of Mundra visited the CFS and informed that no bills of entry bearing the details appearing in the documents akin to the bills of entry presented to the CFS were available on EDI system/record of Custom House, Mundra, *the CFS was able to immediately provide the entire set of documents including those bearing the original signatures and stamps of the Custom officers of Mundra, based on which delivery was given. The CFS also provided the details/photographs of vehicles (trucks), truck drivers, CCTV footage, etc. and it is a matter of record that information as well as CCTV footage, etc. provided by the CFS on 21.09.2015 has proved to be of immense help to the Department in locating and intercepting the containers with imported goods inside. These inputs also helped the Department to apprehend the culprits and arrest them; that the allegation regarding carelessness, etc. on the part of employees or CFS are far from truth. In view of above, they stated that they are not liable for penalty under the provisions of Section 112 (a) of Customs Act, 1962."*

1.9 Learned Commissioner of Customs House, Mundra vide following findings disposed off of appeal imposing penalty under Section 112A, holding the appellant vicarious liable for omission of the employees as follows:

Penal action proposed against Container Freight Stations namely M/s Ashutosh Container Services Pvt Ltd (Noticee No.08), M/s Exim Yard (CFS) (Noticee No.09) and. M/s Mundhra Container Freight Station Pvt Ltd. (Noticee No.10)

1.10. As per the facts of the case, the clearances of the containers were taken on 16 occasions (including the 2 containers which subsequent dicarance were seized) from M/s Ashutosh CFS and 1 container each from Mundra CFS & Exim yard of APSEZ, Mundra by producing forged/fake documents by the conspirators. The main defense of all the 3 CFSS is that they complied with all the requirements prescribed in para (5) of Public Notice no. 24/2007 dated 31.05.2007 issued by the Kandla Custom House (when Mundra port was also a part of Kandia Customs). As per para (5) of the Public Notice, the importer/CHA has to submit the duly signed copy of out of charge bill of entry to the custodian for the delivery of the goods. In the instant case forged/faked copy of out of charge bills of entry were produced before the concerned persons of these CFSS for taking the delivery. In normal course if the custodians complied with the procedure as mandated by the Public Notice, they cannot be charged with allegation of making the goods liable for confiscation under provision of section 111 (j) of the Customs Art 1962. Only after detection of the instant case, it was mandated by Public Notice No.27/2015 dated 28.09.2015 that CFSs shall check status of the Bill of Entry on ICEGATE website before issuing the gate pass for exit of any import cargo.

1.11 I further find that the employees of Mundra CFS and Exim Yard APSEZ Ltd. (from where one solitary container each was removed on the strength of forged/faked documents) in their statements mentioned that procedure as mandated in Public Notice no. 24/2007 referred above has been followed by them. There is no inculpatory statement of their employees indicating any omission in observance of the procedure at these places. Therefore, M/s Mundra CFS & Exim yard of APSEZ cannot be saddled with a penalty under section 112 (a) of the Customs Act, as there is no omission or commission on their part.

1.12 However, in the case of M/s Ashutosh CFS, I find that in addition to the procedure Verifying the status of the bill of entry on ICEGATE website as discussed in para 20 of the Show cause notice. It is stated in the para that as per statement of Vinod Lakhani, Junior Executive(Documents) at Ashutosh CFS recorded under Section 108 of the Customs Act, 1962. he has stated that during the verification of document pertinent to the bill of entry under which clearance was taken, he noticed the name of custom broker for the first time and he has some doubts & on verification of the genuineness of the bill of entry through ICEGATE, it displayed "No record Found", but he allowed the clearance as the document produced appeared to be genuine and many times

ICEGATE show such type of error due to slow server. The reason given by the employee in allowing the exit of import cargo even after noticing on verification of genuineness of bill of entry from ICEGATE that "NO RECORD FOUND" is not at all convincing, as in a situation of slowness of server, sites display error but never display the wrong message as "NO RECORD FOUND". Such a message will be displayed only if wrong bill of entry number is entered or bill of entry is not filled. Therefore, if he had noticed such message on the screen, it was his duty to ask customs officer concerned and get the documents verified. But in their submissions, the said CFS, silently ignoring all such aspects, has disowned the responsibility by simply stating that as the SCN admits the bill of entry were fabricated and signatures of officers were forged, the employees of CFS before whom these forged papers were tendered took them for real and, acting as per Public Notice as well as verbal instructions of customs officers posted at the Custom House from time to time and they have ensured that after completion of delivery of imported goods, the duplicate copy of all the bills of entry was in variably sent to the Custom House for post clearance verification. But they have no explanation about the callous attitude adopted by their employees in spite of doubting the authenticity of the documents as not available on site of ICEGATE and allowed the containers to be moved out by the unauthorized persons. Hence, their submission that they were careful in discharging their duties is completely wrong. Being the custodian of import consignment, they are legally bound to ensure that standard operating procedure followed at their CFS is followed meticulously which included verification from ICEGATE even before issue of PN No. 27/2015 of 28/09/2015. Moreover, on the basis of such forged/faked documents clearances have happened from their CFS not once or twice but 16 times which gives credence to belief that everything was not normal in functioning of CFS and they were not following the SOPS set by themselves. Such glaring omissions have led to grave consequences of clearances on forged documents by unscrupulous elements. Although there is no evidence forthcoming from the case records that the management of the Ashutosh CFS was involved with the conspirators or was in knowledge of lapses on part of their employees, but the CFS cannot escape from the vicarious liability arising due to glaring omissions of their employees.

1.13 As regards the request of cross examinations of their own employee made by M/s Ashutosh CFS I find that the employee has only stated the standard procedure followed by him in normal course and has not made any inculpatory statement against the CFS. Therefore, no useful purpose would be served by allowing cross examination. There are plethora of judgments stating that requirement for cross examination in quasi-judicial proceedings has to be examined in the facts of the case and it is not mandatory to allow all such requests. In this regard, I refer to CESTAT order in case of Shally Thapar Vs. Commissioner of Customs reported in 1993(64) ELT 31(Tribunal) wherein, the Hon'ble tribunal by citing the Supreme Court order in AIR 1997, SC 1627 has held that there is no hard and fast rule in quasi-judicial proceedings in allowing cross examination and it is to be determined depending on the circumstances of the case. In case of Commissioner of Customs, Chennai Vs. D. Bhoormull, reported in 1983 (13) ELT 1546 (SC), the Hon'ble Supreme Court has held that the provisions of the Evidence Act as well as Code of Criminal Procedure, in terms, are not applicable to the adjudication proceedings. Further, Hon'ble Madras High Court, in the case of K. Balan Vs. Govt. of India, reported in 1982 ELT (386) Madras, had held that right to cross examination is not necessarily a part of reasonable opportunity and depends upon the facts and circumstances of each case. It largely depends upon the adjudicating authority, who is not guided by the rules of evidence as such but who must offer such opportunity to the party concerned as would assure him proper opportunity to defend himself It would, however, be in the interest of justice and fairness to the parties, that the opportunity to cross-examination is given wherever it is relevant, justified and genuine and where it is not for protracting the proceeding, as held by the Hon'ble Tribunal in M.P.Jain Vs. CCE 1988 (37) ELT 577 (Trib). Similarly, in the case of Shivom Ply-N-Wood Pvt. Ltd vs. Commissioner of Customs & Central Excise, Aurangabad, reported at 2004 (177) ELT 1150 (Tri. Mumbai), Hon'ble Tribunal, in their order, in para 6, has held as under:

> *"6......Their contentions that principles of natural justice are violated inasmuch as cross-examination of persons, whose statements are relied upon, has to be weighed in the light of the facts that all the statements relied upon were placed before them. They had all the opportunity to demolish these statements during the proceedings. cross-examination cannot be claimed as matter of right in departmental a proceedings."*

1.14 Further, the Hon'ble Tribunal in the case of M/s. Sridhar Paints Co. Pvt. vs. Commissioner, Customs & Central Excise, Hyderabad-III, reported in 2006 (198) ELT 514(Tri.Bang.), has held that "the denial of cross examination of witness is immaterial in case of confessional statements. In the said case, it was charged by the party that the adjudicating authority had denied the right of the appellant to cross-examine the witnesses and the investigating officers. In the said case the Tribunal, in light of following various case laws, cited by the Adjudicating Authority, has held that there was no violation of principal of natural justice by denying of cross-examination of witnesses/officers."

1.15 The Hon'ble Tribunal while passing the aforesaid order, has relied upon the decisions in case of (1) Suman Silk Mills Pvt. Ltd. v. CCE, Baroda reported in 2002 (142) ELT 640 (Tri.- Mumbai) No infraction of principles of natural justice where witnesses not cross-examined when statements admitting evasion were confessional. (ii) Anil Das v/s CC, New Delhi reported in 2002 (141) ELT 135 (Tri.-Del.) - Non-allowance CEOS voming on er appellants when confessional statement made by themselves does not amount to violation of rule of natural justice and (1) Beauty Dyers v. CCE, Chennai reported in 2001 (136) ELT 339 (Tri.-Chennai) - Non- availability of witnesses for cross-examination not a fatal flaw when the findings are based on document about which there is no credite explanation and nothing on record to show statements not voluntary or effectively retracted within close proximity of the time these were detained.

1.16 In light of the discussions on above, I distinguish the conduct of M/s Ashutosh CFS from other 2 CFSS and hold that M/s Ashutosh CFS by their acts of omissions, have rendered the goods liable for confiscation as per provisions of Section 1110) of the Customs Act, 1962 and thus they are liable for penalty under the provisions of Section 112 (a) of the Customs Act, 1962.

1.17 Accordingly, learned Commissioner Customs imposed penalty of Rs. 50 Lakh on the appellant under Section 112A of the Customs Act, 1962. The Learned Counsel for the party submitted that the Section 112A does not permit vicarious liability to be placed upon employer for any lack of diligence of employer, specially when such employees has not even being made party to the SCN. In any case there was no wrong doing even on the part of employee as he was as diligent compare to employees and employer involved of 2 more container freight station who did the same and checked status on ICEGATE as per statement dated 26.11.2015 of Ritesh Devda and statement dated 26.11.2015 of Shri Mukesh Sharma (both employees of Mundra and A.P SEZ resp) and still have been let off by commissioner along with CFS, despite being similarly placed. Further they have been definite findings that there was no inculpatory statement on the part of the employees, therefore Section 112A which requires mens rea could not have been attracted to impose penalty. In this regard, he seeks to place reliance on the decision of Hon'ble High Court of Gujarat in the matter of Rama Nagappa Shetty as reported in 2020 (10) TMI 741 and as followed by (CESTAT-Ahmd.) as reported in 2023 (7) TMI 642 (CESTAT-Ahmd.) in the matter of Sandeep Garg & Company.

1.18 He also pleaded that Commissioner while disallowing cross examination has clearly pointed out that there was no inculpatory statements from the employee against the employer and in the absence of no other self culpatory statement, mens rea of present appellant was not on record and in the absence of such mens rea did not allow the Learned Commissioner to impose any penalty under Section 112A against the present appellant. Apart from above arguments, Learned Counsel also argued that in instant case Learned Commissioner has exonerated the staff and other CPS where such fabrication of bill of entry and documents were pressed into use. Despite the employees making similar check in the computer system about whether the hard copy of documents were present in the system. Neither the employers nor employees have been subjected to any penalty, but employee in this case who had also checked in the computer system, where it was found a message “no documents found” and believing the same to be system failure, on the basis of hard copy of documents allowed containers to clear, has been hand-picked for differential treatment of their employers been subjected to penalty.

2. As against this AR mentioned relied upon the decision of Commissioner of Customs and also on the decision as reported in 2022 (382) ELT 145 (S.C) in the matter of M/s. Munjal Showa Ltd as decided on 23.09.2023, as reported in final order No. 50460-50461/2023. He also reiterated the finding of the lower authority.

3. Considered. We find that in the instant case law of M/s. Munjal Showa Ltd, has no relevance as the same was pronounced, when import was made

under forged license and purchaser in good faith wanted to benefit on the strength of such purchase. Same is not the situation here. We also find that in absence of any statement bringing on record either knowledge of employee or of CFS, penalty under Section 112A does not get attracted, as decided by the Hon'ble High Court of Gujarat in the matter of M/s. Rama Nagappa Shetty reported in 2020 (10) TMI 741 and as followed in the matter of M/s. Sandeep Garg reported in 2023 (7) TMI 642 (Tri.-Ahmd). Accordingly, we hold that mens rea not having been established in the instant matter, penalty imposed under Section 112A of Customs Act, 1962 is not sustainable.

4. Appeal is therefore allowed with consequential relief.

(Pronounced in the open Court on 21.09.2023)

(SOMESH ARORA)
MEMBER (JUDICIAL)

(C.L MAHAR)
MEMBER (TECHNICAL)

PALAK