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

REGIONAL BENCH – COURT NO. 01

Customs Appeal No. 10056 of 2021-DB

[Arising Out Of OIA-MUN-CUSTM-000-APP-101-103-20-21 Dated-28/10/2020 Passed By Commissioner of CUSTOMS-AHMEDABAD)

SANYO CERMICS **.....Appellant**

National Highway 8a Lalpur, Post Box 389
Morbi, Morbi, Gujarat

VERSUS

C.C.-MUNDRA **.....Respondent**

Office of the Principal Commissionerate of Customs,
Port User Buld. Custom House Mundra, Mundra
Kutch, Gujarat, 370421

WITH

- **Customs Appeal No. 10054 of 2021 (KANTIBHAI RAMJIBHAI JETPARIYA)**
- **Customs Appeal No. 10055 of 2021 (MEGHJIBHAI RAMJIBHAI JETPARIYA)**
- **Customs Appeal No. 10127 of 2021 (C.C-MUNDRA VS. SHRI KANTILAL RAMJIBHAI JETPARIYA)**
- **Customs Appeal No. 10128 of 2021 (C.C-MUNDRA VS. MEGHJIBHAI RAMJIBHAI JETPARIYA)**
- **Customs Appeal No. 10129 of 2021 (C.C-MUNDRA VS. SANYO CERMICS)**

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
HON'BLE MEMBER (TECHNICAL), MR. C.L.MAHAR

FINAL ORDER NO. A / 10379-10384 /2024

DATE OF HEARING:26.09.2023

DATE OF DECISION:09.02.2024

SOMESH ARORA

The three appeals by the Appellant-Parties have been made are as follows:

Sl No	Appeal No.	Appellant	Penal provision Section of Customs Act, 1962	Penalty imposed by Ld. Adjudicating Authority	Penalty sustained by Ld. Commissioner (Appeals)
1.	C/10056/2021	M/s. Sanyo Ceramics	114 (i)	50.00 lakh	3.00 lakh
			114AA	50.00 lakh	3.00 lakh
			117	1.0 lakh	0
2.	C/10055/2021	Shri Meghijibhai Jetpariya, Partner	114 (i)	50.00 lakh	1.00 lakh
			114 AA	50.00 lakh	1.00 lakh
3.	C/10054/2021	Shri. Kantibhai Jetpariya, Partner	114 (i)	50.00 lakh	1.00 lakh
			114 AA	50.00 lakh	1.00 lakh

The department on the other hand has made three appeals seeking setting a side of impugned order for inadequate penalties.

2. M/s. Sanyo Ceramics, Morbi is a partnership firm engaged in manufacture of sanitary ware had filed 02 shipping bills (SB No. 5692328 dated 20.06.2018 for container No. DFSU 2147308 and 5571343 dated 14.06.2018 for container No. PCIU 1223252, both filed under MEIS scheme) with Custom House, Mundra for export of Ceramic Sanitary ware Washbasin to UAE and Vietnam respectively.

3. DRI apprehended both the containers at Mundra port and found red sanders logs (which is prohibited for export from India) stuffed inside.

4. Shri Meghjibhai Jetpariya, Partner of M/s. Sanyo, inter alia, stated before DRI that he had agreed to export ceramic sanitary ware at the instance of one Shri Deepakbhai Kotak, who had visited their factory and requested to supply the same to his nephew who was based in UAE; that he agreed to file the Shipping Bills in the name of his partnership firm M/s. Sanyo believing the version of Shri Deepakbhai Kotak that he did not have IEC and allowed Shri Deepakbhai Kotak to appoint Custom House Agent, transporter and shipping line, under a bona fide beliel' that they would get more business.

5. Shri Kantilal Jetpariya, the other partner of M/s. Sanyo, inter alia stated before DRI that he looked after moulding, designing, packing, sorting of sanitary ware and does not deal with sale and export (which was looked after by Shri Meghjibhai).

6. A detailed investigation by DRI revealed that both the containers that were stuffed with sanitary ware and self sealed in the factory of M/s. Sanyo were taken to a plot enroute Mundra port and declared goods were substituted by red sanders logs by Shri Deepak Kotak, Shri Rajendra Shah, Shri Devabhai Rabari and Shri Kuldeep

7. SCN was issued to M/s. Sanyo and their partners, namely, Shri Meghjibhai Jetpariya and Shri Kantilal Jetpariya proposing penalty under Section 114 and 114AA of Customs Act, 1962 the on the basis of allegations contained in the show cause notice and separate penalty under Section 117 was also proposed on M/s. Sanyo.

8. Ld. Adjudicating Authority imposed penalty on M/s. Sanyo under Section 114 (i) and 114AA on the strength of following findings:-

"17.06 None of the partners of the exporter took care at any stage to monitor the cargo being transported in their name..whether knowingly or unknowingly they have permitted blatant use of their self-sealing permission and once undeclared goods such as prohibited Red Sanders Logs were detected in their consignment, they cannot escape from their liabilities under Section 147.."

8.1. Ld. Adjudicating Authority imposed penalty on Shri Meghjibhai and Shri Kantibhai, the 02 partners of M/s. Sanyo under Section 114 (i) and 114 AA of Customs Act, 1962.

"17.12 In this regard, it is to state that once a scam as serious as attempt to export the prohibited good viz. Red Sanders Logs is detected and his involvement in the scam cannot be ruled out as he has allowed blatant misuse of the self sealing permission issued to the exporters of which he was an active partner, mens rea stands established and he becomes liable to penalty under Section 114 (1) and 114AA ibid."

9. As against this, on appeal, Ld. Commissioner (Appeals) found:

"7.5 Thus the adjudicating authority could not establish the direct involvement of the appellant in the attempt to export contraband red sanders in the impugned order."

9.1 Despite above, Commissioner (Appeals) sustained penalty (by reducing it) by observing that:

"7.6 The findings about the role of other two appellants, the partners of the firm, are identical. The adjudicating authority also had not given any findings about the direct involvement of the three

> *appellants. Moreover, at paragraph 9.2 and 9.3 of the show cause notice, it is clearly mentioned who were the culprits and ow they have diverted the trailer. In the circumstances, when the adjudicating authority could not establish direct involvement of the appellants in the alleged attempt to export red sanders, and also when the adjudicating authority could not state which specific condition of self-sealing permission that was not observed by the appellants, there is no justification for imposing such a huge penalty on the three appellants. However, at the same time, the fact remains that the goods and the container in which the goods were stuffed were used for the attempt to illegally export the prohibited red sanders and hence they cannot be absolved completely from the penalty provisions provided in the statute. In view of the above, the penalties under Section 114(i) and under Section 114AA need to be reduced on each of the appellants to meet the ends of the justice..."*

10. Feeling aggrieved by the order, appellant parties have filed present appeal pleading, inter alia, that penalty on M / s Sanyo and their partners was imposed under Section 114 (i) and 114AA of Customs Act, 1962 based on findings as vague as "knowingly or unknowingly", their "involvement in the scam cannot be ruled out", no direct involvement, etc. and have been upheld by Commissioner (Appeals) despite holding that direct involvement of appellants was not established.

11. In this regard, reliance was placed on Final Order No. A/10512-10517/2023 dated 11.07.2023 (copy enclosed) passed by this Tribunal in the case of Eden Overseas setting aside penalty imposed on the appellants under Section 114 (i) of Customs Act, 1962 by holding that:

> *"A plain reading of the Section clearly implies that there has to be active knowledge or any act or omission before penalty under Section 114 (i) can be imposed. In these circumstances, we find no*

merit in the impugned order insofar as it relates to imposition of penalty on these appellants. The appeals are allowed."

11.1 By relying upon the above decision, it was prayed to set aside the penalty imposed on the appellants under Section 114 (i) of Customs Act, 1962.

11.2 Penalty imposed under Section 114AA of Customs Act, 1962 was pleaded not tenable in the light of the fact that no clinching evidence was cited to satisfy the basic ingredients of Section 114AA, i.e. "knowingly or intentionally". On the contrary, penalty was imposed based on vague observations and findings and confirmed despite noting that involvement was not established.

12. Appellant party thus aggrieved has prayed to allow all the three appeals, with consequential relief.

13. As against this, department finding penalties having been inadequately imposed has in its appeals sought setting aside of the order-in-appeal in the light of grounds based primarily on finding in Order-In-Original.

14. We have considered the rival submissions and facts available on record M/s. SANYO CERAMIC is a partnership firm engaged in manufacturing and export of sanitary ware and Shri. Meghijibhai Jetpariya and Shri. Kantibhai Jetpariya are the partners of the firm. They had undertaken export after getting orders through Shri. Deepakbhai Kotak who informed that his nephew with Company name M/s. Royal Flooring & Sanitary Trading, U.A.E needed some sanitary ware from India. On his selecting some designs of his choice a Performa invoice was prepared for him to the forwarded to his nephew in Dubai. As per the terms, the Logistic Company M/s. DSK Logistics was chosen by Shri. Deepakbhai for transportation and the CHA was allowed to be used by Shri. Meghijibhai as his own. The empty container came on

14.06.2018 and was loaded in the afternoon and thereafter loaded container after sealing as per RFID seal and taking photographs was allowed to move forward for export from factory around 6 pm on 14.06.2018 along with documents. Similarly, another container was stuffed and left on 20.06.2018. That payment from exporters were duly received through NEFT by them as exporters. It turned out Shri. Deepakbhai Kotak could not be traced and that he left without any trace, once he came to know that the container was intercepted by Customs department. Shri. Sanjay Sharma who was stated to be the kingpin in collusion with Shri. Deepakbhai was instrumental too made good his escape. Shri. Kuldeep was the transporter in the matter and was instrumental in diverting the trucks with loaded containers and replacing the declared goods with red senders.

14.1 It is Appellant-party’s case, which is not disputed in the Order-In-Original that the sealed containers stuffed with declared goods had actually left the factory of the appellants and change of cargo enroute happened at a plot at the behest of Shri. Kuldeep. They are no incriminating or inculpatory statements as against M/s. SANYO CERAMIC, Shri. Meghijibhai Jetpariya and Shri. Kantibhai Jetpariya. The sustained penalties which have been considerably reduced by the Commissioner (Appeals) were imposed under Section 114(i) and 114AA. However the Commissioner (Appeals) while not attributing any involvement of the appellants firm and its partner or their knowledge has still upheld token penalty under Section 114(i) and 114AA in the present instance. He, however, has done away with the penalty under Section 117 as the same being residuary penalty is imposable when no other penalty provision is available for breach of specific provisions. In the present instance, we find that in the absence of any admission and knowledge about the offending goods penalties under Section 114(i) and 114AA cannot be imposed and that too on the basis of incomplete investigation. There is total lack of investigation on the aspects of who broke the seals on the plot enroute and how they got substituted and where have the substituted goods gone. Main culprits are still at large.

14.2 In view of specific imputation by the department that Shri. Kuldeep driver of the trailer at the behest of Devabhai Ranabhai Rabari and on his instruction brought the sealed container at the empty plot and had replaced the contents which were Washbasin in the container with red senders logs on the way to the port, it becomes clear that not only there was no knowledge on the part of partners of M/s. SANYO CERAMICS and no admission, but also they were cheated by Shri Devabhai and his set of people, most of whom are still at large. Even otherwise going by principle of preponderance of probability, it is highly unlikely and improbable that if M/s. SANYO CERAMIC or its partners were conniving in the matter then why they would seal all Washbasin at their factory premises and then with their knowledge same loaded containers would have gone to an empty plot, where all infrastructure to replace, (as per imputation in para 'T' of the show cause notice) was available. If M/s. SANYO CERAMIC and its partners were conniving in such offending goods, they would have in all probability introduced such goods in the container in their factory premises only. The factum of all genuine exports in the past by M/s. SANYO CERAMIC supports the view that they were victim of the fraud. Exporters earning precious foreign exchange cannot be allowed to be victimised and still further penalised. The lack of knowledge brought on record by the Commissioner (Appeals) in his findings is supported in evidence not only by various statements but also circumstantial evidence. The incomplete investigation coupled with all above narrative does not justify imputation of malafide and penalties under Section 114 (i) and Section 114AA. The reasoning of the Commissioner to that extent is not well founded for the imposition of penalties which require malafide and unconditional knowledge of offending goods. Department has failed to point out as to how sealing process was found to be lacking and that engaging of any transportation is not an option available to exporter of goods in sealed container. A onetime engagement of a transporter does not make him an employee, even otherwise. Employer cannot be held responsible for penalty under Section 117, as held in Amit Rajkumar Singhaniya Vs. Commissioner as reported in 2019 (368) ELT A348 (Tri.-Mum.). We, therefore, find that penalty under Section 114 (i) and under 114AA as imposed by the Commissioner is liable to be set aside. in view of the our findings, even penalty under Section 117 too cannot imposed on the firm, as required by the department in its appeal as same requires existence of a provision in the Customs Act, 1962, the violation of which has been committed and for which no specific penalty exists. The show cause notice of the department seeking imposition of penalty under other section, defies such situation. We rely on the decision as reported in 2017 (357) ELT 1239 (T. All.) in the matter of C.C., Ghaziabad Vs. Ruby Impex in support of above view. Penalty thus under Section 117 cannot be imposed as rightly held by Commissioner (Appeals).

15. In view of the foregoing, appellant party's appeals are allowed and the department's appeals are dismissed. Ordered accordingly.

(Pronounced in the open Court on 09.02.2024)

(SOMESH ARORA)
MEMBER (JUDICIAL)

(C.L. MAHAR)
MEMBER (TECHNICAL)

Prachi