

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

REGIONAL BENCH-COURT NO. 3

Customs Appeal No. 12728 of 2018 - DB

(Arising out of OIO-MCH-PR-COMMR-PVR-37-2015-16 dated 01/04/2018 passed by Principle Commissioner Customs, Excise and Service Tax-MUNDRA)

Rajesh Lihala**Appellant**
C/o Dashmesh Chs Ltd.,
N. Dutta Marg. Four Bunglow, Andheri (w),
Mumbai, Maharashtra

VERSUS

Commissioner of Customs –Mundra**Respondent**
Office of the Principal Commissionerate of Customs,
Port User Buld. Custom House Mundra, Mundra
Kutch, Gujarat- 370421

WITH

Customs Appeal No. 12348 of 2018 – DB

(Arising out of OIO-04-05-COMMISSIONER-2015 dated 16/07/2015 passed by Commissioner of Central Excise, Customs and Service Tax-JAMNAGAR(PREV))

Vinay Singh**Appellant**
A-wing, 303, Green Field,
Lokhandwala Complex, Andheri West,
Mumabi, Maharashtra

VERSUS

Commissioner of Customs –Mundra**Respondent**
Office of the Principal Commissionerate of Customs,
Port User Buld. Custom House Mundra, Mundra
Kutch, Gujarat- 370421

APPEARANCE:

Shri Hardik Modh, Advocate for the Appellant
Shri Rajesh Nathan, Assistant Commissioner (AR) for the Respondent

**CORAM: HON'BLE MEMBER (JUDICIAL), MR. RAMESH NAIR
HON'BLE MEMBER (TECHNICAL), MR. C L MAHAR**

Final Order No.11513-11514/2024

DATE OF HEARING: 07.03.2024
DATE OF DECISION: 05.07.2024

RAMESH NAIR

The above referred appeals have been filed against the impugned Order- in-Original No. MCH/PR.COMMR/PVR/37/2015-16 dated 30.03.2016 whereby the Respondent imposed penalties upon Shri Rajesh Lihala,

Chairman of M/s. Fourcee Infrastructure Equipment Pvt. Ltd. (hereinafter referred to as "the Company") and Shri Vinay Singh, Managing Director of the Company under Sections 112(a) and 114AA of the Customs Act, 1962. The Respondent imposed penalties upon the Appellants on the premise that the Company wrongly claimed benefit of exemption Notification No. 104/94- Cus dated 16.03.1994 which have been duly accepted by the Chairman and Managing Director of the Company in their statements recorded during the course of inquiry. It was held that containers imported by the Company under Notification No. 104/94-Cus dated 16.03.1994 (hereinafter referred to as "the said Notification") was required to be re-exported within a period of 6 months from the date of import. As the Company failed to re-export the imported containers within a period of 6 months, they violated provisions of the said Notification and therefore, the Company was required to pay Customs Duty whereas the Appellants were required to pay penalty under the provisions of Section 112(a) and 114AA of the Customs Act. The Respondent held that Shri Rajesh Lihala being the Chairman and Shri Vinay Singh being Managing Director were involved in day-to-day activities and both were aware about rendering the goods liable for confiscation under Section 111(m) and 111(0) of the Act. It was held that both the Appellants knowingly indulged in the acts of procurement of ISO tank containers duty free wrongly. By their acts of commission and omission, they rendered the goods liable for confiscation and thereby, liable for penalties under 112(a) and 114AA of the Customs Act.

2. Shri Hardik Modh, Learned Counsel appearing on behalf of the appellant made following detail submission:-

**I. DELAY OCCURRED ON THE PART OF REVENUE AUTHORITY
CANNOT PREJUDICE THE RIGHT OF THE ASSESSEE TO
DENY BENEFIT ACCRUED IN FAVOUR OF THE COMPANY:**

1. Notification No.104/94-Cus dated 16.03.1994 allows the importer to import containers of durable in nature without payment of Customs Duty subject to the following conditions that:

- (i) The importer should execute a bond in such a form and for such amount as may be specified by the Assistant Commissioner of Customs;
- (ii) The imported containers should be re-exported within a period of 6 months from the date of their imports;

The Notification provides that the Assistant Commissioner can extend the period of 6 months if sufficient cause is shown for further period as deemed fit. The Notification further provides that in case, the importer is required to pay duty leviable thereon in the event of importers failure to re-export the goods within a period of 6 months or extended time.

2. In the present case, the Company imported approximately 2900 containers. 1800 containers were cleared with payment of appropriate amount of customs duty for purpose of using the same in domestic market whereas remaining 1100 containers were cleared by availing benefit of the above Notification on execution of bond on the condition that the said containers will be re-exported within a period of 6 months.

3. The Customs Department vide letter dated 11.09.2013 seized 236 containers valued at approximately Rs.37.50 crores as the Company failed to re-export the containers within a period of six months in as much as did not seek extension of time for re-export of the goods.
4. It is submitted that immediately after seizure of containers on 11.09.2013, the Company vide letter dated 19.09.2013 requested the Respondent to release the seized containers so as to enable them to use the containers for intended purpose and to fulfil all the conditions as required under the Notification. The Appellant in para 3 of the letter mentioned that the Company continued to have international business and were in a position to deploy the containers for such purposes. Due to inadvertent error committed by the operational staff, the said containers were not put for international business in the last 6 months. The Company ensured that they would put such containers only for international business and would be able to comply with all the conditions as required to be fulfilled in terms of the said Notification.
5. Since no response was not received to their letter dated 19.09.2013, the Company vide letter dated 30.09.2019 again requested the Respondent to consider the request for allowing them to re-export of the goods. The Company inter alia mentioned in the letter that they deposited an amount of Rs.1 crores on 23rd August 2013 to show their bona fide. The Company specifically informed to the Respondent in para 5 as under:-

"5. Sir, While we submit as above, we also request you to kindly take into consideration the fact that in respect of 1800 containers, we have not defaulted nor that we have committed any contravention.

We also request you to kindly take into consideration the fact that we have completely and fully cooperated with the investigations being conducted by your office."

The Company did not get response to the letters dated 19.09.2018 and 30.09.2018. The Company vide letter dated 24.02.2014 again requested to allow for re-export of the goods. The Company inter-alia stated that in respect of short export of the containers, there were no malafide intention on part of the Company. The Company imported several containers both for domestic business and international business. Majority containers were re-exported within a period of 6 months. Due to fact that the Company did not have proper checks and balance regarding containers which were required to be re-exported, there was a lapse on their part in re-export of the goods. Since the Notification provided for extension of time for re-export of the goods, they requested to extend the time limit for re-export of the goods but no response was received from the Department till date

The Company again requested to the Customs Department vide letters dated 25.02.2014 and 21.03.2014 for allowing them to re-export of the goods

6. It is submitted that neither the Company nor the Appellants received any response from the Department against the letters dated 19.09.2013, 30.09.2013, 24.02.2013, 25.02.2014 and 21.03.2014 addressed to the Customs Department for allowing the Company for re-export of the goods in terms of Notification No. 104/94-Cus dated 16.03.1994. Failure on the part of Respondent not allowing to re-export of the goods, the Company failed to re-export the goods

particularly when the Notification empowers the Assistant Commissioner to extend the time limit for re-export of the containers. Had the Assistant Commissioner extended time limit for re-export of the containers, the Company would have re-exported the goods and complied with terms and conditions of the above Notification. It is not the case that the containers were not available for re-export. In such circumstances, the Appellants ought not to have been penalized on account of failure on part of the Customs Department for not considering the request of re-export of containers particularly when the request for extension of time was not rejected. In support of it, we place reliance upon following decisions wherein it was held in the context of exemption Notification that the exemption accrued from the date of application for SSI Registration and the assessee should not be responsible for any delay or inaction on the part of the certificate issuing authority.

A. York Print & Pack Vs Collector of C.Excise

B. Commissioner Central Excise Vs. M.P. V. & Engg. Industries –
2003 (153) ELT 485 (SC) para 11

**II. REQUEST MADE FOR RE-EXPORT OF THE GOODS HAS NOT
BEEN REJECTED:**

7. It is submitted that the Customs Department disregarded the request made by the Company seeking extension of time for re-export of the containers. When the Notification empowers the Assistant Commissioner to grant extension of time limit for reexport, the Assistant Commissioner ought to have passed some order on the application. Action of the customs department not acting upon the request is considered as violation of statutory provisions. In the

following decisions, it has been held that the Customs Department should be lenient in granting *ex post facto* permission for re-export within the further period of 6 months even though the application is made after expiry of six months:

- A. Commissioner, Customs and Central Excise Vs Neo Sack Ltd. - [2009 \(238\) E.L.T. 88](#);
- B. Commissioner of Customs (Kandla) v. APL India Ltd. - [2008 \(230\) E.L.T. 468](#) (Tri.-Ahmd.);
- C. United Export Vs Commissioner of Customs 2017 (357) ELT 156 (T);

**III. FAILURE TO RE-EXPORT OF THE IMPORTED GOODS
WITHIN PRESCRIBED PERIOD LIMIT WOULD BE LIABLE
ONLY FOR DEMAND OF DUTY AND INTEREST BUT DOES
NOT ATTRACT CONFISCATION OR PENALTY:**

8. Notification No.104/94-Cus dated 16.03.1994 provides that duty free containers imported under the Notification are required to be re-exported within a period of 6 months from the date of import or such extended time limit as granted by the Assistant Commissioner. First proviso to the Notification provides that failure to re-export of the goods within the time limit, the importer is required to pay the duty. The Respondent imposed penalty upon the Appellants only on the premise that the goods were not re-exported within a period of 6 months. As the Notification only demands for duty on failure to re-export of the containers, the Respondent ought not to have been imposed penalty for failure of the re-export of the containers within the time limit.
9. It is not the case of the Revenue that there was ill intention on the part of the Appellants at the time of import of these containers. The Company imported more than 2900 containers. Out of 2900, 1800

containers were cleared with payment of duty and 1100 containers were cleared without payment of duty by availing exemption Notification No. 104/94-Cus (supra). In absence of any ill intention on the part of the Company or the Appellants, it would be considered as failure to re-export of the goods within the time limit. But it does not mean that directors of the Company are liable for penalty. In the case of Calcutta Spring Ltd. Vs. Commissioner of Cus. (Port) – 2016 (342) ELT 243 (Tri. Kolkata), it was held as under:

"4.1 On the issue of confiscation and imposition of penalty it is observed that all the relevant details were declared by the appellant at the time of clearance of goods. A delay in exporting the goods will make a case of demand of duty & interest and will not attract confiscation or imposition of penalty upon the appellant. According. Redemption fine imposed & penalty imposed upon the appellant is set aside"

IV. PENALTY CANNOT BE IMPOSED FOR CONTRAVENTION OF CONDITIONS OF NOTIFICATION IN A CASE WHERE THERE WAS NO INTENTION TO EVADE CUSTOMS DUTY:

10. It is submitted that the Company could not re-export of the goods on account of failure on part of the Company for not having proper checks and balance regarding the containers which were required to be re-exported. Further, the Company faced acute financial hardship due to global recession. Immediately after seizure of containers, the Company requested the Customs Department to allow them to re-export of the goods. The Department confiscated the goods only on the premise of the Company failed to re-export the goods within a period of 6 months. In the following decisions it is held that penalty ought not to have been imposed for contravention of the

condition of the Notification in a case, there is no intention to evade customs duty:

- (i) Intermark Shipping Agencies Pvt. Ltd. Vs. Central Ex. Cus. (A), Kandla – 2014 (314) ELT 557 (Tri. Ahmd) (para 5);
- (ii) Nava Bharat Enterprises Ltd. Vs. Commissioner of C. Ex. Guntur – 2010 (261) LET 397 (Tri. Bang.) (para 9 and 10);

V. **PENALTY OUGHT NOT TO HAVE BEEN IMPOSED ON CHAIRMAN AND MANAGING DIRECTOR UNLESS IT SHOWS THEY WERE ABBETOR FOR THE OFFENCE FOR WHICH GOODS ARE LIABLE FOR CONFISCATION:**

11. The Appellants being head of the company were responsible of overall activities of the Company. However, Shri Indrajit Ray, Business Head, International Trade of the Company was given charge for movement of tank containers to and fro India. Both the Appellants handled the business from Mumbai and did not involve into day-to-day activities. Statements of both the Appellants were recorded wherein they clearly mentioned about role of each persons. Since the Appellants did not involve in day-to-day activities, they were not liable for penalty for the offence for which goods are liable for confiscation as held in the following decisions:

- i. O.T. Enasu Vs. Union of India, 2011 (272) ELT 51 (Ker);
- ii. Sanjay Gupta Vs. CCE, 2004 (172) ELT 58 (Tri. Bang.);
- iii. Anil Bhalla Vs. CCE, 2001 (138) ELT 883 (Tri. Kolkata);
- iv. A.K. Tantia Vs. CCE, 2003 (158) ELT 638 (Tri. Del.)

VI. **PENALTY OUGHT NOT TO HAVE BEEN IMPOSED UNDER SECTION 114AA:**

12. Para 23.6 of the impugned order has given finding against the Appellants for imposition of penalties under Section 112(a) and 114AA of the Customs Act. It was held that the Appellants submitted unauthentic documents to M/s. Ocean See Air Logistics Pvt. Ltd., Gandhidham, Liner Agent to fraudulently cancelled continuity bonds thereby attracted ingredients laid down under 114AA of the Customs Act. The impugned order wrongly held that they provided unauthentic documents to Ocean See Air Logistics Pvt. Ltd. for cancellation of continuity bonds. The bonds provided by the Company still exists. The impugned order has not passed speaking order to come to conclusion about providing unauthentic documents to M/s. Ocean See Air Logistics Pvt. Ltd. It is submitted that the email was sent for cancellation of the bond was in respect of 99 containers that were imported in vessel M. V. E. R. Helgoland Voyage MU 594 E which were exported and therefore, the request was made for cancellation of the bond. Relevant extracts of statement of Shri Jayesh A Thakkar, Manager of Mrs. Ocean see Air Logistics Private Limited, Official Liner Agent of the Company which is reproduced from end of para 9 of the impugned order (Para No. 32-33 of Appeal No. 12718 of 2018 as under:

"9. *****

he stated that list of containers was sent through email by Shri Vikas Pawar of M.s. Forcee Infrastructure Equipments Private Limited, Mumbai which he had filed with the customers through Ms. Master Marine but not physically verified containers; information in letter, as shown cancellation of LG of reexport container dated 08.06.2013 which was submitted by him, was in form of number of empty

containers exported against the name of vessel in which the same were imported, e.g 99 containers imported in vessel M. V. E. R. Helgoland Voyage MU 594 E which were exported show the LG was to be canceled.

13. There is no any malafide intention on the part of Appellants, which meet ingredients for imposition of penalty under 114AA of the Customs Act. In the following cases, it is held that penalty under 114AA cannot be imposed :

- (i) Fast cargo Movers Vs. Commissioner of Customs – 2018 (362) ELT 184;
- (ii) Suketu Jhaveri Vs. Commissioner of Cus. (Import) - 2014 (314) ELT 828

14. Without prejudice to the aforesaid, it is submitted that the Respondent imposed disproportionate amount of penalties upon the Appellants. In the identical situation where there was violation for 163 containers for not taking permission for re-export of the goods in the Appellants' own case, the Respondent imposed penalty of Rs.5,00,000/- (five lacs only) under Section 112(a) of the Customs Act as against penalty of Rs. 1 crore imposed in the present case for 286 containers. It is further submitted that the Respondent did not impose penalty under Section 114AA in the other case (Reference **Appeal No. 10375/2018**).

15. In view of the aforesaid, it is submitted that the appeal may kindly be allowed with consequential relief.

3. Shri Rajesh Nathan, Learned Assistant Commissioner (AR) appearing on behalf of the Revenue reiterates the finding of the impugned order.

4. On careful consideration of the submission made by both the sides and perusal of record, we find that in the impugned order, the Learned Adjudicating Authority has given one sided story of the department however, the appellant have made a detailed defense submission, as mentioned above on the fact as well as on the legal issue but from the perusal of the impugned order particularly with regard to imposition of penalties on the present appellants no discussion and finding was given. Therefore, in our considered view, in the matter related to imposition penalty on the present appellants the Adjudicating authority must reconsider the matter carefully considering the submission made by the appellant and thereafter pass a speaking and reason order.

5. Therefore, we set aside the impugned order and allow the appeals by way of remand to the adjudicating authority, for passing a fresh order.

(Pronounced in the open court on 05.07.2024)

(RAMESH NAIR)
MEMBER (JUDICIAL)

(C L MAHAR)
MEMBER (TECHNICAL)