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

REGIONAL BENCH-COURT NO. 3

Customs Appeal No. 10375 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))

Rajesh Lihala **........Appellant**

Chariman, M/s. Fourcee Infrastructure Equipments Pvt Ltd.
431, Laxmi Industrial Estate, Laxmi Mall, New Link Road, Andheri (w),
Mumbai, Maharashtra

VERSUS

Commissioner of Customs -Jamnagar(prev) **......Respondent**

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

WITH

Customs Appeal No. 11011 of 2017 – 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))

Shri Vinay Singh **........Appellant**

Lakshmi Mall, Lakshmi Industrial Estate,
New Link Road, Andheri(w)
Mumbai, Maharashtra

VERSUS

Commissioner of Customs -Jamnagar(prev) **......Respondent**

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

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.11510-11511/2024

DATE OF HEARING: 07.03.2024
DATE OF DECISION: 05.07.2024

RAMESH NAIR

These appeals have been filed against the impugned Order- in-Original No. 04 & 05/Commissioner/O&A/2014 dated 16.07.2015 passed by the Respondent, whereby the Respondent imposed penalties of

Rs.5,00,000/- (Rupees five lacs only) on Shri Rajesh Lihala and Rs. 2,00,000/- (Rupees two lacs only) on Shri Vinay Singh, Managing Director of the Company under Section 112(a) of the Customs Act, 1962 (hereinafter referred to as "the said Act") on the premise that both the Appellant were responsible for conduct of M/s. Fourcee Infrastructure Equipment Pvt. Ltd. (hereinafter referred to as "the said Company") and being on Senior post were connected with the policy decisions of the said Company. It was held that the Company was required to re-export containers which were imported without payment of duty under Notification No. 104/94-Cus dated 16.03.1994 (hereinafter referred to as "the said Notification") within a period of 6 months from the date of import. Since the containers were not re- exported, there was violation of the condition of the said Notification and therefore, failure on the part of the Appellants on account of responsible persons, rendered 163 containers were liable to confiscation under Section 111(0) of the Customs Act and consequently, liable for penalty.

1.1. By way of the impugned order, the Respondent ordered confiscation of 163 containers seized under Seizure Memos and confirmed and ordered for recovery of Customs Duty along with interest and penalty. The Hon'ble Bombay High Court vide Order dated 26.04.2017 ordered for winding up of the said Company and appointed Official Liquidator. As the Company has gone into liquidation, its appeal has been abetted in view of the order passed by this Hon'ble CESTAT. By way of the present appeals, the Appellants are challenging action of the Respondent to the extent of implosion of penalties upon the Appellants.

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

I. <u>PENALTY UNDER SECTION 112(a) CANNOT BE IMPOSED FOR NON-PAYMENT OF DUTY DECLARED IN BILL OF ENTRY FILED PURSUANT TO PERMISSION GRANTED BY THE RESPONDENT:</u>

1. The said Company imported 100 containers and 63 containers separately. Since the Company was unable to re-export the containers within the stipulated time, the Company sought permission from the concerned authority for allowing them to clear in domestic market with payment of duty and interest. The concerned Customs Authority granted the permission and therefore, the said Company filed Bills of Entry on 12.06.2-13 for 100 containers and 19.07.2013 for 63 containers declaring value and duty payable on such containers. Due to financial constraints, the Company could not deposit the duty as declared in the Bills of Entries. The Customs Department vide letters dated 09.10.2013, 14.10.2013 and 23.12.2013 reminded the said Company for payment of Customs Duty. As the Company could not deposit the duty, the said Containers were seized on 26.03.2014 and 05.09.2014 and issued the Show Cause Notices for demanding of the duty and confiscation of the goods. It is submitted that penalty cannot be imposed on account of failure to deposit the customs duty as declared in the Bill of Entry. For imposition of penalties under Section 112(a), goods were required to be confiscated in terms of provisions for 111(o) of the said Act.

2. It is submitted that since the Company could not re-export the goods within the period of 6 months, the Company was allowed to clear the same in domestic market by filing non-EDI Bill of Entry for clearance of the 163 containers with payment of customs duty and interest.

3. It is submitted that the permission granted for filing of non-EDI Bill of Entry has not been challenged by the Revenue before the Appellate Forum. In the absence of challenging the order for granting the permission for filing the Bill of Entry, goods ought not to have been confiscated under Section 111(o) and therefore, consequently penalty under Section 112(a) ought not to have been imposed.

4. Goods under Section 111(o) can be confiscated on account of failure to comply with post import conditions as stipulated under the Notification. Relevant extracts of 111(o) of the said Act is as under:

   (o) *any goods exempted, subject to any condition, from duty or any prohibition in respect of the import thereof under this Act or any other law for the time being in force, in respect of which the condition is not observed unless the non-observance of the condition was sanctioned by the proper officer;*

5. In terms of Section 111(o), if the proper officer waives any of the conditions, goods cannot be confiscated under Section 111(o). In the present case, the Customs Department waived conditions for re-export of the goods and allowed to clear in domestic market with payment of duty. Since the proper officer granted the permission to the said company for clearance of the goods with payment of duty, it cannot be said that the imported goods were liable for confiscation.

II. ACTION OF THE CUSTOMS DEPARTMENT FOR SEIZURE OF GOODS WERE PRIOR TO SIX MONTHS IS PREMATURE STAGE

6. The Customs Department initiated action for seizure of the goods even before expiry of 6 months as stipulated under the Notification No. 104/94-Cus dated 16.03.1994. It is submitted that the said Company imported 63 containers in January 2013 and February 2013. The Customs Department initiated action by way of seizure of the goods on 05.04.2013 (Page No. 76 of the Appeal No. 10375/2018) i.e. even before expiry of 6 months from the date of import. Similarly, 100 containers were imported during March 2012 to March 2013. The said Company executed bond for the said containers in May 2012 which was duly accepted by the Department on 29.09.2012. The Appellant vide letter dated 28.12.2012 requested for clearance of the said containers for home consumption with payment of duty. (para (ii) at page No. 28 of Appeal No. 10375/2018). The Department initiated action for recovery of duty on failure to re-export of the goods before expiry of 6 months and therefore, the said action is bad in law as the Notification itself allows the importer to re-export the goods within a period of 6 months. As the period of 6 months did not expire at the relevant time, action of the Respondent for seizure of the goods was premature.

7. It is submitted that in respect of 63 containers, the said Company filed Bill of Entry much before completion of 6 months of arrival of the container and even during the said period of about 2 months, the said containers were detained by the Department and therefore, the said

containers were not re-exported. In this circumstances, it cannot be said that the said company violated the condition of the Notification.

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 form 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.)

12. 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 reasoned 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)

Raksha