

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

REGIONAL BENCH-COURT NO. 3

Customs Appeal No. 10005 of 2021-DB

(Arising out of OIO-AHM-CUSTM-000-COM-0008-20-21 dated 24/09/2020 passed by Commissioner of CUSTOMS-AHMEDABAD)

SHRI SANDEEP

.....Appellant

Flat No D 302 Shreenagar Residency Vip Road Vesu
Surat, Gujarat

VERSUS

COMMISSIONER OF CUSTOMS-AHMEDABAD

.....Respondent

Custom House,
Near All India Radio Navrangpura,
Ahmedabad, Gujarat

WITH

Customs Appeal No. 10871 of 2020 – DB

(Arising out of OIO-AHM-CUSTM-000-COM-0008-20-21 dated 24/09/2020 passed by Commissioner of CUSTOMS-AHMEDABAD)

RAHUL MISHRA

.....Appellant

B 116 Shri Rangkrishna Avenue
Bharuch, Gujarat

VERSUS

COMMISSIONER OF CUSTOMS-AHMEDABAD

.....Respondent

Custom House,
Near All India Radio Navrangpura,
Ahmedabad, Gujarat

APPEARANCE:

Shri Devashish K Trivedi Advocate & shri Vikas Mehta, Consultant for the Appellant
Shri R K Agarwal, Superintendent (AR) for the Respondent

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

Final Order No. 12513-12514/2024

DATE OF HEARING: 30.04.2024

DATE OF DECISION: 25.10.2024

RAMESH NAIR

The brief facts of the case are that M/s. Jai Mataji Impex, Kim-Surat filed one shipping bill no. 1744103 dated 01.02.2019 with Customs, Hazira Port, Surat for export of Feldspar Powder (Packed in PP bags) in a container bearing no. BAXU 5046619, through custom broker, M/s. Mover Logistic Pvt Ltd. The officer of DRI, Surat on the basis of intelligence, that mis-declared goods were being exported in container no. BAXU 5046619, carried out examination of the container under panchnama dated

05.02.2019 in presence of customs officer, G-card and H-card holder of M/s. Mover Logistic Pvt Ltd and the examination revealed that the said container was stuffed with PP bags filled with feldspar powder in the front and wooden logs, later identified as red sanders. On examination, 295 PP Bags containing 14,750 kgs of feldspar powder (valued at Rs.93,456/-) and 12120 kgs of red sanders valued at 5,45,40,000/- were found.

1.2 After detailed investigation show cause notice dated 14.08.2019 was issued to various co-noticee including present appellants proposing confiscation of the goods i.e. "red sander" and "feldspar powder" and also imposition of penalties under various sections on various persons including the present appellant. The said show cause notice was adjudicated wherein the penalty of Rs. 20 Lakhs under Section 114 (i) and Rs. 60 Lakhs under Section 114 AA of the Customs Act, 1962 were imposed on Shri Rahul Mishra and penalty of Rs. 50,000 under Section 114 (i) was imposed on Shri Sandeep, Inspector Customs. Being aggrieved by the said OIO, the appellants filed the present appeals.

2. Shri Devashish Trivedi, Learned Counsel appearing on behalf of the appellant Shri Sandeep, Inspector customs submits that in the entire case the penalty was imposed admittedly for the charge of negligence. However, it is not established that appellant was involved in abating the smuggling of red sanders. Therefore, the penalty was wrongly imposed on him. He submits that the case detected only on the intelligence received by DRI. Therefore, it is not expected from anyone to know about the concealment of the red sander under the bags of feldspar powder. He submits that even when Shri Sandeep, Inspector Custom examined the containers after opening it was found feldspar powder only. Therefore, he was of bona-fide belief that goods stuffed in containers is feldspar powder. It cannot be expected from the appellant that he has knowledge of concealment of red sanders. Therefore, the penalty is not imposable on the appellant. He placed reliance on the following judgments and board circular:-

- Hon'ble High Court of Calcutta in the case of - Eurasian Equipment and Chemicals Ltd., & Ors., versus Collector of Customs & Ors., reported at 1980 (6) ELT 38 (Cal.)

- Circular No. 6/2002 - Cus., dated 23/01/2002 issued from F. No. 450/126/98-Cus. IV
- Neptune's Cargo Movers Pvt. Ltd., versus Commr. of Cus. (Export), Chennai reported at 2007 (219) ELT 673 (Tri. Chennai)
- Success Engineering versus Commissioner of Customs, Kandla reported at 2007(215)ELT 220 Tri. Ahmd
- Sanco Trans Limited versus Collector of Customs, Bangalore reported at 1996 (83) ELT 557 (Tribunal)
- Commissioner of Customs, Bangalore versus M. Naushad reported at 2007 (210) ELT 464 (Tri. – Bang.)
- Commissioner of Cus. & C.Ex. Hyderabad II versus Rajiv Kumar Agrawal reported at 2007 (217) ELT 392 (Tri. -Bang).

2.1. On behalf of the other appellant , Shir Vikas Mehta, Learned Consultant submits that the appellant was working with customs broker as H-Card holder. He submits that the entire case against this appellant was made out on the basis of his statement recorded by DRI. It is his submission that the said statement was retracted before the Hon'ble Civil & JMFC Judge, Surat. He submits that since his self statement was retracted by him the same cannot be used as evidence and on that basis he cannot be punished.

2.3 He further submits that the Adjudicating Authority has erred in failing to give due consideration to the statement of Shri Onni Rajan Pillai, Director of CB Firm where appellant worked wherein he has inter alia stated that the appellant was looking after marketing activities and assistant Shri Jitendra Sharma, in docks stuffing and KYC documents collection and the appellant was never assigned the job of customer on the basis of KYC documents. Further, no show cause notice was ever issued to the CB for failure in this regard as such there was no breach on this count.

2.4 He submits that the documents for preparing the check list for shipping bill was not received by the appellant on his personal mail ID in as much as the said documents were received by their CB company on mail ID at cus.hazira@staricl.com This fact is duly corroborated by shri

Jitendra Sharma. Moreover, the shipping bill was also filed on EDI system by their Mumbai office and as such he had no role in preparing the shipping bill. He further submits that both Shri Jitendra Sharma, colleague of appellant and Shri Ooni Rajan Pillai, Director of CB firm has categorically stated that shri Jitendra Sharma looked after docks stuffing. thus, the appellant have never had any control over stuffing of the containers. However, instead of probing the role of shri Jitendra Sharma and Director of CB firm the officers coerced the appellant into giving self incriminating statement because appellant had presented the container before the officer. It was never the job of the appellant to look after stuffing and the appellant had no reason to agree with any person including shri paras Patel to deal with the documents mis -declaring the goods and containers stuffed with such mis declared goods for any monetary gain or otherwise. Therefore , the appellant is not responsible for rendering the goods liable for confiscation under section 113. Consequently he is not liable for penalty under section 114 (i) of Customs Act,1962.

2.5 As regard the penalty under Section 114 AA of Customs Act, 1962, he submits that the appellant had not made ,signed or submitted any documents before customs with the prior knowledge about alleged mis declaration neither any show cause notice nor impugned order would pinpoint any specific documents were made or signed before the customs which he knew was false or incorrect. Therefore, the appellant is not liable to penalty under the provisions of Section 114 AA. He also submits that the appellant is a small employee and get a salary of Rs. 30,000 per month with a custom broker at a material time and the adjudicating authority imposed cumulative penalty of Rs. 80,00,000 Rs. 20 Lakh under Section 114 (i) and Rs. 60 Lakh under section 114 (AA) which is beyond the means of appellant. He submits that the quantum of penalty is extremely harassed and not in commensurate with the alleged offence.

3. Shri R.K Agarwal, Learned Superintendent (AR) appearing on behalf of the Revenue reiterates the finding of the impugned order.

4. We have carefully considered the submission made by both the sides and perused the records. In the present appeal issue to be decided is that whether both the appellants are liable for penalty under Section 114(i) and/or 114(AA) for the alleged role of them in aiding and abetting of the smuggling of "red sander".

5. As regard the appeal of Shri Sandeep Inspector, Customs, Surat, we find that the penalty was imposed on the appellant only for the charge of negligence. In this case, since, the appellant was not aware about the concealment of "red sander" in the container with "feldspar powder", It cannot be said that the appellant was involved with mala fide intention to abet the smuggling of 'red sander'. It is found that involvement in abetting the smuggling of 'red sander' was not established against the appellant. The case was detected only on the intelligence received by the DRI. In such case in absence of any intelligence, the appellant was not aware about the concealment of red sander under the bags of feldspar powder. It is also found that when Shri Sandeep, Inspector Customs examined the containers after opening it at that time only feldspar powder was found. Therefore, he was of bona fide belief that the goods stuffed in the containers is feldspar powder. In the normal course it cannot be expected by any one that behind the feldspar powder bags some other goods are concealed. Therefore, we find no involvement of the appellant in the abetment in smuggling of Red Sander. Accordingly, the penalty under Section 114(i) of Customs Act, 1962 was wrongly imposed on the appellant. In the facts of this case the ratio of the following judgment applies:-

a) In the case of Eureasian Equipment and Chemicals Ltd (Supra) the Hon'ble Calcutta High Court has passed the following order:-

"24. *It is quite clear that violation of any prohibition or restriction imposed under Section 12 of the Foreign Exchange Regulation Act, 1947 will result in a violation of the prohibition or restriction under Section 11 of the Customs Act, 1962 by virtue of the deeming provisions contained in Section 23A of the Foreign Exchange Regulation Act, and necessarily, all the provisions of the Customs Act which may be attracted because of violation of Section 11 of the Customs Act will have effect. The question is whether the violation of the prohibition or restriction imposed under Section 11 of the Customs Act will attract the provisions of Sections 113 and 114 of the Act in a case where goods had already been exported. The answer to this question will depend on proper construction of the relevant provisions of the Customs Act and of the provisions contained in Section 113 in particular. Section 113*

lays down conditions when export goods become liable to confiscation. It makes provision as to under what circumstances 'export goods' incur the liability to confiscation. Section 113 does not deal with actual confiscation of the goods or the physical possibility of confiscation thereof. It only provides that 'export goods' shall be liable to confiscation if any of the conditions stipulated in Section 113 are satisfied. In other words, it makes provisions as to the incurring of liability to confiscation of the 'export goods'. Section 113(d) makes it clear that export goods shall incur the liability to confiscation if the goods are attempted to be exported contrary to any prohibition imposed by or under the Customs Act or any other law for the time being in force.

"Export goods" as defined in Section 2(19) of the Customs Act means 'any goods which are to be taken out of India to a place outside India'. Any goods which are to be taken out of India to a place outside India will incur the liability to confiscation under Section 113(d), if the said goods are attempted to be exported contrary to any prohibition imposed by or under the Customs Act or any other law for the time being in force. The liability to confiscation arises and is incurred as soon as the export goods are attempted to be exported contrary to any such prohibition and attempt to export the goods must necessarily precede the actual exportation of the goods. The liability of the goods to confiscation, therefore, arises as soon as the said goods are attempted or sought to be exported contrary to such prohibition. This liability which accrues or arises as soon as the attempt to export the goods is made is in no way dependent and has not been made dependent on the possibility or feasibility of actual confiscation of the goods. This accrued liability of the goods to confiscation clearly attracts Section 114 of the Customs Act which provides that any 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 113 or abets the doing or omission of such an act, shall be liable to penalty as provided in the said Section. With the incurring of liability of the goods to confiscation under Section 113, any person who in relation to such goods has done or omitted to do any act which at or omission has rendered such goods liable to confiscation under Section 113 or abets the doing or omission of such an act, renders himself liable to penalty under Section 114. On a proper construction of Sections 113 and 114 of the Customs Act with reference to the language used in the said Section this position, in our opinion, clearly emerges. We fail to appreciate how the accrued liability of the goods to confiscation with the attempt made for exporting the same contrary to prohibition is extinguished or wiped out with the said illegal attempt succeeding, resulting in the actual exportism of the goods. A plain reading of Section 113 of the Customs Act providing for liability to confiscation of export goods and of Section 2(19) of the Act defining "export goods" does not appear to indicate or suggest that the accrued liability to confiscation is so extinguished or wiped out. It may be noticed that this liability to confiscation attaches to the goods at the time the goods are sought to be exported contrary to prohibition and at that point of time the goods which are to be taken out of India to a place outside India have not been taken out of India to a place outside India. In other words at the point of time when the liability to confiscation accrues the goods are export goods well within the meaning of the definition of export goods in Section 2(19) of the Act.

In our opinion, this appears to be the proper interpretation of Sections 113 and 114 of the Customs Act, applying the well settled principles of construing the said Sections with reference to the language therein. This interpretation further appears to be in accord with the objects for which this particular legislation has been enacted by the Parliament.”

In view of the facts related to the appellant Shri Sandeep and with support of the judgment as referred above, we are of the view that the appellant is not liable for penalty under Section 114(i) of Customs Act, 1962. Hence, penalty is set aside.

6. As regard the other appellant Shri Rhul Mishra, he was working with customs broker as H-Card holder. He was implicated in the present case for the charge of aiding and abetting and smuggling of red sanders. In this regard, we find that the case against appellant was made out on the basis of his statements recorded by DRI. We find that the said statement was retracted before the Learned Civil and JMFC Judge Surat. We find that once the appellant has retracted his statement thereafter, the same has lost its evidentiary value and cannot be used for penalising him. In this matter the appellant's broker firm's Director Shri Ooni Rajan Pillai was also interrogated and as per his statement there is nothing inculpatory against the present appellant. It is also admitted fact that the customs broker where the present appellant is working was not issued any show cause notice for any breach on the part of the custom broker on this count. Therefore, the appellant's alleged offence is not established. It is also fact that the documents were preparing the check list for shipping bill was not received by the appellant on his personal mail id in as much as the said document were received by their custom broker company on mail id at cus.hazira@staricl.com.

6.1 It is the submission of the appellant that even the shipping bill was also filed on EDI system by their Mumbai office and as such he had no role in preparing the shipping bill. We find that the employee of CB firm Shri Jitendra Sharma, is a colleague of the appellant, has also stated that Shri Jitendra Sharma looked after dock stuffing. This shows that the appellant had no control over the stuffing of the containers. It is the claim of the

appellant that the appellant was coerced into giving self incriminating statement because appellant had presented the container before the officer. It is their submission that it was not the job of the appellant to look after the stuffing and appellant has no reason to agree with any person including Shri Paras Patel to deal with the documents mis-declaring the goods and container stuffed with such mis-declared goods for any monetary gain or otherwise.

6.2 We find that in such a situation, the adjudicating authority was suppose to cross-examine the appellant at the time of adjudication for the reason that firstly, he retracted his statement before the JMFC secondly, it is his claim that he was coerced to give incriminating statement. However, the adjudicating authority has not taken pain to cross-examine him before admitting his statement as evidence. Therefore, the entire case made on the basis of his incrementing statement which cannot be accepted as evidential value in the absence of his cross-examination as mandated under Section 138(B) the entire case fails. It is also fact on record, there was nothing brought on record to establish that the appellant had monetary gain out of the smuggling of red sander. It is also observed that it is not coming out from record that the appellant was aware of the stuffing of red sander in the container. Therefore, even if some negligence has occurred on his part which is not established, the appellant cannot be charged for aiding or abetting the smuggling of 'red sander'.

6.3 As regard the penalty under Section 114(AA) of the Customs Act, 1962, we find that the appellant had not signed or submitted any document before customs with a prior knowledge about alleged mis-declaration, neither any show cause nor impugned order pointed out any specific documents were made or signed before the customs. Therefore, in our view the appellant is not liable to penalty under the provision of Section 114(AA) also.

6.4 We find that though the appellant is a small salaried employee drawing Rs. 30,000/- per month salary working with a custom broker at the material time. There is no evidence of any extra consideration particularly

on account of involvement in the smuggling of red sander. Therefore, the department could not prove the case beyond doubt for penalising him under section 114(i) and 114(AA). Hence we are of the view that penalties are liable to set aside accordingly we set aside the penalties on the appellant Shri Rahul Mishra.

7. As a result both appeals are allowed.

(Pronounced in the open court on 25.10.2024)

(RAMESH NAIR)
MEMBER (JUDICIAL)

(RAJU)
MEMBER (TECHNICAL)

Raksha