

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

REGIONAL BENCH- COURT NO. 3

Customs Appeal No. 10386 of 2024- DB

(Arising out of AHM-EXCUS-000-PR-COMMR-37-2023-24 dated 28.03.2024 passed by Principal Commissioner of Customs – Ahmedabad)

SKA Cashew

Survey No. 124/P2

Pipaliya Char Rasta, Pipaliya, Morbi

.....Appellant

VERSUS

C.C.- Ahmedabad

Office of Pr. Commr. Of Customs

1st Floor, Custom House, Opp. Old High Court ,

Navrangpura, Ahmedabad-380009

.....Respondent

WITH

(i) Customs Appeal No. 10387/2024 (Alkesh Navodiya); (ii) Customs Appeal No. 10388/2024 (Amitbhai B Kapoor); (iii) Customs Appeal No. 10389/2024 (Harbhajan Singh Bansal); (iv) Customs Appeal No. 10390/2024 (Mukesh Patel)

(Arising out of AHM-EXCUS-000-PR-COMMR-37-2023-24 dated 28.03.2024 passed by Principal Commissioner of Customs – Ahmedabad)

APPEARANCE:

Shri Paritosh Gupta, Advocate appeared for the Appellant

Shri Girish Nair, Assistant Commissioner (AR) for the Respondent

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

FINAL ORDER NO. 12934-12938 /2024

DATE OF HEARING: 27.11.2024

DATE OF DECISION: 02.12.2024

RAMESH NAIR

The present appeals are being filed against the Order in Original having number AHM-CUSTOM-000-PR.COMMR-37-2023-24 dated 28.03.2024 wherein Ld. Principal Commissioner of Customs, Ahmedabad has confirmed the customs duty of Rs.1,36,79,425/- and penalty of Rs.1,36,79,425/- against the main Appellant i.e. M/s. SKA Cashew Processing LLP. Ld. Principal Commissioner has also imposed the penalty on the partners of M/s. SKA Cashew Processing LLP and also on the employees of the CHA firm.

2. The brief facts leading to the present dispute are that the Appellant placed a purchase order dated 07.11.2022 upon M/s. CV Sumatera Medan Group i.e. foreign supplier for the sale and supply of 18MT of Raw cashew nuts at USD 1405 per MT. In pursuance of this

purchase order, the Appellant filed Bill of Entry No. 4556542 dated 08.02.2023 for import of the said raw cashew nuts.

3. The said consignment came to be inspected and it was found that out of the total material ordered by the Appellant, 180 jute bags weighing 15.04 MT were filled with areca nuts rather than cashew nuts. As areca nuts were never declared in the Bill of Entry filed by the Appellant, the same was put under seizure on 17.02.2023.

4. The Appellant immediately contacted the foreign supplier regarding the same and the foreign supplier in response to the same vide email dated 06.03.2023 accepted the mistake and confirmed that the said material was wrongly dispatched to the Appellant. The bank of Appellant also requested the bank of the supplier to recall the telegraphic transfer of consideration paid.

5. The Appellant vide their letter dated 17.05.2023 informed the Customs Department that they have never ordered areca nuts and therefore they abandon the goods.

6. Statement of the Partners of the Appellant firm were recorded during the course of investigation wherein all the partners reiterated the fact that they had never placed any order for purchase of areca nuts and order was placed only for raw cashew nuts. It was also reiterated that due to the mistake by the supplier as admitted by the supplier the areca nuts were supplied.

7. However, the above investigation culminated into issuance of the show cause notice having number F. No. VIII/10-06/Commr./O&A/202-24/1534 dated 07.06.2023.

8. However, the demand of duty and penalty as raised in the show cause notice dated 07.06.2023 was confirmed in the impugned Order in Original dated 28.03.2024 wherein the goods were also absolutely confiscated.

9. We have heard Ld. Advocate Shri Paritosh Gupta for the Appellants and Shri Girish Nair, Ld. Assistant Commissioner and Authorized Representative of the Revenue Department. We have also considered the submissions made by both the sides.

10. We find that it is undisputed fact in the present case that the goods (areca nuts) are absolutely confiscated by the revenue authorities. In such circumstances, the demand of duty on the

Appellants is not sustainable. We find that the similar question arose before the Division Bench of this tribunal in case of **Maiden Trading Co. Pvt. Ltd.** reported in **2015 (330) ELT 651 (Tri.-Del)** wherein it is observed as under:

"9. In this case it is admitted fact the appellant has not filed any Bill of Entry for clearance of the impugned goods and it is also a fact that on examination of the goods, the goods were found other than the goods declared in the IGM. The case of the Revenue is that when the investigation against the appellant has been started In November, 2006, the appellant disowned the goods. Therefore, the penalty is imposable. But in this case, it is the contention of the appellant that they have not placed any order on the supplier of the goods to supply the said goods. Moreover, Revenue has not made any effort to ascertain truth of this fact that whether the appellant has placed any order on the supplier or not? Moreover, it is the contention of the Id. AR that when the bankers of the appellant informed of arrival of the goods in question and the documents thereof were presented to the bankers for payments, the appellant should have informed to the Revenue about the arrival of the said goods which the appellant failed to do so and rendered the goods liable for confiscation. It is seen in the Customs Act, there is no provision that if goods has not been ordered and the same has been arrived, the person (in whose name the documents are) is required to approach to Revenue to say that I am not the owner of the goods. In this case, when appellant is not owner of the said goods, the Revenue is at liberty to deal the goods in any manner by way of absolute confiscation or by confiscation and allow to be redeemed on payment of redemption fine who claimed the owner of the goods or without confiscation of the goods to be released to the person who claimed the owner of the goods. In this case, admittedly the appellant never owned the goods nor filed Bill of Entry.

10. In these set of facts, it is to be seen that the penalty can be imposed on the appellant under Section 112(a) of the Act for violation of Section 111(d), (m), (n) and (o) of the Act or not? Therefore, to impose penalty under Section 111(d), (m), (n) and (o), we have to see provisions of the Act which are reproduced herein under :

Section 111(d) in the Customs Act, 1962

"(d) any goods which are imported or attempted to be imported or are brought within the Indian customs waters for the purpose of being imported, contrary to any prohibition imposed by or under this Act or any other law for the time being in force;

(m) any goods which do not correspond in respect of value or in any other particular with the entry made under this Act or in the case of baggage with the declaration made under section 77 in respect thereof or in the case of goods under transshipment, with the declaration for transshipment referred to in the proviso to sub-section (1) of section 54;

(n) any dutiable or prohibited goods transisted with or without transshipment or attempted to be so transited in contravention of the provisions of Chapter VIII;

(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; (p) any notified goods in relation to which any provisions of Chapter IVA or of any rule made under this Act for carrying out the purposes of that Chapter have been contravened.]"

On analysing the above provisions, we find that from a plain reading of provisions of sub-section (n) and (o), it is clear that these provisions are not applicable to the case. In fact Section 111(n) deals with transit/transshipment of goods. Section 111(o) deals with a situation where certain claim is claimed

subject to some condition and subsequently the said condition is not followed. In the present case, it is not a situation. In fact, the impugned goods were never cleared from Customs therefore claiming exemption does not arise. Consequently, the provisions of Section 111(n) and (o) are not applicable to the facts of this case.

11. Further, we find that to invoke Section 111(m) of the Act which deals with a situation wherein any goods does not correspond in respect of value or in any other particular of the said goods as per Section 2(16) of the Act which defines the terms "entry" which means Bill of Entry. In the present case, it is a fact that the appellant has not filed any Bill of Entry, therefore, the provisions of Section 111(m) are not attracted in this case. The same view was taken by this Tribunal in the case of *Kabul Textiles Mills (supra)* wherein the Hon'ble Bombay High Court has observed that the CESTAT was therefore right in concluding that even in any case where description was changed within in invoice or in the Bill of Entry or import manifest the same was sufficient to call for confiscation liability of goods under Section 111(m) of the Act as in that case the importer had not filed Bill of Entry which has been affirmed by the Hon'ble Apex Court by holding that in such a situation where Bill of Entry is not the provision of Section 111(m) are not attracted. The only provision of Section 111(d) can be attracted in this case to say that the goods are attempted to be imported contrary in prohibition. We find that in this case, the Id. Counsel has relied on certain cases.

12. We find that in the case of *Arya international (supra)*, this Tribunal has observed that in case the Bill of Entry was not filed declaring description or quantum of the goods and there is no other evidence on record showing the appellant's involvement in loading the goods at the exporters end. Therefore, the penalty was not imposed. The same view taken in *Royal Impex (supra)*, wherein Tribunal has held as under :

4. After giving careful consideration to the submissions, we have to accept the appellants' case. Any Bill of Entry was yet to be filed by the appellants to clear the subject import. The first occasion for an importer to declare or misdeclare particulars of the goods imported by him is at the stage of filing Bill of Entry. He cannot be held liable for any misstatement of particulars in Bill of Lading or Import manifest. Hence, as rightly contended by the appellants, the finding of misdeclaration against them is untenable. In this case, the investigating agency (DRI) also ventured into an inquiry as to what should be the assessable value of the goods and as to whether the importer had misdeclared the value of the goods. The importer never filed any Bill of Entry declaring the value and other particulars of the goods. Hence it is absurd for the DRI to have ventured to such an exercise. Surprisingly, this absurdity was sustained by learned Commissioner in the impugned order.

13. We further find that only ground for imposing penalty in this case by the adjudicating authority that the appellant was having the *modus operandi* and have placed the order on the supplier of the goods but no efforts were made to ascertain the fact that whether the appellant has placed the purchase order on the supplier of the goods or not? Moreover, when the Manager of the appellant was called for recording the statement, he has categorically stated that the appellant has not placed any order on the supplier of the goods and this fact has been confirmed by the act of the supplier when he sought re-export of the goods before the Revenue. If the supplier had supplied the goods at the request of the appellant, in that case, the supplier would have taken legal action against the appellant also but the supplier has asked for No Objection Certificate from the appellant. This act of the supplier shows that the supplier has supplied the goods without obtaining purchase order from the appellant but in regular course of business without any purchase order. Therefore, the act of the appellant does not attribute for imposition of penalty on the appellant under Section 112(a) of the Act, although the goods may be held liable for confiscation in the light of the decision of *Amba Woollen Mills (supra)* as the owner of the goods in this case is supplier of the goods and there is no

connivance or involvement of the appellant with the supplier of goods has been proved by the Revenue with cogent evidence. Further, in the case of Garima Trade Services Ltd. (supra), this Tribunal has held that in case the importer is abandoned the goods and not opted to redeem the same, the penalty is not imposable. But this case is on better footing than the case of Garima Trade (supra), therefore we hold that as the appellant has not filed any Bill of Entry neither placed order for supply of the impugned goods to the supplier/exporter, the penalty under Section 112(a) of the Customs Act is not imposable on the appellant.

14. *In these terms, we do not find any merit in the impugned order, the same is set aside. Appeal is allowed with consequential relief, if any."*

11. It is also undisputed fact in the present case that the goods were abandoned by the Appellant through their letter dated 17.05.2023. Ld. Principal Commissioner has denied the benefit under Section 23 of the Customs Act, 1962 only on the ground that it appears to be an afterthought. However, we find that the similar issue arose before the division bench of this tribunal in case of **Commissioner of Customs Vs. Ankit Pulps & Boards Pvt. Ltd.** reported in **2007 (209) ELT 135 (Tri.-Mumbai)** wherein it is observed as under:

"7. *The department's appeal is on the ground that importer had knowledge about the material difference in declared quantity as well as quantity of the imported goods. The abandonment under Section 23(2) can be applied only in any bona fide case, where the importer relinquishes the imported goods in the normal course of business. The department seeks restoration of the order of the Additional Commissioner.*

8. *Section 23(2) of the Customs Act reads as follows: -*

"The owner of any imported goods may at any time before an order for clearance of the goods for home consumption under Section 47 of an order for permitting the deposit of goods in a warehouse under Section 60 has been made, relinquish his title to the goods and thereupon he shall not be liable to pay the duty thereon."

9. *The right of the importer to abandon the goods at any time before the order for clearances of the goods for home consumption under Section 47 is unconditional. Therefore, the Commissioner's (Appeals) decision in permitting the abandonment and setting aside the demand is legal. Even in cases where the goods are held liable for confiscation and redemption is offered on payment of fine and if a importer does not choose to exercise the option, naturally the ownership of the goods rest with the Central Government and the question of demanding duty will not arise.*

10. *Even after abandoning, if there was evidence of fraud on the part of the importer in relation to import of the goods, the penal action can be considered notwithstanding the fact of the abandonment of the goods. However, in this case, no evidence on the part of the importer about the knowledge that the goods were different from what was declared by the importer and intention to evade payment of duty has been brought out.*

11. *The learned Advocate for the respondents submitted that it was the case of wrong supply and they have initiated the proceedings against supplier for recovery of their money paid through Letter of Credit. The decision of the Commissioner (Appeals) in setting aside the penalty of Rs. 10,000/- also cannot be faulted.*

12. *The department's appeal is, accordingly, rejected. Stay petition is also disposed off accordingly."*

12. In view of the above settled position of law, we hold that demand of duty is not sustainable on the Appellants as goods are absolutely confiscated.

13. For the penalty imposed on the Appellant firm under the provisions of Section 114A of the Customs Act, 1962, we find that Section 114A deals with situations of intentionally making or using any declaration, statement or document which is false or incorrect in the transaction of any business for the purpose of Customs Act, 1962. The said Section is intended to penalize situation where there are paper transaction without any actual import or export of goods. In the present case, the revenue department has no case that the transaction was a paper transaction and that no goods were imported by the Appellant and therefore, we hold that penalty under Section 114A is not attracted. We find that the similar issue arose before the division bench of this tribunal in case of **Interglobe Aviation Ltd.** reported in **2022 (379) ELT 235 (Tri.-Bang)** wherein it is observed as under:

"20. Coming to the various penalties imposed, the appellants submit that when the demand is not tenable interest under Section 28AA of the Customs Act is not imposable as per Apex Court judgment in the case of Pratibha Processors v. UOI, [1996 \(88\) E.L.T. 12](#). We find that in the instant case as the duty is held to be payable interest follows consequentially. The appellants also pleaded that no penalty is imposable when the issue involved is a bona fide interpretation of terms of exemption notification as held in Collector of Central Excise v. H.M.M. Limited, [1995 \(76\) E.L.T. 497 \(S.C.\)](#) and CCE, Aurangabad v. Balakrishna Industries, [2006 \(201\) E.L.T. 325 \(S.C.\)](#). However, we find that the appellants have been giving various declarations about the impugned goods while making export from Delhi and while importing at Bangalore. Only after the issue of notification, they have raised the issue of interpretation of notification. Therefore, we find that the appellant's contention is not valid. The appellants also contended that the penalty under the Section 114AA can be imposed when the goods have been exported by forging the documents knowingly or intentionally. The present case does not relate to export at all and even for imports, all the documents presented for imports were genuine and not forged and thus penalty is not imposable under Section 114AA of the Customs Act, 1962. We find that there is merit in the argument of the appellants. As the case is not of export, we find that no penalty under Section 114AA of the Customs Act, 1962 is imposable. The appellants have also relied upon the case of Bussa Overseas & Properties P. Ltd. v. C.L. Mahar, Assistant Commissioner of Customs, Bombay, [2004 \(163\) E.L.T. 304 \(Bom.\)](#) and submitted that goods already cleared cannot be held to be confiscated. We uphold the view. However, we find that the Adjudicating Authority simply held that the goods are liable for confiscation; he did not confiscate the goods and he did not impose any fine in lieu of confiscation. Therefore, we find that the order of mere holding the goods liable for confiscation is of no consequence, need not be interfered with.

21. In view of the above, the appeal is partly allowed in the above terms i.e. by setting aside the penalty imposed under Section 114AA of the Customs Act, 1962, while upholding the other conclusions."

14. So far as the penalty imposed on the partners of the Appellant firm, we hold that the same is not sustainable for the reason that the

penalty was proposed to be imposed on the Appellant partnership firm. We place reliance on the decision of Hon'ble Gujarat High Court in case of **CCE Vs. Jai Prakash Motwan** reported in **2010 (258) ELT 204 (Guj)** wherein it is observed as under:

"5. A perusal of the impugned order of the Tribunal as a whole, does not reveal that any specific role is attributed to the respondent who is one of the partners in the firm, and there is no adjudication to this effect in the said order. The Tribunal has relied upon the Division Bench decision in the case of Jaybee Industries v. CCE, Gurgaon as reported in [2004 \(168\) E.L.T. 316](#) (Tri.-Del.) to come to the conclusion that where a penalty is imposed on a partnership firm, no separate penalty can be imposed on any of its partners. It has been noticed by the Tribunal that the respondent has been penalized and penalty has also been imposed upon the assessee-firm for the outstanding duty, which is not permissible in law and, therefore the penalty imposed upon the respondent, being a partner, is set aside.

6. The learned counsel for the appellant could not point out any provision in the Central Excise law, which treats a partnership firm as a separate excisable entity from its partners. Admittedly, a partner is not a separate legal entity and cannot be equated with the employees of a firm. Once the firm has already been penalized, separate penalty cannot be imposed upon the partner. The impugned order of the Tribunal does not suffer from any legal infirmity so as to warrant interference. In the absence of any substantial question of law, the appeal is dismissed."

15. Similar proposition was laid down by Hon'ble Punjab & Haryana High Court in case of **Vinod Kumar Gupta Vs. CCE** reported in **2013 (287) ELT 54 (P&H)** wherein it is observed as under:

"9. Having heard learned counsel for the parties, we are of the considered opinion that proprietorship firm or proprietor thereof cannot be treated as two different legal entities. Partnership firm is a firm in mercantile usage, however, penalty imposed on the proprietorship or partnership firms would mean penalty on the proprietor or partners thereof, therefore, imposition of penalties one on the proprietorship firm and second on the proprietor would amount to imposition of penalty twice, which cannot be sustained in the eyes of law.

10. Learned Single Judge of Calcutta High Court in the case of TarakNath Sen and Others v. Union of India and Others, AIR 1975 Calcutta 337, has observed as under :-

"17. Thus, these decisions make it clear that although a firm in mercantile usage has a personality of its own, strictly in the eye of law, it is not a legal entity like a natural person. Therefore, the rights and obligations of a firm are really rights and obligations of the individual partners of the firm. In the instant case, according to the findings made by the Additional Collector of Customs in his adjudication order the petitioners 2 to 4 carrying on business as a partnership firm had contravened provisions of the Customs Act and the Gold Control Rules and were liable for penalties under Section 112 of the Customs Act and under Rule 126-L(16) of the Defence of India (Gold Control) Rules. Therefore, no exception can be taken to imposition of penalties individually upon them. But since the firm is not a legal entity and Section 140 of the Customs Act was inapplicable to the adjudication proceeding, the Additional Collector of Customs by imposing penalties also upon the firm has really twice punished the petitioners Nos. 1 to 4 for the same sets of acts. Therefore, although I propose to sustain the imposition of penalties under the Customs Act and the Defence of India (Gold Control) Rules upon the petitioners 2 to 4, the penalties of fine imposed upon the petitioner No. 5 firm should be quashed."

11. *Having perused the observations of learned Single Judge of Calcutta High Court in the case of TarakNath Sen (supra), we find that a firm in mercantile usage is the firm in its own, strictly in the eye of law, it is not a legal entity like a natural person. Therefore, the rights and obligations of a firm are really rights and obligations of the individual partners of the firm, therefore, penalty imposed on the firm would amount to imposition of penalty to the proprietor or the partner, as the case may be, therefore, imposition of penalty on the proprietor independently would not be legal.*

12. *Appeal is allowed. Imposition of penalty on the appellant stands set aside."*

16. For the reasons above and respectfully following the settled principle we set aside the penalty imposed on all the partners of the Appellant firm.

17. Further, on perusal of the findings of Ld. Principal Commissioner in the impugned order no specific reason or findings is attributed which can concretely prove any mala fide or misstatement on the part of the employees of the CHA firm (Customs Broker Firm). Therefore, the penalties imposed on the employees of the CHA firm (Custom Broker Firm) is also set aside.

18. In view of the above findings, all the appeals filed by the Appellants are allowed with consequential relief, if any.

(Order pronounced in the open court on 02.12.2024)

(RAMESH NAIR)
MEMBER (JUDICIAL)

(RAJU)
MEMBER (TECHNICAL)

Neha