

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

REGIONAL BENCH-COURT NO. 3

Customs Appeal No. 10107 of 2021 - DB

(Arising out of OIO-57-58-SA-57-58-ADG-ADJ-DRI-MUMBAI-2020-21 dated 23/09/2020 passed by Commissioner of Central Excise, Customs and Service Tax-MUMBAI-I)

MUDDASSIR MOHTISHAM

.....Appellant

13/2 QIDWAI ROAD BHATKAL
BHATKAL, KARNATAKA

VERSUS

Commissioner of C.-MUNDRA

.....Respondent

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

APPEARANCE:

Shri Vikas Mehta, Consultant, appeared for the Appellant

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

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

Final Order No. 13074/2024

DATE OF HEARING: 19.11.2024

DATE OF DECISION: 04.12.2024

RAMESH NAIR

Shri Muddassir Mohtisham (hereinafter referred to as 'the appellant) has filed Appeal against the impugned Order No. 57-58/SA (57-58) ADG (ADJ.)/DRI, MUMBAI/2020-21 dtd. 23.09.2020 passed by the Additional Director General, Adjudication, DRI, Mumbai wherein a Penalty under Section 112(a), 112(b) and 114AA of Customs Act. 1962 is imposed on appellant.

1.1 Brief facts of the case of Revenue are that the importer namely, M/s. Dhaiya International, Gandhidham owned by Shri Gaurav Patel (Proprietor) filed two Bills of Entry No. 7735855 dtd. 22.08.2018 and 8400313 dtd. 10.10.2018 with customs House, Mundra for clearance of goods declared as "Bamboo Sticks for making agarbatti." Goods covered by Bill of Entry No. 8400313 dtd. 10.10.2018 were subjected to examination. This revealed mis-declaration. Apart from Bamboo Sticks, laptop adaptor, wrist watch, belt, lingerie set, ladies hand bag, cosmetics items, etc were found. The said undeclared goods placed under detention. Statements of various persons were recorded in this regards. Inquiry with Shri Gauarv Patel revealed that he had imported several items like assorted cosmetic items, electronic items,

garments, ladies purse, oil filter etc. on earlier occasion also under Bill of Entry No. 7735855 dtd. 22.08.2018. The officers traced these goods from a premises in Pydhonie, Mumbai and placed the same under detention and shifted them to ICD, Thar (Sanand). It appeared that these were branded goods, opinion was taken from respective brand owners/right holder, etc. All of these opined that goods are counterfeit. After investigation, SCN dated 01-10-2019 was issued to importer and other persons including Appellant, proposing confiscation of the goods, demanding differential custom duty and proposing imposition of penalties under customs Act, 1962. In adjudication, Ld. Adjudicating Authority as regard the appellant has imposed the penalty under Section 112(a), 112(b) and 114AA of Customs Act, 1962 by inter alia concluding that the role of the Appellant was to arrange finance and to purchase cosmetics, watches, laptop adapter, bags, belt, lingerie set, oil filter, headphone etc. of foreign brands from China and Export the same concealing it behind bamboo sticks for making agarbatti, obtained and provided manipulated import documents i.e invoice, packing list, phytosanity certificate, etc. from china by showing description of goods as bamboo sticks for making agarbatti. Hence, appellant is before this Tribunal against penalties.

2. Shri Vikas Mehta, Learned Consultant appearing on behalf of appellant submits that Ld. Adjudicating authority has found in para 5.1.4 of impugned order that Shri Gaurav Patel, Proprietor of M/s. Dhairya International (importer) and Shri Fahim managed the manipulated import documents and not the appellant. A contradictory finding is in para 5.11.1 that the role of appellant was to arrange finance and to purchase cosmetics, watches, laptops adapter, bags, belt, lingerie set, oil filter, headphones, etc., to obtain and provide manipulated import documents i.e invoice, packing list, phytosanitary certificate, etc. from china, without citing any evidences.

2.1 He also submits that as per the admitted position, Appellant is residing in China since last 15 years. His statement was not recorded during investigation as he was in China. However, it is matter of record that Shri Gaurav Patel had himself visited China from 07.09.2018 to 15.09.2018. He not only met the Appellant but the second container was stuffed with belts, watches, cosmetic, etc. of different make/brands at his behest only. It is duly noted in the impugned order that he got the manipulated import documents, i.e. invoice, packing list, phytosanitary certificate, etc, from China by showing

description of goods as 'Bamboo Sticks for Making Agarbati'. Since he was importer in India, he very well knew the importability of these items in India as against the Appellant who was in China since last 15 years and did not have knowledge about the prevailing import law of India.

2.2 He further submits that it is evident from the findings that the amount of Rs. 14 lakhs in lieu of using IEC of M/s. Dhairya International was payable to Shri Gaurav Patel by the Appellant/Shri Fahim that Ld. Adjudicating authority has failed to pinpoint the role of appellant in the case. Thus, the Appellant is falsely implicated in the this case for his limited role of assisting Shri Gaurav Patel in purchasing Chinese goods for import into India in his own company. Since he had himself selected the items from China and had been filing bill of entry for the said goods, the Appellant had every reason to believe that these goods were freely importable into India.

2.3 He also submits that on the above basis, the Appellant was not involved in shipping any incriminating goods into India or preparing or getting prepared any documents based on which Shri Gaurav Patel filed Bills of Entry with Customs House, Mundra. Hence, the Appellant is not liable to penalty under Section 112(a), 112(b) and 114A of Customs Act, 1962.

3. On the other hand Shri Girish Nair, Ld. Assistant Commissioner (AR) reiterated the findings of the impugned order.

4. Heard both sides and perused the Appeal records. The short question arising for consideration is whether the penalty imposed on the appellant under Section 112(a), 112(b) and 114AA of the Customs Act is sustainable on facts and in law.

4.1 We find that the role of the Appellant in the whole episode has been derived only from the statement of Shri Gaurav Patel, Proprietor of M/s Dhairya International (Importer) and other co-accused.

4.2 We find that the proceeding only on the basis of statement of co-accused is not sufficient to hold the Appellant guilty of mis-declaration of goods and manipulated import documents in absence of any search and recovery of corroborative evidence from him or his place. The alleged statement of the co-accused cannot be relied upon to implicate a person on charges of mis-declaration of goods and manipulation of import documents. Therefore, it was

incumbent on the Investigating Officer, to have searched and recorded statement of the Appellant and to further prosecute him in the matter on the basis of its finding. Therefore, the proceedings against Appellant on the basis of the statements of the co-accused is not sufficient to hold him guilty of disputed imported goods. It is a settled law that no person shall be implicated in a crime merely on the basis of an allegation levelled by a co-accused, without any corroborative evidence. We find that in the case of *Ravi Garg v. Collector of Customs, New Delhi* [1996 (86) E.L.T. 357 (Tribunal) = 1996 taxmann.com 438 (CEGAT - New Delhi)], the Tribunal held that :-

"15. Mohinder Singh has not been examined by the investigating officers. The notice which was sent to his address, has been returned without service. It is stated by the department that the said notice was pasted on the door of his shop. It is stated that he had avoided the summons. Mohinder Singh has submitted that he has never avoided the summons and he was not aware of the allegations made in the show cause notice. He has stated that if he could be served with court summons then it is surprising as to how the department could not arrest him for the purpose of investigation and to record his statement. The Learned Advocate also argued on this point only. We notice that the summons of the magistrate court, on the complaints of the department, has been served on the Mohinder Singh. The alleged statement of the co-accused cannot be only taken to implicate a person on charges of gold smuggling. Therefore, it was incumbent on the investigating officer, to have searched and arrested Mohinder Singh for recording his statement and to further prosecute him in the matter. As the department has not shown by any evidence nor explained to our satisfaction as to why they had not arrested him, therefore, the proceedings against Mohinder Singh on the basis of the statements of co-accused is not sufficient to hold him guilty of gold smuggling, especially when no search and recovery has been done at his place. Even there is no evidence of previous record of gold smuggling against him. The appellants Ravi Garg, Surinder Kumar Anand and Shyam Babu Verma have implicated Mohinder Singh but these statements which are self-implicating in nature, should have been confronted to Mohinder Singh. It is not sufficient to say that the summons were pasted on his shop and merely because he has not come forward to give statement to explain the allegation made against him by co-accused, therefore, the case against him stands proved. The principles of natural justice require that the accused in a matter is required to be confronted with the evidence, which the department has collected against him and full opportunity should be given to an accused to defend himself. It is not

the case of the department that the address of Mohinder Singh is not correct. The postal remarks on the summons sent by the DRI shows that on repeated visits the shop was found to be closed and hence, the cover containing the summons were returned to the sender. The department officers cannot take this postal endorsement as 'refusal of summons' and the appellant Mohinder Singh had knowledge of the case. Therefore, the department officials not having apprehended and no further investigation having been done against him, is by itself sufficient to set aside the order of penalty against Mohinder Singh. We therefore, set aside the order of penalty passed against Mohinder Singh."

4.3 We also find that the penalty under Section 112(a) and 112(b) of the Act ought not to have been imposed. Section 112 is extracted below for ready reference :-

"Section 112. Penalty for improper importation of goods, etc. - Any person, -

(a) 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 111, or abets the doing or omission of such an act, or

(b) who acquires possession of or is in any way concerned in carrying, removing, depositing, harbouring, keeping, concealing, selling or purchasing, or in any other manner dealing with any goods which he knows or has reason to believe are liable to confiscation under section 111,

shall be liable, -

(i) in the case of goods in respect of which any prohibition is in force under this Act or any other law for the time being in force, to a penalty not exceeding the value of the goods or five thousand rupees, whichever is the greater;

(ii) in the case of dutiable goods, other than prohibited goods, subject to the provisions of section 114A, to a penalty not exceeding ten per cent of the duty sought to be evaded or five thousand rupees, whichever is higher :

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4.4 From the above provisions it is clear that any penalty under Section 112 has a nexus to the confiscability of the imported goods, we have first to address the question whether the goods were liable to be confiscated under Section 111 of the Customs Act. In this context, we find much force in the finding of the Ld. Adjudicating authority. The confiscation ordered by the Commissioner is not to be faulted. However, whether the above penalty was liable to be imposed on the appellant would depend on whether his conduct satisfied the requirement of Clause (a) and (b) of Section 112 of the Act. In order that a person is penalised under the above provision, it has to be established that he in relation to said goods, does or omits to do any act which act or omission would render such goods liable to confiscation under section 111, or abets the doing or omission of such an act and he acquired possession of or was in any way concerned in carrying, removing, depositing, harbouring, keeping, concealing, selling or purchasing or *in any other manner dealing with* any goods which, he knew or had reason to believe, were liable to confiscation under Section 111 of the Act. As per the revenue the appellant had dealt with the goods by associating himself with the *modus operandi* of clearance of the goods. The role of the appellant in the present matter was argued by the department was to arrange finance and to purchase disputed goods from China and export to India. Ld. Consultant has opposed this argument on the ground that no evidences provided by the revenue in this regards. We also find force in argument of Ld. Consultant. We also noticed that no physical act of the appellant in relation to the goods in question has been brought out to justify the penalty on the appellant under the above sections.

4.5 We also observed that Section 112' *ibid.* has two limbs : either (a) or (b); no specific averment is made as to the role of the appellants to justify the levy of penalty. The two limbs under the above Section are specific and hence, the Revenue has to invariably specify the guilt as to whether the same is under (a) or (b). Further as regard the role of the Appellant we find the revenue nowhere produced any documentary evidences, therefore, penalty cannot be imposed on surmises, assumptions and presumptions and there is not even any circumstantial evidence brought on record against the appellant, to justify penalty under 'Section 112'. The entire case of the Revenue against the appellant is based upon the statements of the co noticees. It is well-established law that the statements of the co-noticees, unless corroborated in material particulars by independent evidence, do not constitute the legal

evidence. There is nothing on record to establish by the revenue with documentary evidence that Appellant had abetted in the relation to disputed imported goods for purpose of imposition of penalty under Section 112(a) and/or 112(b) of the Customs Act, 1962.

4.6 As regard the imposition of penalty under Section 114AA of Customs Act, 1962 on the Appellant we find the said Section provide as under :

"Section 114AA. Penalty for use of false and incorrect material. - If a person knowingly or intentionally makes, signs or uses, or causes to be made, signed or used, any declaration, statement or document which is false or incorrect in any material particular, in the transaction of any business for the purposes of this Act, shall be liable to a penalty not exceeding five times the value of goods."

From the plain reading of Section 114AA it is evident that penalty under this section can be imposed on a person who intentionally makes, signs or uses, or causes to be made, signed or used, any declaration, statement or document which is false or incorrect in any material particular for the transaction of any business under the Customs Act, 1962. In the present case nothing has been brought on record by which it can be said that the appellant had made or caused to be made any declaration/used or caused to be used any statement or document which is false or incorrect. In the present disputed matter all the declaration related to import of goods is signed and filed by Shri Guarav Patel. In fact Appellant has not made any declaration to the Custom Authorities as required under the Customs Act, 1962. No document etc., which has been produced by the revenue which was signed by the Appellant. We also find that in the present matter revenue in support of allegation that Appellant is guilty of providing manipulated import documents i.e invoice, packing list, phytosanitary certificate etc. from China by showing description of goods as Bamboo Sticks for making Agarbattie not produced any single documentary evidence. As the ingredients for invocation of provisions of Section 114AA are absent in the present case penalty under the said section is not justified.

5. Consequently, the impugned order is set aside to the extent it imposes penalties upon the present appellant and the appeal is allowed with consequential relief, if any, as per law.

(Pronounced in the open court on 04.12.2024)

(RAMESH NAIR)
MEMBER (JUDICIAL)

(RAJU)
MEMBER (TECHNICAL)

Bharvi