CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
<u>ALLAHABAD</u>

REGIONAL BENCH - COURT NO.I

Customs Appeal No.70440 of 2019

(Arising out of Order-in-Appeal No.NOI-CSTM-000-APP-1914 & 1915-18-19 dated 28/01/2019 passed by Commissioner (Appeals) Central Goods & Services Tax, Noida)

Commissioner of Customs, Noida **.....Appellant**
(Cocor Complex P.O. Container Depot, Tilpata, Noida)

VERSUS

M/s Amrut Handicrafts, **....Respondent**

(M-1, Pocket-B, SEZ Moradabad)

WITH

Customs Appeal No.70457 of 2019

(Arising out of Order-in-Appeal No.NOI-CSTM-000-APP-1914 & 1915-18-19 dated 28/01/2019 passed by Commissioner (Appeals) Central Goods & Services Tax, Noida)

Commissioner of Customs, Noida **.....Appellant**
(Cocor Complex P.O. Container Depot, Tilpata, Noida)

VERSUS

M/s Aash Azz Word, **....Respondent**

(82, E/11, GF, Mufti Tola, Moradabad)

<u>APPEARANCE:</u>

Shri Santosh Kumar, Authorised Representative for the Appellant
None for the Respondents

CORAM: **HON'BLE MR. P.K. CHOUDHARY, MEMBER (JUDICIAL)**
HON'BLE MR. SANJIV SRIVASTAVA, MEMBER (TECHNICAL)

Final ORDER NO.70222-70223/2023

DATE OF HEARING : 17 November, 2023
DATE OF DECISION : 17 November, 2023

<u>SANJIV SRIVASTAVA:</u>

The present case is directed by revenue against the common Order-in-Appeal No.NOI-CSTM-000-APP-1914 & 1915-18-19 dated 28/01/2019 passed by Commissioner (Appeals) Central Goods & Services Tax, Noida. By the impugned order Commissioner (Appeals) has held as follows:-

"9. Regarding penalty imposed on the appellant-1 under Section 114 of the Act, I find that Section 114(iii) of the Act under which the penalty has been imposed speaks of

*penalty **not exceeding** the value of the goods, **as declared by the exporter or the value as determined** under the Act, whichever is greater. I find that the adjudicating authority has imposed a penalty of rupees 60 (sixty) lakhs which is around ten times the value of the impugned goods. The penalty of this magnitude has not been justified by giving any grounds or reasons. I find that all along the appellants have pleaded that due to the mistake on part of the labourers/ supervisor of the DTA supplier and the appellant-1, goods other than those declared were loaded. I find that in the SCN as well as in the impugned order it has been mentioned/ acknowledged that the mis-declaration of the goods was on account of the mistake of the persons responsible for the packing of the impugned goods. There is nothing to substantiate that the appellant-1 had deliberately mis declared the impugned goods. The allegation that the appellant-1 intentionally and knowingly prepared the shipping bills, invoices, packing list, signed the declarations in respect of the impugned goods is, therefore, not sustainable as no evidence is brought forth to substantiate the same. I therefore find that the penalty of Rupees sixty lakhs imposed on the appellant-1 under Section 114(iii) of the Act is not only unreasonable but also excessive and too harsh. Accordingly, keeping in view the value of the impugned goods and the fact that there was no willful misdeclaration on part of the appellant- I, the penalty imposed upon the appellant-I is reduced to **Rs. 3,00,000/-(Rupees three lakhs only).***

10. The adjudicating authority has also imposed a penalty of Rs.30,00,000/- on the appellant- 1 under Section 114AA of the Act by stating that the appellant in collusion with his DTA supplier (appellant-2) attempted to export the impugned goods which were liable for confiscation and knowingly made false declarations in the shipping bills, invoices etc. in contravention of provisions of Section 50 (2) of the Act with an intent to claim irregular/fraudulent export incentives. In this regard, I find that penalty under Section 114AA of the Act can be imposed only 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 the Act. However, I find that nowhere in the SCN or in the impugned order has it been brought out that the mis-declaration of the goods was done as per the instructions of Shri Zia Faisal or Shri Mohd Faheem and that they knowingly signed the documents. Shri Zia Faisal from the very beginning has stated that it was done due to mistake by the employees. No evidence has been adduced to corroborate the allegation of collusion of the appellant with his DTA supplier. Besides, I find that reference to word 'person' in the Section 114AA of the Act refers to a natural person and company or a legal/ juridical entity cannot be penalised under the said section. The penalty under section 114AA is not proposed against any natural person. Therefore, no penalty on the appellant-1 is imposable under the said Section. Accordingly, penalty imposed on the appellant-1, under Section 114AA of the Act, is not sustainable and the same is set aside.*

11. *I further find that the adjudicating authority has imposed a penalty of Rs 30,00,000/- on appellant-2 under Section 114(iii) of the Act by stating that appellant-2 in collusion with appellant-1 attempted to export the goods liable to confiscation and knowingly made false declaration in the shipping Bills, invoices etc. with intent to claim irregular/ fraudulent export incentive. I find that appellant-2 was only supplier of the impugned goods to the appellant-1 and he only supplied the impugned goods and did not attempt to export the goods. Penalty under Section 114 of the Act is imposable only when a 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 of the Act or abets the doing or omission of such an act. The appellant-2 had only supplied the goods the appellant-1. The appellants have all along stated and have taken the stand that the wrong supply and consequent mis declaration was on account of* *the mistake of the employees. The appellant-2, under the given facts and circumstances of the case, cannot be alleged to have done or omitted to have done any act or had abetted the doing or omission of any such act which rendered the impugned goods liable to confiscation. The allegation against the appellant-2 are therefore vague and unsubstantiated. In fact, the allegations are contrary to the facts and evidence on record. Nowhere in the SCN or the impugned order has it been brought out that appellant-1 and appellant-2 had any prior understanding to supply and ship the impugned goods which they intentionally and knowingly mis-declared. The appellant-2 is, therefore, not guilty of any act or omission in respect of the impugned goods which were found to be mis- declared and therefore liable for confiscation. None of the ingredients mentioned in the said Section 114 of the Act are satisfied as far as appellant-2 is concerned. Therefore, no penalty under Section 114 of the Act is imposable on the appellant-2. The penalty imposed under Section 114 of the Act is, therefore, set aside. Hon'ble CESTAT, Mumbai, in the case of S.P. Bahl Vs Commissioner of Customs (Import), Mumbai, as reported in 2015 (319) E.L.T. 157, has held as under:*

> *Penalty - Misdeclaration - Goods supplied by appellants to exporter only in domestic area i.e. out of Customs area -* ***No document prepared by appellant or signed by him relevant to export of goods - Appellant not found to be involved in export of goods*** *- Charges based solely on statement of exporter without any corroboration - Goods not liable to confiscation - Penalty not imposable on appellant under Section 114(1) or Section 114AA of Customs Act, 1962.*

11.1 *As regards penalty Rs 15,00,000/- imposed on the appellant-2 under Section 114AA of the Act, it has been discussed in para 10 above that the same is imposable only on a natural person and not against a company or a legal/juridical entity. Besides, there is no evidence to conclude that the appellant-2 had done any of the acts mentioned in the said Section 114AA of the Act in respect* *of the impugned goods. The penalty under Section 114AA of the Act is not imposable on appellant-2. The same is, therefore, set aside."*

2.1 Respondent-I M/s Amrut Handicrafts were engaged in the manufacturing of various items of handicrafts and located in Moradabad. Respondent-II M/s Aash Azz Word is the DTA supplier who supplied the goods to the respondent-I. On the basis of the intelligence, a live consignment export of the respondent-I intercepted at ICD, Moradabad. During the course of examination of the goods it was observed that the goods found stuffed in the two containers were mis-declared as the same were found to be yellowish golden polished Iron artware instead of Brass artware, as declared. The quantity was also found 10104.76 Kg. instead of declared quantity of 30089.52 kg. Samples were drawn and were send to CRCL, New Delhi for testing. CRCL submitted its report through letter dated 06.10.2017 and confirmed that the samples are grayish metallic article (magnetic), painted on both sides, each containing Iron more than 99% of the weight.

2.2 Show cause notice dated 23.03.2018 was issued to the respondents proposing to reject the declared tariff item of consignment i.e. 74199930 and re-classified under tariff item 73239490. He had declared the value of Rs.4,52,34,578/- and should be re-determined the same to Rs.6,87,124/-. The goods is liable for confiscation and imposed redemption fine in view of confiscation and for imposition of penalty under Section 114 and 114AA of Customs Act, 1962.

2.3 The said show cause notice was adjudicated by the Additional Commissioner ICD-Moradabad by holding as follows:-

<u>ORDER</u>

(i) I reject the tariff Item of the consignment attempted to be exported vide Shipping Bill No.4001397, 4001398 and 4001399 all dated 19.09.2017 and 4001394, 4001395 and 4001396 all dated 19.09.2017 declared by the Exporter as Handicraft Artware of Brass falling under chapter heading No. "74199930" and re-classify the said export consignment, actually found to be comprising of Handicraft Artware of Iron, under tariff heading No.73239490 of the Customs Tariff Act, 1975.

(ii) I reject the FOB value of Rs.4,52,34,578/- of the goods, attempted to be exported vide six(6) Shipping Bills bearing No.4001397, 4001398 and 4001399 all dated 19.09.2017 and 4001394, 4001395 and 4001396 all dated 19.09.2017, declared by the Exporter in terms of Rule 8 of the Customs Valuation (Determination of Value of Export Goods) Rules, 2007 read with Section 14 of the Customs Act, 1962 and re-determine the same to Rs.6,87,124/- (Rupees Six Lakh Eighty Seven Thousand One Hundred and Twenty Four only), on the basis of market enquiry conducted by the officers of CIU along with the representative of the Exporter, in terms of the provisions of Rules 3 & 6 of Customs Valuation (Determination of Value of Export Goods) Rules, 2007.

(iii) I hereby confiscate the goods attempted to be exported vide six (6) Shipping Bills baring No. 4001397, 4001398 and 4001399 all dated 19.09.2017 and 4001394, 4001395 and 4001396 all dated 19.09.2017 having declared the FOB value of Rs.4,52,34,578/- & re-determined value of Rs. 6,87,124/- respectively and seized on 26.09.2017 under the provisions of Section 113(h), 113(i) and 113(ia) of the Customs Act, 1962. I give the option to M/s Amrut Handicrafts, M-1, Pocket-B, SEZ-Moradabad to redeem the goods on payment of redemption fine of Rs.4,00,000/- and take them back to their factory at SEZ Moradabad. Further decision regarding allowing the redeemed goods for taking them back to town may be taken by the SEZ authorities.

(iv) I impose penalty of Rs.60,00,000/- upon M/s Amrut Handicrafts, M-1, Pocket-B, SEZ- Moradabad under Section 114(iii) of the Customs Act, 1962.

(v) I impose penalty of Rs.30,00,000/- upon M/s Amrut Handicrafts, M-1, Pocket-B, SEZ- Moradabad under Section 114AA of the Customs Act, 1962.

(vi) I impose penalty of Rs.30,00,000/- upon M/s Aash Azz World, 82 E/11, Ground Floor, Mufti Tola, Moradabad under Section 114(iii) of the Customs Act, 1962.

(vii) I impose penalty of Rs. 15,00,000/- upon M/s Aash Azz World, 82 E/11, Ground Floor, Mufti Tola, Moradabad under Section 114AA of the Customs Act, 1962.

2.4 Aggrieved respondents filed appeal before Commissioner (Appeals), who have disposed of the appeal as per the impugned order referred in para-1 above.

3.1 We have heard Shri Santosh Kumar learned Authorised Representative appearing for the revenue. The notice for hearing issued to the respondents but none appeared on behalf of the respondents on number of occasions. Accordingly, in terms of Rule 21 of CESTAT Procedure Rules, 1982, both the appeals has been taken up for hearing and consideration after hearing the learned Authorized Representative for the Revenue.

3.2 Learned Authorized Representative for the Revenue reiterates the grounds taken in the appeal memo.

4.1 We have considered the impugned orders along with the submissions made in appeal and during the course of argument.

4.2 The only ground stated in the appeal filed by the revenue for challenging the order of Commissioner (Appeals) in respect of respondent-1 is as follows:-

"The Commissioner (Appeals) also finds that it has been mentioned/acknowledged in the SCN as well as in the impugned order that the mis-declaration of the goods was on account of the mistake of the persons responsible for the packing of impugned goods. findings of the Commissioner (Appeals) is not acceptable as it was clearly mentioned in order-in-original that the case was booked on the basis of an intelligence received by the officers that the exporter is exporting articles of Iron by mis-declaring them as articles of brass with the active connivance of their domestic tariff area supplier with intent to avail fraudulent drawback and benefit of MEIS scheme. The exporter's acknowledgment that the mis-declaration of goods was occurred due to mistake of the persons responsible for the packing, is not acceptable as there is huge difference in quantity of goods stuffed in containers and as declared in documents and as these kinds of consignment cannot be stuffed without any supervision or planning.

In view of the above, it appears that the exporter has intentionally and knowingly mis-declared the goods to getting the benefit of export incentives of MEIS scheme and Duty drawback.

4.3 With regards to respondent-II the grounds stated is as follows:-

"With regard to penalty amounting to Rs. Thirty lakhs upon Appellant-2, under Section 114(ii), the Commissioner (Appeals) finds that no penalty is imposable on the Appellant-2 under this section as nowhere in the SCN or the impugned order has it been brought out that appellant-I and appellant-2 had any prior understanding to supply and ship the impugned goods which they intentionally and knowingly mis-declared, therefore, Appellant-2 is not guilty of any act or omission in respect of the impugned goods which were found to be mis-declared.

During the course of Inquiry, it was gathered by the officers of Central intelligence Unit, Meerut Zone, Meerut that the firm found non-existent on the registered address of Appellant-2 i.e. supplier of the material. Owner of the property informed the Assistant Commissioner (CIU) vide his letter dated 04.10.2017 that he rented one of the two shops situated at the ground floor of his above said property to M / s Aash Azz World during the period 2013-14 and the said unit used to exist in their premises during 2013-14, but in the end of 2014, they wound up their business activity from there and left the premises. The officers also tried to locate the whereabouts of the aforesaid suppliers at the residential address as given in IEC but there was no trace of family of the proprietor of M/s Aash Azz World.

In view of the circumstances, it is evident that the Appellant-1 was running the business in the name of someone else and not justified as to why he was not running the business in his name. Further, there were no premises available with appellant-2 for doing any business activities. There was no trace of appellant-2 also. These facts clearly guides that there was some understanding between them and they intentionally and knowingly mis-

declared the goods for getting the export benefits. Hence, penalty under Section 114(ii) is imposable upon Appellant-2 and therefore, the Commissioner (Appeals) has made a mistake while passing the order.

(iv) With regard to penalty of Rs. Fifteen Lakhs upon Appellant-2 under Section 114AA, the Commissioner (Appeals) order is not proper and legal as discussed in para 2 (ii) and (iii) above.

3. The Commissioner (Appeals) has not discussed the departmental view on merits at all but held to be wrong on the ground of party's appeal. In view of the above, the department's appeal deserves to be decided on merits."

4.4 Ultimately, it is contention of revenue that Commissioner (Appeals) has decided the appeal in favour of respondents without discussing departmental views on merits. Form the above reproduced para of Commissioner (Appeals), we find that Commissioner (Appeals) has discussed the relevant portion of show cause notice and has concluded for deduction of the penalties imposed upon the respondents. He has discussed in his order that why he do not find respondents guilty of mis-declaration etc. and imposition of penalties under Section 114 and specifically under Section 114AA is a discretionary power whereby penalty could have been imposed up to the value as declared or to the value as determined under the Customs Act. It is not the case that penalties imposed under the provisions is a mandatory penalty that needs to be reduced. Commissioner (Appeals) in exercise of discretion have reduced the penalties imposed as indicated in his order. Nothing has been stated in the appeal to show that the discretion as exercised was in a malafide manner.

4.5 In case of R A Spinning Mills [2004 (171) E.L.T. 54 (Tri. – Mumbai)] Mumbai bench held as follows:

"7. As regards the issue as to whether penalty should have been imposed, we find that it has been held in series of decisions including that in the case of Wooltex Associates v. CC, Mumbai [1998 (99) E.L.T. 245] that Section 112 of the Customs Act does not provide for a mandatory penalty and the discretion to impose penalty or not to impose penalty depends upon each case. In the

case of Akbar Badruddin Jiwani v. CC [1990 (47) E.L.T. 161 (S.C.)], penalty imposed under Section 112 was set aside by the Apex Court on the ground that the importers were under a bona fide belief that the goods imported were covered under OGL. This decision has been relied upon by the Tribunal in the case of Siris Aqua Ltd. v. CCE, Hyderabad [2000 (115) E.L.T. 186] to set aside penalty as mens rea on the part of the importers was not fully established. Same view was reiterated in the case of SIJ Electronics Comp. Tech. Pvt. Ltd. v. CC, Kochi [2001 (129) E.L.T. 528]. In the light of these decisions, we hold that Section 112 of the Customs Act does not provide for a mandatory penalty."

4.6 In P. Pandithurai [2020 (373) E.L.T. 451 (Mad.)], Hon'ble Madras High Court observed as follows:

"The adjudicating authority should be permitted to exercise their discretion in manner known to law. While exercising their discretion, they may also examine the statements made by the petitioner. Naturally, they would have to provide an opportunity to the petitioner of being heard."

4.7 In Raju Sharma [2020 (372) E.L.T. 249 (Del.)] Hon'ble Delhi High Court held as follows:

"18. …..The Commissioner (Appeals), while rejecting the appeal of the revenue, correctly noted this legal position, and observed that, as the AC had exercised discretion in favour of allowing redemption of the seized currency, on payment of redemption fine of Rs 50,000/-, no occasion arose to interfere therewith. We are entirely in agreement with the Commissioner (Appeals). Exercise of discretion, by judicial, or quasi-judicial authorities, merits interference only where the exercise is perverse or tainted by patent illegality, or is tainted by oblique motives [Mangalam Organics Ltd. v. UOI - (2017) 7 SCC 221 = 2017 (349) E.L.T. 369 (S.C.)]. No illegality, much less perversity, is discernible in the decision, of the AC, to allow redemption of the seized currency on payment of redemption fine of Rs 50,000/-. The Commissioner (Appeals) rightly refused to interfere with the said decision, and the Revisionary

Authority, in an order which reflects total non-application of mind, chose to reverse the said decision."

4.8 In Barnwal Carpet Mfg. Co [2017 (354) E.L.T. 21 (All.)] Hon'ble Allahabad High Court has held as follows:

"6. Section 114(iii) of 'the Act' whereunder the penalty was imposed, provides for the imposition of penalty not exceeding the value of the goods. The use of the phrase 'not exceeding the value of the goods' denotes that the maximum penalty which could be imposed in the aforesaid provision shall not exceed the value of the goods and that the authority in its discretion can impose lesser penalty as well. When the adjudicating authority is empowered to impose lesser penalty than the maximum provided it cannot be said that the Tribunal is not vested with the same power. The Tribunal having exercised the above discretion for the reasons recorded which do not appear to be arbitrary or whimsical, in any way, we are of the view that the said discretion is not liable to be interfered with and the Tribunal was justified in reducing the penalty imposed under Section 114(iii) of 'the Act'. Hence, substantial question is answered in favour of the respondent."

4.9 In view of the above discussions and decisions, we do not find any merits in both the appeals.

5.1 Both the appeals are dismissed.

(Dictated and pronounced in open court)

Sd/-
(P.K. CHOUDHARY)
MEMBER (JUDICIAL)

Sd/-
(SANJIV SRIVASTAVA)
MEMBER (TECHNICAL)

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