CUSTOMS, EXCISE & SERVICE TAX APPELLATETRIBUNAL
ALLAHABAD

REGIONAL BENCH - COURT No. I

Customs Miscellaneous Application No.70009 of 2023
(On behalf of appellant) **In**
Customs Appeal No.70030 of 2023

(Arising out of Order-in-Original No.10/PC/2022-23 dated 12/07/2022 passed by Commissioner of Customs, Noida)

Ms Poonam Pundir, ...Appellant

(140C, Hapur Road Vishnu Enclave Ghaziabad-201001)

VERSUS

Commissioner of Customs (Pre.), Noida ....Respondent

(Concor Complex, Noida-201311)

APPEARANCE:

Shri V.S. Sisodia, for the Appellant
Shri A.K. Choudhary, Authorised Representativefor the Respondent

CORAM: HON'BLE MR. SANJIV SRIVASTAVA, MEMBER (TECHNICAL)

FINAL ORDER NO.70175/2024

DATE OF HEARING : 27 March, 2024
DATE OF DECISION : 27 March, 2024

SANJIV SRIVASTAVA:

This appeal is directed against Order-in-Original No.10/PC/2022-23 dated 12/07/2022 passed by Commissioner of Customs, Noida. By the impugned order following has been held:-

ORDER

I. I order for the cancellation of the public warehouse license issued to M/s Poonam Pundir, Khasra No.19, Mohinddinpur, Mainapur, Pargana-Jalabad, Distt.

Ghaziabad-201002, U.P. under Section 58B of the Customs Act, 1962.

II. I hereby impose a Penalty of Rs.3,00,000/- (three lakh rupees) under Section 117 of the Customs Act, 1962 and a Penalty of Rs.2,00,000/- (two lakh rupees) under Section 158 of the Customs Act, 1962."

2.1 Appellant was granted a license for public warehouse under Section 58B of the Customs Act, 1962. Subsequently during the course of scrutiny of space, re-warehouse certificate dated 10.01.2022, the concerned Export Processing Circle-I of Ghaziabad found that the appellant is storing non duty paid foreign liquor of M/s Meastro Spirit & Wine in their public bonded warehouse. Both appellant and M/s Meastro Spirit & Wine having common PAN No.BWWPP2488Q with legal name of Poonam Pundir, Proprietor was matching with the details of warehouse owner.

2.2 Taking note of Circular dated 09.06.2017 revenue was of the view that by storing the self goods in the said public bonded warehouse appellant has contravened the provisions of Section 57 and 58 of the Customs Act, 1962. Accordingly, an inquiry was initiated against the appellant.

2.3 Enquiry report dated 04.05.2022 was submitted by the enquiring officer by stating as follows:-

> *"I come to the conclusion that Licensee i.e. M/s Poonam Pundir, Khasra no.19, Mohinddinpur, Mainapur, Pargana-Jalabad, Distt. Ghaziabad-201002, U.P. has contravened the provisions made u/s 57 of CA 1962 read with circular 26/2016 dated 09/06/2016 and is liable for penal action u/s 58B of CA 1962."*

2.4 On the basis of above enquiry report notice for hearing/personal hearing was given to the appellant by the competent authority i.e. Principal Commissioner. After taking note of the appellant's submission, the matter has been determined as per the impugned order referred in para-1 above. Aggrieved appellant has filed this appeal.

3.1 I have heard Shri V.S. Sisodia learned Counsel appearing for the appellant and Shri A.K. Choudhary learned Authorised Representative appearing for the revenue.

3.2 Arguing for the appellant Learned Counsel submits that admittedly there was unintentional error committed by the appellant, whoever as advised, they apologies for the same, the punishment matted on them is totally disproportionate in context to the unintentional error committed which includes the cancelation of the warehouse license.

3.3 Learned Authorised Representative reiterates the findings recorded in the orders of the lower authority.

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

4.2 Certain paragraphs of the impugned order are reproduced bellow:-

> *18. While issuing the license to the licensee it was clearly mentioned that if licensee or any person contravenes any of the provisions of regulation regarding warehouse or abets such contravention or fails to comply with any of the provisions of these regulations, he shall be liable to pay penalty under Section 112, 114, 114A, 114AA, 116 and/or 117 of the Customs Act, 1962.*
>
> *19. It was established by the findings of EPC - I Ghaziabad that the warehouse (M/s Poonam Pundir) and importer (M/s Meastro Spirit & Wine) are carrying the same PAN- BWWPP2488Q and have the same ownership The Licensee has contravened the provisions made u/s 57 of CA 1962 read with circular 26/2016 dated 09/06/2016. The contravention made was also accepted by the licensee before the undersigned during course of personal hearing on 27.05.2022 and also before the enquiry officer Shri Bijender Singh, Deputy Commissioner. The licensee had accepted their mistake and submitted that the mistake was not intentional.*

20. Section 73 A (2) of the Customs Act lays down that the responsibilities of the person referred to in sub-section (1) who has custody of the warehoused goods shall be such as may be prescribed. On the basis of records available, fact and circumstances discussed above, it is evident that the licensee contravened the provisions and / or failed to comply with the provisions of the Customs Act and Public Warehouse Licensing Regulations, 2016; Warehouse (Custody and Handling of Goods) Regulations, 2016 issued under Section 57, 58 and Section 73A of the Customs Act, 1962.

25. As discussed above, the licensee had contravened the provisions of the Customs Act as well as the regulations mentioned supra. They had also failed to comply with the provisions of the Act ibid and the regulations which they were duty bound. They had given an undertaking also to comply with the provisions of the Act and rules, regulations made thereunder failing which they will be liable to pay duty, fine, penalties, etc. The terms and conditions of the warehouse licence have also been breached. ***The licensee have also accepted their act of contravention and breach, failure, etc. It is not correct to hold and believe that such mistake was not intentional. Depositing or storing non- duty paid goods of their own in the public warehouse is against the provisions of the regulations and the Customs Act and it can be possible with knowledge. It is deliberate and intentional. It is settled principle of law that in economic offences, intent or mala fide act is not a ground for any penalty Tiability. If there is any breach or failure or contravention of law or rules or regulations, the consequences are bound to follow.*** *In R.S Joshi AIR 1977 SC 2279 it was held that in economic crimes and departmental penalties, mensrea is not essential for imposing penalty. In Gujarat Travancore Agency, Cochin AIR 1989 SC 1671 Honble SC held that* *unless there is something in the language of statute indicating the need to establish element of mensrea, it is generally sufficient to prove that a default in complying with the statute has occurred. Honble SC in the case of Chairman SEBI VS. Shriram Mutual Fund held that the breach of a civil obligation which attracts penalty under the provisions of an Act would immediately attract the levy of penalty irrespective of the fact whether the contravention was made by the defaulter with any guilty intention or not.*

Therefore, the license of public warehouse issued under Section 57 of the Act, which has already been suspended, is held liable for cancellation under Section 58B and the licensee is liable for penalties under Section 117 and Section 158 of the Customs Act, 1962."

4.3 On going through the above paragraphs from the impugned order, I am of the view that order has been passed just by relying upon the enquiry report, without any further application of mind by the competent authority. It is also interesting to note that entire case has been made on the basis of the assessment without going into appreciation of the facts advanced. Bold portion of the reproduced paras clearly shows that competent authority while deciding upon whether the act was intentional or unintentional have himself expressed what are he is assuming. He discords the findings that the error was unintentional not on the basis of any documentary evidences but on the basis of possibilities that would be defined as intentional act such possibilities cannot take place on the evidences which would have been relied or examined for holding show. He further shows that he relies upon the decision of the Hon'ble Apex Court in the case of Gujarat Travancore Agency, Cochin AIR 1989 SC 1671 holding that mensrea/ intention is never intentional for imposition of penalties. That being so the findings recorded based on possibilities that error was intentional resulting cancelation of license cannot be sustained. I do not find much merit in the order of cancelation of the license of warehouse issued to the appellant. In Falcon Air Cargo and Travels (P) Ltd. v. Union of India, 2002 (140) E.L.T. 8 (Del.), the Hon'ble Delhi High Court observe that -

> "*13……Though we have not dealt with the question of proportionality, it is to be noted that the authorities while dealing with the consequences of any action which may give rise to action for suspension, revocation or non-renewal have to keep several aspects in mind. Primarily, the effect of the action vis-a-vis right to carry on trade or profession in the background of Article 19(1)(g) of the Constitution has to be noted. It has also to be borne in mind that the proportionality question is of great significance as action is under a fiscal statute and may ultimately lead to a civil death."*

4.3 However, there are contraventions which has been admitted by the appellant during the course of investigation and before the Adjudicating Authority for which penalty of Rs.3 lakh under Section 117 of the Customs Act, 1962 and penalty of Rs.2 lakhs under Section 158 of the Customs Act, 1962 have been imposed on the appellant..

4.4 It is interesting to note that penalty has been imposed by the adjudicating authority under Section 158 and section 117. Section 158 of the Customs Act, 1962, is not a penal provision under which the penalty can be imposed, but is a rule making power vested with the Central Government. The text of the said Section is reproduced below:

"158. Provisions with respect to rules and regulations.

(1) All rules and regulations made under this Act shall be published in the Official Gazette.

(2) Any rule or regulation which the Central Government or the Board is empowered to make under this Act may provide-

(i) for the levy of fees in respect of applications, amendment of documents, furnishing of

duplicates of documents, issue of certificates, and supply of statistics, and for rendering of any services by officers of customs under this Act;

(ii) that any person who contravenes any provision of a rule or regulation or abets such contravention or who fails to comply with any provision of a rule or regulation with which it was his duty to comply, shall be liable to a penalty which may extend to fifty thousand rupees."

From the above it is evident that this Section empowers the Central Government to provide for penalty in case of contravention of any provision of a Rule or Regulation made by the Central Government. Similar view has been expressed by the Delhi Bench in case of Sunil Kumar Jain [2017 (349) E.L.T. 309 (Tri. - Del.)] observing as follows:

"4. *As is seen from the above, the said Section empowers the Central Govt. to make any rule or regulation in terms of which a penalty to the extent of Rs. 50,000/- can be imposed on any person for contravention of the provisions of rule or regulation. As such, it is seen that the said section is empowering section and cannot be adopted by itself for imposition of penalty. It does not stand to brought to our notice that any rule or regulation stand framed under this section for imposition of penalty. Even if they stand framed the penalty has to be imposed in terms of such framed rules and regulations and not in terms of the empowering provisions. As such, we are of the view that penalty imposed under Section 158(2)(ii) cannot be sustained. Accordingly, the same is set aside the impugned order and allowed the appeal with consequential relief to the appellant."*

4.5 In case of Chandrakant Thakkar [2015 (318) E.L.T. 57 (Bom.)] Hon'ble Bombay High Court has held as follows:

*"**11.** If the show cause notice alleges violation and breach of these Regulations and Sections 8(b) and 141(2) of the*

Customs Act, 1962, then, we do not see how the Tribunal, in a single paragraph reasoning, makes no reference to any of these provisions or the clauses of the Regulations, but only Section 158. That is a section which enables the competent authorities to proceed and impose penalty in terms of a Regulation or Rule. However, Rules and Regulations which are made under the Act and either by the Central Government or the Board may provide for levy of fees in respect of application, amendment of documents, etc. and by Act 18 of 2008 Clause (ii) of sub-section (2) of Section 158 is substituted so as to permit imposition of penalty on any person, who contravenes any Rule or Regulation or abets such contravention or who fails to comply with any provision of Rule or Regulation which it was his duty to comply. Therefore, whether there are Regulations in the field and whether these Regulations provide for imposition of penalty or not and assuming everything is complied with and there are indeed such Regulations, which of them have been violated or breached. Even if they have been so breached or violated, whether that was intentional or deliberate. All such matters are extremely relevant so as to impose penalty or justify such imposition. An imposition of penalty has a far reaching effect and consequence and may result in suspension of the approval or withdrawal of it or non-renewal thereof. Therefore, all such matters have to be gone into and considered meticulously, minutely and seriously. That having not been done and the Tribunal failing to apply its mind to some of the most important and crucial factors that we are constrained to set aside the impugned order."

4.6 Thus in my view penalty imposed under Section 158 cannot be justified.

4.5 The penalties imposed are much on the higher side as nothing has been brought on record with regard to any past offence/ contraventions committed by the appellant. This being one of the solitary act such penal action whereby penalties of rs 5 lakhs is imposed cannot be justified. For the contraventions made by the appellant by storing the self goods in the public bonded ware house, the interest of justice will be met if the penalty imposed under Section 117 is reduced to Rs.50,000/-

5.1 Appeal is partially allowed.

(Dictated and pronounced in open court)

Sd/-
(SANJIV SRIVASTAVA)
MEMBER (TECHNICAL)

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