CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
ALLAHABAD

REGIONAL BENCH - COURT No. I

Customs Appeal No.70071 of 2019-[DB]

(Arising out of Order-in-Original No.29-31/Commissioner/NOIDA-CUS/2018 dated 18/10/2018 passed by Commissioner of Customs, Noida)

M/s Trinity Infraventures Ltd., ...**Appellant**

(Earlier known as Goldstone Exports Ltd.)

VERSUS

Commissioner of Customs, ...**Respondent**

(Noida)

APPEARANCE:

Shri Jitin Singhal, Advocate for the Appellant
Shri Anupam Kumar Tiwari, Authorised Representative for the Respondent

CORAM: **HON'BLE SMT. ARCHANA WADHWA, MEMBER (JUDICIAL)**
HON'BLE MR. ANIL G. SHAKKARWAR, MEMBER (TECHNICAL)

FINAL ORDER NO-71918 / 2019

DATE OF HEARING : 20 August, 2019
DATE OF PRONOUNCEMENT : 26 November, 2019

PER: ANIL G. SHAKKARWAR

The present appeal is directed against Order-in-Original No.29-31/Commissioner/NOIDA-CUS/2018 dated 18/10/2018 passed by Commissioner of Customs, Noida.

2. Brief facts of the case are that the Directorate of Revenue Intelligence received an intelligence that certain companies based in Delhi, Mumbai, Dubai and Singapore are misusing the

facility provided under 'Special Economic Zone' scheme and were exporting metal scrap to fulfill the export obligation by mis-declaring the same as gold jewellery while importing brand new gold jewellery as raw material by mis-declaring the same as old jewellery for repair, remaking and polishing. Therefore, the officers of DRI conducted searches at several places. On 06.02.2009, the officers searched factory premises of M/s Vee Ess Jewellers Pvt. Ltd. & M/s Ajit Exports, Noida, Office-cum-business premises of M/s Vee Ess Jewellers Pvt. Ltd. and M/s Ajit Exports located at Karol Bagh, New Delhi, residential premises of Shri Ajit Singh, Partner of M/s Ajit Exports situated at Pitampura, New Delhi, Business premises of M/s Omkar Jewellers, Karol Bagh, New Delhi and Business premises of M/s Orbit Gold, Zaveri Bazar, Mumbai. On 10.02.2009 officers searched residential premises of Shri Komal Jain, Director of M/s Vee Ess Jewellers Pvt. Ltd. and his brother Shri Kirti Jain, Partner of M/s Ajit Exports, New Delhi. During the search at common factory premises of M/s Ajit Exports and M/s Vee Ess Jewellers Pvt. Ltd. officers found 15 packets lying in the office room being used by directors of both the units. On inspection of said 15 packets, it was found that 13 packets were pertaining to export consignment and two packets were pertaining to import consignment. Out of 13 packets made for export, 4 packets were pertaining to Shipping Bill No.SB/NSEZ/020001430 dated 04.02.2009 which were covered by invoice no.GSE/AE/NSEZ/EXP/109/2008-09 dated 04.02.2009. All the shipping bills along with invoices were issued by M/s Ajit Exports showing third party export of 0.75 and 0.92 fine gold jewellery in the account of M/s Goldstone Exports Ltd., New Delhi, (present appellant, who was earlier known as M/s Goldstone Exports Ltd.) to M/s Samarah Gold Factory, Sharjah and M/s Mahesh & Company Pvt. Ltd., Singapore. The said consignments were examined by Jewellery Export appraiser. He reported that the said 4 packets found to contain brass circles and brass scrap/cuttings in rectangular form whereas it has been declared as 0.750 fine gold jewellery in the concern shipping bill. The said brass, circles and scrap were duly sealed with the seal of M/s Ajit Exports and was ready for export and the same was declared as 0.750 fine gold. The said goods were seized. Investigations were conducted at the end of the appellant. Statement of authorised representative of the appellant was recorded wherein the authorised representative of the appellant stated that they did not give any orders to M/s Ajit Exports for export of the said goods. Further, the investigations were carried out at the end of M/s Anit Exports. It was found that on 20 January, 2009 a memorandum of understanding was entered into between the appellant and M/s Ajit Exports whereby M/s Ajit Exports agreed to manufacture and export gold jewellery on behalf of the appellant in terms of confirmed order obtained from the appellant. As per the memorandum of understanding appellant was not eligible to claim any incentive, cess, duty drawback, DEPB, DEEC, advance license benefits against any consignment exported by M/s Ajit Exports on the name of the appellant. On the basis of said investigations two show cause notices dated

02.02.2010 and 12.11.2013 were issued calling upon the appellant as to why penalty should not be imposed on the appellant under Sections 112, 114 & 117 of Customs Act, 1962. It was stated in the said show cause notices that Shri Komal Jain, who was also associated with the activities of M/s Ajit Exports, requested the appellant to provide authority letter in favour of M/s Ajit Exports for submissions to Customs Authorities at the time of export of the goods where the orders were forwarded by the appellant. In reply to show cause notice appellant submitted to the Original Adjudicating Authority that appellant had never forwarded any authority letter to M/s Ajit Exports and that the appellant had sent a fax to M/s Ajit Exports forwarding a draft of authority letter. The appellant also submitted that appellant had never given duly signed authority letter authorising M/s Ajit Exports to sign export documents on behalf of the appellant in respect of export to be made on account of the appellant. The finding of the Original Adjudicating Authority for the appellant being held liable for penal action as recorded at sub paragraph ee on page no.349 of the impugned Order-in-Original, is reproduced bellow:-

> *"ee. M/s Goldstone Export Ltd., New Delhi has authorized Shri Ajit Singh to sign the documents on behalf of M/s GoldStone Exports Ltd, have also conspire with Shri Ajit Singh in the fraudulent export. The denial by officers/directors of M/s Goldstone Export abount placing any orders for exports through M/s Ajit Exports appears to be a clear afterthought devised cleverly to escape liability. The fact that in their MOU/s Goldstone Export Ltd, had indicated that they had confirmed export orders and that a written authorization was given by them on the strength of which actual exports, were shown to have been made, clearly establishes the complicity of M/s Goldstone Exports*

Ltd, in the fraudulent export of gold jewellery, which is also corroborated by the transaction of huge amount between M/s Goldstone Export Ltd, and M/s MBS Impex Pvt. Ltd., discussed in paras above. M/s Goldstone Export Ltd, is therefore liable for penal action under Section 112, 114 & 117 of the Customs Act, 1962."

Accordingly, the Original Adjudicating Authority has imposed two penalties of Rs.5 crores each on the appellant under Sections 112 & 114 of the Customs Act, 1962. The Original Adjudicating Authority further imposed a penalty of Rs.95,000/- on the appellant under Section 117 of Customs Act, 1962. Further, the Original Authority has confiscated brass circles and scrap which was seized. Aggrieved by the said order appellant is before this Tribunal.

3. Heard Shri Jitin Singhal learned Advocate appearing on behalf of the appellant. He has made following submissions:-

a) A general memorandum of understanding was entered into between the appellant and M/s Ajit Exports on 20.01.2009 whereby it was agreed that M/s Ajit Exports would export gold jewellery on behalf of the appellant in terms of confirmed order obtained from the appellant.

b) In response of E-mail received from Shri Komal Jain who had requested to the appellant to provide authority letter in favour of M/s Ajit Exports for submissions to Customs Authorities, the appellant had provided only a fax which was draft of authority letter and the same was never signed by the appellant. Therefore, appellant had not authorised for export of any particular consignment on behalf of the appellant.

c) The entire basis of imposition of penalty on the appellant taken into consideration by the Original Adjudicating Authority is the said memorandum of understanding. As such the terms of the same was never acted upon by the appellant since the appellant was required to give confirmed orders as and when available with it to M/s Ajit Exports. On the basis of which M/s Ajit Exports was to manufacture gold jewellery and export the same to the foreign parties, as per the orders placed by the appellant. It is a fact that the appellant had never placed any order for manufacture and export of gold jewellery on M/s Ajit Exports. Subsequently, the said memorandum of understanding was annulled on 19.02.2009.

d) During the course of investigations, statements of the officials of the appellant were also recorded under Section 108 of Customs Act, 1962 wherein the officials of the appellant specifically stated that the appellant had never given any authorization in favour of Shri Ajit Singh of M/s Ajit Exports to sign the export documents on behalf of the appellant and this fact has not been contravened by referring to any part of the statement of either Shri Ajit Singh or any other person for arriving at the decision by Original Adjudicating Authority.

e) The appellant had not received any consideration in lieu of any such transaction which establishes that appellant had not authorised M/s Ajit Exports to export goods on their behalf.

f) Memorandum of understanding has nowhere stated that the appellant had agreed to authorised M/s Ajit Exports to involve into any illegal activities on behalf of the appellant. Therefore, the appellant cannot be held responsible for any act of omission or commission by Shri Ajit Singh or M/s Ajit Exports.

g) The two shipping bill invoices were issued in the name of M/s Samrah Gold Factory, Sharjah. During the course of investigations statement dated 28.10.2010 was recorded of Shri Kishore Ratilal Dhakan, Director of M/s Samrah Gold Factory under Section 108 of Customs Act, 1962 wherein he had categorically admitted that he never had business dealing with the appellant and he had neither placed any order to the appellant directly or indirectly nor have had made any payment to the appellant for the gold jewellery.

h) Transactions between the appellant and M/s MBS Impex were related to land transactions as the appellant is into the business of real estate. In fact the said transactions were clearly explained by Shri Sukesh Gupta, Director of M/s MBS Impex Pvt. Ltd. in his statement dated 08.11.2011 and 13.12.2011 recorded under Section 108 of Customs Act, 1962.

i) Penalty under Section 112 of Customs Act, 1962 can be imposed in respect of improper importation of any goods which are liable for confiscation there was no allegation in the show cause notice that the appellant was in any manner involved in any irregular imports. Therefore, the penalty imposed under Section 112 of Customs Act, 1962 on the appellant is liable to be set aside.

j) Penalty under Section 114 of the Customs Act can be imposed on any person who in relation to any goods meant for export does or omits to do any act which act or omission would render such goods liable for confiscation under Section 113 of the Act. In the present case, since the appellant was not at all concerned or connected with the mis-declaration, if any, done by Shri Ajit Singh or M/s Ajit Exports in respect of said shipping bills. Therefore, appellant is not liable for imposition of any penalty under Section 114 of the Customs Act, 1962. Therefore, the said penalty is liable to be set aside.

k) Under Section 117 of Customs Act, 1962 penalty can be imposed for any contraventions for which specific provisions for imposition of penalty is not provided for. By imposing penalty under Section 107 of the Customs Act the Original Adjudicating Authority has proved that there was no omission or commission on the part of the appellant to be punished under any provisions of Customs Act, 1962. Further, since for which contravention penalty under Section 117 of the Customs Act, 1962 was imposed is not stated by the Original Adjudicating Authority, the said penalty is liable to be set aside.

4. Learned Authorised Representative appearing for revenue has supported the impugned Order-in-Original.

5. Having considered the submissions from both the sides and on perusal of record, I note that appellants were imposed with penalties under Section 112, 114 & 117 of the Customs Act, 1962. For the sake of ready reference the said provisions of the Act are reproduced bellow:-

> "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 :
>
> **Provided** that where such duty as determined under sub-section (8) of section 28 and the interest payable thereon under section 28AA is paid within thirty days from the date of communication of the order of the proper officer determining such duty, the amount of penalty liable to be paid by such person under this section shall be twenty-five per cent. of the penalty so determined;]

[(iii) in the case of goods in respect of which the value stated in the entry made under this Act or in the case of baggage, in the declaration made under section 77 (in either case hereafter in this section referred to as the declared value) is higher than the value thereof, to a penalty [not exceeding the difference between the declared value and the value thereof or five thousand rupees], whichever is the greater;

(iv) in the case of goods falling both under clauses (i) and (iii), to a penalty [not exceeding the value of the goods or the difference between the declared value and the value thereof or five thousand rupees], whichever is the highest;

(v) in the case of goods falling both under clauses (ii) and (iii), to a penalty [not exceeding the duty sought to be evaded on such goods or the difference between the declared value and the value thereof or five thousand rupees], whichever is the highest.]"

"SECTION 114. Penalty for attempt to export goods improperly, etc. — 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, -

(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 three times the value of the goods as declared by the exporter or the value as determined under this Act], 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 :

Provided that where such duty as determined under sub-section (8) of section 28 and the interest payable thereon under section 28AA is paid within thirty days from the date of communication of the order of the proper officer determining such duty, the amount of penalty liable to be paid by such person under this section shall be twenty-five per cent. of the penalty so determined;]

[(iii) in the case of any other goods, to a penalty not exceeding the value of the goods, as declared by the exporter or the value as determined under this Act, whichever is the greater.]

"SECTION 117. Penalties for contravention, etc., not expressly mentioned. — Any person who contravenes any provision of this Act or abets any such contravention or who fails to comply with any provision of this Act with which it was his duty to comply, where no express penalty is elsewhere provided for such contravention or failure, shall be liable to a penalty not exceeding *[one lakh rupees].*

The above reproduced provisions of the Customs Act clearly indicated that penalty under Section 112 of the Customs Act, 1962 is provided for improper importation of the goods. The finding of the Original Adjudicating Authority in sub para no.ee on page no.349 of Order-in-Original is reproduced in the forgoing paragraphs. The said finding nowhere indicates that the appellant had anything to do with any imports. Therefore, imposition of penalty on the appellant under Section 112 of Customs Act, 1962 is without application of mind by the Original Adjudicating Authority, therefore, the same is set aside.

Penalty under Section 114 of the Customs Act, 1962 is provided for any act of omission or commission in respect of export goods, if the goods become liable for confiscation. The Original Adjudicating Authority has held that appellant has authorised Shri Ajit Singh to sign the documents on behalf of the appellant. The examination of the consignment covered by the shipping bills, which were prepared for export on account of the appellant, was not provided to M/s Ajit Exports by the appellant. Even if, it is accepted for the sake of argument that appellant has authorised Shri Ajit Singh to sign documents on their behalf still it does not establish that appellant had entered into any understanding with M/s Ajit Exports to export brass circles and brass scrap in the name of 0.75 fine gold. Therefore, the proceedings do not establish that the appellant had any knowledge that the documents were having mis-declaration with reference to the actual contents of the consignment to be exported. The reading of the said provisions of act indicate that the person liable to penalty must have knowledge or reason to believe that the goods in which he is dealing are liable to confiscation. Even if it is accepted for the sake of argument that appellant has authorised Shri Ajit Singh to Sign documents on their behalf, still revenue has not established that the appellant had knowledge that the goods which were being presented for export were liable for confiscation and they were different than the goods described in Shipping Bills. Further, the documents were in respect of export of 0.75 and 0.92 fine gold jewellery. Revenue did not find anything irregular, had the goods described were exported. Therefore, we hold that appellant was not liable for imposition of penalty under Section 114 of the Customs Act, 1962. We, therefore, set aside the penalty imposed on the appellant under Section 114 of the Customs Act, 1962.

Further, penalty under Section 117 of the Customs Act, 1962 is provided for such omission or commission for which no penalty is provided for. The findings as reproduced in the earlier paragraph does not indicate as to which omission or commission on behalf of the appellant has rendered appellant liable for imposition of penalty under Section 117 of Customs Act, 1962. In the absence of any such finding by the Original Adjudicating Authority the penalty imposed on the appellant under Section 117 of the Customs Act, 1962 is liable to be set aside. We, therefore, set aside the penalty imposed on the appellant under Section 117 of the Customs Act, 1962.

6. In view of the forgoing, we set aside all the penalties imposed on the appellant and allow the appeal.

(Pronounced in open court on-26 November, 2019)

Sd/-
(Archana Wadhwa)
Member (Judicial)

Sd/-
(Anil G. Shakkarwar)
Member (Technical)

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