CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
SOUTH ZONAL BENCH
BANGALORE

Appeal(s) Involved:

C/20904/2019-SM

[Arising out of Order-in-Appeal No. TVM-EXCUS-00-APP-270-2019 dated 17/06/2019 passed by Commissioner of CUSTOMS , COCHIN(Appeal)]

M/s Kaaizeen Meditech Pvt Ltd
Doore No 5/206 B-b2 Kailas Nagar
Thrikkakara
KOCHI
KERALA
682021

Appellant(s)

Versus

C.C-Cochin-cus
CUSTOM HOUSE, WILLINGDON ISLAND
COCHIN
KERALA
682009

Respondent(s)

Appearance:

Mr. Manoj Pillai, Advocate
TAXAIDE T C
26/1747,KALYAN
U R 72,UPPALAM ROAD, TRIVANDRUM
TRIVANDRUM
KERALA
695001

For the Appellant

Mrs. C.V. Savitha, AR For the Respondent

Date of Hearing: 06/11/2019
Date of Decision:08/11/2019

CORAM:
HON'BLE SHRI S.S GARG, JUDICIAL MEMBER

Final Order No. 21001 /2019

Per : S.S GARG

The present appeal is directed against the impugned order dated 17.06.2019 passed by the Commissioner (Appeals) whereby the Commissioner (A) has modified the Order-in-Original dated 20.10.2010 and enhanced the penalty from Rs.5,55,000/- to Rs.15,00,000/- under Section

112 (a) of the Customs Act, 1962.

2. Briefly the facts of the present case are that the appellants are regular importer and dealer in Surgical Instruments, Parts & Accessories classifiable under item 9018 CT and are regularly importing through Air Cargo Complex, Trivandrum and paying appropriate Customs Duty. The appellant had taken import licences issued by the Drug Controller and the main item imported by the appellant was different type of 'Catheters'. The appellant has been importing the said item from 23.11.2005 to 17.03.2011 and has been filing Bill of Entry declaring the entire details of the goods imported and Customs used to clear them after examination on payment of Customs Duty and other lawful charges and after satisfying themselves that the appellant has complied with all statutory formalities/procedures under Customs Act. Further, it was provided under Rule 43A of Drugs and Cosmetics Rules, 1945 that "drug" should not be imported by air to India through Trivandrum. However, the appellant has imported and cleared only Surgical Instruments, Parts & Accessories" including Catheter and not any "drugs". However, on 06.10.2005, Department of Health, Ministry of Health and Family Welfare Government of India, had issued Notification No. 1468 E dated 06.10.2005 under which inter alia Catheters were specified as Drugs for the purpose of Section 3(iv) Drugs and Cosmetics Act, 1940. The said Notification was not in the knowledge of the appellant as well as the Customs officials of the Air Cargo Complex, Trivandrum and appellant continue to import Catheters through Trivandrum Air Cargo Complex and Customs used to clear the same without any objection during the entire period from 23.11.2005 to 17.03.2011. Subsequently, a SCN dated 27.08.2011 was issued to the appellant alleging mis-declaration and all imports affected during the said period were declared illegal. After following the due process, the Assistant Commissioner vide OIO dated 28.10.2016 and Corrigendum dated 02.12.2016 confiscated the goods and allowed redemption on payment of fine or Rs.41,69,720/- and also imposed penalty of Rs.5,55,000/- under Section 112(a) of the Act. Aggrieved by the imposition of penalty of Rs.5,55,000/-, the appellant filed appeal before the Commissioner, Cochin in December 2016 and personal hearing was held on 27.02.2018. After three years of filing the appeal and after one year and

two months of the personal hearing, the Commissioner (A) issued a Notice dated 22.04.2017 under Section 128A(3) of the Act on the ground that the penalty of Rs.5,55,000/- imposed by the Original Authority in the OIO is on the lower side and therefore proposed enhancement of penalty. Thereafter, the Commissioner (A) enhance the penalty from Rs.5,55,000/- to Rs.15,00,000/-.

3. Heard both the parties and perused the records of the case.

4. Learned Counsel for the appellant submitted that the impugned order is not sustainable in law as the same is contrary to the facts without appreciating the facts in right perspective. He further submitted that originally there were two allegations leveled against the appellant in the SCN, viz. that the appellant had imported Catheter through Trivandrum Airport which is not a designated Airport to import Drugs under the Drugs and Cosmetics Rules, 1945 and secondly the appellant had mis-declared in the Bill of Entry the description of imported goods. He further submitted that as far as charge of mis-declaration is concerned, the Original Authority after considering all the documents produced by the appellant has set aside the charge of mis-declaration and the Commissioner (A) has also accepted the said fact. As far as other charges are concerned, the Original Authority after relying upon the Circular of the Ministry of Health and Family Welfare came to the conclusion that all the imports made by the appellant are not valid because Catheter cannot be imported through Trivandrum Air Cargo Complex as the same is not a designated Airport to import Drugs. He further submitted that the said Notification on the basis of which SCN was issued was not in the knowledge of the Department as well as the appellant and the appellants have been declaring all the details in the Bill of Entry and the Department used to clear the same on payment of Excise Duty and have never raised any objection that the said item cannot be imported through Trivandrum Airport. He further submitted that during the last six years, the Customs has not raised any objection in spite of full declaration by the importer/appellant. He also submitted that charge of mis-declaration has been dropped by both the authorities but in spite of that the redemption fine and penalty was imposed on the appellant. The redemption fine has already

been paid by the appellant and the appellant has only challenged the imposition of penalty of Rs.5,55,000/- by the Original Authority to the Commissioner (A). He also submitted that another SCN No.21/2010 dated 23.07.2010 was issued for recovery of short payment of duty and in that Notice also, there was no mention of the mis-declaration and that the said item cannot be imported through Trivandrum Airport. He also submitted that substantially, the demand is barred by limitation because the SCN was issued on 16.08.2011 for the imports affected from 23.11.2005 to 17.03.2011 and no suppression of fact has been proved against the appellant. He further submitted that the imposition of penalty by the Original Authority and enhancing the same is not tenable in law because the penalty can only be imposed when goods are liable for confiscation and the same are available too. He also submitted that after the expiry of three years from the filing of these appeals and after the expiry of more than one year from the date of Hearing, a SCN was issued by the Commissioner for enhancing the penalty and enhances the penalty without giving any reasons.

5. On the other hand, Learned AR defended the impugned order.

6. After considering the submissions of both the parties and perusal of the material on record, I find that the appellant has been regularly importing the Catheter from the Trivandrum Airport during the period 23.11.2005 to 17.03.2011 and has been paying Customs Duty and no objection was raised by the Department during these six years regarding any violation made by the appellant. Further, I find that the Notification No. 146 E dated 06.10.2005 issued by the Department of Health was not in the knowledge of the appellant as well as the Customs officials and no objection was raised against the appellant. Subsequently, after the expiry of six years, a SCN dated 06.08.2011 was issued proposing confiscation of the goods imported under 111 Bills of Entry mentioned therein and also proposing penalty under Section 112 and 117 of the Act. Further, I find that the Original Authority after considering the submissions of the appellant has observed that there was no mis-declaration on the part of the appellant while filing the Bill of Entry and that finding has not been disturbed even by the Commissioner (A). Further, I find that the Department issued another

SCN No.21/2010 dated 23.07.2010 demanding short payment of duty on certain items but in the said SCN also, no allegation was made that the appellant is not entitled to import through Trivandrum Airport. Once the Customs authorities has come to the conclusion that there is no mis-declaration and there is no suppression of facts by the appellant in filing the Bill of Entry which was accepted by the Department, then invoking the extended period of limitation is not justified because there was no intention to evade payment of duty. Further, I find that the imposition of penalty of Rs.5,55,000/- on the appellant by the Original Authority was not justified in view of the fact that there was no mis-declaration on the part of the appellant during the last six years when he was regularly importing the said item and the Customs had raised no objection whatsoever regarding any mis-declaration. Further, I find that enhancing the penalty from Rs.5,55,000/- to Rs.15,00,000/- without any justification and without giving any reasons is also not tenable in law and therefore keeping in view the facts and circumstances of the case, I am of the considered opinion that the impugned order is not sustainable in law and therefore, I set aside the same by allowing the appeal of the appellant.

(Order was pronounced
in Open Court on **08/11/2019**.)

S.S GARG
JUDICIAL MEMBER

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