CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
BANGALORE

REGIONAL BENCH - COURT NO. 1

Customs Appeal No. 20172 of 2015-SM

[Arising out of No. 28/2014-Commr dated 28/08/2014 passed by the Commissioner of Customs, Mangalore]

M/s. Agarwal Industrial Corporation Limited
Karwar Port Installation
Sea Bird Road,
Baithkol,
Karwar

Appellant(s)

VERSUS

The Commissioner of Customs,
New Customs House,
Panambur,
Mangalore-575010.

Respondent(s)

APPEARANCE:

Mr. Venugopal, Advocate,
Venu Associates,
#82, 3rd Floor,
S.T. Bed Layout, 1st 'B' Main Road,
4th Block, Koramangala,
Bangalore-560034,
Karnataka.

For the Appellant

Mr. P. Gopakumar, Jt. Commr. (AR)

For the Respondent

Date of Hearing: 16/01/2020
Date of Decision: 27/01/2020

CORAM:

HON'BLE SHRI S.S GARG, JUDICIAL MEMBER

Final Order No. 20062/2020

Per : S.S GARG

The present appeal is directed against the impugned order dated 28/08/2014 passed by the Commissioner of Customs, Mangalore, whereby the Commissioner has imposed redemption fine and penalty on the appellant on the ground that the 'country of origin' has been mis-declared in the bills of entry by the appellant-importer.

2. Briefly, the facts of the present case are that the appellants are engaged in the manufacture of excisable goods i.e., Bitumen, Bitumen Emulsion, modified Bitumen, Water Proofing Components and Blown Bitumen, falling under Chapter Heading No.27 of CETA, 1985. The appellant were issued a show-cause notice dated 26/03/2014 wherein it has been inter alia, alleged as follows:

i. The investigation initiated by the Customs Preventive Unit, Customs Division, Karwar, revealed that certain bitumen shipments loaded in Iran have been imported through the Karwar Port and that in respect of these shipments, the vessel has resorted to mis-declaration of country of origin of the goods as UAE by using doctored documents. That one such consignment of bitumen loaded per vessel MT CLAYTON II has been scheduled for arrival at the Karwar Port during last week of February 2014.

ii. Verification of relevant documents filed with Customs, Karwar pertaining to voyages made to the Karwar Port by the subject vessel MT CLAYTON II indicated that in all, three Bills of Entry for Warehousing under Section

46 of the Customs Act, 1962 have been hitherto filed in the current fiscal for import of bitumen parcels in the said vessel, as detailed below:

Sl. No.	**Vessel**	**BOE (Into Bond) No. & date**	**IGM No. & date**	**Quantity (MT)**	**Importer**
1	CLAYTON II VOYAGE NO.1	14/16.01.2014	03/16.01.2014	2776.436	Agarwal Industrial Corporation Ltd.
2	CLAYTON II VOYAGE NO.2	32/04.02.2014	07/03.02.2014	2799.719	Bitumen Corporation Ltd.
3	CLAYTON II VOYAGE NO.3	60/25.02.2014	13/25.02.2014	2788.645	Agarwal Industrial Corporation Ltd.

iii. It was alleged that the assessment of goods covered under these three into-bond Bills of Entry were made provisional for subjecting the goods to chemical test as well as for want of original documents. It is apparently noticed that in respect of all these three bitumen shipments, the load port was declared to be 'Sharjah' and the Country of Origin was declared to be 'UAE' in the relevant import/shipping documents. It was apparently noticed that for all these three voyages, the Master of the vessel MT CLAYTON II has appointed M/s. Marinelinks Shipping Agencies, Opposite Karwar Port Office, Baithkol, Karwar-581302, as the steamer agents of the vessel, as envisaged under Section 148 of the Customs Act, 1962.

iv. Verification of the records further indicated that the said vessel MT CLAYTON II had already performed two voyages to the Karwar Port during January 2014 and early part of February 2014 and had separately delivered two parcels of bitumen under IGM No.

03/16.01.2014 filed in respect of Voyage No. 1 and IGM No. 07/03.02.2014 filed in respect of Voyage No.2.

v. It was discreetly gathered that the subject vessel MT CLAYTON II, in its Voyage No. 3 declared to be loaded with 2776.436 MT of bitumen from Port Khalid, Sharjah, UAE was scheduled to call at the Karwar port on 28.02.2014 for discharge of cargo into the bonded-warehouse storage tank No. 6 of the importers M/s. Agarwal Industrial Corporation Ltd., situated in the premises of M/s. Tropicana Liquid Storage Pvt. Ltd., Baithkol, Karwar. Accordingly, soon after its arrival at the Karwar Port in the evening of 28.02.2014, the officers of Customs visited on board the vessel MT CLAYTON II, Voyage No.3 and verified in detail all the documents, records and systems available on board. On verification, certain records as listed below and few email correspondences exchanged by the Master were indentified to be relevant and useful for the subject investigation and the same were furnished by the Master of the vessel under the provisions of the Customs Act, 1962.

i. Deck Log Book maintained for the period from Dec’2013 to Jan’2014.
ii. Deck Log Book maintained for the period from Feb’2014 to Mar’2014
iii. One Box File comprising of ship’s ports of call related documents.

vi. Accordingly, from the foregoing discussions made hitherto on the relevant documents/records of the vessel MT CLAYTON II, it appears that in respect of its voyages No.1 and 3, the subject vessel had loaded bitumen originally at Port Bandar Abbas, Iran and then proceeded to the Port Karwar by only touching the anchorages of Port Khor Fakkan (Voy.1) and Port Khalid (Voy.3), as the case may be.

vii. On comparison of these findings of investigation with the relevant import documents furnished to Customs by the importer AICL for clearance of bitumen imported per vessel, MT CLAYTON II in voyages No.1 and 3, it appears that the origin of goods indicated as 'UAE' and port of loading indicated as "Sharjah" in the import documents is false. It therefore appears that there is mis-declaration regarding origin of the subject goods. It further appears that the relevant shipping/import documents viz., stowage plan, Load port ullage survey, statement of facts, bills of lading, quantity certificate etc., have been fudged and manipulated so as to falsely indicate the port of loading/country of origin as "Sharjah/UAE", as the case may be.

Based on these above allegations, the show-cause notice dated 26/03/2014 proposed to confiscate the impugned consignment imported by the appellant under Section 111(m) of the Customs Act, 1962 as the imported goods did not correspond in respect of material particulars i.e., country of origin and port of loading with the entry made in the impugned Bills of Entry and also under Section 111(d), as the said goods were imported in violation of provisions of FEMA read with RBI Circular No.31 dated 27/12/2010 read with Foreign Exchange Management (Manner of Receipt and Payment) Regulations, 2000. The appellant filed a detailed reply dated 22/04/2014 to the said show cause notice and contested the allegation made in the show cause notice. The Commissioner of Customs, after following the due process vide the impugned order rejected the submission of the appellant and ordered confiscation of the imported goods under Section 111(m) and 111(d) of the Customs Act, 1962 and imposed redemption fine of Rs. 25,00,000/- (Rupees Twenty Five Lakh Only)in lieu of the confiscation; imposed penalty of Rs.5,00,000/- (Rupees Five Lakh Only) under Section 112(a) of the Customs Act, 1962 and also imposed a penalty of Rs.2,00,000/- (Rupees Two Lakh Only) under Section 114AA of the Customs Act, 1962. However, the Commissioner has also imposed penalties on other co-noticees namely steamer agents M/s. Marinelinks Shipping Agencies to the tune of Rs.2,00,000/- (Rupees Two Lakh Only) and the Master of the vessel Rs.2,00,000/- (Rupees Two Lakh Only) and the Capt. Krishna Kumar Rs,1,00,000/- (Rupees One Lakh Only) and 50,000/- (Rupees Fifty Thousand Only) under Section 114AA was also imposed on Krishna Kumar and they have paid those penalties and have not challenged the decision imposing penalties on them. It is only the appellant who have challenged the imposition of redemption fine and penalties.

3. Heard both the parties and perused the material on record.

4. Learned counsel for the appellant submitted that the impugned order is not sustainable in law as the same has been passed without properly appreciating the facts, evidence on record and the statutory provision governing the confiscation and imposition of fine and penalty. He further referred to the provisions of Section 111(d) and

111 (m) of the Customs Act and submitted that the confiscation of the imported goods under these provisions of Customs Act is not correct in law. He then referred to Section 111(d) of Customs Act, 1962 which reads as under:

> *"any goods which are imported or attempted to be imported or are brought within the Indian Customs waters for the purpose of being imported, contrary to any prohibition imposed by or under this Act or any other law for the time being in force".*

4.1 He further submitted that Section 111(d) can only be invoked where the goods are imported in contrary to any prohibition imposed either under the Customs Act or any other law, for the time being is in force. He further submitted that the case of the Revenue in the impugned order is that the appellant has violated the provisions of RBI Circular No. 31 dated 27/12/2010 read with Foreign Exchange Management (Manner of Receipt and Payment) Regulations 2000 in terms of which the trade transactions with Iran should be settled in any permitted currency from outside ACU mechanisam (Asian Clearing Union). He further submitted that in the present case, it is a admitted position as reflected in the show cause notice also that the impugned goods i.e., bitumen is not prohibited goods either under the Customs Act or the Foreign Trade Policy or any other law in force at the time of importation of said goods. He further submitted that there was no prohibition for import of goods from Iran either under the Customs ACT or the Foreign Trade Policy or any other law in force. He further submitted that once the goods imported is not prohibited and therefore the importation made by the appellant is legal and cannot be said to be imported against any prohibition. Further, the appellant had made payment to the overseas supplier located in Dubai through proper banking channels on a bona fide belief that the country of origin of the impugned import consignments are of "UAE". He further submitted that even after the settlement of payment for trade transaction with Iran is not in accordance with the prescribed procedure by the RBI read with Regulations under FEMA, the same would not in any way make the import transaction prohibited to bring the transaction under the provisions of Section 111(d) of the Act. He then referred to Section 111(m) of the Customs Act which reads as follows.

> *"any goods which do not correspond in respect of value or in any other particular with the entry made under this Act or in the case of baggage with the declaration made under Section 77 in respect thereof, or in the case of goods under transshipment, with the declaration for transshipment referred to in the proviso to sub-Section (1) of the Section 54."*

4.2 He further argued that even the provision of Section 111(m) is not applicable in the present case because the said provision comes into play when the imported goods do not correspond to the value or any other particulars which are statutorily required to be declared in the bills of entry in terms of Section 46(4) of the Customs Act, 1962. He also submitted that in the present case, the issue is with regard to the 'country of origin' declared in the bills of entry filed, with respect to impugned imports for clearance for home consumption as UAE while in the investigation it was found that the import was from Iran. He further submitted that the Revenue failed to establish by way of any documentary evidence in the show cause notice as well as in the impugned order that the appellants are connected with the manipulation of the import documents. Further, he referred to the statements made by various persons during the course of investigations including the appellant and also the Captain of the Vessel and none of them have implicated or stated about the involvement of the appellant directly or indirectly to the manipulation of the import documents. He also submitted that as per the procedure provided by the Central Board of Excise and Customs in the Customs Manual 2015**,** the 'country of origin' becomes relevant to be mentioned in the bill of entry if preferential rate of duty is claimed by the importer where as in the present case the importer did not claim any preferential rate of duty and mentioned the 'country of origin' in the bills of entry as per the documents given to him by the supplier based at Dubai. In support of his submissions he relied upon the following decisions and circular:

(a) Oriental Containers Ltd., Vs Union of India, 2003 (157) E.L.T. 503 (Bom.)

(b) Shree Ganesh International Vs Commissioner of C.Ex., Jaipur, 2004 (174) E.L.T. 171 (Tri. Del.)

(c) Kirti Sales Corporation vs Commissioner of Customs, Faridabad, 2008 (232) E.L.T. 151 (Tri. – Del.)

(d) Trishla Steel Engg. Co. Vs Commissioner of Cus. (Import), Nhava Sheva, 2014 (313) E.L.T. 443 (Tri. Mumbai)

(e) RBI Circular No.31 (RBI/2010-11/335) dated 27/12/2010

5. On the other hand, the learned AR defended the impugned order and submitted that there was a mis-declaration in the bill of entry regarding the 'country of origin' of the imported goods. He further submitted that goods started from Iran and at Sharjah Master of the vessel along with the steamer agent and other persons manipulated

the documents and changed the 'country of origin' from "Iran" to "UAE" in various documents given to the appellant. He further submitted that the prohibition imposed under Section 111(d) includes any restriction, and in the present case there was a restriction regarding the payments to Iran imposed by Reserve Bank of India.

6. After considering the submissions of the both the parties and perusal of the material on record, I find that in the present case there is no dispute that the impugned goods i.e., bitumen is not prohibited goods either under the Customs Act or Foreign Trade Policy or any other law in force at the time of importation of goods and the Customs in the show cause notice has admitted this fact. It is also a fact that there is no prohibition of impugned goods from Iran either under the Customs Act or Foreign Trade Policy. Further, I find that the only allegation against the appellant in the present case is that in the bill of entry filed by them, they have wrongly mentioned the 'country of origin' as "UAE" whereas in fact the 'country of origin' is from Iran. After perusal of various statements made by the various persons during the course of investigation including that of the appellant, I find that nobody has spoken against the appellant that the appellant is in any way involved in the manipulation of changing the 'country of origin' documents. The appellant has filed the bill of entry and showed the 'country of origin' as "UAE" on the basis of documents supplied to him by the supplier based at UAE. Further no document has been produced by Revenue on record to show the involvement of appellant in any way in the said mis-declaration. Further, I find that in the present case the appellant has not claimed any preferential rate of duty. After examining the provisions of Section 111(d) and 111(m), I find that both the provisions are not applicable in the fact and circumstances of this case. Further, I find that no mala fides has been brought on record on the part of appellant so as to impose penalties

on the appellant under Section 112(a) and Section 114AA of the Customs Act, 1962. Further, I find that in the case of **<u>Oriental Containers Limited vs Union of India</u>** (cited supra), the Hon'ble High Court of Bombay in para 9 has observed as under:

> **"9.** *Having heard the Counsel on both the sides, we are of the opinion that in the present case, it is admitted by the Customs authorities that the petitioners are not party to the fraud and there was no mala fide intention on the part of the petitioners in importing the Tin Plate/ Waste instead of Tin Plate Prime. In fact, the petitioners have paid to the foreign supplier the price of tin plate prime and in return got tin plate waste. The petitioners have paid the customs duty payable on Tin Plate Prime. Under the circumstances, when the petitioners are innocent victims of the fraud played by the foreign supplier and the petitioners have suffered double jeopardy by paying the price and the duty payable on Tin Plate Prime, on account of the fraud committed by the foreign supplier, the petitioners could not be held to be guilty of violating any of the provisions of the Act and hence confiscation of the goods is not justified. It is pertinent to note that the rate of customs duty on Tin Plate Prime is higher than the rate of customs duty payable on Tin Plate /Waste. As soon as the petitioners came to know about the fraud played by the foreign supplier, they have taken effective steps and have cleared the goods on furnishing licenses which permit clearance of Tin Plate waste. When the petitioners had placed an order for import of tin plate prime and have paid the price for Tin Plate Prime, no fault could be found with the petitioners in furnishing Bill of Entry and licences for clearance of tin plate prime. In the present case, when the petitioner has been given a clean chit and there is no violation of the provisions of the Customs Act committed by the petitioners and no revenue loss is caused by wrong supply of goods by the foreign supplier, the Collector of Customs was not justified in confiscating the goods."*

6.1 Further in the case of **<u>Shree Ganesh International</u>** (cited supra), the Tribunal in para-8 has held as under:

> *"**8.** We, however, agree with the learned Advocate that the impugned goods are not liable for confiscation. It has not been denied by the Revenue that the appellants have made the declaration on the Bills of Entry on the basis of documents received by them from their foreign suppliers. The test report of the foreign supplier is dated 9-8-2003 which clearly mentions that the goods are non-texturised fabrics. They have also claimed that a similar consignment imported by them from the same supplier had earlier been cleared as non-texturised polyester fabrics which gave them the bona fide belief that the present consignment would also be of non-texturised variety. In similar situations, the Supreme Court has held in the case of Northern Plastics Ltd. (supra) that the declaration is in the nature of a claim made on the basis of belief entertained by the Appellants and therefore cannot be said to be misdeclaration under Section 111(m) of the Customs Act. It has also been held by the Tribunal in the case of Jay Kay Exports and Industries (supra) that finalisation of Tariff Heading under which the goods will fall is the ultimate job of the Customs authorities and if the Appellants have claimed wrong classification according to his limited understanding of the Customs Law, mens rea cannot be attributed to him. Accordingly, we hold that in the present matters, it cannot be claimed by the Revenue that the Appellants have deliberately misdeclared the goods with a view to avail the benefit of lesser rate of duty. We, therefore, set aside the confiscation and consequently the redemption fine imposed on them in both the appeals as well as the penalty."*

7. In view of my discussion above, I am of the considered view that the impugned order is not sustainable in law and therefore I set aside the impugned order in totality and allow the appeal of the appellant with consequential relief, if any.

(Order was pronounced in Open Court on **27/01/2020**)

(S.S GARG)
JUDICIAL MEMBER

Devi