CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
BANGALORE

REGIONAL BENCH - COURT NO. 1

Customs Appeal No. 20444 of 2021

(Arising out of Order-in-Appeal No. 190/2021 dated 25/02/2021 passed by Commissioner of CUSTOMS (Appeals-I), BANGALORE)

M/s Access World Wide Cargo
No 1 Shamanna Complex 13th Cross
Kaggadasapura C V Raman Nagar Post
BANGALORE - 560093
KARNATAKA

Appellant(s)

VERSUS

Commissioner Of Customs, Bangalore
C.R. BUILDING, QUEENS ROAD,
P.B.NO. 5400,
Bangalore - 560001
Karnataka

Respondent(s)

APPEARANCE:
Shri Pradyumna G.H. Advocate for the Appellant
Shri K.B. Nanaiah, Authorised Representative for the Respondent

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

Final Order No. 20666 / 2021

Date of Hearing: 10/08/2021
Date of Decision: 10/08/2021

Per : S.S GARG

The present appeal is directed against the impugned order dated 25.02.2021 passed by the Commissioner of Customs (Appeals) whereby the Commissioner has dismissed the appeal of the appellant and upheld the Order of the Original Authority imposing a penalty of Rs.50,000/- on the appellant who is the CHA under Section 114AA of the Customs Act, 1962.

2. Briefly the facts of the present case are that the M/s Aakanksha Distributors Private Limited, who is an exporter, are engaged in the export of mobile phones of different makes and models. On the basis of intelligence that the ADPL were claiming ineligible duty drawback under Section 75 of the Customs Act, 1962 investigation was launched by Customs Intelligence Unit (CIU), Bangalore. Preliminary enquiry showed that ADPL had filed three Shipping Bills dated 15-09-2016 and 16-09-2016 for the export of mobile phones to New Zealand, Hong Kong and Dubai. Verification of the Shipping Bills in question showed that the mobile phones appeared to have been manufactured in China. According to CIU, as per the provisions of Section 75 of Act, duty drawback was admissible in respect of any goods manufactured, processed or in respect of which any operation had been carried out in India and in the present case there appeared to be no evidence of the mobile phones having been manufactured in India so as to claim duty drawback in terms of Section 75 of the Act. Investigation led to the conclusion that the exporter had claimed ineligible duty drawback to the tune of Rs.1,20,02,815/- and the said amount was liable to be demanded and recovered from them as per Rule 16 of Customs, Central Excise & Service Tax Drawback Rules, 1995 read with Section 75A(2) of the Act. Thereafter, a SCN dated 23.05.2017 was issued by the Additional Commissioner of Customs, demanding drawback of Rs.1,20,02,815/- along with interest. In the SCN, the allegation against the appellant (Customs Broker) was that he presented the shipping bills on behalf of ADPL and were involved in the misrepresentation of facts as they had filed shipping bills on behalf of the exporter and hence rendered themselves liable to imposition of penalty under the provisions of Section 114AA of Customs Act, 1962. After following the due process, the Additional Commissioner of Customs, Bangalore vide Order-in-Original No.628/2019 dated 29.10.2019 held that the exporter is liable to pay drawback of Rs.50,48,749/- out of Rs.1,20,02,815/- under Rule 16 of the Customs, Central Excise Duties & Service Tax Drawback Rules, 1995. It was further held that the appellant (Customs Broker) had rendered themselves liable for imposition of penalty under Section 114AA of the Act and accordingly penalty of Rs.50,000/- was imposed on the appellant. Aggrieved by the said order, the appellant filed appeal before the Commissioner who, vide the impugned order, has rejected the same. Hence, the present appeal.

3. Heard both the parties and perused the records.

4. Learned Counsel appearing for the appellant submitted that the impugned order is not sustainable in law as the same has been passed without properly appreciating the facts and the law. He further submitted that penalty under Section 114AA of the Act cannot be imposed on the appellant because the appellant's case does not fall within the ingredients of Section 114AA of the Act. He further submitted that after perusal of the Section 114AA of the Act, it is clear that penalty is imposable on any person who willingly make a false declaration or statement or file a false document. However, the fact that as per the legal provision, the penalty is imposable which can be extended up to three times of the value means, invocation of Section 114AA of the Act against the Customs Broker is not legal and proper since no goods were exported by them. He further submitted that no penalty has been imposed on the exporter and penalty has only been imposed on the Customs Broker. He further submitted that the statement of Shri D. Narendran, Partner of the appellant has been mis-construed and mis-understood. He further submitted that Shri Narendran has only stated that other goods like Blackbeery, iphones Macbook Notebooks which are not manufactured in India are not entitled for drawback and this is a general statement and cannot be inferred that the appellants were aware that drawback could not be claimed and he failed to advise the exporter accordingly. He further submitted that the Commissioner (Appeals) in the impugned order has wrongly observed that the appellants have been operating under the same premises and have an identical ICE code which leads one to suspect the *bona fides* of the appellant. He further submitted that penalty under Section 114AA of the Act is exclusively imposable in cases involving fraudulent exports. In this regard, he made reference to paras 65 and 66 of the 27th Report of the Standing Committee on Finance which is reproduced herein below:

> *65. The Ministry also informed as under: "The new Section 114AA has been proposed consequent to the detection of several cases of fraudulent exports where the exports were shown only on paper and no goods crossed the Indian border. The enhanced penalty provision has been proposed considering the serious frauds being committed as no goods are being exported, but papers are being created for availing the number of benefits under various export promotion schemes."*

> *66. The Committee observe that owing to the increased instances of wilful fraudulent usage of export promotion schemes, the provision for levying of penalty upto five times the value of goods has been proposed. The proposal appears to be in the right direction as the offences involve criminal intent which cannot be treated at par with other instances of evasion of duty. The Committee, however, advise the Government to monitor the implementation of the provision with due diligence and care so as to ensure that it does not result in undue harassment.*

4.1. He also submitted that the fact that the Additional Commissioner against the demand of Rs.1,20,02,815/-has confirmed the demand of only Rs.50,48,749/- against which the revision petition is pending before the Revisionary Authority which clearly shows that the entire drawback has not been claimed illegally by the exporter ADPL. He also relied upon the following decisions wherein it has been held that in the absence of *mala fide* and wilful mis-representation, penalty on the Customs Broker under Section 114AA of the Act is not imposable:

> ***(a) Bosch Chassis Esystems India Ltd Versus Commr. Of Cus. New Delhi [2015 (325) E.L.T 372 (Tri-Del)***
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> ***(b) Kamal Sehgal Versus Commissioner of Customs (Appeals) [2020 (371) E.L.T 742 (Tri-Del)]***

5. On the other hand, learned AR reiterated the findings of the impugned order.

6. After considering the submissions of both the parties and perusal of the material on record, I find that the appellant who is the Customs Broker has only filed the shipping bills pertaining to the exports made by the ADPL Customs Intelligence Unit conducted the investigation and *prima facie* found that the mobile phones exported were not manufactured in India and have been manufactured in China and the exporter ADPL was not entitled to drawback under Section 75 of the Act. A SCN was issued demanding drawback of Rs.1,20,02,815/- along with interest but after following the due process, the Additional Commissioner only confirmed the demand of drawback to the tune of Rs.50,48,749/- as per Rule 16 of Customs, Central Excise & Service Tax Drawback Rules, 1995. Further, the rejection of this amount is under challenge before the Revisionary Authority. This, itself, shows that the exporter ADPL is contesting the denial of drawback which is subjudice. Further, I find that in the present case, penalty has only been imposed on the CHA under Section 114AA of the Act and no penalty has

been imposed on the exporter. Further, I find that the ingredients of Section 114AA of the Act is not applicable to the CHA and is meant against the fraudulent exporter as is made out from 27th Report of the Standing Committee on Finance (cited Supra). I also find that in the present case, the Department has failed to prove that there was a mala fide and wilful mis-representation by the Customs Broker. It seems that the Commissioner (Appeals) has totally misunderstood the facts and has wrongly observed that the appellant (Customs Broker) and the exporter have been operating from the same premises and have an identical ICE Code which leads one to suspect the bona fides of the appellant. This finding of the Commissioner is factually incorrect and without any basis. Further, the Commissioner on the basis of these facts has wrongly come to the conclusion that the appellant is involved in the illegal export whereas the appellant is only a Customs Broker who has filed the shipping bills on the basis of the documents furnished by the exporter.

7. Therefore, in view of these facts, the imposition of penalty itself is not sustainable in law and therefore I set aside the imposition of penalty on the appellant by allowing the appeal of the appellant.

(Order pronounced in the open court on **10/08/2021**)

(S.S GARG)
JUDICIAL MEMBER

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