

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
SOUTH ZONAL BENCH
CHENNAI**

**Application No.C/Misc/40382/2018
Appeal Nos.C/40604/2018 & C/40605/2018**

[Arising out of Order-in-Appeal Sea. C.Cus.No.II No.28 & 29 / 2018 dt. 12.02.2017 passed by Commissioner of Customs (Appeals-II), Chennai]

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|----|------------------------|-----------|
| 1. | Orion Enterprises | |
| 2. | Shri Mohd Salik Shaikh | Appellant |

Versus

Commissioner of Customs, Chennai	Respondent
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Appearance :

Shri P.A. Augustian, Advocate
For the Appellant

Ms. T. Usha Devi (DC) AR
For the Respondent

CORAM :

Hon'ble Ms. Sulekha Beevi, C.S., Member (Judicial)
Hon'ble Shri Madhu Mohan Damodhar, Member (Technical)

Date of hearing / decision : 25.09.2018

FINAL ORDER No. 42483-42484 / 2018

Per Bench

The facts of the case are that M/s.Orion Enterprises (appellant in appeal C/40604/2018), had filed Bill of Entry No.9023152 dated 24.03.2017 for the import of "2016 (MY2017) RHD NEW BRAND CADILLAC ESCALADE ESV LUXURY COLLECTION 10 SEATS, 6.2 LTR, VB PETROL CHASSIS No.1GYS4HKJ3GR342043" with declared supplier as Auto Group International (Pvt.) Ltd., Sri Lanka and the country of origin declared as Australia. Pursuant to

investigations conducted by DRI, it emerged that the appellants had imported the impugned 10 seated SUV vehicle from Sri Lanka with a declared value of USD 96,000 which included basic price of the vehicle as USD 83,000 by classifying the same under CTH 87029011 attracting BCD @ 40%,CVD @ 27% and NCD @ 1%. Appellants had submitted a letter dt. 13.03.2017 from Autogroup International Pvt. Ltd., Sri Lanka confirming that the vehicle had been converted by them at Sri Lanka as per ADR compliance (ADR Approval No.48091 dated 01.11.2016) and that the vehicle is new and has not been registered for use in any country prior to exportation to India. Appellants had also submitted documents and a letter dt. 1.11.2016 from the Department of Infrastructure and Regional Development, Govt of Australia to M/s.Saltrip International Pty Ltd. with ADR Approval No.48091 dated 01.11.2016. It appeared to the investigating agency that the vehicle was imported by mis-declaring the description, value, country of origin. In proceedings initiated against the appellant, original authority vide an order dt. 21.12.2017 held that the vehicle is 8 seater of US origin, rejected the declared value of Rs.64,18,752/- and re-determined the value as Rs.70,23,764/-. The adjudicating authority confiscated the vehicle under Sections 111 (d) and (m) of the Customs Act, 1962, however option was given to appellants to redeem the vehicle, only for the limited purpose of re-export, on payment of a fine of Rs.2,00,000/-. Penalty of Rs.64,18,752/- and Rs.2 lakhs were also imposed on the appellant under Section 114AA and Section 112 (a) ibid respectively. An amount of Rs.57,40,501/- was paid by appellant towards duty of the impugned vehicle was also appropriated by the original authority. Original authority also imposed a penalty of Rs.2 lakhs on Shri Mohd Salim Shaikh

(Appellant in C/40605/2018) under Section 112 (a) *ibid.* In appeal, the Commissioner (Appeals) vide the impugned order dt. 12.02.2017 upheld the order of the original authority and rejected the appeals. Hence both these appellants are before this forum.

2.1 The matter was also heard on earlier dates. In between, Ld. Advocate for the appellant Shri P.A. Augustian had preferred a petition under Rules 40 & 41 of the CESTAT (Procedure) Rules, 1982 dt. 05.04.2018 wherein *inter alia*, it had been prayed to issue directions to the department to release the car subject to execution of bank guarantee to cover the differential duty and to enable completion of registration process of the vehicle.

2.2 Today during further hearing of the matter, Ld. advocate has confined his arguments, only to request for permission to allow re-export of the impugned vehicle subject to payment of a nominal fine and penalty. Ld. Advocate prayed that the other grounds made in the earlier petition dt. 05.04.2018 may be considered as withdrawn. Ld. Advocate argues that the decision of adjudicating authority to impose penalty under Section 114A of Customs Act is unjustified when there is no false document submitted by appellant. Further, when the vehicle has been allowed re-export, there is no justification for demanding import duty and appropriating amount paid by the appellant during investigation for that purpose.

2.3 Ld. Advocate submits that they are taking this course of appeal as considerable time has lapsed pursuant to adjudication of the matter and that vehicle is still under seizure at the port as a result of which the demurrage thereon has climbed up to around Rs.22 lakhs. Appellants have preferred to re-export the vehicle so as to avoid any further demurrage.

3. On the other hand, Ld.A.R Ms. T. Usha Devi vehemently opposes the appeal. She submits that the penalty has been imposed under Section 114AA of the Customs Act, 1962 which is very much applicable in this case as the appellant had falsely declared the country of origin as Australia in the Bill of Entry.

4. Heard both sides and have gone through the facts.

5.1 The appeal / petition is now confined to permission to re-export the impugned vehicle on nominal fine and penalty. The lower appellate authority has already upheld the order of the original authority inter alia allowing re-export of vehicle on certain terms. This being so, the appeal / petition as modified by the Ld. Advocate is only restricted to allowance of more lenient terms in the matter of fine and penalty, in particular, with regard to penalty imposed under Section 114AA ibid and appropriation of amount paid towards duty.

5.2 From the SCN dt. 30.8.2017, we find that *raison d'être* for proposing imposition of penalty under Section 114AA of the Customs Act, 1962 is given in para 18 as under :

“18. Further, M/s.Orion also appear to be liable to penalty in terms of Section 114AA of the Customs Act, 1962 for having intentionally made,used false and incorrect declaration / documents to evade payment of legitimate customs duties as discussed in the preceding paras. ..”

5.2 Although the said para indicates that appellant had “*intentionally made / used false and incorrect declaration of documents*” as discussed in preceding

paras, we are not able to find any specific charges in the remaining part of the SCN which directly implicates the importer-appellant to have themselves caused falsification of any document. True, there are allegations in the SCN that appellant has committed misdeclaration of country of origin, value of goods and classification of the goods. However for these infractions, the SCN already proposes in paras 17 & 19 (d), confiscation under Section 111 (d) and (m) of the Customs Act, 1962 and imposition of penalty under Section 112A of the Customs Act, 1962. These proposals have been acted upon by the original authority who has ordered confiscation of the vehicle under Section 111 (d) of the Customs Act for the reason that *“as country of origin, value of goods along with confiscation of goods has been misdeclared in the Bill of Entry”*. [para 26 (d) of the order of original authority]. From the facts on record, it is seen that both the lower authorities have found that as there has been misdeclaration of country of origin value of goods and classification of goods in the Bill of Entry provisions of Section 111 (m) of the Act would be applicable. However, nowhere in the discussion and finding portion of the adjudication order (para 24.1 onwards) has the authority discussed or justified the imposition of penalty under Section 114AA *ibid* in the matter. Even the LAA, while upholding the order of the original authority, has not analysed or justified the imposition of penalty under Section 114AA *ibid*. There is also no finding or justification given by any of the lower authorities for appropriating an amount of Rs.57,40,501/- paid by the appellant towards duty of the impugned vehicle, in a situation when at the same time re-export of the vehicle has been allowed on payment of redemption fine. It is also interesting to note that while appropriation towards “duty” amount has been made, the provisions of Customs Act under which such appropriation has been made has not been indicated by any of the lower authorities. In any case, when

the importer is accepting the option to re-export the imported vehicle, and the said are not cleared for home consumption into the DTA area, the question of imposition of import duties of Customs will not arise.

5.3 In the circumstances, when the permission for re-export has been made we find that sufficient justification has not been given by any of the lower authorities for imposition of penalty under Section 114AA of the Act and also for appropriation for the amount paid by the appellant towards duty amount.

5.4 Viewed in this light, while not interfering with the option accorded by the lower authorities for re-export of the vehicle, however, the penalty of Rs.64,18,752/- imposed under Section 114AA of the Customs Act, 1962 and also the appropriation of an amount of Rs.57,40,501/- paid by the appellant during investigation towards “duty”, cannot then be sustained and will require to be set aside, which we hereby do. So ordered. We once again make it clear that we do not interfere with any other part of the impugned order.

6. Appeal **C/40604/2018** is partially allowed on above terms. Appeal **C/40605/2018** is dismissed. MA for provision of release of the goods is dismissed as not pressed.

Issue order by '**dasti**'.

(dictated and pronounced in court)

(**Madhu Mohan Damodhar**)
Member (Technical)

(**Sulekha Beevi, C.S**)
Member (Judicial)

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