

IN THE CUSTOMS, EXCISE & SERVICE TAX
APPELLATE TRIBUNAL
SOUTH ZONAL BENCH AT CHENNAI
Court : DB- B1

Appeals No. C/389, 390/2010, C/423/2010

(Arising out of Order-in-Original No. 4/2010 dated 14.10.2010 passed by the Commissioner of Customs, Central Excise and Service Tax, Coimbatore).

1. M/s. Network Industries Ltd. : Appellants
2. M/s. Uttam Cotton Mills (P) Ltd.
3. M/s. AFL Dachser Pvt Ltd.

Vs.

CCE & ST, Coimbatore : Respondent

Appeals No. C/29, 35/2011

(Arising out of Order-in-Original No. 4/2010 dated 14.10.2010 passed by the Commissioner of Customs, Central Excise and Service Tax, Coimbatore).

CCE & ST, Coimbatore : Appellant

Vs.

1. M/s. Network Industries Ltd. : Respondents
2. M/s. Uttam Cotton Mills (P) Ltd.

Appearance

Ms. Lakshmi Sriram, Advocate, (C/ 389, 390/2010)
Shri Arun Chandra K, Representative (C 423/2010)
for the Appellants

Shri K. Veerabhadra Reddy, ADC (AR)
for the Respondents.

CORAM :

Hon'ble Shri Madhu Mohan Damodhar, Member (Technical)
Hon'ble Shri P. Dinesha, Member (Judicial)

Date of Hearing/Decision: **01.01.2019**

FINAL ORDER Nos. 40065-40069/2019

Per Madhu Mohan Damodhar

The facts of the matter are that M/s. Network Industries Ltd. and M/s. Uttam Cotton Mills Private Ltd. (hereinafter referred to Network and Uttam) have filed shipping bills indicating the exports therein, to have been made against EPCG Licence issued to M/s. Rogini Garments (hereinafter referred to Rogini) for export of 100% cotton knitted mens vests and T-Shirts. Pursuant to investigations, it appeared that the EPCG license pertained actually to Rogini; that Network and Uttam had mis-declared Rogini as supporting manufacturers of the goods in the documents to fabricate evidences that Rogini had indeed manufactured the export goods; that this was done to facilitate Rogini to fraudulently avail the benefits under EPCG Scheme by getting the credit of exports made by Network and Uttam. Accordingly, a SCN dated 25.06.2010 was issued to Network, Uttam and Rogini interalia proposing confiscation of the goods attempted to be exported as above, disallowing the value of the goods towards non-fulfilment of export obligation under EPCG licence, and also imposition of penalties on Network, Uttam and Rogini under Section 114 (iii) of the Customs Act, 1962. The SCN also proposed imposition of penalties under Section 114 (iii) and /or 112 ibid on M/s. AFL Dachser Pvt. Ltd., the CHA (hereinafter referred to Dachser), on the allegation of abetting the mis-declaration detected in the aforesaid exports. In

adjudication, the Commissioner vide OIO dated 14.10.2010 interalia held that the goods exported by both Network and Uttam are liable for confiscation under Section 114 (iii) ibid; that the said goods cannot be accounted for the purpose of fulfilment of export obligation by Rogini. The adjudicating authority also imposed penalty of Rs. 5,00,000/- on Network and Uttam under Section 114(iii) ibid. Penalty of Rs.10,00,000/- was imposed under Section 114(iii) ibid on Rogini. A penalty of Rs. 1,00,000/- was imposed on Dachser under Section 114 (iii) ibid. Network and Uttam have preferred appeals C/389/2010, and C/390/2010 claiming relief against the penalty imposed on them under Section 114 (iii) ibid. Dachser has filed appeal C/423/2010 against the imposition of penalty of Rs. 1,00,000/- under Section 114 (iii) on the ground of violation of natural justice. The department has also preferred appeal C/29/2011 and C/35/2011 on the ground that the adjudicating authority while upholding the confiscability of the goods sought to be exported by Network and Uttam, has however, not proceeded to confiscate the goods and not released the same under Section 125 ibid.

2.1 When the matter came up for hearing, on behalf of Network and Uttam, Ld. Advocate Ms. Lakshmi Sriram appeared and submitted that mention of EPCG license of Rogini by these appellants is only by inadvertence; that Rogini was the supporting manufacturer of both Network and Uttam and all the three firms have long relationship between them. The mention of EPCG license of Rogini was only made by

bonafide mistake on the part of Network and Uttam. Ld. Advocate also submits that no active connivance has been established against them so as to conclude that the entire exercise was only to cause undue benefit to Rogini.

2.2 In respect of Dachser, Ld. Consultant Shri Arun Chandra K submits that nothing has been brought forth in the SCN that there was any abetment on the part of the CHA or any intention to defraud the exchequer.

3.1 On the other hand, Ld. AR Shri K. Veerabhadra Reddy, ADC, opposes the appeals. He takes us to para-30 of the impugned order where the adjudicating authority has found that both Network and Uttam are holders of Export House Status, hence their plea that the mistake had happened due to their misunderstanding of law is unacceptable. He further submits that the adjudicating authority has already taken a lenient view in the matter of imposing penalty and hence no further interference is called for in respect of both Uttam and Network.

3.2 In respect of the appeal filed by Dachser, Ld. AR took us to para 28 to point out that Dachser has failed to exercise due diligence to ascertain the correctness of the information provided by the exporters by in which manner they had played a major role in abetting the omissions and commissions of the exporter and are very much liable for penal action as confirmed in the impugned order.

4. With regard to the departmental appeals, Ld. AR points out that although the SCN dated 25.06.2010 had very clearly proposed confiscation of the goods sought to be exported by both Uttam and Network under Section 113 (i) of the Customs Act, 1962, the adjudicating authority also in para-32 (1) and (iv) have clearly held that the impugned goods sought to be exported by both Network and Uttam were "liable for confiscation under Section 113 (i) of the Customs Act, 1962". However, the authority has not proceeded to order confiscation and impose redemption fine to redeem the goods so confiscated under Section 125 *ibid.* Ld. AR therefore submits that this portion of the order needs modification to the extent of confirming the confiscation of the goods under Section 113 (i) *ibid* and imposition of appropriate fine under Section 125 *ibid.*

5. Heard both the sides and have gone through the facts of the case.

6.1 With regard to imposition of penalty under Section 114 (iii) *ibid* on Uttam and Network, we find that the common plea of both the appellants is that since Rogini Garments were supplying yarn for the manufacture of the exported goods, the latter is their supporting manufacturer; hence their EPCG licence details were indicated in the shipping bills by mistake. On going through the facts, and in particular paras 23 & 24 of the impugned order, we find that these two appellants have only purchased yarns from Rogini. We fail to understand how

this would make Rogini a supporting manufacturer of Network or Uttam. From the facts on record, it is also not disputed that Rogini had no claim whatsoever over the goods attempted to be exported. There is then no connection whatsoever between the impugned goods and Rogini. This being the case, the claim that both appellants have made, a "mistake due to their misunderstanding of law" is too much of a coincidence to be believable. Viewed in this light, we are of the considered opinion that penalty under Section 114 (iii) ibid is very much imposable on both Network and Uttam. However, we do find that there is scope of some leniency in the quantum of penalty. The adjudicating authority in para-31 of the impugned order, while confirming the fact of mis-declaration in the shipping bills by both the appellants, has observed that appropriate proceedings on further investigations will have to be initiated by the concerned Customs House, where the EPCG licenses relating to Rogini have been registered. There is also no discrepancy or mis-declaration in the description and value of the goods sought to be exported. In the circumstances, we hold that the ends of justice will be adequately served by reducing penalty imposed under Section 114 (iii) of Uttam and Network from Rs.5,00,000/- each to Rs. 1,00,000/- each. So ordered.

6.2 Coming to the appeal filed by Dachser, the SCN has alleged abetment on the part of the said appellant by mis-declaration of the documents filed by Network and Uttam. There is also an allegation that Dachser had "allowed Rogini

Garments to endorse the shipping bills". However, no evidence of any sort had been adduced to support these allegations. Even in the impugned order, in Para-28 the adjudicating authority has entertained the presumption that Dachser failed to exercise due diligence on the exporters and consequently played an active role in the mis-declaration by the latter. We are afraid that such a presumption is not sufficient to establish the charge of abetment under Section 114(iii) *ibid.* The ratio of *Moriks Shipping and Trading Pvt. Ltd.* - 2008 (227) ELT 577 (Tri.-Chen.) supports the stand of the appellant. Other Tribunal decisions on the very same issue have consistently reiterated the ratio that when there is no case of active connivance and abetment of the CHA to facilitate the fraud allegedly committed by the exporter/importer, penalty under Section 112 of the Customs Act, 1962, cannot be imposed on the CHA.

6.3 Coming to the departmental appeals, we find merit in the arguments advanced by the Ld. AR. As pointed out by the Ld. AR, the impugned SCN has definitely proposed confiscation under Section 113 (i) *ibid.* The adjudicating authority in para-32 (i) & (iv) has also accepted the proposition that the goods are liable for confiscation. It is pertinent to note that this finding of the adjudicating authority has not been appealed against by neither Network and Uttam nor have they filed any cross objections against the departmental appeals. Be it as it may be, the adjudicating authority should have correctly proceeded to order confiscation of the goods and imposed

redemption fine under Section 125 ibid thus gives an option for the exporters to redeem the goods. This has not been done. We therefore order modification of the impugned order in respect of paras 32 (i) and 32 (iv) to order that the goods impugned therein are confiscated under Section 113 (i) ibid. We further hold that the goods should be released on redemption fine under Section 125 ibid. In the ordinary course, the quantum of redemption fine would have to be commensurate not only on the value of the goods but also to some extent with the margin of profit of the goods and other ingredients. However, notwithstanding the value of the goods viz. Rs. 92,26,410/- in respect of Network and Rs.77,454,624/- in respect of Uttam, we are of the opinion that redemption fine should also be commensurate to the gravity and incurability of the offence alleged. True, both Network and Uttam have indicated EPCG licence number in the concerned shipping bills which have not been issued in their name in the name of Rogini. However, it is not the case that there is mis-declaration of nature or description of the goods, or their value or any other material particular. Even if the modus operandi had been successful, the beneficiary would not be Network or Uttam but Rogini only. In any case, timely detection meant that even Rogini will not now claim the benefit. We further note that the adjudicating authority observed in para-30 that the goods are not available for confiscation. Taking all the facts into account, we hold that a redemption fine of Rs.1,00,000/- each under Section 125 ibid

on Network and Uttam would sufficiently meet the ends of justice in these cases. So ordered.

7.1 Appeals C/389/2010, C/390/2010 and C/423/2010 partly allowed as above.

7.2 Appeals C/29/2011 and C/35/2011 allowed by way of modification of impugned orders as above.

(Order dictated and pronounced in the open Court)

(P.DINESHA)
MEMBER (JUDICIAL)

(MADHU MOHAN DAMODHAR)
MEMBER (TECHNICAL)

BB