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

S.No.	Appeal No.	Appellant	Respondent
1.	C/81/2012	MSK International	Commissioner of Customs (Air), Chennai
2.	C/82/2012	K.Saravanan	Commissioner of Customs (Air), Chennai
3.	C/83/2012	Sujath Ali	Commissioner of Customs (Air), Chennai
Arising out of Order in Original No.99/2012-CAU-AIR dt. 28.02.2012 passed by Commissioner of Customs (Airport & Aircargo)			

Appearance :

Shri S.Murugappan, Advocate
For the Appellant

Shri B. Balamurugan, AC (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 : 16.11.2018
Date of Pronouncement : 29.01.2019

FINAL ORDER No. 40171-40173 / 2019

Per Bench

All these appeals since emanating from same impugned order they were taken up for common disposal.

2. The facts of the case are that M/s.K.S.R Pharmacy, Chennai (hereinafter referred to as KSR) had attempted to clear "Ceftriaxome Sterile" by declaring its chemical name as "{6R-(6a, 7B)} -7- [{2-Amino 4 – Thiazolyl (Methoxyimino) Acetyl} Amino]-8-oxo-3 – { (1,2,5,6 — Tetrahydro-2-Methyl-5,6 — dioxo – 1,2,4 — triazin-3-yl) thio} methyl] 5-thia-1-azabicyclo [4,5,0] octo-2-ene-2-carboxylic acid

disodium salt" instead of its generic name viz. "Cetriaxone Sodium" which originated from China in order to evade Anti Dumping Duty (ADD). Scrutiny of similar imports made by the other importers was carried out by Special Intelligence and Investigation Branch (SIIB). It was noticed that identical goods were imported by M/s.MSK International, Chennai vide Bills of Entry dt. 18.2.2009, 11.4.2009 and 27.5.2009. On scrutiny of the details available in EDI system it was noticed that the country of origin was declared as China and Hongkong on such Bills of Entry. It was also noticed that the unit price of the goods was declared as USD 10.10 (CIF) per kg. In the Bills of Entry dt. 18.2.2009 and 11.04.2009 based on the invoices raised by M/s.V.S.Trading, Hongkong. In respect of other Bill of Entry dt. 27.05.2009, the unit price was declared as USD 8.75 (CIF) per kg. Based on the invoices raised by M/s.Farmasino Pharmaceuticals (Jiangsu) Co. Ltd. It appeared that in a similar import made by appellant herein vide Bill of Entry dt. 24.07.2009, the value was determined at USD 87.50 (CIF) per kg. based on the commercial invoice dt. 20.07.2009 raised by M/s.Farmasino Pharmaceuticals (Jiangsu) Co. Ltd., China which was also produced by importer at a later date. The department observed that there was gross undervaluation in all these three clearances made by MSK International, Chennai. Further, "Ceftriaxone Sodium Sterile", originating from 'China' attracted Anti-Dumping Duty as per Notification No.98/2008-Cus. and hence the issue was taken up for detailed examination.

3.1 The search of premises of the importer M/s.MSK International was carried out by the officers of SIIB on 29.09.2009. During the search, it was noticed that the address of the firm mentioned in the Bills of entry is a residential apartment consisting of about 30 flats with no evidence of any company functioning in the said address. On further enquiries, it was noticed that one Shri Saravanan Krishnamurthy declared as the proprietor of MSK International in the IEC was residing in one of the flats of the said apartment. However, no incriminating documents were recovered from the premises. Shri Saravanan handed over the copies of all the Bills of entry filed in the name of M/s.MSK International, Chennai. Summons were issued by the department to Shri K. Saravanan who appeared before the department and in his voluntary statement dt. 30.09.2009, he stated *interalia* that he had applied and got IEC registration number in the name of 'MSK International' to start an import business, but he had not imported any goods; that as requested b his friends S/Shri Sivakumar and Sriram he agreed to the usage of the IEC code for the imports made under the subject Bills of Entry; that he did not actually know the imports.

3.2 A statement was recorded from Shri K. Sriram wherein he stated that he looked after the operational / administrative activities of the company; that one Shri Sujath Ali, Partner of K.S.R. Pharmacy, appellant herein is the original importer of the goods imported vide impugned Bills of Entry filed in the name of MSK International, Chennai; that Sujath Ali contacted him and requested for arrangement for temporary IEC number for his imports; that Shri Saravanan agreed to sign the documents and allowed the use of IEC of MSK International.

3.3 Statement of Shri Sujath Ali was also recorded on 7.10.2009 and he deposed that K. Saravanan had no knowledge of imports made by him. He also admitted that the goods in all the three Bills of entry were under-valued and the actual transaction value were commonly known as ‘Ceftriaxone Sodium Sterile’ and originated from China and that attracted ADD.

3.4 Thus it appeared that Sujathi Ali who is one of the appellants herein had actually imported all the three consignments under reference in the name of M/s.MSK International, Chennai by obtaining the signature of Shri K. Saravanan in the import documents filed for clearance of goods. During investigation, Shri Sujath Ali paid a total amount of Rs.28,33,472/- towards differential duty. Show cause notices were issued alleging misdeclaration of goods, undervaluation and also proposing for confiscation of the goods, demand of duty and imposition of penalties. After due process of law, the original authority rejected the price declared and re-determined the price at the rate of USD 87.50 (CIF) per kg and ADD @ USD 77.35 per kg. was also imposed on the aforementioned three Bills of Entry as per Notification No.98/2008-Cus. dt. 27.08.2008. Thus total differential duty of Rs.1,47,28,161/- was confirmed along with interest and Rs.28,33,472/- paid during investigation was appropriated. The adjudicating authority also held that the goods totally valued at Rs.1,61,77,000 (AV) are liable for confiscation under Section 14 of the Drugs & Cosmetics Act, 1940 read with Section 111 (d) & 111 (m) of the Customs Act, 1962. However, since the goods are not available for confiscation, did not pass any order in this regard under Section 125 of the Customs Act, 1962. A penalty of Rs.1,47,28,161/- was imposed on Sujath Ali, partner of M/s.K.S.R. Pharmacy under Section 13 (b) of Drugs & Cosmetics Act, 1940 read with Section 114A of the Customs Act, 1962. It was also ordered that if the duty demanded is paid along with appropriate interest within 30 days, the appellant would be liable to pay only reduced penalty of 25%. Separate penalty of Rs.1 lakh was imposed on Shri K. Saravanan. Aggrieved by the order, the appellants are now before the Tribunal.

4.1 On behalf of the appellants, Ld. Counsel Shri S. Murugappan appeared and argued the matter. He submitted that enhancement of value and levy of ADD is not disputed by the appellant; that as far as MSK International is concerned, full chemical name was declared in the bill of entry though generic name was not mentioned. Thus the charge of misdeclaration cannot be sustained.

4.2 With regard to imposition of penalty of Rs.1 lakh on Shri Saravanan under Section 112 (b), it is argued by Ld. counsel the same is not sustainable and is also disproportionate to the alleged omission as he has ony let the IE code and name for the imports made.

4.3 With regard to the penalty imposed on Shri Sujath Ali, it is submitted by the Ld. counsel that he is only a partner in another firm, K.S.R. Pharmacy and penalty under Section 114A cannot be levied on him as he is not chargeable with duty and further the notice only proposed penalty under Section 114A on him for rendering the goods liable for confiscation; that penalty under Section 13 (b) of Drugs and Cosmetics Act, 1940 is not imposable by a customs authority as that provision relates to punishment for offences by a court of law.

5. On the other hand, Ld. A.R Shri B. Balamurugan supports the impugned order. He took note of the Ld. Advocate’s submissions for enhancement of value and levy of ADD are not disputed. However, Shri Sujath Ali, Partner of K.S.R. Pharmacy was the kingpin of the entire modus operandi to import prohibited “Ceftriaxone Sodium” in the guise of its chemical name and also attempted to

undervalue the goods. So also Shri K. Saravanan proprietor of MSK International has unlawfully lent his IEC number and signed the import documents for the clandestine import and clearance of the impugned goods. Hence penalties imposed on Sujath Ali as well as K.Saravanan, Proprietor of MSK International are very much in order.

6. Heard both sides and have gone through the records.

7.1 The Ld.Advocate has been at pains to contend that as far as MSK International is concerned, the full chemical name was declared in the Bill of Entry and only generic name was not mentioned, hence there cannot be any charge of misdeclaration. We are not enthused by this argument. It is quite evident that when the import of 'Ceftriaxone Sodium' was saddled with ADD when imported from China, it was obvious that no additional reference in such ADD notification or any alternative chemical name or formula of the said item. In any case, in the normal course of business and trade and especially imports, the goods are only known by the chemical name and certainly not by the chemical formula run into almost four lines. Then, there is no doubt in our mind that the chemical formula was declared instead of the chemical name only to trick the assessment system and to evade ADD which would have been otherwise imposable on its import. From the facts of the case, it is also clear that the entire exercise was planned and furthered by Sujath Ali, Partner of K.S.R. Pharmacy on imported impugned goods. In the normal course, we would not have faulted imposition of penalty under the provisions of the Customs Act, 1962 as applicable on the said Sujath Ali. However, penalty under Section 13 (b) of the Drugs and Cosmetics Act, 1940 read with Section 114A of the Customs Act, 1962. In this regard, we find merit in the Ld. Advocate's contention that the said Section 13 (b) relates to punishment for offences which are to be awarded by a court not inferior court of a Metropolitan Magistrate or of a Judicial magistrate of the first class as has been clearly laid down in Section 15 ibid. More importantly, Section 114A of the Customs Act, 1962 mandates penalty equal to duty or interest so determined only on the person who is liable to pay such duty or interest. In the present impugned order, duty / interest has not been demanded from Sujath Ali, Partner of K.S.R. Pharmacy and hence there cannot be any penalty on the said person under Section 114A ibid also. In the circumstances, the penalty of Rs.1,47,28,161/- imposed on Sujath Ali cannot be sustained and will require to be set aside, which we hereby do. So ordered.

7.2 Penalty of Rs.1 lac has been imposed on Shri K. Saravanan, Proprietor of MSK International. In this regard, we find that an appeal has been filed not only by MSK International but also by its Proprietor K.Saravanan. Be that as it may, the adjudicating authority in para 24.0 of the impugned order has conceded that *"though Shri K.Saravanan does not appear to be directly involved in the fraudulent import activities of Shri Sujath Ali*....". No doubt, Shri K. Saravanan had lent his IEC number and signed the import documents for the import and clearance of the impugned goods. But there is no evidence that he was aware of the fraud at any stage before or during the import. When the modus operandi of using the chemical formula name instead of the regular chemical name has fooled even the assessment system module of the customs authorities, it would be unjust to saddle K.Saravanan with a large penalty only for having lent IEC number. This being so, in the interests of justice the penalty of Rs.1 lac imposed under Section 112 (b) ibid is reduced to Rs.50,000/- (Rupees Fifty thousand only). So ordered.

7.3 Since Shri K.Saravanan is the Proprietor of MSK International, separate appeal filed by MSK International has become infructuous and we therefore dismiss the same.

All the appeals are disposed on above terms.

(order pronounced in court on 29.01.2019)

(Madhu Mohan Damodhar)
Member (Technical)

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

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