

**CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
CHENNAI**

REGIONAL BENCH – COURT NO. I

Customs Appeal No. 41077 of 2019

(Arising out of Order-in-Appeal No. 39/2019-TTN (CUS) dated 22.03.2019 passed by the Commissioner of G.S.T. & Central Excise (Appeals), No.1, Williams Road, Cantonment, Tiruchirapalli – 620 001)

M/s. Sree Ayyanar Spinning & Weaving Mills Ltd., : Appellant
Mallanginar,
Virudhunagar District – 626 109

VERSUS

The Commissioner of Customs, : Respondent
Custom House, New Harbour Estate,
Tuticorin – 628 004

APPEARANCE:

Shri. T. Ramesh, Advocate for the Appellant

Shri. B. Balamurugan, Authorized Representative for the Respondent

CORAM:

HON'BLE MR. P. DINESHA, MEMBER (JUDICIAL)

FINAL ORDER NO. 40963 / 2019

DATE OF HEARING: 19.07.2019

DATE OF DECISION: **25.07.2019**

The only issue involved in the above appeal by the assessee is the levy of penalty under Section 114AA of the Customs Act, 1962.

2.1 The facts leading to the present dispute are that the appellant, being an importer, filed a Bill-of-Entry dated 09.04.2018 for the import of raw cotton and the imported goods were supplied by M/s. Mehment Dogan Docotton Group, Turkey and the Country-of-Origin was Turkmenistan. The goods being one which required "No

Objection" Certificate from Plant Quarantine (hereinafter referred to as 'PQ') authorities, the imported goods were subjected to first check examination.

2.2 The Plant Quarantine Officer (WS) of the Directorate of Plant Protection, Quarantine & Storage, Plant Quarantine Station, Tuticorin, however, vide communication dated 04.05.2018 ordered for deportation/destruction of the subject import consignment as per Clause 3 (16) of the Plant Quarantine (Regulation of Import into India) Order, 2003 since, according to him, the consignment was imported under "Fake PSC" (Fake Phytosanitary Certificate).

2.3 The Adjudicating Authority, based on the above communication by the PQ Officer, assessee's request for waiver of Show Cause Notice and personal hearing, took up the assessee's case for adjudication and vide Order-in-Original dated 27.06.2018 ordered confiscation of the goods imported under Section 111 (d) of the Customs Act, 1962 with an option of redemption under Section 125 ibid and also imposed penalties under Sections 112 and 114AA ibid.

2.4.1 The appellant carried the matter in appeal before the First Appellate Authority i.e., the Commissioner of G.S.T. and Central Excise (Appeals), Tiruchirapalli. During the pendency of its first appeal, the appellant furnished another certificate by the same authority dated 24.09.2018 with the following remarks :

"Competent authority has approved relaxation. All conditions of relaxation shall be applied".

2.4.2 The Ld. First Appellate Authority after considering the pleadings and also the subsequent certificate issued by the authority, vide Order-in-Appeal No. 199/2018 dated 24.10.2018 allowed the appeal by way of remand for fresh consideration. The First Appellate Authority in its findings has categorically observed as under :

"The Order-in-Original No. 25/2018 dated 27.06.2018 was based on the fact that the imported 'Raw Cotton' has not been accorded NOC by the PQ Authorities as the same was imported under 'Fake Phytosanitary Certificate (PSC)' and the PQ authorities has since relaxed the conditions and allowed PQ Clearance on 24-09-2018 for the above consignments and hence, I find that this is a fit case for remanding back to the original authority to decide it based on the PQ Clearance issued on 24-09-2018 by PQ Authorities, Tuticorin."

(Emphasis supplied)

Both the Revenue as well as the assessee accepted the above order of the First Appellate Authority without challenging the same in any appeal.

3.1 Based on the above remand order, the Original Authority resumed adjudication proceedings and vide Order-in-Original (Denovo) dated 10.12.2018, after accepting the remarks of the PQ Authorities, concluded that the PQ clearance was given by relaxing the norms, but however, imposed a penalty of Rs. 2,00,000/-, the payment of which was made condition for clearance for home consumption.

3.2 The appellant preferred appeal against the levy of penalty under Section 114AA ibid before the First Appellate Authority and the First Appellate Authority vide impugned Order-in-Appeal No. 39/2019-TTN (CUS) dated 22.03.2019, however, upheld the levy of penalty thereby rejecting the claim of the appellant. The appellant is therefore before this forum.

4. When the matter was taken up for hearing, Shri. T. Ramesh, Ld. Advocate, appeared for the assessee and Shri. B. Balamurugan, Ld. AR, appeared for the Revenue.

5.1 The main contention of the Ld. Advocate is that the PQ Authorities themselves have confirmed the quality of the cotton imported and in any case, the appellant had no role in so far as quality of the imported cotton was concerned and the report issued by the concerned authority is concerned.

5.2 He further contended that the imposition of penalty was not automatic since there was no finding by the authorities below as to the satisfaction of the conditions prescribed under Section 114AA *ibid* by the assessee.

5.3 Ld. Advocate also relied on the decision of the Mumbai Bench of the Tribunal in the case of ***M/s. UPS Jetair Express Pvt. Ltd. Vs. Commr. of Cus., Airport, Mumbai reported in 2019 (365) E.L.T. 461 (Tri. – Mumbai)***.

6.1 *Per contra*, Ld. AR, seriously opposing the contentions of the Ld. Advocate for the appellant, submitted that the fakeness of the first certificate has never been disputed and therefore, at the threshold, the penalty should be confirmed. He also contended that the assessee has nowhere disputed the findings as to the fakeness of the Phytosanitary Certificate and therefore, the penalty imposed under Section 114AA *ibid* becomes mandatory.

6.2 He also drew support from the findings of the lower authorities.

7. I have considered the rival contentions, gone through the decisions/orders and the relevant provision of law.

8.1 Section 114AA reads as under :

"SECTION [114AA. Penalty for use of false and incorrect material. –

If a person knowingly or intentionally makes, signs or uses, or causes to be made, signed or used, any declaration, statement or document which is false or incorrect in any material particular, in the transaction of any business for the purposes of this Act, shall be liable to a penalty not exceeding five times the value of goods.]"

8.2 The essence of Section 114AA is that the “person knowingly and intentionally makes, signs or uses” is as good as suppression or playing fraud and hence, the burden of proof is heavily cast on the Revenue to establish the *mala fides*. The allegation of Fake PSC (which was later on set right) *ipso facto* does not lead to the liability under this Section. The words “knowingly” and “intentionally” touches upon the culpability of the mindset *ab initio* and consequently, it is for the Revenue to discharge its burden of establishing that the imported consignment was forbidden or that the appellant was well aware of the fact that the cotton it ordered was forbidden or was not fit for home consumption. It is a matter of record that only after the preliminary tests when the consignment reached India, did everyone realize that it was unfit for home consumption. But for this allegation, there is no reasoned analysis nor do I see any follow-up enquiry as to the role of the appellant and how that had resulted in the acts of omission and commission, to bring home guilt under Section 114AA *ibid*.

9.1 The issue can be looked at from a different angle: First PSC which directed for deportation/destruction of the imported cotton, came to be adjudicated vide Order-in-Original dated 27.06.2018. During the pendency of the appeal against this Order-in-Original, the appellant procured a second report i.e., PSC which is dated 24.09.2018, wherein the same issuing authority has remarked differently and cleared the cotton for home consumption. Taking note of this development, the Ld. First Appellate Authority remanded the matter and the observations are already extracted elsewhere in this order and the gist of the First Appellate Authority’s order is – to re-decide based on PSC dated 24.09.2018. Following the First Appellate Authority’s direction, the Adjudicating Authority acts upon the second PSC and grants substantial relief, but for penalty under Section 114AA. The question is, therefore, when admittedly no fault is found by the authority, can its report be still held to be

available, if not for anything, but for levying penalty alone under Section 114AA *ibid*?

9.2 The impugned penalty is for an express default and when the report itself has a clean slate, there cannot be any penalty, at least with respect to that report. This is also for the reason that the Commissioner (Appeals) has, in her first order, set aside the entire issue for passing fresh adjudication order in the light of the second report. The natural corollary is that the first report becomes *non-est*. Hence, I do not find any basis for imposition nor has the Revenue brought out any *raison d'être* for imposition of the impugned penalty on record since the very basis i.e., the alleged fake report is itself not there on board anymore.

10. Viewed from any angle, it is but obvious that the Adjudicating Authority has been injudicious and peremptory in imposition of the impugned penalty under Section 114AA *ibid*, since, unless it is proved that the person to be penalized has knowingly or intentionally implicated himself in use of false and incorrect materials, there can be no justification for penalty under this Section. This requirement of factual finding itself is not there and nor has it been answered satisfactorily either in the Show Cause Notice or in the orders of the lower authorities and hence, I do not have any hesitation in setting aside the same.

11. In the result, the impugned order is set aside, the appeal is allowed and the penalty is ordered to be deleted.

(Order pronounced in the open court on **25.07.2019**)

(P. DINESHA)
MEMBER (JUDICIAL)