IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL, CHENNAI

REGIONAL BENCH - COURT NO. III

CUSTOMS APPEAL No. 40249 of 2020

[Arising out of Order-in-Appeal Seaport Cus.II No.359/2020 dated 12.02.2020 passed by Commissioner of Customs (Appeals-I), Chennai]

M/s.Trueman Global Solution Pvt. Ltd. **Appellant**

Old No.29, New No.61,
Moore Street, George Town,
Chennai 600 001.

Vs.

The Commissioner of Customs **Respondent**

Chennai-II Commissionerate,
Custom House No.60, Rajaji Salai,
Chennai 600 001.

APPEARANCE:

Ms. A. Aruna, Advocate for the Appellant

Shri R. Rajaraman, Assistant Commissioner (Authorized Representative) for the Respondent

CORAM :

Hon'ble Ms. Sulekha Beevi C.S., Member (Judicial)

Date of Hearing: 07.12.2021
Date of Pronouncement: 10.12.2021

FINAL ORDER No. 42458 / 2021

The above matter had been originally listed before the Division Bench on 20.10.2021. The Ld. Counsel submitted before the Division Bench that the appellant is not pursuing the issue of valuation, confiscation etc. and the appellant is contesting only the penalty imposed under Section 114A of Customs Act, 1962. She therefore prayed for transfer of the matter to the Single Member Bench. Accordingly, the Division Bench transferred the matter before the SM Bench and it was taken up for hearing.

2. The Ld. Counsel Ms. A. Aruna appeared and argued the matter for the appellant. She adverted to the show cause notice and argued that the show cause notice is issued under Section 124 read with Section 28 of Customs Act, 1962 and the duty demand is raised under Section 28 (4) of the Customs Act, 1962. Though appellant filed Bill of Entry through their Customs broker for clearance of the imported cargo, the goods were not cleared or redeemed by the appellant. She submitted that Section 28 can be invoked only when the goods are cleared. When duty demand made under Section 28 (4) cannot sustain, the consequent penalty imposed under Section 114A also cannot sustain. It is her contention that in a live consignment (when the goods are not cleared), the duty cannot be demanded under Section 28 (4) and the Bill of Entry can be reassessed only under Section 17 (4). It is argued by her that when duty demand under Section 28 (4) does not survive, penalty imposed under Section 114A has to be set aside.

3. She relied upon the decision of the Hon'ble Supreme Court in the case of *Union of India Vs Jain Shudh Vanaspati Ltd.* - 1996 (86) ELT 460 (SC) to argue that show cause notice under provisions of Section 28 can be issued only subsequent to the clearance of the goods under Section 47 of the Customs Act, 1962. She prayed to set aside the penalty imposed.

4. Ld. Authorized Representative Shri R. Rajaraman appeared and argued for the Revenue. He submitted that on the basis of intelligence, the Bill of Entry filed by the appellant was taken up for 100% examination by the officers of Special Intelligence and Investigation Branch on 04.01.2019. Upon examination of the cargo, a total of 1185 cartons were found against the declared 1088 cartons. Out of 1185 cartoons, 285 cartons were of declared items, 62 of misdeclared items and 838 cartons were of underdeclared items. The undeclared items were T-shirts and of different brands such as Gucci Tommy Hilfiger, Emporio Armani, Armani, Lacoste, Calvin Klein, Diesal and Guess, Men's undergarments of different brands such as Gucci, Armani, Tommy Hilfiger, Burberry and Lacoste, Mobile back cover, Earphones, USB Multi-charging cables, Car Armrest, Power Bank PCB, Fabric Bales, Stainless Steel saloon, Chair accessories and Car accessories. It appeared that the goods have been deliberately undeclared to evade payment of Customs duty. Some of the undeclared goods were branded and involved infringement of IPR Rules; seizure mahazar was drawn and the goods were seized under Section 110 of the Customs Act, 1962. Show cause notice was issued to the appellant under Section 124 read with Section 28 of the Customs Act, 1962. The original authority after due process of law, has redetermined the value of the goods at Rs.67,03,746/-. A differential duty of Rs.11,97,371/- was confirmed under Section 28 (4) of the Act along with interest. The goods mentioned in Sl.No.1 & 2 of Table-3 which do not conform to the standards laid down by the

BIS and were found concealed with other goods imported, were treated as prohibited goods. Goods mentioned in Sl.No.3 to 10 of Table-3 were imported in violation of IPR Rules and were thus prohibited goods. All these goods were absolutely confiscated. The other goods mentioned in Table-2 were misdeclared / undeclared / undervalued goods and used to conceal the prohibited goods. The value of these goods was redetermined as Rs.57,45,346/-. The said goods were allowed to be redeemed on payment of a Redemption fine of Rs.5,80,000/-. The penalty equal to the duty (Rs.11,97,371/-) was imposed under Section 114A of the Act.

5. Ld. A.R argued that the import of undeclared goods established suppression on the part of the appellant with intention to evade customs duty. Before the adjudicating authority as well as the first appellate authority, the appellant has contested the matter wherein they have prayed to set aside enhancement of value and confirmation of duty demand. At this second appellate stage, the appellant has now submitted that they do not intend to clear the goods and are abandoning the goods. The Bill of Entry has been filed by the appellant with intention to clear the goods. The appellant has abandoned the goods only after the order confirming the confiscation, duty and penalty. Merely because the appellant has abandoned the goods, the infractions committed by the appellant or the duty confirmed cannot be done away with. He referred to the provisions of Section 28 as well as Section 17 of the Customs Act, 1962. Section 28 of the Customs Act, 1962 can be invoked when there

is suppression of facts. The appellant having given up the contest with regard to valuation and confirmation of duty has no grounds for seeking the waiver of penalty. The contention of the Learned Counsel that reassessment has to be done under Section 17 (5) is not applicable to the facts of the case as there is wilful suppression of facts and misdeclaration of the goods. The demand raised under Section 28 (4) is proper. He prayed that the appeal may be dismissed.

6. Heard both sides.

7. The appellant has given up the contest with regard to valuation and confiscation of the goods.

8. The original authority has absolutely confiscated the items falling in Table-3 of the show cause notice. The goods mentioned in Table 2 are allowed to be redeemed on payment of Redemption Fine of Rs.5,80,000/- and applicable duty of Rs.11,97,371/-. Equal penalty has been imposed under Section 114A of the Act ibid.

9. It is now submitted by the learned counsel that the appellant does not wish to redeem the goods. The Ld. Counsel has been at pains to argue that demand of duty under Section 28 cannot be invoked unless goods are cleared for home consumption; that demand, if any, has to be raised under sub-section (5) of Section 17 as the goods are not cleared by the appellant. I am afraid that this interpretation of the provisions is misconceived.

10. Sub-section (4) and sub-section (5) of Section 17 of the Customs Act, 1962 read as under :

"SECTION 17. Assessment of duty. —

… …. …..

(4) Where it is found on verification, examination or testing of the goods or otherwise that the self-assessment is not done correctly, the proper officer may, **without prejudice** to any other action which may be taken under this Act, re-assess the duty leviable on such goods.

(5) Where any re-assessment done under sub-section (4) is contrary to the self-assessment done by the importer or exporter and in cases other than those where the importer or exporter, as the case may be, confirms his acceptance of the said re-assessment in writing, the proper officer shall pass a speaking order on the re-assessment, within fifteen days from the date of re-assessment of the bill of entry or the shipping bill, as the case may be.

[emphasis supplied]

11. Sub-section (1) and (4) of Section 28 of the Customs Act, 1962 read as under :

"SECTION 28. Recovery of duties not levied or not paid or short-levied or short-paid or erroneously refunded. —

(1) Where any duty has not been levied or not paid or has been short-levied or short-paid or erroneously refunded, or any interest payable has not been paid, part-paid or erroneously refunded, for any reason other than the reasons of collusion or any wilful mis-statement or suppression of facts,—

(a) the proper officer shall, within two years from the relevant date, serve notice on the person chargeable with the duty or interest which has not been so levied or paid or which has been short-levied or short-paid or to whom the refund has erroneously been made, requiring him to show cause why he should not pay the amount specified in the notice;

Provided that before issuing notice, the proper officer shall hold pre-notice consultation with the person chargeable with duty or interest in such manner as may be prescribed;

(b) the person chargeable with the duty or interest, may pay before service of notice under clause (a) on the basis of,—

(i) his own ascertainment of such duty; or

(ii) the duty ascertained by the proper officer,

> the amount of duty along with the interest payable thereon under section 28AA or the amount of interest which has not been so paid or part-paid.
>
> **Provided** that the proper officer shall not serve such show cause notice, where the amount involved is less than rupees one hundred.
>
> … …. ….
>
> (4) Where any duty has not been levied or not paid or has been short-levied or short-paid or erroneously refunded, or interest payable has not been paid, part-paid or erroneously refunded, by reason of, —
>
> (a) collusion; or
>
> (b) any wilful mis-statement; or
>
> (c) suppression of facts,
>
> by the importer or the exporter or the agent or employee of the importer or exporter, the proper officer shall, within five years from the relevant date, serve notice on the person chargeable with duty or interest which has not been so levied or not paid or which has been so short-levied or short-paid or to whom the refund has erroneously been made, requiring him to show cause why he should not pay the amount specified in the notice."

12. Sub-section (4) of Section 17 provides that if the assessment is not done correctly, the proper officer may, without prejudice to any other action which may be taken under this Act, reassess the duty on the goods. It is expressly and specifically stated in sub-section (4) that the reassessment under Section 17 is without prejudice to any other action which may be taken under the Act. When there is suppression of facts in the nature of 'undeclared goods' and 'misdeclared goods', the demand of duty consequent to the confiscation made under Section 28 (4), is valid and proper. The reliance placed by the Ld. Counsel in the case of *Union of India Vs Jain Shudh Vanaspati Ltd.* (supra) is also incorrect. The Hon'ble Supreme Court in the said judgement had held that High Court erred in coming to the conclusion that no show cause notice under

Section 28 could have been issued until and unless the order under Section 47 had been first revised. The judgement of the Hon'ble High Court was set aside and the Hon'ble Apex Court directed that proceedings pursuant to the show cause notices under Sections 28 and 124 shall continue. The relevant paras of the Hon'ble Apex Court judgement are reproduced as under :

> "**10.** We are also of the view that the High Court in any event, ought not to have allowed the writ petition without reserving liberty to the appellants to proceed against the respondents under Section 130 which, as the High Court looked at it, was the appropriate course of action.
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> **11.** We have refrained from expressing ourselves, so far as we could, upon the merits of the controversy between the parties. In deciding upon the show cause notices under Sections 28 and 124, the authorities shall not take into account our observations or those of the High Court in the order under appeal.
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> **12.** The appeal is allowed. The judgment and order of the High Court is set aside. The writ petition filed by the respondents is dismissed. Proceedings pursuant to the show cause notices under Sections 28 and 124 shall continue. The respondents shall have the opportunity therein to place such evidence as they may deem appropriate."

In the present case, the appellant has been allowed to redeem the goods on payment of payment of duty. The appellant has later at the time of hearing of the appeal opted to abandon the goods. This does not in any way absolve the allegations of misdeclarations confirmed and upheld by the impugned order. The appellant imported prohibited goods which were absolutely confiscated. The goods which were allowed to be redeemed were also found to be undeclared / misdeclared for which penalty is imposable under Section 114A of the Customs Act.

13. Ld. Counsel has not put forward any other arguments. I do not find any grounds to interfere with the penalty imposed under Section 114A of the Customs Act, 1962.

14. In the result, the impugned order is upheld. Appeal is dismissed.

(Pronounced in open Court on 10.12.2021)

(**SULEKHA BEEVI C.S.**)
Member (Judicial)

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