CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI

PRINCIPAL BENCH – COURT NO. – IV

Customs Appeal No. 52266 of 2018 [SM]

[Arising out of Order-in-Appeal No. CC(A) CUS/D-11/PRE/NCH/47/2018 dated 28.02.2018 passed by the Commissioner (Appeals), Customs, New Delhi]

M/s Kamal Sehgal
Custom House Agent
D-52A, Viskwakarma Colony,
M.B. Road, New Delhi – 44. **...Appellant**

Vs.

The Commissioner
Customs (Appeals)
New Customs House,
Newar IGI Airport,
New Delhi. **...Respondent**

APPEARANCE:

Shri S.Sunil, Advocate for the Appellant
Ms. Tamana Alam, Authorised Representative (DR) for the Respondent

Coram: HON'BLE MRS. RACHNA GUPTA, MEMBER (JUDICIAL)

DATE OF HEARING : 28.11.2019
DATE OF DECISION : 28.11.2019

FINAL ORDER No. 51660/2019

RACHNA GUPTA

Present in appeal assailing the Order-in-Appeal No. 47/2018 dated 28.02.2018 vide which the penalty under Section 114AA of Customs Act, 1962 has been confirmed as against the Appellant/the Custom House agent.

2. The relevant facts in brief are that the Appellant, being a CHA firm had filed a bill of entry No. 3212091 dated 07.09.2013 on behalf of M/s Dheeraj Gupta for home clearance of unbranded cosmetic. The

department on the basis of specific intelligence regarding import of branded goods had examined the goods and found the cosmetics of Lakme and Lotus brands, though with some unbranded cosmetic items as well. Since the Drugs and cosmetics (4th Amendment) Rules, 2010 were already in existence. Since 1st April, 2013 which required the mandatory registration of the cosmetic goods to be imported that a show cause notice dated 10.03.2014 was issued to the Appellant, though also to the importer proposing a penalty upon the Appellant under Section 114. The said proposal against the CHA was initially confirmed by the original adjudicating authority vide order bearing No. 134/14 dated 29.10.2014 the appeal thereof has been rejected vide the order-under-challenge.

3. I have heard Mr. S. Sunil, learned Counsel for the Appellant and Ms. Tamanna Alam learned DR for the Department.

It is submitted on behalf of the Appellant that the only allegation in the show cause notice against the Appellant/CHA is that, he failed in his duty by ignoring the mandatory requirement of production of license as mandated by Drugs and Cosmetics (4th Amendment) Rules, 2010 while filing the bill of entry on behalf of the importer. Thus appellant is alleged to have rendered himself liable for Penal action under Section 112 of the Customs Act, 1962. It is submitted that despite the said findings against the Appellant, the penalty under 114 AA of Customs Act has been confirmed for which there is no basis in the show cause notice itself.

4. Learned Counsel has brought to my notice the statement of the Appellant wherein he stated to have provided the Customs Clearance

services for import shipments to M/s Dheeraj Gupta/the Importer, however, for the first time. He, specifically, stated about his unawareness for the aforesaid Rules of 2010 as have been made applicable from 01.04.2013. The importer is denied to have informed him about requirement of any registration at the time of the filing of the Bill of entry which was not demanded for want of knowledge of CHA for the aforesaid Rules.

It is impressed upon that the statement is sufficient to reflect that there was no mensrea in part of the Appellant to make any false and incorrect declaration. No question arises of imposing any penalty under Section 114AA of the Customs Act. While relying upon the decision of **Fast Cargo Movers Vs. Commissioner of Customs, Jodhpur reported in 2018 (362) ELT 184 (Tri.Delhi),** learned Counsel has prayed for the order of Commissioner (Appeals) to be set aside and the appeal in hand to be allowed.

5. Per contra learned DR has made emphasis on para 9 and 10 of the order-under-challenge wherein Commissioner (Appeals) is impressed upon to have observed that Appellant CHA file the bill of entry a document which was untrue and incorrect on many material aspects as that of non declaration of brand of the cosmetic goods importers. Such omission on para CHA attracts a penalty under Section 114AA itself. Justifying the said order, appeal in hand is prayed to be dismissed.

6. After hearing the parties and perusing the record I opine that to adjudicate the impugned controversy, it is foremost necessary to have a look at section 114AA which reads as follows:

> ***114AA. Penalty for use of false and incorrect material :*** *It 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 good.*

7. The perusal thereof makes it clear that this provision mandates imposition of penalty where any person who in relation to any goods knowingly or intentionally does any of such act as mentioned in the above provision that he shall be liable to the penalty. Thus it becomes clear that to confirm the penalty under this provision there must be ample evidence about the knowledge and intention of the person who is concerned with the import of goods.

8. From the statement of the Appellant as brought to my notice by his learned Counsel , it is a clear deposition that the Drugs and Cosmetics (4th Amendment) Rules, 2010 were recently made applicable i.e. w.e.f 01.04.2013 due to which the CHA had no knowledge about the mandate of the said Rules as such he did not insist for any registration certificate about the impugned cosmetic. There is no suggestion in the show cause notice about the intention or knowledge of the CHA about the said registration to be mandatory.

9. I observe that Commissioner (Appeals) also has acknowledged the aforesaid voluntary statement of the CHA which he has observed to be true, holding that Appellant would have simply filed the bills of entries on the basis of documents received from the importer without making any enquiry from the importer regarding production of mandatory license from the ADC. Commissioner (Appeals) has also appreciated that to impose penalty under 114 AA, it is necessary to

check as to whether the afore noticed non-compliance on part of CHA was simply procedural or for the ulterior motive of tax evasion.

11. Further perusal of his findings revealed that there is no such check conducted by Commissioner (Appeals). No such evidence is otherwise apparent from the record to prove that the CHA had ulterior motive of tax evasion or to falsify his voluntary statement about simple unawareness towards the mandate of registration certificate while importing the cosmetics. Accordingly, the findings of Commissioner (Appeals) that the CHA did not make even the minimum efforts to ensure the veracity of the submissions made to the department is not sufficient to hold that the said failure was intentional and that the CHA had the mensrea to facilitate the importer in his wrong act of not obtaining the certificate as mandated under Cosmetics Rules, 2010.

12. Keeping in view that the allegations against the appellants are mainly concerned with failure to discharge their duties and responsibilities mandated under various Regulations for dealing with goods in legalized manner. However, apparently, there is no material evidence available on records to prove that the appellants intentionally encouraged and supported the wrong doer i.e. the importer in doing the wrongful act of attempting to export the branded cosmetic goods in violation of Cosmetic Rules, 2010. Section 114A of the Act is applicable only when there is sufficient evidence about prior knowledge of wrong doing or existence of deliberated intend (malafide). It also provides for imposition of penalty for furnishing incorrect or false declarations and that such declaration should also be intentional with prior knowledge.

13. In view of the entire above discussion, it has been held that the appellant since was unaware of the mandatory registration while importing branded cosmetics, as required by the Cosmetic Rules, 2010 being very recent in time. The malafide intent cannot be attributed to him. Onus was otherwise of the Revenue. There is no cogent positive evidence to prove the contrary. There might be intentional omission on part of importer but same cannot be presumed against the CHA unless & until proved. Hence, it is held that the Commissioner (Appeals) has wrongly imposed penalty under Section 114AA of Custom Act, 1962 upon the Appellant CHA. The order is, accordingly, hereby set aside appeal stands allowed.

[Dictated and pronounced in the open Court]

(RACHNA GUPTA)
MEMBER (JUDICIAL)

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