CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL NEW DELHI.

PRINCIPAL BENCH - COURT NO. II

Customs Appeal No. 52169 of 2019

(Arising out of Order in Appeal No. CC(A)CUS/D-II/Prev.NCH/561/2019 dated 04.07.2019 passed by the Commissioner of Customs (Appeals), New Customs House, Near IGI Airport, New Delhi).

M/s Vishesh Cargo Services **Appellant**
V/1/1, 2nd Floor, Rajauri Garden
New Delhi-110027.

VERSUS

Commissioner of Customs **Respondent**
New Custom House, Near IGI Airport
New Delhi-110037.

APPEARANCE:

Ms. Ishita Sharma, Advocates for the appellant
Shri Y. Singh, Authorised Representative for the respondent

CORAM:

HON'BLE MR. ANIL CHOUDHARY, MEMBER (JUDICIAL)

FINAL ORDER No. 50758/2020

DATE OF HEARING: 04.02.2020
DATE OF DECISION: 02.09.2020

ANIL CHOUDHARY:

The appellant - CHA is in appeal against the impugned order in appeal whereby the penalty imposed is confirmed under Section 114 and 114AA of the Customs Act, 1962, was upheld.

2. Brief facts of the case are that M/s Vishesh Cargo Services operating from Rajouri Garden, New Delhi is a valid Customs Broker (CB) License holder bearing License No. R-007/88 issued under

Regulation 7(1) of Customs Broker Licensing Regulations, 2013 from the office of Commissioner of Customs, New Delhi.

3. That the appellant has been working efficiently and diligently as a Customs House Agent since 1985 and have clear antecedents. In more than about 34 years of work, the appellant does not even have a single complaint against him. The Commissioner of Customs (Appeals) has failed to take cognizance of the clear antecedent and faultless conduct of the appellant. Therefore, the finding of the Commissioner (Appeals) is erroneous and perverse. One Shri Rakesh Sagar used to bring work to the appellant. He was just a middleman who connected the exporter with the CHA for the purpose of clearance of goods. He was a freelancer and used to bring clients for other CHA's as well. He was never an employee of the appellant and neither his name was mentioned in the payroll register of employees of the appellant. Therefore, the ld. Commissioner has erroneously considered Sh. Rakesh Sagar as the 'export manager' of the appellant - CHA firm.

4. That the appellant CHA in his normal course of business, did the clearance for exporter - M/s Ayaan International, only for the five shipping bills (bearing No. 5987805, 5987955, 5988149, 5988271 and 5988856 dated 11.11.2014) of RMG, blouses etc., valued FOB Rs.2,67,96,000/-. He was merely acting in the capacity of facilitator of the customs transaction and was bound to facilitate the authorised clearance work of exporter. Therefore, in the present case as the Customs Broker was only facilitating the customs transaction on behalf of principal (exporter), therefore penalty is not imposable, otherwise

all the customs transaction will come to halt, if penalty is imposed on CHA for the omission & commission of exporter/ importer. Moreover in the present case, the CHA had no knowledge of the quality of goods being exported neither was capable to judge the quality of RMG, since he was never involved in the business of sale, purchase, procure and manufacture of RMG, MMF and ladies blouse. The sample provided to the CHA firm was of decent quality. Further the CHA was not aware and had no knowledge that the RMG, MMF and ladies blouse being exported is of inferior quality. The CHA lacked mens-rea to commit the alleged offence. In absence of mens-rea or malafide, the CHA cannot be punished. Therefore the penalty upheld by ld. Commissioner of Customs (Appeals) is based on erroneous and ill-founded ground. It is denied that the CHA had ever taken Rs.1 lakh over and above their usual charges. The original authority imposed penalty of Rs.1,00,000/- under the provisions of Section 114 and also imposed penalty of Rs. 1,00,000/- under the provisions of Section 114AA of the Customs Act, 1962 on the appellant, for the alleged acts of omission and commission. Being aggrieved, the appellant had filed appeal before the Commissioner (Appeals), which was rejected.

5. Learned Counsel for the appellant submitted that he is supposed to look into genuineness of exporter from IEC No. etc. which was produced by the exporter, that appellant filed Shipping Bills on the basis of documents such as invoice, packing list, etc. supplied by client/ forwarder on the reasonable belief that such documents are genuine, that their filing of shipping bills were not with intent to fraudulently claim the drawback, or collude with the exporter.

6. That with respect to the said consignments all the documents were procured such as invoices, packing list, SDF form and other export related documents including shipper’s authorisation. Appellant received work through from one of the freight forwarder in Mahipalpur namely Shri Rakesh Sagar, and that the appellant was not in direct contact with shipper/ exporter namely M/s Ayaan International. The appellant further submitted that the CHA is not liable to any penal action for alleged contravention under Section 114 & 114AA of the provisions of Customs Act, 1962.

7. The ld. Commissioner of Customs (Appeals) erred in observing that the appellant is involved in the preparation of inflated invoices without any corroborative evidence. The Commissioner has failed to assign any motive to substantiate the appellant’s involvement in the availment of duty drawback or any proceeds flowing to them. Therefore, the impugned order is liable to be set aside.

8. That the confessional statement made by Shri Rakesh Sagar cannot be relied upon and made a ground to prosecute the appellant, solely based on the statement recorded under Section 108 of the Customs Act, 1962. Corroborative evidence is necessary to initiate proceedings against the appellant accused as held by the Hon’ble Supreme Court in **Vinod Solanki vs. Union of India (2008) 16 SCC 537** and **Noor Aga vs. State of Punjab and Anr -2008 (56) BLJR 2254;** Criminal Appeal No. 1034 of 2008 (arising out of SLP (Crl.) No. 5597 of 2006, which is missing in the present case.

9. Ld. Commissioner has completely disregarded Section 138A of Customs Act, 1962, as the appellant has been penalised merely on the basis of preponderance of probability. He has not been able to assign any motive or knowledge of cheap quality RMG, MMG and ladies blouses to the appellant, beyond reasonable doubt. He urges that the Commissioner has completely ignored the facts while passing the impugned order that the CHA was not a beneficiary of the illegal duty drawback, nor money has not changed hands either from or to the appellant. He further urged that the Commissioner has not examined the issue before him in correct perspective and had come to an absurd/ abrupt conclusion, while discussing in detail as to why the exporter had inflated the invoices when he does not know the actual price. Hence the Court below has portrayed abnormal vagueness while imposing penalty on the appellant. Therefore he prays for allowing the appeal.

10. Learned Authorised Representative Shri Y. Singh appearing for the Revenue relied on the impugned order. Evidently, the appellant – CHA have not met their client – exporter personally before filing the shipping bill. Further, as there have been frequent fraud happening as regards claim of duty drawback, the appellant – CHA should have been vigilant in presenting or filing the shipping bill, under the claim of duty drawback. Evidently, there is failure of duty by the appellant – CHA which has facilitated the claim of wrong duty drawback by the exporter. Accordingly, he prays for dismissing the appeal.

11. Having considered the rival contentions, I find that there are two middleman between the exporter M/s Ayaan International and the appellant – CHA, namely Shri Rohit Sharma a forwarder and Shri Rakesh Sagar. Further, I find that the allegation against the appellant – CHA of their having received Rs. 1 lakh per consignment is not substantiated, over and above the usual charges. Shri Rakesh Sagar have stated that he was to receive Rs. 4,000/- on bill and remaining amount of Rs. 1 lakh in cash, is not the representative of the CHA firm, and is an outsider. Thus, receipt of Rs. 1 lakh by Shri Rohit Sharma or Shri Rakesh Sagar is not the amount received by the appellant – CHA. I further find that the Prop. of the exporter firm and its Authorised Signatory have nowhere stated that they have paid any amount over and above usual charges to the appellant – CHA. Further, there is no allegation of any flow back of ill gotton draw back money to the appellant – CHA. I further find that the consignment under seizure was to be exported to Dubai for which as per the inspection norms, prescribes 100% examination of the export consignment. Further, it has nowhere come on record that CHA was present at the time of packing and stuffing of container for shipping. Further, there is no allegation that CHA has cooked or concocted any document for presenting it to the Customs, knowing it to be false.

12. Penalty is imposable under Section 114 of the Act where any person who, in relation to any goods, does or omits to do any act, which act or omission would render such goods liable to confiscation under section 113 or abets the doing or omission of such an act. From the facts on record, I find that appellant have not done any act of

omission or commission leading to violation of any of the provisions mentioned in Section 113 of the Customs Act.

13. Section 114AA provides for penalty, 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. From the facts on record, I find that appellant have not done any such act or omission nor knowingly used any document for the clearance knowing to be false. The appellant have given cogent explanation as regards the undervaluation, that the samples shown to them were of good quality and hence on such reasonable belief they have undertaken the clearance work. No case is made out that the appellant knowingly filed the shipping bills that the goods are overvalued. Accordingly, I hold that penalty under Section 114AA is also not imposable.

14. Accordingly, I set aside the impugned order and allow the appeal.

(Pronounced on 02.09.2020)

(Anil Choudhary)
Member (Judicial)

Pant