CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI

PRINCIPAL BENCH

CUSTOMS APPEAL NO. 960 of 2005

[Arising out of Order-in-Original No. 72/2005 dated 29/08/2005 passed by the Commissioner of Customs (ICD), Tuglakabad, New Delhi.]

Shri Kuldeep Thapar,
F-56, Rajouri Garden,
New Delhi – 110 027. **…Appellant**

Versus

Commissioner of Customs,
(ICD), TKD,
New Delhi. **…Respondent**

APPEARANCE:

Dr. Prabhat Kumar, Advocate for the appellant.
Shri Sunil Kumar, Authorised Representative for the Department

CORAM:
HON'BLE MR. JUSTICE DILIP GUPTA, PRESIDENT
HON'BLE MR. P. ANJANI KUMAR, MEMBER (TECHNICAL)

DATE OF HEARING : 04.08.2021
DATE OF DECISION: 10.08.2021

FINAL ORDER No. 51720/2021

P. ANJANI KUMAR

The brief facts of the case are that the appellant Shri Kuldeep Thapar filed this appeal No. C/960 of 2005 – CU (DB) against an order-in-original dated 29/08/2005 passed by Commissioner of Customs, Tughlakabad, New Delhi.

2. The appellant is a co-noticee in a case of alleged export of 586 wooden cases containing rusted, old, used and damaged Ball Bearing, Roller bearings and taper Bearings by M/s Bhagwati International a 100% EOU. The appellant was accused of conniving in disposal of imported Ball bearings through a shop situated in Kashmiri Gate. The penalty of Rs. 5 lakhs was imposed on the appellant on conclusion of the adjudication proceedings. Hence, this appeal.

3. Learned Counsel of the appellant submits that the proceedings against the main noticee i.e. M/s Bhagwati International was dropped by this Bench vide **2017 (358) E.L.T. 431 (Tri. – Del.)** except for the seizure of the live consignment. The appellant claims that CESTAT has also set aside the order of confiscation of seized goods from the local shops. The allegation against the appellant was that he connived in sale of imported goods from his shop. The appellant submits that the Department has not challenged the above order of CESTAT and submits that penalty under Section 112 and 114 of the Customs Act cannot be imposed on the appellant as the confiscation itself has been set aside. He relies upon the following decisions :-

(i) **Commissioner of Customs (Export), Mumbai versus M.K. Industries – 2008 (230) E.L.T. 91 (Tri. – Mumbai)** and Department's appeal was dismissed by the Hon'ble High Court at Mumbai – **2010 (251) E.L.T. A115 (Bom.)**

(ii) **Munilal Mehra versus Commissioner of Customs (Adj.), Mumbai – 2008 (226) E.L.T. 102 (Tri. – Mumbai)**.

4. Learned Authorized Representative for the Department reiterates the findings in the order-in-original.

5. Heard both sides and perused the records of the case.

6. We find that the Commissioner in his order finds that Kuldeep Thapar in his statement has denied any concern with godown No. 3214-A/3, Chutani Manzil, Ram Bazar, Mori Gate, Delhi. However, Shri Lal Chadha S/o Late Shri Dharampal Chadha R/o 26, Hauz Khas, New Delhi in his statement dated 14/06/99 has stated that Kuldeep Thapar S/o Shri Diwan Chand Thapar was a tenant in Shop No. 3. Therefore the Commissioner found that the statement of Kuldeep Thapar stands disproved and accordingly imposed penalty on the appellant. However, as submitted by the appellant, we find that CESTAT vide the order stated above has set aside the confiscation. CESTAT has observed as follows :-

> "After going through the entire records of the case, we find that the evidence on the basis of which above conclusion has been arrived at by the adjudicating authority is the inculpatory statements given by both, Shri K.K. Kaura and Shri M.L. Thapar, partners of the unit.

> However, it is on record that both the statements were promptly retracted before the Hon'ble Magistrate. The law is well settled that inculpatory statement which stands retracted subsequently, cannot be made the only basis for establishing the evasion of duty particularly, if such statements are not corroborated by other documentary evidences. We find that the Customs authorities have failed to corroborate the above allegation with any documentary evidence other than the statements. The goods imported through 8 consignments (totally comprising 11 containers) have been cleared by Customs without payment of duty. However at the time of bonding of the goods in the factory of the appellant, the goods have been examined by the respective Bond Officer and found to be as per the imported documents. Further, it is on record that all issues of raw materials for manufacture, have been done only with the approval of the respective Bond Officer. The statements recorded by Customs from some of the officers who were functioning as Bond Officer in charge of the appellant's unit, did not reveal anything to the contrary. They have reiterated the stand that the imported goods were as per the accompanied documents. In the light of the above, there is no tangible evidence establishing that the goods found in the bonded store room were part of goods imported duty free and hence, we are of the view that the fully finished goods, found in the bonded store room of the appellant's factory at the time of search are not liable for confiscation under Section 111 of the Customs Act, 1962. The confiscation is liable to be set aside also for the reason that the goods were still found within the Customs bonded warehouse and not cleared illegally. For the similar reasons we are of the view that confiscation of goods totally valued at about Rs. 27.53 Lakhs from various shops and godowns is without any basis in the absence of any evidence linking the said goods to the allegation that they are part of the goods imported by the appellant".

7. We find that in terms of Section 112 of the Customs Act penalty imposable on any person, -

> "(a) 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 111, or abets the doing or omission of such an act, or
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> (b) who acquires possession of or is in any way concerned in carrying, removing, depositing, harbouring, keeping, concealing, selling or purchasing, or in any other manner dealing with any goods which he knows or has reason to believe are liable to confiscation under Section 111".

8. It is clear from the above provision that confiscation of goods is a necessary and pre-requisite condition for imposition of penalty. We also observe that the Tribunal in **Commissioner of Customs (Export), New Delhi** (supra) held that :-

> "7. The prayer in the other appeals for holding the respondents liable to penalty is also required to be rejected for the reason that no penalty under the provisions of Section 112(a) providing for imposition of penalty on 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 111 or abets the doing or omission of such an act, is warranted in the absence of an order of confiscation of goods or a finding of liability of any goods to

confiscation. The ingredients of Section 112(b) are also not attracted against the co-noticees on the above reckoning, as held by the Tribunal in *Castrol (India) Ltd.* v. *CCE, Vapi* - 2008 (222) E.L.T. 408 in the context of Rule 209A which is *pari materia* with Section 112(b) of the Customs Act, 1962".

9. The appellant has also submitted that the proceedings against the main accused in the case of M/s Bhagwati International were set aside as far as the confiscation of goods alleged to have been sold through different shops located in New Delhi. The seizure having been vacated, imposition of penalty would not survive as held by the Tribunal in **Munilal Mehra** (supra), wherein it was held :-

"3. The ld. Jt CDR relies upon the decision of the Tribunal in the case of *Patel Madhavlal Maganlal & Co*. [2002 (147) E.L.T. 823] to contend that the sale proceeds were also liable to confiscation and are goods within the meaning of Sec. 112(b). However, we note that this decision does not advance the Revenue's case for the reason that the Tribunal has held therein that seized currency alleged to be proceeds of smuggling, is liable to confiscation under the provisions of Sec. 121 of the Customs Act and not under Section 111 and therefore, penalty cannot be imposed under Section 112 as Sec. 112 provides for imposition of penalty on a person who acquires possession of or is in any way concerned in carrying, removing, depositing, harbouring, depositing, keeping, concealing, selling or purchasing or in any other manner dealing with any goods which he knows or has reason to believe are liable to confiscation under Sec. 111. In other words, only if goods are liable to confiscation under Sec. 111 of the Customs Act, 1962, the question of imposition of penalty arises, subject to satisfaction of other conditions under the provisions of Sec. 112".

10. In view of above, the impugned order is set aside and the appeal is allowed.

(Order pronounced on 10/08/2021).

(JUSTICE DILIP GUPTA)
PRESIDENT

(P. ANJANI KUMAR)
MEMBER (TECHNICAL)

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