

CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI
PRINCIPAL BENCH, COURT NO. 3

CUSTOMS APPEAL NO. 55268 OF 2023

[Arising out of Order in Appeal No. CC(A) CUS/D-II/PREV/1431/2022-23 dated 17.02.2023 passed by the Commissioner of Customs (Appeals), New Delhi]

M/S GEE PEE MICA ENTERPRISES **Appellant**
13, North West Avenue Road,
Punjabi Bagh Extension, New Delhi-110026

Vs.

ADDITIONAL COMMISSIONER OF CUSTOMS **Respondent**
PREVENTIVE-NEW DELHI
Commissioner of Customs (Preventive)
New Customs House, New Delhi-110037

Appearance:
Present for the Appellant : Shri Akhil Krishan Maggu, Advocate
Present for the Respondent: Shri Rohit Issar, Authorised Representative

CORAM:
HON'BLE MS. BINU TAMTA, MEMBER (JUDICIAL)

FINAL ORDER NO. 55775 /2024

Date of Hearing : 15/05/2024
Date of Decision : 17/05/2024

BINU TAMTA

1. Challenge in the present appeal is to the Order in Appeal No. CC(A) CUS/D-II/PREV/1431/2022-23 dated 17.02.2023 whereby the appeal was partly rejected and the duty amount as determined was confirmed. The penalty imposed under section 114A of the Customs Act, 1962¹ was set aside, however, penalty was imposed under section 112 of the Act.

1 The Act

2. Briefly stated, the appellant filed the Bill of Entry no. 3119207 dated 12.03.2021 for clearance of the goods declared as "Copper Clad Laminates-AL grade" classified under CTH 7474102100. The goods were put under preventive check and on examination were found to be mis-declared in terms of the description of the classification as they appeared to be "Aluminium Paste Copper Clad Laminates" classifiable under CTH 76061200. Hence the goods were seized under section 110 of the Act on the reasonable belief that the same are liable to confiscation under section 111 of the Act.

3. Shri Jaskaran Singh, the partner of the appellant company in his statement dated 25.03.2021 accepted the revised classification of the goods and undertook to pay the differential customs duty due to change of classification of goods along with interest, fine and penalty. He also sought for the waiver of the show cause notice and also for an opportunity of hearing. On behalf of his firm, he regretted for such mistake and undertook that the firm will be more careful in future in classifying the goods properly. By order dated 26.03.2021, calculated the duty liability to Rs. 9,67,241/- was calculated and since the appellant had already paid the customs duty of Rs. 7,63,540/- towards duty liability on the basis of the declaration in the Bill of Entry, the differential duty of Rs. 2,03,701/- was held to be leviable. The goods were ordered to be confiscated being mis-declared under the provision of section 111(m) of the Act, an option was given to the appellant to redeem the same on payment of redemption fine of Rs. 50,000/- in terms of provisions of Section 125 of the Act. The adjudicating

authority imposed the penalty of Rs. 2,03,701/- under the provisions of section 114A of the Act. In appeal, the Commissioner (Appeals) upheld that the impugned consignment was mis-classified and were, therefore, liable for confiscation, modified the order of penalty by setting aside the penalty under section 114A and imposing penalty for a sum of Rs. 20,370/- under section 112 of the Act, relying on the decision of this Tribunal in the case of **Nagpur International**² hence the present appeal before this Tribunal.

4. We have heard Shri Akhil Krishan Maggu, learned counsel for the appellant and Shri Rohit Issar, learned authorised representative appearing for the department.

5. Learned counsel for the appellant submitted that re-classification has been done on the basis of visual inspection and no evidence have been produced by the department which could confirm the proposed classification. He submitted that the onus is on the department to prove the classification, which they have failed to do so. Learned counsel clarifies that the statement made by the partner of the appellant company under section 108 of the Act was retracted by a communication dated April 16, 2021 as he was forced by the department to sign the statement which was typed by them and hence it was not voluntary and was recorded under duress. In so far as the differential duty amount deposited by the appellant, he submitted that the same was paid 'under protest'. Lastly, on the issue of penalty, learned counsel submitted that the adjudicating authority had imposed

the penalty under section 114A and, there was no reference at all to the penalty under section 112, therefore, the penalty imposed under section 112 by the impugned order was beyond the jurisdiction of the appellate authority and, therefore, the imposition of penalty is unsustainable.

6. In reply to the submissions made on behalf of the appellant, learned authorised representative appearing for the department stated that since Shri Jaskaran Singh (partner) had voluntarily accepted that the major material used in the goods is aluminium (to the extent of 70%), it was not open to the appellant to challenge the same and in view of the settled principles of law what is admitted need not be proved, he relied on the decision in **Commissioner of Customs (Import,) ICD TKD, New Delhi vs. Sodagar Knitwear**³ which had relied on the decision of the Apex Court in **CCE, Madras vs. Systems & Components Pvt Ltd.** ⁴.

7. Learned authorised representative next submitted that the retraction based on record by the appellant has no evidential value as the same is dated April 16, 2021, which is much after the order in original dated 26.03.2021 was passed. In support of his submission he relied on the decision in **Hanuman Prasad vs. Collector of Customs, Jaipur**⁵. Similarly on the point of payment of differential duty 'under protest', learned authorised representative has pointed out that in the challan dated 26.03.2021 there is no mention that the duty is being

3 2018 (362) ELT 819 (Tri.-Del.)

4 2004 (164) ELT 136 (SC)

5 1998 (99) ELT 658 (Tribunal)

paid 'under protest' and it is only subsequently vide letter dated 16.04.2021 that the appellant has stated that the amount has not been voluntarily deposited but was 'under protest'.

8. Have heard both sides and perused the records.

9. During the course of arguments, learned authorised representative appearing for the department has referred to the statement of Shri Jaskaran Singh (partner) in the form of question/answer. The relevant contents of the same are quoted below:

"Q8. From visual inspection of the imported goods, it appears that the goods made of Aluminum and laminated with a thin layer of copper and the most suitable classification of this product is 76061200. Major portion of material used in the goods is Aluminum. What is the composition of the product and what you want to say?"

Ans. I state that right now we have not composition of the goods. I agree that major material used in these goods is aluminum and the goods are made of Aluminum, Copper, insulated material & pet film of plastic. I state that we don't know exact percentage of aluminum used in this product however on visual inspection it appears that part of raw material used in this product is more than 70%

Q9. You are being shown the Customs Tariff Act CTH 7410 and nowhere item aluminum based Copper Clad Laminates have been mentioned in this CTH. what you want to say?"

Ans. I state that I have seen the Customs Tariff Act CTH 7410 and I nowhere find out the And product described as aluminum based Copper Clad Laminates. Further, if on the basis of raw material used in the product and the view of department, I state that we agree if the clearance of goods allow to us under the CTH 76061200 | agree to pay the differential duty on the import of goods vide B/E No. 3119207 dated 12.03.2021 along with penalty, if any. I am voluntarily submitting the revised check list for the purpose of calculation of duty. I have appended my dated signature having accepted the revised check list & duty and offer my acceptance to pay the same alongwith applicable fine and penalty if any. As per revised checklist the differential duty comes as under -

Declared Assessable value of the imported goods: Rs. 34,87 438/-

Total duty payable as per assessment: Rs. 7,63,540/-

Duty Leviable due to change in CTH: Rs.9,67,241/-

Differential duty to be paid: Rs. 2,03,701/-

Further, he stated that mis-classification of the goods is due to mistake and he regret for the mistake done inadvertently. He assured that it will not happen again. He also requested that they do not want any formal Show Cause Notice or opportunity of Personal hearing in this case and request to dispose of the case at the earliest and they are ready to pay the differential Customs duty due to change of classification of goods along with interest, fine, penalty as decided by the Customs authorities."

10. From the aforesaid, it is evident that the appellant has voluntarily accepted and admitted that the goods have been mis-classified due to mistake and, therefore, paid the differential customs duty. The principle settled by judicial pronouncements is clear that once the party admits, the same need not be proved by the department. The decision in **Commissioner of Customs, (Import) ICD TKD, New Delhi vs. Sodagar Knitwear**⁶ relied on by the Revenue, where the branded goods bearing the name 'Versace' were imported without declaring so and the Manager admitted that certain goods were not as per the declaration made in the Bill of Entry and agreed with the manner of calculating the assessable value and differential duty on the basis of market inquiry conducted by the customs officers, it was observed as under:

9. It is settled position of law that the facts which are admitted need not be proved. In the case of CCE, Madras vs. Systems & Components Pvt.

Ltd. -2004 (165) ELT 136 (SC), the Hon^{ble} Apex Court in para 5 of the order has observed as follows:

"..... Once it is an admitted position by the party itself, that these are parts of a Chilling Plant and the concerned party does not even dispute that they have no independent use, there is no need for the department to prove the same. It is a basic and settled law what is admitted need not be proved".

10. Further, this Tribunal in the case of Jai Shiv Trading Company vide F. O. dated 20.07.2017 has observed as follows:

"The appellant has also challenged that valuation adopted by the customs authorities. From record, it is seen that such redetermination of value has been carried out in terms of Rule 7 of the Customs Valuation Rules which provides for determination of value on the basis of the price of identical or similar imported goods in India. It is further seen from records, that the proprietor of the appellant, Sh. Jayshiv, was shown the market enquiry report at the time of recording his statement on 08.07.2008. Further, in the statement he has voluntarily accepted the increased valuation of the imported goods. It is settled position of law that once the importer has admitted the re-determination of value on record and has accepted the method of such valuation, he cannot subsequently challenge the same on the same ground. Consequently, we uphold the redetermination of the value carried out by the customs authorities".

11. The decision of the Tribunal in **Sodagar Knitwear** was challenged before the Apex Court and vide order dated 31.08.2018⁷ the appeal was dismissed and, therefore, in view of the principle of law enunciated and the admission by the partner of the appellant company nothing further needs to be proved as the re-classification has been accepted and the differential duty paid thereon, which needs to be upheld.

12. Learned authorised representative appearing for the department also placed on record the recent decision of this Tribunal in **Sumridh Aluminium (P) Limited vs. The Commissioner of Customs**⁸ where

⁷ 2018 (362)ELT A213 (SC)

⁸ Customs Appeal No. 52491 of 2019 and others vide Final Order No. 51191-51282/2023

also the appellant deposited the customs duty on the enhanced value which was accepted by them, it was observed as under:

"30. The following position emerges from the aforesaid decisions of the Tribunal:

(i) When an importer consents to the enhancement of value, it becomes unnecessary for the revenue to establish the valuation as the consented value, in effect, becomes the declared transaction value requiring no further investigation;

(ii) When an importer accepts the loaded value of the goods without any protest or objection, the importer cannot be permitted to deny its correctness; and

(iii) The burden of the Department to establish the declared value to be in correct is discharged if the enhanced value is voluntarily accepted.

31. What, therefore, follows is that once the appellant had accepted the enhanced value it was not necessary for the revenue to determine the valuation as the consented value, in effect, became the declared transaction value. Further, once the appellant accepted the enhanced value it would not be open to the appellant to now contend that the procedure as contemplated under rule 12 of the Valuation Rules should have been complied with."

13. On the issue of retraction, I am of the considered view that the statement was made on 25.03.2021 and the retraction was made vide communication dated 16.04.2021, which is nothing but afterthought and belated action and hence no reliance can be placed thereon. The decision referred by the learned authorised representative appearing for the department in the case of **Hanuman Prasad** where learned Single Member dealt with the issue of retraction in similar circumstances and observed that the effect of retraction of the statement does not by itself reflect upon the evidential value of the statement which have been retracted under section 108 of the Act. Also that no other material has been placed on record to corroborate the fact that the statement were recorded under the exhortation and duress. Referred to the decision of

the Apex Court in **Surjeet Singh Chabra**⁹ and in the case of **K I Pavunny vs. Assistant Collector(Hq) CEX Collectorate**¹⁰, where it has been held that if the statements are recorded, Court is required to examine whether it is obtained by pressure or duress or by promise and whether the confession is truthful or not and if found to be voluntary, the same is to be relied upon. In other words, it has been laid down that mere fact of retraction of the confessional statement by itself is not sufficient and if on further examination nothing is found to hold the statement having been given under the exhortation or duress, the same can be made the basis for holding the appellant guilty.

14. The plea taken by the appellant that differential duty was paid 'under protest' does not seem to have any substance inasmuch as the challans referred to by the learned counsel for the appellant does not show that the duty has been paid 'under protest'. The statement dated April 16, 2021 that they paid the differential duty amount under protest is just an afterthought and has no evidential value and, therefore, the plea needs to be rejected.

15. Now, the issue to be considered is, whether the penalty imposed by the impugned order under section 112 of the Act is sustainable. In the present case no show cause notice has been issued proposing the demand of differential duty or the penalty. On adjudication, the penalty was

9 **1997 (89) ELT 646 (SC)**
10 **1997 (90) ELT 241 (SC)**

imposed only under section 114A of the Act and there was no reference at all to the provisions of section 112 of the Act. Once the appellant has challenged the said order in original, it was incumbent upon the appellate authority to decide the issues under challenge which was the differential duty amount and the penalty under section 114A. The appellate authority relying on the decision in **Nagpur International** set aside the penalty imposed under section 114 A, however, imposed penalty under section 112 of the Act. First of all, the appellate authority had no jurisdiction to consider the imposition of penalty under section 112 on the appellant in the appeal filed by him and hence the order imposing penalty under section 112 is beyond the jurisdiction and hence needs to be set aside. The decision relied on in the case of Nagpur International is clearly distinguishable inasmuch as in the said case in the show cause notice itself the proposal was to impose the penalty under section 112 read with section 114A and it is in these circumstances that it was observed as under:

" Further, it is also observed that the impugned order, though has specifically mentioned that Mr. Rakesh Nagpal was liable for penal action for his acts of omission or commission under the provisions of Section 114A *ibid*, but in the order portion the provisions Section 112(a) & (b) *ibid* have been invoked for imposition of penalty on Mr. Rakesh Nagpal. Invocation of the provisions Section 112(a) & (b) *ibid* in the impugned order is in conformity with the statutory mandates inasmuch as the issue relates to confiscation of goods and not on the issue of determination of the duty liability, which was short-paid, non-paid by reason of collusion or any wilful misstatement or suppression of facts etc.

16. In such circumstances, I am of the view that the Commissioner (Appeals) travelled beyond the jurisdiction in the matter of imposing

penalty under section 112 of the Act and, therefore, the same is set aside. To the extent the impugned order stands modified.

17. In so far as the evidence on merits are concerned regarding the imposition of differential customs duty, confiscation and redemption fine is concerned, the same is confirmed, also for the reason that during the hearing the learned counsel for the appellant categorically stated that he does not dispute the same except the issue of penalty. Therefore, the imposition of penalty under section 112 of the Act stands set aside. The appeal is, accordingly, partially allowed.

[Order pronounced on **17.05.2024**]

(BINU TAMTA)
MEMBER (JUDICIAL)