CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL NEW DELHI

PRINCIPAL BENCH, COURT NO. 1

CUSTOMS APPEAL NO. 51591 OF 2022

[Arising out of Order-in-Appeal No. CC(A)/Customs/D-II/IMP/ICD/TKD/200/2021-22 dated 27.05.2021 passed by the Commissioner of Customs (Appeals) New Delhi]

M/S VIJAY SONS **....Appellant**
483, Katra Ishwar Bhawan,
Khari Baoli, Old Delhi-110006

Vs.

COMMISSIONER OF CUSTOMS(APPEALS)-NEW DELHI **....Respondent**
New Customs House, Near IGI Airport,
New Delhi-110037

Appearance:

Shri Salil Arora and Sh. Divya Ratna Singh, Advocates for the appellant

Shri Girijesh Kumar, Authorised Representative for the revenue

CORAM:
HON'BLE MR. JUSTICE DILIP GUPTA, PRESIDENT
HON'BLE MR. P. V. SUBBA RAO, MEMBER (TECHNICAL)

FINAL ORDER NO. 58600/2024

Date of Hearing/Decision : 05/09/2024

P. V. SUBBA RAO:

1. M/s Vijay Sons, Old Delhi[1] filed this appeal to assail the Order-in-Appeal Dated 27.05.2021 passed by the Commissioner (Appeals) whereby he partly allowed the appeal of the appellant and set aside the confiscation of the declared goods and the consequential redemption fine. He also set aside the re-determination of value of the imported goods, demand of differential duty and interest. He also set aside the

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1 the appellant

penalty imposed under section 114AA of the Customs Act, 1962[2] and ordered that the seized cash may be released to the appellant after recovering dues, if any. He also reduced the penalty under section 112 from Rs. 50,00,000/- to Rs. 5,00,000/-.

2. This appeal has been filed by the appellant to pray that the penalty of Rs. 5,00,000/- may also be set aside by this Tribunal.

3. The facts which led to the issue of the impugned order are as follows.

4. The appellant filed a Bill of Entry dated 05.02.2016 declaring the imported goods be "Shilajit Stone" imported from China of assessable value of Rs. 11,23,140.57/- and quantity of 23,000 Kg in 459 bags. On examination, only 457 bags were found of which 333 contained "Red Corals" while only 124 bags contained the declared Shilajit Stone. The total weight of the Red corals was 15,450 Kgs and the weight of the shilajit stone was 6520 Kgs. Red corals is an endangered species and its import is restricted. Wild Life Crime Control Bureau confirmed on 10.02.2016 that consignments had Organ Pipe Coral (Tubipordae), whose export was restricted by the Convention on International Traffic of Endangered Species (CITES) and it was protected under the Wild Life Protection Act, 1972. The proprietor of the appellant, Shri Manveer Chokra, admitted to the mis-declaration and that he had no licence to import Red corals and further stated that he had imported the goods on credit basis from M/s Top Grade Enterprises, Hong Kong. The value

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2 **Act**

of the Red corals was assessed as Rs. 1,200/- per kg totaling Rs. 1,85,40,000/-.

5. A show cause notice dated 03.08.2016 was issued by the Joint Commissioner Inland Container Depot,[3] Tughlakhabad proposing confiscation of the Red corals, re-determination of the value of Shilajit Stone, confiscation of the shilajit stone and demand of differential duty under section 28(4) along with applicable interest under section 28 AA. It was also proposed to impose penalties on the appellant under section 112 (a), 114A and 114AA of the Act, appropriate the currency of Rs. 1,75,000/- seized from the appellant against the fine and penalty. The appellant contested the allegations in the show cause notice which were, however, confirmed by the Joint Commissioner in his Order in Original dated 30.04.2014. The operative part of it is as follows:

> "1. I determine the value of non-declared goods i.e. Red Coral (Organ Pipe Coral (Tubiporidae) packed in 333 bags and totally weighing 15450 Kgs as Rs. 1,85,40,000/- under rule 9 of the Customs Valuation (determination of value of imported goods) rules 2007 framed under section 14 of the Customs Act 1962. I order absolute confiscation of non-declared goods i.e. Red Coral (Organ Pipe Coral (Tubiporidae) packed in 333 bags and totally weighing 15450 Kgs having determined value of Rs.1,85,40,000/- under Section 111 (d), (1) & (m) of the Customs Act, 1962 for contraventions discussed above.
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> 2. I order confiscation of Shilajit Stone (6250 Kgs packed in 124 bags) used for concealment of the un-declared goods i.e. Red Coral (Organ Pipe Coral (Tubiporidae) under Sections Section 119 and under section 111 (m) (for misdeclaration) of the Customs Act. 1962. However I redeem the confiscated goods to the importer on payment of redemption fine of Rs. 1.00.000/-(Rupees One Lakhs Only)
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> 3. I reject the declared value transaction value and self-assessed value of Rs.3,19,089/-in respect of the goods i.e Shilajlt Stone (found 6250 kgs packed in 124 bags) covered

3 **ICD**

> under Bill of Entry No. 4159010 dated 05.02.2016 under Rule 12 of the Customs Valuation (Determination of Value of Import Goods) Rules, 2007 and re-determine the value as Rs. 3.54.818/-under Rule 5 of Customs Valuation (determination of value of imported goods) rules 2007 framed under section 14 of the Customs Act 1962.
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> 4. 1 order recovery of the differential duty of Rs. 8,969/- under provision of Section 28(4) read with section 28(8) of the Customs Act, 1962 along with applicable interest under Section 28AA of the Customs Act, 1962.
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> 5. I impose a penalty of Rs. 50,00,000/ (Rupees Fifty Lakhs only) on M/s. Vijay Sons through its Proprietor Shri Manveen Chhokra under Section 112. and 114AA of the Customs Act, 1962 for various acts of omissions and commission already discussed above. Since penalty under section 112 is imposed so I refrain from imposing penalty under the provisions of section 114A of the Customs Act 1962.
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> 6. 1 order for appropriation of Indian currency of Rs. 1,75,000/- (Rupees one lakh seventy- five thousand only) against the penalty and fine imposed on the importer."

6. Aggrieved, the appellant filed appeal before the Commissioner (Appeals) who, by the impugned order, reduced the penalty imposed on the appellant from Rs. 50,00,000/- to Rs. 5,00,000/-but dropped rest of the demand raised in the Order in Original.

Submissions by the learned counsel for the appellant.

7. Learned counsel for the appellant made the following submissions:

(a) Penalty under section 112 cannot be imposed as there was no *mens rea.* The appellant had placed an order for shilajit stone but the overseas supplier sent Red corals also. In the absence of *mens rea,* no penalty can be imposed under section 112;

(b) The appellate authority's order shows lack of proper application of mind as it did not specify under which clause of section 112 the penalty was imposed;

(c) Mere filing of Bill of Entry on the basis of the documents available does not amount of any act or omission as envisaged in section 112(a).

Submissions on behalf of the Revenue.

8. Learned authorized representative appearing for the department submits that the appeal deserves to be dismissed. He submits that the appellant imported Red corals which are prohibited goods and they were confiscated under section 111(d), 111(l) and 111(m) without an option of redemption.

9. The declared shilajit stone was confiscated under section 119 by the original authority on the ground that it was used to conceal the undeclared Red corals. However, this confiscation of shilajit stone was set aside by the Commissioner (Appeals) in the impugned order. Red corals were confiscated under section 111.

10. Once the goods are liable for confiscation under section 111(m), penalty is imposable under section 112 and no *men rea* is required to hold by the Madras High Court in **Commissioner of Customs (Export,) Chennai-I** vs. **Bansal Industries**[4]. The adjudicating authority imposed a penalty of Rs. 50,00,000/- considering the value of confiscated goods was Rs. 1.85 lakhs. However, the Commissioner (Appeals) reduced it to Rs. 5,00,000/-

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4 2007 (207) ELT 346 (Mad.)

11. Thus, the Commissioner (Appeals) took a very lenient view in the facts of the case and there is no ground to provide any further relief to the appellant.

12. We have considered the submissions advanced by the learned counsel for the appellant and the learned authorized representative for the department and perused the records.

13. The Commissioner (Appeals) has taken an extremely lenient view and only upheld the penalty of Rs. 5,00,000/- under section 112 upon the appellant on value of the confiscated Red corals was Rs. 1.85 crores. There is no cross appeal by the Revenue of assailing the order in appeal. We, therefore, have to only consider whether in the facts and circumstances of the case penalty of Rs. 5,00,000/- under section 112 is justified.

14. The facts that Red corals were prohibited goods and that they were imported in consignment of the appellant are not in dispute. It is not disputed that they were confiscated absolutely under section 111 of the Customs Act. Penalty under section 112 can be imposed for acts or omissions, which render goods liable for confiscation under section 111. Section 112 reads as follows:

> **"112. Penalty for improper importation of goods, etc.**
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> - Any person,-
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> (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, shall be liable,-
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> (i)in the case of goods in respect of which any prohibition is in force under this Act or any other law for the time being in force, to a penalty not exceeding the value of the goods or five thousand rupees, whichever is the greater;
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> (ii)in the case of dutiable goods, other than prohibited goods, to a penalty not exceeding the duty sought to be evaded on such goods or five thousand rupees, whichever is the greater;
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> (iii) in the case of goods in respect of which the value stated in the entry made under this Act or in the case of baggage, in the declaration made under section 77 (in either case hereinafter in this section referred to as the declared value) is higher than the value thereof, to a penalty not exceeding the difference between the declared value and the value thereof or five thousand rupees.
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> (iv)in the case of goods falling both under clauses (i) and (iii), to a penalty not exceeding the difference between the declared value and the value thereof or five thousand rupees, whichever is the highest;
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> (v)in the case of goods falling both under clauses (ii) and (iii), to a penalty not exceeding the duty sought to be evaded on such goods or the difference between the declared value and the value thereof or five thousand rupees"

15. The appellant's submission is that it had no *mens rea* and it had not placed any order for Red corals and that it, therefore, did not declare Red corals in the Bill of Entry. Instead of sending shilajit stone for which it had placed the order the supplier from Hong Kong had sent to it Red corals. On a specific query from the Bench, learned counsel for the appellant admits that Red corals are far more valuable than shilajit stone. The order of the original authority shows that shilajit stone was worth amount of Rs. 52 per kg whereas Red Corals Rs. 1,200/- per kg. It is not disputed the Red corals is an endangered species and its import is prohibited into India under Wild Life Control Act.

16. The appellant's submission is that it had not placed order for Red corals and, therefore, it was not liable cannot be accepted. Every importer is responsible for the goods which it imports. The controls

and prohibitions on imports and the duty payable are on the goods imported and not the goods said to be imported in the documents. Nobody will were ever declare that he imported prohibited goods in its documents. However, so long as the imported goods are prohibited goods, the importer is liable for all the consequences. *Mens rea* can only be inferred from the facts of the case. If the importer had any doubts regarding the consignment which was sent by the overseas supplier, he could have asked for examination of the goods before filing the Bill of Entry and if the goods were not as per his order, he could have abandoned the goods under section 23(2). However, once the importer imports certain goods and declares something else in the Bill of Entry, the importer has to face the full consequences of such imports. If the argument of the learned counsel for the appellant that simply because he had not placed order for prohibited goods he should be get ride of from the responsibility of the import is accepted, it will open floodgates of smuggling in the country. Any prohibited goods including drugs, explosives, arms and engendered species can be imported into India if the importer simply does not mention it in his papers. Customs Act cannot be read in a manner to allow such smuggling.

17. A plain reading of Section 112 also does not indicate that *mens rea* is required to impose any penalty under section 112. This specific issue examined at length by the Madras High Court in **Bansal Industries**. Paragraphs 4 to 9 which reads as follows.:

> **"4.** At the outset, we are of the view that the questions of law referred to above have not been happily framed, as the entire issue in this appeal revolves on the intention of the assessee in making such a misdeclaration with a view to evade duty, and accordingly, we reframe the question as under :

"Whether the element of *mens rea* is required for imposition of punishment under the Customs Act?"

5. Learned Counsel appearing for the appellant submits that the Tribunal has failed to consider the reasonings given by the original authority on the basis of evidence on record, but, on the other hand, the Tribunal has merely observed that it is inclined to accept the reasonings given by the assessee and hence, the order of the Tribunal is liable to be set aside.

6. We have gone through the order of the Tribunal. It is true that the Tribunal has recorded a finding of fact that it is inclined to accept the reasons given by the assessee that it was the supplier who by mistake loaded tin sheets waste which were not ordered by the assessee and that the Revenue has not shown that there was any flow back of funds for the purpose of tin sheets waste. However, a perusal of the order impugned shows that the Tribunal proceeded on the basis that the assessee had no intention to evade duty. We are deliberately quoting the order of the Tribunal in the following words :

"…. the Revenue has not shown that appellant had wilfully suppressed the facts and had mis-declared the goods with intention to evade duty and the fact that he had consciously committed the act of misdeclaration..."

7. It is oft-repeatedly held that *mens rea* is not an essential ingredient for contravention of the provisions of a civil law. The Apex Court recently in *Chairman, SEBI* v. *Shriram Mutual Fund* [(2006) 5 SCC 361] held as under :-

"*Mens rea* is not an essential ingredient for contravention of the provisions of a civil Act. Unless the language of the statute indicates the need to establish the element of *mesn rea*, it is generally sufficient to prove that a default in complying with the statute has occurred and it is wholly unnecessary to ascertain whether such a violation was intentional or not. The breach of a civil obligation which attracts a penalty under the provisions of an Act would immediately attract the levy of penalty irrespective of the fact whether the contravention was made by the defaulter with any guilty intention or not."

8. Applying the above ratio to the facts of the case, we find that though the Tribunal has recorded a finding of fact that it was the supplier who by mistake loaded tin sheets waste which were not ordered by the assessee, the Tribunal rendered its decision on the basis that the Revenue has not shown that the assessee had wilfully suppressed the facts and had misdeclared the goods with intention to evade duty. The order of the Tribunal mainly proceeded on the footing of intention of the assessee to evade duty, which, in our view, is not correct in the matter of breach of a civil obligation attracting levy of penalty. Therefore, the order of the Tribunal is liable to be set aside.

9. Accordingly, the question as reframed by us is answered in the negative and against the assessee. The appeal is allowed and the order of the Tribunal is set aside and the matter is remitted back to the Tribunal for fresh disposal on merits and in accordance with law. No costs. Connected C.M.P. is closed."

18. In view of the above, we find that the penalty confirmed by the Commissioner (Appeals) in the impugned order is correct and it does not call for any interference. The impugned order is upheld and the appeals is dismissed.

(Order pronounced in open court)

(JUSTICE DILIP GUPTA)
PRESIDENT

(P. V. SUBBA RAO)
MEMBER (TECHNICAL)

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