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CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
PRINCIPAL BENCH, WEST BLOCK No.2, R.K.PURAM, NEW DELHI - 110066
SINGLE MEMBER APPEAL BRANCH

Appeal No. C/410 /2008 – SM [BR]   Date 18/03/2009

Assistant Registrar
C.E.S.T.A.T, New Delhi

To :
M/S GATEWAY DISTRIPARKS LTD.
ICD, GARHI HARSARU,GURGAON-122505 HARYANA.

M/S GATEWAY DISTRIPARKS LTD. : Appellant
Vs
C.C.E. DELHI III : Respondent

I am directed to transmit herewith a certified copy of **Final order No. 210 / 2009 – SM[BR]** dated 20.2.2009 passed by the Tribunal under Section 129, (B) of the Customs Act,1962 & Financial Act 1994 relating to Service Tax

Assistant Registrar
(SM Appeal Branch)

Copy to :
1. Respondent
C.C.E. DELHI III
UDYOG MINAR, UDYOG VIHAR, VANIJYA NIKUNJ, PHASE V, GURGAON - 122016 (HARYANA)
2. Adv. / Consult
MR.BHASIN SETHI & ASSICIATE
401,SATYAM CINEMA BUILDING,RANJEET NAGAR,DELHI

3 S.D.R
~~4 J.C.D.R.~~
5 Bar association, CESTAT, New Delhi
6 M/s. Deeparchi Publications, M-93, Marg. 46, Saket, New Delhi 110017
7 M/s Centax Publictions (P) Ltd., 1512-B, Bhishm Pitamah marg, Opp. ICICI Bank of Defence Colony, New - 3
8 Excise & Customs cases, B-37, Sector -1, NOIDA - 201301 Gautam Budh Nagar, (U.P.)
9 Raghuraman's 44-B, Regal Flat,Shipra Suncity, Indirapuram - 201010,Ghaziabad, DT, U.P.
10 Nidheshak publications, I.P.Estate, new Delhi
11 Taxmann Allied Service Pvt Ltd., 21/35, West Punjabi Bagh, New Delhi - 110026
12 Commercial Laws of India Pvt Ltd Post Bag No. 1033, No.70(Old No. 88), Thyagaraya Road, T. Nagar,Chennai
13 Taxindiaonline.com Pvt.Ltd, B-XI/8183,Vasant Kunj, New Delhi - 110070
14 Easy Service Tax Online Dot Com Pvt.Ltd.407A,Iscon Mall,Above Star India Bazar,Satellite Road,Ahmedabad-1
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Assistant Registrar
(SM Appeal Branch)

IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
West Block No.2, R.K.Puram, New Delhi-110066.
Principal Bench, New Delhi.

C/410/08-SM

(Arising out of Order-in-Appeal No.36-37/KKG/GGN/2008 dt.4.2.08 passed by Commissioner(Appeals), Gurgaon)

Hon'ble Mr. RAKESH KUMAR, MEMBER (TECHNICAL)

1. Whether Press Reporters may be allowed to see the Order for publication as per Rule 27 of the CESTAT (Procedure) Rules, 1982? :
2. Whether it would be released under Rule 27 of the CESTAT (Procedure) Rules, 1982 for publication in any authoritative report or not? :
3. Whether their Lordships wish to see the fair copy of the order? :
4. Whether order is to be circulated to the Department Authorities: :

M/s. Gateway Distriparks Ltd. Appellant

Versus

CCE, Gurgaon Respondent

Appearance
Shri V.R.Sethi, Adv. For Appellant
Shri S.Gautam, Authorised Departmental Representative(DR) For Respondent

Coram: Hon'ble Mr. RAKESH KUMAR, MEMBER (TECHNICAL)

Date of decision: 20.2.09
Final Order No. 210/09-SM (BR)

Per Rakesh Kumar:

The facts of the case, in brief, leading to this appeal are as under:

The Appellants are custodian of the goods at ICD, Garhi Harsaru, Gurgaon. M/s. S.P.Enterprises, A-15, Priyadarshini Vihar, Delhi-110092(hereinafter referred to as the importer) imported 64 MTs of EVA Resin contained in four containers ~~and~~ with declared CIF value of Rs.17,25,984/-. The goods landed at Gateway Port, Nhava Sheva in Distt. Raigad. Initially the part of clearance was mentioned as ICD Tughlakabad but on the Importer's request, the same was changed to ICD Garhi Harsaru. As per "Imported Goods (Conditions of Transhipment)Regulations,1995", both, the shipping line M/s. PIL Mumbai Pvt. Ltd. and the Appellant as custodian filed a transit bond for transshipment of the goods from Nhava Sheva to Garhi Harsaru. Thereafter the transshipment of the goods from Nhava Sheva to ICD Garhi Harsaru, Gurgaon was allowed by the Dy. Commissioner of Customs, Nhava Sheva. The Appellant vide letter dt.13.8.04 intimated the jurisdictional Customs Authorities that the containers have arrived but the same are empty. After a few days, the cargo of the said containers was brought in loose form in four trucks at ICD Garhi Harsaru but on chemical examination, the goods were found to be Calcium Carborate(chalk) and not EVA resin. On investigation of this matter by the Customs, it was found that one Shri Ram Gupta in connivance with the importer was the person responsible for diversion of the goods on way to ICD Garhi Harsaru and accordingly, a SCN dt.12.8.05 was issued to the importer, Shri Ram Gupta, the shipping line M/s. PIL Mumbai Pvt. Ltd. and also the present Appellant for demand of duty on the goods illicitly diverted and also imposition of penalty on them. The duty on the goods amounting to Rs.7,09,960/- was demanded only from Shri Ram Gupta and ~~the~~ other noticees including the present Appellant ~~was~~ were show caused for penalty under Section 112 of the Customs Act,1962 "for their acts of omission and commission". The SCN was adjudicated vide order dt.27.2.07 by which the duty demand in respect of goods, as made in the SCN, was confirmed against Shri Ram Gupta and penalty was under Section 112 was imposed on Shri Ram Gupta as well as on other noticee including the Appellant in this case. The penalty imposed on the Appellant in this case was Rs.2 lakhs under Section 112 of the Customs Act,62 for "their abetment in doings and omissions of the Acts which have rendered the impugned imported goods liable for confiscation under Section 111 of the Act". The appeal filed by the Appellant against the Asstt. Commissioner's order was dismissed by the impugned order-in-appeal No.36-37/KKG/GGN/08 dt.4.2.08 and it is against this order that the present appeal has been filed challenging the imposition of penalty under Section 112 of Customs Act.

2. Heard both the sides.

2.1 Shri V.R.Sethi, Advocate, Ld. Counsel for the Appellant made the following submissions:

(1) The Appellant being the custodian of the ICD, Gari Harsaru are responsible for the goods only on receipt at the ICD and when the containers were received in empty condition, they immediately informed the Customs Authorities.

(2) Though the Appellant had also executed bond for transhipment of the goods, subsequent investigation revealed that one Shri Ram Gupta was responsible for diversion of the goods and duty has been demanded from Sh. Ram Gupta only. The SCN does not allege any involvement of the custodian in the illicit diversion of the goods.

(3) The appellants are in no way guilty of any abetment in this illicit diversion of the goods by Sh. Ram Gupta. None of their ~~action~~ act or omission has rendered the impugned imported goods liable for confiscation. In fact the SCN itself does not allege abetment on the part of the appellant and thus the Asstt. Commissioner's order bringing in the allegation of abetment is beyond the SCN. Moreover, no evidence has been produced by the Department indicating any abatment of the appellant in the illicit diversion of the goods.

2.2 Shri S.Gautam, learned Sr. Departmental Representative defended the impugned order pleading that since as per the requirement of Regulation 3 of the Transhipment Regulations, the Appellant had executed transit bond, they have to face the consequences as per Regulation 4 in the case the goods do not reach the destination any. In view of the violation of these Regulations, penalty has been rightly imposed on the Appellant under Section 112 of the Customs Act and that in this regard, he relies on the Tribunal's judgment in the case of D.Ankineedu Chowdry vs CC, Chennai reported in 2004(178)ELT.578(Tri.-Chennai).

3. I have carefully considered the submissions from both the sides and perused the records. In this case initially the port of clearance of the goods was mentioned ICD Tuglakabad but on the request of the importer, the shipping line filed an application for amendment of the port of clearance to ICD Garhi Harsaru which was allowed. After the amendment of the port of clearance in respect of this consignment, the Appellants were informed about the arrival of the consignments. The Appellant filed the necessary bond even though according to the Appellant, the shipping line had also executed the bond. I find that when the containers arrived at ICD and were found to be empty, it is the custodian who on 13.8.04 informed the Customs authorities and the Customs authorities initiated the investigation and in course of investigation which it was found one Shri Ram Gupta was behind the illicit diversion of the goods. I find that the show cause notice does not contain any allegation against the Appellant that they are involved in any manner in the illicit diversion of the goods. ~~and~~ Because of the evidence against Shri Ram Gupta, the duty has been demanded from him instead of from the custodian. Though the Addl. Commissioner while imposing penalty of Rs.2 lakhs on the Appellant mentioned that the penalty is being imposed under Section 112 of the Customs Act for the Appellant's

abetment in the doings and omission of the act which have rendered the imported goods liable for confiscation, the order does not discuss in what manner the Appellant have abetted the illicit diversion of the goods. Even the SCN does not discuss any evidence or contain even the allegation that the Appellant had connived with Ram Gupta or any other person illicit diversion. In view of this, I hold that the impugned order upholding the penalty on the Appellant under Section 112 of the Act is not sustainable. The same is set aside and the appeal is allowed.

Order dictated in the open Court.

(Rakesh Kumar)
Member Technical

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