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

Appeal No. C/78 /2002-79 /2002-CU[DB] Date **13/04/2011**

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

To : ASHWANI KUMAR JAIN, PROP.
M/S. MEERUT EXIM, 79, RAILWAY ROAD,
KISHAN FLOUR MILL COMPOUND,
MEERUT, U.P.

ASHWANI KUMAR JAIN & OTHERS Appellant

Vs

C.C.E. MEERUT Respondent

I am directed to transmit herewith a certified copy of **Final order No. C/146-147/ 2011 CU[DB]** dated 24.02.2011 passed by the Tribunal under **Section 129, (B) of the Customs Act,1962 & Financial Act 1994 relating to Service Tax**

Assistant Registrar
(Customs Appeal Branch)

Copy to :

1. Respondent **C.C.MEERUT**
2. Adv. / Consult
3. C.D.R
4. Bar association, CESTAT, New Delhi
5. Director Publications, Customs, Excise. I.P. Estate, New Delhi
6. M/s Centax Publictions Pvt Ltd., 1512-B, Bhishm Pitamah marg, Opp. ICICI Bank of Defence Colony, New Delhi -
7. Company Law Institute of India Pvt Ltd.,No.2(Old No. 36), Vaithyaram Street, T. Nagar,Chennai -17
8. M/s. Deeparchie Publications, M-93, Marg. 46, Saket, New Delhi 110017
9. Taxmann Allied Service Pvt Ltd., 59/32, New Rohtak Road, New Delhi - 110005
10. Easy Service Tax Online Dot Com Pvt.Ltd.407A,Iscon Mall,Above Star India Bazar,Satellite Road, Ahmedabad-15
11. LAWCRUX Advisors Pvt Ltd, LAW House,1-8,Sector - 10, Faridabad 121003 (Haryana)
12. TaxIndiaOnline.com Pvt Ltd., Unit No.1, 2nd Floor,Vasant Arcade,Nelson Mandela Road, Vasant Kunj, New Delhi - 110070
13. Office Copy
14. Guard file
15. BALBIR SINGH SETHI
82/1-M, RAILWAY ROAD,
MEERUT, U.P.

Assistant Registrar
(Customs Appeal Branch)

IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
West Block No. 2, R.K. Puram, New Delhi – 110 066.

COURT NO. I

Customs Appeal No. 78 of 2002

Shri Ashwani Kumar Jain — Appellant

Versus

CCE, Meerut — Respondent

Customs Appeal No. 79 of 2002

Shri Balbir Singh Sethi — Appellant

Versus

CCE, Meerut — Respondent

[Arising out of the Order-in-Original No. 51/Commr/MRT/2001 dated 29/10/2001 passed by The Commissioner of Customs & Central Excise, Meerut.]

For Approval and signature :
Hon'ble Shri Justice R.M.S. Khandeparkar, President
Hon'ble Shri 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?	:

Appearance

S/Shri Ashwani Kumar and Balbir Singh, I.P. – for the appellant.

Shri Sumit Kumar, Authorized Representative (DR) - for the Respondent.

CORAM : **Hon'ble Shri Justice R.M.S. Khandeparkar, President**
Hon'ble Shri Rakesh Kumar, Member (Technical)

DATE OF HEARING : 24/02/2011.
DATE OF DECISION : ____________.

Final Order No. C/146-147/11 Dated : 8.4.11

Per. Rakesh Kumar :-

The facts leading to these two appeals, which have been remanded by Hon'ble Supreme Court vide its order dated 29/09/2010 for denovo decision are, in brief, as under.

1.1 The appellant No. 1 – Shri Ashwani Kumar Jain is the Proprietor of M/s Meerut Exim, Meerut. The appellant No. 2 – Shri Balbir Singh Sethi is the brother-in-law of Shri Ashwani Kumar Jain and is partner of M/s Dooab Exim, Mawana Road, Meerut. The officers of Directorate General of Revenue Intelligence, on receipt of an intelligence that two trucks containing illicitly imported ball bearings of foreign origin, had been unloaded in the premises of Dooab Exim, Mawana Road, Meerut, and that the ball bearings had been cleared from ICD, Meerut by mis-declaring the quantity, value and country of origin and thereby evading huge amount of Customs Duty, searched the premises at 5 p.m. on 18/7/2000. At that time one Shri P.K. Gupta was present in the premises, who on seeing the DRI officers tried to run away, but he was intercepted and in presence of two independent Panch witnesses, the premises were searched, as a result of which 7,76,945 pcs. of ball bearings and roller bearings of Nachi and NTN brands of Japan, FLT brand of Poland and LYC brand of China, totally valued at Rs. 6.3 crores were recovered. Since, Shri P.K. Gupta could not produce any document regarding their legal import, the bearings were placed under seizure under Section 110 of Customs Act, 1962. Statement of Shri P.K. Gupta was recorded under Section 108 of Customs Act, 1962, wherein he stated that he is the Director of M/s Commando Courier, Kashmiri Gate, New Delhi, that another Director of M/s Commando Courier is Shri Trilok Nath Mittal, on whose instructions he used to visit M/s Dooab Exim, that Shri Trilok Nath Mittal also runs a firm M/s Royal International, 2528/8 Rohatagi Mansion, 3rd Floor, Kashmiri Gate, Delhi, that M/s Royal International used to deal in indigenous and imported bearings, that though on paper he was also a 10% partner in M/s Royal International, actually Shri Trilok Nath Mittal is the sole owner of M/s Royal International, that Shri Trilok Nath Mittal alongwith Shri Ashwani Kumar Jain of Meerut used to import ball bearings and roller bearings, that Shri A.K. Jain was an exporter and alongwith him, Shri Trilok Nath Mittal made a plan for illicit import of bearings which were to be cleared from ICD, Meerut by mis-declaring their country of origin, brand quantity and value, and that he (Shri P.K. Gupta) was getting a commission @ Rs. 1.5 per bearing from Shri Trilok Nath Mittal, that the bearings after being cleared from ICD, Meerut used to be sent to the factory of Shri Ashwani Kumar Jain, M/s Dooab Exim and after being sorted out, the same used to be sold by issuing the invoices in the name of bogus firms, that one consignment of bearings mainly of Japanese Nachi brand had been imported around May 2000 and second consignment had been cleared from ICD, Meerut on 17/7/2000 and had reached the factory of M/s Dooab Exim in the same night, that intimation regarding arrival of the bearings had been given to him by Shri Ashwani Kumar Jain who was going abroad and had told the partner of M/s Dooab Exim, Shri Balbir Singh Sethi to get his goods cleared from customs, and that when he was informed by Shri Balbir Singh Sethi that the goods have arrived at M/s Dooab Exim, he had reached the premises of M/s Dooab Exim at around 2.30 p.m. on 18/7/2000 alongwith the labourers for sorting out the bearings. The bearings seized from the factory of M/s Dooab Exim on 18/7/2000 consisted of entire consignment of bearings cleared from ICD, Meerut on 17/7/2000 and also part of the consignment cleared earlier. The quantity and description of the consignment cleared on 17/7/2000, as found in the premises of M/s Dooab Exim, was compared with the quantity and description, as declared in the bill of entry filed by M/s Meerut Exim on 17/7/2000 and it was found that the quantity as declared in the bill of entry No. 26 dated 17/7/2000 filed by M/s Meerut Exim was much less than the quantity actually found and while the bill of entry did not mention the brand of the bearings, the bearings were found to be of mostly Nachi brand of Japan. The declared value of the bearings was also found to be on much lower side. Subsequently inquiry was made with Shri Balbir Singh Sethi of M/s Dooab Exim, who was also authorised signatory of M/s Meerut Exim, which had imported the consignment of bearings, Shri Trilok Nath Mittal, Proprietor of M/s Royal International, 2528/8 Rohatagi Mansion, 3rd Floor, Kashmiri Gate, Delhi, Shri Ashwani Kumar Jain, Proprietor of M/s Meerut Exim, Shri M.K. Gupta, Superintendent, Customs Meerut in charge of ICD, Meerut, who had allowed the clearance of the consignment of bearings imported by M/s Meerut Exim under bill No. 23 dated 5/6/2000 and bill No. 26 dated 17/7/2000, Shri Ajay Kumar, Inspector, Customs at ICD, Meerut, Shri Deepak Mishra, Superintendent, U.P. Warehousing Corp., ICD, Meerut, Shri Mohd. Aslam and Shri Raghubir Singh, Drivers of the Trailer Truck No. HR-37-7229 and HR-47-3145 respectively which had been used for bringing the consignment of bearings from ICD, Tuglakabad to ICD, Meerut on 17/7/2000, Shri Sunil Jain, Partner of M/s A.S. Pick & Move, New Delhi owner of the said truck number HR-37-7229 and HR-47-3145, Shri Jaswant Singh, Director M/s Darshan Lifters (P) Ltd., New Delhi, the authorised contractors of U.P. Warehousing Corporation for handling and transporting containers from ICD, Tuglakabad to ICD, Meerut, Shri Brahm Dev Sharma, Superintendent, U.P. State Warehousing Corporation camp office ICD, Tuglakabad, Shri Rajeev Dhawan, Import Shipping Agent of M/s Containers Maritine Agency (P) Ltd. and Shri Raman Kumar Dadhwal, Manager M/s Inter Shipping Travels and Exhibition (P) Ltd. On inquiry with these persons and also from the documents recovered from them, it appeared that Shri Ashwani Kumar Jain, Proprietor of M/s Meerut Exim, assisted by his brother-in-law Shri Balbir Singh Sethi, Partner of M/s Dooab Exim, had imported two consignment of bearings in June and July 2000 by not only under declaring their value, but also their country of origin, description and quantity and in this manner had evaded huge amount of Customs duty and that in this Shri Trilok Nath Mittal and Shri P.K. Gupta were also their co-conspirators. The total duty evaded in respect of the consignment cleared under bill of entry No. 23 dated 5/6/2000 appeared to Rs. 29,28,428/-, and duty evaded in respect of consignment cleared under bill of entry No. 26 dated 17/7/2000 appeared to Rs. 78,89,311/-. It also appeared that in this illicit import, Shri Ashwani Kumar Jain had also got cooperation from the Customs officer Shri M.K. Gupta, Superintendent, Customs who had ordered clearance of the goods without examination for some monetary consideration. In view of these circumstances, a show cause notice dated 15/1/2001 was issued to M/s Meerut Exim, Shri Ashwani Kumar Jain, Proprietor of M/s Meerut Exim, Shri Balbir Singh Sethi, Shri Trilok Nath Mittal, Shri Pawan Kumar Gupta and Shri M.K. Gupta for –

(a) recovery of short paid Customs Duty total amounting of Rs. 1,18,17,739/- in respect of the consignments of bearings imported under bill of entry No. 23 dated 5/6/2000 and bill of entry No. 26 dated 17/7/2000 under proviso to Section 28 (1) of Customs Act, 1962 alongwith interest on this duty at the applicable rate as per the provisions of Section 28AB of Customs Act, 1962 ;

(b) imposition of penalty on M/s Meerut Exim under Section 114A of Customs Act, 1962 ;

(c) confiscation under Section 111 (m) and 111 (l) of the goods valued at Rs. 1,52,88,769/- CIF imported vide bill of entry No. 26 dated 17/7/2000 and the goods valued at Rs.

20,93,799/- CIF imported under bill of entry No. 23 dated 5/3/2000 which had been placed under seizure ;

(d) confiscation under Section 111 (m) and 111 (l) of the goods valued at Rs. 69,58,578/- CIF imported under bill of entry No. 23 dated 5/6/2000 which had been cleared by the Customs and which are not available for confiscation ; and

(e) imposition of penalty on Shri Ashwani Kumar Jain, Shri Balbir Singh Sethi, Shri Trilok Nath Mittal, Shri P.K. Gupta and also Shri M.K. Gupta, Superintendent of Customs under Section 112 of Customs Act, 1962

1.2 The above show cause notice was adjudicated by the Commissioner of Customs and Central Excise, Meerut vide order-in-original No. 51/Commr/MRT/2001 dated 29/10/2001 by which–

(a) Customs Duty demand of Rs. 1,18,17,739/- was confirmed under proviso to Section 28 (1) of Customs Act, 1962 alongwith interest on this duty at the applicable rate as per the provisions of Section 28 AB ibid ;

(b) penalty of Rs. 1,18,17,739/- was imposed on M/s Meerut Exim under Section 114A of Customs Act, 1962 ;

(c) the bearings value at Rs. 1,52,88,769/- CIF imported/ cleared under Bill of entry No. 26 dated 17/7/2000 which had been under seizure were confiscation under Section 111 (m) and 111 (l) of Customs Act, 1962 with option to be redeemed on payment of redemption fine in lieu of confiscation of Rs. 1,00,00,000/- ;

(d) bearings value at Rs. 20,93,799/- CIF imported/ cleared under bill of entry No. 23 dated 5/6/2000 were ordered to be confiscated under Section 111 (m) and 111 (l) of Customs Act, 1962 with option to be redeemed on fine of Rs. 15,00,000/- ;

(e) the bearings value at Rs. 69,58,578/- CIF imported and cleared under bill of entry No. 23 dated 5/6/2000, which were not available for confiscated, were also ordered to be confiscated, under Section 111 (m) and 111 (l) and fine of Rs. 50,00,000/- was imposed on M/s Meerut Exim under Section 125 of Customs Act ;

(f) penalty of Rs. 1,75,00,000/- was imposed on M/s Meerut Exim and penalty of equal amount was imposed on Shri Ashwani Kumar Jain, Proprietor under Section 112 of Customs Act, 1962 ;

(g) penalty of Rs. 1,00,00,000/- was imposed on Shri Balbir Singh Sethi, Authorised Signatory of M/s Meerut Exim under Section 112 of Customs Act, 1962 ;

(h) penalty of Rs. 1,50,00,000/- each was imposed on Shri Trilok Nath Mittal and Shri Pawan Kumar Gupta under Section 112 (b) of Customs Act, 1962 ; and

(i) penalty of Rs. 10,00,000/- was imposed on Shri M.K. Gupta, Superintendent, Customs and Central Excise, Meerut under Section 112A of Customs Act, 1962.

1.3 Against the above order of the Commissioner, these appeals were filed before the Tribunal. The appeals filed by Shri Ashwani Kumar Jain and Shri Balbir Singh Sethi were disposed of by the Tribunal by a common final order No. 606-607/2004-NB (A) dated 18/6/04. In these appeals, as recorded in para 2 of the Tribunal's order, the valuation and the duty demands have not been challenged and only the penalties imposed on Shri Ashwani Kumar Jain, Meerut Exim and Shri Balbir Singh Sethi, and confiscation of the goods not available for confiscation, which have been challenged pleading that the Proprietor and the firm are not two separate entities and hence separate penalties on them cannot be imposed, that when penalty has been imposed under Section 114A of Customs Act, 1962 on M/s Meerut Exim, separate penalty on the importer firm M/s Meerut Exim, under Section 112 are not called for and that there is no justification for imposition of penalty on Shri Balbir Singh Sethi who had no role in these imports. The Tribunal by this order held that imposition of penalty of Rs. 1,00,00,000/- on Shri Ashwani Kumar Jain would meet the ends of the justice and other penalties imposed on M/s Meerut Exim and Shri Ashwani Kumar Jain were set aside. As regards penalties on Shri Balbir Singh Sethi, the Tribunal observing that the materials on record do not justify penalty on him and set aside the penalties on Shri Balbir Singh Sethi.

1.4 Against this order of the Tribunal, the Department filed Civil appeal No. 3080 and 3081/2005 before Hon'ble Supreme Court and Shri Ashwani Kumar Jain also filed appeal No. 3082/2005 before Hon'ble Supreme Court. These appeals were disposed of by Hon'ble Supreme Court vide order dated 29/9/2010. By this order while dismissing Civil appeal No. 3082/2005 as infructuous, Hon'ble Supreme Court in respect of appeal No. 3080-3081/2005 filed by the Department, set aside the Tribunal's order and remanded the matter to the Tribunal for deciding the appeals denovo after hearing the parties. In this regard, the observations of the Hon'ble Supreme Court in para 3,4,5,6 and 7 of the order are reproduced below :-

> **"3. Learned Additional Solicitor General submitted that the aforementioned findings of the Tribunal are untenable. He has also drawn our attention to the show cause notice dated 5/1/2001 issued by the Directorate of Revenue Intelligence, I.P. Bhawan, I.P. Estate, New Delhi, the relevant portion of which reads as under :**
>
> > **"(iii) The said M/s Meerut Exim, Meerut, Shri Ashwani Kumar Jain, Prop. M/s Meerut Exim, Meerut, who masterminded the entire operation. Shri Balbir Singh Sethi, who was actively involved in the entire operation as an authorised signatory of M/s Meerut Exim, Meerut, and ensured the improper clearance from Customs and subsequent storage of goods, Shri Trilok Nath Mittal, who was also actively involved in planning the operation with A.K. Jain, and later on was involved in disposing of the smuggled goods in the market knowing well that they were improperly imported goods and were liable to confiscation appear liable to penal action under Section 112 (a) and (b) and/or Section 114A of the Customs Act, 1962."**
>
> **4. Mr. Parasaran has also drawn our attention to the order dated 29/10/2001 passed by the Commissioner, Customs & Central Excise, Meerut, in which the learned Commissioner has clearly observed as under :**

"The said M/s Meerut Exim, Meerut, Shri Ashwani Kumar Jain, Prop. M/s Meerut Exim, Meerut, who master minded the entire operation, Shri Balbir Singh Sethi, who was actively involved in the entire operation as an authorised signatory of M/s Meerut Exim, Meerut, and ensured the improper clearance from Customs and subsequent storage of goods, Shri Trilok Nath Mittal, who was also actively involved in planning the operation with A.K. Jain, and later on was involved in disposing of the smuggled goods in the market knowing well that they were improperly imported goods and were liable to confiscation are liable to penal action under Section 112 (a) and (b) and/or Section 114A of the Customs Act, 1962."

5. As regards, Balbir Singh Sethi, issue No. (iii) was framed by the Commissioner of Customs & Central Excise, Meerut and the Commissioner of Customs having arrived at a clear finding of conspiracy in which Balbir Singh Sethi was involved, the Tribunal could not have arrived at the finding that Balbir Singh Sethi was not involved in the conspiracy.

6. In this view of the matter, we are constrained to set aside the impugned judgment and remit the matters to the Customs, Excise & Service Tax Appellate Tribunal. We direct the said Tribunal to decide the appeals de novo after hearing the parties. All questions are left open for the parties to be raised before the Tribunal.

7. In order to avoid further delay in the matter, we direct the parties to appear before the Tribunal on

25th October, 2010. We request the Tribunal to decide the appeals as expeditiously as possible.

1.5 In view of the directions of the Hon'ble Supreme Court, the matter was heard on 17/2/11, 23/2/11 and 24/2/11.

2. Heard both the sides.

2.1 Shri Ashwani Kumar Jain, appearing in person, pleaded that while he does not challenge the duty demand, he is contesting the penalty on him as well as on his firm M/s Meerut Exim and on his brother-in-law Shri Balbir Singh Sethi, that Shri Balbir Singh Sethi had no role in these imports, that since on the date of arrival of the second consignment - 17/7/2000, he was abroad, he had instructed his brother-in-law Shri Balbir Singh Sethi to file the necessary documents in the ICD and clear the goods, that Shri Balbir Singh Sethi had filed the documents as per his instructions, cleared the goods and took the same to the godown in the premises of M/s Dooab Exim, that there is no evidence on record indicating that Shri Sethi had made this import or was in any way knowingly concerned in transportation, storage, sale etc. of the goods, in question, that Shri Sethi had retracts his statement dated 20/07/2000, but the Commissioner did not consider his retraction, that the Commissioner has imposed penalty on M/s Meerut Exim under Section 114A equal to the total duty demand of Rs. 1,18,17,739/-, the major portion of which had been paid prior to the issue of show cause notice, that the penalty under Section 114A can be imposed only of the amount equal to the short paid duty which had not been paid at the time of issue of show cause notice, that a firm and its proprietor are not two separate entities and, therefore, imposition of penalty on him (Shri Ashwani Kumar Jain) as well as his firm M/s Meerut Exim is incorrect, that in any case, when penalty under Section 114A had been imposed, a separate penalty under Section 112(a) on him and his firm M/s Meerut Exim were not called for, that redemption fine cannot be imposed on the goods which are not available for confiscation and as such, the order of the Commissioner imposing redemption fine of Rs. 50,00,000/- in respect of the goods valued at Rs. 69,58,578/- CIF cleared under bill of entry No. 23 dated 5/6/2000 which were not physically available for confiscation is incorrect, and that while it is not disputed that the goods imported in both the consignments were in excess of the declared quantity, the excess quantity had been shipped on account of mistake by the suppliers and in this regard, the letter from the supplier was not considered by the Adjudicating Authority, Shri Ashwani Kumar Jain, therefore, pleaded that –

(a) no fine under Section 125 of Customs Act, 1962 can be imposed in respect of the goods valued at Rs. 69,58,578/- CIF imported under bill No. 23 dated 5/6/2000 which were not physically available for confiscation ;

(b) no penalty imposable on Shri Balbir Singh Sethi ;

(c) imposition of separate penalty under Section 112 on M/s Meerut Exim as well as on him (Shri Ashwani Kumar Jain) are not correct and

(d) the penalty on M/s Meerut Exim under Section 114A should be confined only to the short paid duty, which had not been paid at the time of issue of show cause notice and the imposition of penalty under this section equal to the duty demand confirmed is not correct ;

(e) simultaneous penalty under Section 114A and 112 cannot be imposed and when penalty under Section 114A had been imposed on M/s Meerut Exim, there was no justification for imposing penalty on him as well as on M/s Meerut Exim under Section 112 of Customs Act.

2.2 Shri Sumit Kumar, the learned Departmental Representative, pleaded that in this case huge quantity of ball bearings mainly of the costly Japanese brand had been imported by under declaring quantity as well as value and description, that the fact that the excess quantity had been imported and the value had been under declared have not even been disputed by the importers M/s Meerut Exim and its proprietor Shri Ashwani Kumar Jain, that the excess quantity was not due to any mistake on the part of the suppliers but had been deliberately imported in connivance with the supplier, that while the bearings were mainly of Japanese origin of the costly Nachi brand, in the bills of entry, the same had been simply declared as machinery parts, that Shri Balbir Singh Sethi had signed the bill of entry dated 17/7/2000 as authorised signatory as M/s Meerut Exim, that from his statement dated 20th July 2000 recorded under Section 108 of Customs Act, 1962, it is clear that he was aware of the fraud being committed by Shri Ashwani Kumar Jain and not only this, the premises in which the bearings after being cleared were stored belonged to Shri Balbir Singh Sethi, that Shri Balbir Singh Sethi was thus not only involved in illicit clearance of goods but was also involved in their storage in his premises, knowing very well that the quantity and value of the goods had been grossly misdeclared and hence the same were liable for confiscation, that as regards imposition of fine under Section 125 of Customs Act, 1962 in respect of the goods not available for confiscation, the redemption fine can be imposed even if the goods are not available for confiscation and in this regard he relies upon the judgment of Hon'ble Supreme Court in the case of **Weston Components Ltd. vs. CC, New Delhi** reported in **2000 (115) E.L.T. 278 (S.C.)**, wherein it was held that redemption fine is imposable even after the release of goods on execution of bond and mere fact that the goods were released on bond, would not take away the powers of Customs Authorities to levy redemption fine, if subsequent to release of the goods, the import was not found valid or there was any other irregularity which would entitle the Customs Authorities to confiscate the same goods, that penalty under Section 112 can be imposed even if the penalty on the importer under Section 114A has been imposed, that penalty under Section 114A is for duty evasion while the penalty under Section 112 (a) is in respect of any Act or omission on the part of an importer which would render the goods liable for confiscation or the Acts of transportation, sale, storage or in any manner dealing with the goods which a person known are liable for confiscation, that in view of this, even when the penalty under Section 114A imposed, penalty under Section 112 can be imposed, and that separate penalty on a firm and its proprietor can be imposed.

3. We have carefully considered the submissions from both the sides and perused the records.

4. In this case the Appellant No. 1 through his firm M/s Meerut Exim had imported two consignment of bearings at ICD, Meerut and had cleared the same under bills of entry No. 23 dated 5/6/2000 and No. 26 dated 17/7/2000. Containers containing the consignment of bearings had first arrived at ICD, Tuglakabad from the Gateway Port and from there the same had been transported to ICD, Meerut by trucks, - the consignment covered by bill of entry No. 26 dated 17/7/2000 was transported from ICD, Tuglakabad to ICD, Meerut by truck No. HR-37-7229 and HR-47-3145 belonging to M/s A.S. Pick & Move, New Delhi. In this case there is no dispute that the value as well as quantity of the bearings had under declared and beside this, there was also mis-declaration of the description of the goods, which had resulted in short payment of duty amounting to Rs. 1,18,17,739/-. The duty demand is not under challenge in these appeals. What has been challenged is –

(a) imposition of penalty on Shri Balbir Singh Sethi, brother-in-law of Shri Ashwani Kumar Jain ;

(b) imposition of separate penalty on the appellant firm M/s Meerut Exim under Section 114A of Customs Act, 1962 as well as under Section 112 of Customs Act, 1962 and also the imposition of penalty on Shri Ashwani Kumar Jain, Proprietor of M/s Meerut Exim under the same Section ;

(c) the quantum of penalty imposable on the importer firm M/s Meerut Exim under Section 114A ; and

(d) levy of fine under Section 125 of Customs Act, 1962 on the goods valued on Rs. 69,58,578/- CIF imported under bill of entry No. 23 dated 5/6/2000, which admittedly were not available for confiscation as the same had been unconditionally released at the time of their import.

5. Coming first to the question of imposition of penalty on Shri Balbir Singh Sethi, there is no dispute about the fact that it is Shri Balbir Singh Sethi, who on the instructions of Shri Ashwani Kumar Jain, had filed the bill of entry No. 26 dated 17/7/2000, had got the goods cleared from the customs and arranged the transportation of the goods to the premises of M/s Dooab Exim, where the goods had been stored. There is also no dispute that he is a partner of M/s Dooab Exim. As per his statement dated 20/7/2000 recorded under Section 108 of Customs Act, 1962, Shri Balbir Singh Sethi on the evening of 17/7/2000 had approached Shri M.K. Gupta, the Customs Superintendent posted at ICD, Meerut. From the statement of Shri M.K. Gupta, Customs Superintendent and the statement of Shri Ajay Kumar, Inspector, Customs posted at ICD it is clear that the consignment of bearings, which arrived at ICD, Meerut on 17/7/200 had been cleared without any examination and the trucks containing the containers had not even entered the ICD, Meerut and only the seal of the containers had been broken by the customs while the

trucks containing the containers were parked outside the ICD gate. While Shri M.K. Gupta, Customs Superintendent in his statement dated 18/7/2000 claimed that the goods were examined by the Inspector Shri Ajay Kumar Gupta, Inspector, Shri Ajay Kumar Gupta, Inspector in his statement dated 18/7/2000 claimed that he had been told by the Superintendent Shri M.K. Gupta he would himself take care of the examination of the imported cargo and that he (Shri Ajay Gupta) had not examined the goods. Shri Deepak Mishra, Superintendent, U.P. Warehousing Corp. ICD, Meerut in his statement dated 18/7/2000 has stated that Shri Balbir Singh Sethi of the importer firm had taken delivery of the goods on 17/7/2000 and had endorsed his signatures on the two gate passes, that the trailers with the containers were parked outside the ICD gate, that after the issue of the gate passes, the containers went to the premises of the importers, and that since pass out order had been given by the customs, he did not verify as to how the containers did not come inside ICD premises. The manner in which this consignment was cleared by the customs is highly unusual, as not only the trucks containing the containers did not enter the ICD but were parked outside the ICD gate, neither the Customs Superintendent nor the Inspector conducted examination of the goods and the same were allowed to be cleared without any examination. Shri A.K. Jain in his statements dated 4/8/2000 and 5/8/2000 stated that the value and quantity had been deliberately under declared in the consignments cleared under bill of entry No. 23 dated 5/6/2000 and 26 dated 17/7/2000 and to ensure smooth customs clearance without examination of the consignment he had paid Rs. 10,00,000/- to Shri M.K. Gupta, Customs Superintendent for each consignment. This shows that Shri M.K. Gupta, Customs Superintendent was also part of the conspiracy in illicit import of bearings by mis-declaring the value, quantity and description and for this reason only the Adjudicating Authority has also imposed penalty on Shri M.K. Gupta, Customs Superintendent under Section 112 (a) of Customs Act, 1962 as the person who had opted this offence. When the consignment covered by bill of entry No. 26 dated 17/7/2000 was cleared without any examination and without even bringing the container inside the ICD, and it is Shri Balbir Singh Sethi who had dealt with the customs, he could not be unaware of the illicit nature of the import. No consignment of any imported goods and that too when the goods being prone to under valuation are of sensitive nature, would be cleared by the Customs in normal course without examination and without even the consignments coming to the premises of the ICD for examination. In view of these circumstances, it is difficult to believe that Shri Balbir Singh Sethi had no knowledge about the illicit nature of the consignment which had been cleared by him, transported up to the premises to M/s Dooab Exim and thereafter stored there. Under Section 112 (a) of Customs Act, 1962 penalty is attracted 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**, or **any person, who acquires possession of or is in any**

manner person carrying, removing, concealing, selling or purchasing, or in any other manner dealing with any goods which he knows or has reason to believe are liable for confiscation under Section 111. The part played by Shri Balbir Singh Sethi clearly amounts of abetment of illicit import and also being concerned in transportation and storage of the illicitly imported goods which he knew were liable for confiscation. In view of this, we are of the view that penalty under Section 112 of Customs Act, 1962 had been rightly imposed on Shri Balbir Singh Sethi. However, looking to the part played by him the penalty of Rs. 1,00,00,000/- appears to be harsh and the same is reduced to Rs. 10,00,000/-.

5. As regards the contention that excess quantity in the consignment cleared under bill of entry No. 26 dated 17/7/2000 had been shipped on account of mistake of the consignee – M/s Al Daffa Al Zahabya RG Trading, Dubai this contention is difficult to accept as –

(a) excess quantity was not only in the consignment covered under bill of entry No. 26 dated 17/7/2000, but was also in the consignment covered under bill of entry No. 23 dated 5/6/2000 ; and

(b) from the statement dated 18/7/2000 of Shri P.K. Gupta it is clear that excess quantity had been imported in connivance with the suppliers, which is corroborated by the statements dated 4/8/2000 and 5/8/2000 of Shri A.K. Jain.

Thus, the quantity of the goods had been deliberately mis-declared. Beside this, it is not disputed that description and value of the goods had also been mis-declared. Therefore penalty on the importer under Section 114A of Customs Act, 1962 has been rightly imposed.

5.1 As regards the second contention of Shri A.K. Jain that penalty under Section 114A of Customs Act, 1962 should be confined only to the amount of duty which had remained short paid at the time of issue of show cause notice, this contention is not acceptable. Under Section 114A of Customs Act, 1962, the penalty is attracted on an importer where the duty has not been levied or has been short levied or has been erroneously refunded by the reason of collusion, wilful misstatement, suppression of facts etc. and this penalty is imposable on the person who is liable to pay the duty. The quantum of penalty, as mentioned in this Section, is equal to the duty liability determined under sub-section (2) of Section 28. In this case the duty liability of M/s Meerut Exim determined under Section 28 (2) is Rs. 1,18,17,739/- and, therefore, the penalty imposable would be the same amount. The penalty cannot be reduced or waived just because a part of the duty demand or the entire amount had been paid prior to the issue of the show cause notice. Hon'ble Supreme Court in the case of **CCE, Jaipur vs. Rajasthan Spinning & Weaving Mills Ltd.** reported in **2010 (255) E.L.T. 481 (S.C.)** while interpreting Section 11AC of Central Excise Act, 1944, which is in pari-materia with the provisions of Section

114A of Customs Act, 1962, has held that penalty equal to the duty demand determined under Section 11A (2) would be imposable on a person liable to pay the duty, whenever the conditions for imposition of such penalty, as mentioned in this Section, i.e. the short levy, short payment, non-levy or enormous refund of duty having taken place due to fraud, collusion, wilful misstatement, suppression of facts etc., are satisfied and for imposition of penalty under this Section it is not material that the duty had been paid prior to the issue of show cause notice. The ratio of Hon'ble Supreme Court in the case of **CCE, Jaipur vs. Rajasthan Spinning & Weaving Mills Ltd.** (supra) is squarely applicable to the facts of this case and just because the appellant had paid part of the duty demand prior to the issue of show cause notice, the penalty on them under Section 114A cannot be reduced to that extent. In view of this, we do not find any infirmity in the order of the Adjudicating Authority imposing penalty of Rs. 1,18,17,739/- on the appellant Shri A.K. Jain under Section 114A of Customs Act, 1962.

6. As regards the third point of dispute that simultaneous penalty cannot be imposed under Section 114A and 112 of Customs Act, 1962, we find that the penalty specified under Section 114A and the penalty specified under Section 112 of Customs Act, 1962 are for two different types of offences. While penalty under Section 114A is for duty evasion by resorting to fraud, collusion, wilful misstatement or suppression of facts etc. and in such a situation, the penalty prescribed is an amount

equal to the duty demand confirmed against the person under Section 28 (2) of Customs Act, 1962, the penalty under Section 112 on a person is for –

(a) any act or omission would render some imported goods liable for confiscation or abetment of such acts or omission ; and

(b) acquiring possession of or in any way being concerned in carrying, removing, depositing, harbouring, keeping, concealing, selling or purchasing, or in any other manner dealing with any goods which the person knows or has reason to believe are liable to confiscation under Section 111.

6.1 There is nothing in section 112 of Customs Act, 1962 from which it can be inferred that penalty under this Section cannot be imposed if penalty under Section 114A has also been imposed. In this can undisputedly the description, quantity and value of the goods had been misdeclared with intent to evade the payment of duty. Now mis-declaration of description, quantity and value by itself is a contravention of the provisions of Section 11 (1) of the Foreign Trade (Development and Regulation) Act, 1992 readwith Rule 11 of the Foreign Trade (Development & Regulation) Rules, 1993, which would make the goods imported liable for confiscation under Section 111 (d) of Customs Act, 1962, as the provisions of Section 111 (d) are applicable to the goods imported contrary to the prohibitions imposed by the Customs Act, 1962 or any other law for the time being in force. Hon'ble Supreme Court in case of **Om Prakash Bhatia vs. CC, Delhi** reported in **2003 (155) E.L.T. - 423 (S.C.)** has held that over invoicing of the goods for export would mean attempt to export prohibited goods and the goods attempted to be exported by mis-declaring their value would be liable for confiscation under Section 113 of the Customs Act, 1962. Beside this, the Act of mis-declaration of description, value and quantity would also make the goods for liable for confiscation under Section 111 (m). Since the Act of mis-declaration of description, value and quantity of the goods by M/s Meerut Exim rendered the goods liable for confiscation, M/s Meerut Exim would be liable for penalty under Section 112 (a) of Customs Act, 1962.

6.2 However, we agree with the appellant's contention that since Shri Ashwani Kumar Jain is the Proprietor of M/s Meerut Exim, penalty can be imposed either on him or on M/s Meerut Exim and there is no justification for separate penalty on M/s Meerut Exim or its Proprietor Shri Ashwani Kumar Jain as a proprietorship firm and its proprietor are not separate entities but are one entity. In view of this, while the penalty under Section 112 on Shri Ashwani Kumar Jain is upheld, penalty under Section 112 on M/s Import Exim is set aside. However, looking to the fact that penalty equal to the duty demand has been imposed on the importer firm under Section 114A, penalty on Shri Ashwani Kumar Jain under Section 112 (a) is reduced to Rs. 25,00,000/-.

7. Coming to the last point of dispute as to whether fine under Section 125 of Customs Act, 1962 is imposable in respect of the goods valued at Rs. 69,58,578/- CIF which are part of the

consignment imported under bill of entry No. 23 dated 5/6/2000 and which though held to be liable for confiscation, are not available for confiscation for the reason that the same had been cleared and had been disposed of by the importer, the plea of the appellants is that since the goods are not available for confiscation, no redemption fine under Section 125 can be imposed, while the learned DR citing the judgment of Hon'ble Supreme Court in the case of **Weston Components Ltd. vs. CC, New Delhi** (supra) pleads that even if the goods have been released and are not available for confiscation, the fine under Section 125 can be imposed.

7.1 Section 125 (1) of Customs Act, 1962 states that whenever confiscation of any goods is authorised by this Act, **the officer adjudging it may**, in the case of any goods, the importation or exportation whereof is prohibited under this Act or under any other law for the time being in force, **and shall**, in the case of any other goods, give to the owner of the goods or, where such owner is not known, the person from whose possession or custody such goods have been seized, an option to pay in lieu of confiscation, such fine as the said officer thinks fit. In terms of 1^{st} proviso to this Section, such redemption fine shall not exceed the market price of the goods confiscated, less in the case of imported goods, the duty chargeable thereon. Thus, what Section 125 (1) provides is that while in case of goods whose import or export is prohibited, the adjudicating officer at his discretion may either confiscate the goods absolutely without giving any option for release on fine or may give option to the importer/exporter or the person from whose possession the goods has been seized, to get the goods released on payment of fine, but in case of goods whose importation/export is not prohibited, such an option has to be compulsorily given. Though the provisions of Section 125 (1) are in accordance with the principle stated in Section 126 that on confiscation of goods, the property in them shall vest in the Central Government and therefore if the owner of the goods wants the goods back he will have to pay fine, what Section 125 (1) prescribes is only giving an option for release of the goods to the owner/the person from whom the goods had been seized, which the person may or may not exercise. Thus, what Section 125 (1) provides for is redemption fine, which the owner of the goods/ person from whose possession the goods had been seized, is required to pay, in addition to duty, if any payable under Section 125 (2), if he wants to release the goods. The question arises as to whether the redemption fine can be imposed and recovered if the goods are not available for confiscation for the reason that the same had been released prior to confiscation order. In this regard, there can be two situations -

(a) At the time of import, there is dispute about liability of goods to confiscation under Section 111 or 113 of the Customs Act, 1962 and pending the settlement of dispute, on the request of the importer/exporter, the goods are allowed to be cleared against a provisional release bond – the condition of bond being to produce the goods when called upon to do so or pay the value of the goods.

(b) At the time of import/export, the goods are cleared by the custom without any objection and only subsequently upon investigation it is found that the import/export of the goods was contrary to prohibitions imposed under Customs Act or any other law for the time being in force and the goods are liable for confiscation.

In situation (a), it can be said that the importer/exporter had opted to get the goods released pending the settlement of dispute regarding their confiscation, and when subsequently the goods are held to be liable for confiscation, in term of bond executed by him, he can be asked to pay the redemption fine under Section 125 (1). The judgment of Hon'ble Supreme Court in case of **Weston Components Ltd. vs. CC, New Delhi** (supra) is in respect of such a case. According to the learned DR, this judgment of the Apex Court is applicable in all the cases including the cases at (b) above where the goods are not available for confiscation, as the same had been unconditionally released by the customs without any objection, at the time of import/export. This plea is not acceptable as what Section 125 (1) prescribes is giving an option to the owner of the goods/person from whom possession the goods had been seized, to get the confiscated goods released on payment of fine determined by the adjudicating authority and therefore this section can be invoked only in those cases where either at the time of confiscation order, the goods are available and the owner of the goods is in a position to exercise the option to redeem the goods on payment of fine or the owner of the goods, pending the settlement of dispute regarding confiscation, but before the confiscation order, had opted for provisional release of the goods against a bond. But in a case when at the time of import/export, there was no objection from customs authorities and the goods had been cleared without any objection unconditionally, and subsequently the goods are held to be liable for confiscation, if the goods are still available, the Government can take possession of the same, but if the goods are not available for confiscation, redemption fine cannot be imposed under Section 125 (1), as giving an option to redeem the goods on payment of redemption fine is meaningless when the goods had been unconditionally released and are not available for confiscation. Hon'ble Punjab & Haryana High Court in case of **CC, Amritsar vs. Raja Impex (P) Ltd.** reported in **2008 (229) E.L.T. – 185 (P&H)** has held that if initially, some goods are cleared unconditionally and subsequently proceedings are initiated for under valuation and other irregularities, redemption fine under Section 125 (1) cannot be imposed and that when goods are not available for confiscation, Section 125 would be applicable only in those cases where the goods had been released by the concerned authorities subject to furnishing bond/undertaking etc. This Tribunal in case of **Blue Dart Express vs. Commissioner of Customs** reported in **1999 (111) E.L.T. – 102 (T)** while holding that no fine can be imposed under Section 125 (1) of the Customs Act, 1962 in respect of the goods held to be liable for confiscation but which are not available for confiscation for the reason that the same at the time of import had been cleared unconditionally without any objection, observed that redemption fine in lieu of confiscation under Section 125 (1) is not a fine as understood in criminal jurisprudence, that it is not a penalty in that sense, that it is only an option to the person to pay an amount in lieu of confiscation and that it contains no penal connotation.

7.2 In view of the above discussion, the imposition of redemption fine of Rs. 50,00,000/- in respect of goods valued at Rs. 69,58,578/- imported under bill of entry No. 23 dated 5/6/2000 is set aside. However, the redemption fine in respect of the goods which had been seized and were available for confiscation is upheld.

8. In view of the above discussion -

(a) while the redemption fine of Rs. 50,00,000/- (Rupees Fifty Lakhs) imposed in respect of the goods valued at Rs. 69,58,578/- CIF cleared under bill of entry No. 23 dated 5/6/2000, which are not physically available for confiscation, is set aside, the confiscation and redemption fine in respect of seized goods which were available for confiscation is upheld ;

(b) imposition of penalty of Rs. 1,18,17,739/- on M/s Meerut Exim under Section 114A of Customs Act, 1962 is upheld ;

(c) while imposition of penalty on Shri Ashwani Kumar Jain, under Section 112 is upheld and separate penalty on M/s Meerut Exim under Section 112 is set aside, penalty on Shri Ashwani Kumar Jain reduced to Rs. 25,00,000/- (Rupees Twenty Five Lakhs) ; and

(d) penalty on Shri Balbir Singh Sethi under Section 112 is upheld, but the same reduced to Rs. 10,00,000/- (Rupees ten Lakhs).

9. The appeals stand disposed of, as above.

(Pronounced in open court on 8/4/2011)

(Justice R.M.S. Khandeparkar)
President

(Rakesh Kumar)
Member (Technical)

PK