IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL, NEW DELHI, PRINCIPAL BENCH NEW DELHI
COURT-IV

Date of Hearing/ Decision : **09.03.2017**

Appeal No. C/50320,50322,51685/2016 -CU (DB)

[Arising out of the Order in Original No. OIO-25-2015-DM-COMMR-IMP-ICD-TKD dated 14.12.2015 passed by Commissioner Customs, New Delhi]

M/s. Global Infotech … Appellant
Shri Pankaj Gupta, Partner
Shri Rohit Sarna

vs.

Commissioner of Customs, New Delhi … Respondent

Appearance:

Rep. by Shri J.P. Kaushik & Shri Bhasin Shetty, Advs. for the Appellants
Rep. by Ms. Suchitra Sharma, DR for the respondent

Coram: Hon'ble Mrs. Archana Wadhwa, Member (Judicial)
Hon'ble Mr. V. Padmanabhan, Member (Technical)

Final Order No. 52282-52284/2017 –CU (DB)

Per Mrs. Archana Wadhwa

All the three appeals are being disposed by a common order as they arise out of the same set of proceedings.

2. After hearing both the sides duly represented by Shri J.P. Kaushik, and Shri Bhasin Shetty ld. Advocates for the appellants and Ms. Suchitra Sharma, ld. DR for the Revenue, we find that M/s. Global Infotech imported certain items and filed bill of entry on 08.09,2014 declaring various items imported by them along with value of the same. As per the table annexed to the order of the Commissioner, items 1 to 30 were declared by the appellant which are in the nature of Toys, Ash Tray, Soft balls etc. There is no dispute about the description of the said declared items. However, the Revenue enhanced the value of the same based upon the

NIDB data. Apart from the said items, the consignment was also found to contain 40 boxes of Glass Chattons, which were not declared by the appellant.

3. The matter was taken up for adjudication. The lower authority confirmed the demand of duty in respect of 30 declared items by enhancing the assessable value based upon NIDB Data. As regards Glass Chatons, the value was again adopted from the NIDB Data and the demand was confirmed to the extent of Rs. 46.63 Lakh along with confiscation of the same and imposition of penalty.

4. Arguing in respect of first 30 items, ld. Advocate submits that it is well settled law that NIDB Data cannot be made the sole basis for enhancement of value of the goods. For the above purpose, reliance is placed upon the Tribunal decision in the case of *CCE vs. Asia Pacific Distributors – 2012 (286) ELT 720 (Tri. Del.).*

We agree with the ld. Advocate that apart from the NIDB Data, there is virtually no other evidence on record to reflect upon the under valuation of the said declared items. There is also no discrepancy about the description of the same and as such, enhancement of the value, without any evidence on record except NIDB Data, cannot be upheld.

5. As regards Glass Chatons, ld. Advocate fairly agrees that the same were not declared to the customs but submits that as per the correspondence entered into between them with the foreign supplier, the said Glass Chatons were sent by mistake. However, the assessee is ready to accept the same and get the same cleared on payment of duty. Ld. Advocate submits that the Glass Chatons have to be held to be beads classifiable under heading 7018 1020, which attracts lower rate of duty whereas, the Revenue has classified the same under the residuary entry 7018 1090 which attracts the higher rate of duty. He draws our attention to the Tribunal's order in the case of *Art Beads Pvt. Limited vs. CC (Import) Mumbai – 2013 (292) ELT 472 (Tri. Mum.)* wherein the Glass Chatons have been held to be

beads. He submits that even though the said decision was placed before the Commissioner, he has side-lined the same and has not given any finding in respect of the said classification dispute.

Ld. Advocate further submits that items 1 to 30 have been confiscated under the provisions of Section 119 of the Customs Act, on the ground that the same have been used to conceal the undeclared Glass Chatons. He refers to the Tribunal decision in the case of *Kantilal Daga & Anandmal Sethia vs. CC, INB, Patna*, wherein it was held that the concealment and covering are two different expressions and unless there is evidence to show that the undeclared goods were concealed with the declared goods, mere coverage would not call for confiscation under Section 119 of the Act. Similarly, in respect of the imposition of penalties on the partner of the Company, ld. Advocate submits that penalty has been imposed under Section 114A and also under Section 114AA, which provides for imposition of penalty on the importers and not on the partners.

6. Arguing on behalf of Shri Rohit Saran, ld. Advocate Shri Shetty submits that he is an employee of the CHA who filed Bill of Entry and has been held liable to penalty for the alleged contravention of CHA Regulations. By drawing our attention to various decisions, he submits that such contravention of CHA regulations cannot call for imposition of penalty under the Customs Act, unless there is evidence to the effect that the CHA has abetted or connived with the importer. As regards Glass Chatons, we note that the same were admittedly undeclared items.

7. Ld. DR for the Revenue submits that the Commissioner has independently examined the classification of the Glass Chatons and has come to the finding that the same were properly classifiable under the residuary heading. As such, she submits that the duty has rightly demanded from the appellant.

She also submits that admittedly Glass Chatons which were not declared by the importer, were covered by the various other items which were declared by the assessee and such coverage was with a malafide intention to conceal the Glass Chatons. As such, the confiscation of other items under Section 119 of the Act is appropriate.

8. After appreciating the submissions made by both sides, we have already held that demand of duty in respect of 30 declared items by enhancing their value on NIDB Data basis cannot be upheld. For the said reasons, then confiscation can also not be upheld. We will examine the confiscation of the said items, in terms of section 119 later on.

9. As regards Glass Chatons, it stands fairly admitted before us that the same were not declared by the importer. As such, we hold that such undeclared items are liable to confiscation and the importer is also liable to penalty. However, the appellants have contested the classification of the same and have relied upon the Tribunal decision in the case of *Art Beads Pvt. Limited (supra)*. Though this decision was placed before the Commissioner, he has not referred to the same and has not even distinguished it on any logical ground. The adjudicating authority was under the legal obligation to consider the law declared by the higher fora and to decide the issue accordingly. As such, for the limited purpose of classification of the Glass Chatons, we remand the matter to the Original Adjudicating Authority for fresh decision. The appellants duty liability would also be assessed accordingly. Inasmuch as the matter stands remanded for re-assessment of the duty quantum, the redemption fine as also the penalty on M/s. Global Infotech would also be re-quantified by the adjudicating authority, accordingly.

10. As regards the confiscation of the 30 declared items, in terms of Section 119 of the Customs Act, we find that there is nothing on record to show that the same were used for concealing the undeclared goods. Mere presence of the declared and undeclared items in the import consignment would not *ipso-facto*

lead to the conclusion that declared items were brought only with the intention of concealing the undeclared items. As such, we hold that their confiscation is not called for, the same is accordingly set-aside.

11. As regards the penalty on Shri Pankaj Gupta, Partner of the firm, we find that the partnership firm has already been held liable to penalty and as such imposition of separate penalty on the partner is not justified. For the above proposition, we refer to the decision of the Hon'ble Bombay High Court in the case of *Commissioner of Customs (E.P.) vs. Jupiter Exports – 2007 (213) ELT 641 (Bom.).* Accordingly, the penalty imposed on Shri Pankaj Gupta is set-aside.

12. As regards penalty on Shri Rohit Saran, we find that the same stands imposed only for alleged violation of CHA Regulations and not for the contravention of any of the provision of Customs Act. The Hon'ble Madras High Court in the case of *Commissioner of Customs (Exports), Chennai vs. I. Sahaya Efin Prabhu – 2015 (320) ELT 264 (Mad.)* has upheld the Tribunal decision wherein, in the absence of any positive role played by CHA for abetment to the exporter in that case, penalty imposition for violation of CHA Regulations was set-aside. By following the said decision, we set-aside the penalty imposed on Shri Rohit Saran and allow his appeal with consequential relief, if any.

All the three appeals are disposed of in the above terms.

[Order dictated and pronounced in the open court]

(**V. Padmanabhan**)
Member (Technical)

(**Archana Wadhwa**)
Member (Judicial)

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