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

COURT NO. I

DATE OF HEARING : 20/06/2017.
DATE OF DECISION : 07/08/2017.

Customs Appeals No. 51369 and 51661 of 2014

[Arising out of the Order-in-Original No. 49/NLB/Commr/2013 dated 31/10/2013 passed by The Commissioner of Customs (Import & General), New Custom House, New Delhi.]

M/s Om Freight Forwarders Pvt. Ltd.] Appellants
Shri Prashun Jain]

Versus

CC (I&G), New Delhi Respondent

Appearance

Shri Rupesh Kumar, Advocate (For appeal No. C/51369 of 2014) and Ms. Surabhi Sinha, Advocate (For appeal No. C/51661 of 2014) – for the appellant.

Shri R.K. Manjhi, Authorized Representative (DR) – for the Respondent.

CORAM :**Hon'ble Shri Justice Dr. Satish Chandra, President**
Hon'ble Shri B. Ravichandran, Member (Technical)

Final Order No. 55820-55821/2017 Dated : 07/08/2017

Per. B. Ravichandran :-

These two appeals are against the common impugned order dated 31/10/2013 of Commissioner of Customs (I&G), New Custom House, Airport, New Delhi. The case relates to import consignment covered by bill of entry dated 16/11/2010. The said bill of entry was filed by Custom House Agent M/s Rajender P. Kapur in the name of M/s Rajdhani Crafts, Jaipur, a 100% EOU. The goods were declared as herald frame (spare parts of weaving machine) with a value of Rs. 5,66,862/-. The exemption from customs duty and CV duty was claimed under Notification 52/2003-CUS dated 01/03/2003 and 2/2008-CX dated 01/03/2008. Based on certain specific information regarding possible violation of provisions of Customs Act, 1962 in the import of the said consignment, the officers intercepted the consignment and conducted further follow up enquiry. Shri Prashun Jain, had gate pass for the consignment and was present in the clearance gate for clearing the said goods. M/s Prashun Jain is the proprietor of Custom House Agent, M/s Prashun Jain and has "F Card" issued by the Customs Authority. During the course of enquiry, he informed that the import consignment was Micro SD Memory Card of 2 GB capacity. The goods were examined and found contained Micro SD Card of 2GB and RAM of 1 GB. The goods were seized and further investigation conducted. On completion of the investigation show cause notice dated 17/11/2011 was issued to various persons for confiscation of seized goods, to re-determine of value including for past clearances, demand of differential duty including past clearances, imposition of penalties under Section 112 and 114AA, 117 for various offences alleged therein.

2. The case was adjudicated resulting in the impugned order. The Commissioner ordered confiscation of goods covered under

the bill of entry dated 16/11/2010 after re-determining the value as Rs. 67,29,000/-. Option to redeem the same was given to Shri Prashun Jain on payment of a fine of Rs. 10 lakhs. The value for similar goods cleared in the past two occasions were re-determined and a total differential duty of Rs. 67,17,015/- was demanded from Shri Prashun Jain. Penalties equivalent to this amount, each, were imposed under Section 112 and Section 114AA of the Customs Act, 1962. Penalties of Rs. 2 lakhs each were imposed separately under Section 112 and Section 114AA on Shri Biplav Kumar, 'H' Card holder of CHA and M/s Om Freight Forwarders P. Ltd.. No penalties were imposed on Shri Prashant Gupta and on M/s CMC Ltd., the other noticees.

3. The learned Counsel for Shri Prashun Jain, contesting the impugned order, submitted on the following points :-

(a) customs duty cannot be demanded from appellant as he does not fall into the scope of "importer" as per Section 2 (26) of the Customs Act, 1962. The appellant is neither the importer of the said goods nor is he owner of the said goods. He did not deal with the goods for purpose of customs clearance at any time. Duty under Section 28 can be demanded only from the person chargeable to duty;

(b) the reliance placed on the statements dated 19/11/2010 of the appellant is not sustainable. The appellant nowhere admitted that he is the importer of subject goods. The statement was retracted on 20/11/2010 itself, before the Magistrate. Shri Prashant Gupta was alleged to be the owner of the impugned goods. Even the show cause notice alleged that Shri Prashant Gupta is involved in import and the demand was also proposed against appellant alongwith Shri Prashant Gupta. However, the impugned order exonerated Shri Prashant Gupta based on the very same evidence ;

(c) there are serious infirmities and inconsistencies in the show cause notice as well as the impugned order. On the one hand, the appellant is held to be actually importer whereas on the other hand it was also held that the appellant is CHA of anonymous import and thus gets status of importer in terms of Section 147 (3) of the Act ;

(d) merely because the appellant had the gate pass for the goods under said bill of entry, no action can be taken against the appellant. The goods were lying outside the customs area and the appellant never presented himself for clearance from customs. The duty demand on the past imports are not at all sustainable. There is no evidence about the involvement of appellant as the importer of goods. No evidence was given in the notice regarding the contends of past clearances and the connection of the appellant to such clearances.

Without prejudice to the above contention, the duty calculation is made arbitrarily on prorata basis without any enquiry regarding the quantity of goods imported under the past bills of entry. No enquiry or investigation was conducted with reference to the said two bills of entry ;

(e) no penalty under Section 114AA or Section 112 of the Customs Act, 1962 is imposable on the appellant as these provisions are not attracted in the case against the appellant.

4. The learned Counsel appearing on behalf of M/s Om Freight Forwarders P. Ltd. submitted that the appellants are engaged in

the business of freight forwarding. On 16/11/2010 in respect of import consignment in the name of M/s Rajdhani Crafts, one Shri Sunil Kumar came to the premises of the appellant representing the importer and collected the delivery order. As Shri Sunil Kumar brought an authorization with a letter head of M/s Rajdhani Crafts, they collected the clearing charges of Rs. 3,111/- and allowed the clearances. Apart from the regular clearing charges, the appellants are not involved in any activity which can attract penalty under Section 112 or Section 117 of the Act. The show cause notice was issued to the appellant for imposition of penalty under Section 112 and 117 of the Act, whereas the Commissioner imposed penalty under Section 114AA. The proceedings are beyond the scope of the notice and on this ground alone the same has to be set aside. There is no justification to impose penalty on the appellant as they have not acted with any malafide, with prior knowledge, of any possible violation of Customs Act. They have not gained anything in dealing with the said consignment, except for regular clearance charges.

5. The learned AR supported the findings of the Original Authority. He submitted that at the time of examination of goods on 18/11/2010 at the import shed, Shri Prashun Jain presented himself and informed about exact nature of goods and had gate pass for the shipment with him. In the two confessional statement dated 19/11/2010, Shri Prashun Jain gave details of the background of the case. The shipment was imported by Shri

Prashant Gupta as per the claim made by Shri Prashun Jain. However, the Department could not get any evidence regarding involvement of Shri Prashant Gupta. Shri Prashun Jain tried to mislead the Department when the bill of entry was actually in the name of M/s Rajdhani Crafts. Shri Rajender P. Kapur, CHA, in whose name the bill of entry filed stated in his statement that he was not aware as to who filed the bill of entry. The statement of the transporter Shri Kishan Pal indicates that Shri Prashun Jain has booked the shipment for transport from airport to Rohini. Past import of similar goods were admitted by Shri Prashun Jain. Shri Prashun Jain as a 'F' card holder, was aware of the provisions of customs law. The retraction statement given by him cannot be relied upon. The learned AR submitted that the appeals are without merit.

6. We have heard both the sides and perused the appeal record. The first point for determination is – who is the importer of the impugned goods. Section 2 (26) of the Act defines "importer", in relation to any goods at any time between their importation and the time when they are cleared for home consumption, includes any owner or any person holding himself out to be the importer. In the present case, the impugned order held Shri Prashun Jain as the importer. In consequence of such finding, the duty demand and the penalties were confirmed against him. The appellant denied that he is the importer of the goods. On careful perusal of the impugned order, we note that there are serious infirmities and inconsistencies in the said order

in certain crucial aspects. The confessional statements of Shri Prashun Jain which formed the main basis of the case (alongwith his possession of gate pass for clearing the cargo), did not bring out that the ownership of the goods is with the appellant. In fact, in the statements given before the authorities Shri Prashun Jain has never admitted to his importing these goods. The admission is regarding arranging for parties who will provide financial assistance and procurement of imported goods. It indicates his involvement with the import consignment as facilitator, not as importer. In fact, it was mentioned that he and Shri Biplav Kumar has arrangement between them to the effect that Shri Prashun Jain will arrange for parties who will provide finance and procurement of imported goods and Shri Biplav Kumar will arrange for clearance of goods. In the second statement, the appellant stated that the goods were imported by Shri Prashant Gupta, the appellant is suppose to help the importer in clearing the goods through customs.

7. On perusal of the discussion in the impugned order and the submissions made by the appellant, we note that nowhere it is coming out, with evidence, that the appellant can be considered as importer of the impugned goods. The main emphasis was on the statements given on 19/11/2010, which were retracted on 20/11/2010 before the Magistrate. This puts a question mark on the reliability of such statement. The statements provided valuable evidence, if corroborated with support from other sources. This is missing in the present case. Even the statements

given by the appellant were selectively relied upon. When he claimed that Shri Prashant Gupta was the owner/ importer of the consignment, the same was not accepted. Whereas, the other aspects which were adverse to him were accepted as true, by the Original Authority. In fact, we note that no other corroboration is available to indicate that Shri Prashun Jain can be held as importer of the consignment. The Original Authority itself recorded that Shri Prashun Jain acted as a CHA of anonymous importer and thus gets the status of importer in terms of Section 147 (3) of the Act. We find that such contrary findings have only weakened the conclusion drawn by the Original Authority. In fact, the proviso to the said sub-section was not examined and discussed by the Original Authority. It states that in case of short levy or non-levy, the same shall not be recovered from the agent unless the Assistant Commissioner forms the opinion that the same cannot be recovered from the owner or importer. In the present case, when the importer himself is not identified, the question of authorization, expressly or impliedly does not arise. We note that the appellant never presented himself before the customs with reference to import or clearance of goods. He presented himself before the officers when the enquiry was conducted regarding the subject goods. It is also to be noted that the bill of entry in the present case is in the name of Shri Rajender P. Kapur, CHA. On later investigation, it was also revealed that Shri Kapur was not aware of filing of these bill of entry.

8. When the position regarding the consignment under seizure is as above, the proceedings with reference to past clearance are in further weaker ground. The contents of the past clearance, their identity and who processed the import on whose behalf could not be established. Even on the principle of preponderance of probability as invoked by the Original Authority, we find that the present case falls much short of required proof. The selective reliance of part of the retracted statements alone cannot be the basis for sustaining the duty demand against the appellant. On careful consideration of the evidences available on record, we hold that Shri Prashun Jain cannot be held as importer in the present case.

9. However, the available evidence including the statement of the transporter and presence of gate pass with the appellant, his prior knowledge of contents, alongwith other evidences gathered, shall indicate that the appellant is not totally blemishless. Considering that the appellant is a 'F' card holder, he is aware of the provisions of the customs law. He had acted in a manner in the present case that will attract penal provisions of Section 114AA. The said section stipulates that if a person knowingly or intentionally makes, signs or uses, or causes to be made, signed or used, any declaration, statement or document which is false or incorrect in any material particular, in the transaction of any business for the purposes of this act shall be liable to a penalty not exceeding five times, the value of goods. We note that the

said provisions are wide enough to cover the acts of the appellant as brought out during the investigation. Considering that the evidences of such involvement in the past clearances are not available to a sustainable level and involvement in the present consignment has been established based on available evidence, we find that a penalty of Rs. 5 lakhs under Section 114AA will meet the ends of justice. Other than this penalty, we find that the appellant cannot be put to any liability for duty or penalty, under Section 28 and 112 of the Act.

10. Regarding the penalty imposed on M/s Om Freight Forwarders P. Ltd., we note that show cause notice proposed penalty on them under Section 112 and 117 of Customs Act, 1962 for their acts of omission and commission. However, the Original Authority imposed a penalty of Rs. 2 lakhs each under Section 112 and Section 114AA. We hold that the penalty under Section 114AA is not sustainable on the ground that the same was never proposed in the show cause notice. Regarding the penalty under Section 112, we note that the appellants are in the business of freight forwarding. They have collected clearing charges of Rs. 3,111/- as normally charged for the said services. They have stated that they have not acted in any manner in violation of the provision of Customs Act. The Original Authority imposing penalty under Section 112, held that the appellants have given delivery order to an unauthorized person, thereby violated the provision of Customs Act. The Original Authority relied on the decision of Hon'ble Karnataka High Court in **CC,**

Bangalore vs. Vikram Jain reported in **2009 (244) E.L.T. 504 (Kar.)**. We note that the Hon'ble High Court was interpreting Section 111 and held that the person from whom the goods were seized has to establish the bonafideness with valid document. Further, we also note that the reliance placed by the Original Authority on the Tribunal decision dealing with unclaimed consignment has no application to the facts of this case to decide the penalty on the forwarding agent. Even if it is admitted that the delivery order was issued without verifying the antecedent of the person, this will not amount to abetting an act or omission of such act, which requires prior knowledge of possible breach of legal provision, by the main offender. The Original Authority stated that by issuing delivery order without proper verification, the appellants have abetted the unlawful import of impugned consignments in connivance with Shri Prashun Jain. This assertion is not supported by any evidence. The charge of abetting can be established only when there is an prior knowledge on the part of abettor regarding possible offence by the main offender.

11. We also note that the Original Authority dealing with the liability of M/s CMC held that although there is negligence on the part of CMC staff no element of mens-rea appears to exist. Its also recorded that there is no evidence to support that M/s CMC benefitted from such contravention. It was accordingly concluded that the omission on the part of M/s CMC is not liable to penalty as an abettor as they had no knowledge of the offence

as well as they had no intention to defraud the exchequer by indulging in the offence of smuggling. The charge against M/s CMC was that they have enabled filing of bill of entry without verifying the authorized person’s status. On a similar situation, the Original Authority arrived at a different conclusion in respect of the freight forwarders. Here also the charge of negligence cannot lead to an offence as abettor. The reasons adopted by the Original Authority for M/s CMC are equally applicable to the present appellant also. In view of this, we find that there is merit in the appeal filed by the appellant and accordingly we set aside the penalties imposed on them. In view of above discussion and analysis, the appeal filed by Shri Prashun Jain is partly allowed and the appeal filed by M/s Om Freight Forwarders P. Ltd. is allowed.

(Order pronounced in the open court on 07/08/2017.)

(Justice Dr. Satish Chandra)
President

(B. Ravichandran)
Member (Technical)

PK