CUSTOMS EXCISE & SERVICE TAX APPELLATE TRIBUNAL,

West Block No.2, R.K.Puram, New Delhi

COURT-I

Date of hearing: 12.09.2017
Date of Pronouncement: 26.10.2017

Appeal No. C/50435/2015-CU[DB]

[Arising out of the Order-in-Original No. DLI-CUSTM-AXD-23/2014 dated 31.03.2014, passed by the Commissioner of Central Excise, New Delhi]

Shri Jatin Arora … Appellant

Vs.

C.C. New Delhi ... Respondent

Appearance:

Present Shri A.K. Prasad & Ms. Surabhi Sinha, Advocate for the appellant
Present Shri Govind Dixit, DR for the respondent

Coram: Hon'ble Mr. Justice (Dr.) Satish Chandra, President
Hon'ble Mr. V. Padmanabhan, Technical Member

FINAL ORDER No. 57373/2017

Per V. Padmanabhan:

The present appeal is against the order in Original No. 23/2014 dated 24/07/2014.

2. The impugned order has been challenged by Sh. Jatin Arora, partner, against the penalties levied on him amounting to rupees 70 lakh as well as rupees 20 lakh under various sections of the Customs Act. It is pertinent to record that no appeals are before us from the main unit i.e. M/s Global Partners (India) against whom duty demands have been raised and penalties

imposed. No appeals have also been filed by any of the others on whom penalties have been imposed in the impugned order.

3. The brief facts of the case are that M/s. Global Partners (India) is a unit licensed in the NOIDA Special Economic Zone (NSEZ). They have been given permission for trading in ready-made garments and accessories for garment industries such as buttons, tapes, labels, chatons, needles and consumables. On 15.12.2012, intelligence was received that goods imported duty free by M/s. Global Partners (India), SF-1-10B, NSEZ, Noida, have been clandestinely removed from the NSEZ without any valid and proper documents. Consequently, checking and stock taking of the goods imported was ordered to be conducted in the unit in order to ascertain the factual position. During the course of the checking as well as physical verification of stock, it was found that some goods were lying packed in cartons and plastic bags Shri Jatin Arora, Partner of M/s. Global Partners (India), Noida, declared that the said goods were Chatons which had been imported without payment of duty for trading and had been packed for export. The cartons appeared to be fresh and without any marks and numbers. Thereafter, the cartons were opened and the goods were subjected to examination. On being opened, the cartons were found to contain "old and rejected glass beads and glass pieces." However, no quantity of Chatons which were imported by the unit and as declared by Shri Jatin Arora, was found in the premises during the physical verification. Further, some of the cartons were found to contain sewing needles which

was stated by Shri Jatin Arora to have been imported under BOE no. 7 434 dated 29.10.2012. On being asked about the presence of the old and rejected glass beads and glass pieces instead of chatons in the carton boxes in the premises of the unit, Shri Jatin Arora failed to give any satisfactory reply. Thereafter, the total quantity of the goods imported by the unit was co-related with the total quantity of goods exported by the unit. The co-relation revealed that there was a shortage of 3931 kgs of Chatons and 7166 kgs of sewing machine needles which should have been available in stock in the unit. A work sheet showing import-export details of M/s. Global Partners (India), Noida, was prepared for arriving at the shortage. On being asked about the reasons for the shortage, Shri Jatin Arora admitted that the goods found short have been diverted in the DTA clandestinely without payment of duty and in place of Chatons, old and used glass pieces and beads of various shapes, size and colour have been brought in the premises to export the same in the garb of chatons to cover up the clandestine removal of the imported chatons into DTA. Further, investigations were undertaken by the Customs Authorities which ultimately led to the conclusion as follows:

i) Goods viz. chatons and machine sewing needles procured by M/s. Global Partners (India), Noida without payment of duty for trading were clandestinely diverted from NOIDA SEZ to domestic tariff area without payment of customs duty.

ii) M/s. Global Partners (India), Noida transferred hand sewing needles to M/s. Aparna Fashions, SEZ, Noida without seeking permission and without accounting the details in the books of accounts.

iii) M/s. Global Partners (India), Noida brought within the limits of SEZ, old and rejected glass beads and needles with a view to substitute the imported goods which were diverted without payment of duty.

4. After issue of show cause notice, the adjudicating authority vide the impugned order, ordered confiscation of the old and rejected glass pieces found in the premises of M/s. Global Partners (India), Noida as well as the hand sewing needles found in the premises of M/s Aparna Fashions. Customs duty was demanded from M/s. Global Partners (India), Noida on the total quantum of imported goods which were procured without payment of duty and which were found diverted into DTA clandestinely.

5. In addition to imposition of penalty on M/s. Global Partners (India), Noida and others, penalties were also imposed on Sh. Jatin Arora, Partner of M/s. Global Partners (India), Noida under section114 (a) as well as 114(AA).

6. The present appeal is filed by Sh. Jatin Arora, challenging the penalties imposed on him.

7. With the above background we heard Shri A.K. Prasad & Ms. Surabhi Sinha, Advocate for the appellant as well as Shri Govind Dixit, DR for the respondent.

8. Shri A.K. Prasad, Advocate arguing the case of the appellant submitted as follows:

i) The proceedings against the appellant have been conducted by the Customs Authorities without jurisdiction. SEZ units are deemed to be territory outside customs territory of India and the Commissioner of Customs had no jurisdiction to confiscate the goods and impose penalty in respect of a unit which is situated in SEZ area. He referred to section 3(1) of the SEZ Act 2005 and argued that powers to Customs Authorities were extended only vide the SEZ Rules (Amendment) Rules 2016 w.e.f 05.08.2016. CBEC circular dated 01.03.2017 has further clarified this position.

ii) He further relied on the following case laws to support the point that the impugned order has been issued by Commissioner without jurisdiction:

   a) Morgan Tetronics Ltd. Vs. CC New Delhi 2015 (316) ELT 276 (Tri-Del)

   b) Charisma Jewellery Pvt. Ltd. Vs. CC Mumbai 2016 (340) ELT 221 (Tri-Mum).

iii) The Ld. Counsel further argued that no penalty can be imposed on Sh. Jatin Arora who is a partner in M/s. Global Partners (India), Noida inasmuch as penalty has already been imposed on the partnership firm in the impugned order. In this regard he relied on the case of

Amritlakshmi Machine Works Vs. CC Mumbai 2016 (335) ELT 225 (Bom.)

9. Countering the arguments the ld. DR submitted as follows:

i) On the question of jurisdiction, he submitted that SEZ is physically situated within the territory of India and consequently Customs officers will have jurisdiction since the Customs Act is applicable to the whole of India.

ii) DR distinguished the decision of the Hon'ble Bombay High Court in the case of ***Amritlakshmi Machine Works***. He argued that penalty can be imposed upon both the partner as well as the firm in cases where the partner is found to have acted with knowledge in his individual capacity in addition to being a partner in the partnership firm. From the facts of this case, it is established that Sh. Jatin Arora was instrumental in planning and carrying out the evasion of customs duty by diverting duty-free imported goods into the DTA without payment of customs duty and in violation of SEZ act and rules.

10. We have heard both sides and perused the appeal record.

11. M/s. Global Partners (India), Noida have been permitted to operate in the Noida SEZ for carrying out trading in ready-made garments and accessories. In pursuance of such permission, M/s. Global Partners (India), Noida have imported various goods such as glass beads, chatons, sewing needles etc. The investigations carried out by Customs Department established the fact that M/s. Global Partners (India), Noida had diverted the

duty-free imported goods clandestinely without payment of duty. Further, it was noticed during investigation that an attempt was made for substituting the imported goods with old and worthless glass beads and needles so as to cover up such diversion.

12. At the outset we propose to discuss the argument advanced on the ground of jurisdiction. It has been argued on behalf of the appellant that M/s. Global Partners (India), Noida is a unit situated in Noida, SEZ and that Customs officers have no jurisdiction to investigate or adjudge any offence taking place in SEZ area. Such powers rest only with the Development Commissioner. Such powers have been conferred on customs Officers w.e.f 5.8.2016 vide notification amending the SEZ Rules 2005. The ld. counsel has further cited the case laws by the Tribunal in which it has been held that in the absence of any enabling provision in the SEZ act, the provisions of Customs Act 1962 will not be applicable to a unit situated in that region. Section 53 of the SEZ Rules makes it clear that SEZ is deemed to be a territory outside the customs territory of India.

13. We have perused the above decision in which the Tribunal has observed that the Customs Authorities had no jurisdiction to confiscate goods and impose penalty and interest on a SEZ unit. However, we note that the Hon'ble High Court of Gujarat has taken the Contra view in the case of ***Union of India vs Oswal Agricomm Pvt. Ltd. 2011-TIOL-733-HC-AHM-CUS***, the Division Bench of the Hon'ble High Court observed as follows:

"32. We have noticed that except the acts or omissions punishable under the Foreign Trade (Development and Regulation) Act, 1992, no other offence including the offence if any committed under the Customs Act or any other Central Act have been declared as "notified offence" under sub-section (1) of Section 21. Similarly, no officer or agency has been declared as "Enforcement officer" or "Agency" under sub-section (2) of Section 21 of the SEZ Act, 2005 for the purpose of the Customs Act or any other Central Act.

33. We have also note that Section 53 of the SEZ Act has been given effect in regard to Kandla SEZ, Gandhidham with effect from 14-3-2006. From the date of such notification, the Kandla SEZ, Gandhidham is deemed to be a territory outside the customs territory only for the purpose of undertaking the 'authorized operation'. That means the customs authority, who were empowered under Section 76G (repealed since 11-5-2007), has no power to authorise any developer to undertake any operation in the Special Economic Zone nor has the power to approve any proposal for setting up any unit within the Kandla SEZ.

34. But Section 53 being limited to the extent of 'authorized officer', who was earlier empowered to perform certain jobs under Chapter XA, the power of the Customs authorities under the Customs Act, including the power to confiscate and impose penalty under Sections 111 to 114, as enumerated in Chapter XIV of the Customs Act, is not taken away.

35. Thus, we hold that the competent authorities under the Customs Act are still empowered to confiscate any goods under Sections 111 and 112 and impose penalty under Sections 113 and 114, in appropriate case, even with regard to the units situated within the Special Economic Zone. The competent authorities are also empowered to take penal action under any other Central Act, if such violation is found to have been committed by any or other unit of SEZ including the writ petitioners, with regard to which no notification has been *issued either under sub-section (1) or sub-section (2) of Section 21 or sub-section (1) or sub-section (2) of Section 22 of the SEZ Act, 2005."*

14. Upon careful consideration of the above judgment of the Hon'ble High Court, we observed that the Tribunal's decision appears to have been delivered without considering the above decision. To this extent the Tribunal decisions may have to be considered as per *in curium*.

15. By respectfully following the decision of the Hon'ble Gujarat High Court, we decide that Customs Authorities had the jurisdiction to adjudicate cases originating within a SEZ even for the period prior to the amendment in the SEZ Rules. To this extent the impugned order cannot be held to be passed without jurisdiction.

16. Next to be considered is the argument that no penalty can be imposed on Sh. Jatin Arora, partner in as much as penalty has already been imposed on the a SEZ unit . we have carefully considered the decision of Hon'ble Bombay High Court in the case of the ***Amritlakshmi Machine Works (Supra)***. The Hon'ble High Court observed as follows:

"31. We make it clear that although the Division Bench of this Court in Textoplast Industries (supra) has held on first principles that Section 140 of the Act is to be read into all cases falling under Section 112(a) of the Act, we do not agree. Section 140 of the Act on first principles has to be read into only in cases where the notice to impose penalty under Section 112(a) of the Act, the Revenue makes out a case of an offence prima facie satisfying the requirements of Section 135(1)(a) of the Act. It is only then that Section 140 of the Act

can be invoked for purposes of imposition of penalty under Section 112(a) of the Act both upon the partner as well as the firm. In the second class of cases, i.e., abetment under Section 112(a) of the Act a specific case of abetment against the partner would have to be made for a separate penalty upon him. The notice issued by the Revenue should make out a case of the partner having acted and/or omitted to act with knowledge in his individual capacity that such act and/or omission to act on the part of the firm would render the goods liable to confiscation. It has nothing to do with Sections 135 and 140 of the Act. However, penalty cannot be imposed on the partner merely because penalty is being imposed upon the firm."

17. In the light of the above observations of the Hon'ble High Court, we have carefully examined the relevant show cause notice as well as the impugned order.

18. The investigation further established that Sh. Jatin Arora, partner, was the main person who was instrumental in planning and carrying out the systematic diversion of duty-free imported goods. The part played by Sh. Jatin Arora has been summarized as follows by the adjudicating authority in the impugned order:

"Shri Jatin Arora, Partner, M/s Global Partners (India), the unit is a partnership concern and the entire affairs of the unit are being managed and looked after by Shri Jatin Arora who is himself signing all the records and documents. Thus it is evident that he is solely responsible for the diversion of 3931 kgs of chatons and 7166 kgs of Machine sewing needles imported vide different bills of entry. He has attempted to cover up the shortage and clandestine clearance of 3931 kgs of chatons by substituting the same with 4030.70 kgs of old and rejected glass beads / pieces procured from the domestic

market to fulfill its export obligation and similarity he has attempted to cover up the shortage of 7166 kgs of machine sewing needles by substituting the same with hand sewing needles found in the premises of the unit as well as by placing them in the unit of M/s. Aparna Fashion. In his initial statement dated 15.12.2012 he admitted categorically and unequivocally that the shortages noticed during the course of physical verification conducted in the unit and recorded under panchnama dated 15.12.2012 in respect of both chatons and machine sewing needles. He also confessed categorically that the goods found in the cartons were old and rejected glass beads / pieces which had been purchased from the domestic market and were not the ones which had been imported against bills of entry filed with NSEZ customs. He again reiterated the said submissions and the admissions in his statement dated 15.04.2013. However, subsequently he has tried to mislead the investigations by stating that the goods were low quality chatons imported against BOE nos. 8468 dated 05.12.2012, 8696 dated 14.12.2012 and 7723 dated 07.11.2012. The contention of Shri Jatin Arora, does not appear to be tenable and is an afterthought aimed at covering up the misdeeds in view of the fact that the old and used glass beads were found in plain cartons without any marks and numbers and thus they can in no way be identified and related with the said BOEs."

19. Further it is seen that Sh. Jatin Arora tried to cover up the shortage which has arisen by clandestine clearance of 7166 kgs of machine sewing needles by bringing 1500kg of hand sewing needles to unit. He even tried to mislead the Department by storing 496 kg of hand sewing needles in the premises of M/s Aparna Fashions. We are in agreement with the findings of the adjudicating authority in respect of Sh. Jatin Arora, partner.

20. As outlined above, the impugned order has clearly brought out the fact that Sh. Jatin Arora, partner, has indulged in acts of commission leading to evasion of customs duty by M/s Global Partners (India). Hence the present case will fall within the guidelines outlined by the Hon'ble High Court at Bombay. Consequently, for the acts of omission and commission on the part of Sh. Jatin Arora leading to the evasion of customs duty by M/s Global Partners (India), he will be liable for penalty both under section 114 A as well as section 114AA. Consequently we find no infirmity in the impugned order in respect of the penalties imposed on Sh. Jatin Arora, partner. The same is upheld.

21. In view of the above discussions the appeal filed is rejected. We make it clear that no other appeals filed by any of the other persons have been considered by us.

[Order Pronounced in the open court on **26.10.2017**]

(Justice Dr. Satish Chandra)
President

(V. Padmanabhan)
Technical Member

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