CUSTOMS EXCISE & SERVICE TAX APPELLATE TRIBUNAL,
West Block No.2, R.K.Puram, New Delhi

COURT-III

Appeal No. C/50857/2017-CU [DB]

[Arising out of the Order-in-Original No. DLI/ CUSTOM/ PREV/ MKV/PR.COMMR/03/2017 dated 27/02/2017, passed by the Principal Commissioner of Customs, Preventive, New Delhi]

M/s Unitech Developers and Hotels Pvt. Ltd. … Appellant

Vs.

CC New Delhi … Respondent

Appearance:
Present Shri Sanjeev Sachdeva, Advocate & Shri A.K. Sinha, Consultant for the appellant
Present Shri Govind Dixit, DR for the respondent

Coram: Hon'ble Mr. S.K. Mohanty, Member (Judicial)
Hon'ble Mr. B. Ravichandran, Member (Technical)

Date of hearing/decision: 21.08.2017

FINAL ORDER No. 57927/2017

Per S.K. Mohanty

This appeal is directed against the impugned order dated 27/02/2017 passed by the Ld. Principal Commissioner of Customs, New Delhi. The appellant is not contesting the demand confirmed against it for non-fulfillment of the conditions of Notification dated 17.09.2004 and dated 09.05.2008 and also as per the conditions of Bond executed by it. However, the appellant has assailed the impugned order on the ground that imposition of penalty under Section 114A of the Customs Act, 1962 is not proper and justified inasmuch as Section 28 *ibid* has not been invoked for confirmation of the duty demand.

2. The Ld. Advocate appearing for the appellant submits that since the provisions of Section 28 *ibid* has not been invoked in the adjudication order for confirmation of the duty demand, penalty cannot be imposed under Section 114A *ibid* . He further submits that though the Show Cause Notice dated 29/02/2016 proposed for recovery of the duty demand under Section 28(4) *ibid*, but the Ld. Adjudicating Authority has observed that the said statutory provisions have no application since, there was no issue of non-levy or short levy of duty. Thus, referring to the observations of the ld. adjudicating authority, the ld. Advocate submits that in absence of fulfillment of the ingredients of Section 28 *ibid*, the provisions of Section 114A *ibid* cannot be invoked, justifying imposition of penalty on the appellant.

3. On the contrary, the Ld. DR appearing for the Revenue reiterates the findings recorded in the impugned order and further submits that for non-fulfillment of conditions of bond executed before the Department, the short paid duty can be recovered and the appellant is also exposed to the penal consequences and accordingly, imposition of penalty by the adjudicating authority is proper and justified.

4. Heard both sides and peruse the appeal records.

5. The short question involved in this appeal for consideration by the Tribunal is whether, in absence of determination of the duty liability by the proper officer, which was not levied or short levied by reason of willful misstatement or suppression of fact etc., can the provisions of Section 114A ibid be invoked for imposition of penalty.

6. The provisions of Section 114A *ibid* is reproduced below:-

> "**Section 114A. Penalty for short-levy or non-levy of duty in certain cases -** w*here the duty has not been levied or has not been short-levied or the interest has not been charged or paid or has been part paid or the duty or interest has been erroneously refunded by reason of collusion or any willful mis-statement or suppression of facts, the person who is liable to pay the duty or interest, as the case may be, as determined under sub-section (8) of section 28 shall also be liable to pay a penalty equal to the duty or interest so determined :*
>
> *Provided that …………………………………………………..."*

7. On perusal of the above statutory provisions, it reveals that imposition of penalty is subject to the condition that there must be determination of the duty liability under Section 28 *ibid* by the proper officer, which according to him, has been short levied or non-levied, owing to the reason of suppression etc. In this case, it is an admitted fact on record that the original authority has not determined the duty liability on account of short-levy or non-levy of

duty in terms of Section 28 *ibid*. Rather, in terms of non-fulfillment of the conditions of the bond executed by the appellant, the penalty has been imposed under Section 114A *ibid*. Since there is no adjudication or determination of duty in terms of Section 28 by the proper officer, as per the mandates of section 114(A*) ibid,* no penalty can be imposed on the appellant.

8. Therefore, we do not find any merits in the impugned order, so far as it imposed penalty on the appellant. Accordingly, the impugned order imposing penalty is set aside and the appeal is allowed in favour of the appellant.

[Order dictated and pronounced in the open Court]

(B.Ravichandran)
Member (Technical)

(S.K.Mohanty)
Member (Judicial)

Rekha