CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI

PRINCIPAL BENCH – COURT NO. – IV

Customs Appeal No. 50858 of 2019 [DB]

[Arising out of Order-in-Original No. 16/2017-18/VS/Commr(Import) C. No. VIII (HQ)10/ACC-IMP/ADJ/ST/44/15 dated 29.03.2018 passed by the Commissioner of Customs (Air Cargo Imports), New Delhi]

M/s. Smart Technologies **...Appellant**
Through Arvind Jawa (Proprietor)
C-44, Okhla Industrial Area
Phase – I, New Delhi

Vs.

Commissioner of Customs
(Air Cargo Imports) **...Respondent**
New Custom House
Near IGI Airport
New Delhi

APPEARANCE:

Shri Somesh Arora, Advocate for the Appellant
Shri Rakesh Kumar, Authorised Representative for the Respondent

Coram: HON'BLE MR. BIJAY KUMAR, MEMBER (TECHNICAL)
HON'BLE MRS. RACHNA GUPTA, MEMBER (JUDICIAL)

DATE OF HEARING : 24.06.2019
PRONOUNCED ON : 28.08.2019

FINAL ORDER No. 51145/2019

RACHNA GUPTA

The appellants herein are the importers involved in the import of electronic items. They imported a consignment under Bill of Entry No. 9454459 dated 04.06.2015. The Department on the basis of indication by the officers of SIIB, ACC(Import) NCH, New Delhi for a 100% examination after they observed a substantial difference between the IGM and the said Bill of Entry filed by the notice, examined the goods. An envelope was found in the package showing the value of goods amounting to USD 6,890 which was the value as found mentioned in IGM as well. However, the declared value of the said consignment by the appellant was USD 890. On further examination of goods it was observed that the goods imported were five sets of standard transition as against one set declared in the Bill of Entry. During investigation, the statement of the proprietor of appellant alongwith that of all concerned including the CHA, M/s. Milap Logistics Pvt. Ltd. were recorded and the documents were collected from the airlines/carriers/banks, etc. On the basis thereof, the Department alleged under valuation as well as mis-declaration of the consignment under Bill of Entry No. 9454459 dated 04.06.2015. Resultantly, a show cause notice No. 92/2015 dated 20.08.2015 was served upon the appellant proposing the demand and recovery of differential customs duty amounting to Rs. 1,64,50,604/- alongwith the interest. The amount of Rs. 75Lakhs as already deposited by the appellant was proposed to be appropriated. The imposition of penalty under Section 114A and 114AA was also proposed. The said show cause notice was adjudicated vide the Order-in-Original No. 16/2017-18 dated 30.03.2018 confirming the aforesaid proposal with imposition of same amount of penalty as that of the aforesaid demand under both the Sections respectively. Being aggrieved, the appellant is before this Tribunal.

2. We have heard Shri Somesh Arora, Advocate for the Appellant and Shri Rakesh Kumar, Authorised Representative for the Respondent.

3. It is submitted on behalf of the appellant that the Order is liable to be set aside on the sole ground of violation of principles of natural justice as no opportunity was afforded to the appellant to either present the case or to be heard in the matter and the decision is as good as an *ex-parte* decision. It is submitted that a request for keeping the adjudication in abeyance was made by the appellant seeking time to file an application in the Settlement Commission and also for Department to calculate the interest. It is submitted that personal hearing notices were never received by the appellant who was abroad from 13.01.2018 to 24.06.2018. Order is accordingly prayed to be set aside with the request for the opportunity of personal hearing being afforded to the appellant.

3.1 Learned Counsel has relied upon the case of **Surjit Singh and others Vs. State of Punjab** reported at **1984 (18) E.L.T. 241 (S.C.)** impressing upon that the penalty cannot be imposed upon/enhanced without giving an opportunity of being heard. The decision of **Reji Kurian Vs. State Tax Officer, Goods & Services Tax, Mattancherry** reported at **2018 (13) G.S.T.L. 260 (Ker.)** is also relied upon. It has been submitted that appellant was chronically sick who has been donated kidney by both of his parents and required treatment abroad for long intervals but, still in all its sincerity, the appellant has already paid duty and part interest. This fact was also brought to the notice of the Commissioner during the hearing dated 07.10.2016 and even prior to that the request was made to the Department to work out the figure of interest so that it could be deposited but there was no response to either of the requests of the appellant rather he confirmed the demand against him vide the Order under challenge, without appellant being heard.

3.2 It is also submitted that in the given circumstances, the Department was not even entitled to invoke extended period of limitation. The imposition of penalty under both the Sections i.e. 114A and 114AA of the Customs Act, 1962 has also been objected as both deal with the mis-declaration. It is submitted that penalty could be imposed under either of the said Sections to the discretion of the adjudicating authority but imposition of penalty under both these Section amounts to double jeopardy. With these submissions, the Order under challenge is prayed to be set aside and Appeal is prayed to be allowed.

4. While rebutting these arguments, learned Departmental Representative has submitted that it s not only the impugned Bill of Entry No. 9454459 dated 04.06.2015 but there has been as many as 190 Bill of Entries with respect to the prior imports by the appellant, as have been checked by the Department. In almost 98 cases, thereof the changes in invoices have been noticed. The noticed forgery has duly been acknowledged by the Proprietor of the appellant. His admission stands corroborated from the other respective documents as that of airways and even those as were received from banks. The appellant was intentionally under-valuing and mis-declaring his goods with the sole intention to evade the payment of Customs duty. The Department has committed no error while invoking the extended period of limitation. The observed guilt of the appellant stands well proved from the documents on record.

Adjudicating Authority has committed no error while confirming the demand.

4.1 It is further submitted that scope of both the Sections i.e. 114A and 114AA of the Customs Act is different. There is no error when the penalty under both of them has been proposed and confirmed. Finally, submitted that the case laws as relied upon by the appellant is not applicable to the given facts and circumstances. The Appeal is prayed to be dismissed.

5. After hearing both the parties, we are of the opinion as follows:

5.1 The main ground praying for setting aside of the impugned Order-in-Original is the violation of principles of natural justice. But from the Order-in-Original we observe that the adjudicating authority below had afforded the personal hearing in the matter on 07.10.2016. The hearing was attended by the father of the Proprietor of the appellant. On the said date Shri KL Jawa had paid customs duty of Rs.1.64Cr. and revealed the desire to file an application in the Settlement Commission with the prayer to keep in abeyance the adjudication proceedings. Subsequent thereto several other opportunities of personal hearing were granted to the appellant. It is observed that the adjudicating authority issued notices on 24.11.2017, 28.11.2017, 05.12.2017, 12.01.2017 and 31.01.2018 but neither there was an appearance on behalf of the appellant nor any proof was filed with respect of filing an application in the Settlement Commission as was mentioned on 07.10.2016 with the request for keeping the adjudication proceedings at abeyance. In the absence of the subsequent presence as well as the requested documents that too for a period of almost $1^{1/2}$ Years the adjudicating authority below proceeded ahead with the Order under challenge. This perusal is sufficient for us to hold that the Order is not an *ex-parte* Order and it has been wrongly so alleged by the appellant. Sufficient opportunity seems to have been granted to the appellant by the Adjudicating Authority. Also, the absence of appellant from 13.01.2018 to 24.06.2018 due to being abroad for medical treatment for chronic illness is also not opined sufficient to explain as to what prevented his father who appeared on 07.10.2016 on his behalf, to further appear or to at least tender the requisite document. The appellant had otherwise been corresponding with the Department.

6. We observe that till date the appellant has not produced anything to show that they ever approached the Settlement Commission nor there is any other effort post 07.10.2016, the date of personal hearing when father of the appellant attended the same that any reminder for continued abeyance for calculation of interest was ever given to the Department. There is nothing on record to show as to why the interest could not have been calculated and deposited in full by the appellant. Also, there is nothing on record to show that the notices as issued post 07.10.2016 were given to the appellant at the wrong addresses. In the given circumstances, especially when the appellant had knowledge of pendency of proceedings before the adjudicating authority and had appeared once through his father but instead of submitting on merits had prayed abeyance of adjudication in view of the desire to appear

before the Settlement Commission it was utmost required on the part of appellant to be diligent about the impugned adjudication. Absence of requisite due diligence on the part of the appellant cannot be a ground to extend any benefit in his favour. The ground of medical sickness of the Proprietor of appellant is already opined not relevant as the appellant had already marked his presence through the father of the Proprietor thereof. With these observations, we are of the firm opinion that neither the Order under challenge is an *ex-parte* Order as alleged nor there is violation of principles of natural justice as alleged. Rather sufficient efforts are apparent on the part of the adjudicating authority to serve repeated reminders to the appellant to appear and submit on merits. The appellant wilfully opted to not to avail the said opportunity. The Order under challenge cannot be set aside on the grounds of violation of principles of natural justice.

7. Coming to the merits of the case, we observe that Department after obtaining the documents from the respective banks of the importer and various airlines/carriers had observed that the appellant importer has systematically and with malafide intentions procured duplicate invoices or under-valued the consignment with express purpose of defrauding the Government Exchequer not only for the impugned Bill of Entry but also for the imports made during the period w.e.f. June 2010 to June, 2015. We observe that thrice the statements of Proprietor of appellant were recorded as on 11.06.2015, 25.06.2015 and 22.07.2015 under Section 108 of the Customs Act, 1962. There is the sufficient admission of the Proprietor of the appellant about the invoice dated 26.05.2015

issued by M/s. Patricia Hubbard Bomco Ind. Gloucester, USA retrieved from the consignment and also a copy obtained by the customs officers from the carrier M/s. UPS Jet Air Express showing the value of shipment covered under Bill of Entry No. 9454459 dated 04.06.2015 as USD 6890. It is also admitted that however, the total value thereof was declared at USD 890 FOB with the further admission that the said change in the value of the imported consignment was made keeping in view the cut throat competition in the market and in order to make some reasonable profits. The original invoices of value USD 6890 have been admitted to be intentionally replaced with the invoice having lesser value of USD890 to save the custom duty payable thereon which was done by the appellant by making a scanned copy thereof and by making the amendment therein. This admission is sufficient admission for alleged forgery on the part of the appellant to under-value the imported consignment with a clear intent to evade the customs duty.

8. Further, perusal of statement of Mr. Arvind Jawa (Proprietor of appellant) makes it clear that on earlier occasions also the appellant had similarly replaced the invoices showing the actual and higher value with the invoices showing lesser value and have thus repeatedly evaded the actual customs duty payable thereon. It is further observed that during the investigation the meticulous exercise with respect to comparing prior 192 Bills of Entry viz.-a-viz. the value reflected in the copy of 192 invoices, bills obtained from carrier/airlines and the bank statements of the appellant was done. The Department summarised that the appellant has resorted to

similar replacement in as good as 130 cases thereof. Those were summarised in Annexure A to the show cause notice reflecting the short payment of customs duty amounting to Rs.1,23,05,963/- during the period w.e.f. August, 2010 to June, 2015. In 17 other cases for the period July and August, 2015 the differential customs duty has been observed as Rs.41,44,641/- where after the impugned demand of Rs.1,64,50,604/- being an evasion of customs duty has been proposed and has been confirmed vide the Order under challenge.

9. There is nothing on record produced by the appellant to contradict the said documents based whereupon the differential duty has been calculated and confirmed by the Department. Above all, there is no retraction of the statement of the Proprietor of appellant acknowledging the alleged guilt. Law has been settled by Hon'ble High Court of Punjab and Haryana in the case **Shiv Shakti Steel Tube Vs. Commissioner** reported at **2008 (221) E.L.T. 166 (P&H)**wherein it was held that all statements made under Section 114 of Central Excise Act, 1944 by a witness or a party are *exfacie* admissible in evidence to sustain penalty. Section 14 of Central Excise Act, 1944 is *para meteria* to Section 108 of Customs Act, 1962. We further draw our support from the decision of Hon'ble Apex Court in the case of **R.Vishwanatha Pillai Vs. State of Kerala** reported at **2004 (2) SCC (105)** wherein it was held that equity or compassion cannot be allowed to bend the arms of law in a case where an individual acquires the status by practising fraud.

9.1 The fraud in the form of forgery is very much apparent in the present case not only from the non retracted confession of the

Proprietor of appellant but stands corroborated from the various documents recovered during investigation pointing towards the alleged under valuation, as discussed above. We, therefore, hold that under valuation of goods has rightly been held by the adjudicating authority below. The demand of differential customs duty is, therefore, upheld.

10. Now coming to the issue of mis-declaration, we observe that admittedly, five sets of the impugned mechanical instruments were found in the impugned consignment at the time of examination, i.e. with respect to Bill of Entry No. 9454459 dated 04.06.2015 whereas the Bill of Entry was mentioning only one set. Apparently, there is the difference in description of the imported goods as mentioned in the invoices issued by the exporter to the one annexed with the Bill of Entry. Even the Bill of Entry mentions the import of one set only. There is no evidence to support that five sets is actually equal to one set. We, therefore, are of the opinion that the adjudicating authority has committed no error while confirming the proposed mis-declaration of the goods imported by the appellant.

11. Coming to the aspect of imposition of penalty under both the provisions i.e. 114A and 114AA of Customs Act, 1944 –

11.1 Section 114A prescribes penalty in case of short levy or non levy of duty, i.e. in a case where the duty or interest as determined under Sub-section 8 of Section 28 of the Act and the interest payable thereon under Section 28AA of the Act has not been paid by the importer. Whereas, Section 114AA prescribes penalty for the use of false and incorrect material. No doubt, in case of use of false and incorrect material there would also be the short paid duty or interest but all cases of short paid duty or interest may not be the cases of use of false and incorrect material. Hence, the scope of both the Sections is out rightly distinct. We find no infirmity in the Order where, in the given facts and circumstances of admitted forgery duly corroborated by the documentary evidence, penalty under both the Sections have been imposed. The case law as relied upon by the appellant is not applicable to the facts because in the present case there is sufficient evidence about use of false and incorrect material.

12. The non calculation of interest (as alleged), if any, on the part of the adjudicating authority is also not relevant for extending any benefit to the appellant, in view of the fact that appellant out of his own volition has deposited the entire differential customs duty and even the part interest thereof that too beyond the period of 30 days from the date of the show cause notice.

13. In view of entire above discussion we are of the opinion that there is no infirmity noticed in the Order under challenge, same is hereby upheld and the Appeal is accordingly dismissed.

[Order pronounced in the open Court on 28.08.2019]

(BIJAY KUMAR)
MEMBER (TECHNICAL)

(RACHNA GUPTA)
MEMBER (JUDICIAL)

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