

**IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE
TRIBUNAL, KOLKATA
EASTERN ZONAL BENCH: KOLKATA**

Appeal No. C/78053/2018

(Arising out of Order-in-Appeal No.Kol/Cus (Port)/AA/62/2018 dated 04.01.2018 passed by the Commissioner of Customs (Appeals), Kolkata)

Commissioner of Customs (Port), Kolkata

Applicant (s)/Appellant (s)

Vs.

M/s. M.K.Impex

Respondent (s)

Appearance:

Shri S.Guha, AC(AR) for the Appellant (s)

None for the Respondent (s)

CORAM:

Hon'ble Shri P.K.Choudhary, Member (Judicial)

Date of Hearing/Decision:- 07.12.2018

ORDER NO.FO/77071/2018

Per Shri P.K.Choudhary

Revenue is in appeal being aggrieved by the impugned order passed by the Commissioner (Appeals), wherein he has reduced the fine and penalty under the condition that the goods could not be confiscated on the second charge of misdeclaration of value under Section 111(m) of the Customs Act, 1962 as the department could not bring any evidence which showed that the value declared in the subject bills of entry were misdeclared, thus leaving non-possession of a valid licence as the only offense to render the goods fit for confiscation under Section 111(d) of the Customs Act, 1962. Revenue has filed the present appeal praying for setting aside the Order-in-Appeal and restore the assessment made in case of Bills of Entry No.3763703 dated 30.12.2015 passed by the Deputy Commissioner of Customs, Group 3, Custom House, Kolkata.

2. Revenue is represented by Shri S.Guha, AC(AR), none is present for the respondent.
3. Heard Id.DR and perused the appeal records.
4. On perusal of record I find that the Commissioner (Appeals) in the impugned order has given a detailed finding. Relevant portions of the order are reproduced below:

“37. Considering all the facts and records available before me and appreciating the Board’s instruction on this issue, I find that the redemption fine has been imposed on higher side. The imported goods were old and used garments and no proper market enquiry was conducted to ascertain the actual margin of profit (MOP), beside this, approximately 25% value was extra loaded without any reasonable justification and same was accepted by the importer who also incurred demurrage for more than one month. In these circumstances the redemption fine should have been of the lower amount. There is no mis-declaration of value and goods are not liable for confiscation under Section 111 (m) of the Act and appellant had accepted the enhanced value and duty was paid in excess on enhanced assessable value from declared value to US\$ 1.316 (when they only agreed up to USD 1.10) and the importer had paid the extra duty.

38. Accordingly, enhanced assessed value is confirmed. I set aside the confiscation under Section 111 (m) of the Act but uphold the confiscation under Section 111 (d) of the Act.

39. In so far as, the imposition of penalty is concerned, I find that since the goods were liable to confiscation only under Section 111(d) and have been confiscated, therefore imposition of penalty is sustainable in law. However, while imposing personal penalty the adjudicating authority observed in its OIO that in past in identical cases penalty equivalent to 10% was imposed and he imposed penalty of 11% giving no justification for such variation. I find that the penalty should not be imposed in such a fashion but circumstances of each case and role of importer should be examined case to case basis before imposing personal penalty. Although imposition of penalty is discretion of adjudicating authority but discretion must be exercised judiciously. In very old famous judgment in the case of sharp Vs. Wakefield reported in 1891 appeal case at page 179, wherein it was held that “discretion means when it is said that something is to be done with discretion of the authorities, that something to be done according to the rules of reason and justice, not according to private opinion. It should be according to law not humour. It is to be not arbitrary, vague and fanciful, but legal and regular.” I find that in these cases, penalty has been imposed on the higher side as mentioned at column (j) of table chart at Para 1 above and I consider that unjustified high penalty

should be reduced making the same commensurate to the offence considering that alleged charge of under valuation under Section 111 (m) has been set aside and therefore, I reduce the personal penalty to 5% of CIF assessed value under Section 112 (a) of the Act. I, therefore, while imposing redemption fine and penalty, in respectful manner, follow the case laws of M/s Navpad Enterprises 2009 (235) E.L.T. 376 (Tri.-Bang.) affirmed by Hon'ble Kerala High Court and same stand taken by Hon'ble Tribunal, Kolkata in case reported in 2010 (261) ELT 824 (T) and in case of CC (Port) Vs. Sambhav Enterprises and others vide A/522/Kol/2009 and A/523/Kol/2009 dt. 27.08.2009; accordingly I modify the OIO and reduce the redemption fine to 10% and penalty to 5% of assessed value as follows:

Sr. No.	Appeal File No. 55".../Cus)Appg)/Kol /Port/ "xxxx"	B/E No. and Date	Re- assessed/co nfiscate value (in Rs.)	Redemptio n fine @ 10% (in Rs.)	Penalty @ 5% (in Rs.)
1.	449/16	3763703 dt. 30.12.15	3891149/-	3,89,100/-	1,94,600/-

5. In view of the above discussions, I do not find any infirmity with the impugned order and the same is hereby sustained.

6. In the result, appeal filed by the Revenue is dismissed.

(Dictated and Pronounced in the Open Court)

S/d.
(P.K.Choudhary)
MEMBER (JUDICIAL)