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

Customs Appeal No. 77218 of 2019

Arising out of Order-in-Appeal No. Kol/Cus(Port)/111/2019 dated 13.08.2019 passed by the Commissioner of Customs (Appeals), Kolkata.

Shri Anil Kapani
(48B, Pocket B, Ashok Vibar Phase 2,
New Delhi-110052.

....Appellant (s)

Vs.
Commissioner of Customs (Port), Kolkata.
15/1, Strand Road,
Kolkata-700001.

....Respondent (s)

Appearance:
Shri Aakarsh Srivastava (Advocate) for the Appellant (s)
Shri A. K. Singh, (AR) for the Respondent(s)

CORAM:
HON'BLE SHRI P.K.CHOUDHARY, MEMBER (JUDICIAL)

Final Order No. 76586/2019

Date of Hearing:- 13.11.2019

Date of Pronouncement:-18th November 2019

PER SHRI P.K.CHOUDHARY:

The present Appeal has been filed by Appellant Shri Anil Kapani against Order-in-Appeal whereby confiscation and imposition of Redemption Fine of Rs.4,50,000/- was upheld, and Penalty under Section 112(a)(i) & Section 112(b)(i) of the Customs Act was reduced from Rs.5,00,000/- to Rs,4,50,000/-, while Penalty under Section 114AA of the Customs Act was reduced from Rs.5,00,000/- to Rs.4,00,000/-

2. Briefly stated, the facts of the case are that goods such as DVB Remotes, LED, Rechargeable Batteries/Lead Acid Rechargeable Batteries etc were imported in Kolkata Port vide Bill of Entry No 525227412 dated 11.05.2016 by IEC Holder M/s Sky Traders, 212A, Usha Kiran Building, 2nd floor, Azadpur, New Delhi-110033. These goods were cleared from

Kolkata Port on 14.05.2016 and booked for delivery at M/s Sky Traders, 212, Usha Kiran Building, 2nd floor, Azadpur, Delhi-110033, but they were intercepted in front of premises of M/s Malhotra Road Carriers, AG-88, Sanjay Gandhi Transport Nagar, New Delhi by DRI on 18.05.2016. On examination by DRI, all the goods were matching in description, value and quantity as per the declaration by M/s Sky Traders, except Rechargeable Batteries which the DRI said was Lead Acid Rechargeable Batteries.

During investigation, the DRI visited the official and residential premise of IEC Holder M/s Sky Traders but did not find the IEC Holder there. However, the Appellant Shri Anil Kapani visited DRI(HQ) and claimed to be the owner of the goods and his statement was recorded under Section 108 of the Customs Act wherein he stated that he placed an order for some goods in the firm M/s Lumevox Enterprises, but when the goods arrived at Kolkata Port, M/s Lumevox Enterprises told the Appellant that there were some issues in its IEC and thus the Appellant should not use it. Thereafter, the Appellant informed the supplier M/s Capitol Group Limited to convert the Bill of Lading in the name of another IEC Holder M/s Sky Trader, which he thereafter gave to the Customs Broker, who filed the Bill of Entry in the name of M/s Sky Traders.

The DRI found the rechargeable batteries under CTH 85078000 to actually be Lead Acid Rechargeable Batteries, the import of which is governed by Rule 6 of the Batteries (Management and Handling) Rules 2001 notified under Environment (Protection) Act 1986. As per Rule 6, Customs clearance of Lead Acid Rechargeable Batteries shall be contingent upon:-

i. Valid registration with Reserve Bank of India (with importer's code number)]
ii. One time registration with the Ministry of Environment and Forests or an agency designated by it in Form-II
iii. Undertaking in Form-III
iv. A copy of the latest half yearly return in Form-IV

Therefore the DRI alleged that Rule 6 of the Batteries (Management and Handling) Rules 2001 notified under Environment (Protection) Act 1986 was not met since the importer did not have registration with the Ministry of Environment and Forests or an agency designated by it. However, after that the IEC holder M/s Sky Traders submitted the original Registration Certificate issued by Central Pollution Control Board, Parivesh Bhawan, Delhi vide F.No. B-29016/BMHR/2016-Importer/HWMD/5145 dated 13.07.2016.

Since DRI did not find the IEC Holder M/s Sky Traders at the official or residential premise, it alleged that its IEC was obtained on the basis of forged documents. The DRI also alleged that by importing in the name of M/s Sky Traders, the Appellant violated Section 7 of Foreign Trade(Development & Regulation) Act, 1992 as amended in 2010 read along with Rule 12 of the Foreign Trade (Regulation) Rules 1993 and Para 2.9.2 of Handbook of Procedure Vol.I 2009-2014, clarified by DGFT in Exim Policy Circular No-6(RE-2013) 2009-2014 dated 16.9.2013, wherein it is stated that no person shall make any import or export except under an IEC number granted by the Director general or the officer authorized by him in this behalf and also that IEC Number cannot be used by anyone other than the IEC Holder himself.

Accordingly, Show Cause Notice dated 10.11.2016 was issued to M/s Sky Traders, Custom Broker M/s Universal Clearing and Forwarding Agency, and Shri Anil Kapani who is the Appellant herein, to show cause as to why the goods should not be confiscated under Section 111(d) of the Customs Act and why Penalty under Sections 112(a), 112(b) and 114AA of the Customs Act 1962 should not be imposed, which culminated into Order-in-Original dated 30.01.2018 whereby the goods were confiscated with option to redeem on payment of Redemption Fine of Rs.4,50,000/- and penalties were imposed on all the three Noticees in the Show Cause Notice. Penalties of Rs.5,00,000/- under Sections 112(a)(i) & 112(b)(i), and of Rs.5,00,000/- under Section 114AA of the Customs Act, 1962 were imposed on the Appellant herein vide Order-in-Original dated 30.01.2018. The Appellant herein filed an appeal before the Ld. Commissioner (Appeals), who, by the impugned order dated 13.08.2019, partially allowed the appeal by reducing the Penalty under Sections 112(a)(i) & 112(b)(i) of the Customs Act, 1962 to Rs.4,00,000/- and reducing the Penalty under Section 114AA of the Customs Act, 1962 to Rs.4,50,000/-, but upheld the order of confiscation of goods as well as the quantum of Redemption Fine. Being aggrieved, the Appellant is in appeal before the Tribunal.

3. Shri Aakarsh Srivastava, Ld. Counsel for the Appellant has argued the matter at length and states that the impugned order has been passed by the Ld Commissioner (Appeals) after a huge delay of 10.5 months from the date of personal hearing before him and thus there has been violation of Principles of Natural Justice which also sends a wrong signal to the

litigants, as held by the Hon'ble Supreme Court in Joint Commissioner of Income Tax vs Saheli Leasing and Industries Ltd 2010 (253) ELT 705(SC).

4. Ld Counsel for Appellant states that admittedly there is no allegation of the Department regarding under invoicing, duty evasion, undervaluation or misclassification of the goods. He states that admittedly on examination, all the goods matched in quantity as well as description with the declaration except rechargeable batteries which were found to be lead acid rechargeable batteries. He states that the Appellant had ordered for rechargeable batteries, the goods were declared as rechargeable batteries, and on examination they indeed turned out to be rechargeable batteries but of the Lead Acid type of rechargeable batteries. Ld. Counsel further states that the Appellant was not aware that the foreign supplier had sent the lead acid variety of rechargeable batteries and therefore was under bonafide belief that no certificate from the Ministry of Environment and Forests was needed as the order had been placed for rechargeable batteries and even the Kolkata Port Customs officers had cleared the consignment after proper examination, verification, assessment as well as value loading and thus the Kolkata Customs officials were also of the view that the goods were rechargeable batteries. It was only after the DRI intercepted the consignment in Delhi that the Appellant found out that the rechargeable batteries were of lead acid variant, and as soon as this fact came to be known, Registration Certificate vide F.No B-29016/BMHR/2016-Importer/HWMD/5145 dated 13.07.2016 was obtained from Central Pollution Control Board, Delhi. He submits that this Registration Certificate be considered as valid from the time of import.

Ld. Counsel for Appellant submits that if the foreign supplier or Kolkata Port Customs officials had brought it to the notice of the Appellant or IEC Holder that the rechargeable batteries were of lead acid variety, this could have been corrected under Section 149 of the Customs Act 1962 which allows correction of mistakes by amending the documents because nothing turns on such an error since by mentioning rechargeable batteries in place of lead acid rechargeable batteries no advantage would have fallen upon the Appellant or IEC Holder. He further submits that even if one assumes without admitting that this is an error, at best it is a pure technical or clerical error since the Registration Certificate from Ministry of Environment and Forests can be obtained easily by submitting documentation as required in the Standard Operating Procedure for Grant, Renewal or Cancellation of registration to the Importers of New Lead Acid Batteries under Rule 5 of the Batteries (Management and Handling) Rules, 2001 as amended in 2010. He states that description of goods in the Bill of Entry is based on Invoice and Packing List prepared by the supplier which was "Rechargeable Batteries" in this instance, so there is no fault of the Appellant or the IEC Holder and therefore neither confiscation of goods is warranted nor any penalty can be imposed on the Appellant, as held by the Ld. CESTAT Delhi in Final Order numbers 53182-53183/2018 dated 26.10.2018 in the case of Shri L R Maurya vs CC Bhopal and M/s Ideal Carpets Ltd vs CC Bhopal in Appeal Numbers C/50238/2018(DB) and C/51246/2018(DB).

Ld. Counsel submits that the Appellant is not in violation of Section 7 of Foreign Trade (Development & Regulation) Act, 1992 as amended in 2010 read along with Rule 12 of the Foreign Trade (Regulation) Rules 1993 and

Para 2.9.2 of Handbook of Procedure Vol.I 2009-2014, clarified by DGFT in EXIM Policy Circular No-6(RE-2013) 2009-2014 dated 16.9.2013, according to which no person shall make any import or export except under an IEC number granted by DGFT, since the import is made by M/s Sky Traders which had a valid IEC Code issued by DGFT after due process. Moreover, he seeks to rely on Section 2(26) of the Customs Act 1962 which states that "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, beneficial owner or any person holding himself out to be the importer" to plead that the Appellant has not violated Section 7 of Foreign Trade (Development & Regulation) Act, 1992 as amended in 2010 read along with Rule 12 of the Foreign Trade (Regulation) Rules 1993 and Para 2.9.2 of Handbook of Procedure Vol.I 2009-2014, clarified by DGFT in EXIM Policy Circular No-6(RE-2013) 2009-2014 dated 16.9.2013.

Ld. Counsel submits that the findings of the lower authorities that IEC of M/s Sky Traders was obtained using forged documents is based on presumptions and assumptions since they arrived at this conclusion because the official and residential premises were closed and it is not known whether further adequate steps were taken by DRI to find M/s Sky Traders. Also, M/s Sky Traders has not alleged any forgery on the part of the Appellant.

Ld. Counsel submits that the goods could not have been confiscated under Section 111(d) of the Customs Act 1962 because in the consignment there were various goods apart from lead acid rechargeable batteries which were neither restricted nor prohibited and thus their confiscation is erroneous. Even the lead acid rechargeable batteries are not prohibited goods but are restricted and can be imported with Registration Certificate of the Ministry of Environment and Forests which was obtained vide F.No B-29016/BMHR/2016-Importer/HWMD/5145 from Central Pollution Control Board, Delhi and which is to be seen from the time of import. He further submits that since goods were not liable for confiscation under Section 111(d), question of imposing penalty under Section 112 of the Customs Act 1962 on the Appellant does not arise.

Ld. Counsel further submits that the Appellant did not know the Rechargeable Batteries were of lead acid variety uptill the time that DRI apprised them of this fact. The Appellant never knowingly or intentionally made, signed or used or caused to be made, signed or used any declaration, statement or document which was false or incorrect in any material particular, in the transaction of any business for the purposes of this Act. Registration Certificate from Central Pollution Control Board was taken as soon as it came to be known through the DRI that rechargeable batteries were of lead acid variant. Ld. Counsel submits that as seen from Appellants statement under Section 108 of the Customs Act, he immediately informed the supplier and CHA about change in name of IEC Holder from M/s Lumevox Enterprises to M/s Sky Traders, thus invoking penalty under Section 114AA of the Customs Act 1962 on the Appellant is unwarranted as held by the Ld CESTAT Mumbai in Suketu Jhaveri vs Commissioner of Customs (Import) Nhava Sheva 2014(314) ELT 828.

5. The Ld. D.R justifies the findings of the Ld. Commissioner (Appeals) and prays that the appeal may be dismissed accordingly.

6. Heard both sides and perused the appeal records.

7. In the instant case, the issue that arises for consideration is whether the goods are liable for confiscation under Section 111(d) and whether the Appellant is liable for penalty under Sections 112 and 114AA of the Customs Act 1962. It is an admitted fact that there is no case of duty evasion or undervaluation of goods or that the CTH declared in the Bill of Entry is incorrect. It is also an admitted fact that the Bill of Entry was filed by M/s Sky Traders which had a valid and functioning IEC Code issued by the DGFT. The goods were admittedly cleared from Kolkata Port on 14.05.2016 and booked for delivery at the premises of M/s Sky Traders at 212, Usha Kiran Building, 2nd floor, Azadpur, Delhi-110033, but were intercepted in New Delhi by DRI on 18.05.2016. The DRI found all the goods to be matching in description, value and quantity as per the declaration by M/s Sky Traders, except rechargeable batteries which admittedly were lead acid rechargeable batteries, the import of which is governed by Rule 6 of the Batteries (Management and Handling) Rules 2001 notified under Environment (Protection) Act 1986 according to which one time registration with the Ministry of Environment and Forests or an agency designated by it is required which was admittedly obtained vide F.No B-29016/BMHR/2016-Importer/HWMD/5145 dated 13.07.2016 from Central Pollution Control Board, Delhi. It is also an admitted fact that the DRI visited the premises of IEC Holder M/s Sky Traders but did not find the IEC Holder there, while the Appellant herein, Shri Anil Kapani visited DRI(HQ) and claimed ownership of the goods.

I find force in the contention of Shri Aakarsh Srivastava, Ld. Counsel for the Appellant, that he was not aware that the supplier had sent the lead acid variant of rechargeable battery and he was under bonafide belief that no certificate from the Ministry of Environment and Forests was needed since the order was for rechargeable batteries and it seems that the Kolkata Customs officials also held the opinion that the goods were rechargeable batteries since they cleared the consignment after examination, verification, assessment and value loading. Thus, I find force in the contention of the Ld. Counsel for the Appellant that it came to be known that these were lead acid rechargeable batteries only when the DRI intercepted the consignment in Delhi, and as soon as this fact came to light, Registration Certificate vide F.No B-29016/BMHR/2016-Importer/HWMD/5145 dated 13.07.2016 was obtained from Central Pollution Control Board, Delhi, and this ought to be treated as valid from the date of import. I also find force in the contention of the Ld. Counsel for the Appellant that if the foreign supplier or Kolkata Customs officials had informed the Appellant or IEC Holder regarding this, a correction could have been done under Section 149 of the Customs Act 1962 by amending the documents since nothing turns on such an error because no advantage would have fallen upon the Appellant or IEC Holder as this is a purely technical and clerical issue since Registration Certificate from Ministry of Environment and Forests is easy to obtain by submitting the documents as required under the Standard Operating Procedure for Grant, Renewal or Cancellation of registration to the Importers of New Lead Acid Batteries under Rule 5 of the Batteries (Management and Handling) Rules and also that description of goods in the Bill of Entry is based on Invoice and Packing List prepared by the supplier which admittedly was rechargeable batteries, therefore the Appellant or IEC

Holder cannot be faulted. Similar view has been taken by the Ld. CESTAT Delhi in the case of Shri L R Maurya vs CC Bhopal and M/s Ideal Carpets Ltd vs CC Bhopal (supra)

I find that the contention of the Ld. Counsel that the Appellant has not violated Section 7 of Foreign Trade (Development & Regulation) Act, 1992 as amended in 2010 read along with Rule 12 of the Foreign Trade (Regulation) Rules 1993 and Para 2.9.2 of Handbook of Procedure Vol.I 2009-2014, clarified by DGFT in Exim Policy Circular No-6(RE-2013) 2009-2014 dated 16.9.2013, deserves to be considered since it states that no person shall make any import or export except under an IEC number granted by DGFT, and in this instance the Bill of Entry has been filed by M/s Sky Traders which had a valid IEC Code issued by DGFT at the time of import and also since the Appellant is squarely covered by Section 2(26) of the Customs Act which states that "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, beneficial owner or any person holding himself out to be the importer". I further find force in the contention of the Ld. Counsel for the Appellant that just because the official and residential premises of IEC Holder M/s Sky Traders were found closed by DRI, it is presumptuous to say that its IEC was obtained by forgery especially since it is not known whether any more measures were taken by DRI to get M/s Sky Traders to join the investigation.

Further, I find force in the contention of the Ld. Counsel for the Appellant that the confiscation of goods under Section 111(d) of the Customs Act 1962 cannot be sustained since lead acid rechargeable batteries are not prohibited, but restricted and can be imported with Registration Certificate of the Ministry of Environment and Forests which was admittedly obtained vide F.No B-29016/BMHR/2016-Importer/HWMD/5145 from Central Pollution Control Board, Delhi and which is to be seen from the time of import. Once confiscation of goods cannot be sustained, penalty under Section 112(a) and/or 112(b) cannot be imposed on the Appellant since penalty under Section 112 is contingent on confiscation of goods under Section 111 of the Customs Act 1962.

I further find that the question of imposing penalty under Section 114AA of the Customs Act 1962 does not arise as far as the Appellant herein is concerned since Section 114AA can be invoked only in case of use of any false document, statement or declaration made intentionally for import transactions and not for using IEC of some other person. Similar view has been taken by the Ld. CESTAT Mumbai in the case of Suketu Jhaveri(supra).

8. In view of the above discussions and decisions cited supra, the impugned order cannot be sustained. Accordingly, confiscation of goods and penalty under Sections 112(a), 112(b) and 114AA of the Customs Act 1962 is set aside and the appeal filed by the Appellant is allowed with consequential benefits.

(Pronounced in the Open Court on…18th November 2019)

Sd/-
(P.K. Choudhary)
Member (Judicial)

T.K.