

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

REGIONAL BENCH - COURT NO.2

Customs Appeal No.75528 of 2021

(Arising out of Order-in-Appeal No.KOL/CUS(PREV)/AKR/202-204/2021 dated 24.02.2021 passed by Commissioner(Appeals) of Customs, Kolkata.)

M/sSo-Hum Trading Company

(486/4, Circular Road, Near Amar Bhawan, Chowk, Panipat-132103, Haryana.)

...Appellant

VERSUS

Commissioner of Customs (Preventive), Kolkata

.....Respondent

(15/1, Strand Road, Custom House, Kolkata-700001.)

WITH

Customs Appeal No.75529 of 2021

(Arising out of Order-in-Appeal No.KOL/CUS(PREV)/AKR/202-204/2021 dated 24.02.2021 passed by Commissioner(Appeals) of Customs, Kolkata.)

Shri Ajay Midha,

(486/4, Circular Road, Near Amar Bhawan, Chowk, Panipat-132103, Haryana.)

...Appellant

VERSUS

Commissioner of Customs (Preventive), Kolkata

.....Respondent

(15/1, Strand Road, Custom House, Kolkata-700001.)

APPEARANCE

Shri Aakarsh Srivastava& Shri Utkarsh Srivastava, Advocates for the Appellant (s)

Shri M.P.Toppo, Authorized Representative for the Respondent (s)

**CORAM: HON'BLE SHRI P.K. CHOUDHARY, MEMBER(JUDICIAL)
HON'BLE SHRI P.V. SUBBA RAO, MEMBER(TECHNICAL)**

FINAL ORDER NO. 75687-75688 / 2021

DATE OF HEARING : 15 September 2021

DATE OF DECISION : 10 November 2021

P.K. CHOUDHARY :

The Present Appeals have been filed by the Appellants M/s So-Hum Trading Company and its Authorized Signatory Shri Ajay Midha against the Order-in-Appeal No.KOL/CUS(PREV)/AKR/202-204/2021 dated 24.02.2021 passed by Commissioner(Appeals) of Customs, Kolkata, whereby the learned Commissioner(Appeals) has rejected the Appeals before him and upheld the Order-in-Original, whereby imported goods were confiscated under Section 111(o), Redemption Fine of Rs.90,000/- under Section 125, demand of duty of Rs.19,67,759/- and penalty of equal amount under Section 114A for past and present Bills of Entry were upheld against the Appellant importer M/s So-Hum Trading Company and a penalty of Rupees Two Lakhs was imposed under Section 114AA of the Customs Act, 1962 (hereinafter referred to as 'the Act') on the 2nd Appellant Shri Ajay Midha, the Authorized Signatory of M/s. So-Him Trading Company.

2. Briefly stated, the facts of the case are that the Appellant importer was importing goods, namely 100% Polyester quilt cover from Bangladesh and intended to clear it at concessional rate of duty by availing benefit of South East Asia Free Trade Agreement (SAFTA) in terms of Notification No.99/2011-CUS dated 09.11.2011, for which Country of Origin certificate under SAFTA was obtained from Bangladesh by declaring incorrect data about quantum of non-originating contents of the said quilt covers and thus it was not eligible for SAFTA benefit.

3. Directorate of Revenue Intelligence (DRI) intimated the Assistant Commissioner of Petrapole LCS on 19.07.2017 and a team of officers visited Petrapole on 22.07.2017. On examination, the goods were found as per declaration along with a letter dated 16.07.2017 by which the Deputy Commissioner of Petrapole LCS was requested to allow warehousing as the SAFTA Certificate had been sent back to Bangladesh for rectification.

4. After comparing all the documents related to Bill of Entry No.2321708 dated 05.07.2017 that the Certificate of Origin under

SAFTA issued by Bangladeshi authorities, it was alleged by the DRI that the value of the goods was declared differently in Bangladesh as per the SAFTA Certificate as compared to the invoice filed by the Appellant in India. Based on the aforesaid discrepancy, the goods were detained and subsequently seized. While investigating, DRI went through EDI system and found a similar discrepancy in respect of past imports of consignments of quilt cover from Bangladesh in the year 2016 vide three Bills of Entry viz. 6671904 dated 09.09.2016, 7700933 dated 09.11.2016 and 7745037 dated 07.12.2016. DRI alleged that the value of fabrics imported from China and supplied free of cost by the Appellant was deliberately not included in the value of the goods at the time of obtaining Certificate of Origin from the Bangladeshi authorities and further if the value of fabric was considered, the content of third country origin would be more than the percentage declared in the Certificate of Origin. All the above three consignments got cleared without payment of Basic Customs Duty by availing benefit of Notification No.99/2011-CUS (supra). Statement of Shri Pramod Nahata, one of the Directors of the Customs Broking Firm, M/s.ERT Shipping & Warehousing (P) Ltd., was recorded under Section 108 of the Act on 06.09.2017. On being asked about the letter dated 16.07.2017, regarding sending back of SAFTA Certificate of Bangladesh for rectification, he submitted that the SAFTA Certificate had been sent back to Bangladesh for rectification as in the original Certificate the category was wrongly mentioned as 'B' which was pointed out by the Superintendent of Customs Mr A.Ghosh. It is the case of the Appellants that before the revised SAFTA Certificate could be received, the goods had already been detained by the DRI and no amendment could be done. The importer paid the duty for the live consignments and his statement was recorded under Section 108 of the Act *ibid* on 02.11.2017, wherein *inter alia* he stated that the SAFTA Certificate had been sent back to Bangladesh for rectification, but in the meantime the goods were detained by the DRI. He agreed that the value of non-Bangladeshi material in the live goods was more than 80% and he was

not aware how the Country of Origin Certificate showed otherwise. Regarding the past Bills of Entry, he expressed his innocence and stated that he was not aware about the value declared by the Bangladeshi supplier before the Bangladeshi authorities for obtaining the Country of Origin Certificate under SAFTA, and he would enquire from the Bangladeshi supplier about it. Further, a letter dated 15.12.2017 was received from CHA on the instructions of the Appellant agreeing to pay duty under protest to cut down the cost of storage of the imported consignments. Show Cause Notice dated 20.01.2018 was issued by the Directorate of Revenue Intelligence, Kolkata Zonal Unit to the Appellant importer M/s So-Hum Trading Company, Appellant's Authorized Signatory Shri Ajay Midha and the CHA M/s ERT Shipping & Warehousing (P) Ltd.. This culminated into Order-in-Original, which confirmed all the allegations in the Show Cause Notice. The Appellants herein namely M/s So-Hum Trading Company, the importer and its Authorized Signatory Shri Ajay Midha filed Appeals before the first Appellate Authority, who rejected their Appeals. Hence the present Appeals before the Tribunal.

5. The learned Advocate, appearing on behalf of the Appellants, submitted that the learned Commissioner(Appeals) has erred in holding that Appellants had sent the Country of Origin Certificate to Bangladesh after investigation by DRI had started. It is the submission of the learned Advocate that it can be seen from the letter dated 16.07.2017 that the Country of Origin Certificate for the live consignment had been sent back to Bangladesh for rectification after the Superintendent of Customs Mr. A.Ghosh pointed out the mistake and this was much before DRI got involved in the case on 19.07.2017/22.07.2017. The learned Advocate further submits that since the Appellant had already sent back the Country of Origin Certificate for rectification much before the intervention of DRI, confiscation under Section 111(o) of the Act is not warranted as it is for contravention of any exemption Notification and the Appellant had no intention to avail any exemption benefit for the live consignment. Learned Advocate further submitted that under

instruction and without prejudice to the rights and contentions of his clients, that they are not agitating the duty demand for the live goods under Bill of Entry No.2321708 dated 05.07.2017 and they are only agitating against confiscation and penalty.

6. The learned Advocate further submits that Country of Origin Certificates are substantive and conclusive evidence since these are valid Certificates which have been issued by Designated Authority of Bangladesh i.e. Export Promotion Bureau, Bangladesh. He vehemently argued that there is nothing on record that the Country of Origin Certificates issued by the Designated Bangladeshi Authorities have been found forged or even alleged to be forged or questioned by the Indian Authorities. No follow up was done after the imports in order to cancel or recall the same. He relied upon the decision of the Tribunal in the case of RS Industries (Rolling Mills) Ltd. vs. CCE, Jaipur-I reported in 2018 (359) ELT 698, wherein it was held that in presence of valid Certificates of Origin issued by the Competent Authority, it was not proper on the part of the Assessing Authorities in India in denying the benefit of exemption Notification. He also relied upon the decision of the Tribunal in the case of Minakshi Exports vs. CC, Jodhpur reported in 2018 (359) ELT 689. The learned Advocate further submits that the Appellant in his statement has categorically stated that he was not aware of any wrong-doing and had acted as soon as anomaly was pointed out by sending back the Country of Origin Certificate for rectification in respect of the live consignment. The Appellant in his statement had also pleaded innocence in respect of the past Bills of Entry. The learned Advocate further submits that in respect of past three Bills of Entry, the Proper Officer i.e. the Assistant/Deputy Commissioner of Customs, Petrapole LCS had extended the benefit of Notification after examining the goods and documents such as SAFTA Certificate, invoices etc. and had even done value loading of the consignment as per Section 17(4) of the Act and all the documents related to the past three Bills of Entry were available with the Department. By virtue of value loading after verification of the

consignment related documents and the Appellants not contesting it, the adjudication order was passed in respect of these three Bills of Entry. He relied on the following decisions of the Tribunal and the High Court :-

- (a) Karan Associates v. CC(Import),Mumbai –
[2009 (236) ELT 23 (Bom.)]
- (b) Kairali Granites v. CC
[2010 (255) ELT 239 (Ker.)]
- (c) Anant Wines & Spirits v. CC, Amritsar
[2016 (342) ELT 419(Tri.-Chan.)]
- (d) Vitesse Export Import v. CC
[2008 (224) ELT 241 (Tri.-Mumbai)]
- (e) Confident Dental Equipments Ltd. v. CCE & ST, Bangalore
[2019 (370) ELT 362 (Tri.-Bang.)]
- (f) Axiom Cordages Ltd. v. CC, NhavaSheva-II
(F/O No.85727/2020 dtd.11.09.2020-Tri.-Mum)]

7. It is the submission of the learned Advocate for the Appellants that penalty under Section 114A of the Act can be imposed only if duty is short paid due to collusion or any willful misstatement or suppression of facts, which is not the case in the instant Appeal under consideration. He further states that no new documents had been found during investigation and all the relevant documents like invoices, Country of Origin Certificate duly authenticated by the Bangladesh Chamber of Commerce and Industry, viz. Export Promotion Bureau, Bangladesh etc. were always available with the Proper Officer. Accordingly, he submits that penalty under Section 114A is not at all warranted on the Appellant importer M/s So-Hum Trading Company.

8. Regarding the penalty under Section 114AA of the Act *ibid* imposed on the Appellant No.2 Shri Ajay Midha, the Authorized Signatory of Appellant No.1 is unwarranted and uncalled for since it is trite law that penalty cannot be imposed for cases involving Exemption Notification and placed reliance on the Tribunal's Order in the case of *Lewek Altair Shipping Pvt.Ltd. v. Commissioner of Customs, Vijayawada* reported in 2019 (366) ELT 318. The learned Advocate further submits that the impugned order deserves to be set aside in view of the judgement of the Hon'ble Supreme Court in the case of *M/s Canon India Pvt. Ltd. v. Commissioner of Customs* [2021 (3) TMI 1034, since

Show Cause Notice in the present proceedings have been issued by the Directorate of Revenue Intelligence (DRI).

9. Shri M.P.Toppo, learned Authorized Representative, appearing on behalf of the Department justifies the impugned orders and reiterates the discussions and findings and prays for dismissal of the Appeals as being devoid of any merits.

10. Heard both sides through video conferencing and perused the Appeal records, the relied upon decisions/judgements as well as the synopsis filed in the course of hearing.

11. We find that the Appellant was not availing any benefit in terms of the Exemption Notification and there was no occasion for confiscation of the live goods under Bill of Entry No.2321708 dated 05.07.2017 as the letter dated 16.07.2017 shows that the Country of Origin Certificate for these goods had been sent back to Bangladesh for rectification which was much before the DRI's intervention on 19/22 July 2017. It is our considered view that confiscation and subsequent redemption fine for Bill of Entry No.2321708 dated 05.07.2017 is un-warranted and cannot be sustained. Further, penalty under Section 114A of the Act cannot be sustained in respect of these consignments since there is no case of duty short paid due to collusion, willful misstatement or suppression of facts.

12. We observe that the Country of Origin Certificates are conclusive evidence since these are issued by the Designated Committee of Bangladesh i.e. Export Promotion Bureau, and in absence of any material on record to show that these were forged or its genuineness questioned by DRI or Indian Customs, these Country of Origin Certificates should be considered as substantive and conclusive evidence. We find support from the decision of the Tribunal in the case of RS Industries (Rolling Mills) Ltd. (supra) and Minakshi Exports (supra). In the case of Minakshi Exports, the Tribunal held that in absence of any record to the effect that the Country of Origin Certificates issued by Bangladeshi Authorities have been questioned by the Indian Authorities and any follow up after import was done in order

to cancel or recall the same, denial of Exemption benefit cannot be done. We also do not find any evidence on record of any overseas enquiry with the Bangladeshi supplier or confirmation with Bangladesh Customs or Bangladeshi Authority, and therefore the SAFTA Certificate cannot be unilaterally rejected. We find that the past three Bills of Entry, the Proper Officer i.e. Assistant/Deputy Commissioner of Customs, Petrapole LCS had done value loading after due consideration and extended benefit of Exemption Notification on verification of documents like SAFTA Certificates, invoices etc. and thus we do not find any ingredient of collusion, willful misstatement or suppression of facts and accordingly the penalty imposed under Section 114A of the Act *ibid* is fit to be set aside.

In view of the above discussions, the Appeals filed by the Appellants are allowed with consequential relief, as per law.

(Order pronounced in the open court on 10 November 2021.)

Sd/
(P.K. CHOUDHARY)
MEMBER (JUDICIAL)

Sd/
(P.V. SUBBA RAO)
MEMBER (TECHNICAL)