IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
WEST ZONAL BENCH AT MUMBAI
COURT No. I

APPEAL No. C/991/2010

(Arising out of Order-in-Original F. No. S/10-63/09-Adjx(X) S/10-170/97-Gr.VII dated 13.8.2010 passed by Commissioner of Customs (Export), Mumbai)

Commissioner of Customs (Exp), Nhava Sheva **Appellant**

Vs.

Fenil Enterprises **Respondent**

Appearance:

Ms. Trupti Chauhan, Assistant Commissioner (AR), for appellant
None for respondent

CORAM:

Hon'ble Mr. Ajay Sharma, Member (Judicial)
Hon'ble Mr. Sanjiv Srivastava, Member (Technical)

Date of Hearing: 24.10.2018
Date of Decision: 15.01.2019

ORDER No. **A/85079/2019**

Per: Sanjiv Srivastava

This appeal filed by the revenue is directed against the order in original No 18/2010 dated 13.08.2010 of Commissioner of Customs (Export) JNCH Nhava Sheva. By said order Commissioner has decided the issue holding as follows:

"Order

4.1 On the basis of the foregoing, I pass the following orders:

4.2 I order that the duty amounting to Rs 11,13,265/- along with interest at appropriate rates be recovered from the importer, M/s Fenil Enterprises, in terms of Section 28 and 28A of the Customs Act, 1962.

4.3 I also impose a penalty of Rs 11,13,265/- on the license holder M/s Fenil Enterprises, who is also incidentally the importer in the case, under Section 114A of the Customs Act, 1962.

4.4 Penalty under section 112 of the Customs Act, 1962 is not imposed as Section 114A clearly precluded imposition of penalty under both the section 112 and Section 114A of the Customs Act, 1962.

4.1.1 This order is passed without prejudice to any other action and/ or further action, on the aforesaid noticee/ company/ firm and/ or on the individuals/ persons under the provisions of the Customs act, 1962 or other act for the time being in force."

2.1 In their appeal, revenue has challenged the quantum of penalty imposed under Section 114A of the Customs Act, 1962. As per the revenue the penalty should have been equivalent to the total of duty demanded under Section 28 and the interest demanded under Section 28A of Customs Act, 1962 whereas Commissioner has imposed penalty equivalent to the duty demanded.

3.1 We have heard Ms. Trupti Chauhan, Assistant Commissioner (Authorized Representative) for the revenue, who reiterated the grounds taken in appeal.

3.2 Non appeared for the respondent.

4.1 We find the issue involved is no longer res-integra and this tribunal has constantly taken the view the penalty imposed under Section 114A will be equivalent duty demanded under Section 28 or interest demanded under Section 28AA. Section 114A of the Customs Act, 1962 read as follows:

"SECTION 114A. Penalty for short-levy or non-levy of duty in certain cases. –

Where the duty has not been levied or has 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 wilful 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 (2) of section 28 shall also be liable to pay a penalty equal to the duty ***or*** *interest so determined:"*

4.2 Tribunal has in case of Commissioner of Central Excise & Service Tax Bangalore 1 vs B. SURESH VASUDEV BALIGA [2015 (329) ELT 433 (T-Bang)] held as follows:

"As seen from above, the said section is applicable to a person who is liable to pay the duty 'OR' interest as the case may be, who shall be liable to penalty equal to the duty or interest so determined. The expression used is "or", which is disjunctive between duty or interest. Further use of expression "as the case may be" clearly suggests that the said section is referring to two different persons and situations. One which may be liable to duty and the other which may be liable to interest only and provides that in both the situations, the person liable to

duty would be liable to penalty equal to duty and the person liable to interest would be liable to penalty equal to interest. There is no warrant to read "or" as "and". In view of the above I find no reasons to interfere with the impugned orders of Commissioner (Appeals). Revenue's appeals are accordingly rejected."

4.3 In case of Bharti Airtel [2012 (286) ELT 270 (T)] Bangalore Bench of Tribunal held as follows:

"21.2 At this stage, the appeals by the department on the quantum of penalties imposed on the appellant-assessees can be considered. In the said appeals, the prayer is for imposition of penalties equivalent to the "duty demanded plus the corresponding, interest accrued under Section 28AB of the Act" instead of restricting the penalties to "duty demanded". Section 114A reads as under :

……………………….

Section 114A of the Customs Act envisages that the penalty thereunder should be "equal to the duty or interest so determined". Section 28 requires the proper officer to "determine the amount of duty or interest due from such person not being in excess of the amount specified in the notice". It is to be noted that the demand of duty to be confirmed has to be either below or equal to the duty demanded in the show-cause notices. Section 114A refers to cases where "the person who is liable to pay the duty or interest as the case may be, as determined……………." It appears that Section 114A deals with penalty on the person who is liable to pay duty or the person who is liable to pay interest.

21.3 We find that the show-cause notices specifically indicated only amounts of duty proposed to be demanded but did not (and could not) indicate the quantum of *interest proposed to be demanded. Apparently, the duty demand itself was to be determined subject to the outer limit of amounts mentioned in the show-cause notices. The interest payable depends not only on the duty so determined but also the actual date of payment of the duty so determined. Only then, the actual interest payable will be ascertainable. Obviously, in the present cases, the Commissioner at the time of adjudication of the case could not have determined the actual amounts of interest to be included in penalties under Section 114A. Further Section 114A envisages penalty "on 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". The Commissioner was not in a position to determine the interest amount at the time of passing the impugned order. Therefore, his imposing penalties equal to the duty determined is in order."*

4.4 Bharti Airtel, supra has been followed in Mangalore Refinery and Petrochemicals Ltd [2014 (313) E.L.T. 353 (Tri. - Bang.)]

5.1 In view of the above we do not find any merit in the appeal filed by the revenue and dismiss the same.

(Pronounced in court on 15.01.2019)

(Ajay Sharma)
Member (Judicial)

(Sanjiv Srivastava)
Member (Technical)

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