IN THE CUSTOMS EXCISE & SERVICE TAX APPELLATE TRIBUNAL
WEST ZONAL BENCH AT MUMBAI

APPEAL NO: C/209/2012

Arising out of: Order-in-Original No. COMMR/PMS/ADJN/ 01/2011-12 dated 20/12/2011

Passed by: Commissioner of Customs, Mumbai

Dalumi Hongkong Ltd.

Appellants – Represented by:
Shri N.D.George, Advocate

versus

Commissioner of Customs, Mumbai

Respondent – Represented by:
Shri Manoj Kumar, Assistant Commissioner (AR)

Date of hearing: 10/01/2019
Date of pronouncement: 18/04/2019

CORAM

Hon'ble Shri C J Mathew, Member (Technical)
Hon'ble Shri Ajay Sharma, Member (Judicial)

ORDER NO: A/85757 / 2019

Per: Ajay Sharma

The issue to be decided in the instant Appeal is whether, in the facts of the case, the diamonds in question are liable to be confiscated under Section 113(d) of the Customs Act, 1962.

2. The brief facts of the matter are that 616.547 carats of cut and polished diamonds valued at Rs.2,85,24,926/- had been seized by the officers of the Directorate of Revenue Intelligence (DRI) from the

possession of a courier company, M/s.DHL Express (India) Pvt. Ltd (hereinafter referred to as “the courier company”) on 25.8.2010. Prior to that, a packet containing the diamonds concealed in a sports jacket had been brought to the courier by one Perez Hender Valmore for export to Italy. He had also furnished a declaration to the courier company to the effect that the packet contained garments and other personal goods only. The courier company prepared an Airway Bill with the above person as the consignor and one Giorgio Borrelli (Italy) as the consignee. Shortly after preparation of the Airway Bill, DRI officers, having received intelligence to the effect that diamonds were likely to be couriered through DHL, stepped in and after inspecting the goods, i.e. 1641 diamonds, seized the packet under a Panchanama. The valuation of the seized diamonds was got done under subsequent Panchanama on 26.8.2010. Subsequently, on 27.8.2010, the Managing Director and Asia Sales Manager of the Appellant herein, i.e. M/s. Dalumi Hong Kong Ltd., came to the DRI office and informed that they had imported the seized diamonds for an exhibition held at Goregaon, Mumbai. They also gave an account of what happened to the diamonds imported by them for the said exhibition. They had imported a total quantity of 4422.395 carats of diamond valued at over US $ 59,96,458.87 which were cleared by Customs. During exhibition, 887.244 carats of diamond were found to have been stolen whereupon a First Information Report (FIR) was lodged with the Police. Documentary evidence of lawful import of the goods was also submitted to the Police. Another 37.21 carats of diamond were also found missing but the same was omitted to be reported to the Police. The Police recovered 305.46 carats of diamond on 26.8.2010. Later, on 616.547 carats of diamonds, which are in issue, were recovered by DRI taking the total recovery to 922.007 carats of diamond. DRI recorded the statement of the Managing Director of the Appellant u/s 108 of the Customs Act on 27.8.2010, wherein he stated the aforesaid facts relating to theft of diamonds. He further stated that he had identified the diamonds seized by DRI to be a part of the diamonds imported by the Appellants for the purpose of exhibition. After inquiry, a show-cause notice was issued by the DRI alleging that the diamonds had been attempted to be exported illegally and hence liable for confiscation under Section 113(d), (e) & (i) of the Customs Act read with relevant provisions of the Foreign Trade (Development and Regulation) Act/Rules and that the noticees were liable to be penalized under Section 114 of the Act. The said Perez Hender Valmore did not respond to the show-cause notice. The Appellants, in their reply to the show-cause notice, claimed ownership of the diamonds and prayed for permission to redeem the same.

3. The Commissioner of Customs, CSI Airport, Mumbai, vide earlier adjudicating order dated 10.2.2011, ordered for confiscating of diamonds u/s 113 ibid with option for redemption by the courier

company M/s. DHL on payment of fine of Rs. 30 lakhs (*since the diamonds were seized from their possession)* and also imposed a penalty of Rs. 30 lakhs on Perez Hender Valmore u/s 114 of the Act. On Appeals filed by the Appellant as well as Revenue separately, this Tribunal vide order dated 24.6.2011 remanded the matter back to the ld. Commissioner for *de novo proceedings* observing as under:-

> *"14. If, upon proper application of mind to the facts of the case and the evidence on record, the learned Commissioner finds that the Courier did not make any attempt to export the goods as agent of the consignor, the goods cannot be confiscated and will be liable to be released unconditionally to the owner. On the other hand, if it is found that there was an attempt by the Courier as agent of the consignor to export the goods, clause (d) of Section 113 of the Act would get attracted. However, option for redemption of the goods is liable to be given to the owner under Section 125 of the Customs Act in lieu of confiscation, particularly as the Criminal Court has ordered release of the goods to a functionary of Dalumi Hong Kong Ltd. In our view, the Criminal Court's direction to release the goods to the owner will not preclude the Commissioner functioning under the Customs Act from imposing the condition as to redemption fine.*
>
> *15. The request of M/s. Dalumi Hong Kong Ltd. for re-export of the goods in terms of the relevant Notification is also liable to be considered by the learned Commissioner. We are of the view that, in the facts and circumstances of this case, the delay of re-export is liable to be condoned."*

4. The learned Commissioner vide impugned Adjudicating Order dated 16.12.2011 ordered for confiscation of the diamonds in issue,

i.e. *1641 pieces of cut and polished diamonds,* u/s. 113(d) ibid and granted option to the Appellants, being owner of the diamonds, to pay a fine of Rs.20 lakhs in lieu of confiscation u/s.125 ibid.

5. We have heard learned counsel for the Appellants and learned Authorised Representative for the Revenue and perused the records. Learned counsel for the appellant submitted that there was no preparation or attempt for export of the diamonds on the part of the Appellant. It is the learned counsel's submission that confiscation under Section 113(d) of the Act could have been ordered only if there was an attempt to either export the goods or they had been brought within the limits of the customs area for the purpose of being exported. The learned Authorised Representative for the Revenue reiterated the findings recorded in the impugned order and prayed for dismissal of the Appeal.

6. According to the Appellants, 924.45 carat diamonds were stolen from the exhibition. It is not in dispute that the Appellants had filed FIR on 23.8.2010 with the Police for theft of approximately 887.244 carat diamonds worth Rs.6,60,85,280/- and they submitted the copy of the said FIR to DRI alongwith Bill of Entry, Invoice and packing list filed by them at the time of importation of the said diamonds. The Police had recovered 305.46 carats of diamonds from some accused persons and the said diamonds were returned back to the Appellants by the order passed by the ld. ACMM, 37th Court,

Esplanade, Mumbai and the same were exported out of India and no fine or penalty were imposed on the Appellant for the same. The balance 616.547 carats of diamonds, which are in issue, were seized by DRI. Had the theft at their stall not taken place, these diamonds could have been re-exported safely as per procedure, on completion of the Exhibition. For the purpose of deciding the issue whether the diamonds in question are liable to be confiscated under Section 113(d) ibid the said section is extracted as under:-

> *"113. Confiscation of goods attempted to be improperly exported, etc. - The following export goods shall be liable to confiscation:-*
> *xxx*
> *xxx*
> *(d) any goods attempted to be exported or brought within the limits of any customs area for the purpose of being exported, contrary to any prohibition imposed by or under this Act or any other law for the time being in force."*

Section 113(d) specifically provides that the export goods are liable for confiscation, if they are exported or attempted to be exported contrary to any prohibition imposed by or under Customs Act or any other law for the time being in force. The fine of Rs.20 lakhs on the appellants were imposed for the reason that the goods were liable for confiscation under Section 113(d). The word 'export goods' has been defined in Section 2(19) of the Customs Act, 1962 as follows:

> *"(19) 'export goods' means any goods which are to be taken out of India to a place outside India".*

The language of Section 113(d) and Section 2(19) of the Customs Act convey that only those goods which are attempted to be exported are liable to confiscation. Regulation 6 of Courier Imports & Exports (Clearance) Regulations, 1998 provides for the procedure which shall be followed in case of export of goods through courier which comprises of filing a statement before departure at the Airport with proper form alongwith courier bag and also that the Authorised Courier shall present the export goods to the proper officer for inspection, examination and assessment thereof. In the instant matter, admittedly the goods, i.e. the diamonds, were not presented to the proper officer and were found in the office of the courier company at Andheri by DRI and this itself shows that the formalities as per Regulation 6 ibid were not completed. We also noticed that the courier company did not follow the procedure prescribed under the Courier Imports and Exports (Clearance) Regulations, 1998 while receiving the goods for export from the said Perez Hender Valmore. If the Appellant has done any act towards the exportation, namely, taking of the goods out of India and if the act or acts could be fitted in the course of such movement of the goods, or, in other words, the act could fall in the course of progress towards the actual physical taking of the goods out of India, the mischief of section 113(d) would be attracted. Admittedly the goods were booked for export by Perez Hender Valmore. It is not the case of DRI that the said Perez Hender

Valmore has any link or relation or concern with the Appellant. There must be an act or acts, by the Appellant, done towards the actual physical movement of the goods with intention to take them out of India. That alone, in our view, would constitute an attempt to export the goods. 'Attempt' must also have relevance to the taking of the goods out of India. We are not concerned with the actual completion of the exportation. We are concerned only with the attempt. If no feature which would constitute *actus reus* or physical element towards taking of the goods out of India is made out on the facts and circumstances of the case, it will be far fetched to invoke section 113(d) of the Act. From the facts of the matter, it emerges that, according to DRI also, the said Shri Perez Hender Valmore and not the appellant, attempted to export 1641 pieces of cut and polished diamonds illegally by concealing the same in the courier packet by mis-declaring the contents and concealing the aforesaid diamonds in grey & black coloured sports jacket of Nike brand and the said Perez Hander Valmore has no link with the Appellant.

7. In view of the discussions made hereinabove, we are of the view that Section 113(d) ibid has no application on the facts of the present case. Therefore the goods/diamonds in question cannot be confiscated and are liable to be released unconditionally to the owner i.e. the Appellant.

8. The Appeal filed by the Appellant, therefore, deserves to be allowed.

(Pronounced in Court on 18/04/2019)

(C J Mathew)
Member (Technical)

(Ajay Sharma)
Member (Judicial)

arch