CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL MUMBAI

WEST ZONAL BENCH

CUSTOMS APPEAL NO: 976 of 2010

[Arising out of Order-in-Original No: COMMR/PMG/ADJN/02/2010-11 dated 13th September 2010 passed by the Commissioner of Customs, Airport, Mumbai.]

Om Hemrajani … ***Appellant***
18/4 Hemkutir, Rafi Amhed Kidwai Road
Wadala, Mumbai – 400 031

versus

Commissioner of Customs ***…Respondent***
Chattrapati Shivaji International Airport
Awas Corporate Point, Makwana Lane,
Andheri Kurla Road, Andheri (E)
Mumbai – 400 099

CUSTOMS APPEAL NO: 977 of 2010

[Arising out of Order-in-Original No: COMMR/PMG/ADJN/02/2010-11 dated 13th September 2010 passed by the Commissioner of Customs, Airport, Mumbai.]

Veena Mishra … ***Appellant***
6/44 Shyam Nivas, Warden Road
Mumbai – 400 026

versus

Commissioner of Customs ***…Respondent***
Chattrapati Shivaji International Airport
Awas Corporate Point, Makwana Lane,
Andheri Kurla Road, Andheri (E)
Mumbai – 400 099

APPEARANCE:

Shri Any Banhatti, Advocate for the appellant

Shri R Kumar, Assistant Commissioner (AR) for the respondent

CORAM:

HON'BLE MR C J Mathew, MEMBER (TECHNICAL)
HON'BLE MR AJAY SHARMA, MEMBER (JUDICIAL)

FINAL ORDER NO: A/ 85763-85764/2019

DATE OF HEARING: 18/12/2018
DATE OF DECISION: 18/04/2019

PER: C J MATHEW

As both these appeals of Shri Om Hemrajani and Ms Veena Mishra arise from the same order-in-original no. COMMR/PMG/ADJN/02/2010-11 dated 13th September 2010 of Commissioner of Customs, Chatrapati Shivaji International Airport in the same dispute and is limited to the imposition of penalty, we dispose off both by this common order.

2. The appellants were the Managing Director and General Manager respectively of M/s Tangerine Informatique Ltd which was charged with having imported goods, declared as 'integrated circuit chips' of various specifications, against 12 bills of entry in May 1997 that, upon taking up for examination, was found to contain some pieces that were dummy, fake or overvalued. The importer, though not in appeal, was a unit established in the SEEPZ, an Export Processing Zone operating under the Foreign Trade Policy of the Government of India, and had been permitted by the competent authority to trade and repack imported goods. The offending goods were claimed to have been shipped by mistake; this plea was not

found acceptable by the adjudicating authority who, besides confiscating the said goods under section 111 (d) and section 111 (m) of Customs Act, 1962 but allowed to be redeemed on payment of fine, also imposed penalties under section 112 of Customs Act, 1962. It is the penalty of ₹ 20,00,000 on the Managing Director and ₹ 15,00,000 on the General Manager that is assailed here.

3. It is contended on behalf of the appellants that the Managing Director was not connected with the day to day transactions and certainly not of the imports. It is contended that none of the statements recorded in the proceedings have cast any aspersions on his role. It is also submitted that the scheme of Export Processing Zones, requiring units to obtain approval as ‘private bonded warehouses’ which were operated under ‘double lock’, precludes any misuse of imported goods. There is also a contention that this was one of the many consignments that had been imported and a single mistake should not be seen as deliberate. It is also pointed out that no benefit would have accrued to him from such imports. As far as the role of General Manager was concerned, Learned Counsel informed that she was first made aware of the discrepancy only after examination of the consignment, that the rigour of monitoring and control embodied in the scheme was not amenable to any wrongful use of imported goods and that, as an employee, she did not stand to derive any benefit.

4. Learned Counsel also drew our attention to the proceedings initiated against the Managing Director by Enforcement Directorate that was dropped on the basis of certain circumstantial references. He places reliance on the decision of the Tribunal in *Guru Ispat Ltd v. Commissioner of Customs (Port), Calcutta [2003 (151) ELT 384 (Tri-Kolkata)]* and in *HCL Comnet Systems & Services Ltd v. Commissioner of Customs, New Delhi [2003 (158) ELT 349 (Tri-Del)]*.

5. Learned Authorised Representative contends that, on the basis of the findings of the adjudicating authority and the implied admission of offence by the importer, all that remained in the appeal was to ascertain the role of the appellants herein. According to him, the Hon'ble Supreme Court had held in *Pine Chemical Suppliers v. Collector of Customs [1993 (67) ELT 25 (SC)]* that *mens rea* was not relevant for invoking of section 111 and section 112 of Customs Act, 1962 even if it could be said to impact the quantum of fine and penalties. We are not certain about the applicability of the said decision to justify the visiting of penal consequence on every wrongly declared import transaction as the conclusions therein appear to the consequence of certain factual circumstances including acceptance of the reports of the laboratories and the plea for release of goods on revised assessment.

6. Neither are we convinced that the decisions cited on behalf of the appellants would stand them in good stead. The detriment of fine and penalties were erased in *re Guru Ispat Ltd* on the basis of judicial determination that ordering of re-export could not be conditional. Likewise, in *re HCL Comnet Systems & Services Ltd*, which followed the decision *supra*, the erasure of detriment was accompanied the allowing of the plea of re-export at the appellate stage. The circumstances of permitting of re-export with such conditions attached did not arise here. There is no doubt that the importer of the impugned goods did seek re-export but the adjudicating authority did not, on the basis of specific findings, accept that plea. There is also, no doubt, that the importer is not in appeal though in circumstances of having been placed under liquidation. Nevertheless, that, by itself, eliminates a foray into the justification for denial of re-export as well as scope for such permission of re-export by us.

7. We are, therefore, limited to an ascertainment of the role of the two appellants. The goods were imported by a unit operating under a special scheme framed to showcase best practices and while enabling industrial growth in circumstances of minimal intervention. The 'double lock bond' regulated the deployment of imported goods in the operations of the unit and ensured that such privileged goods was utilized exclusively for the intended purpose. In the present instance, it is not anybody's case that the goods have been diverted or intended

to be; on the contrary, it would appear that the claim of the appellants of lack of motive was discarded on the finding of benefits derived from transacting in foreign exchange. Notwithstanding this, the culmination of penalty under section 112 of Customs Act, 1962 commenced from confiscation of the goods as a consequence of admitted mis-declaration in which the motives are not relevant. The decision of Enforcement Directorate was specific to the context of proceedings under Foreign Exchange Regulations Act, 1973.

8. The pleas of the appellants do not justify any alteration of the findings in the impugned order. However, in the light of the decision of the Hon'ble Supreme Court in *re Pine Chemical Suppliers* that *mens rea* may have a bearing on the quantum of penalty, we hold that as the benefits that may have accrued to the appellants through misuse of foreign exchange transactions was brought to nought and as the misdemeanour is limited to the act of mis-declaration, the penalty on Shri Hemrajani be reduced to ₹ 5,00,000 and that on Ms Veena Mishra to ₹1,00,000.

(Order pronounced in the open court on 18/04/2019)

(C J Mathew)
Member (Technical)

(Ajay Sharma)
Member (Judicial)

**/as1804*