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

APPEAL NOS: C/87839 to 87842/2017

[Arising out of Order-in-Appeal No: MUM-CUSTM-APSC-APP-523/17-18 dated 19th September 2017 passed by the Commissioner of Customs (Appeals), Mumbai – III.]

Accord Global Express Pvt Ltd
Bhavdeep Pandya
Poonam Courier Pvt Ltd
Ashok Shukla …***Appellants***

versus

Commissioner of Customs (Import)
ACC, Mumbai ***…Respondent***

Appearance:

Shri ND George, Advocate for appellants.

Shri MK Mall, Assistant Commissioner (AR) for respondent.

CORAM:

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

Date of hearing: 18/04/2018
Date of decision: 18/04/2018

ORDER NO: A/88340-88343 / 2018

In these four appeals against order-in-appeal no. MUM-CUSTM-APSC-APP-523/17-18 dated 19th September 2017 of Commissioner of Customs (Appeals), Mumbai – III, M/s Poonam

Courier Pvt Ltd, M/s Accord Global Express Pvt Ltd, Shri Bhavdeep Pandey and Shri Ashok Shukla challenge the penalties imposed on them under section 112 of Customs Act, 1962 and section 114AA of Customs Act, 1962.

2. The detriments that were visited upon the appellants was the consequence of interception of a package received from Dubai at EICI Courier Terminal of the International Airport Mumbai and, though described in courier bill of entry no. 29519/14.09.2017 as ‘kaftan sample’, was found to be articles of clothing laced with gold beads weighing 364 gms and valued at ₹ 8,97,902. The consignment, booked by one Mohammed Athif, was intended for delivery to one Aayazuddin Shaikh of Mumbai for which documentation was filed in the name of M/s Poonam Courier Pvt Ltd, an Authorised Courier under the Courier, Imports and Exports (Clearance) Regulations, 1998.

3. The lower authorities have recorded a finding that the Authorised Courier had virtually abdicated all its functions in favour M/s Accord Global Express Pvt Ltd who, in turn, had connived with M/s Team Express Services LLC, Dubai on this, as well as on former, occasion for the shipment of consignments with intent to smuggle goods and in contravention of the prohibition on import of gold through the courier mode. Relying upon the statements recorded

during the investigations, the proposals in the show cause notice for confiscation of the gold and imposition of the various penalties, as confirmed by the original authority, was upheld by the first appellate authority leading to the present proceedings.

4. Learned Counsel for the appellants contested the various penalties by reiterating the submissions made before the first appellate authority to the effect that the statements that were relied upon were bereft of evidentiary value owing to the denial of request for cross-examination, that the statement of the consignee does not implicate any of the appellants and that none of the statements recorded from the noticees was inculpatory. He also informed that the outsourcing of the responsibility of 'last mile delivery' by the Authorised Courier was not in contravention of the Regulation. Placing reliance on the decision of the Tribunal in *Prathamesh Shipping P Ltd v. Commissioner of Customs, Nhava Sheva [2000 (119) ELT 75 (Tribunal)],* he questioned the appropriateness of imposition of penalties on the two individual-Directors in the absence of any role in the alleged breaches attracting penal action. Furthermore, he cited the decisions of the Tribunal in *Lemuir Express v. Collector of Customs, Bombay [2000 (126) ELT 749 (Tribunal)], PS Bedi & Company v. Commissioner of Customs, New Delhi [2001 (133) ELT 86 (Tri-Del)]* and *V Esakia Pillai v. Commissioner of Customs, Chennai [2001 (138) ELT 802 (Tri-Chennai)]*. He also drew attention to the specific

portions of the impugned order exonerating the Authorised Courier from any active role in the attempt.

5. Learned Authorised Representative urged us to uphold the categorical, and valid, findings of the first appellate authority. Citing from various provisions of the Regulations *supra*, he was emphatic that the Authorised Courier had failed to discharge obligations contained therein and that the delegate operator was found to be equally derelict.

6. That the courier route was mis-utilized for smuggling of gold is not in dispute. That M/s Poonam Courier Pvt Ltd had undertaken the task of clearance of the impugned package and that M/s Accord Global Express Pvt Ltd was associated with the handling of the package are also not in dispute. It is only their knowledge of the contents of the package, connivance in the *modus* and intentional contravention of the Regulations that are. It is ironical that a proceeding for imposition of penalties under section 112 and section 114AA of Customs Act, 1962 has travelled beyond the ingredients mandating such penalties to render a finding on adherence to obligations and requirements under Courier Imports and Exports (Clearance) Regulations, 1998 which, contrary to a validation in accord with the prescriptions of section 112 and 114AA of Customs Act, 1962, are entirely outside the jurisdiction of the original authority

and the first appellate authority. Reliance on those provisions and the rendering of a finding that would, in the hands of the appropriate jurisdiction authority, lead to penal action under the Regulations *supra* vitiates the invoking of the penal provisions under Customs Act, 1962.

7. Indeed, note cannot but be taken of the categorical finding by the original authority that the transgression of M/s Poonam Courier Pvt Ltd was a manifestation of folly rather than deliberate connivance with the smuggling. Note is also taken of the absence of evidence that would justify the finding of deliberate involvement on the part of the various noticees - an integral requirement for invoking of section 112 and section 114AA of Customs Act, 1962. Admittedly, the statements are bereft of such indictment. In *re V Esakia Pillai*, it has been held that

> *'5.... We note that there is no evidence either in the form of a confessional statement of the appellant, or any statement of exporter or anybody to show that the appellant had knowledge or information that the contents… were different from those described in the shipping bill…'*

while in *re PS Bedi & Company*, the Tribunal was of the opinion that

> *'6… On careful examination of the record of evidence in this case, I am inclined to accept the plea of the appellants that, in filing the Bill of Entry on the basis of the records made available to them by the importer, they have only acted in a*

> *bona fide manner and not otherwise. There is absolutely no evidence of any incriminating conduct, in this case, as against the CHA….'*

Likewise, in *re Lemuir Express*, the Tribunal held that

> *'6. As regards M/s Lemuir Express, in the absence of any evidence to establish any omission or commission on their part so as to enable the importers to over value the consignments and attempted to remit excess amount of foreign exchange, we hold that penalty on the courier agency is not warranted in law and accordingly set aside the same.'*

8. The lower authorities appear to have considered the notice which the appellants were placed on to be sufficient for arriving at the conclusions they did and as sufficient discharge of the burden of responsibility for invoking of such detrimental consequence. In the light of the above decisions and, considering the lack of any evidence other than statements that that are also not inculpatory, the penalties under section 112 and section 114AA are not sustainable

9. As far as the individual-Directors are concerned, the decision of the Tribunal that

> *'4…. could only have been through the acts or omissions by one or more of its employees. A private limited company can only act, or fail to act by not fulfilling its duties through such acts or omissions of these human beings. Therefore in a case of this kind not involving breach of failure to follow statutory obligation, penalty could only be imposed after the*

> *involvement of a particular employee were shown…. For penalty to be imposed on the appellant, the Commissioner has to show the acts or omissions, that company was guilty of such acts or omissions, which would call for imposition of penalty, and such acts or omissions are attributable to its individual employees…'*

in *re Prathamesh Shipping P Ltd*, and the requirement to overcome this test cannot be ignored. That is, patently, not evident here.

10. In view of the above, the penalties imposed against the present appellants will not sustain. These are set aside and appeals allowed.

(Pronounced in Court)

(C J Mathew)
Member (Technical)

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