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

REGIONAL BENCH – COURT NO.I

CUSTOM APPEAL NO. 854 of 2009

(Arising out of Order-in-Appeal/Original No.CCP/ADJ/SR/01/2009 dated 29.4.2009 passed by the Commissioner of Customs (Preventive), Mumbai)

J. K. International : **Appellant**
285/287 Zaveri Bhavan, Old Hanuman Lane,
Mumbai 400 002

VS

Commissioner of Customs (Preventive), Mumbai : **Respondent**
New Customs House, Ballard Estate,
Mumbai 400 001

WITH

1) **CUSTOM APPEAL NO. 855 of 2009 (Jeetendra H. Shah)**

(Arising out of Order-in-Appeal/Original No.CCP/ADJ/SR/01/2009 dated 29.04.2009 passed by the Commissioner of Customs (Preventive), Mumbai)

2) **CUSTOM APPEAL NO. 856 of 2009 (Billiards of Tulsa Inc. USA)**

(Arising out of Order-in-Appeal/Original No.CCP/ADJ/SR/01/2009 dated 29.04.2009 passed by the Commissioner of Customs (Preventive), Mumbai)

3) **CUSTOM APPEAL NO. 857 of 2009 (Galaxy Fun World Private Limited)**

(Arising out of Order-in-Appeal/Original No.CCP/ADJ/SR/01/2009 dated 29.04.2009 passed by the Commissioner of Customs (Preventive), Mumbai

4) **CUSTOM APPEAL NO. 873 of 2009 (Mukesh J. Shah)**

(Arising out of Order-in-Appeal/Original No.CCP/ADJ/SR/01/2009 dated 29.04.2009 passed by the Commissioner of Customs (Preventive), Mumbai

5) **CUSTOM APPEAL NO. 864 of 2009 (Commissioner of Custom (Preventive) Mumbai**

(Arising out of Order-in-Appeal No.CCP/ADJ/SR/01/2009 dated 29.04.2009 passed by the Commissioner of Customs (Preventive), Mumbai

Appearance

Shri D H Nadkarni, Adv. for Appellant (For appeal No.C/854 & C/855)

Trupti Chavan D.C. (A.R) for Respondent

CORAM:

Hon'ble Shri Ajay Sharma, Member (Judicial)
Hon'ble Shri P Anjani Kumar, Member (Technical)

Date of hearing : 21.02.2019
Date of decision : 20.06.2019

ORDER NO. A/86142-86147/2019

Per : **P Anjani Kumar, Member (Technical)**

Heard both sides and perused the records of the case.

2. Briefly stated the facts of the case are that M/s. Galaxy Fun world, having Shri Mukesh Shah, Smt Varsha Shah and Shri Jeetendra H. Shah as directors, imported various amusement games and tables from M/s. Billiards of Tulsa Inc. USA, which was managed by one Shri Jeetendra H. Shah. Investigation conducted and statements recorded of different persons revealed that the prices declared to the customs were deliberately undervalued in comparison to the unit price charged by the manufacturer; they have used ATA Carnet route by importing, under the guise of exhibitions at Delhi and Mumbai, and diverting the same without payment of duty instead of re-exporting. On completion of investigation the Show Cause Notice dated 19.03.1999 was issued seeking to confiscate the seized goods; demanding differential duty alongwith interest and we impose penalty on both the firms i.e. M/s. Galaxy Fun world Pvt. Ltd and M/s. J. K. International. The Adjudicating Authority vide order dated 2.11.99 passed an order confirming duty of Rs.2,81,837 on M/s. Galaxy Fun world Pvt Ltd and duty of Rs.11,25,480 on M/s. J. K. International; confiscating 5 Nos. plus 20 Nos. of games and machines totally valued at Rs.7,10,000 plus 18,50,000 imported by M/s. Galaxy Fun world Pvt. Ltd, while imposing total redemption fine of Rs.9,00,000; imposing penalty of Rs.7,50,000 each on M/s. Galaxy Fun world Pvt. Ltd., M/s. Billiards of Tulsa Inc. USA and Shri Mukesh J. Shah; Penalty of Rs.6,00,000 on M/s. J. K. International and penalty of Rs.2,50,000 on Shri Jeetendra H. Shah. On an appeal filed by the Appellants, CESTAT vide final order A/636-640/WZB/2006/CSTB/CI dated 17.07.2006, remanded the matter, back to adjudicating authority, while observing that the confiscation order arrived at alongwith valuation is required to be set aside; whether ATA Carnet imports fell foul of import regulation are not is to be re-determined; since valuation has not been arrived as per the provision of law and the question of liability to confiscation under Section 111(d) of Customs Act 1962 would depend on such determination for ATA Carnet goods and question of penalty under Section

114A/112A needs to be re-considered in the light of facts of payment made by the Appellants and the duty demands re-quantified. In *de novo* proceedings Learned Commissioner vide order CCP/ADJ/SR/99 dated 29.04.2009 confirmed customs duty of Rs.11,25,480 on M/s. J. K. International alongwith interest and imposed penalties as shown against the appeals filed as below. Revenue filed an appeal on the grounds that the Adjudicating Authority did not impose penalty under Section 114A, of the Customs Act, 1962, though confirmed duty under proviso to Section 28ibid.

Sl. No	Name of the appellant M/s or Shri	Appeal No	Duty/Penalty confirmed Rs
1	J.K. International	C/854/2009	Duty 11,25,480 RF 7,50,000 Penalty 6,00,000
2	Jeetendra H. Shah	C/855/2009	Penalty 2,00,000
3	M/s Billiards of Tulsa USA	C/856/2009	Penalty7,50,000
4	Galaxy Fun world	C/857/2009	Penalty 5,00,000
5	Mukesh J. Shah	C/873/2009	Penalty 5,00,000
6	Commissioner of Custom (Preventive) Mumbai	C/864/2009	Penalty not imposed under Section 114A of CA’62

Shri D.H. Nadkarni, counsel for the appellants submits that he was appearing on behalf of M/s. J. K. International (Appeal No. C/854/2009) and Shri Jeetendra H. Shah (Appeal No.C/855/2009). The other Appellants were not represented by any counsels. We find that the appeals are of 2009 and there have been No. of adjournments. Even after disengagement of the counsel from the other appeals, by his letter dated 29.10.2018, the case was listed for hearing on 03.12.2018, 07.01.2019, 08.01.2019, 16.01.2019 and it was finally heard on 21.02.2019. In view of the same, it is understood that the Appellants M/s Billiards of Tulsa (Appeal No. C/856/2009), Galaxy Fun world (Appeal No. C/857/2009) & Mukesh J. Shah (Appeal No. C/873/2009), are not interested in pursuing their appeal.

3. Shri D.H. Nadkarni, counsel for the appellants, submits **on behalf of M/s J.K. International** that goods were imported by M/s. Billiards of Tulsa Inc., USA under ATA Carnet Scheme from USA, which is an admitted position; goods after import were sold by M/s. Billiard of Tulsa Inc., to M/s. J.K. International who in turn sold to M/s. Galaxy fun world Pvt. Ltd; said goods were seized from the premises of M/s. Galaxy fun world Pvt Ltd; M/s J.K. International have neither imported the goods nor goods were seized from their premises; hence, proposal of recovery of duty and appropriation thereof of the amount of Rs.13,63,242 paid during investigation is not legal and proper; as per Section 28 of the Customs Act,1962 duty can be demanded from importer or the agent or the employee of the importer; Appellant is neither an importer nor agent or employee of M/s. Billiard of Tulsa; even under Section 124 of the Customs Act, 1962, it is permissible to recover duty either from owner of goods or where such owner is not known then person in whose possession or custody such goods have been seized is liable to pay duty; Therefore, confirmation of duty on the Appellant is not sustainable in law.

3.1. He further submits that it is alleged that the Appellant have failed to produce any valid special import licence for debiting the value of the goods covered by two ATA Carnets of total value of Rs.17,33,899; said goods were imported by M/s. Billiard of Tulsa as per Annexure to the impugned Show Cause Notice; there is no need for Indian Buyer of imported goods to produce any valid special import license; hence order of confiscation under Section 111(d) of the Customs Act, 1962 is not sustainable; even though the Appellant have presented photocopy of license, it is not open for the adjudicating Authority to order confiscation under Section 111(d) of the Customs Act, 1962. As M/s. Billiards of Tulsa is an importer and duty liability, if any, is on them; no violation can be established on part of M/s. J. K. International even as a facilitator for assisting M/s. Billiards of Tulsa and thereafter selling the goods,, regarding liability of goods to confiscation under 111(d); therefore, duty and penalty under Section 112(b) of the Customs Act, 1962 cannot be ordered or recovered from them for import of said goods. In this connection, he relies on Proprietor, Carmel Exports & Imports – 2012 (276) ELT 505 (Ker.)

3.2. As an alternate submission, he submits that, assuming without admitting that M/s. J.K. International is treated as Importer), Customs duty demand of Rs.11,25,480/- is on Pool Tables and Amusement Machines; in earlier proceedings duty was determined based on the Statement of Shri Jeetendra Shah, which was set aside by the Hon’ble Tribunal Vide Order dated 17-7-2006, after observing that valuation has to be arrived at based on the Valuation Rules and not on admissions and acceptance of under valuation; in the *de novo* proceedings, the learned Adjudicating Authority followed the said direction as regards to Valuation of Pool Tables but not in the case of Amusement Machines and proceeded to determine the value on the basis of the Statement of Shri Jeetendra Shah; hence, enhancement of value of Amusement Machines is not at all sustainable and deserves to be set aside; when declared value of pool tables could be accepted, same analogy can be adopted for valuation of Amusement Games and quantum of penalty can be accordingly decided.

4. Learned counsel for the appellants submits, on behalf of M/s. Jeetendra H. Shah, Director of Galaxy Fun world Pvt. Ltd. that as submitted above valuation of the amusement machines cannot be made on the basis of statement of Shri Jeetendra Shah. In such case there would not be any reason for confiscation of goods and accordingly no penalty can be imposed upon Shri Jeetendra H. Shah.

5. Ms. Trupti Chavan, Assistant Commissioner, Authorised Representative, for the Revenue, reiterated the findings of OIO and submitted that the case of the department is strong and based on documents. Shri Jeetendra Shah, in his statement recorded during investigation, stated that he along with Shri Mukesh J. Shah and Shri R. D. Mehta had supervised the imports under ATA Carnet; all the imports were at the behest and directions of Shri Mukesh J. Shah and he acted as per directions of Shri Mukesh J. Shah; Billiards of Tulsa sold all the machines to M/s. J. K. International, which were subsequently sold to M/s. Galaxy Fun world Pvt. Ltd. It is pertinent to note that the statement was not retracted and therefore, has evidentiary value. M/s. J.K. International have deposited the duty during the investigation and as such are deemed to have claimed themselves to be importers. Therefore there is no infirmity in demanding duty at against them. She also reiterated grounds of appeal in respect of the appeal filed by the department.

6. Heard both sides and perused the records of the case. We find that in terms of the Show Cause Notice dated 19.03.1999 M/s. Billiards Tulsa Inc. USA had participated in two exhibitions at Delhi and Mumbai in 1997-98 and 1998-99 and displayed various machines imported by them under international ATA Carnet. However, after completion of the exhibitions, instead of re-exporting the amusement machines, they diverted the same for home consumption and sold the same to M/s. J. K. International Mumbai without discharging the custom duty liability and have further sold them to M/s. Galaxy fun world Pvt. Ltd. Some goods were seized at the premises of M/s. Galaxy fun world on 23.09.1998. The Show Cause Notice mentions that M/s. Billiards Tulsa Inc. USA have applied for permission, vide letter dated 31.08.1998, to Ministry of Finance for permitting them to sell the goods in domestic market. The Show Cause Notice seeks to confiscate 5 Nos. of amusement games and tables (as shown in Sr. No.1 to 3 in Annexure C to the SCN) from M/s. Galaxy fun world Pvt. Ltd; while demanding duty of Rs.2,81,837 on the basis of alleged under valuation in respect of Bills of Entry 571/01.10.97 and 5219/11.4.98 alongwith penalties. The Show Cause Notice also proposes to confiscate 20 Nos. of amusement games and tables (as show in sr. Nos.4 to 21 in Annexure C to the SCN) from M/s Galaxy fun world Pvt. Ltd however, demands differential duty of Rs.11,25,480 the goods imported by Carnets No.US 5/97 09282 and US 5/97 09296 and to impose penalties thereof on M/s J.K. International. Learned Commissioner of Customs confirmed duty of Rs.11,25,480 on M/s. J. K. International in terms of *proviso to* Section 28(2) of Customs Act, 1962 while levying penalties on different companies/persons as detailed above. While Learned Commissioner confiscates 20 Nos. of machines, gives an option to redeem on payment of fine of Rs.7,50,000, it is not made clear as to who would pay the redemption fine.

6.1. Learned Counsel for the Appellants, M/s. J. K. International has argued on two grounds. No. 1 being that they are not the importers in terms of the ATA Carnets in question and the goods were also not seized from their premises. Therefore, they cannot be treated as importers and duty cannot be demanded from them both in terms of section 28 and section 124 of the Customs Act 1962. The second argument is that in the *de novo* proceedings Learned Commissioner has not followed the principals of valuation properly. Coming to the first question we find that the Appellants have raised this issue for the first time. This issue was not submitted to the adjudicating authority in the original proceedings as well as de novo proceedings. However, the Learned Counsel for the Appellants argues that this being a question of law can be raised at this juncture. We find that there is merit in his submission in this regard. We find that as discussed above, the main allegation of the department in respect of these two ATA Carnets is that they are obtained by M/s. Billiards Tulsa Inc USA. As stated above the Show Cause Notice acknowledges the fact in para 2 of the Show Cause Notice wherein it was stated that M/s. Billiards Tulsa Inc. USA had participated in two exhibitions at Delhi and Mumbai in 1997-98 and 1998-99 and displayed various machines imported by them under international ATA Cornet. However, after completion of the exhibitions, instead of re-exporting the amusement machines, they diverted the same for home consumption and sold the same to M/s. J. K. International Mumbai without discharging the custom duty liability and have further sold them to M/s. Galaxy fun world Pvt. Ltd. The Learned Commissioner the de novo adjudication has specifically mentioned that para 41 as follows:

> *I find that the said goods viz. amusement game machines/tables were imported by M/s. Billiards of Tulsa, USA under ATA Carnet Nos. US 5/97 09282 and US 5/97 09296 and invoice no.#EX1005-IN dated 12.09.1997 and no.#EX1006-IN dated 1.10.1997 respectively for exhibition in India and were cleared under the said ATA Carnets from Mumbai Customs without payment of customs duty subject to condition that the said goods would be re-exported within the statutory period of six months form the date of import. The Noticee no.2 has produced the copies of the notification no.157/90 – Cus dt. 28.3.1990 and Public Notice no.39 dated 2.05,1990 issued by the Commissioner of Customs (General), New Customs House, Mumbai and claimed that the import was made by*

following the procedure laid down there under. On perusal of said notification and Public Notice. I find that the goods described in schedule I to the said notifications, when imported into India for display or use of any event specified in Schedule II to the said notification were exempt from the whole of Customs duty and the whole of Additional duly leviable thereon subject to the following conditions:

1. The event specified in Schedule II was held in public interest and was sponsored or approved by the Government of India or the Trade Fair Authority of India.

2. The said goods were imported under an ATA Carnet issued in accordance with the Customs Convention on ATA Carnet and the Carnet was guaranteed by the Federation of Indian Chamber of Commerce ("FICCI)" in short), authorized guaranteeing, association for ATA Carnet in India.

3. The said goods conform to the description, quantity, quality, value and other specifications given in the ATA Carnet.

4. The said goods would be re-exported within the statutory period of six month from the date of import.

5. Further, I find from the para 1.4 of the said Public Notice that :

i) The ATA Carnet shall be sole document for temporary importation and temporary exportation of goods under the Convention and, therefore, instead of normal bill of *entry/Shipping bill, only the ATA Carnet would be filed.*

ii) The "FICCI" shall be the sole guaranteeing association for ATA Carnet in India.

iii) The validity of ATA Carnet shall not in any case exceed one year from the date of issue and

iv) The temporary importation of goods under the Convention has been exempted from ITC Regulations under the saving clause of the Import Trade Control Order, 1955.

It is also pertinent to note that the Government of India has vide notification no.14/1990 notified the ATA Carnet (Form of B/E and Shipping Bill) Regulations, 1990.

6.2 We fail to understand as to how Commissioner, having given such elaborate finding on the provisions of Law, proceeded to confirm the duty on M/s JK International. As argued by Learned Authorised Representative, the Revenue has presumed M/s J.K. International to be the importers as they have come forward and paid the duty and as per the statement of Shri Jeetendra H. Shah. We find that neither the Show Cause Notice nor the initial OIO/the *de novo* OIO have given reasoning as to why M/s JK International were treated to be importers. While the Show Cause Notice asked M/s Galaxy Fun World to show cause as to why 20 Nos. of amusement games and tables (as show in sr. Nos.4 to 21 in Annexure C to the SCN), should not be confiscated, the OIO does not specify as to who is liable to pay the redemption fine. Even though the appellants have not contested the fact in the initial proceedings, it being a question of Law, we find that the same is acceptable. Any action beyond the scope of provisions of Law *is* to be treated as having no mandate of Law. May be under some circumstances, someone who claims to be importer could be treated so in cases where the importer cannot be identified. In the instant case, it is clear that M/s Billiards Tulsa Inc USA have the Carnets No.US 5/97 09282 and US 5/97 09296; a Guarantee was given by the FICCI for the importation of the same in terms of the Notification No 157/90-Cus dated 28-3-1990 and agreeably M/s Billiards Tulsa Inc USA have applied to Ministry of Finance, seeking permission to sell the goods in domestic market on finding unable to export. In case of any violations, by M/s Billiards Tulsa Inc USA, like selling the goods to M/s J.K. International Revenue was free to take action as per law to recover duty and other dues if any as per the law laid down therein. If M/s J.K. International have sold the goods in domestic market and realized Customs duty, Revenue could invoke suitable provisions of Law to recover that amount from M/s J.K. International. It is not open to department to recover the duty from M/s JK International in terms of proviso to Section 28 of Customs, Act, 1962. Therefore, to that extent we find that the show cause notice and the order is not maintainable. As we find that the demand made on M/s J.K. International is not sustainable under Section 28 of Customs Act, 1962, we are not going in to the merits of valuation of the goods.

6.3 Coming to the penalties imposed, though we find that it was not open for Revenue to demand duty from M/s J.K. International for the goods imported under ATA Carnets by M/s Billiards Tulsa Inc USA, it is not to conclude that there was no role for M/s JK International in rendering the goods liable for confiscation. We find there is force in the submissions made by the Learned AR that Shri Jeetendra Shah, in his statement recorded during investigation, stated that he along with Shri Mukesh J. Shah and Shri R. D. Mehta had supervised the imports under ATA Carnet; all the imports were at the behest and directions of Shri Mukesh J. Shah and he acted as per directions of Shri Mukesh J. Shah; Billiards of Tulsa sold all the machines to M/s. J. K. International, which were subsequently sold to M/s. Galaxy Fun world Pvt. Ltd. It is pertinent to note that the statement was not retracted and therefore, has evidentiary value. We find that both M/s J.K. International and Shri Jeetendra H Shah have rendered themselves liable for penalty under Section 112 of the Customs, Act, 1962. The Learned Counsel for the appellants submitted that penalty cannot be imposed on M/s Galaxy Fun world and Shri Jeetendra H Shah its proprietor. As we are looking in to the acts of commissions and omissions of M/s JK International, we find that there is no infirmity in demanding penalty from M/s J.K. International of which Shri Jeetendra H. Shah is a director. However, looking in to fact that the case is very old and mired in litigation and the circumstances of the case we are inclined to reduce the penalties. However, as we hold that duty cannot be recovered from M/s J. K. International under the provisions of Section 28 of Customs Act, 1962, consequentially question of penalty under Section 114 A doesn't arise. Moreover, we find that even though the penalty under Section 112 and 114A are mutually exclusive, the Show Cause Notice seeks to recover penalty under both the sections. We find that this is not tenable under the Law. For this reason, we find that the Revenue appeal is not maintainable.

7. In view of the above, the impugned order is modified to the following extent and appeals are disposed accordingly.

(i). In respect of appeal No C/854/2009 we hold that demand of duty from M/s J.K. International is not sustainable. Penalty imposed on M/s JK International is reduced from Rs.6,00,000 to Rs.1,00,000 (Rupees One Lakh only)

(ii). Redemption fine is reduced from Rs.7,50,000 to Rs 4,00,000 (Rupees Four Lakhs only).

(iii). Penalty imposed on Shri Jeetendra H. Shah (No.C/855/09) is reduced from Rs.2,00,000 to Rs.1,00,000 (Rupees One Lakh only) (iv). Appeals filed by M/s Billiards of Tulsa (No.C/856/09), Galaxy Fun world (No. C/857/09) & Mukesh J. Shah (No. C/873/09) are dismissed for non-prosecution.

(Order pronounced in open court on 20.06.2019)

(Ajay Sharma)
Member (Judicial)

(P Anjani Kumar)
Member (Technical)

HM