

**CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
MUMBAI**

WEST ZONAL BENCH – COURT NO. 3

Customs Appeal No: 88655 of 2018

[Arising out of Order-in- Original CAO No: CC/VA/03/2018-19Adj(I) ACC dated 14th June 2018 passed by the Commissioner of Customs (Import), ACC, Mumbai.]

Priya Limited
4th Floor, Kimatrai Building, 77/79 Maharshi Karve
Marg, Marine Lines (E), Mumbai – 400 002

... Appellant

versus

Commissioner of Customs (Import)
ACC, Sahar, Andheri (E), Mumbai – 400 099

...Respondent

With

Customs Appeal No: 88659 of 2018

[Arising out of Order-in- Original CAO No: CC/VA/03/2018-19Adj(I) ACC dated 14th June 2018 passed by the Commissioner of Customs (Import), ACC, Mumbai.]

Aditya Bhuwania, Director
Priya Limited, 4th Floor, Kimatrai Building,
77/79 Maharshi Karve Marg, Marine Lines (E),
Mumbai – 400 002

... Appellant

versus

Commissioner of Customs (Import)
ACC, Sahar, Andheri (E), Mumbai – 400 099

...Respondent

APPEARANCE:

Ms Rashmi Deshpande, Advocate for the appellant

Ms PV Sekhar, Additional Commissioner (AR) for the respondent

CORAM:

**HON'BLE MR C J MATHEW, MEMBER (TECHNICAL)
HON'BLE DR SUVENDU KUMAR PATI, MEMBER (JUDICIAL)**

FINAL ORDER NO: A/86553-86554/2019

DATE OF HEARING:	14/05/2019
DATE OF DECISION:	04/09/2019

PER: C J MATHEW

This appeal lies against order-in-original CAO no. CC/VA/03/2018-19Adj(I) ACC dated 14th June 2018 of Commissioner of Customs (Import), Air Cargo Complex, Mumbai which has confirmed duty liability of ₹3,02,62,909/- consequent upon re-classification of ‘Windows XPE Embedded software’ under heading no. 8523 8020 of the First Schedule to Customs Tariff Act, 1975. The recovery of duties under section 28 of Customs Act, 1962 by denial of the exemption notification no. 12/2012-CE dated 17th March 2012 (at serial no. 266) was accompanied by order for imposition of penalties under section 112(a) or section 114A of the Customs Act, 1962 besides imposition of penalty under section 112(a) of Customs Act, 1962 on Shri Aditya Arun Kumar Bhuwania. Subsequently, by corrigendum dated 27th July 2018, confiscation of goods valued at ₹24,85,25,364/- was further amended to incorporate the refrainment from the consequence of confiscation while altering the penalty from ₹2,50,00,000/- to ₹3,92,62,909/- under section 114A of Customs Act, 1962 in addition granting the benefit of the *proviso* to section 114A of the Customs Act, 1962.

2. The issue in brief is that the appellants were alleged to have evaded duties of custom on import of 'recorded disc' by mis-declaring the same as 'windows XPE embedded (customized) software licence' and claiming classification under heading no. 4907 of the First Schedule to Customs Tariff Act, 1975. The case of Revenue is that these goods, declared to be valued at US \$ 57, had, prior to September 2012, been classified under heading 8524 and 8523 of the First Schedule to Customs Tariff Act, 1975 but for the period between October 2012 and July 2013 the heading was altered owing to the imposition of additional duties on goods imported under heading 8523 and 8524 of the First Schedule to the Customs Tariff Act, 1975. According to the appellant, 'stickers' and 'license' were imported for export to their customers as permission for the use of customized software developed from the 'XPE embedded software' imported on the earlier occasion. According to them, software is customized to render it suitable for specific end use such as 'automated teller machines' etc and that, on receiving payments from these customers, the authorization for downloading of the customized software would be provided. To enable this to be put to use, the stickers and licence used to be dispatched through the air cargo complex and that, at times, one disc with the same software would be sent. It would appear that the presence of the disc in the export consignment which was correlated with the relevant import consignment led to the conclusion that

these very discs had been imported in the first instance in recorded form and hence not classifiable under heading 4907 of the First Schedule to Customs Tariff Act, 1975. Relying in large measure on the statement of Shri Aditya Bhuwania, Director of M/s Priya Limited, that confessed to import of software in individually recorded disc which were then re-exported, the original authority confirmed the demand.

3. The adjudicating authority has deduced his conclusions from the description of identical goods in the import documents filed from 2005 up to the issue of notification no. 12/2012-CE dated 17th March 2012 and the statement of Shri Aditya Bhuwania. It is seen that the exemption notification (at serial no. 266) is applicable to ‘customized software other than packaged software or canned software’ under heading 8523 of the First Schedule to Customs Tariff Act, 1975 which has been defined in the *explanation* following the description of exempted goods. It would appear that the case of the customs authorities is that with the dichotomizing of software for levy, the appellant, with intent to avoid any controversy over eligibility of their product as ‘customized’, opted for the alternate classification under heading 4907 0030 of the First Schedule to Customs Tariff Act, 1975 which was intended for licences and licence stickers.

4. According to Learned Authorised Representative the output of

the importer does not amount to customization for which reliance is placed on the product offering obtained from the website of the shipper, viz., M/s Microsoft Inc.

5. On the other hand, Learned Counsel for the appellant contends that 'Windows XPE' is available with them and, under an agreement with the supplier, they cull out such modules as are required for the utility of a particular client for dispatch to them as a link over data network. It was explained that these would be downloaded at the destination for loading in the equipment or hardware on which the 'stickers' or 'licences' are affixed to indicate conformity with intellectual property rights.

6. It is submitted on behalf of Revenue that the consignment-to-consignment comparison of the imported goods with exported goods, of identical weight and identical description save for the inclusion of compact disc in the shipping bill, is a clear indicator that the discs were also being imported though the packages were claimed to be consisting only of licences or sticker licences. Moreover, the presumption for alteration of the heading and classification after the issue of notification no. 12/2012-CE dated 17th March 2012 was also concluded to be an indicator of incapability of description as customized software. According to Learned Counsel, it was physically impossible to contain the weight of as many CDs as declared in the

various shipping bills within the weight of the imported packages. It is her contention that, at best, the export consignment could contain one disc as back up in the event of failure to receive the link for downloading of the customized software. She also informs that the customization in the present instance cannot be questioned because components of the entire software that is already in their possession are isolated and made specific to the respective clients. According to her, with the exemption accorded by notification no. 12/2012-CE, to which they were entitled, there would be no reason for them to take shelter under an alternative heading. According to Learned Authorised Representative, the statement of the Director of the importing-company which has admitted to the mis-declaration and has confirmed the various acts of omission and commission made with that intent needs no further corroboration. It is also submitted that the deposit of a substantial portion of the demand by the appellant during investigation attests to the genuineness of this admission. Learned Counsel, however, submits that the deponent of the statement had retracted it before a notary public and the affidavit, sworn for that purpose, elaborates on the limited aspects of the correspondence between import and export packages that was grossly exaggerated in the impugned order.

7. The value declared itself is not in doubt. The statement recorded from Shri Aditya Bhuwania is undoubtedly inculpatory but

not against the claim of having been retracted which, even if not done before the authority which recorded the statement, was, nevertheless, placed later before the adjudicating authority, there can be no doubt that the contents of the said statement is not acceptable without some corroboration. It is clear that the adjudicating authority, or the investigating officers, were not privy to the contents of either the export or import goods and rely heavily on the declarations in the documents and the purported confessional statement. Though doubts are sought to be cast on the retraction, it may not be easily discardable. The contents of the affidavit must, however, be established independently. The documents do not evince mis-declaration and circumstantial deduction are not credible in the absence of even a single consignment and, more particularly, impossibility of such large number of recorded discs being a part of consignments in light packages. It is also not certain as to the particular benefit obtained by the appellant in going through this elaborate deception as alleged when warehousing could have been resorted and in the light of eligibility of the appellant for the facility offered by section 74 and 75 of Customs Act, 1962. The acceptance of the shipping bills and the conclusion that the bills of entry were mirror images fortifies the claim of the appellant for eligibility to drawback under section 74 of the Customs Act, 1962. In these circumstances, the motive distances itself from the method and without motive there

can be no offence. Learned Counsel places reliance on the decision of the Hon'ble High Court of Gujarat in *Commissioner v. Fact Paper Mill Ltd* [2015 (322) ELT 283 (Guj.)] to highlight the failure of the adjudicating authority in dealing with the retraction even if not in compliance with the various judicial rulings on the subject; that there was a retraction should suffice for the adjudicating authority to render a ruling on its acceptance or otherwise. Learned Authorised Representative relies on the decision of the Hon'ble Supreme Court in *KI Pavunny v. Assistant Collector (HQ), Central Excise Collectorate, Cochin* [1997 (90) ELT 241 (SC)], in which the rival contentions were substantially the same, and which has held that

'25. It would thus be seen that there is no prohibition under the Evidence Act to rely upon the retracted confession to prove the prosecution case or to make the same basis for conviction of the accused. The practice and prudence require that the Court could examine the evidence adduced by the prosecution to find out whether there are any other facts and circumstances to corroborate the retracted confession. It is not necessary that there should be corroboration from independent evidence adduced by the prosecution to corroborate each detail contained in the confessional statement. The Court is required to examine whether the confessional statement is voluntary; in other words, whether it was not obtained by threat, duress or promise. If the Court is satisfied from the evidence that it was voluntary, then it is required to examine whether the statement is true. If the Court on examination of the evidence finds that the retracted confession is true, that part of the inculpatory portion could

be relied upon to base conviction. However, the prudence and practice require that Court would seek assurance getting corroboration from other evidence adduced by the prosecution.'

8. According to us, the decision in *re K I Pavunny* doubtlessly permits reliance upon a confession to suffice but, nevertheless, the admonition to exercise prudence in practice by corroboration with other evidence cannot be ignored. Referring to the decision of the Tribunal in *Sidharth Shankar Roy v. Commissioner of Customs, Mumbai [2013 (291) ELT 244 (Tri.-Mumbai)]*, Learned Authorised Representative contends that retraction of statement is not in conformity with the test prescribed therein and must be rejected. The circumstances in which the statement of the appellant therein were accorded special importance is no template for the present dispute. It is also the contention of the Learned Authorised Representative that substantive difference between section 28 of Customs Act, 1962 and section 11A Central Excise Act, 1944 has been commented upon in *Associated Cement Companies Ltd v. Commissioner of Customs [2001 (128) ELT 21 (SC)]* to support the contention that, for demand of duty under section 28, there is no requirement for establishing a motive.

9. Considering that the adjudicating authority has placed overwhelming reliance on the statement of the Director and as the retraction of that statement has not been taken into consideration, we

are of the opinion that the adjurement in *re K I Pavunny* mandates independent corroboration. The declaration in the shipping bill, according to us, in the absence of any other evidence must be accepted as truthful assertion of the contents therein. The impossibility of carrying such large number of CDs in the corresponding import package within the declared weightment would lend credibility to the argument of the Learned Counsel that nothing other than stickers and licence had been imported. It is also surprising that, along with revision of the classification, the adjudicating authority compelled a change in the description of the imported goods. We failed to see the necessity for, or logic of, that.

10. In view of the absence of any evidence of the imported goods being nothing other than licence stickers or licences, we are not inclined to agree that the motive for such an elaborate exercise has been established. In the light of the above, we find no reason to uphold the impugned order, which is set aside.

11. Appeals are allowed.

(Order pronounced in the open court on 04/09/2019)

(C J Mathew)
Member (Technical)

(Dr. Suvendu Kumar Pati)
Member (Judicial)