CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL MUMBAI

WEST ZONAL BENCH

Customs Appeal No: 1175 of 2012

[Arising out of Order-in-Original No: 23/2012 dated 24th August 2012 passed by the Commissioner of Customs (Export), JNPT, Nhava Sheva.]

Ramesh Hande … ***Appellant***
C/o SR Sale & Co, 519 Grohitram Bldg, Plot No. 14B
Sector 19, APMC Market, Vashi Navi Mumbai - 400705

versus

Commissioner of Customs (Export) ***…Respondent***
Jawaharlal Nehru Port Trust, Nhava Sheva, Uran,
Dist: Raigad – 400 707

<u>APPEARANCE</u>:

Shri Anil Balani, Advocate for the appellant

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

WITH

(i) Customs Appeal No. 1183 of 2012 (NCS Industries Pvt. Ltd), (ii) Customs Appeal No. 1185 of 2012 (Manoj Gore), (iii) Customs Appeal No. 1198 of 2012 (Rajshri Packagers Ltd.), (iv) Customs Appeal No. 1199 of 2012 (Vinod M. Chitalia), (v) Customs Appeal No. 1204 of 2012 (Seaport Logistics Pvt. Ltd.), (vi) Customs Appeal No. 1206 of 2012 (Mohan Lal & Sons), (vii) Customs Appeal No. 1207 of 2012 (Chand Prakash & Co.), (viii) Customs Appeal No. 1208 of 2012 (Hind Kabul Co.), (ix) Customs Appeal No. 1209 of 2012 (Uttam Chand Sunder Lal), (x) Customs Appeal No. 1210 of 2012 (Rakesh Kumar & Co.), (xi) Customs Appeal No. 1211 of 2012 (Fairways Trading Co.) (xii) Customs Appeal No. 1212 of 2012 (Knight Trading Co.), (xiii) Customs Appeal No. 1213 of 2012 (Lalit & Co.), (xiv) Customs Appeal No. 1231 of 2012 (Bagsons International), (xv) Excise Appeal No. 1847 of 2012 (Bagsons International)

[Arising out of Order-in-Original No: 23/2012 dated 24th August 2012 passed by the Commissioner of Customs (Export), JNPT, Nhava Sheva.]

APPEARANCE:

Shri VM Doiphode, Shri Anil Balani, Shri Ganesh Iyer and Shri GB Yadav, Advocates for the appellants

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/86746-86761 / 2019

DATE OF HEARING: 18/03/2019
DATE OF DECISION: 18/09/2019

PER: C J MATHEW

These appeals are filed against order no. 23/2012 dated 24th August 2012 of Commissioner of Customs (Export), Jawaharlal Nehru Port Trust, Nhava Sheva, in which 'soap stone powder' was held to have been substituted in the consignments claimed to be 'bulk drugs' valued at ₹ 2,76,14,059/- for shipment against ten shipping bills and the goods were confiscated under section 113 of Customs Act, 1962 subject to option for redemption on payment of fine of ₹27,00,000/-. Besides, penalty of ₹3,00,00,000/- imposed on the exporter, M/s Bagsons International, under section 114AA of Customs Act, 1962, Shri Vinod Chitalia, Shri Manoj Gore, Shri

Shabeer Rana, Shri Ramesh Hande, M/s Seaport Logistic Pvt Ltd and M/s Consolidated Shipping Line (I) Ltd under section 114AA of Customs Act, 1962 are also disputed. In addition, the goods removed from the premises of various manufacturers for fulfilment of exports executed by M/s Bagsons International were held to have been illegally diverted and confiscated under rule 25 of Central Excise Rules, 2002, with the duty thereon of ₹ 10,61,600/- ordered to be recovered under section 11A of Central Excise Act, 1944 read with rule 19 of Central Excise Rules, 2002, besides imposing penalty of like amount under section 11AC of Central Excise Act, 1944 on M/s Bagsons International. Furthermore, duties foregone at the time of imports effected by M/s Knight Trading Co, M/s Uttam Chand Sunderalal, M/s Kripa International, M/s Chand Prakash & Co, M/s Rakesh Kumar & Co, M/s Kishan Chand & Brothers, M/s Mohan Lal & Sons, M/s NCS Industries Pvt Ltd, M/s Rajashree Packagers Ltd, M/s Hind Kabul Co, M/s Fairways Trading Co and M/s Lalit & Co were also ordered to be recovered for having been cleared by recourse to scrips released on completion of export obligation that were fabricated while subjecting the goods to confiscation though permitted to be redeemed on payment of fine along with attendant penalties.

2. We have heard Learned Counsel for appellants and Learned Authorised Representative on the sustainability of the outcomes in the face of challenge to the manner in which proceedings were conducted.

3. It was contended that the adjudicating authority was not empowered to demand duties, and impose penalties, under Central Excise Act, 1944. Learned Authorised Representative draws our attention to notification no. 7/2009-Cus(NT) dated 6th January 2009 conferring powers under several statutes, including Central Excise Act, 1944, to adjudicate the various notices. In view of this notification, the plea against proceedings under Central Excise Act, 1944 fails.

4. The next issue which comes up is the invoking of a provision that came into force only on 13th July 2006 on exports that had been effected between February 2003 and May 2003. It is seen that the show cause notice leading to the impugned order was issued on 1st July 2008 when section 114AA had been enacted. It was also canvassed by Learned Authorised Representative that the notices had proposed imposition of penalty under section 114 of Customs Act, 1962 and that the findings pertained to the liability for penalty under the same provision even though mentioned otherwise in the operative part of the order which should not stand in the way of sustaining the penalty. Decisions of the Hon'ble Supreme Court in *Collector of Central Excise, Calcutta v. Pradyumna Steel Ltd [1996 (82) ELT 441 (SC)]*, *JK Steel Ltd v. Union of India [1978 (2) ELT 355 (SC)* and *Assistant Collector of Central Excise, Bombay v. The Elphinstone Spinning and Weaving Mills Co Ltd [1978 (2) ELT (J399) (SC)]* and

various decisions of the Tribunal holding that the power to impose penalties or recovery of duties suffices for visiting these detriments on noticees even if a wrong provision in law has been cited. In our view, this contention is neither reflective of the context in which Hon'ble Supreme Court rendered its decision nor tenable as invoking of a provision which is intended by the legislature to be resorted to in a specific circumstance is substantive and not to be wished away as a typographical error. Section 114 is liable to be invoked for acts of omission and commission that contribute to the export goods being rendered liable to confiscation; section 114AA of Customs Act, 1962, on the other hand, is restricted only to the furnishing of false documentation in relation to transactions under Customs Act, 1962. The unconnectable variance between the two, giving rise to different penalties, again discountenances the contention of Learned Authorised Representative that the penalty imposed under section 114AA, without examination of the circumstances and without placing the entities on notice, is sustainable.

5. Furthermore, as pointed out by the Learned Counsel, the Hon'ble Supreme Court, in *Commissioner of Central Excise, Mumbai – I v. Lal Mining Engineering Works [2007 (215) ELT 167 (SC)]*, has held that

> *'3. Section 11AC being a penal provision providing for a mandatory penalty, in our opinion, cannot be invoked in a*

case of this nature as the same would amount to give retrospective operation thereto which is impermissible in law. The view which we are taking find support from a Judgment of this Court in Commissioner of Central Excise, Coimbatore v. ELGI Equipments Ltd., - 2001 (128) ELT 52 (SC),

6. Likewise, in *Commissioner of Central Excise, Coimbatore v. Elgi Equipments Ltd [2001 (128) ELT 52 (SC)]* it was held that

> *'3. The learned Attorney General has placed reliance on the judgment of this Court in Mithilesh Kumari v. Prem Behari Khare [1989 (40) ELT 257 (SC) = 1989 (2) SCC 95]. But the following observation in that decision need to be noted :*
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> > *The presumption against retrospective operation is strong in cases in which the statute, if operated retrospectively, would prejudicially affect vested rights or the illegality of the past transactions, or impair contracts, or impose new duty or attach new disability in respect of past transactions or consideration already passed.*
> >
> > *(emphasis supplied)*
>
> *This observation supports our view.'*

and on the very issue of invoking of any provision before it came into force, the Tribunal, in *Kody Teck Ltd v. Commissioner of Customs, Chennai [2007 (212) ELT 428 (Tri. - Chennai)]*, held that

> *'3. After considering the above submissions and hearing learned SDR, we find that it is not in dispute that the goods in question were imported and cleared prior to 28-9-1996. It is settled law that a penal provision has no retrospective effect unless otherwise specified in the provision itself. Section 114A of the Customs Act did not have retrospective operation and hence would not be applicable to the offence alleged against the appellants. Hence the penalty imposed on them is*

vacated. The appeal is allowed only to this extent.'

Consequently, on the admission that section 114AA of Customs Act, 1962 had not been invoked in the show cause notice, the penalties on the various individuals under this provision are set aside.

7. Demand for duties of central excise has been confirmed on goods that had not, ultimately, been cleared for export. It has been held by the adjudicating authority, on the basis of statements, reports of the delivery of the goods as well as the details of delivery, that the manufactured goods had not been brought to the port for export. Furthermore, it has been established that the copies of shipping documents submitted to the jurisdictional Central Excise officers as proof of export were forged.

8. It was concluded from the statements of Shri Vinod Chitalia, Shri Manoj Gore, Shri Ramchandra Prajapati, Shri Naresh Solanki, Shri Kaushik Shinde and Shri Ramesh Hande that the marking on the export goods had been tampered to bring them in conformity with their true nature after clearance for exports and that the statements themselves admit to the failure to export. As the goods were not exported, their liability to duty, in terms of the bond and the CT-1 certificate, is not disputable. The penalties imposed on the shipping agent and on the employee of the Custom House Agent, Shri Ramesh Hande, were stated to be in relation to the confiscation of the goods

for mis-declaration. We find nothing on record to indicate that these persons, engaged for discharge of functions that are permitted to be done on behalf of exporter, could be held to have been aware of the claim that the goods were actually ‘soap stone powder’. It would probably take talent and expertise to conclude, from a visual observation, that the goods claimed to be ‘bulk drugs’ were in fact ‘soap stone powder’. It would appear that no other cited authority has been examined and the claim for, and the request for cross-examination, had been denied. Section 138B of Customs Act, 1962 mandates that statements relied upon, if challenged, should be tested by cross-examination. In the absence of such, statements themselves lack relevancy.

9. The submission of Learned Counsel is that the imports were effected against scrips that had been legally procured and that the appellant-importers were not privy to any act which would have jeopardized their eligibility for duty-free imports. Reliance has been placed on the decision of the Hon’ble High Court of Punjab & Haryana in *Commissioner of Customs, Amritsar v. Vallabh Design Products [2007 (219) ELT 73 (P & H)]* and on that the Hon’ble High Court of Bombay in *Commissioner of Customs (Import) Mumbai v. Coromandal Fertilizers Ltd [2018-TIOL-2568-HC-MUM-CUS]* and in *Taparia Overseas (P) Ltd v. Union of India [2008-TIOL-144-HC-MUM-CUS].*

10. Learned Authorised Representative, on the other hand, relies upon the decision of the Hon'ble High Court of Punjab & Haryana in *Friends Trading Co v. Union of India [2010 (254) ELT 652 (P&H)]* and *Munjal Showa Ltd v. Commissioner of Customs & Central Excise, Faridabad [2009 (246) ELT 18 (P&H).*

11. The recovery of duties of excise on goods, though cleared with the claim of intendment for export, that were allegedly diverted, and that of duty of customs on the goods imported against scrips that were made ineligible owing to non-fulfillment of export obligation would be contingent upon determination that the goods that were not 'bulk drugs', as per declaration, but was 'soap stone powder'. The goods themselves were not available for testing and it is by a set of circumstantial evidence, relying almost entirely upon statements, that this conclusion has been inferred. In the light of the submission that the plea for cross-examination of some other deponents had been denied by the adjudicating authority, the evidentiary value of the statements themselves become questionable. As the statements provided the material framework for arriving at the conclusion that the goods which were dispatched were not 'bulk drugs', it is necessary, for conformity with the interest of natural justice, that such examination to be granted.

12. In view of the above circumstances, we set aside the impugned

order and remand the matter back to the original authority for deciding afresh on all the issues raised, including that of penalties under section 114 of Customs Act, 1962 as proposed in the show cause notice.

13. Appeals are accordingly disposed off.

(Order pronounced in the open court on 18/09/2019)

(C J Mathew)
Member (Technical)

(Ajay Sharma)
Member (Judicial)

**/as*