CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL, MUMBAI
REGIONAL BENCH
COURT No. I

Customs Appeal No. 839 of 2008
C/Cross/144 of 2008

(Arising out of Order-in-Original No. 38/2008/CAC/CC/KS dated 26.03.2008 passed by Commissioner of Customs (Adjudication), Mumbai)

Commr. of Customs (EP), Mumbai **Appellant**
New Custom House,
Ballard Estate,
Mumbai 400 001.

Vs.

M/s. Brimco Plastic Machinery P Ltd. **Respondent**
Brimco House, Plot No.55,
Govt. Indl. Estate,
Charkop, Kandivli,
Mumbai 400 067.

WITH

Customs Appeal No. 1275 of 2008

(Arising out of Order-in-Original No. 38/2008/CAC/CC/KS dated 26.03.2008 passed by Commissioner of Customs (Adjudication), Mumbai)

Commr. of Customs (EP), Mumbai **Appellant**
New Custom House,
Ballard Estate,
Mumbai 400 001.

Vs.

M/s. Tulja Overseas **Respondent**
Sundaram Apartment,
3rd floor, No.6, Royal Park,
University Road,
Rajkot 360 005.

WITH

Customs Appeal No. 1276 of 2008

(Arising out of Order-in-Original No. 38/2008/CAC/CC/KS dated 26.03.2008 passed by Commissioner of Customs (Adjudication), Mumbai)

Commr. of Customs (EP), Mumbai **Appellant**
New Custom House,
Ballard Estate,
Mumbai 400 001.

Vs.

M/s. Godrick Enterprises **Respondent**
Sundaram Apartment,
3rd floor, No.6, Royal Park,
University Road,
Rajkot 360 005.

WITH

Customs Appeal No. 1277 of 2008

(Arising out of Order-in-Original No. 38/2008/CAC/CC/KS dated 26.03.2008 passed by Commissioner of Customs (Adjudication), Mumbai)

Commr. of Customs (EP), Mumbai **Appellant**
New Custom House,
Ballard Estate,
Mumbai 400 001.

Vs.

M/s. Vinayak Sales **Respondent**
Sundaram Apartment,
3rd floor, No.6, Royal Park,
University Road,
Rajkot 360 005.

WITH

Customs Appeal No. 1278 of 2008

(Arising out of Order-in-Original No. 38/2008/CAC/CC/KS dated 26.03.2008 passed by Commissioner of Customs (Adjudication), Mumbai)

Commr. of Customs (EP), Mumbai **Appellant**
New Custom House,
Ballard Estate,
Mumbai 400 001.

Vs.

M/s. Gallium Enterprises **Respondent**
Lot No.117, Sector 59,
HSIDC Indl. Estate,
Faridabad 121 004.

WITH

Customs Appeal No. 1279 of 2008

(Arising out of Order-in-Original No. 38/2008/CAC/CC/KS dated 26.03.2008 passed by Commissioner of Customs (Adjudication), Mumbai)

Commr. of Customs (EP), Mumbai **Appellant**
New Custom House,
Ballard Estate, Mumbai 400 001.

Vs.

M/s. Darshan Enterprises **Respondent**
B-13, Tejmahal,
S.V. Road, Borivali (W),
Mumbai 400 092.

WITH

Customs Appeal No. 1280 of 2008

(Arising out of Order-in-Original No. 38/2008/CAC/CC/KS dated 26.03.2008 passed by Commissioner of Customs (Adjudication), Mumbai)

Commr. of Customs (EP), Mumbai **Appellant**
New Custom House,
Ballard Estate,
Mumbai 400 001.

Vs.

M/s. Rupam Trading **Respondent**
4B-101, Paras Nagar,
Shankar Lane, Kandivli (W),
Mumbai 400 067.

WITH

Customs Appeal No. 1281 of 2008

(Arising out of Order-in-Original No. 38/2008/CAC/CC/KS dated 26.03.2008 passed by Commissioner of Customs (Adjudication), Mumbai)

Commr. of Customs (EP), Mumbai **Appellant**
New Custom House,
Ballard Estate,
Mumbai 400 001.

Vs.

M/s. Karuna Enterprises **Respondent**
Ram Niwas, Room No.4,
Near Manju Niwas,
Station Road,
Ulhasnagar 421 004.

WITH

Customs Appeal No. 1282 of 2008

(Arising out of Order-in-Original No. 38/2008/CAC/CC/KS dated 26.03.2008 passed by Commissioner of Customs (Adjudication), Mumbai)

Commr. of Customs (EP), Mumbai **Appellant**
New Custom House,
Ballard Estate, Mumbai 400 001.

Vs.

Shri Manharlal Vora **Respondent**
73-75, Gitanjali Co-op. Hsg. Soc.,
Plot No.83, Walkeshwar Road,
Mumbai 400 006.

AND

Customs Appeal No. 1283 of 2008

(Arising out of Order-in-Original No. 38/2008/CAC/CC/KS dated 26.03.2008 passed by Commissioner of Customs (Adjudication), Mumbai)

Commr. of Customs (EP), Mumbai **Appellant**
New Custom House,
Ballard Estate,
Mumbai 400 001.

Vs.

Shri L.K. Vora **Respondent**
9, Krishna Niwas,
18/3, R.A. Kidwai Marg,
Wadala, Mumbai 400 031.

Appearance:

Shri Ramesh Kumar, Authorised Representative for the Appellant
None for the Respondent

CORAM:

Hon'ble Dr. D.M. Misra, Member (Judicial)
Hon'ble Mr. Sanjiv Srivastava, Member (Technical)

FINAL ORDER NO. **A/86871-86880/2019**

Date of Hearing: 24.09.2019
Date of Decision: 24.09.2019

PER: SANJIV SRIVASTAVA

These appeals filed by the revenue are directed against the Order In Original No 38/2008/CAC/CC/KS dated 26.03.2008 of the Commissioner Customs (Export) Air Cargo Mumbai. By the impugned order Commissioner has held as follows:

"ORDER

<u>*A*</u>

I. Customs duty demanded on the goods covered under 9 bills of entry amounting to Rs.53,35,544/- is confirmed and the same should be recovered under proviso to section 28 of the Customs Act, 1962.

II. Customs duty demanded on the goods covered under 3 bills of entry amounting to Rs.25,65,526/- is confirmed and the same should be recovered under proviso to section 28 of the Customs Act, 1962.

III. Customs duty demanded on the goods covered under one bill of entry amounting to Rs.19,539/- is confirmed and the same should be recovered under proviso to section 28 of the Customs Act, 1962.

IV. Customs duty demanded on the goods covered under one bill of entry amounting to Rs.2,85,559/- is confirmed and the same should be recovered under proviso to section 28 of the Customs Act, 1962.

V. Interest at applicable rate demanded on Rs.82,06,168/- is confirmed under section 28AB of the Customs Act, 1962.

VI. The goods referred to at Sr.No. (I) to (IV) above valued at Rs.51,37,342/- CIF is confiscated under section 111(d) and 111(o) of the Customs Act, 1962.

A redemption fine of Rs.12,84,285/- is imposed under Section 125 of the Customs Act, 1962 in lieu of confiscation.

VII(i) Penalty of Rs.82,06,168/- is imposed on M/s. Brimco Plastic Machinery Pvt. Ltd. under Section 114A of the Customs Act, 1962.

VII(ii)A penalty of Rs.20,00,000/- is imposed on Shri Anil B. Goradia, Director of Brimco Plastic Machinery Pvt. Ltd. under Section 112(a) of the Customs Act, 1962.

<u>*B*</u>

I. Customs duty demanded on the goods covered *under one bill of entry amounting to Rs.8,20,061/- is confirmed and the same should be recovered under proviso to section 28 of the Customs Act, 1962..*

II. Customs duty demanded on the goods covered under one bill of entry amounting to Rs.7,19,459/- is confirmed and the same should be recovered under proviso to section 28 of the Customs Act, 1962.

III. Customs duty demanded on the goods covered under one bill of entry amounting to Rs.14,61,268/- is confirmed and the same should be recovered under proviso to section 28 of the Customs Act, 1962.

IV. Interest at the applicable rate demanded on the duty amounting to Rs.30,00,878/- is confirmed under section 28 AB of the Customs Act, 1962.

V. The goods referred to at Sr.No. (I) to (III) above having CIF value of Rs.16,84,222/- is confiscated under section 111(d) and 111(o) of the Customs Act, 1962.

A redemption fine of Rs.4,21,050/- is imposed under Section 125 of the Customs Act, 1962 in lieu of confiscation.

VI(i) Penalty of Rs.30,00,000/- is imposed on M/s. Brimco Plastic Machinery Pvt. Ltd. under Section 114A of the Customs Act, 1962.

VI(ii) A penalty of Rs.7,50,000/- is imposed on Shri Anil B. Goradia, Director of Brimco Plastic Machinery Pvt. Ltd. under Section 112(a) of the Customs Act, 1962."

2.1 Respondent 1 namely M/s Brimco Plastic Machinery Pvt Ltd had obtained an Advance License for duty free import of various goods including 4464 pieces of Ball Bearings, on the basis of Chartered Engineer Certificate submitted by them at time of making the application for the License. No SION existed for the specific export machineries.

2.2 Though application for license was made on 26.09.1994, the license No 207983 was issued on

09.01.1995 after the respondent 1 had completed the exports in ten consignments during October 1994. Subsequently four year later i.e. in 1998 on the basis of Chartered Engineer Certificate dated 18.07.1998 they got the license amended to import various type of bearings, which were never used for the manufacture of export goods.

2.3 This fraudulently amended license was transferred and used by various importer namely M/s Tulja Overseas, M/s Goodrick Enterprises, M/s Vinanyak Sales, M/s Gallium Inds. Ltd., M/s Roopam Trading Co., M/s Karuna Enterprises and M/s Darshan Enterprise (Respondent No 2 to 10) for importing roller bearings. Some of the importing firms were found to be the dummy companies floated by the Shri Anil B Garodia, MD of Respondent 1, Shri L K Vora, Authorized signatory and Shri Manharlal Vora.

2.4 After completion of investigations a Show Cause Notice No DRI/MZU/D/5/2000 dated 25.07.2003 was issued to the respondents seeking to recover the duty short/ not paid in respect of the clearances made using the said license, and for imposition of penalties.

2.5 The show cause notice has been adjudicated by the Commissioner by the impugned order referred in para 1 supra. Aggrieved by the impugned these appeals under consideration have been filed by the revenue.

2.6 Appeals were also filed by M/s Brimco Plastic Machinery Pvt Ltd (Respondent No 1) and Shri Anil B Garodia and Others.

3.1 We have heard Shri Ramesh Kumar, Assistant Commissioner, Authorized Representative for the Appellant Revenue. None appeared on behalf of respondents

3.2 Arguing for the revenue learned Authorized Representative while reiterating the submissions made in appeal stated-

- Adjudicating authority had not fastened the duty on the actual importers viz M/s Tulja Overseas, M/s Goodrick Enterprises, M/s Vinanyak Sales, M/s Gallium Inds. Ltd., M/s Roopam Trading Co., M/s Karuna Enterprises and M/s Darshan Enterprises and had dropped proceedings against them holding that they are bonafide transferees.

- However, while holding them to be the bonafide transferees, the adjudicating authority had failed to give any findings on facts or case laws on the basis of which he had arrived at the conclusion at para 34 (f) that they are bonafide transferees. In fact, of these seven firms M/s Tulja Overseas, M/s Goodrick Enterprises & M/s Vinayak Sales were benami firms. In view of the above, the adjudicating authorities order is not a speaking order.
- In view of the above, the departments appeal in case of M/s Brimco Plastic Machinery Pvt Ltd may also be allowed by way of remand.

4.1 We have considered the impugned order along with the submissions made in appeal and during the course of arguments on appeal.

4.2 The appeal filed by the Respondent 1 i.e. M/s Brimco Plastic Machinery Pvt Ltd has been dismissed by the Tribunal under Rule 22 of CESTAT Procedure Rules as the company has wound up and no application under the said rule was made by the official liquidator. Since the company itself has been wound up we are not in position to accept the submissions made by the revenue that the appeal against Respondent No 1 should be allowed and matter remanded back. Even if such request was to be allowed then it would be an excise in futility as on the date of remand the respondent No 1 do not exist.

4.3. The appeals filed by Shri Anil Garodia and others have been dismissed by the tribunal on merits vide final order No A/90893-90895/2017 dated 17.10.2017.

4.4 From the order of the Commissioner, it is observed that the Commissioner has confiscated the goods and allowed them to be released on the payment of redemption fine. In terms of Section 125 (2) of the Customs Act, 1962, as interpreted by the Hon'ble Supreme Court in case of Jagdish Cancer and Research Centre [2001 (6) SCC 483], the demand of duty against the confiscated goods is consequence of the release of the confiscated goods. Hence the duty is to be paid by the person who seeks the release of the goods on payment of redemption fine. The relevant paragraphs of the Apex Court decision are reproduced below:

"9. Learned counsel for the Centre draws our attention to Chapter XIV of the Customs Act and submits that it relates to confiscation of goods and conveyances and imposition of fines. It does not relate to imposition or demand of customs duty. Section 124 and 125 also fall in Chapter XIV. Section 124 provides for issue of show cause notice before confiscation of goods and Section 125 relates to payment of fine in lieu of confiscation. Section 28 of the Act which falls in Chapter V provides for notice for payment of duties which has been demanded by the notice in this case. Therefore, it is submitted on behalf of the Centre that demand of customs duty and the order for payment of the same is relatable to only Section 28(1) of the Customs Act, as also found by the CEGAT. That being the position, the notice was beyond time and not by a competent officer authorised to issue the same. The argument, as advanced, though seems to be attractive but on scrutiny, we find no merit in it. Section 124 reads thus:-

124. Issue of show cause notice before confiscation of goods, etc.- No order confiscating any goods or imposing any penalty on any person shall be made under this Chapter unless the owner of the goods or such person-

(a) is given a notice in writing informing him of the

grounds on which it is proposed to confiscate the goods or to impose a penalty;

(b) is given an opportunity of making a representation in writing within such reasonable time as may be specified in the notice against the grounds of confiscation or imposition of penalty mentioned therein; and

(c) is given a reasonable opportunity of being heard in the matter:

Provided that the notice referred to in clause (a) and the representation referred to in clause (b) may at the request of the person concerned be oral.

10. It provides that an order for confiscation of the imported goods may be made after giving a show cause notice to the importer of the goods. It also provides for imposition of fine.

11. Section 125 reads as under:-

125. Option to pay fine in lieu of confiscation.-(1) Whenever confiscation of any goods is authorised by this Act, the officer adjudging it may, in the case of any goods, the importation or exportation whereof is prohibited under this Act or under any other law for the time being in force, and shall, in the case of any other goods, give to the owner of the goods or, where such owner is not known, the person from whose possession or custody such goods have been seized, an option to pay in lieu of confiscation such fine as the said officer thinks fit:

Provided that, without prejudice to the provisions of the proviso to sub-section (2) of section 115, such fine shall not exceed the market price of the goods confiscated, less in the case of imported goods the duty chargeable thereon.

(2) Where any fine in lieu of confiscation of goods is imposed under sub-section (1) the owner of such goods or the person referred to in sub-section (1) shall, in addition, be liable to any duty and charges payable in respect of such goods.

12. Whenever an order confiscating the imported goods is passed, an option, as provided under Sub-section (1) of Section 125 of the Customs Act, is to be given to the person to pay fine in lieu of the confiscation and on such an order being passed according to Sub-section (2) of Section 125, the person shall in addition be liable to any duty and charges payable in respect of such goods. A reading of Sub-section (1) and (2) of Section 125 together makes it clear that liability to pay duty arises under Sub-section (2) in addition to the fine under Sub-section(1). Therefore, where an order is passed for payment of customs duty along with an order of imposition of fine in lieu of confiscation of goods, it shall only be referable to Sub-section (2) of Section 125 of the Customs Act. It would not attract Section 28(1) of the Customs Act which covers the cases of duty not levied, short levied or erroneously refunded etc.. The order for payment of duty under Section 125 (2) would be an integral part of proceedings relating to confiscation and consequential orders thereon, on the ground as in this case that the importer had violated the conditions of notification subject to which exemption of goods was granted, without attracting the provisions of Section 28(1) of the Customs Act. A reference may beneficially be made to a decision of this Court reported in Mohan Meakins Ltd. Versus Commissioner of Central Excise, Kochi (2000) 1 S.C.C. 462 wherein it has been observed in Para 6

"Therefore there is a mandatory requirement on the adjudicating officer before permitting the redemption of goods, firstly, to assess the market value of the goods and then to levy any duty or charge payable on such goods apart from the redemption fine that he intends to levy under sub-section (1) of that section."

In this view of the matter the objection raised by the Centre that Section 28 of the Customs Act would be attracted is not sustainable. "

4.5 Thus in view of the Apex Court decision as referred to above the duty determined by the adjudicating authority is normal consequence to the redemption of the confiscated goods. Hence any person, who seeks to redeem the confiscated goods, is required to pay the duty determined in view of the provisions contained in Section 125(2) of Customs Act, 1962. Hence we do not find any merits in the submissions made by the appellants that demand should have been confirmed also against the respondents who were the innocent transferee of the fraudulently amended licence.

4.6 We also take note of the various decisions of tribunal wherein it has been categorically laid down that at the material time there was no provision in the Customs Act, 1962 for confirmation of demand severally and jointly against the co-noticees in the proceedings initiated by a common show cause notice. Some of such decisions are reproduced below:

Vision Inc and Arun Kumar Gupta [Final Order dated 28.02.2010 in Customs Appeal No C/261, 262,263 & 264/2009] held as follows:

"10. It is made clear that it will not be open to the Commissioner to order for recovery jointly and severally inasmuch as it is incumbent on him to fix the duty liability on individual exporters based on individual drawback claims allowed earlier. It will also not be open to the Commissioner to impose separate penalties under the same provision of law on a proprietorship and its proprietor."

CESTAT Ahmedabad Bench Order No A/10307-10314/2017 dated 20 Jan 2017 has held as follows:

5.0 After careful consideration of facts on records, the submissions of both sides and case law cited, it appears that adjudicating authority has not rightly imposed duly liability severally and jointly against the noticee appellants. The CESTAT Delhi in case of M/s Golden Tobacco

Ltd.,[2015 (317) ELT 164 (T-Del)] held that demand cannot be confirmed severally and jointly against the assessee. CESTAT Delhi has in the said decision interalia observes as under:

*"**5.** Legal issue as to whether demands can be confirmed jointly and severely was the subject matter of various decision of the Tribunal. One such reference can be made to Tribunals' order in the case of Sree Aravindh Steels Ltd. v. Commissioner of Central Excise, Trichy - 2007 (216) E.L.T. 332 (Tri.-Chennai). Further, reference can be made to Tribunal's decision in the case of Rimjhim Ispat Ltd. v. CCE, Kanpur - 2013 (293) E.L.T. 124 (Tri.-Del.) as also to the Hon'ble Gujarat High Court decision dated 13-4-2011 in the case of Commissioner v. Mahesh Harlalka vide which the Tribunal's order setting aside the impugned order of the lower authorities confirming the demand jointly and severely, therefore set aside and the matter was remanded, stands upheld by High Court."*

4.7 Accept for making a bald and vague assertion that adjudicating authority had failed to give any findings on facts or case laws on the basis of which he had arrived at the conclusion in para 34(f) of the impugned order, that the respondents were bonafide transferee, revenue has failed to state the fact and case laws which were to be considered and have not been considered by the adjudication commissioner. Commissioner has in his order at para 26C recorded that there was some collusion between the person procuring and getting the licenses amended fraudulently and the importer but has still concluded in para 34(f) against holding them they were bonafide transferees. In the appeal memo we do not find anything stated by which this finding of the Commissioner can be challenged. In our view no appeal could be considered on the basis of such vague statements made in the appeal memo.

5.0 In view of discussions as above, we do not find any merits in the appeals filed by the revenue and dismiss the same. The cross objection filed by the respondent is also disposed of.

(Order pronounced in the open court)

(Dr. D.M. Misra)
Member (Judicial)

(Sanjiv Srivastava)
Member (Technical)

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