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

Customs Appeal No. 40 of 2011

(Arising out of Order-in-Original CAO No. CC/MJ/19/2010 ADJ.ACC dated 27.10.2010 passed by Commissioner of Customs (Import), ACC, Mumbai)

M/s. Prime Focus Ltd. **Appellant**
2, Anand Kunj, North Avenue,
Linking Road, Santacruz (W),
Mumbai 400 054.

Vs.

Commr. of Cus. (ACC & Imp.), Mumbai **Respondent**
Air Cargo Complex,
Sahar, Andheri (E),
Mumbai 400 099.

WITH

Customs Appeal No. 41 of 2011

(Arising out of Order-in-Original CAO No. CC/MJ/19/2010 ADJ.ACC dated 27.10.2010 passed by Commissioner of Customs (Import), ACC, Mumbai)

Shri Namit Malhotra **Appellant**
Prime Focus House,
Linking Road, Khar,
Mumbai 400 052.

Vs.

Commr. of Cus. (ACC & Imp.), Mumbai **Respondent**
Air Cargo Complex,
Sahar, Andheri (E),
Mumbai 400 099.

AND

Customs Appeal No. 42 of 2011

(Arising out of Order-in-Original CAO No. CC/MJ/19/2010 ADJ.ACC dated 27.10.2010 passed by Commissioner of Customs (Import), ACC, Mumbai)

Shri Nishant Fadia **Appellant**
Prime Focus House,
Linking Road, Khar,
Mumbai 400 052.

Vs.

Commr. of Cus. (ACC & Imp.), Mumbai Respondent
Air Cargo Complex,
Sahar, Andheri (E),
Mumbai 400 099.

Appearance:

Shri Anil Mishra, Advocate, for the Appellant
Shri R.K. Dwivedy, Additional Commissioner, Authorised Representative for the Respondent

CORAM:

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

FINAL ORDER NO. A/**86999-87001/2019**

Date of Hearing: 30.08.2019
Date of Decision: 30.08.2019

PER: SANJIV SRIVASTAVA

These appeals are directed against order in original No CC/MJ/19/2010 ADJ.ACC dated 27.10.2010 of Commissioner Customs (Import), Air Cargo Complex, Mumbai. By the impugned order, Commissioner held as follows:

i) *"It is held that these software are not "customized software" within the meaning given to the expression in the notification and are not eligible for exemption under Notification No 06/2006-Central Excise (Entry No 27) dated 01.03.2006.*

ii) *The imports of software made under Bills of Entry No 61700071 dated 28.04.2006 and the software "Bones Application TE Ver 2" is reassessed under Rule 5(1)(b) of the Customs Valuation rules, 1988 as detailed in Annexure A to the SCN.*

iii) *The imp[orts of software made under Bill of Entry No 599588 dated 12.04.206 and the software "Da Vinci 2K" is reassessed under Rule 5(1)(b) of the Customs Valuation rules, 1988 as detailed in Annexure A to the SCN.*

iv) *The two software having total declared assessable value of Rs 1,43,69,68/ and total revised assessable value f Rs 2,54,4,937 is confiscated under section 111(m) of the Customs Act, 162. As per provision section 125 of the Customs Act I give the importer an option to pay fine of Rs 5,00,000/- in lieu of confiscation and redeem the goods.*

v) *The demand of duty amounting to Rs 21,17,500/- is hereby confirmed as detailed in Annexure to the SCN, under the provisions of Section 28 of the Customs Ac, 12 for invoking extended period of five years along with the interest amounting to Rs 3,83,122/- under Section 28AB of the Customs Act, 1962.*

vi) *The amount of Rs 22,15,150/-deposited by M/s PFL vide Cash No 93 dated 25.09.2007 is adjusted towards duty demanded at (v) above and to the extent of Rs 97650/- towards interest payable as at (v) above.*

vii) *I impose a penalty amounting to Rs 21,17,500/- plus Rs 3,83,122/- on M/s PFL under Section 112(a) and (b) of the Customs Act, 1962.*

viii) *I impose a penalty amounting to Rs 3,00,000/- on Shri Namit Malhotra under Section 112(a) and (b) of the Customs Act, 1962.*

ix) *I impose a penalty amounting to Rs 1,50,000/- on Shri Nishant Fadia under Section 112(a) and (b) of the Customs Act, 1962."*

2.1 Appellants filed Bill Of Entry No 599588 dated 12.04.2006 and 617071 dated 28.04.2006 for import clearance of two software's namely "Da Vinci 2K and "Bones". The value of the software's on CD Rom with user manual was declared at US$ 1,38,000/- and Euro. 1,45,000/-. They claimed benefit of Notification No 21/2002-Cus dated 1.03.2002 (Sr No 157), Notification No

6/2006-CE dated 1.03.2006 9Sr no 27) and 20/2006-Cus dated 01.03.2006 (Sr No 60). The software's were cleared assessed to nil duty in terms of the said notifications.

2.2 Investigation were undertake by the DRI against the imports made, and for the reason that they were imported by claiming the inadmissible benefit under Notification No 6/2006-CE dated 01.03.2006. As calculated by the DRI Officers they immediately on the same day paid the duty demanded along with interest amounting to Rs 22,15,150/-.

2.3 A show cause notice dated 5.03.2008 was issued to the appellants. The show cause notice has been adjudicated by the Commissioner as per impugned order referred in para 1, supra.

2.4 Aggrieved by the impugned order, appellants are in appeal.

3.1 We have heard Shri Anil Mishra, Advocate for the appellants and Shri R K Dwivedy, Additional Commissioner, Authorized Representative for the revenue.

3.1 Arguing for the appellants learned counsel for the appellant submitted that-

- his basic challenge is to the order confiscating the goods and imposition of redemption fine and penalties on the appellants.
- The goods were cleared on the basis of assessed bill of entries, though they have claimed the benefit of exemption notification under 6/2006-CE, but they had not misdeclared any fact at the time of clearance of the goods.
- They were under bonafide belief that the gods imported by them were packaged software and benefit of exemption from payment of CVD as per the sad notification admissible to them.

- They deny that the goods have been undervalued by them as the value declared by them is the transaction value between them and the foreign supplier. Without rejecting the transaction value the value adopted by the revenue, is contrary to the decision of Apex Court in case of Eicher Tractors [2000 (122) ELT 321 (SC)].
- Since the goods were not seized and provisionally released the same cannot be confiscated and redemption fine imposed {Carina Creations {2016 (9) TMI 75 CESTAT Kolkata, Weston Components 2000 (1) TMI 45 SC.
- Since there is no case of misdeclaration the goods no penalty could have been imposed on them under section 112(a) and (b).

3.3 Arguing for the revenue learned authorized representative while reiterating the findings in the impugned order

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

4.2 There is no dispute in respect of the fact that duty could have been demanded against the goods cleared against the assessment order on Bill of Entry. Commissioner has in para 41.4 relying on the decisions n case of Priya Blue Industries [2004 (172) ELT 145 (SC)], Jain Shudh Vanspati Ltd [1996 (86) ELT 460 (SC)] Re-Rolling Mills [1997 (94) ELT 8 (SC)], held so. We do not find any reason to differ with the findings of Commissioner on this Account.

4.3 We also find that Commissioner has specifically concluded that the by misinterpreting the phrase “customized software” used in the notification appellants have wrongly availed the benefit of exemption notification 6/2006-CE. The phrase “customized software” was not open for any other interpretation as the same has been defined in the notification itself. Further by using the phrase "customized" on the invoice, in respect of the software, which was not customized software as per the notification was intentional misdeclaration to mislead the assessing officer, to avail the benefit of exemption notification. We are in agreement with the findings of the Commissioner and would also like to point out that Hon'ble Apex Court has in case of Dilip Kumar & Co [2018 (361) ELT 577 (SC)] clearly laid own the principle of strict interpretation of exemption notifications sating as follow:

"52. *To sum up, we answer the reference holding as under -*

(1) Exemption notification should be interpreted strictly; the burden of proving applicability would be on the assessee to show that his case comes within the parameters of the exemption clause or exemption notification.

(2) When there is ambiguity in exemption notification which is subject to strict interpretation, the benefit of such ambiguity cannot be claimed by the subject/assessee and it must be interpreted in favour of the revenue.

(3) The ratio in Sun Export case (supra) is not correct and all the decisions which took similar view as in Sun Export case (supra) stands overruled."

Hence we uphold the findings of Commissioner in this respect.

4.4 On the issue of valuation, Commissioner has determined the value of the goods on the basis of contemporaneous imports made by similarly placed importer namely M/s Shemaroo from the same suppliers at about the same time i.e. March April 2006. The on the basis of value of the contemporaneous imports Commissioner has determined that undervaluation in respect of Bones Software was o the extent of 38.98% and for Da Vinci software 48%. It is settled law that the value of contemporaneous imports can be a good reason for rejection of transaction value. Hence we do not find any merits in the submissions made by the appellant, relying on the decision in case of Eicher Tractors. In case of Viral Copier Services [2011 (263) ELT 280 (T-Chennai)], tribunal held as follows:

"11. In the course of argument the learned DR appearing for the Department had drawn our attention to the decision of the Hon'ble Supreme Court in the case of Collector of Customs, Calcutta v. Sanjay Chandiram - 1995 (77) E.L.T. 241 (S.C.) which held that Rule 3 of the Customs (Valuation) Rules, 1988 providing for acceptance of transaction value is not a rule of invariable application regardless of the circumstances. In cases of misdeclaration the irresistible conclusion would be that if the real value of the imported goods has not been shown in the invoices, then the declared value cannot be taken as the transaction value. She has also drawn our attention to the Hon'ble Supreme Court's decision in the case of Radhey Shyam Ratanlal v. Commissioner of Customs - 2009 (238) E.L.T. 14 (S.C.) which holds that deemed value under Section 14(1) of the Customs Act, 1962 would prevail when price declared does not reflect the price at which the imported or like goods are ordinarily sold. These two decisions of the Hon'ble Supreme Court provide adequate amplitude to the customs authorities to reject declared values on the face of misdeclaration of the goods and/or when the values are abnormally low. Customs authorities cannot be precluded from determining correct values for the purpose of charging customs duty and cannot be compelled to accept abnormally low values declared by the importers as has been done by the appellants in this case to the detriment of public revenue.

12. In a recent decision in Commissioner of Customs (Gen), Mumbai v. Abdulla Koyloth - 2010 (259) E.L.T. 481 (S.C.) the Hon'ble Supreme Court has observed as follows :-

"16. In Varsha Plastics Private Limited (supra), this Court while dealing with a similar situation where the importer had misdeclared in terms of value, description and quality of the imported goods, had held that :-

"It has to be kept in mind that once the nature of goods has been misdeclared, the value declared on the imported goods becomes unacceptable. It does not in any way affect the legal position that the burden is on the Customs Authorities to establish the case of misdeclaration of goods or valuation or that the declared price did not reflect the true transaction value."

17. Similarly, in Collector of Customs, Calcutta v. Sanjay Chandiram (1995) 4 SCC 222 = 1995 (77) E.L.T. 241 (S.C.), a three judge bench of this Court observed that :-

"These rules are based on the assumption that the price actually paid or payable for the goods has been genuinely disclosed by the importer. But, if the certificates of origin of the goods have been found to be false, the value declared in the invoices cannot be accepted as genuine".

Hence in our view the value determine by the Commissioner on the basis of contemporaneous imports rejecting the transaction value cannot b faulted with. Hence we are of the view that appellants had suppressed the value of the goods with intention to evade payment of duty. Accordingly in our view the extended period of limitation as provided by section 28 of Customs Act is rightly invoked for demanding the duty.

4.5 Since we have held that appellants have suppressed the value and have misdeclared the description by using the phrase "Customized" to avail the benefit of exemption from payment of CVD, in terms of Notification No 6/2006-CE, the penalty imposed under Section 114A of Custom Act, 1962 cannot be faulted with in view of the Hon'ble Apex Court decision in case of Rajasthan Spinning and Weaving Mills [2009 (238) ELT 3 (SC)]. However we find that while imposing the penalty under Section 114A, Commissioner has imposed penalty equivalent to duty plus interest, which is contrary to provision of the section itself wherein section prescribes that the penalty impossible to be equal to Duty or Penalty. Hon'ble Supreme Court has in case of U Enterprises [2007 (218) ELT 481 (SC)] has clearly stated as follows:

"9. *After hearing learned counsel for the parties, we find substance in the first submission of the learned counsel for the appellants, that the amount of penalty could not be more than the amount equal to the duty chargeable. A bare perusal of Section 114A makes it clear that the liability to pay penalty can be equal to the amount of duty and could not exceed the payable duty. Hence, the penalty imposed was against the express provisions of law. In these circumstances, we reduce the amount of penalty under Section 114A to Rs. 4,91,000/-."*

Tribunal in case of B Suresh Vasudev Baliga [2015 (329) ELT 433 (T-Bang)] held as follows:

"4. *Apart from noticing that the issue is covered by the said decision, I also find that the expression used in the said Section 114A is "or". For better appreciation I reproduce the said section.*

"Section 114A. Penalty for short-levy or non-levy of duty in certain cases. - *Where the duty has not been levied or has been short-levied or the interest has not* *been charged or paid or has been part paid or the duty or interest has been erroneously refunded by reason of collusion or any wilful misstatement or suppression of facts, the person who is liable to pay the duty or interest, as the case may be, as determined under sub-section (8) of Section 28 shall also be liable to pay a penalty equal to the duty or interest so determined"*

As seen from above, the said section is applicable to a person who is liable to pay the duty 'OR' interest as the case may be, who shall be liable to penalty equal to the duty or interest so determined. The expression used is "or", which is disjunctive between duty or interest. Further use of expression "as the case may be" clearly suggests that the said section is referring to two different persons and situations. One which may be liable to duty and the other which may be liable to interest only and provides that in both the situations, the person liable to duty would be liable to penalty equal to duty and the person liable to interest would be liable to penalty equal to interest. There is no warrant to read "or" as "and". In view of the above I find no reasons to interfere with the impugned orders of Commissioner (Appeals). Revenue's appeals are accordingly rejected."

Following the said decision we reduce the penalty imposed by the Commissioner under section 114A by the amount of interest.

4.6 On the issue of confiscation and imposition of redemption fine on the imported goods, we find that the goods were not seized and provisionally released to the appellants against any bond and bank guarantee. Since the goods were never seized or released against the bond and bank guarantee, we are not in position to uphold the order of confiscation of goods and imposition of redemption fine, in view of the decision of larger bench of

Tribunal in case of Bhagyanagar Metals Ltd [2016 (333) ELT 395 (T-LB)] wherein following has been has been held:-

"46. Learned Senior Counsel for the appellants contested confiscation of impugned goods and imposition of redemption fine on the same. He submitted that there was no seizure at all or ever, either of the phones or the CD-ROMS imported by the appellants. Appellants had not executed any bond for provisional release of any goods in terms of Section 110A of the Customs Act, 1962. He further submitted that the bond mentioned by the Original Authority in his order dated 18-8-2006 is for the clearance of goods on payment of provisional duty. In the present case in the absence of any seizure thereafter provision release of goods under bond, confiscation or imposition of redemption fine are not sustainable. We find that reliance placed by Revenue on the decision of Hon'ble Supreme Court in Weston Components Ltd. v. CC, New Delhi (supra) is misconceived. In the said case, there was a seizure and provisional release against a bond, undertaking to produce the goods when called for. In such situation, the Hon'ble Supreme Court held that redemption fine can be imposed if the goods are already cleared. Since, such release of goods is on execution of bond such fine was justified. We find that the Hon'ble Punjab & Haryana High Court in CC, Amritsar v. Raja Impex (P) Ltd. reported in 2008 (229) E.L.T. 185 (P & H) held :-

"12. It may also be noticed here that in the case of M/s. Weston Components Ltd. v. Commissioner of Customs, New Delhi (supra), the goods were released to the assessee on an application made by it and on the execution of a bond by the assessee and in those circumstances, the Hon'ble Apex Court held that the mere fact that the goods were released on the bond being executed would not take away the power of custom

authority to levy redemption fine. A reading of the judgment/order of the Hon'ble Apex Court in M/s. Weston Components Ltd. v. Commissioner of Customs, New Delhi (supra), would show that the Apex Court has taken the view that redemption fine can be imposed even in the absence of the goods as the goods were released to the appellant on an application made by it and on the appellant executing a bond. Since the goods were released on a bond the position is as if the goods were available. The ratio of the above decision cannot be understood that in all cases the goods were permitted to be cleared initially and later proceedings were taken for under-valuation or other irregularity, even then redemption fine could be imposed. We are, therefore, not inclined to accept the contention raised by the appellant on this issue and set aside the redemption fine.

13. The reliance of learned counsel for the revenue upon the provisions of Section 125 of the Act is also misconceived. Section 125 of the Act is applicable only in those cases which have been cleared by the concerned authorities subject to furnishing undertaking/bond etc. However, in the present case, admittedly, the goods were cleared by the respondent-authorities without execution of any bond/undertaking by the assessee. Thus, in view of the fact and circumstances of the case, we find no error in the impugned orders. No substantial question of law arises for our determination in the present appeal and the same is hereby dismissed".

47. Further, learned Counsel pleaded that the fine is payable, if at all, only on redemption of goods. Here there is neither a seizure nor provisional release under bond and, hence, the question of payment of redemption fine either to release the goods or in terms of the bond does not arise. We find that there can be no redemption fine in the absence of any seizure or provisional release of such *seized goods under proper bond. In the present case in the absence of such events, redemption fine imposed is not sustainable."*

Following the said decision of Larger Bench of Tribunal we do not find any merits in the order of Commissioner confiscating the goods and imposing the redemption fine.

4.7 Commissioner has in impugned order, held Appellant 2 an Appellant 3, liable for penalty under Section 112(a) and (b) by recording as follows:

"47. The question whether this case there is misdeclaration warranting demand of duty invoking extended period under Section 28 was considered. As is seen from findings above this is clearly a case where the goods have been mis-declared in the matter of its description as well as its value. So it s clear that extended period can be invoked. Since such misdeclaration makes the god liable to confiscation, the persons responsible for such actions namely Shri Namit Malhotra and Shri Nishant Fadia are liable to penalty under Section 112 (a) and (b of the Customs Act. Shri Namit Malhotra who was the Managing Director of the firm had a higher responsibility that Shri Nishant Fadia who was Chief Financial Officer."

The Commissioner has held the Appellant 2 and 3 liable to penalty under Section 112(a) and (b) for the reason of position they held with Appellant 1. He has not assigned any specific act of omission or commission on their part which have rendered the goods liable for confiscation. Neither in para 11 of the Show Cause Notice, titled "Analysis of Modus Operand ad the Role Played by Individuals-" we do not find any act of omission or commission, attributed to these individuals for by which the goods have become liable for confiscation. Hence we are not in position to agree with the order of Commissioner imposing penalty under Section 112 (a) and (b) on Appellant 2 and 3.

4.8 Summarizing our finding in para's above-

i. Demand of duty amounting to Rs 21,17,500/- under Section 28 of the Customs Act, 1962 is upheld.
ii. Demand of interest amounting to Rs 3,83,122/- on the above duty demanded, under Section 28AB is upheld.
iii. Penalty imposed on importer, Appellant 1, under Section 114A is upheld but restricted to amount of duty confirmed i.e. Rs 21,17,500/-.
iv. Order Confiscating the goods and allowing them to be redeemed on payment redemption fine of Rs 5,00,000/- is set aside.
v. Penalties imposed under Section 112(a) & (b) on Appellant 2 and 3 are set aside.

5.1 In view of discussions as above,-

- Appeal No C/40/2011 is partly allowed to the extent indicated in para 4.8 above;
- Appeal No C/41/2011 and C/42/2011 are allowed.

(Order pronounced in the open court)

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

(Sanjiv Srivastava)
Member (Technical)

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