CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL, WEST ZONAL BENCH AT MUMBAI

REGIONAL BENCH - COURT NO. 02

Customs Appeal No. 87044 of 2019

(Arising out of Order-in-Original No. 32/2019-20/Commr/NS-I/JNCH dated 19.06.2019 passed by Commissioner of Customs (NS-I), Nhava Sheva)

Shri Dhananjay Balchandra Desai **.....Appellant**
Flat No. 502, D-Wing,
Ashok Vihar CHS,
Marol Military Road,
Marol, Andheri (E),
Mumbai

VERSUS

Commissioner of Customs, Nhava Sheva - I **.....Respondent**
JNCH, Custom House,
Nhava Sheva, Raigad,
Maharashtra-400707

WITH

Customs Appeal No. 87045 of 2019

(Arising out of Order-in-Original No. 32/2019-20/Commr/NS-I/JNCH dated19.06.2019 passed by Commissioner of Customs (NS-I), Nhava Sheva)

M/s Nirvanza Trading Pvt. Ltd. **.....Appellant**
FC/3, Shiv Market Khureji,
Khas Near Masjid,
Delhi-110051

VERSUS

Commissioner of Customs, Nhava Sheva - I **.....Respondent**
JNCH, Custom House,
Nhava Sheva, Raigad,
Maharashtra-400707

Appearance:

Shri Ashok Kumar Singh, Advocate for the Appellant
Shri Bhudhan Kamble, Authorized Representative for the Respondent

CORAM:
HON'BLE MR. S.K. MOHANTY, MEMBER (JUDICIAL)
HON'BLE MR. P. ANJANI KUMAR, MEMBER (TECHNICAL)

FINAL ORDER NO. A/87042-87043/2019

Date of Hearing: 04.09.2019
Date of Decision: 04.09.2019

Per: S.K. MOHANTY

These appeals are directed against the impugned order dated 19.06.2019 passed by the Commissioner of Customs, Nhava Sheva.

2. Briefly stated, the facts of the case are that the appellant M/s Nirvanza Trading Pvt. Ltd. is *inter alia*, engaged in the business of trading of cosmetic products, perfumes and deodorants. During the disputed period September 2018, the appellant had imported EDT-100ML, Deodorants-200ML, Body Spray-250ML, Bioluxe Scrub-500ML from Dubai-UAE and filed the Bills of Entry No. 7973716 dated 09.09.2018 and 8027706 dated 12.09.2018 for clearance of the said imported consignments. During the course of examination of the imported goods at Continental CFS, the Customs Department found that there is mis-declaration of goods and that in respect of most of the consignments; the CDSCO Certificates were not issued in conformity with the statutory norms. Accordingly, the subject goods were seized under Section 110(1) of the Customs Act, 1962. On further investigation into the matter and upon recording of statements from the Director of the appellant company and the authorized signatory of the shipping lines, the department concluded that the goods covered under the Bills of Entry were mis-declared in terms of quantity, value and non-compliance of the CDSCO norms and accordingly, the goods were undervalued with an intent to evade payment of customs duty. Thus, the declared value of subject goods furnished by the appellant were rejected by the department under Rule 12 of Customs Valuation (Determination of Value of Imported Goods) Rules, 2007 and the transaction value was re-determined/re-assessed under Rule 9 *ibid*. The matter was adjudicated against the appellant vide the impugned order dated 19.06.2019, wherein the declared value of the subject goods at Rs.1,08,89,740/- was enhanced and re-determined at Rs. Rs.1,46,64,039/- with ordered for confiscation. Out of the re-determined value of Rs.1,46,64,039/-, the impugned order has

absolutely confiscated the cosmetics valued at Rs.1,25,48,722/- under Section 111(d) *ibid* on the ground that the said goods were attempted to be imported without any valid CDSCO Certificate, and thus, the provisions of Drug & Cosmetics Act, 1940 have been violated. The goods valued at Rs.21,15,317/- were allowed for redemption on payment of redemption fine of Rs.2,50,000/-. The impugned order has imposed penalty of Rs.35,00,000/- on the appellant company under Section 112(a) *ibid.* Besides, the impugned order also imposed penalties of Rs.10,00,000/- each under Section 112(a) *ibid* and 114AA *ibid* on the other appellant Shri Dhananjay Balchandra Desai.

3. The learned Advocate appearing for the appellants submitted that the subject goods were wrongly sent by the overseas supplier due to cross stuffing and the said fact had also been informed to the department in the statements, recorded on 03.12.2018 and 25.01.2019, of the Director of the appellant company. Thus, he submitted that the appellant was not aware about any mis-declaration and due to bona fide mistake on the part of the supplier, the goods were wrongly supplied. Hence, he prayed for allowing re-export of the goods covered under both the Bills of Entry. He further submitted that in absence of any malafides on the part of the appellant, imposition of redemption fine and penalties in the impugned order are also not proper and justified.

4. On the other hand, the learned AR appearing for the Revenue reiterated the findings recorded in the impugned order. He further submitted that the appellants have not specifically contested the report furnished by the department, showing discrepancies observed during examination of the goods. He further submitted that the appellant company had not complied with the conditions with regard to the CDSCO certificate issued by the competent authority. Thus, it is contended on behalf of Revenue that confirmation of the adjudged demands in the impugned order is sustainable.

5. Heard both sides and perused the records.

6. It is an admitted fact on record that the subject goods in the present case were imported, resorting to mis-declaration in terms of quantity, value and also most of the goods were not in conformity with the CDSCO Certificate. This fact is evident from paragraph 11 of the impugned order. Further, the appellant had not submitted any plausible evidence either before the original authority or the Tribunal, in disproving the correctness of the examination report furnished by the department. On the contrary, it is observed from the submissions recorded from the appellant at paragraph 6 in the impugned order that it had agreed with the fact of mis-declaration of goods and non-compliance of the CDSCO requirement as per the provisions contained in the Drugs and Cosmetic Act, 1940. Thus, we are of the considered view that rejection of the declared value by resorting to the provisions of Rule 12 *ibid* and re-determination of the same under Rule 9 *ibid* read with Section 14 *ibid* is in conformity with the statutory provisions.

7. In this case, the learned adjudicating authority has absolutely confiscated the cosmetics valued at Rs.1,25,48,722/- under Section 111(d) *ibid* on the ground that the goods were attempted to be imported without any valid CDSCO certificate obtained from the competent authority functioning under the provisions of Drugs & Cosmetics Act, 1940. Further, the impugned goods valued at Rs.21,15,317/- were also ordered for confiscation under various provisions contained in Section 111 *ibid*. However, such goods were allowed for redemption, on payment of redemption fine of Rs.2,50,000/-.

8.1 In so far as confiscation of improperly importation of goods are concerned, Section 111 *ibid* deals with various situation, under which the imported goods shall be liable for confiscation. Clause (d) of Section 111 *ibid* provides that any goods which are imported or attempted to be imported, contrary to any prohibition imposed by or under the Customs Act, 1962 or any other law for the time being in force; shall be liable to confiscation. Section 11 *ibid* empowered the Central Government for issuance of notification in prohibiting import or export of goods either absolutely or subject to fulfilment of the specified conditions. Section 125 ibid provides the option to pay fine in lieu of confiscation.

8.2 On a conjoint reading of the above statutory provisions, it transpires that in case of non-compliance of the prohibitions/restrictions contained in Section 11 *ibid,* the discretion vested with the adjudicating authority under Section 125 *ibid* is to be exercised in the prescribed manner; In case if the restriction or regulation relating to import of goods is violated, then no discretion can be exercised by the Commissioner in offering an option for payment of redemption fine in lieu of confiscation of the goods. Moreover, the Hon'ble Madras High Court, in the case of ALM Enterprises Vs. Commissioner of Customs, Imports, Chennai - 2017 (353) ELT 289 (Mad.) have observed that when any restriction or condition is imposed by or under the other statute, then the adjudicating authority under the customs statute is not even competent to waive or condone such restriction and in effect, cannot provide the option for payment of redemption fine in respect of the imported goods.

8.3 In the present case, regulations for import of perfumes are provided in the Drug & Cosmetics Act, 1940. Since, the appellant did not import the subject goods under the cover of valid CDSCO certificate, the provisions of the said statute have been violated. Thus, the goods are liable for absolute confiscation under the provisions of Section 111(d) *ibid*. Further, the offending goods were not notified under Section 11 *ibid* at the material time of import. Thus, the adjudicating authority under the Customs statute was not empowered to relax the conditions provided in the Act, 1940 to offer redemption of goods on payment of fine. Therefore, We do not find any infirmity in the impugned order, so far it has ordered for absolute confiscation of goods. Such findings of the learned adjudicating authority is squarely covered by the ratio of judgment delivered by the Hon'ble Madras High Court, in the case of ALM Enterprises Vs. Commissioner of Customs, Imports, Chennai - 2017 (353) ELT 289 (Mad.).

9. With regard to the remaining confiscated goods, which were allowed for redemption on payment of redemption fine of Rs.2.50 lakhs, we find that the impugned order at paragraph 6 has recorded the submissions made by the appellants pursuant to summons issued by the department, that on receipt of information regarding mis-declaration of goods, they immediately contacted the supplier, who, in turn, had confirmed that due to cross stuffing, the goods were wrongly supplied to the appellant company. Further, it is also evident from the impugned order that the appellant company had made the request to overseas supplier for re-exportation of the goods. Thus, under the circumstances, we are of the considered view that the quantum of redemption fine and penalty imposed on the appellant company can be reduced in the interest of justice.

10. The impugned order has invoked the provisions of Section 112(a) *ibid* and Section 114AA *ibid* for imposition of penalties on the other appellant Shri Dhananjay Balchandra Desai, Director of the appellant company. On perusal of the case records, especially the statement recorded by the department pursuant to summon issued under Section 108 *ibid*, we do not find any justification to uphold the impugned order to such extent inasmuch as the ingredients mentioned in the said statutory provisions have not been satisfied in support of imposition of penalties.

11. With regard to the prayer made by the appellant to re-export of the subject goods, we find that provisions governing redemption as in the case and re-export as requested are altogether separate. The impugned order at paragraph 39 has recorded that after redemption of the goods and payment of due duty, the importer will be free to treat the goods in any legal way permissible. Such observation of the adjudicating authority is in conformity with the statutory provisions. Thus, no separate order is required to be passed at this juncture, in relation to appellants' request to re-export the goods.

12. In view of above discussions, the appeal is disposed of in following terms:

(a) The impugned order is sustained as far as goods held liable for absolute confiscation.

(b) The impugned order sustains, so far as it has re-determined the assessable value under Rule 9 *ibid* read with Section 14 *ibid* and absolutely confiscated the goods under Section 111(d) ibid;

(c) the impugned order is modified, as far as it relates to goods held to be redeemable, quantum of redemption fine is reduced to Rs.25,000/-;

(d) the impugned order is modified, in reducing imposition of penalty under Section 112(a) on the appellant company to Rs.1,00,000/-;

(e) the impugned order, in so far as it has imposed penalties on Shri Dhananjay Balchandra Desai, Director of the appellant company under Section 112(a) *ibid* and Section 114AA *ibid* are set aside and the appeal to such extent is allowed in favour of the said appellant.

(Operative part of the order pronounced in the open court)

(S.K.Mohanty)
Member (Judicial)

(P. Anjani Kumar)
Member (Technical)

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