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

Customs Appeal No. 437 of 2012

(Arising out of Order-in-Original CAO No. 08/2011-12/CAC/CC(EP)/AK/GR.VII dated 23.02.2012 passed by Commissioner of Customs (Export Promotion), NCH, Mumbai)

Shri Nirmal Agarwal **Appellant**
24A, Arum Nagar Part No.1,
J.P. Road, Picknick Cottage,
Andheri (W), Mumbai 400 061.

Vs.

Commissioner of Customs (Export), Mumbai **Respondent**
New Custom House, Ballard Estate,
Mumbai 400 001.

WITH

Customs Appeal No. 438 of 2012

(Arising out of Order-in-Original CAO No. 08/2011-12/CAC/CC(EP)/AK/GR.VII dated 23.02.2012 passed by Commissioner of Customs (Export Promotion), NCH, Mumbai)

Shri Ajay Verma **Appellant**
Proprietor of Aum International,
703, Kailash Ramkripa CHS Ltd.,
Upper Govind Nagar, Malad (E),
Mumbai 400 061.

Vs.

Commissioner of Customs (Export), Mumbai **Respondent**
New Custom House, Ballard Estate,
Mumbai 400 001.

WITH

Customs Appeal No. 454 of 2012

(Arising out of Order-in-Original CAO No. 08/2011-12/CAC/CC(EP)/AK/GR.VII dated 23.02.2012 passed by Commissioner of Customs (Export Promotion), NCH, Mumbai)

Shri Gyan B. Sharma **Appellant**
Partner of Vinayak Shipping Agency
15/235, Adarsh Nagar, Worli,
Mumbai 400 030.

Vs.

Commissioner of Customs (Export), Mumbai Respondent
New Custom House, Ballard Estate,
Mumbai 400 001.

AND

Customs Appeal No. 459 of 2012

(Arising out of Order-in-Original CAO No. 08/2011-12/CAC/CC(EP)/AK/GR.VII dated 23.02.2012 passed by Commissioner of Customs (Export Promotion), NCH, Mumbai)

Shri Rashid Y. Shaikh Appellant
Manager of Panorama Express Agencies,
Room No.18, Nazir Bldg.,
Calicut Street, Ballard Pier,
Mumbai 400 038.

Vs.

Commissioner of Customs (Export), Mumbai Respondent
New Custom House, Ballard Estate,
Mumbai 400 001.

Appearance:

Shri N.S. Patel, Advocate, for the Appellants in appeal C/455 & 459/12
None for other Appellants
Shri Ramesh Kumar, Assistant 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/**87191-87194/2019**

Date of Hearing: 24.10.2019
Date of Decision: 24.10.2019

PER: SANJIV SRIVASTAVA

The appeals detailed in table below are directed against the order in original CAO No 08/ 2011-12/CAC/CC (EP)/AK/GR. VII dated 23.02.2012 of the Commissioner of Customs (Export Promotion), New Custom House, Mumbai.

Appeal No	Appellant
C/437/2012	Shri Nirmal Agarwal
C/438/2012	Shri Ajay Verma, Proprietor M/s Aum International
C/454/2012	Shri Gyan B Sharma, Partner M/s Vinayak Shipping

C/459/2012 Shri Rashid Y Shaikh, Proprietor M/s Panorama Express

1.2 By the impugned order, Commissioner has held as follows:

a. *"I hereby reject the declared FOB of Rs 338.25 per piece of Mens 100% Cotton Knitted T Shirts sought to be exported under Shipping Bill number 5327189 dated15.03.2004 and re-determine the same as Rs 35/- per piece and total FOB value as Rs 4,20,000/-;*

b. *I hereby reject the declared PMV of Rs 120/- per piece of Mens 100% Cotton Knitted T Shirts sought to be exported under above Shipping Bill and re-determine the same as Rs 28.53 per piece;*

c. *I reject the claim for drawback of Rs 4,30,254/-, claimed in respect of said Mens 100% Cotton Knitted T Shirts sought to be exported under the said Shipping Bill number 5327189 dated 15.03.2004 under Section 76(1)(b) of the Customs Act, 1962, as the PMV of goods sought to be exported is less than the drawback due on the declared value;*

d. *I hereby confiscate the total quantity of 12,000 Pieces of Mens 100% Cotton Knitted T shirts having declared FOB value of Rs 40,59,000/- and re-determined FOB value of Rs 4,20,000/- seized under Seizure Memorandum dated 27.05.2004, under Section 113(d) and 113(j) of the Customs Act, 1962.*

e. *I hereby give an option to the exporter to redeem the confiscated goods valued at Rs 4,20,000/- on payment of redemption fine of Rs 2,00,000/- (Rupees Two Lakhs only)*

f. *I hereby impose a penalty of Rs 4,20,000/- (Rupees Four Lakhs Twenty Thousand only) on Aum International and Shri Ajay Verma its proprietor under Section 114(i) and 114(iii) of the Customs Act, 1962;*

g. *I hereby impose a penalty of Rs 4,20,000/- (Rupees Four Lakhs Twenty Thousand only) on Shri Nirmal Agarwal under Section 114(i) and 114(iii) of the Customs Act, 1962;*

h. I hereby impose a penalty of Rs 4,20,000/- (Rupees Four Lakhs Twenty Thousand only) on Shri Gyan B Sharma, partner of Vinayak Shipping Agency, CHA under Section 114(i) and 114(iii) of the Customs Act, 1962;

i. I hereby impose a penalty of Rs 4,20,000/- (Rupees Four Lakhs Twenty Thousand only) on Shri Rashid Y Shaikh proprietor of Panorama Express Agency, under Section 114(i) and 114(iii) of the Customs Act, 1962."

2.1 Acting on intelligence, M/s Frost International Ltd is attempting to export low quality readymade garments viz. 100% Cotton Knitted T Shirts from Bombay based ports through its power of Attorney holder Shri Nirmal Agarwal, by mis-declaring its PMV (Present Market Value) and FOB value, so as to avail higher and ineligible amount of duty drawback. During the course of investigation in the said matter of exports by Frost, it was found that the export documents were signed by Shri Ajay Verma who is proprietor of a firm M/s Aum International having IEC 0303038161. On behalf of M/s Aum International, M/s Vinayak Shipping Services (CHA No 11/898) had filed shipping bill No 5327189 dated 15.03.2004 for export goods declared 12000 Pcs of "Mens 100% Cotton Knitted T-Shirts" under Duty Drawback Scheme. The declared PMV and FOB value of each piece as Rs 120/- and Rs 338.25 (US$ 7.5). The total declared FOB value of the goods was Rs 40,59,000/- and on this they claimed drawback of Rs 4,30,254/- .

2.2 As per the investigations carried out by the DRI it was determined that the goods will be available at the place of export i.e. Mumbai from Rs 33.46 to Rs 36.30 per piece, thus Rs 35/- per piece was proposed as FOB value of the goods at Mumbai port.

2.3 Investigations also revealed that actual market price of the said goods was in range of Rs 25.26 to Rs 28.53 per piece at Tirpur. Whereas the declared PMV is Rs 120/- per piece and on this they had the intention to claim drawback of Rs 35.85 which is more than the actual market value of the goods. The drawback therefore claimed was not admissible to them

2.4 Thus investigation revealed that Shri Nirmal Agarwal and Shri Ajay Verma conspired to defraud the exchequer by claiming drawback based on manipulated documents showing exaggerated export prices of garment.

2.5 Shri Rashid Y Shaikh Manager with M/s Panorama Express has actually dealt with the export consignments of M/s Aum International knowing well that the value of the goods has been misdeclared. He was not having any CHA License and was not authorized to deal with the export goods or export documents. He thus aided and abetted Shri Nirmal Agarwal and M/s Aum International in their export fraud.

2.6 Shri Gyan B Sharma, Partner, Vinayak Shipping (CHA 11/898) admitted that M/s Frost International Limited is a client of M/s Panorama Express Agencies and he did not knew the exporters. All the work relating to exports of M/s Aum International was handled by Shri Rashid Shaikhs Manager in M/s Panorama Express Agencies. He by lending his CHA License to Shri Rashid Shaikh aided and abetted Shri Nirmal Agarwal and M/s Aum International in their export fraud.

2.7 After completion of investigations a Show Cause Notice was issued asking-

A. M/s Aum International and Shri Ajay Verma to show cause as to why-

i. The declared FOB value of Rs 338.25 per piece of Mens 100% Cotton Knitted T Shirts sought to be exported under Shipping Bill number 5327189 dated 15.03.2004 should not be determined at Rs 35/- per piece and total FOB value of the export covered by the said shipping bill should not be taken as Rs 4,20,000/-

ii. The declared PMV of Rs 120 per piece of Mens 100% Cotton Knitted T Shirts sought to be exported under above Shipping Bill filed with Mumbai Custom House should not be determined at Rs 28.53- per piece.

iii. The drawback claimed amounting to Rs 4,30,254/- in respect of said Mens 100% Cotton Knitted T Shirts sought to be exported under said Shipping Bill filed with Mumbai Custom House should not be denied to them under Section 76(1)(b) of the Customs Act, 1962 as the PMV of goods sought to be exported is less than the drawback due on declared value.

iv. The total quantity of 12,000 pieces of Mens 100% Cotton Knitted T Shirts having declared FOB value of Rs 40,59,000/- and determined FOB value of Rs 4,20,000/- seized under Seizure Memorandum dated 27.05.004 should not be confiscated under Section 113(d) and 113(i) of the Customs Act, 1962.

v. penalty should not be imposed under Section 114(i) and 114(iii) of the Customs Act, 1962.

B. Shri Nirmal Agarwal, Shri Gyan B Sharma Partner M/s Vinayak Shipping (CHA 11/898) and Shri Rashid Y Shaikh, Proprietor, M/s Panorama Express Agencies and authorized Signatory M/s Vinayak Shipping Services (CHA 11/898) to show cause why penalty should not be imposed under Section 114(i) and 114(iii) of the Customs Act, 1962.

2.8 Matter has been adjudicated by the Commissioner as per impugned order referred to in para 1, supra.

2.9 Aggrieved by the impugned order these appeals have been filed.

3.1 Matter was listed for hearing on 20.08.2018, 01.02.2019, 19.03.2019, 25.04.2019, 21.06.2019, 30.07.2019, 12.09.2019 and 24.10.2019. None appeared on behalf of M/s Nirmal Agarwal and Shri Ajay Verma on any of the dates when the matter was listed. Shri N S Patel, Advocate for Shri Gyan B Sharma and Shri Rashid Y Shaikh appeared on 19.03.2019, 25.04.2019, 21.06.2019, 30.07.2019 and 24.10.2019.

3.2 When the matter was listed for hearing on 20.08.2018, Shri Nirmal Agarwal, filed a written submission through Shri Parmatma Agarwal, challenging the jurisdiction of DRI officers to issue the Show Cause Notice at the relevant time. From then onwards there has been no representation on his behalf at time of any hearing despite notice.

3.3 Similarly Shri Ajay Verma also never turned up for any hearing despite notice.

3.4 We have heard Shri N S Patel, Advocate for Shri Gyan B Sharma & Shri Rashid Y Shaikh, and Shri Ramesh Kumar, Assistant Commissioner, Authorized Representative for the revenue.

4.1 The only submission which has been made in the written submissions filed by the Appellant in Appeal No C/437/2012 on 20.08.2018, is in respect of the jurisdiction of DRI officers to issue the Show Cause Notice, which has been settled by Hon'ble Bombay High Court in case of Sunil Gupta [2015 (315) ELT 167 (Bom)] {SLP Filed has been dismissed by the Apex Court as reported at [2017 (354) ELT A 162 (SC)] holding that DRI Officers have the jurisdiction to issue the Show Cause Notice. Appellant has since then never been represented at the time of hearing thereafter despite the notice. Hence this Appeal needs to be dismissed for non prosecution in terms of Rule 20 of Custom Excise Service Tax Appellate Tribunal Procedure Rules, 1982.

4.2 Appellant in Appeal No C/438/2012 also has not been appearing during the hearing of appeal on appointed and notified dates. Hence this Appeal also needs to be dismissed for non prosecution in terms of Rule 20 of Custom Excise Service Tax Appellate Tribunal Procedure Rules, 1982.

4.3 In respect of other two appellants we have considered the impugned order with submissions made in appeal and during the course of Argument.

4.4 The findings recorded by the Commissioner in the impugned order holding the appellants in appeal No C/454/2012 and C/459/ 2012 are reproduced below:

"90. As far as Shri Gyan B Sharma, partner of Vinayak Shipping Agency is concerned, I find that even though they had promised to file written submissions within one week, they did not file any such submission. Further during the course of hearing they had produced a copy of CESTAT order No A/1/CSTB/2008/C dated 24.12.2007 and had submitted that the CESTAT had given decision in their favour. However, on going through the said order, I find that the CESTAT had remanded the case back to the adjudicating officer, in the proceedings pertaining to revocation of their license to work as CHA. Further, I find that Shri Gyan B Sharma has not contested that he had illegally lent his CHA Licence to Shri Rashid Shaikh and thus aided and abetted in the fraud committed by the exporter. Therefore I hold Shri Gyan B Sharma liable for penalty under Section 114(i) and 114(iii) provisions of Customs Act, 1962.

91. Shri Rashid Y Shaikh, of Panorama Express Agencies has also not made any submissions contesting the charges made against him in the show cause notice. I find that he had actually dealt with the export consignments of AUM knowing fully well that the value of the goods was misdeclared and an export fraud was being committed. He was not holding any CHA Licence and was not authorized to deal with the export goods or the export document in any way. Therefore, I hold that he aided and abetted Shri Nirmal Agarwal and AUM in committing the export fraud and liable for penalty under Section 114(i) and 114(iii) provisions of Customs Act, 1962."

4.5 The paragraph 4 and 5 of the Show Cause Notice reads as follows:

"4 Statement of Shri Gyan B Sharma, partner of the CHA firm M/s Vinayak Shipping Services was recorded u/s 108 of the Customs Act, 1962 on 07.04.04 wherein he interalia stated that M/s Frost International Ltd and M/s AUM International are clients of M/s Panorama Express Agencies who have been engaged as their agents on Commission basis and all the Customs clearance work is attended by its Manager Shri Rashid Y Shaikh; that he did not know the exporters, that their job is limited to attending the customs assessment and physical examination in docks.

5. Statement of Shri Rashid Y Shaikh, Manager, M/s Panorama Express Agencies was recorded U/s 108 of Customs Act, 1962 on 07.04.04 wherein he inter alia stated that their firm is not having a CHA License and the Customs clearance work relating to their clients was being done under CHA License of M/s Vinayak Shipping Services (11/898); that he had undertaken the customs clearance work related to exports of M/s Frost International Ltd and M/s AUM International; that one Shri Ajay Verma used to hand over the export documents of M/s Frost International Ltd; that in case of export by M/s AUM International Ltd, the documents were handed over by one Shri Mayur; that apart from Shri Ajay Verma at times one Shri Nirmal Agarwal, who is broker by profession, also used to contact him regarding documentation and unloading of goods; that the consignment covered vide S/B No 5327189 dated 15.03.04 is the first consignment that he had handled for M/s Aum International."

4.6 From the above it is quite evident that neither in Show Cause Notice nor adjudication a finding has been recorded that these person were in knowledge of the export fraud being committed by the other co-noticees. CHA has admitted that it was responsible for undertaking the work of custom assessment and physical examination in docks. These are the functions that are to be attended by the CHA in normal course of his business. Similar M/s Panorama Express

Agencies was in business of freight forwarding and cargo movement for his client. Nothing has been brought on record by which it can be shown that they had the knowledge of fraud being committed by the exporters by mis-declaring the value. Without bringing on record any evidence to show that these persons have acted beyond their normal business requirements or had the knowledge of the fraud being committed, they cannot be held liable for aiding or abetting the fraud. Thus the penalty imposed under Section 114(i) and 114(iii) is not maintainable. Similar view has been expressed by the tribunal in case of Freightwings & Travels Ltd [2017 (358) ELT 669 (T-Mum)] in following words-

*"**8.**Doubtlessly, the goods can be subject to confiscation if value is found to have been misdeclared. Penalty is imposed only if it is established that, in relation to the offending goods, some act is committed or is omitted to be done that leads to confiscation. Such act or omission has not been brought on record. Mere filing of bills or presentation of goods that were found to be liable to confiscation does not constitute act or omission referred to in Section 114 because these are procedural requirements. None of the statements establish that the appellants were aware or participated in the procurement, packing or transportation of the goods."*

In case of P D Prasad and Sons Pvt Ltd [2017 (358) ELT 1004 (T-Del)], Delhi bench held as follows:

"5. It is not disputed on record that before filing the shipping bills the appellant took authorization letter as also verified the PAN card and IEC copy of the exporter. As per the Revenue, the only lapse of the CHA is that he did not physically verified address given by the exporter. According to the learned advocate, the said lapse on the part of the employee of the CHA cannot be held to be a strong evidence so as to conclude that appellant aided and abetted the exporter in fraudulent exports. This may, at the best result in contravention of some provisions of the Regulation 13 of CHALR but cannot be made

the basis for invoking the penal provisions of Section 114 of the Customs Act.

Tribunal in the case of Nirmal Kumar Agarwal v. Commissioner of Customs (Gen.) Mumbai [2013 (298) E.L.T. 133 (Tri.-Mum.)] observed that in the absence of any evidence showing the involvement of CHA as regards the fraudulent activities, ingredient of Section 114 cannot be held to be satisfied so as to impose penalties. Under similar circumstances, the penalty on the CHA was set aside in the case of Prime Forwarders v. Commissioner of Customs, Kandla [2008 (222) E.L.T. 137 (Tri.-Ahmd.)], wherein it was observed by the Tribunal that as CHA acted on the basis of documents given to him and there is nothing to show that he was aware of containers being stuffed with the material other than the one declared, it cannot be said, in the absence of any evidence to the contrary, that he was involved and had knowledge about the misdeclaration. Further, in the case of Akanksha Enterprises v. Commissioner of Customs, Mumbai [2006 (203) E.L.T. 125 (Tri.-Delhi)], it was observed that CHA's role is limited to facilitate the proper filing of the documents as received from the exporter and he is not required to go into the authenticity of the value of the goods.

6. In the present case also, the appellant filed shipping bills on the basis of documents received by them. If there is any difference in the value of the export consignment, the CHA cannot be held responsible for the same as it is not the duty of the CHA to adjudge the correct value of the goods. There is virtually no evidence on record to show that he was aware of the overvaluation of the export consignment and he simplicitor proceeded by the declaration made by the exporters. In such a scenario, the appellant cannot be held liable for any aiding and abetting and consequently to penalty.

7. In the case of Adani Wilmar Ltd. v. Commissioner of Customs (Prev), Jamnagar [2015 (330) E.L.T. 549 (Tri.-

Ahmd.)] wherein it was held that non-following of the KYC norms of CHA Licence would result in breach of Regulation 13 of CHALR and not under Customs Act, 1962. In the absence of any evidence that CHA was aware of the alleged irregularities by the exporter, imposition of penalty on him is not justified. We find from the present impugned order that apart from the fact that the appellant did not physically verified the correctness of the address given to him by the exporter, whereas all other documents were verified from computer data and found to be correct. This fact by itself cannot lead to conclusion that he was aware of the overvaluation of the export consignment, thus calling for imposition of penalty upon him."

5.1 In view of discussion as above-

i. Appeal No C/437/2012 filed by Shri Nirmal Agarwal is dismissed for non prosecution as per Rule 20 of CESTAT (Procedure) Rules, 1982. (Para 4.1).

ii. Appeal No C/438/2012 filed by Shri Ajay Verma, Proprietor M/s Aum International is dismissed for non prosecution as per Rule 20 of CESTAT (Procedure) Rules, 1982. (Para 4.2).

iii. Appeal No C/454/2012 filed by Shri Gyan B Sharma, Partner M/s Vinayak Shipping is allowed. (Para 4.6).

iv. Appeal No C/459/2012 filed by Shri Rashid Y Shaikh, Proprietor M/s Panorama Express is allowed. (Para 4.6).

(Order pronounced in the open court)

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

(Sanjiv Srivastava)
Member (Technical)

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