CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
MUMBAI

WEST ZONAL BENCH, MUMBAI

Customs Appeal No.89693 of 2018

(Arising out of Order-in-Original No. 11/2018-19 dated 23-8-2018 passed by the Commissioner of Customs (Import-II), Mumbai.)

........Appellant

MS. PRERNA SINGH, CEO
M/S. SEVILLE PRODUCTS LIMITED
P.O. Box No. 5176
Sharjah, U.A.E.

Indian Authorised Representative:
V.Lakhsmikumaran
2nd Floor, B&c Building, Cnergy IT Park
Appa Saheb Marathe Marg
Prabhadevi, Mumbai 400 025.

VERSUS

Commissioner of Customs (Import-II) - Mumbai ....Respondent
New Custom House
Ballard Estate
Mumbai – 400001.

WITH

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<u>APPERANCE:</u>

Shri Akhilesh Kangsia, Advocate for the Appellant
Shri Manoj Kumar, Asst. Commissioner, Authorised Representative for the Respondent

CORAM:

HON'BLE DR. SUVENDU KUMAR PATI, MEMBER (JUDICIAL)

FINAL ORDER NO. A/85065-85066/2020

Date of Hearing: 25-09-2019
Date of Decision: 22-01-2020

SUVENDU KUMAR PATI:

Imposition of penalty under Section 112(a) of the Customs Act on appellants M/s. Sevile Product and Ms. Prerna Singh, CEO, both based in Dubai, by the Ld. Commissioner of Customs (Import-II), Mumbai is assailed in both the appeals.

2. Facts of the appellants case, in a nut-shell, is that DRI Mumbai Zonal Unit through investigation found appellants and three others were resorting to large scale under invoicing and consequently by mis-declaring transaction value as well as retail sales price (RSP) of confectionary items like wafers, cookies and toffees etc. they were evading Customs duty during importation of these goods. Statement of Prerna Sing (CEO) was recorded after she was summoned from Dubai who admitted about issuing of two different invoices with different price structures to the importer on regular basis for production of invoices

having lesser price before the Customs authority to avoid payment of tax and the other one with proper price for business transactions. Statement of other connected persons including importer named Prakesh Menon i.e. Indian representative of Appellant company were also recorded during investigation and ultimately they were issued with show cause notices. Three of them settled the matter before the settlement Commissioner and both the appellants challenged the application of Indian Customs Act to impose penalty on overseas company and person unsuccessfully before the Commissioner Customs (Import-II) who confirmed penalty of Rs. 2,50,000/- on the appellant company and penalty of Rs. 50,000/- on Prerna Sing, its CEO under Section 112(a) of the Customs Act. Both the Appellants are before this Tribunal challenging legality of the said order passed by the Commissioner (Customs).

3. In the memo of appeal and during the course of hearing of appeal, Learned Counsel Mr. Akhilesh Kangsia for the appellant argued that prior to amendment to the Customs Act 1962 introduced on 29-03-2018, the same was extended only to the whole of India and not beyond India for which operation of the Act beyond the territory of India cannot be made applicable to the overseas suppliers of Dubai, UAE and its NRI CEO and subject them to penalty under Section 112(a) of the Customs Act. With reference to the Hon'ble Supreme Court's decision in British India Steam Navigation Co. Ltd. Vs. Shanmughavilas Cashew Indus – 1990 (3) SCC 481, he argued that Indian statute are ineffective against foreign property and foreigners. Further, with reference to the decision

reported in 2017 (348) E.L.T. 168 (Tri. Mumbai) in the case of Narendra Lodaya v. Commissioner of Customs, Nhava Sheva, HI Lingos Co. Vs Collector of Customs decision delivered on 20th September 1993 and decision of Customs Appeal no. 70148 of 2019 in the case of M/s. Shakti Jewellers Pvt. Ltd. v. Commissioner of Customs, he also argued that appellants, being company and NRI based in Dubai having no permanent establishment in India and having no place of business in India, cannot be penalised under the provision of Customs Act which extends to the whole of the Indian territory and not all over the world beyond India and responsibility as well as obligation of the importer commences with filing of declaration under section 46 of Customs Act for which incident occurred prior to that cannot be brought into the purview of the Customs Act. Placing reliance in the case law reported in 2015 (325) ELT 199 (Tri. Bang) in the case of Shafeek P. K Vs. CC, Cochin, Learned Counsel for the Appellants argued that in Foreign Exchange Regulation Act, 1973 and in IPC under Section 3 as well as 4, specific provision exists for trial of citizens of India residing outside India and branches of company or agencies located outside India but no such provision exists in Customs Act and therefore in the absence of an identical provision in the Customs Act, the same cannot be invoked against resident of foreign country even though he/she was an Indian for which he prays to set aside the order passed by the Commissioner of Customs.

4. In response to such submissions, Learned Authorised Representative for the respondent department Mr Manoj Kumar argued in support of the reasoning and rationality found in the order passed by

the Commissioner of Customs but conceded that the Commissioner had not dealt with the jurisdictional issue while confirming penalties under section 112 of the Customs Act on the appellants.

5. I had heard the arguments at length on the other day and perused the case record.

6. The issue of jurisdiction of Customs Act and its application to the appellant is primarily challenged in the present appeal, besides the legality of the Order of the Commissioner. Though the issue appears to be small it has wide ramifications. No Municipal law can ever be extended beyond the territorial boundaries of a country including its continental self and exclusive economic zone, whether or not there is express provision in the Act or statute to stretch the same beyond the country's territory since the same would amount to encroachment upon the territorial authority of other State. It is therefore, defined in the Statute of the country that the said Act has its application within the territorial limits of the country. Likewise in case of penal statute, it is clearly defined that the "act or its violation" should have its effect and consequence within the territorial limit of the said country. If violation of provision of statute is committed within the said country, then the consequence in conformity to the legal provision of the country would ensue, no matter the violator is a resident of the country or an alien. It is, therefore, necessary to determine if the "act or its omission" committed is in violation of law and accordingly to punish the violator

and not to determine if such violation has been committed by a legal person based in the Country or not.

7. Sovereign country asserts extra territorial jurisdiction in criminal laws though the principal basis of jurisdiction over crime is the territorial principle which permits a State in control of its territory to prescribe, adjudicate and enforce its law in the territory. The crime is said tobe committed even partly in a state’s territory when any essential constituent element itself is consummated there. Therefore, when an offence’s adverse effect endangers a State’s security or Government’s function, extra territorial jurisdiction is enforced. Customs law from an international Criminal law prospective requires a consideration of the classification between Crime law and administrative law and the same is required to be placed under the administrative penal law though in a legal sense it is not penal but nevertheless retributive (Gist has been borrowed from the article titled “Criminal and Quasi-Criminal Customs Enforcement among the U.S., Canada and Mexico” written by Bruce Zagaris and David R. Stepp.)

8. In a nut-shell, the discussion above would reflect the principle that whether violation of an act has an adverse effect to the State’s interest, the same violation is to be dealt by the State itself and the violator is to be penalised irrespective of his/her nationality or place of residence.. It is in this prospective, the jurisdiction of sovereign State is to be understood though the general understanding of jurisdiction is based on the nationality of the perpetrator since nationals of a State

remained under the sovereignty and owe their allegiance to it even though they are free to travel and reside outside its territory. It is in this contest that Foreign Exchange Regulation Act 1973 prescribing application of it to all citizens of India residing outside India and to branches, agencies situated outside India is to be understood and also application of section 4 of IPC in the cited judgements of the above referred case laws. However, a comparison is required to be made between Section 3 & Section 4 of the Indian Penal Code concerning its application beyond the territorial jurisdiction of sovereign India. While Section 4 deals with application of IPC to extra territorial offences, Section 3 provides judicial power of punishment to **any person** for violation of any Indian law. Such primary distinction is not noticeable in the judgement of Shafeek P.K. v. CC, Cochin-2015 (325)ELT 199 cited Supra.

9. It has also been argued by Learned Counsel for the appellant that judgement of the Tribunal in the Hi Lingos Co. v. Collector of Customs case has been confirmed by Hon'ble Supreme Court (reported at 1997 (95) E.L.T. A147 (SC) and it was the first decision on the jurisdiction issue apart from C.K Kunhammed V. Collector of Central Excise & Customs – 1992 (62) E.L.T. 146 judgement which had dealt with application of Private International law on foreign nationals. However, going by the findings in Hi Lingos' case, it can be noticed that penalty under Section 112 was set aside not on the ground of jurisdiction and there was a specific finding made by one of the members in the said judgement at Para 4 (8) that such mis-declaration of description of

goods was within the mischief of Secton 112 Customs Act even though the importers were in foreign country. Hon'ble Supreme Court had not dealt with any of the aspects on merit, since the appeal was dismissed for non-prosecution. Moreover no finding is forthcoming from the judgement reported in 2017 (348) E.L.T. 168 (Tri. – Mumbai) in the case of Narendra Lodaya v. Commissioner of Customs, Nhava Sheva as to why settlement Commissioner had not dealt with the cases of foreign nationals therein to make the said judgement a binding precedent for the subsequent decisions of the Tribunal, besides the fact that stage from which Customs Act is applicable was determined therein.

10. In the instant case appellants have subjected themselves to the jurisdiction of Customs Act upon notice sent to them under Section 108 of the said Act which would have otherwise ensured through extradiction process Appellant Prerna Singh had also confessed during regarding of her statement as CEO of her company that appellant Seville Products Ltd. used to raise two invoices for same import having law value and high value recorded in those invoices which were despatched through a computer of third party named Prakesh Menon for presentation of the invoices having lower value before the Customs for payment of customs duty and clearance and that the commercial invoice against which payment was received was not shown to the customs. Meaning of word abetment is "to help someone in wrong doing'. In the instant case such wrong doing had its effect in the Mumbai Customs jurisdiction and appellants had aided the importer in such wrong doing. Therefore, penalty under Section 112 was rightly involved. Further Appellant

Prerna had never rescinded from her statement and in view of Section 56 of the Indian Evidence Act, such admission needs no further proof to hold appellants guilty of violation of the Section 112(a) of Customs Act. Hence the order.

ORDER

11. Both the appeals are dismissed and order no. 11/2018-19 dated 23-8-2018 of the Commissioner of Customs (Import-II), Mumbai is hereby confirmed.

(Order pronounced in the court on 22-01-2020)

(Dr. Suvendu Kumar Pati)
Member (Judicial)

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