CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL, MUMBAI

REGIONAL BENCH - COURT NO. I

Customs Appeal No. 88996 of 2018

(Arising out of Order-in-Original No. MUM-CUS/VBS/II/APSC/05/2017-18dated 24.10.2017 passed by the Commissioner of Customs,Mumbai)

M/s Savithri Jewellers Pvt. Ltd. .... Appellant
No. 165, Mauli Mantralaya, Hindwadi, Balgam,
Karnataka - 590001

Versus

Commissioner of Custom (II), Mumbai .... Respondent
Air Special Cargo, Avas Corporate Point,
Andheri Kurla Road, Andheri (E), Mumbai - 400059

WITH

Customs Appeal No. 88998 of 2018

(Arising out of Order-in-Original No. MUM-CUS/VBS/II/APSC/05/2017-18 dated 24.10.2017 passed by the Commissioner of Customs, Mumbai)

Ms. Deepa S Vernekar .... Appellant
No. 165, Mauli Mantralaya, Hindwadi, Balgam,
Karnataka - 590001

Versus

Commissioner of Custom (II), Mumbai .... Respondent
Air Special Cargo, Avas Corporate Point,
Andheri Kurla Road, Andheri (E), Mumbai - 400059

AND

Customs Appeal No. 88999 of 2018

(Arising out of Order-in-Original No. MUM-CUS/VBS/II/APSC/05/2017-18 dated 24.10.2017 passed by the Commissioner of Customs, Mumbai)

Ms. Shilpa S Vernekar .... Appellant
No. 165, Mauli Mantralaya, Hindwadi, Balgam,
Karnataka - 590001

Versus

Commissioner of Custom (II), Mumbai .... Respondent
Air Special Cargo, Avas Corporate Point,
Andheri Kurla Road, Andheri (E), Mumbai - 400059

AND

Customs Appeal No. 89003 of 2018

(Arising out of Order-in-Original No. MUM-CUS/VBS/II/APSC/05/2017-18 dated 24.10.2017 passed by the Commissioner of Customs, Mumbai)

Roshan S Vernekar .... Appellant
No. 165, Mauli Mantralaya, Hindwadi, Balgam,
Karnataka - 590001

Versus

Commissioner of Custom (II), Mumbai .... Respondent
Air Special Cargo, Avas Corporate Point,
Andheri Kurla Road, Andheri (E), Mumbai - 400059

Appearance:

Ms. Pooja Reddy, Advocate for the Appellant
Shri R.N. Deshpande, AC, AuthRepresentative for the Respondent

AND

Customs Appeal No. 85090 of 2018

(Arising out of Order-in-Original No. MUM-CUS/VBS/II/APSC/05/2017-18 dated 24.10.2017 passed by the Commissioner of Customs, Mumbai)

M/s Protocol Logistics Pvt. Lt. .... Appellant
102, Bora Bazar Street, Fort, Mumbai - 400001

Versus

Commissioner of Custom (II), Mumbai .... Respondent
Air Special Cargo, Avas Corporate Point,
Andheri Kurla Road, Andheri (E), Mumbai - 400059

Appearance:

None for the Appellant
Shri R.N. Deshpande, AC, AuthRepresentative for the Respondent

AND

Customs Appeal No. 85186 of 2018

(Arising out of Order-in-Original No. MUM-CUS/VBS/II/APSC/05/2017-18 dated 24.10.2017 passed by the Commissioner of Customs, Mumbai)

Vinay Shah .... Appellant
B/127, Vrindavan Society, LBS Marg,
Ghatkopar (W), Mumbai - 400086

Versus

Commissioner of Custom (II), Mumbai .... Respondent
Air Special Cargo, Avas Corporate Point,
Andheri Kurla Road, Andheri (E), Mumbai - 400059

Appearance:

Shri Lilesh P Sawant, Advocate for the Appellant
Shri R.N. Deshpande, AC, AuthRepresentative for the Respondent

CORAM:

HON'BLE DR. D.M. MISRA, MEMBER (JUDICIAL)

FINAL ORDER NO. A/85770-85775/2020

Date of Hearing: 14.01.2020
Date of Decision: 11.09.2020

Per: Dr. D.M. Misra

These appeals are filed assailing the Order-in-Original No. MUM-CUS/VBS/II/APSC/05/2017-18 dated 24.10.2017 passed by the Commissioner of Customs, Mumbai.

2. Briefly stated the facts of the case are that the appellant M/s Savithri Jewellers Pvt. Ltd. (SGPL in short) filed shipping bill No. 11026 dated 26.05.2014 for export of 15290.330 gms. Gold jewellery declaring it as "22 Carat Studded Gold Jewellery" with a total FOB value of Rs.3,47,50,800/-. In the enclosed export invoices dated 26.05.2014 the goods were described as "194 'Malas' Studded with Imitation Stone". Initially, on visual examination, it was found to be in order, but later on re-examination of the goods, the gold content of the consignment was found to be less than the quantity of gold declared. Against the declared weight of gold of 13633.730 gms (22 Carat), it was found to be 3540 gms. Consequently, on further detailed investigation, it revealed that the appellant SGPL. had purchased a total weight of 13000 gms of gold from MMTC,

Bangalore under "Outright Scheme" for manufacture of Gold Jewellery with an obligation to export the same with certain quantity of gold within stipulated period of ninety days with required value addition. Alleging that in order to show that the export of gold in the form of Gold Jewellery was in compliance with the said scheme, the appellant SGPL mis-declared the actual quantity of gold containing in the said jewellery, a show-cause notice was issued to SGPL proposing confiscation of the same under Section 113(h) and 113(i) of Customs Act,1962; Penalty under Section 114(iii) on SGPL; also personal penalty on other noticees under Section 114(iii)and 114AA of the Customs Act, 1962. On adjudication, the gold jewellery was confiscated with an option to the exporter to redeem the same on payment of fine of Rs.35.00 lakhs and penalty of Rs.10.00 lakhs imposed under Section 114(iii) of the Customs Act, 1962 and penalty also imposed on respective appellants as under: -

Sr. No.	Name of the appellant	penalty under Sec.114(iii) of CA,1962	Under Section 114AA/117 of CA,1962
1.	M/s Savithri Jewellers Pvt. Ltd.	10.00 lakhs	-----
2.	Shri Roshan Vernekar	10.00 lakhs	5.00 lakhs
3.	Ms. Deepa Vernekar	5.00 lakhs	2.00 lakhs
4.	Ms. Shilpa Vernekar	5.00 lakhs	2.00 lakhs
5.	Shri Vinay Shah	5.00 lakhs	2.00 lakhs
6.	M/s Protocol Logistic Pvt. Ltd.	----------	75,000/-

Hence, the present appeals.

3. Learned Advocate Ms. Pooja Reddy for the appellant SGPL has submitted that the allegation against the appellant that they knowingly and intentionally mi-declared the content of the gold and value of the impugned goods i.e. Gold Jewellery to be exported by the appellant with an intent to avail the benefit

under the "outright purchase scheme" in connivance with Mr. Hitesh Desai is incorrect and baseless. She has submitted that on re-examination at the time of export of the gold Jewellery, the gold content was found to be 3560 gms against declared weight of 13633.730 gms. She has submitted that the customs duty applicable on the quantum of gold in question was determined by M/s MMTC at the time of purchase of the gold and the applicable duty amount has already been deposited with the Customs Department by the MMTC on non fulfillment of the export obligation i.e. after the proposed examination of the said gold jewellery. Therefore, there was no demand of duty raised in the show-cause notice on the alleged mis-declaration.

4. She has further submitted that the intention to evade customs duty knowingly by suppressing the quantity of gold and cubic zirconium by the appellants Ms. Deepa S. Vernekar and Ms. Shilpa S. Vernekar SGPL is unfounded and without merit inasmuch as the declaration in the shipping bill was made by Shri Hitesh Desai. They are not the active Directors in the company and they have nothing to do with the present export, which has been stated by Shri Roshan S. Vernekar in his statement. Thus, there is no evidence against these two appellants on the allegedly mis-declaration. She has further submitted that against Voucher No. 120 dated 12.5.2014 and 141 dated 18.5.2014 a total quantity of 27267.46 gms of gold and 30377 gms of cubic zirconium was handed over to Shri Hitesh Desai by SGPL, the appellant as stated by both Shri Roshan S Vernekar and and Shri Hitesh Desai in their respective

statements. Also, these facts have been further ascertained during the cross examination of Shri Hitesh Desai on 15.12.2016. Therefore, the Karigar who was handed over gold has cheated the appellants while making the jewellery by using lesser quantity of gold and more quantity of cubic zirconium and stealing the excess amount of gold. Thus, there is no intention on the part of the appellant SGPL or any of the appellants in the mis-declaration of the quantity of gold as alleged and confirmed by the Commissioner. She has further submitted that the cross-examination of Shri Hitesh Deasi sufficiently proves that he had received the correct quantity of gold as was required to make the gold jewellery as declared and also shows that the appellants SGPL were not in any manner aware about the change in quantity of gold in the making of the jewellery by the karigar, which was meant to be exported. It is her contention that the learned adjudicating authority failed to analyze the results of the cross-examination of various witnesses in scrutiny of the allegation against SGPL and the Appellants , therefore, the order is bad in law. In supports, she has referred the following judgments of the Tribunal:-

(i) *Penshibao Wang Pvt. Ltd. Vs. Commissioner of Customs (Seaport-Import), Chennai – 2016 (338) ELT 597 (Tri-Chennai)*

(ii) *Buhler India Pvt. Ltd. Vs. Commissioner of Customs & Service Tax, Bangalore – 2014 (310) ELT 593 (Rri-Bang)*

(iii) *Buhariwala Logistics Vs. Commissioner of Customs (Import & General), New Delhi – 2015 (326) ELT 170 (Tri-Del)*

(iv) *Arya International Vs. Commissioner of Customs, Kandla – 2016 (332) ELT 726 (Tri-Ahmd)*

5. It is also submitted by the Learned Advocate for the appellants that for imposition of penalty under Section 114(iii) of the Customs Act, 1962, it is necessary to establish that the persons concerned act in a manner or omitted from doing something that he was legally required to do with acts or omission directly led to the goods liable for confiscation. It is her contention that in the present case, the adjudicating authority failed to record finding on any of the acts or omissions on the part of the SGPL and other appellants, which directly led to the goods liable for confiscation.

6. The learned Advocate for the appellants further submitted that as far as Directors of the company namely, Ms. Deepa S Vernekar and Shilpa S Vernekar are concerned, there are no allegation or even finding by the adjudicating authority involving the Directors in the allegation of involvement of the Director in the whole episode i.e. mis-declaration of value and quantity or description of the goods in the shipping bill. She has further submitted that there was no intentional act or omission on the part of the Manager of the Company or company itself, therefore, imposition of penalty is required to be set aside. She has submitted that the Manager of the company has filed a criminal complaint against the Karigar to whom the gold was handed over for making the jewellery and also several visits made to the latest known address/location to locate the Karigar, but the said efforts did not yield any result. She has further submitted that penalty imposed on each of the appellants under Section 114AA is also required to be set aside and since there is

no evidence or finding to the effect that the appellants had signed the export documents with an intent or knowledge to the effect that the declaration of the goods entered in the export documents could not match with the actual goods meant for export as a result of the fraud committed by the Karigar.

7. Learned AR for the Revenue reiterates the findings of the learned Commissioner.

8. Heard both sides and perused the records.

9. The issues involved for determination are:(i) whether the goods meant for export are liable for confiscation under Sec. 111(h) and 111(i) of the Customs Act, 1962 and (ii) penalty under Sections 114(iii), 114AA and 117 of the Customs Act, 1962 are imposable on SGPL and other Appellants involved in the mis- declaration of attempt to export 22 "carat gold jewellery".

10. The facts not in dispute are that the appellant SGPL purchased 13633.730 gms of gold from MMTC, Bangalore under "outright purchase scheme" with an obligation to export the same within a period of 90 days after 5% value addition to the price of the said gold. As per the said scheme, they filed a shipping bill No. 11026 on 26.5.2014 declaring the gold content of 22 carat in the Gold studded jewellery of 15290.330 gms as 13633.730 gms.; whereas on detailed physical examination of the said consignment, the gold content was found to be 3540

gms. On further, investigation by the Customs authorities, the authorized signatory of SGPL Shri Roshan Vernekar disclosed to the Department that he had entrusted the work of making the studded gold jewellery to one Shri Hitesh Desai for a commission of Rs.1.00 per gram of gold jewellery exported. He has further stated that Shri Hitesh Desai in turn after making the gold jewellery from one Bengali Babu (Shaikh Mohd. Basir), who stayed at Dharavi, Sion, Mumbai informed him that the gold jewellery is ready for export. He came to know about the gold content of jewellery only when it was physically examined by the AIU, Mumbai on 27.5.2014 that the gold content of the jewellery was only 3540 gms instead of 13633.730 gms. He has submitted that immediately they have taken action by filing necessary criminal case against Shri Hitesh Desai. In his further statement, he has also disclosed that other two Directors Mrs. Deepa Vernekar and Mrs. Shilpa Vernekar are not concerned with the day to day business of the work nor they signed any of the documents.

11. Thus, from the statement of Roshan Vernekar and that of the other persons recorded in the impugned Order, one thing is very clear that the export quantity of gold declared in the Shipping Bill is incorrect and the same was detected by the Customs authority on a thorough re-examination of the declared gold jewellery meant for export. It is not disputed by SGPL at any stage of the proceeding that the content of the gold in the jewellery meant for export was found to be 3540 gms. instead of the declared quantity of 13,633.730 gms. Thus, in my opinion

the Ld. Commissioner was justified in directing confiscation of the goods and imposition penalty on SGPL under the respective provisions of the Customs Act, 1962. However, the quantum of fine directed and penalty imposed appears to be on higher side in the circumstances of the case and the evidence brought on record. Hence, to meet the ends of justice the redemption fine is reduced to 20.00 lakhs and penalty to Rs.5.00 lakhs on SGPL.

12. While imposing penalty on Shri Roshan Vernkear, learned Commissioner analyzing the evidences observed that Shri Roshan Vernekar did not take any steps to examine the content of the gold in the gold studded jewellery before export and declaration made on behalf of the appellant company M/s SGPL. The learned Commissioner also did not accept the submission of Shri Roshan Vernekar that the making of jewellery was entrusted to one Shri Hitesh Desai, who met him only once and also without visiting the premises of Bengali Babu, who carried out the making of jewellery for export, and the said gold jewellery was accepted as genuine and declaration with Customs for export was filed accordingly. Thus, he found him guilty and imposed penalty both under section 114(iii) & 114AA of Customs Act, 1962 . I do not find justification to interfere with the said finding of the Ld. Commissioner which points out to omission of necessary steps required to be taken by Shri Roshan Vernekar in the verification of the jewellery and preparation of export documents on behalf of SGPL. Also, it cannot be ignored that as a remedial action, necessary criminal case was initiated against the karigar. In these circumstances, the penalty imposed on him

seems to be disproportionate and consequently deserves to be reduced. Consequently, penalty on Shri Roshan Vernkear under Section 114AA is reduced to Rs.2.00 lakhs and penalty under Sec. 114(iii) is set aside as imposition of penalty under Sec. 114AA would meet the ends of justice.

13. In imposing penalty on Directors Mrs. Deepa Vernekar and Mrs. Shilpa Vernekar, the learned Commissioner observed that even though they have not signed any export documents, they are liable for penalty for the mis-declaration and misdeeds of Shri Roshan Vernekar. I do not find merit in the observation of the learned Commissioner imposing penalty on Directors Mrs. Deepa Vernekar and Mrs. Shilpa Vernekar, as neither of them was examined nor in any of the statements of other witnesses, anyone implicated them stating that they had knowledge about handing over the gold to Hitesh Desai for making the jewellery and/or they had the knowledge of the content of the gold in the jewellery declared for export was less than the declared quantity in the export documents. Therefore, imposition of penalty on them cannot be sustained.

14. Imposing penalty on CHA M/s Protocol Logistics P. Ltd. & Shri Vinay Shah, the learned Commissioner observed that Shri Vinaya has personally presented the goods for examination on 26.5.2014 as representative of the exporter; the impugned shipping bills was signed by him. He has observed that the CHA M/s Protocol Logistics Pvt. Ltd. failed to verify the genuineness of the person who signed all export documents in respect of the

impugned shipping bill that it contains proper authorization from the Directors of SGPL. Rebutting the said finding, the CHA in their grounds of appeal submitted that they have signed the export documents as disclosed to them; also Shri Vinay Shah was never their employee, hence, imposition of penalty on them is unjustified. I find force in the contention of the CHA inasmuch as the Department could not produce any cogent evidence to establish the fact that either Shri Vinay Shah or CHA was aware of the fact that the gold jewellery meant for export did not contain the quantity of gold as declared along with other imitation stone, assuming for a while that Shri Vinay Shah was the employee of the CHA. He has prepared the document as declared to him on behalf of the exporter. Therefore, following the principle of law settled in this regard cited by the Appellants, in my opinion, imposition of penalty on Shri Vinay Shah and the CHA cannot be sustained.

15. In the result, the impugned Order is modified and the Appeals No. 88998/2018, 88999/2018, 85090/2018 & 85186/2018 filed by Ms. Deepa Vernekar, Smt. Shilpa Vernakear, M/s Protocol Logistics Pvt. Ltd. and Shri Vinay Shah are allowed and the Appeals Nos. 889966/2018, 89003/2018 filed by SGPL and Shri Roshan Vernekar is partly allowed to the extent of reduction in fine and penalty, as the case may be, mentioned as above.

(Pronounced in court on 11.09.2020)

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

Sinha