

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE
TRIBUNAL, MUMBAI**

REGIONAL BENCH - COURT NO. I

Customs Appeal No. 88206 of 2019

(Arising out of Order-in-Original No. 47-2019-20-COMMR-NS-I-JNCH dated 30.10.2019 passed by the Commissioner of Customs (NS-I), JNCH, Nhava Sheva)

Siddiq Yusuf Merchant

92, Jasmine Apartment, S.V. Road,
Andheri (W), Mumbai - 400058

.... Appellant

Versus

Commissioner of Customs, Nhava Sheva-I Respondent
JNCH, Nhava Sheva,

WITH

Customs Appeal No. 88207 of 2019

(Arising out of Order-in-Original No. 47-2019-20-COMMR-NS-I-JNCH dated 30.10.2019 passed by the Commissioner of Customs (NS-I), JNCH, Nhava Sheva)

Sunil Yadav

Flat No. 303, Vijay Apartment, Oswal Nagri,
Nala Sopara (E), Mumbai -401209

.... Appellant

Versus

Commissioner of Customs, Nhava Sheva-I Respondent
JNCH, Nhava Sheva, Raigad

AND

Customs Appeal No. 88208 of 2019

(Arising out of Order-in-Original No. 47-2019-20-COMMR-NS-I-JNCH dated 30.10.2019 passed by the Commissioner of Customs (NS-I), JNCH, Nhava Sheva)

M/s Gallardo Trading Pvt. Ltd.

405, 4th Floor, Plot -140, Plaza Shopping Centre,
Chakala Market, Mumbai

.... Appellant

Versus

Commissioner of Customs, Nhava Sheva-I Respondent
JNCH, Nhava Sheva, Raigad

AND

Customs Appeal No. 88209 of 2019

(Arising out of Order-in-Original No. 47-2019-20-COMMR-NS-I-JNCH dated 30.10.2019 passed by the Commissioner of Customs (NS-I), JNCH, Nhava Sheva)

Sandeep Tandekar

Power of Attorney of M/s Transwing,
1220, 12th Floor, Sai Parwati, Andheri (E), Mumbai - 40069

.... Appellant

Versus

Commissioner of Customs, Nhava Sheva-I Respondent

JNCH, Nhava Sheva, Raigad

Appearance:

Shri J.C. Patel, Advocate for the Appellants

Shri Bhushan Kamble, AC, Auth. Representative for the Respondent

CORAM:

HON'BLE MR. ANIL CHOUDHARY, MEMBER (JUDICIAL)

HON'BLE MR. C.J. MATHEW, MEMBER (TECHNICAL)

FINAL ORDER NOS. A/85217-85220/2022

Date of Hearing: 18.02.2022

Date of Decision: 18.02.2022

Per: Anil Choudhary

The issue in this appeal is whether in the facts and circumstances, the absolute confiscation of the part of the goods and confiscation of other part with the option to redeem the goods on payment of fine of Rs.3 lakhs, as well as imposition of penalty under Section 112 (a)& 114 AA of the CA, 1962 is justified.

2. The brief facts of the case are that the appellant M/s Gallardo Trading Pvt. Ltd. had filed two Bills of Entry No. 4928291 dated 24.09.2018 and 5828079 dated 2.4.2018 for clearance of cosmetics, namely, EDT-100 ml., Deodorant 200ml and EDT-150 ml, Deodorants -150ml, Deodorants- 200ml, Hair spray-250ml (Brand Lomani) declaring their value as Rs.48,21,120/- &Rs.55,76,010/-, respectively. On 100% examination of the imported consignment, shortages were noticed; in the first Bill of Entry no. 4928291 dated 24.09.2018

against declared quantity of 1,32,280 pcs., 1,26,000pcs and in the second Bill of Entry no 5828079 dated 2.4.2018 against 1,49,918 pieces 1,47,007 pieces had been found. Also, during the said examination it came to the notice of the Customs Department that the imports were mis-declared being not supported with certificate of the Controller of Drugs and Cosmetics Organization (CDSCO) and also the goods were grossly undervalued. Consequently, the goods were seized for further investigation. On completion of the investigation, show-cause notice was issued to the appellants alleging import of aforesaid goods without valid CDSCO certificate, gross mis-declaration of the value of the goods resulting into short payment of duty. Consequently, differential duty amounting to Rs.99,99,241/- was demanded under Section 28(4) of the Customs Act, 1962, confiscation of the seized goods and penalty was proposed on the appellants, M/s Gallardo Trading Pvt. Ltd. under Section 112(a), 114A of the Customs Act, 1962; also penalty was proposed on other appellants viz. Shri Sunil Yadav, Director, Shri Siddiq Yusuf Merchant and Shri Sandeep Tandekar under Section 112(a)/114A/114AA of the Customs Act, 1962. On adjudication, the learned Commissioner rejected the transaction value and re-determined the assessable value; i) directed absolute confiscation of 2,19,435 pieces valued at Rs.2,06,51,122/- imported without CDSCO certificate under Section 111(d) of the Customs Act, 1962; ii) also confiscated 35,712 pieces valued at Rs.20,95,104/- under Sections 111(f), (i), (l), (m) and Section 119 of the Customs Act, 1962 but allowed to redeem the same on payment of fine of Rs.3.00 Lakh; also imposed penalties on other Appellants under

Sec.112(a) & 114AA of Customs Act, 1962. Hence, the present appeals.

3. At the outset, learned Advocate Shri J.C. Patel for the appellants has submitted that even though the Appellants assailed the impugned Order on various grounds as stated in their Appeals, however, the appellants intend and choose to contest the denial of re-export of the goods as requested by the appellant M/s Gallardo Trading Pvt. Ltd. during the course of adjudication proceedings. It is submitted that instead of allowing re-export, the Ld. Commissioner directed absolute confiscation of the 2,19,435 pieces valued at Rs.2,06,51,122/-. It is his contention that the appellant has not disputed the fact that major portion of the goods have been imported without valid certificate from CDSCO except for 35,712 pieces valued at Rs.20,95,104/-. He submits the issue of rejection of transaction value and re-determination of the value are not contested by the appellant nor the statements furnished during the course of investigation are challenged now. The principal argument advanced by the learned Advocate is that the learned adjudicating authority has wrongly rejected their request of re-export of the goods, thereby not followed the procedures prescribed for disposal of the imported goods without having a valid Registration certificate under the Drugs and Cosmetics Act, 1940 and the Rules made there under. He has submitted that in Part XIII of the Drugs and Cosmetics Rules, 1945, Rule 129 stipulates that the cosmetics product imported into India should be registered under the Rules by the Licensing Authority. The imports in the present circumstances, which were not in compliance with the condition of registration granted by the

Licensing Authority, hence contravenes Rule 129 and the import is under contravention of the Section 10(c) and (f) of the Drugs and Cosmetics Act, 1940. Further, he has submitted that as per Rule 131(3) of the Drugs and Cosmetics Rules, 1945 when it is reported to the Collector of Customs that the sample of imported cosmetic item in a consignment contravenes the provisions of Chapter III of the Drugs & Cosmetics Act, 1940 or the Rules made thereunder and the contravention is such that it cannot be remedied by the importer, the Collector of Customs shall communicate the report forthwith to the importer, who shall within two months of receiving such communication, re-export the cosmetics so imported and failing such re-export the same shall be handed over to the Central Government who shall cause it to be destroyed. It is the contention of the learned Advocate that in the present case the appellant in exercise of the said option of re-export, requested for re-export to the Commissioner of Customs. The learned Commissioner instead of allowing the re-export directed absolute confiscation of the goods. It is his argument that the order and direction of the learned Commissioner of Customs is not in accordance with the provisions of Drugs and Cosmetics Act and rules made thereunder, hence liable to be set aside.

4. It is submitted that the said Drugs and Cosmetics Act and the Rules made thereunder being special enactment dealing with imports of Drugs and cosmetics, hence the same would take precedence over the provisions of the Customs Act, 1962, in so far as, the consequence flowing from contravention of the Drugs and Cosmetics Act and Rules made thereunder is concerned. Rebutting the Revenue's argument that the said provision is

applicable for re-export of goods only in cases where the sample is found to be of sub-standard quality, he has contended that the provisions of Rule 131(3) provides for re-export of goods in case of contravention of any of the provisions of the Chapter III of the Drugs and Cosmetics Act or rules made thereunder and the provisions directing re-export of the goods is not confined merely to sub-standard quality of goods only, but to all contraventions including import without valid registration certificate. In support of his contention, the learned Advocate referred to the judgment of the Hon'ble Madras High Court in the case of ***Kanwarlal & Co. Vs. Jt. Commissioner of Customs – 2018 (360) ELT 837 (Mad)*** and ***B. Kholani & Co. Vs. Commissioner of Customs – 2015 (320) ELT 189 (Mad)***.

5. He has further submitted that absolute confiscation of the goods would not be in the benefit of anyone as the goods if remained in India, could only to be destroyed and cannot be put for auction and sale by the Customs Department for want of registration under the Drugs and Cosmetics Act and the rules made thereunder. Distinguishing the judgment cited by the learned AR for the Revenue, he has submitted that in none of the decisions referred to by the Department, the importers sought specifically to re-export the goods under the provisions of Drugs and Cosmetics Rules, 1945, instead the importer in the cited decision was seeking redemption of goods for clearance into India, which was disallowed as the imported goods had contravened the provisions of Drugs and Cosmetics Act and the rules made thereunder, a defect which cannot be remedied. It is his contention that therefore in all the decisions, the issue of applicability of provisions for re-export of goods contained under

the Drugs and Cosmetics Rules, 1945 has not been examined and accordingly, the said judgments cannot be held as precedent on the issue in question.

6. Further, he has submitted that the decision of Larger Bench in the case of ***Hemant Bhai R Patel Vs. Commissioner of Customs – 2003 (153) ELT 226 (Tri-LB)*** is not applicable to the facts of the present case as in the said judgment while permitting re-export of the confiscated goods, which are allowed to be redeemed, it was observed that the adjudicating authority has the power to impose fine and penalty. It is submitted that the said decision is not rendered in the context of violation of Drugs and Cosmetics Act and Rules made thereunder insisting re-export of the imported goods being in contravention of Chapter III to Drugs and Cosmetics Act, 1940. It is alternatively argued on behalf of the Appellant that in the event it is held that the goods are liable for confiscation and penalty, then re-export of the goods be allowed on imposition of nominal/minimum fine and penalty. Further, arguing for other Appellants Shri Sunil Yadav, Director and Shri Siddiq Yusuf Merchant it is submitted that imposition of penalties on them is too excessive and harsh. It is further submitted that imposition of penalties on Shri Sandip Tandekar, power of attorney holder of the CHA, is unwarranted as not a single piece of evidence is brought on record to establish that the CHA was aware of or having knowledge of the mis-declaration and under valuation of the goods. Also, they were not aware that the entire quantity of cosmetics was not supported with valid CDSCO certificate. It has complied with all the formalities necessary before filing the respective Bills of Entry, as is required.

7. Per contra, the learned AR for the Revenue has submitted that in the statements of Shri Sunil Yadav, Director of M/s Gallardo Trading Pvt. Ltd., it is admitted that the goods imported were not in conformity with the CDSCO certificate and also agreed to the mis-declaration of the value and quantity of the goods. Similarly, Shri Siddiq Yusuf Merchant has also admitted undervaluation of the goods and accepted mis-declaration noticed by the Department during the examination of the goods. It is his contention that these statements have never been retracted, therefore, it is accepted by the appellant that the goods were imported without valid CDSCO certificate resulting into contravention of the provisions of Drugs and Cosmetics Act, 1940 and the rules made thereunder. In support of his submission that the statements not retracted is valid piece of evidence, the learned AR for the Revenue referred to the judgments of the Hon'ble Supreme Court in the case of **Ramesh Chandra Mehta Vs. State of West Bengal – AIR 1970 SC 940** and the Tribunal in the case of **S.M. Steel Ropes Vs. Commissioner of Central Excise (Adj), Mumbai – 2014 (304) ELT 591 (Tri-Mum)**. Further, he has submitted that since the appellant had violated the provisions of Section 46(4) of the Customs Act, 1962 thereby rendering the goods liable to confiscation under Sections 111(m), 111(d) and 119 of the Customs Act, 1962, accordingly also liable for penalty under Sections 112(a), 114A and 114AA of the Customs Act, 1962. Reiterating the learned Commissioner's finding on various aspects, the learned AR has submitted that directing absolute confiscation under Section 125 of the Customs Act, 1962 in the

impugned order is also correct and in accordance with law. It is his contention that apart from infringements of the provisions of Customs Act, 1962, the provisions of Drugs and Cosmetics Act, 1940 and the rules made thereunder are also violated by importing goods which are not supported by valid CDSCO certificate, as such goods are prohibited from importation. Consequently, 2,19,435 pcs. of the imported goods since not in compliance with CDSCO certificate cannot be permitted to be cleared for home consumption, therefore, cannot be allowed to be redeemed on payment of fine under Section 125 of the Customs Act, 1962 accordingly confiscated absolutely. In support of his submission, the learned AR referred to the judgment of Hon'ble Madras High Court in the case of ***ALM Enterprises Vs. Commissioner of Customs (Imports), Chennai – 2017 (353) ELT 289 (Mad)***. and this Tribunal in the case of ***Dhananjay Balchandra Desai Vs. CC 2020-TIOL-194-CESTAT-Mum.***

8. Heard both sides and perused the records.

9. The principal issue as raised by the Appellants is: whether the request for re-export of the imported cosmetics of 2,19,435 pieces, without CDSCO certificate, and 35,712 pieces with CDSCO certificate be allowed or otherwise. The undisputed facts are that the appellants had filed two Bills of Entry dated 24.09.2018 and 02.04.2018, declaring the products as 'cosmetics', which on examination were found to be mis-declared in relation to its quantity, value and requirement of valid registration certificate under Drugs and Cosmetics Act, 1940 and the Rules made thereunder. Consequently, the available goods were seized. During the course of investigation, the Director and

concerned persons in their respective statements before officers of the department, accepted the mis-declaration of quantity, value and lack of registration certificate from Drugs and Cosmetics authorities for 2,19,435 pieces. The said statements were neither retracted nor disputed by the appellants at any point of time and also before this Tribunal. In this backdrop, the arguments advanced by the learned Advocate for the appellant centres around their request and right to re-export the goods, when it was discovered that the imported goods have not been supported with CDSCO certificate.

10. Even though in their respective appeals, the appellants have disputed rejection of the transaction value and the method of its redetermination based on various statements, however, the same was not pressed/argued during the course of hearing before this Tribunal. We find that before the adjudicating authority, the appellants had accepted the fact that the imported goods comprising of 2,19,435 pieces were not supported with CDSCO certificate, hence prohibited goods. The appellants have argued that since the goods are not supported with valid CDSCO certificate, therefore it cannot be retained in India. Accordingly, they may be permitted to send back the said goods to overseas supplier. It is their grievance that the learned Commissioner instead of allowing their request for re-export of the said goods, directed absolute confiscation of the same without considering the specific provisions/procedure contained under the Drugs and Cosmetics Act, 1940 and the rules made thereunder. It has been argued on behalf of the Appellants that as per Rule 129 of the Drugs and Cosmetics Rules, 1945, in the event the imported goods are not in conformity with or in contravention of Chapter

III of the Act or the Rules made thereunder, the Collector of Customs(now Commissioner) shall communicate it to the importer, who shall within two months of such communication send back the cosmetics to the country from where it was imported or hand it over to the Central Government, which shall cause it to be destroyed. It is their contention that once the imported goods were found not in conformity with Rule 129 of the Drugs and Cosmetics Rules, 1945, the Commissioner of Customs ought to have following sub-rule (3) of Rule 131, afforded an opportunity to them to re-export the goods.

11. Before analyzing the correctness of the said argument, it is necessary to refer and reproduce the relevant rules of Drugs and Cosmetics Rules, 1945: -

“129.Registration of cosmetic products imported into the country.- No cosmetic shall be imported into India unless the product is registered under the rules by the licensing authority appointed by the Central Government under rule 21 or by any person to whom such powers may be delegated under rule 22.

.....

131.Procedure for the import of cosmetics.- (1) If the officer appointed at the post of entry by the Central Government has reason to believe that any cosmetic contravenes any of the provisions of the Act or the rules made thereunder he may take sample of the cosmetic from the consignment for inspection. If on examination of the sample defects are noticed the officer shall advise the Collector of Customs for further action to be taken.

If the suspected contravention of the provisions of the Act or the Rules is such as may have to be determined by test, the officer shall send the sample to the laboratory established for the purpose for performing such tests. The consignment of the said cosmetic shall be detained till such time that the test report on such sample is received from the Director of the said laboratory or any other officer of the laboratory empowered by him in this behalf with the approval of the Central Government:

Provided that if the importer gives an undertaking in writing not to dispose of the cosmetic without the consent of the Collector of Customs and to return the consignment or such portion thereof as may be required, the Collector of Customs shall make over the consignment to the importer.

(2) If the importer who has given an undertaking under the proviso to sub-rule (1) is required by the Collector of Customs to return the consignment or portion thereof, he shall return the consignment or portion thereof within ten days of receipt of the notice.

Further procedure on receipt of the report of analysis

(3) If the Director of the Laboratory established for the purpose by the Central Government or any other officer of the laboratory empowered by him in this behalf with the approval of the Central Government, reports to the Collector of Customs or to the officer mentioned in sub-rule (1) above that the sample of any cosmetic in a consignment contravenes the provisions of Chapter III of the Act or the Rules made thereunder and that the contravention is such that it cannot be remedied by the importer, the Collector of Customs shall communicate the report forthwith to the importer who shall within two months of receiving such a communication either send back all the cosmetic of that description to the country in which it was manufactured or to the country from which it was imported or hand it over to the Central Government which shall cause it to be destroyed:

Provided that the importer may within thirty days of receipt of the report make a representation against the report to the Collector of Customs who shall forward the representation with a fresh sample of the cosmetic to the Drugs Controller, India, who after obtaining, if necessary, the report of the Director of the Central Drugs Laboratory shall pass orders thereon which shall be final.

(4) If the Drugs Controller or any other officer empowered by him in this behalf with the approval of Central Government reports to the Collector of Customs after the inspection of the sample of cosmetic and if necessary, after obtaining a test report thereon that the sample of the said cosmetic contravenes in any respect the provisions of Chapter III of the Act or the Rules made thereunder but that the contravention is such that it can be remedied by the importer, the Collector of Customs shall communicate the report forthwith to the importer and permit him to import the cosmetic on his giving an undertaking in writing not to dispose of the cosmetic without the permission of the officer authorised in this behalf by the Central Government."

(emp. supp.)

12. In the impugned order, the learned Commissioner, have not considered the above provisions while rejecting re-export of the goods requested by the Appellants following the decision of the Hon'ble Madras High Court in *ALM Enterprises'* and the judgment of this Tribunal in the case of ***M/s Nathi Mal Rugan Mal Vs. Commissioner of Customs, Nhava Sheva, Raigad 2018 –TIOL-3335-CESTAT-Mum.*** Assailing the findings of the learned Commissioner, it is vehemently argued that the Hon'ble Madras High Court in ALM's Case has no doubt upheld absolute confiscation of the cosmetics, toiletry etc. imported without a valid CDSCO Certificate, but nowhere held that re-export of the

imported goods cannot be allowed in the event it is requested by the Appellant. As such, the issue of re-export was not before the Hon'ble High Court, hence it is not applicable to the facts of the present case, as the Appellant had made a specific request for re export of the goods. Same argument is advanced in distinguishing the judgment of this Tribunal in **Shri Dhananjay Balchandra Desai's** case(supra) relied by the Revenue.

13. We find merit in the argument of the appellants. There is no doubt that since the goods are not supported with CDSCO certificate definitely be considered as prohibited under the Drugs and Cosmetics Act, 1940 and the rules made thereunder and the consequence thereof is confiscation. But, simultaneously, it cannot be ignored that some procedure has been prescribed under Drugs and Cosmetics Rules, 1945 to mitigate such a situation where the imported cosmetics are found to be in contravention with the provisions of Drugs and Cosmetics Act and the rules made thereunder. Under sub-rule(3) of Rule 131 of the said Rules, the Collector of Customs(now Commissioner) is duty bound to communicate to the importer to exercise their option either to re-export the goods to the country of origin or allow the Central Government to take possession of it and destroy the same accordingly. Therefore, in our considered opinion it is a statutory right available to an importer which cannot be overlooked by the department; the importer should have been allowed to exercise the option to re-export the goods, as prayed for. It would sound more logical and legal to follow the said procedure prescribed under Rule 131(3) of the Drugs and Cosmetics Rules,1945, in absence of any contrary provisions under the Customs Act, 1962, which has not been cited before

us. At the cost of repetition, it appears that the imported cosmetics are considered as prohibited at the threshold of its import, being not supported by the Registration Certificate issued under Drugs and Cosmetics Act, 1940 and the rules made thereunder. Therefore, the issue of under valuation of the goods and contravention of other provision of Customs Act, 1962 would arise thereafter, to dispose the goods accordingly. This Tribunal dealing with disposal of imported goods not in compliance with the Bureau of Indian Standards, expressed more or less similar view in the case of ***Global Enterprises Vs. CC, Nhava Sheva - 2019 (169) ELT 1596 (Tri.-Mum)***.

14. Also, the principle laid down by this Tribunal in ***Nathi Mal Rugan Mal's case***(*supra*) relied by the Commissioner in directing absolute confiscation is not applicable to the facts of the present case, for the simple reason that the Tribunal in the said case was confronted with the question whether after allowing redemption of the goods on payment of appropriate fine, the assessee be forced to export the goods only and not allowed to dispose the same in any other manner including clearance for home consumption. In the present case, however, no such situation arose. On the contrary, the Appellant has requested for re-export of the goods.

15. In view of above, we do not find any justification in the impugned order directing absolute confiscation of the imported cosmetics of 2,19,435 pieces, instead of allowing re-export of the same following the procedure laid down under Rule 131(3) of the Drugs and Cosmetics Rules, 1945. The said order of confiscation is set aside and the re-export of 2,19,435 pieces is allowed.

16. Further, in view of the prayer for re-export of the balance 35,712 pieces valued at Rs.20,95,104/- (supported with CDSCO certificate), confiscation is also set aside and the appellant is permitted to re-export the goods. The question of mis-declaration becomes immaterial in view of the prayer for re-export, in accordance with law. We also observe that the appellant has already suffered loss in the whole process (part charges, demurrage, etc.) and thus, we set aside the fine and penalties imposed on all the appellants.

17. We also set aside the penalties imposed on all the individual appellants viz. Shri Sunil Yadav - Director, Shri Siddiq Yusuf Merchant, and also on Shri Sandip Tandekar - Power of Attorney Holder of CHA.

18. We further find that allegation of non-exercise and due diligence and case against the CHA is not made out in the facts and circumstances of the case.

19. Thus, all the appeals are allowed as above.

(Operative portion of the order pronounced in open Court)

(C.J. Mathew)
Member (Technical)

(Anil Choudhary)
Member (Judicial)