CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL, MUMBAI
REGIONAL BENCH
Single Member Bench

Customs Appeal No. 907 of 2012

(Arising out of Order-in-Original CAO No. 29/2012/CAC/CC/BKS dated 25.06.2012 passed by Commissioner of Customs (Adjudication), Mumbai)

Shri Kumar Sayani **Appellant**
Director, M/s. Harshly Polymers Pvt. Ltd.,
9, Om Aashish Building,
Liberty Garden Road No.4,
Malad (W), Mumbai 400 064.

Vs.

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

Appearance:

Shri Arun Mehta, Advocate, for the Appellant
Shri Manoj Kumar, Deputy Commissioner, Authorised Representative for the Respondent

CORAM:

HON'BLE MR. SANJIV SRIVASTAVA, MEMBER (TECHNICAL)

Date of Hearing: 13.05.2022
Date of Decision: 13.05.2022

FINAL ORDER NO. A/85516/2022

This appeal is directed against order-in-original CAO No. 29/2012/CAC/CC/BKS dated 25.06.2012 passed by Commissioner of Customs (Adjudication), Mumbai. By the impugned order, a penalty of Rs.1,00,000/- has been imposed on the appellant under Section 112(b) of the Customs Act, 1962.

2.1 Investigation was taken against M/s. Sumira Plastics for diversion of goods imported under DEEC scheme, which were diverted to the domestic market without fulfillment of export obligation as provided for. A show cause notice dated 24.09.2009 was issued to M/s. Sumira Plastics and other co-noticees for the said contravention leading to diversion of goods imported under DEEC scheme.

2.2 Appellant is one of the co-noticees in the entire proceedings and penalty of Rs.1,00,000/- as stated in para 1 has been imposed upon him under Section 112(b) of the Customs Act.

3.1 I have heard Shri Arun Mehta, Advocate for the appellant and Shri Manoj Kumar, Deputy Commissioner, Authorised Representative for Revenue.

3.2 Appeals filed by Sumira Plastics, G.N. Pai and Rajshree G. Pai have been dismissed by the Tribunal vide order No. A/562 to 564/13/CSTB/C-I dated 09.04.2013 for non-compliance with the stay order. Stay application in case of the appellant was allowed waiving off of the entire amount of penalty to be deposited, vide order No. S/150/13/CSTB/C-I dated 20.12.2012. It has also been reported that appeal of no other co-noticee is now pending before the Tribunal. Accordingly this appeal has been taken up for consideration.

3.3 Discussing the role of the appellant in the entire proceedings, the Commissioner has in the impugned order observed as follows:-

"3.8.4 SHRI KUMAR SAYANI (NOTICEE NO.4)

3.8.4.1 Shri Kumar Sayani, Director of M/s. Yash Polymers and M/s. Harshly Polymers Pvt. Ltd. in statement dated 20.02.2008 has stated that he knows Mr. G.N. Pai, partner of M/s. Sumira Plastics for last 5 years; that he is involved in the business of manufacturing plastic products in the above companies, that he had undertaken the job work in plastic injection moulding; that he had undertaken moulding of job work from Mr. Ganesh Pai of M/s Sumira Plastics; that Mr. G. N. Pai supplied the plastics raw materials duly compounded for moulding the bucket and this was done during 2004 to 2006; that he delivered the goods to M/s Sumira Plastics as well as to his third party exporters as directed by Mr. G. N. Pai; In his further statement dated 26.11.2008 he interalia stated that his company is not registered with the Central Excise Authorities as their turnover is below the required limit, that he used to receive the raw materials through tempo loads and he was not aware that the raw materials were imported or not and did not enquire *with M/s Sumira Plastics about the source of raw materials; that he was doing the job work of M/s Sumira Plastics about till 2006.*

3.8.4.2 Thus from the above it is evident that Shri Kumar Sayani, Director of M/s Harshly Polymers Pvt. Ltd./ M/s. Yash Polymers Pvt. Ltd., knew Shri G. N. Pai, years before and carried out the manufacturing of buckets and shutter cones in his said factory. No records/documents for carrying out this manufacturing process were maintained. It clearly indicates that he was well aware of the fact that imported goods were under DEEC licence and to help Shri G.N.Pai, no records were being maintained. The third party export was also being made from their factory therefore, their defence that they are not aware that imported goods were under DEEC is of no consequences. He was well aware of the fact that the raw materials supplied were cleared under duty free DEEC Scheme and the resultant products were for export. Shri Kumar Sayani did not ask for any permission from the concerned department whether his company is declared by Shri G. N. Pai as a supporting manufacturer under the provisions of Notification No. 43/2002-Cus., dated 19.04.2002. Thus by his acts of omission and commission he has aided and abetted Shri G. N. Pai in diverting the raw materials and finished goods to his factory for job work and sale in the local market. Thus, Shri Kumar Sayani has made himself liable for penal action under the provisions of Section 112 (b) of Customs Act, 1962.

3.8.4.3 Taking into account the facts and circumstances of the case, penalty of Rs.1,00,000/- (Rupees One Lakh only) is liable to be imposed on Shri Kumar Sayani, Director of M/s Yash Polymers and M/s Harshly Polymers Pvt. Ltd under Section 112(b) of Customs Act, 1962."

3.4 From the above observation made by the Commissioner, it appears that penalty has been imposed upon the appellant only for the reason that he knew Shri G.N. Pai of M/s. Sumira Plastics. The company of the appellant was undertaking the job work on the material supplied by M/s. Sumira Plastics. It is nowhere recorded that the appellant had any knowledge with regard to the fact of importation of the goods claiming the benefit under DEEC scheme. Only because the appellant knew Shri G.N. Pai cannot be a reason for claiming that the appellant was in hand in glove for the fraud committed by Shri Pai in diverting the goods imported by him under DEEC scheme. Appellant's company was acting in normal job work activities on the material provided by Shri G.N. Pai. It is not even the case of the Revenue that certain documents or certain evidences have been received showing that the appellant could be attributed with a positive knowledge about the imported nature of the goods. Section 112(b) of the Customs Act provides as under:-

"112(b) who acquires possession of or is in any way concerned in carrying, removing, depositing, harbouring, keeping, concealing, selling or purchasing, or in any other manner ***dealing with any goods which he knows or has reason to believe are liable to confiscation under section 111, shall be liable****,—*
(i) in the case of goods in respect of which any prohibition is in force under this Act or any other law for the time being in force, to a penalty not exceeding the value of the goods or five thousand rupees, whichever is the greater;
(ii) in the case of dutiable goods, other than prohibited goods, to a penalty not exceeding the duty sought to be evaded on such goods or five thousand rupees, whichever is the greater;
(iii) in the case of goods in respect of which the value stated in the entry made under this Act or in the case of baggage, in the declaration made under section 77 (in either case hereafter in this section referred to as the declared value) is higher than the value thereof, to a penalty not exceeding the difference between the declared value and the value thereof or five thousand rupees, whichever is the greater;
(iv) in the case of goods falling both under clauses (i) and (iii), to a penalty not exceeding the value of the goods or the difference between the declared value and the value thereof or five thousand rupees, whichever is the highest;
(v) in the case of goods falling both under clauses (ii) and (iii), to a penalty not exceeding the duty sought to be evaded on such goods or the difference between the declared value and the value thereof or five thousand rupees, whichever is the highest."

3.5 From the above it is evident that positive knowledge or mens rea is an active ingredient for imposition of penalty under Section 112(b).

3.6 Even while granting complete waiver of pre-deposit, the Tribunal has observed as follows:-

"6.1. From the statement recorded under Section 108 of the Customs Act, it is clearly evident that the appellant did not know that the plastic granules supplied to him for job-work purpose was imported under DEEC scheme by M/s. Sumira Plastics. After completing the job-work, the goods were returned back to M/s. Samira Plastics or as per their directions. Further, it is noted that the job-work activity of the appellant is covered under small scale exemption under the Central Excise laws since his turn over was less than the exemption limit and, therefore, he was not required to maintain the records or to get registered with the department. From the evidence available on record, we do not find any reason to come to a conclusion that the appellant herein knew about the import of the raw material under DEEC scheme and the supplier had violated the provisions of DEEC scheme. Accordingly, we are prima facie of the view that the appellant has made out a strong case for waiver of pre-deposit. We, therefore, waive the requirement of pre-deposit of the penalty imposed and stay recovery thereof during the pendency of the appeal."

3.7 In absence of any positive knowledge, penalty imposed under Section 112(b) of the Customs Act cannot be sustained.

4.1 In the result, appeal is allowed.

(Order pronounced in the open court)

(Sanjiv Srivastava)
Member (Technical)

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