

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

WEST ZONAL BENCH

Custom Appeal No. 85419 of 2020

(Arising out of Order-in-Appeal No. MUM-CUSTOM-AMP-APPELLANT-1181 to 1184/19-20 dated 29.01.2020 passed by the Commissioner of Custom (Appeals), Mumbai Zone III)

Vinesh Naresh Chheda
3, Deep Prakash Apt.
82/1, Linking Road, Santacruz (West),
Mumbai

.....Appellant

VERSUS

Commissioner of Customs (Import-I),
Mumbai
New Custom House, Ballard Estate,
Mumbai

.....Respondent

APPEARANCE:

Shri D.H. Nadkarni, Advocate for the appellant
Shri S.B. Hatangadi, (AR) for the respondent

CORAM:

HON'BLE MR. AJAY SHARMA, MEMBER (JUDICIAL)

FINAL ORDER No: A/85033 / 2023

DATE OF HEARING : 18.11.2022
DATE OF DECISION : 20.01.2022

Per: AJAY SHARMA

This appeal has been filed assailing the order dated 29.1.2020 passed by the Commissioner of Customs (Appeals), Mumbai-Zone III.

2. The issue involved herein is whether a penalty under section 114A, Customs Act, 1962 can be imposed on the appellant, who is not the importer?

3. A Bill of entry has been filed by the importer & the IEC holder-M/s. Sun Impex on 28.12.2011 for import of the goods as ceiling lamps, chandeliers, wall lamps, hanging lamps, pole lights, drawer slider telescopic, decorative show pieces, hair accessories, cutting plotter, glass door accessories, glass fittings, spectacle frames, watch accessories, garment accessories through CHA M/s. The India Mercantile Agency. The importer had declared total CIF value as Rs.7,38,636/- (USD 14042.57) for the declared goods and the customs duty amounting to Rs.2,00,997/- was assessed by them as payable. Declaration form was signed by Shri Ganesh Shankar Nirulkar, Proprietor of M/s. Sun Impex. The department got the information that the importer had imported consignments containing watches and that they would be attempting clearance of the same by way of mis-declaration. Acting on the basis of information, the SIIB (Imports) carried out investigations and carried out 100% examination of the said container under a Panchanama dated 9.1.2012 in presence of CHA representative and the information was found to be correct. Various statements were recorded including the statements of CHA, the importer and the appellant herein. The IEC certificate was also issued in the name of the importer i.e. M/s. Sun Impex. After investigation the declared value of the consignment as declared by the importer was rejected and market survey was carried out in the market in the presence of the importer and the claimant of the goods. The total CIF value of the goods ascertained on market survey was worked out to Rs.60.99 lakhs (approx.) on which the customs duty was estimated to be Rs.16,37,738/-. Since the consignment was seized u/s. 110 ibid vide seizure memo dated 29.3.2012, the same was released provisionally on the request of the importer vide order dated 30.3.2012 and the importer paid the

customs duty of Rs.16,42,871/-, which was calculated by loading the CIF value, vide challan dated 31.3.2012. On the basis of investigation the department made out a case that the appellant asked Mr. Ganesh Shankar Nirulkar to open a company under the name of M/s. Sun Impex and started importing consignments in the name of M/s. Sun Impex. Accordingly a show cause notice dated 25.9.2012 was issued to the appellant, claimant of the imported goods, Mr. Ganesh Shankar Nirulkar-proprietor of the importer M/s. Sun Impex and also to the CHA.

4. The show cause notice was adjudicated and the Adjudicating Authority vide Order-in-Original dated 31.7.2013 held that the importer had mis-declared the quality, quantity and value before the assessing officer and therefore a total differential duty of customs amounting to Rs.16,87,347/- is liable to be recovered under Section 28(4) *ibid* alongwith interest, if applicable. Penalty u/s. 114A *ibid* for Rs.16,87,347/- was imposed on the importer M/s. Sun Impex and also on the appellant herein separately by terming the appellant as the '*actual* importer'. A penalty u/s. 114AA *ibid* for Rs.3 lakhs was imposed on M/s. Sun Impex and Ganesh Shankar Nirulkar respectively for use of manipulated invoices. No separate penalty has been imposed u/s. 114A *ibid* on Shri Ganesh Shankar Nirulkar the proprietor of M/s. Sun Impex as according to the Adjudicating Authority the same has been imposed on the importer i.e. M/s. Sun Impex. So far as CHA is concerned, the show cause notice was dropped being not sustainable. On Appeal filed by the appellant herein, the learned commissioner partly allowed the appeal and by maintaining the penalty u/s. 114A *ibid* held that the appeal is allowed to the extent that the provision of reduced penalty to be extended to the appellant.

5. Learned counsel for the appellant submits that admittedly the importer is M/s. Sun Impex and the appellant has been penalized only on the basis of speculation without there being

any evidence. He further submits that while importing, the IEC code of Shri Ganesh Shanker Nirulkar, proprietor of M/s. Sun Impex has been used which is not illegal as during material time Import Export Code holder can import goods in normal course of business on the strength of contract either with consumer or trader who eventually sells imported goods to consumers and such transaction is neither illegal nor prohibited by law. Accordingly to learned counsel admittedly the duty has been demanded from the importer M/s. Sun Impex-proprietor Ganesh Shanker Nirulkar and has been paid by the said importer therefore penalty u/s. 114A ibid cannot be imposed on the appellant and by imposing penalty on the appellant the authorities are treating two different persons as importer of one consignment, which is not permissible in law. In support of his submissions learned counsel placed reliance on the following decisions:-

- (i) Chowhan Exports Ltd. vs. CC, Sheva, Raigad; 2000(121) ELT 833 (Tri.)
- (ii) Nippon Audiotronix Ltd. vs. CC, New Delhi; 2000(120) elt 736 (Tri.)
- (iii) Paresh Parekh vs. CC, Chennai; 2008(221) ELT 441 (Tri.-Chennai)

Per contra learned Authorised Representative very vehemently argued the matter and prays for dismissal of appeal. He submits that nowhere the term '*importer or beneficiary or owner*' has been used in section 114A ibid therefore there is no illegality in imposing penalty on the appellant u/s. 114A. He further submits that going by the panchanama, evidence on record and the statements recorded during investigation it is clear that the appellant is the actual importer and owner of the goods in issue and the entire conspiracy, financing and import with fabrication of invoice and mis-declaration was resorted to by the appellant and the same has been admitted also in the statements recorded during investigation.

6. I have heard learned counsel for the appellant and learned authorised representative for the revenue and perused the case records including the written submissions placed on record by the respective sides and the case laws submitted by learned counsel. I have carefully gone through the provisions of Section 114A *ibid* and the same is reproduced hereunder for ready reference:-

"114A. Penalty for short-levy or non-levy of duty in certain cases.:-

Where the duty has not been levied or has not been short-levied or the interest has not been charged or paid or has been part paid or the duty or interest has been erroneously refunded by reason of collusion or any wilful mis-statement or suppression of facts, the person who is liable to pay the duty or interest, as the case may be, as determined under sub-section (8) of section 28 shall, also be liable to pay a penalty equal to the duty or interest so determined."

Section 114A *ibid* deals with imposition of mandatory penalty in certain cases. As per the Customs Act it is the importer who is to file the bill of entry to the proper officer u/s. 46 *ibid* while importing the goods and the assessment has to be made on that bill of entry and on such assessment, the duty is levied. Thereafter on payment of duty so assessed goods are cleared u/s. 47 *ibid*. If there is any non-levy or short levy on the goods so cleared then the procedure as contemplated by section 28 *ibid* is initiated and the competent officer of the department issues notice to the person chargeable with duty or interest requiring him to show cause why he should not pay the amount specified therein. Whereas Section 114A contemplates penalty for short-levy or non-levy of duty on *the person who is liable to pay the duty or interest as determined u/s.28 ibid*. The language of the aforesaid section is plain and clear. According to it, the person who is liable to pay duty or interest as determined u/s. 28 shall also be liable to pay a penalty equal to duty or interest so determined. Now it is to be seen from whom customs duty or

interest has been demanded and who has paid it. The answer is obvious i.e. 'the importer' i.e. M/s. *Sun Impex* and in fact that importer has paid the customs duty amounting to Rs.16,42,871/- vide TR-6 Challan dated 31.3.2012 even before the issuance of the show cause notice and initiation of adjudication proceedings. From the case records it is clear that no duty or interest has been demanded from the appellant herein nor any duty or interest has been determined against him. It is the settled legal position that it is the importer who is liable to pay the duty not even its director or proprietor as the case may be and this view finds support from the decision of this Tribunal in the matter of *Nippon Audiotronix Ltd. (supra)*. The relevant paragraph of the said decision is reproduced as under:-

"8. In *Collector of Customs, Cochin v. Trivandrum Rubber Works Ltd. 1999 (106) E.L.T. 9 (SC)*, the Supreme Court had to consider whether notice issued under section 28(2) to a clearing agent was a proper notice under that section. Their Lordships took the view that notice contemplated by Section 28 can only be to a person chargeable to duty. In the case of imports, it is the importer to whom notice is to be issued. Such a notice cannot be to an importer's clearing agent. This position applies on all fours to the present case. In the instant case the importer is M/s. *Nippon Audiotronix Limited*. So notice under section 28(2) can only be to the Company. The penalty contemplated by Section 114A can only be on the person liable to pay the duty and not to any other person. Viewed in this light, the order imposing penalty under section 114A on the Director is illegal."

No written agreement between the importer and the appellant herein has been placed on record as there was no such agreement as admitted by the importer i.e. Mr. Ganesh Shankar Nirulkar, proprietor of M/s. *Sun Impex*. The appellant herein is not the importer but alleged to be the claimant of the goods. The importer & the IEC holder is M/s. *Sun Impex*. Penalty under Section 114A is liable to be imposed on the person liable to pay

duty or interest as determined u/s. 28. In this case the differential customs duty has been paid by the importer i.e. M/s. Sun Impex through its proprietor Mr. Ganesh Shankar Nirulkar. Penalty u/s. 114A is attracted only for the *person who is liable to pay duty or interest under section 28* and not on anyone else. Therefore the imposition of penalty on the appellant herein under Section 114A *ibid* is without authority of law. The appellant could have been held liable for penalty under some other provision of the Act but not under Section 114A as the language of the said section is very clear and unambiguous.

7. In view of the observations made in the preceding paragraphs, the appeal filed by the appellant is allowed with consequential relief, if any, as per law.

(Pronounced in open Court on 20.01.2023)

(Ajay Sharma)
Member (Judicial)

//SR