

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

WEST ZONAL BENCH

CUSTOMS APPEAL NO: 85951 OF 2022

[Arising out of Order-in-Appeal No. MUM-CUSTM-PCCC-APP-1656/2021-22 dated 09th February 2022 passed by the Commissioner of Customs (Appeals), Mumbai-III.]

Sheetal Manufacturing Co Pvt Ltd

CC, 3100, C Wing, Bharat Diamond Bourse,
Bandra-Kurla Complex, Bandra (E), Mumbai 400 051

... *Appellant*

versus

Principal Commissioner of Customs

Airport Special Cargo, 5th Floor,
Avas Corporate Point, Makwana Lane
Andheri (E), Mumbai - 400059

...*Respondent*

APPEARANCE:

Shri J C Patel with Shri V K Singh, Advocates for the Appellant

Shri D S Maan, Deputy Commissioner (AR) for the Respondent

CORAM:

HON'BLE MR S.K. MOHANTY, MEMBER (JUDICIAL)

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

FINAL ORDER NO: A / 85874 /2023

DATE OF HEARING:	02/11/2022
DATE OF DECISION:	01/05/2023

PER: C J MATHEW

This is a story of two consignments of 'cut and polished diamonds' that, somehow, became one and of bill of lading issued for

one of the two, but with value of both, having to be re-issued twice to get the material particulars right. This is also the story of an importer who is unable to fathom cause for this ado about something that has no duty advantages flowing to them and to a class of goods that, unvaryingly, are examined before being assessed. Yet, as Learned Counsel for M/s Sheetal Manufacturing Co Pvt Ltd, the appellant, would have us believe that, between the two lower authorities, every possible detriment in the book has been thrown at them without factual, or legal, context.

2. According to Learned Counsel, clearance of such goods is permitted without payment of either 'basic customs duty (BCD)' or of 'integrated goods and service tax (IGST)' by notification no. 45/2017-Cus dated 30th June 2017 (at serial no. 5). He also submitted that the order of Commissioner of Customs (Appeals), Mumbai Zone-III, impugned here, upheld confiscation not only by validation of invoking of section 111(i) and section 111(m) of Customs Act, 1962 on the entirety of import – that matching with, as well as in excess of, declaration in bill of entry - for breach in self-assessment and of section 46(4) of Customs Act, 1962 but also insinuated section 118 of Customs Act, 1962 that the adjudicating authority had not found to be applicable. He further intimated that their entitlement to the benefit of exemption from duties on import of the 'cut and polished diamonds' in the second box had been inappropriately denied when, in the light of their explanations, their plea for amendment of bill of entry under

section 149 of Customs Act, 1962, preferred before the original authority, could easily have resolved the matter fairly and equitably.

3. There is no dispute on the foundational facts. However, the dichotomy of the controversy stems from inference placed upon the situational context which, according to Learned Counsel, is nothing but procedural and the customs authorities have not placed sufficient premium on the absence of motive, arising from entitlement to duty-free clearance, to indulge in any deliberate misdemeanour. The technical perspective of customs authorities, while not amounting to overreach, has glossed over the intrusive treatment accorded to ‘cut and polished diamonds’ that, for all practical purposes, has been resuscitated from the era of Sea Customs Act, 1878. Shipped to the appellant from New York was a consignment of ‘cut and polished diamonds’, through M/s Brinks Global Services, USA, by M/s Diamonds and Diamonds Corp, New York for which they filed bill of entry no. 6738822/03.02.2020 declaring, and on the basis of invoice no. DC/128/2019-20 dated 28th January 2020, 311.03 carats with value of US\$ 52,298.05 (₹ 37,47,155.9) for assessment after subjecting to ‘first check’ in accordance with established procedure. During the prescribed check, the consignment was found to contain 410.17 carats valued at US\$ 119245.85 comprising two boxes - one matching the declaration and the other containing 99.14 carats of ‘cut and polished diamonds’ valued at US \$ 66,947.80 (₹ 47,97,455). The appellant claimed that they had shipped 1218.31 carats of ‘cut and

polished diamonds' in two consignments of 890.88 carats, valued at US \$ 86,040.60, against shipping bill no. 9634307/13.01.2020 and 327.43 carats, valued at US \$ 225,299.25, against shipping bill no. 9657543/14.01.2020 on 'consignment approval sale basis' and that the two boxes were unsold returns from the two consignments respectively entitling them to the benefit of 'nil' rate of duty in terms of notification no. 45/2017-Cus dated 30th June 2017 (at serial no. 5) claimed by them in the bill of entry filed purportedly for clearance of the first of the unsold returns. The failure to declare the second box in the impugned consignment was found sufficient for depriving the goods of the benefit of the exemption notification to confirm recovery of duty liability on value of ₹ 85,44,610 on 410.17 carats while directing the assessing officer to ascertain the correctness of the claim for exemption on 311.03 carats valued at ₹ 37,47,155 for the remission of duty to that extent even as the entire consignment was confiscated under section 111(i) and section 111(m) of Customs Act, 1962 though permitted to be redeemed on payment of fine of ₹ 8,00,000 under section 125 of Customs Act, 1962 besides imposing penalty of ₹ 40,877 on the importer under section 112 of Customs Act, 1962 and of ₹ 5 0000 on the 'consol agent', M/s Brinks BVC, under section 117 of Customs Act, 1962 while dropping proceedings against the customs broker.

4. It is evident that, while the claim for exemption, though now restricted to one box of 311.03 carats, was not disallowed for one and

was not allowed for the second box of 99.14 carats solely on the ground that the benefit could not be extended in the absence of claim for such in the bill of entry; impliedly, denial of exemption has been grounded on absence of declaration in bill of entry and concurrent claim for the benefit. There is, thus, no categorical finding of ineligibility for the exemption, accorded to 'exported goods returned subsequently', by notification no. 45/2017-Cus dated 30th June 2017 and subject to satisfaction of the 'proper officer' of the goods having been identified as previously exported.

5. Linked to this detriment is the confiscation of the entire consignment which, Learned Counsel claims, is legally inappropriate insofar the first box, matching the declaration and the bill of entry, is concerned for which reliance was placed on the decision of the Tribunal in *Exports v. Commissioner of Central Excise, PPG, New Delhi [2018 (363) ELT (Tri-Del)]* and in *Microqual Techno Pvt Ltd v. Commissioner of Customs (Exports), Mumbai [2019 (370) ELT 1547 (Tri-Mumbai)]*. Furthermore, he contended that the chain of amendment of 'house airway bill (HAWB)' should have sufficed to accept their explanation of the unsold portion of the two consignments exported earlier having, thus, been received together through lack of adequate communication. It was pointed out that the consignor was expected to dispatch unsold returns from each consignment separately and that, on receipt of the first house airway bill no. 1110-0386955 from M/s Brinks BVC for the reported 311.03 carats but with value of

US\$ 119, 245.85 reported for the two lots expected to be returned separately, at their instance, another bill amended for reduction of value to US\$ 52.298.05, appropriate to the consignment expected by them, was issued. The discrepancy of physical arrival of unsold returns of the second export consignment in the same packing, though in a different box, prompted them to obtain fresh house airway bill no. 1110-0386955 once again for restoration of original value and combined quantity of both boxes. Learned Counsel placed reliance on the decision of the Tribunal in *Shree Ganesh International v. Commissioner of Central Excise, Jaipur* [2004 (174) ELT 171 (Tri-Del)] and in *Kirti Sales Corporation v. Commissioner of Customs, Faridabad* [2008 (232) ELT 151 (Tri-Del)].

6. That the undeclared quantity of ‘cut and polished diamonds’ came to light during the examination is not in question; however, as pointed out on behalf of the appellant, ‘cut and polished diamonds’, being subject to ‘first check’ – a relic of the regime of Sea Customs Act, 1878 with custodianship vesting with customs – resorted to, for lack of details with the importer, even under the regime of Customs Act, 1962, appeared to have been adopted ‘diamonds’ at the Bharat Diamond Bourse for convenience of control by the customs authorities. Nonetheless, its unvarying imposition on every consignment was a throwback to the days before ‘self-assessment’ and even delegated custodianship consequent upon rescinding of Sea Customs Act, 1878. The inevitability of such inspection does not sit

well with the allegation that there was deliberate misdeclaration of material particular which alone would warrant invoking of section 111(m) of Customs Act, 1962.

7. Likewise, in invoking section 111(i) of Customs Act, 1962, the adjudicating authority appears to have overlooked the 'physical control' regimen of times past that continues to rule the Bharat Diamond Bourse at Mumbai in accordance with official instructions staying the hand, and passage, of time that that had brought about devolution of obligations on importers preferring declarations under section 46 and section 50 of Customs Act, 1962. The insistence on visiting the importer with the same rigour of responsibility and onus, as pervades the customs areas outside the Bourse, is nothing short of a scathing indictment of the manner in which the 'first check' system is operated; surely, that cannot have been the intent of the lower authorities. As Learned Counsel has reiterated, time and again, the deterrence implicit in unalloyed 'first check' precludes any inclination in that direction and, in any case, the absence of motive, concludible from entitlement to exemption, rules out indulgence in foolhardy undertaking speculated upon by the adjudicating and appellate authorities. It appears to us a reasonable premise that concealment does not entail two boxes of 'cut and polished diamonds' matching in value with the first of the 'house airway bill' and their presentation in such form for 'first check' appraisal by customs authorities.

8. Moreover, the first appellate authority appears to have found section 118 of Customs Act, 1962 to be the apt breach to justify the confiscation ordered, though for other reasons and other breaches, by the original authority. It is also clear from the records that, against the dropping of proposal for confiscation under section 118 of Customs Act, 1962, no appeal had been preferred in consequence of review enabled by section 129D of Customs Act, 1962. Learned Authorised Representative attempted to lend legal cover to this digression on the part of the first appellate authority by claiming coverage within the approval accorded by the Hon'ble Supreme Court in *State of Karnataka v. Muniyalla* [AIR 1985 SC 470], holding that

'4..... But it is now well-settled that merely because in order is purportedly made under a wrong provision of law, it does not become invalid so long as there is some other provision of law under which the order could be validly made. Mere recital of a wrong provision of law does not have the effect of invalidating an order which is otherwise within the power of the authority making it.'

and in *Collector of Central Excise, Calcutta v. Pradyumna Steel Ltd* [1996 (82) ELT 441 (SC)], holding that

'3. It is settled that mere mention of a wrong provision of law when the power exercises available even though under a different provision, is by itself not sufficient to invalidate the exercise of that power....'

which we may attribute to eagerness in defending the order impugned by the appellant. Invoking of an authority under a statute may, thus, be latitude that an original authority can avail of. The order impugned

here is the outcome of an appeal, filed by an importer whose grievance, and thereby the framework of the appeal itself, was limited to the points raised in appeal and section 118 of Customs Act, 1962 was not one among them for the same had been considered and dropped in the order appealed against. The provision, so deliberately dropped, could not have been revived in appeal within the boundaries noticed by the Hon'ble Supreme Court in the judgements *supra* except by an appeal of Revenue or, in specific exercise of power so granted by the statute, by reframing of the issues in appeal but only after placing the appellant before it on notice of intent to do so. Owing to this statutory enablement, and non-exercise thereof, the cited decisions would not legitimise the overreach undertaken by the first appellate authority. Therefore, the recourse to section 111(i) of Customs Act, 1962 to order confiscation of the imported goods is not tenable.

9. By the failure of the confiscation upheld in the impugned order, the consequent penalty under section 112 of Customs Act, 1962 cannot be sustained. Moreover, the findings of the original authority are replete with observations about the mistake that occurred as well as the role of the 'consol intermediary' for not reflecting the contents of the consignment despite having issued 'house airway bill (HAWB)' in acknowledgement of having assumed custodianship of the package and its contents. The fastening of wrongdoing on the appellant, therefore, does not sustain.

10. The lower authorities have distinguished between the contents of the two boxes insofar as assessment to duty is concerned. That distinction may have had some validity had the procedure envisaged in section 47 of Customs Act, 1962 for other cargo been the norm; our findings *supra* have established the contrary and ‘first check’, which includes tabulation of the contents of an import consignment both for completion of the declaration as well as for appraisal of value, is inconsistent with that discriminatory treatment considered fit by the lower authorities. It has ever been the claim of the appellant that the consignment in its entirety are unsold returns from the two export shipments affected by them in accordance with notification no. 45/2017-Cus dated 30th June 2017. No attempt was made to establish the veracity of the claim even in relation to the contents declared in the bill of entry before effecting seizure of the consignment of its entire on 24th February 2020. However, the lower authorities have acknowledged the eligibility, subject to ascertain, of the declared goods to such exemption; the principle so espoused cannot be withheld from the entirety of the consignment in view of mandated ‘first check’ appraisal of contents. The eligibility of the undeclared ‘cut and polished diamonds’ would adequately evidence the lack of motive in concealment, let alone deliberate attempt to evade duty. A facilitative administration dedicated to furtherance of ‘ease of doing business’ should have, in circumstances of ‘first check’ appraisal, accorded priority to ascertainment of eligibility. In our considered

view, the directions of the original authority, upheld by the first appellate authority, insofar as 311.03 carats of 'cut and polished diamonds' will have to be broadened to cover the 99.14 carats of like goods. As the goods are yet to be cleared for home consumption, there cannot be any prejudice caused to Revenue by exercise of authority under section 149 of Customs Act, 1962 to make appropriate alterations in the bill of entry for which the appellant may make formal application insofar as the ascertainment of claim for eligibility to exemption from duty is extendable to them is concerned.

11. In accordance with our findings *supra*, we set aside the impugned order except the extent of ascertainment of eligibility to notification no. 45/2017-Cus dated 30th June 2017 while modifying even that to cover the entire 410.17 carats. Appeal is disposed of on these terms.

(Order pronounced in the open court on 01/05/2023)

(S.K. MOHANTY)
Member (Judicial)

(C J MATHEW)
Member (Technical)