CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL MUMBAI

Customs Appeal No. 86209 of 2022

(Arising out of Order-in-Original CAO No. CC-PVNSB/24/2021-22 Adj.(I) ACC dated 15.03.2022 passed by Commissioner of Customs (Import), Air Cargo Complex (ACC), Mumbai.)

Aakash Thakkar **.....Appellant**
A-1, Al Aziz Palace,
1402, Dongri Cross Lane
Near Sandhurst Road Station,
Dongri, Mumbai-400009.

VERSUS

Commissioner of Customs (Import), ACC **.....Respondent**
Air Cargo Complex, Navpada, Sahar Village,
Andheri (East), Mumbai–400 099.

Appearance:

Shri N.D. George, Advocate for the Appellant

Shri S.K. Hatangadi, Authorized Representative for the Respondent

FINAL ORDER NO. A/85055/2024

Date of Hearing: 02.11.2023
Date of Decision: 01.02.2024

PER : M.M. PARTHIBAN

This appeal has been filed by Shri Aakash Thakkar, Mumbai (herein after, referred to, for short, as 'the appellant'), assailing Order-in-Original CAO No. CC-PVNSB/24/2021-22 Adj.(I) ACC dated 15.03.2022 (herein after, referred to as 'the impugned order') passed by Commissioner of Customs (Import), Air Cargo Complex (ACC), Mumbai.

2. Briefly stated, the facts of the case are that the appellant herein is an employee of Customs Broker (CB) M/s Shanti shipping agency and they had been engaged as a customs broker by an importer M/s Viranis Impex, for whom they had filed a Bill of Entry (B/E) No.2440138 dated 21.01.2021. The imported goods had been declared as 'cut–tobacco' classifiable under Customs Tariff Item 2403 9970. On the basis of reasonable suspicion, the Central Intelligence Unit of Air Cargo Complex (CIU-ACC) customs authorities have conducted detailed examination of the imported goods and found that the goods were actually 'Roll Your Own Tobacco' packed in retail pouches of 50 grams each. The customs authorities had disputed the classification of the product and found that necessary declaration in terms of Legal Metrology Act and the Rules made thereunder have not been mentioned in the packages. Accordingly, the said imported goods were seized under a seizure memo dated 01.02.2021 and detailed investigation was conducted by CIU-ACC and show cause proceedings were initiated by issue of SCN dated 29.07.2021. In adjudication of the said show cause notice, the learned Commissioner of Customs had discussed the role of the appellant and had imposed penalty of Rs.10,000/- under Section 112(a) of the Customs Act, 1962 in respect of the above import consignment and had also imposed penalty of Rs.50,000/- on the appellant under Section 112(a) ibid, in respect of the past consignments involving 16 B/Es. Feeling aggrieved with the above order, the appellant had filed this appeal before the Tribunal.

3. Heard both sides and perused the records of the case.

4. In the impugned order, the learned Commissioner of Customs had imposed penalty on the appellant under Section 112(a) of the Customs Act, 1962 on the basis of his findings that Shri Aakash Thakkar, being an employee of customs broker should have been aware of the proper classification of the imported goods and should have advised the importer M/s Viranis Impex, instead of following the importers instructions for classification of the goods. In this regard, I find that the provision for filing of a declaration for import of goods is contained under section 46 ibid, which is extracted as below:

*"**Section 46. Entry of goods on importation. -***

(1) The importer of any goods, other than goods intended for transit or transhipment, shall make entry thereof by presenting electronically[on the customs automated system to the proper officer a bill of entry for home consumption or warehousing in such form and manner as may be prescribed:

Provided that the Principal Commissioner of Customs or Commissioner of Customs may, in cases where it is not feasible to make entry by presenting electronically on the customs automated system, allow an entry to be presented in any other manner:

Provided further that if the importer makes and subscribes to a declaration before the proper officer, to the effect that he is unable for want of full information to furnish all the particulars of the goods required under this sub-section, the proper officer may, pending the production of such information, permit him, previous to the entry thereof (a) to examine the goods in the presence of an officer of customs, or (b) to deposit the goods in a public warehouse appointed under section 57 without warehousing the same.

(2) Save as otherwise permitted by the proper officer, a bill of entry shall include all the goods mentioned in the bill of lading or other receipt given by the carrier to the consignor.

(3) The importer shall present the bill of entry under sub-section (1)before the end of the day (including holidays) preceding the day on which the aircraft or vessel or vehicle carrying the goods arrives at a customs station at which such goods are to be cleared for home consumption or warehousing:

xx xx xx xx

(4) The importer while presenting a bill of entry shall make and subscribe to a declaration as to the truth of the contents of such bill of entry and shall, in support of such declaration, produce to the proper officer the invoice, if any, and such other documents relating to the imported goods as may be prescribed.

(4A) The importer who presents a bill of entry shall ensure the following, namely:-

(a) the accuracy and completeness of the information given therein;

(b) the authenticity and validity of any document supporting it; and

(c) compliance with the restriction or prohibition, if any, relating to the goods under this Act or under any other law for the time being in force.

(5) If the proper officer is satisfied that the interests of revenue are not prejudicially affected and that there was no fraudulent intention, he may permit substitution of a bill of entry for home consumption for a bill of entry for warehousing or vice versa."

From the plain reading of above legal provisions, it transpires that in order to determine the appropriate duties of customs payable on any imported goods, an importer is required to file a Bill of Entry (B/E) giving all required particulars of such imported goods for assessment to duty. It is also to be noted that in terms of definition of the term 'assessment' provided under Section 2(2) ibid, determination of duty liability of imported goods has to be determined in accordance with the tariff classification of such goods in terms of Customs Tariff Act, 1975. Thus mentioning of the description in detail and tariff classification of the imported goods is one of the important requirement in the declaration to be made under section 46 ibid.

5. From the facts of the case, and the findings recorded by the learned Commissioner of Customs in paragraph 31.5 of impugned order, it clearly emerges that Shri Aakash Thakkar, had stated that the customs tariff heading declared in the bill of entry was decided by the importer and he followed the importers instructions. Further, in the impugned B/E, the CB and importer had sought for examination of the goods on 'First Check basis', which indicates that the goods are required to be firstly examined by customs authorities before assessment of the customs duty and for compliance with other requirements applicable thereon. In view of the above factual position, responsibility for proper declaration of the goods lies with the importer and having sought for examination of the goods before assessment, there was no element of mis-declaration on the part of customs broker and the employee Shri Aakash Thakkar attracting imposition of penalty under Section 112(a) ibid.

6. I also find that the learned Commissioner of Customs in the impugned order had come to the conclusion that the appellant was responsible for omissions and commissions in respect of mis-classification of the imported goods and the resultant duty evasion; besides the failure for providing mandatory declaration on the packages of the imported goods. The various paragraphs of the impugned order in which he had arrived at such a conclusion is extracted and given below:

> *"31.5. I find that the SCN proposed penal action u/s. 112 (a) against Shri Aakash Thakkar, employee of the CB firm, M/s. Shanti Shipping Agency. In this regard, I find that Shri Aakash Thakkar in his statement recorded u/s. 108 submitted that they are handling the clearance work of the importer since 2019; that the CTH declared in the B/E was decided by*

the importer and he followed importer's instructions; that he was present during examination of present as well as past consignments and the goods in question are Tobacco used for Roll Your Own Cigarettes; that due to COVID-19 Pandemic in European Countries creates labour crisis which resulted in non-affixing of labels under Legal Metrology as well as precautionary warring under COTPA.

31.5.1 In his written submission, Shri Thakkar contended that the impugned B/E was filed under First Check Examination basis as well as for Warehousing. However, I find that though the B/E declared the brands of the imported goods, but the same were not actually Cut-Tobacco in terms of definition in the Supplementary Note (2) to Chapter 24 of Customs Tariff. Therefore, the CTH declared in the B/E, i.e. 2403 9970 is not correct and required to be changed to CTH 2403 1990 which covers Other Tobacco Products having Brand Names. Further, not only in the present case, same practice was adopted by the CHA by classifying the goods under CTH 2403 9970 by declaring the same as Cut Tobacco. This fact has been admitted by Shri Aakash Thakkar in his voluntary statement recorded u/s. 108 of the Customs Act, 1962.

31.5.2. I find that CB firm is a nodal agency between Customs and Trade and bound to comply with certain mandatory obligations envisaged under Customs Brokers' Licensing Regulations, 2018. The CB should aware all the provisions of Customs Act and Allied Acts, Customs Tariff and Chapter Notes thereof and they should be sure of classification of the goods and in case of any difference they should sensitize their clients to classify the goods under appropriate CTH. In the instant case, I find that Shri Thakkar in his statement stated that the classification of goods was decided by the importer and he followed importer's instructions. I find that the CB should have advised their client to classify the goods under correct CTH or brought the matter to the notice of the Proper Officer. In the instant case, lfind that Shri Aakash Thakkar, Employee of CB firm fails to do so. Therefore, these acts of omission and commission which resulted in short levy of legitimate duties which rendered the goods liable for confiscation under the provisions of Section 111 of the Customs Act, 1962.Therefore, I agree with the proposal of the Investigating Agency to impose penalty u/s. 112(a) on Shri Aakash Thakkar, Employee of CB firm M/s. Shanti Shipping Agency.

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34.3. I find that the SCN proposed penalty u/s. 112 (a) on the employee of the CB firm, M/s. Shanti Shipping Agency, namely Shri Aakash Thakkar for his acts of omission and commission. I have already discussed at length about the role of Shri Thakkar in Para Noa. 31.3 to 31.3.2. above. Accordingly, I held Shri Aakash Thakkar liable for penal action under Section 112 (a) of the Customs Act, 1962 for aiding and abetting the wrong doings of the importer in their past imports during the period April, 2019 to December, 2020.”

7. Further, I also find that the learned Commissioner of Customs in the impugned order had come to the conclusion that the importer was not responsible for omissions and commissions of mis-declaration of imported goods on the basis of following findings, which is also extracted as below:

> *"31.2. I find that the SCN proposes penal action u/s. 114AA against Shri Ali Virani, Proprietor of M/s. Viranis Impex. In this regard, I find that the acts of Shri Ali Virani, who is instrumental in declaration of CTH of the goods in the live B/E, which found to be incorrect during the course of investigation. I find penalty undue 114AA is imposable when the Noticee intentionally signs any document/statement which is incorrect in nature.* ***I find that investigation has not brought any evidence to substantiate that noticee intentionally signed any false document.***
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> *32.1.1 I find that the Investigating Agency proposed that the goods are correctly classifiable under CTH 2403 1990 for past consignments of the noticee.1. In this regard I have already discussed at length about the Classification of impugned goods at para no 25.1 to 25.9 supra.* ***I find that it is pretty clear that the importer did not disclose the end-use of the imported goods at the time of its importation and taking the verbatim meaning of CTH and cleared the goods under CTH 2403 9970 which attracts lower rate of GST Compensation Cess****.* ***Therefore, it is crystal clear that the importer willfully mis-stated the classification of goods as well as suppressed the facts from the Department with an intent to evade applicable GST*** *Compensation Cess, which resulted in duty short levied of legitimate Custom duty.*
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> *31.4. In view of the facts above and legal pronouncement, I find that investigation has not brought any evidence to substantiate that noticee Shri Ali Virani, Proprietor of M/s. Viranis Impex had intentionally signed any false document.* ***Also, it is matter of fact that the said B/E dated 21.01.2021 was filed under First Check Examination basis as well as for Warehousing of goods, therefore, even if there are any wrong declarations/mistakes by the importer, same could have been rectified before clearance of goods for warehousing by the Proper Officer. Hence, I refrained to impose penalty u/s 114AA of the Customs Act 1962.****"*
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> *(Emphasis supplied)*

8.1 The above findings of the learned Commissioner of Customs in the impugned order makes it very clear that in the absence of any evidence to show that there was suppression of facts from the Department, and inasmuch as the imported goods having been offered for examination by customs authorities on 'first check examination' basis, there was no basis for imposition of penalty on the importer. Thus, by extending such finding, even the Customs broker, who acts as an agent of the importer in terms of

Section 147 ibid, and the employee of such Customs broker, also cannot be fastened with the liability of imposing penalty on the same grounds.

8.2. Further, I find that there is apparent contradiction in the stand taken by the learned Commissioner of Customs at paragraphs 32.1.1 and 31.4 of the impugned order. In para 32.1.1 he stated that the importer did not disclose the end-use of the imported goods at the time of its importation and cleared the goods under CTH 2403 9970 attracting lower rate of GST compensation cess, which proved that the importer wilfully mis-declared the classification of goods as well as suppressed the facts from the Department with an intent to evade payment of legitimate customs duty. On the other hand, at para 31.4 in the absence of any evidence to substantiate that the importer had intentionally signed any wrong declaration, there was no basis for imposition of penalty on the importer. Besides taking these contradictory stand on the part of the importer, he had at para 31.5.2 stated that employee of CB did not advise the importer to classify the goods correctly which resulted in short levy of legitimate duties and thus he agreed with the proposal of the investigating agency for imposition of penalty on Shri Aakash Thakkar, an employee of CB.

9. In view of the foregoing discussions, I do not find any merits in the impugned order passed by the learned Commissioner of Customs (Imports), ACC, Mumbai in imposition of penalty under Section 112(a) ibid on Shri Aakash Thakkar, employee of CB, and the findings in the impugned order to this extent is contrary to the facts on record.

10. In the result, I set aside the impugned order to the extent mentioned above at paragraph 9, and allow the appeal in favour of the appellant.

(Order pronounced in open court on 01.02.2024)

(M.M. Parthiban)
Member (Technical)

Sinha