CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
MUMBAI

Customs Appeal No. 89245 of 2018

(Arising out of Order-in-Appeal No. 220{Adjn(I)2018(JNCH)/Appeal-II dated 26.02.2018 passed by Commissioner of Customs (Appeal), Mumbai-II, JNCH, Nhava Sheva)

Mukhtar Shaikh
B-26 Sayba Palace, 2nd Floor,
New Mill Road, Kurla West **.....Appellant**
Mumbai– 400070

VERSUS

Commissioner of Customs (Import-I) **.....Respondent**
Jawaharlal Nehru Customs House (JNCH)
Nhava Sheva, Taluka Uran, District Raigad
Maharashtra - 400707.

Appearance:

Shri Mukhtar Shaikh in person.
Shri Ram Kumar, Authorized Representative for the Respondent

CORAM:
HON'BLE MR. M.M. PARTHIBAN, MEMBER (TECHNICAL)

FINAL ORDER NO. A/85544/2024

Date of Hearing: 01.02.2024
Date of Decision: 03.06.2024

PER : M.M. PARTHIBAN

This appeal has been filed by Shri Mukhtar Shaikh, Proprietor of M/s Fast Forward Logistics, Mumbai (herein after referred to as 'the appellant', for short), assailing the Orders-in-Appeal No. 220{Adjn(I)2018(JNCH)/ Appeal-II dated 26.02.2018 (referred to as 'the impugned order') passed by Commissioner of Customs (Appeal), Mumbai-II, JNCH, Nhava Sheva.

2.1 The brief facts of the case are that the appellant is a proprietor of M/s Fast Forward Logistics, Mumbai who is providing logistics support service in clearing and forwarding of imported goods as well as export goods. The appellant has been interacting with various Custom House Agents (CHAs)/ Customs Brokers (CBs) in order to get the consignments cleared for import or export on behalf of their various clients. The appellant was following a practice of receiving various documents from his clients and then sending such documents to the CHA/CB in order to get the consignments cleared out of customs control. Similarly, in the present case of import of trolley bags by

M/s Ganesh Enterprises, Dombivali (East), Mumbai vide Bill of Entry No. 9159911 dated 07.05.2015, the appellant had received the documents of import from one Shri Kanaiya Hurbada and forwarded the same to M/s P.N. Shipping Agency, CHA/CB for clearing the imports.

2.2 On the basis of specific intelligence, the Directorate of Revenue Intelligence (DRI) had examined the imported goods covered by B/E No. 9159911 dated 07.05.2015 imported in container No. BAXU 5009940 brought from Jebel Ali. The examination of such goods resulted in recovery of 20,445 boxes of DJARUM BLACK and GUDANG GARAM brand foreign origin cigarettes totaling to 48,08,880 cigarette sticks concealed by camouflaging 423 boxes of trolley bags. The total value of such smuggled foreign origin cigarettes in the present case was valued at Rs.3,42,96,990/-. Accordingly, such goods involving violations of Customs law were seized on 07.05.2015.

2.3 During investigation, statements were recorded by DRI from various persons including the Shri Omkar Rajendra kumar, Proprietor of importer firm M/s Ganesh Enterprises and the appellant i.e., Shri Mukhtar Shaikh, Proprietor of M/s Fast Forward Logistics. The investigation also revealed that the Delivery Order for the imported goods was obtained by Shri Mukhtar Shaikh as per Shri Kanaiya Hurbada's instructions and in a manner so that this would not leave any trail. After taking into account the role played by various persons in illegal act of smuggling of foreign origin cigarettes, show cause proceedings were initiated proposing for confiscation of smuggled goods and for imposition of penalties on various persons under the Customs Act, 1962 by issue of Show Cause Notice (SCN) dated 29.10.2015. The said show cause notice was adjudicated by original authority vide Order-in-Original dated 15.05.2017 in confiscation of smuggled goods and imposition of penalties proposed on various persons in the SCN which *inter alia* included imposing penalty of Rs.5,00,000/- on the appellant under Section 112(a) of the Customs Act, 1962. Being aggrieved with the above original order, the appellant filed an appeal before the Commissioner of Customs (Appeals), Mumbai-II who disposed of the same in the impugned order by confirming the original order and rejecting the appeal filed by the appellant. Feeling aggrieved with the impugned order, the appellant had preferred this appeal before the Tribunal. As a matter of abundant caution, it is clarified that present appeal is limited to the extent of assailing the impugned order only for imposition of penalty on the appellant and not in respect of confiscation of smuggled goods and imposition of penalty on various persons concerned with such illegal acts.

3. Learned Advocate appearing for the appellant had stated that the appellant being service provider of logistics support in clearing the imported goods had provided the services in good faith; there was no occasion for the appellant to suspect the import transaction, as all the requisite documents including KYC documents were duly verified by them before submitting to CHA/CB and they did not derive benefit from importer. He further stated that they did not do any positive act, or indulge in omission or commission of act which could be a ground for imposition of penalty, and imposing penalty only on the basis of statements recorded under Section 108 of Customs Act, 1962 does not sustain the order imposing penalty on the appellant. Hence, they pleaded that their appeal be allowed.

4. On the other hand, learned Authorized Representative (AR) pointed out that the appellant received the import documents from a third person viz. Shri Kanaiya Hurbada, who is neither the importer or his authorised representative; the appellant tried calling up the importer on his mobile phone and despite not getting their response, still without verifying the existence of importer went ahead for clearance of foreign origin cigarettes under the guise of trolley bags; the appellant did not even check whether the person from whom he received documents is the importer or an authorized person of importer, before handling the consignment; for simple job of uploading the check list for generation of bill of entry the appellant paid Rs.10,000/- to the CHA/CB. Further, during search of the appellant's premises incriminating documents such as blank and signed letter head of importer M/s Ganesh Enterprises along with rubber stamps of M/s Ganesh Enterprises and its authorized signatory were recovered, indicating complicity of the appellant in the smuggling of foreign origin cigarettes in this case. Thus, learned AR submitted that the appellant had actively connived with Shir Kanaiya Hurbada and unknown persons in attempting to clear the foreign Origin cigarettes and thus the penalty imposed on the appellant is sustainable.

5. Heard both sides and perused the records of the case. I have also examined the submissions advanced by the learned Advocate appearing for the appellants and the learned Authorized Representative of the Department. Further, I have also perused the additional written submissions in the form of

paper books submitted by both sides along with citation of case laws which both sides have mentioned in support of their case.

6. I find that the Order-in-Original dated 15.05.2017 which was upheld by the impugned order, deals with various issues covering offences of smuggling foreign origin cigarettes under the guise of trolley bags, by camouflaging the same by importing it along with few boxes of trolley bags; confiscation of seized goods under Section 111(f), 111(l) and 111(m) ibid; besides imposition of penalties on various persons who had played active role played in such illegal act under Section 112(a) ibid. These persons included the CHA/CB, importer, Shir Kanaiya Hurbada who handed over import documents and the appellant who obtained the documents for processing it for clearing the imported foreign origin cigarettes, in an illegal manner. Hence, the short point for determination before me is limited to that portion of the order relating to imposition of penalty on the appellant as co-noticee under Section 112(a) ibid.

7. On perusal of the original order dated 15.05.2017, in the above context, it is seen that the findings in the adjudication order which was confirmed in the impugned order are as follows:

"32. In view of the above, I find that

A) …

B) After detailed investigation by DRI and statements of various persons in connection with the case it emerged that a criminal conspiracy was hatched by some unknown/unidentified persons to smuggle cigarettes. The investigation has concluded that:-

…

- *The CHA was arranged through Shri Kanaiya Hurbada by Shri Dinesh Banushali and Shri Rajan Bhanushali who were fronting for the unknown/identified person. The CHA's role was restricted to merely filing the Bill of Entry and not with the clearance work of assessment and examination which was to be carried out by the Shri Kanaiya Hurbada so as to ensure smooth clearance of the subject contraband. The CHA was arranged by Shri Kanaiya through Shri Mukthar Shaikh of M/s Fast Forwards Logistics.*
- *The delivery order was to be obtained by Shri Mukthar Shaikh as per Shri Kanaiya Hurbada's instructions in the manner which would not leave any trail. For this purpose, Shri Mukthar Shaikh was to make payment of the shipping line through NEFT after depositing the cash given to him by Shri Kanaiya Hurbada….*

C) In view of the above, I find that some unknown/identified personnel is trying to smuggle the cigarettes in the guise of trolly bags. Since, the Cigarettes were not declared in the IGM and Bill of Entry, I find the said 20,445 boxes of total value Rs.3,36,62,160/- is liable for confiscation under section 111(f), 111(l) and 111(m) of the Customs Act, 1962. I also find that 423 boxes of Trolley bags have been used to camouflage cigarettes therefore, I hold that the seized 423 boxes of Trolley liable for confiscation *under section 119 of the Customs Act 1962. I also find that all the noticees in the subject SCN are liable for penalty under section 112(a) of the Customs Act, 1962.*

...

ORDER

xx xx xx xx xx

35.6 I impose penalty of Rs. 5,00,000/- (Rupees Five Lakh Only) on Shri Mukthar Shaikh, proprietor of M/s Fast Forward Logistics Solutions under Section 112(a) of the Customs Act, 1962….."

8. As the original authority has confirmed the proposal for imposition of penalty on the appellant under Section 112(a) of the Customs Act, 1962, the short issue for consideration before me is to examine the issue in the limited compass of determining whether the imposition of penalty on the appellant under Section 112(a) ibid in the present case is legally sustainable or not?

9. The facts of the case indicate that the impugned order has been passed in respect of an issue relating to smuggling of foreign origin cigarettes by camouflaging in the imported goods i.e., Trolly bags from Jebel Ali Port, by misuse of IEC of importer. In this regard, the role of appellant as a Proprietor of Freight Forwarder have been analysed by the learned adjudicating authority and he had justified the imposition of penalty under Section 112(a) ibid, which has also been confirmed by the learned Commissioner of Customs (Appeals) in the impugned order.

10. In order to address the above issue of imposition of penalty under Section 112(a) ibid, we would like to refer the relevant legal provisions contained in the Customs Act, 1962.

"Section 112(a) of the Customs Act, 1962

Penalty for improper importation of goods, etc.

112. *Any person,—*

(a) who, in relation to any goods, does or omits to do any act which act or omission would render such goods liable to confiscation under section 111, or abets the doing or omission of such an act, or

(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 [17][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, subject to the provisions of section 114A, to a penalty not exceeding ten per cent of the duty sought to be evaded or five thousand rupees, whichever is higher:

> ***Provided*** *that where such duty as determined under sub-section (8) of section 28 and the interest payable thereon under section 28AA is paid within thirty days from the date of communication of the order of the proper officer determining such duty, the amount of penalty liable to be paid by such person under this section shall be twenty-five per cent of the penalty so determined;*
>
> *(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 [19][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 [20][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 [21][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."*

11.1 From plain reading of the above legal provisions under Section 112(a) of the Customs Act, 1962, it is clear that it is in relation to 'goods' which are liable to confiscation under Section 111 ibid, and that such penalty is liable to be imposed on 'any person'. It also transpires that the provision under Section 112(a) ibid is attracted under the following situations viz. (a) when 'any person' does or omits to do any act which act or omission would render such goods liable to confiscation, or (b) when 'any person' abets the doing or omission of such an act.

11.2 In the perspective of imported goods, the action of filing import declaration by way of filing Bill of Entry under Section 46 ibid determines the action taken by Customs authorities for assessment of customs duty, verification of compliance with various laws relating to import, enforcing the prohibitions or restrictions in force. In this regard, the facts of the case clearly provide that foreign origin cigarettes were concealed in a manner that the declared goods viz. trolley bags were used to camouflage the smuggled cigarettes, so that the same is not identified by the customs authorities. However, on the basis of specific intelligence such smuggling attempt was identified before the goods could be cleared from the customs control. The factual matrix of the case also clearly provide that the appellant acting as the freight forwarder, undertook the task of collecting/ receiving various import documents, act of preparing the checklist for filing the bill of entry, and as their entity not being a CHA/customs broker, had forwarded such documents to the CHA/CB M/s P.N. Shipping Agency, for filing the bill of entry to enable clearance of such smuggled goods. Further, no proper verification of the importer, existence of the importer, the authenticity of authorisation to handle such documents received from unknown or unconnected person having no authority, was done by the appellant. Furthermore, investigation also brought up the various documents, letter heads, authorisation seals of importer, were covered from the appellant’s premises which clearly indicated that the appellant was playing an active role in clearing the contraband by using IEC of importer in an illegal manner. Thus, in terms of legal provisions under Section 112(a) ibid, this case fits in the four corners of the situations mentioned in such provision where the proper authority could impose penalty. Further, the value of smuggled foreign origin cigarettes at Rs.3,32,62,160/- which were attempted to be cleared by various persons involved in the offence including the appellant is very high and significant. Thus, I find that the above acts done by the appellant clearly prove that it is a planned action on their part to conceal the smuggled foreign origin cigarettes, right from the stage of preparation of documents for filing bill of entry, filing the declarations including B/E, manner of payment of customs duties and other dues etc. so that the act of smuggling is not detected by customs authorities.

11.3 Though it is not specifically coming out from the facts of the case, by corollary it can be concluded that smuggled cigarettes of foreign origin do not comply with legal requirements of the Cigarettes and Other Tobacco Products (Prohibition of Advertisement and Regulation of Trade and Commerce, Production, Supply and Distribution) Act, 2003, inasmuch has the mandatory specified warning including pictorial warning as may be prescribed Indian authorities are not printed in the package of such foreign origin cigarettes brought in an illegal manner, and had this been escaped the action by customs authorities, it would pave way to domestic market for consumption by common man causing serious and deleterious effect on the society at large, as they may consume such smuggled foreign origin cigarettes, showing no pictorial warning on the ill effects on the health of a smoker.

11.4 In view of the above, I find that the penalty imposed in the Order-in-Original dated 15.05.2017 for Rs.5,00,000/- (Rupees Five Lakhs) and upheld in the impugned order is legally sustainable.

11.5 It is not the case of appellant that sufficient opportunity for personal hearing was not given to them to explain their position and to defend their stand. I find that the Original authority has given personal hearing to all the noticees on 01.03.2016 & 02.03.2016, and again on 16.08.2016, 17.08.2016 & 18.08.2016. In respect of the appellant, one Advocate Shri Ashwini Jadhav had appeared to explain their stand before the Original authority on 01.03.2016 and Shri Mukhtar Ismail Shaikh, himself also appeared on 17.08.2016 before the original authority explaining their case. Further, the appellant had also appeared before the Commissioner of Customs (Appeals) for personal hearing on 05.10.2017 and had reiterated the grounds of appeal filed against the original order. Hence, I find that sufficient opportunity for personal hearing has been given to the appellant, both at the original stage of adjudication of the appellant's case and at the first appeal stage, therefore the impugned order fulfils the requirement of adhering the principles of natural justice in arriving at a decision and passing a speaking order on the disputed issue.

12.1 I further find that in a similar case of smuggling of foreign origin cigarettes in *Ashok T. Sadarangani Vs. Commissioner of Customs (Prev.) – (2024) 17 Centax 178 (Tri.-Bom.),* the Tribunal had passed an order upholding the imposition of penalty under Section 112(a) of the Customs Act, 1962. The relevant paragraphs of the said order are as follows:

> ***"5.*** *I am constrained to note that the sufficient opportunities had been given to the appellant, and more specifically on 10-5-2022, 15-3-2023, 27-7-2023 and 18-12-2023 for the appellant to be present and plead his case. Even today, none had appeared for the appellant. Thus, it is very clear that the appellant is not interested in pursuing the legal remedy despite he being aware of the proceedings before the Tribunal as they had appeared earlier on two occasions before the Tribunal. Hence, I take up the case on merits of the case and with the consent provided by the learned AR for the Revenue.*
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> ***6.*** *This is a case of smuggling of foreign origin cigarettes along with cosmetics totally valued at Rs. 1,10,77,667/- and the appellant was one of the noticee for having participated in the said smuggling activity. I also find that the personal hearing opportunities have been given by the original authority to the appellant on 20-8-2018, 22-11-2018 and 3-12-2018 and decided the issue on merits. In view of the detailed examination of the case, role played by the appellant and the decision taken by the learned Commissioner of Customs (Preventive), Mumbai, I do not find any grounds for entertaining the appeal of the appellant for setting aside the impugned order.*
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> ***7.*** *In the result, I uphold the impugned order dated 17-1-2019 and dismiss the appeal filed by the appellant."*

12.2 In this regard, I also find that in order to appreciate and properly apply the legal provisions of the taxation statute, I would take the guidance provided in the judgement of the Hon'ble High Court of Delhi in the case of *Rameshwar Tiwari Vs. Union of India* – (2024) 17 Centax 261 (Del.). Thus, it is clear that the plea made by the appellant that they have provided the services in good faith and do not have any knowledge about the smuggling of cigarettes is of no relevance for the imposition of penalty in the given factual matrix of the present case. Further, the judgement given by the Hon'ble Supreme Court in the case of *Commissioner of Customs, Kandla Vs. Essar Oil Ltd.*- The relevant paragraph in the said judgement of the Hon'ble High Court of Delhi is extracted and given below:

> ***"16.*** *Section 112 (a) of Customs Act also applies on a strict liability concept. It does not require any mens rea. Section 112 (a) of the Customs Act may be contrasted with the provisions of section 112 (b) of the Customs Act. It is clear that for Section 112 (a) to be applicable, no mens rea is required whereas for Section 112(b) to be applicable mens rea or knowledge is required. The expression used in Section 112 (b) is "dealing with any goods which he knows or has reason to believe are liable to confiscation underSection111". Section 112(b) imposes an obligation on the authorities to establish mens rea and/or knowledge."*

12.3 Further, the judgement given by the Hon'ble Supreme Court in the case of *Commissioner of Customs, Kandla Vs. Essar Oil Ltd.* also provide that in a planned deception or fraudulent acts like the one in the present case before me, imposition of penalty under Section 112(a) ibid is clearly warranted. The relevant paragraphs in the said judgement of the Hon'ble Supreme Court is extracted and given below:

> ***"44.*** *In view of the aforesaid, it was concluded by the Commissioner that in respect of the imported goods the aforesaid three persons have done or omitted to do acts which acts or omissions have rendered such goods liable for confiscation and they had also abetted in acts which they knew or had reasons to believe that the goods are liable to confiscation under Section 112(i) of the Act and rendered themselves liable to action under Section 112(a) of the Act. Accordingly penalties as noted above were levied on respondents 2, 3 and 4.*
>
> ***47.*** *The manipulative roles of respondents 2 to 7 have been clearly established. They were clearly active participants in the well-planned deception and fraudulent acts leading to evasion of duty. They had played major roles in the whole game of fraud and deception. There was clearly wilful disregard and deliberate defiance of statutory provisions. Levy of penalty is clearly warranted. Impugned order of CEGAT is set aside and order of Commissioner is restored."*

13.1 From the above detailed discussions and analysis, in answering the question of imposition of penalty on the appellant for the role of Proprietor of freight forwarder, under Section 112(a) ibid, I had come to the conclusion that factual matrix of the case attract imposition of penalty under Section 112(a) and the same is rightly applicable in a situation where the appellants either as a freight forwarder or as an individual is involved in certain action like filing of documents without proper verification and receiving the same from unauthorised persons and omits to do certain act of verifying the authenticity of documents etc., which lead to the smuggling of foreign origin cigarettes in a surreptitious manner.

13.2. With all the above analysis leading to certain findings and conclusion as discussed above, I have come to the considered view that the provisions of Section 112(a) ibid does apply to the present case of the appellant co-noticee who is a Proprietor in a Freight Forwarding firm. Hence, I had come to the considered view that imposition of penalty under Section 112(a) ibid can be upheld in the present case of the appellant.

14. In view of the foregoing discussions and analysis, and in terms of the judgements of the Hon'ble Supreme Court, it is found that there are strong grounds to sustain the imposition of penalty under Section 112(a)of the Customs Act, 1962 on the appellant in the present case. Consequently the impugned order dated 28.02.2018, to the extent it has upheld imposition of penalty of Rs.5,00,000/- (Rupess Five Lakhs) on the appellant is legally sustainable.

15. In the result, by upholding the impugned order dated 28.02.2018, to the limited extent of imposition of penalty of Rs. 5,00,000/- (Rupees Five Lakhs Only) on Shri Mukhtar Shaikh, Proprietor of M/s Fast Forward Logistics Solutions under Section 112(a) of the Customs Act, 1962, the appeal filed by the appellant is rejected.

(Order pronounced in open court on 03.06.2024)

(M.M. Parthiban)
Member (Technical)

Sinha