CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL MUMBAI

WEST ZONAL BENCH

CUSTOMS APPEAL NO: 359 OF 2008

[Arising out of Order-in-Original No: 156/2007/CAC/CC/KS dated 30th November 2007 passed by the Commissioner of Customs (Adjudication), Mumbai.]

Dipali Electronics Pvt Ltd … ***Appellant***
101 Arun Chambers, Tardeo, Mumbai – 400 004

versus

Commissioner of Customs ***…Respondent***
Air Cargo Complex, Airport, Sahar, Andheri (E),
Mumbai 400 009

APPEARANCE:

Shri Bharat Raichandani, Advocate for the appellant

Shri D S Mann, Deputy Commissioner (AR) for the respondent

CORAM:

HON’BLE MR C J MATHEW, MEMBER (TECHNICAL)
HON’BLE MR AJAY SHARMA, MEMBER (JUDICIAL)

FINAL ORDER NO: 85606/2024

DATE OF HEARING:	29/01/2024
DATE OF DECISION:	19/06/2024

PER: C J MATHEW

M/s Dipali Electronics Pvt Ltd is one of several entities and individuals – and almost all of them against three different orders – who filed appeals before the Tribunal impugning orders of ‘proper officers’ under Customs Act, 1962 related to import of ‘modems’, ‘automated teller machines’ and ‘automated teller machine processors’ by M/s Hindustan Engineering Corporation that investigations pointed to having been procured as fully built equipment for supply to M/s Hongkong and Shanghai Banking Corporation (HSBC). This particular appeal took a curious turn inasmuch as the disposal of all the other appeals, barring those of the importer, in the order[1] of the Tribunal which, save that of one individual, upheld the penalties in the impugned order was construed by the appellant as including theirs too; curious, as that order, while referring to the several appeals including that of the appellant and recording in the note of proceedings of submission of Learned Authorised Representative incorporated therein that present appellant was unrepresented then, did not, for some reason or other, purport to render a decision in the appeal of theirs.

2. Yet, the appellant herein preferred an application under section 129B(2) of Customs Act, 1962 for being heard afresh in circumstances of *ex parte* decision that was taken without notice of hearing to them or even considering their grounds of appeal at the least. Not unnaturally, that application was rejected and the appellant herein carried the matter to the Hon’ble High Court of Bombay which came to be disposed off with direction that appeal be restored before the Tribunal and heard

[1] [order-in-original no. 156/2007/CAC/CC/KS dated 30th November 2007]

afresh. And thus it is that the appellant is before us impugning the order of Commissioner of Customs in the matter of import of ‘modems’ of different specifications by M/s Hindustan Engineering Corporation.

3. It may be premised here that with the dismissal of appeals of M/s Hindustan Engineering Corporation by the Hon’ble Supreme Court, the confiscation of impugned goods under section 111 of Customs Act, 1962 attained finality and, consequently, the finding that goods were indeed misdeclared and undervalued does not brook any quarrel. The scope of the present appeal is limited to the role of the appellant herein in the import of the offending goods within the context of authority to impose penalty under section 112 of Customs Act, 1962. We have heard Learned Counsel for the appellant and Learned Authorised Representative at length on this aspect.

4. While Learned Authorised Representative harped upon the contents of the order of the Tribunal *vis-à-vis* the other appeals, Learned Counsel contended that the specific aspects averred by him had not been considered in the said decision.

5. According to Learned Counsel for the appellant, the impugned order was liable to be set aside as the show cause notice on which it was based, as well as the finding of the adjudicating authority, had not distinguished between the two mutually exclusive situations in which section 112(a) and section 112(b) were to be invoked. Reliance was

placed by him on the decision of Hon'ble Supreme Court in *Gajanan Visheshwar Birjur v. Union of India [1994 (72) ELT 788(SC)],* in *Metro Enterprises v. Commissioner of Central Excise, Thane-II [2014 (311) ELT 785 (Tri. - Mumbai)],* in *Amrit Foods v. Commissioner of Central Excise, UP [2005 (190) ELT 433 (SC)]* and the decisions of Hon'ble High Court of Bombay in *Commissioner of Central Excise & Customs v. Nakoda Textile Industries Ltd [2009 (240) ELT 199 (Bom.)]* and of the Hon'ble High Court of Punjab and Haryana in *Commissioner of Central Excise, Jalandhar v. Max GB Ltd [2008 (221) ELT 491 (P&H)]*. It was further contended by him that penalty could not be imposed on an artificial person that can only act through its employees for which reliance was placed on the decision of a Larger Bench of the Tribunal in *Steel Tubes of India Ltd v. Commissioner of Central Excise, Indore [2007 (217) ELT 506 (Tri. - LB)]*, and an order[2] of the Tribunal in *Zapak Digital Entertainment Ltd v. Commissioner of Central Excise, Mumbai – II* disposing off appeal[3] against order[4] of Commissioner of Central Excise (Appeals), Mumbai, as well as in *Nasik Strips Pvt Ltd v. Commissioner of Central Excise, Nasik [2008 (226) ELT 410 (Tri. - Mumbai)],* in *Apple Sponge And Power Ltd v. Commissioner of Service Tax, Audit-I [2018 (362) ELT 894 (Tri. - Mumbai)]* and in *Kakateeya Fabs (P) Ltd v. Commissioner of Central*

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[2] [final order no. A/85107/2023]
[3] [excise appeal no. 1660 of 2012]
[4] [order-in-appeal no. US/475 to 477/M-II/2012 dated 7th August 2012]

Excise, Bhopal [2018 (15) GSTL 350 (Tri. - Del.)]. It was argued by the Learned Counsel that the appellant is not an importer nor was he connected with activity relating to imports, such as classification, valuation and clearance of goods, and hence penalty should not have been visited on the appellant. He further alleged that the findings against the appellant, brief as it was, had been arrived at by relying upon documents and statements of persons which went unchallenged only owing to rejection of request for their cross-examination in terms of section 138B of Customs Act, 1962. Reliance was placed by him on the decision of the Hon'ble High Court of Bombay in *Kellogg India Pvt Ltd v. Union of India [2006 (193) ELT 385 (Bom.)]*, in *Johnson & Johnson Ltd v. Dy Chief Controller of Imports & Exports [2003 (154) ELT 370 (Bom)]*, and in *Kalpena Industries Ltd v. The Union of India [2018-TIOL-397-HC-MUM-CUS]* as well as of the Hon'ble High Court of Delhi in *Basudev Garg v. Commissioner of Customs [2013 (294) ELT 353 (Del.)]*, of the Hon'ble High Court of Allahabad in *Commissioner of Central Excise v. Kurele Pan Products Pvt Ltd [2014 (307) ELT 42 (All)]* and of the Hon'ble Supreme Court in *Swadeshi Polytex Ltd v. Collector of Central Excise, Meerut [2000 (122) ELT 641 (SC)]* and in *Bareilly Electricity Supply Co Ltd v. The Workmen & Ors [(1971) 2 SCC 617]*.

6. On perusal of the records, we find that the appellant was undoubtedly held to be a registered company and one among several

within a conglomerate that included the importing entity. It is also on record that the importer was held to be liable for consequences of misdeclaration for having claimed the imported goods to be 'electrical and control switches' instead of 'modems' and it was alleged that the appellant-company had afforded a cover for the supply of purportedly finished 'modems' to the customers. It is seen that the findings against the appellant herein is limited to

> *'32. From the foregoing facts and circumstances, it is evident that:*
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> *(i) M/s. Philips India had a plan to manufacture and sell Modems through their professional system factors whereby they found that the material cost would have a major impact on the cost of the product. They found it uneconomical to assemble /manufacture the Modems at a profitable price going by the Modems of the range 2400 bits, which were being offered at HFL 1360/1088. However, they desired price of NLG 603.50 as against inter-company invoice price of NLG 1485. Having found this activity unprofitable economically and facing certain difficulties technically, they placed purchase order on the companies controlled by Shri J.P.Mody, namely M/s. Dipali Electronics Pvt. Ltd., for the supply of Modems by describing them as 'Modem Control Unit - Type S-2411 etc. as against the straight description of Modem S-2411, S-4821 etc. The prices were, indicated as inclusive of all taxes, Sales Tax, Excise duty etc.*
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> *xxxxx*
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> *33. In view of the matter, it appeared that 550 pcs. of different types of Modems were imported by M/s. Hindustan Engg. Corprn., a JPM company, under various bills of entry, during the period w.e.f. 4.11.87 to 22.1.88. the said modems were then sold to M/s.*

> *Philips India on 4.11.87, 10.12,87, 7.1.88 22.1.88 by M/s. Dipali Electronics Pvt. Ltd., another JPM company. While importing the said Modems, M/s. HEC misdeclared the description and value of goods with intent to evade Customs duties, to the tune of Rs. 1,26,27,674.80 (say Rs. 1,26,27,675/-) as per chart enclosed to the show cause notice.'*

leading to a summary finding thus

> *'35. M/s. Hindustan Engg. Corpn., Bombay, M/s. Dipali Electronics Pvt. Ltd., Bombay, M/s. Philips India (M/s. Peico Electronics & Electricals ltd.), Bombay, Shri J.P.Mody, Shri S.J.Mody, and others concerned are the persons, who conspired in their collective and individual capacity, in relation to the said Modems and did or omitted to do acts, which acts or omissions rendered such goods liable to confiscation under sec. 111 and abetted the doing or omission of such acts and are the person(s)/firms who acquired possession of and were concerned in selling, purchasing, and dealing with the said goods which they knew or had reasons to believe, are liable to confiscation under Sec. 111 of Act ibid. They are, therefore, liable to penalty under Sec. 112 of the Act ibid.'*

7. Thus, it would appear that the submission of Learned Counsel that the impugned order is deficient in details from which it could reasonably be concluded that penalty under section 112 was liable to be invoked. It is also correct that the stipulations for imposing penalty under section 112(a) and 112(b) are mutually exclusive requiring a detailed finding on the role of any person on whom penalty was to be imposed. In the absence of such finding, it is not appropriate for us to determine whether the empowerment to impose penalty has been validly invoked. On the finding that the goods are liable for

confiscation, which has since been attained finality, there is need for evaluation of the role of the appellant. To enable this to be done, we set aside the impugned order and remand the matter back to the original authority to determine whether the conditions specified in section 112(a) of 112(b) of the Customs Act, 1962 are found applicable in the instant case insofar as the appellant herein is concerned.

8. The matter is, thus, remanded on this limited aspect to the original authority.

(Order pronounced in the open court on 19/06/2024)

(AJAY SHARMA)
Member (Judicial)

(C J MATHEW)
Member (Technical)

**/as*