

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

REGIONAL BENCH - COURT NO. I

Customs Appeal No. 89407 of 2014

(Arising out of Order-in-Appeal No. MUM-CUSTM-AXP-APP-179&180/14-15 dated 25.06.2014 passed by Commissioner of Customs (Appeal), Mumbai Zone-III.)

Rashesh Joshi

.....Appellant

Partner of M/s Shantilal Devji & Co.
51, Ashok Chambers
Devji Ratanshey Marg
Mumbai – 400 009.

VERSUS

Commissioner of Customs(EP)

.....Respondent

Air Cargo Complex, Sahar

Andheri (East)
Mumbai-400 099.

Appearance:

Shri N.D. George, Advocate for the Appellant

Shri D S Maan, Authorized Representative for the Respondent

CORAM:

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

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

FINAL ORDER NO. A/85848/2024

Date of Hearing: 01.05.2024

Date of Decision: 30.08.2024

PER : M.M. PARTHIBAN

This appeal has been filed by Shri Rashesh Joshi, Partner of M/s Shantilal Devji & Co. (herein after, referred to as 'the appellant'), holders of Customs Broker License No. 11/116, assailing Order-in-Appeal No. MUM-CUSTM-AXP-APP-179&180/14-15 dated 25.06.2014 (herein after, referred to as 'the impugned order') passed by Commissioner of Customs (Appeal), Mumbai Zone-III.

2.1. Briefly stated, the facts of the case are that in one export consignment out of eight identical shipping bills (S/Bs), the goods were examined by the Customs officers of Export Shed, Air Cargo Complex (ACC), Mumbai pursuant to the examination order to "examine package No. 01 & 02" as per Customs EDI System/Risk Management System. On such examination, it was found that such export goods were mis-declared with respect to its value. It was further found that goods covered under each of the eight S/Bs Nos.viz., 5684479, 5684483, 5684484, 5684485, 5684486, 5684489, 5684490 and 5684491, all dated 01.10.2011 were filed for 3240 pieces of 'Wallets for Gents' each and the declared value was Rs.9,66,680.18/- for each of the consignment covered by individual S/B and all these consignments were destined to same buyer abroad at Dubai. All these export consignments were examined by the Customs officers at Export Shed of the ACC under panchanama proceedings held on 15.11.2011 and the goods were seized for further action. The exporter in all these consignments covered under Eight Bills of Entry for export is one M/s Aijaz Esmail Pawaskar, and the appellant's firm has acted as Customs Broker (C/B) in transacting business with customs authorities.

2.2 Further investigation in the form of market enquiry was conducted by the Customs officers in shed examination on 18.10.2011 and it was found that the goods were highly overvalued. Upon completion of the investigation, the department had issued show cause proceedings by issue of Show Cause Notice (SCN) dated 10.05.2012 to the exporter and the appellant. After giving personal hearing to the appellant on 04.12.2012 and giving sufficient opportunity of personal hearing to the exporter on 4th, 13th and 21st December, 2012, the case was decided by the Additional Commissioner of Customs, Export Assessment, ACC, Mumbai. The FOB value of the export goods was re-determined and the impugned goods were confiscated under Section 113 (d) and 113(i) of the Customs Act, 1962 with an option for redemption on payment of fine of Rs. 1,00,000/-; besides consequential drawback benefit was denied in terms of Section 76 of the *ibid* and Penalties of Rs 6,00,000/- and Rs. 1,00,000/- under section 114(i) *ibid* was imposed on the exporter and the appellant, respectively. Being aggrieved with the above order dated 18.01.2013, the appellant and the exporter had filed appeal before the Commissioner of Customs (Appeal), who upon considering the extent of misdeclaration, has held that the penalty imposed on the appellant in the original order is not excessive or unreasonable, and it does not merit any reduction. Accordingly, in the

impugned order dated 25.06.2014 learned Commissioner (Appeals) had upheld the order of the original authority. Feeling aggrieved with the above impugned order, the appellant alone had preferred this appeal before the Tribunal.

3.1. Learned Advocate appearing for the appellant submitted that the appellant CB had filed the S/Bs on the basis of the documents provided by the exporter; he was not aware of the mis-declaration of value of export goods, till the same was identified by the customs officers upon physical examination of the goods and subsequent market enquiry. Further, he submitted that as the appellant did not do any specific act which could be called as abetting with illegal export, the appellant cannot be penalized under Section 114(i) *ibid*.

3.2 In support of their stand, the learned Advocate had relied upon the following decisions of the Tribunal in the respective cases mentioned below:

(i) *M. Shashikant and Company Vs. Union of India* - 1987 (30) E.L.T.868 (Bom.)

(ii) *Jai Singh Clearing Agency Vs. Commissioner of Customs (Import), Nhava Sheva*- 2008 (230) E.L.T. 486 (Tri.-Mum.)

(iii) *P.D. Prasad & Sons Pvt. Ltd. Vs. Commissioner of Customs (Export), New Delhi*- 2017 (358) E.L.T.1004(Tri.-Del.)

(iv) *Akanksha Enterprises Vs. Commissioner of Customs, Mumbai* - 2006 (203) E.L.T. 125 (Tri.-Del.)

4. Learned Authorised Representative (AR) reiterated the findings made by the Commissioner of Customs (Appeals) in the impugned order. He further submitted that the argument placed by the appellant's side that they had acted in good faith, does not result from their employee action of blind faith. He stated that the concept of good faith is understood as, "Nothing is said to be performed or believed in good faith which is done or believed without due care and interest". He further stated that in the present case, there is no evidence adduced by the appellant to establish that his belief had a rational foundation. Since, the appellant was a Licensed Customs Broker, he was required to exercise due care and attention in filing the S/Bs and the obvious mistakes like the ones in the present case, does not support their claim of action in good faith. Further, in support of their case, he relied upon the judgement of the Hon'ble

Supreme Court in the case of *Pine Chemical Suppliers Vs. Collector of Customs* – 1993 (67) E.L.T. 25 (S.C.). Therefore, learned AR prayed that imposition of penalty on the appellant in the impugned order is sustainable in law.

5. We have heard both sides and perused the case records.

6.1 The issue involved herein is to decide whether the appellant, who is the proprietor of Customs Broker firm, having handled all the eight S/Bs involving overvaluation of export goods, is imposable with penalty under Section 114(i) of the Customs Act, 1962 or otherwise?

6.2 The legal provision dealing with imposition of penalty at the relevant point of time in the present case, is extracted and given below:

"Penalty for attempt to export goods improperly, etc.

Section 114. Any person 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 113, or abets the doing or omission of such an act, 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 not exceeding three times the value of the goods as declared by the exporter or the value as determined under this Act, whichever is the greater;

(ii) in the case of dutiable goods, other than prohibited goods, to a penalty not exceeding the duty sought to be evaded or five thousand rupees, whichever is the greater;

(iii) in the case of any other goods, to a penalty not exceeding the value of the goods, as declared by the exporter or the value as determined under this Act, whichever is the greater."

6.3 We find that the learned Commissioner (Appeals) had come to the conclusion that the appellant CB had abetted the act of splitting of the grossly overvalued impugned export consignments in eight S/Bs, which attract confiscation under section 113 *ibid*. Hence, he held that the appellant Rashesh Joshi is liable to penalty under section 114 (i) *ibid*.

6.4 From the documents placed on record, we find that the exporter Shri Aijaz Esmail Pawaskar, in his voluntary statement given before the Customs investigation authorities on 18.10.2011, to a specific question regarding why he had submitted eight shipping bills for one consignment had answered as following: *"I prepared 8 Invoices and gave to my CHA and submit the paper accordingly to Customs"*. It thus transpires, that the

exporter himself had prepared eight separate consignments for export, leading to the appellant requiring eight shipping bills to be filed in the present case, as per the directions of the exporter.

6.5 Since the Customs EDI facility under ICES provide for filing multiple commercial invoices under single S/B, the department had alleged that the appellant had failed to file such eight export consignments under eight different invoices in one single S/B instead of eight S/B, resulting in artificial splitting single export consignment, for avoiding examination of the goods by the customs officers and in exploitation of the simplified procedure of assessment / examination of export consignments. It is a fact on record, that the exporter himself had prepared eight different invoices and asked the appellant to prepare the export documents accordingly. Further, there is no evidence on record to suggest that the appellant had prepared eight different S/Bs on his own; even if this was done to avoid examination by the Customs officers, all such S/Bs were filed on the same day, simultaneously as the S/B Numbers reveal that they are almost in same serial order. Thus, it does not stand to logic that the appellant had purposefully split the consignments to avoid examination and to facilitate availment of simplified procedure. Further, as the Customs EDI system processing of S/B is based on Risk Management System (RMS) of analyzing the various risk parameters of each consignment or S/B, it does not stand to reason that such RMS system would not pick up the similar eight consignments of same export goods of uniform quantity, value etc. destined to one single customer exported by same single exporter and that too on the same day consecutively, for detailed scrutiny. Thus, the stand taken by the authorities below for imposing penalty on the appellant on the ground of abetting mis-declaration of value of export goods, is not found to be on a rational basis. For the alleged non-compliance of procedure in filing S/Bs, the right course of option open for the customs authorities is to take action under Customs House Agents Licensing Regulations, 2004/Customs Brokers Licensing Regulations, 2018 for any failure of the obligation on the part of appellant as CB. It is also seen from the records, that such an action has already been taken by the customs authorities and the licensing authority i.e., the Commissioner of Customs (General), Mumbai vide Order dated 24.05.2013 had imposed penalty by forfeiture of security deposit of Rs.20,000/- on the appellant CB.

6.6 Further, the legal provisions governing Section 114(i) *ibid* deal with imposition of penalty in respect of prohibition in force for export of goods, leading such export goods liable for confiscation under Section 113 *ibid*. We are unable to find any specific findings in this regard being mentioned by the authorities below, except overvaluation of export goods on the basis of market survey, and hence even on this account, the impugned order upholding imposition of penalty under Section 114(i) *ibid*, on the appellant is not sustainable.

6.7 Further, on perusal of the market survey report, it is seen that the price of Rs.15/- per piece of Gents wallet was arrived at as follows:

**"REPORT REGARDING MARKET ENQUIRY
EXPORT SHED, ACC, SAHAR**

It is to report that Market enquiry with the sample from the subject export consignment was conducted on dated 18.10.2021 in the presence of Exporter's representative Shri Ganesh Dalvi (CHA No.11/116).

Since, the identical goods during the course of market enquiry at King Circle Market were not found, a similar product was purchased for a sum of Rs.15/- from M/s Ramachandra store, Shop No.55, Indira Sewa Market, Kings Circle, Mumbai-37. The purchase receipt along with the similar product (Gents Wallets) has been place in the file.

Sd.(on 17.01.2012)
Ganesh Dalvi
CHA Representative

Sd.(on 17.01.2012)
Praveen K Sinha
PO/Export Shed

Sd.(on 17.01.2012)
Narinder Kumar
Supdt./Export Shed"

Plain reading of the above market survey report indicates that the allegation of overvaluation of export goods, on the above basis, is neither supported by any proper evidence or on a legal basis as is required under the Customs Valuation (Determination of Value of Export Goods) Rules, 2007. Since, in terms of Rule 3 *ibid*, transaction value shall be accepted even where the buyer and seller are related, provided that the relationship has not influenced the price; and that if the value cannot be determined under the provisions of sub-rule (1) and sub-rule (2) of Rule 3 *ibid*, then the value shall be determined by proceeding sequentially through rules 4 to 6 *ibid* the aforesaid method of ascertaining the value of export goods by such a non-scientific, rudimentary market survey is devoid of merits and is contrary to the statutory provisions. In terms of Rule 4 *ibid*, the value of the export goods shall be based on the transaction value of goods of like kind and quality exported at or about the same time to other buyers in the same destination country of importation or in its absence another

destination country of importation adjusted in accordance with the provisions of sub-rule (2) for various factors such as difference in the dates of exportation, difference in commercial levels and quantity levels, difference in composition, quality and design between the goods to be assessed and the goods with which they are being compared and difference in domestic freight and insurance charges depending on the place of exportation. We find that the aforesaid market inquiry report does not throw any light of the compliance to the above Customs Valuation Rules of 2007 relevant to exports, and hence the allegation of overvaluation, on the basis of which the entire proceedings of confiscation and imposition of penalty has been decided, does not stand to reason, as the same are not supported by the legal provisions of Customs statute.

6.8 We further find that in terms of Section 50(2) of the Customs Act, 1962, the exporter while presenting the shipping bill is required to make and subscribe to a declaration as to the truth of its contents, including the accuracy, completeness, authenticity and validity of any document supporting it. Further, the declaration in the form of '*Annexure-I i.e., Declaration to be filed in case of Export of goods under Claim for Drawback*' Under the Shipping Bill and Bill of Export (Form) Regulations, 1991, is required to be filed by an exporter under his signature. Hence, such an obligation on the part of the exporter, cannot fastened on the appellant CB, particularly when the genuineness of the invoices for the export goods was not disputed.

7.1 Further, we find that the Co-ordinate Bench of this Tribunal has held in the case of *Akanksha Enterprises (supra)*, that the role of appellant CB is limited to facilitating the proper filing of the documents as received from the exporter; he is not required to make any declaration of the value of export goods and hence penalty under Section 114 *ibid* is not imposable. The relevant portion of the said order is extracted below:

"4. *From the plain reading of the provisions of the section it would be clear that the penalty can be imposed only if there is mis-declaration of value and description of the goods that are sought to be exported. In this case the appellant is only a CHA and he is not required to make any declaration of the value nor is he required, under the law to file description of goods. His role is limited to facilitate the proper filing of the documents as received from the exporter. He is not required to go in to the authenticity of the value of the goods etc. His job is confined to the submissions of the papers as given by the exporter and to identify the exporter to the authorities which he did so when the goods were examined by the*

authorities. The Exporter was physically present when the authorities examined the goods. To my mind, in this case the CHA has acted in a responsible way by producing the exporter who had filed the documents for export of goods. No motive could be attributed to the appellants in this for imposition of penalty under Section 114 of the Customs Act, 1962, as there are no specific allegations as to the commission and omissions of the appellant with knowledge.

5. *The Tribunal in the case of Vetri Impex v. CC, Tuticorin as reported at [2004 \(172\) E.L.T. 347](#) (Tri.) had an identical issue before them. The tribunal in that case held as under :*

"Penalty - Customs - Customs House Agent - No finding in impugned order that appellant did anything, or omitted to do anything, in connivance of, or with the knowledge of illegal acts of exporter - Penalty not imposable - Section 114 of Customs Act, 1962."

The issue in this case is squarely covered by the decision of the Division Bench's order."

7.2 Furthermore, in the case of *P.D. Prasad (supra)*, the Co-ordinate Bench of the Tribunal has held that there is no evidence of CB being aware of overvaluation, then he cannot be held liable for any aiding and abetting and consequently to penalty. The relevant portion of the said order is extracted below:

"6. *In the present case also, the appellant filed shipping bills on the basis of documents received by them. If there is any difference in the value of the export consignment, the CHA cannot be held responsible for the same as it is not the duty of the CHA to adjudge the correct value of the goods. There is virtually no evidence on record to show that he was aware of the overvaluation of the export consignment and he simplicitor proceeded by the declaration made by the exporters. In such a scenario, the appellant cannot be held liable for any aiding and abetting and consequently to penalty."*

7.3 We further find that the judgement of the Hon'ble Supreme Court in the case of *PineChemicals (supra)* has, *inter alia*, relied upon by the learned AR relates to mis-declaration of imported goods in terms of the grade/quality of the imported product and the difference in value arising thereof, for which the importer appellant in that case were held liable for penalty. As the facts in the present case, are different from the one referred above, and that the appellant here in the present case is a CB and not the exporter *per se*, we find that the ratio of the above case is not applicable to the case before us.

7.4 From the above orders of the Tribunal and on the basis of the factual matrix of the present case, particularly when the appellant is the proprietor of the CB, who was not aware of the overvaluation of export goods, it cannot be said that the appellant is responsible for such act and for imposition of penalty under Section 114 *ibid*.

8. In view of the foregoing discussions, we do not find any merits in the impugned order passed by the learned Commissioner (Appeal), Mumbai Zone-III, in upholding imposition of penalty under Section 114(i) of the Customs Act, 1962 on the appellant.

9. Therefore, by setting aside the impugned order dated 25.06.2014, the appeal is allowed in favour of the appellant.

(Order pronounced in open court on 30.08.2024)

(S.K. Mohanty)
Member (Judicial)

(M.M. Parthiban)
Member (Technical)

Sinha