CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL, MUMBAI

REGIONAL BENCH - COURT NO. I

CUSTOMS APPEAL No. 85979 of 2020

(Arising out of Order-in-Original No. 10/2020-21/Commr/NS-III/CAC/JNCH dated 29.05.2020 passed by Commissioner of Customs, JNCH, Nhava Sheva-III, Nhava Sheva.)

Ashok Gupta **.....Appellant**
Aditya Birla Management Corporation Pvt. Ltd.
Aditya Birla Center,
S.K. Ahire Marg, Worli
Mumbai – 400025.

VERSUS

Commissioner of Customs, NS-III **.....Respondent**
Jawaharlal Nehru Customs House (JNCH)
Nhava Sheva-IIICommissionerate
Nhava Sheva, District Raigad
Maharashtra - 400 707.

APPEARANCE:

Shri Vipin Jain a/w Shri Nikhil Kumar Rungta, Advocates for the Appellant
Shri Ram Kumar, Authorised 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/86815/2024

Date of Hearing: 01.05.2024
Date of Decision: 01.05.2024

PER : M.M. PARTHIBAN

This appeal has been filed by Shri Ashok Gupta (herein after, referred to as 'the appellant'), assailing Order-in-Original No. 10/2020-21/Commr/NS-III/CAC/JNCH dated 29.05.2020 (herein after, referred to as 'the impugned order') passed by Commissioner of Customs, JNCH, Nhava Sheva-III Commissionerate, Nhava Sheva.

2.1 Brief facts of the case, leading to this appeal, are summarised below:

2.2 The appellant herein, Shri Ashok Guptais the Chief Legal Officer of the Aditya Birla Management Corporation Private Limited, a company limited by guarantee and a mutuality company of Hindalco, Grasim, Ultratech Cement etc. whose objective is to provide functional excellence to its member companies. The role of the appellant is limited to providing legal counselling services to Aditya Birla Management Corporation Private Limited. Directorate of Revenue Intelligence (DRI), Zonal Unit, Ludhiana had received intelligence about some importers, that they are importing fresh acrylic fibre/tow in the guise of synthetic waste and sub-standard acrylic fibre/tow by mis-declaration and undervaluation, allegedly for evading customs duty. Further, investigations were also conducted about the supply of such imports from M/s Thai Acrylic Fibre Co. Thailand and M/s Alexandra Fibre Co., SAE, Egypt and the premises of the Indian entity M/s Thai Acrylic Fibre Co. Ltd., Ludhiana was also searched by DRI on 21.06.2016. On the basis of documents, electronic records resumed during the search, statements recorded from various persons and other details collected about the illegal import during investigation, show cause proceedings were initiated against various importers. Since, the two suppliers from abroad are group companies of Aditya Birla corporate group, details were also called for by issue of letter dated 12.01.2017 to the Chairman of the Aditya Birla group. In this context, the appellant Shri Ashok Gupta, being the Chief Legal Officer had entered into correspondence with DRI, informing that Aditya Birla group is not involved in the management of the supplier companies. Hence, he requested that DRI may consider seeking the required details directly from the said two companies. Further, M/s Thai Acrylic Fibre Co. Thailand vide their letter dated 11.02.2017 informed DRI, that they were unable to retrieve old records relating to the past period sought by DRI, but provided the sales data relating to the recent period of April, 2015 to December, 2016. Subsequently, they also provided the names of various customers in India to DRI, sales ledger accounts of Indian importers for the past period sought by DRI. On the basis of above details, show cause proceedings was initiated against one of the importer M/s Abhinandan Exports Ltd., Bhiwadi, Rajasthan. Upon completion of the investigation Show Cause Notice (SCN) dated 19.06.2018 was issued to the importer M/s Abhinandan Exports Ltd., proposing for revising the value of imports and demanding differential duty of customs which was short levied by invoking extended period and for imposition of penalties. In respect of the appellant Shri Ashok Gupta, the said SCN dated 19.06.2018 proposed for imposition of penalties as co-noticee under Section 112(a) and 114AA of the Customs Act, 1962.

2.3 In adjudication of the aforesaid SCN, learned Commissioner of Customs had confirmed the proposals made in the SCN, besides imposition of penalty of Rs.7,00,000/- under Section 112(a) ibid and Rs.3,00,00,000/- under Section 114AA ibid, on the appellant Shri Ashok Gupta. Feeling aggrieved with the impugned order imposing the above penalties, the appellant has filed this appeal before the Tribunal.

3.1 Learned Advocate submitted that the appellant is the legal counsel for Aditya Birla Management only, and is not in any way concerned with the two supplier companies abroad, who were found indulging in supply of undervalued goods to the Indian importers. He also submitted that the SCN has not even alleged that the appellant had played any role in mis-declaration or under valuation of the import transactions, in order to make him liable for penal action under the Customs Act, 1962. He further stated that it is a fact on record, that the appellant came to be involved in the present matter for the first time only as a result of correspondence initiated by the DRI for the purpose of gathering information, documents for its investigation under a mistaken belief that the Aditya Birla Management group, for which the appellant is working, are connected with the supplier companies. Further, as the companies situated abroad, who were involved in the customs offence case had supplied the information required by DRI, the appellant had not caused any impairment or non-cooperation to the investigation conducted independently by the DRI.

3.2 Learned Advocate by relying on the judgement of the Hon'ble Supreme Court in the case of *Assistant Commissioner of Commercial Tax Vs. Shukla & Bros.* – 2010 (254) E.L.T. 6 (S.C.) had pleaded that the principles of natural justice have not been followed in the impugned order, inasmuch as the submissions made by the appellant, against the charges framed in the SCN, have not even been dealt with in the impugned order, and hence not considered for its acceptance or rejection, and no reasons given for arriving at a conclusion for imposition of penalty on the appellant. Hence, he pleaded that on this ground alone, the impugned order is liable to be set aside.

3.3 Learned Advocate further submitted that in the show cause proceedings initiated by DRI against main supplier M/s Thai Acrylic Fibre Co., the matter was finalised by the Customs, Central Excise & Service Tax Settlement Commission, Mumbai additional bench, vide Order No.08/FINAL ORDER/CUS/AG/2020 dated 27.02.2020, wherein the penalty imposed on the appellant under Section 112(a) and 114AA was dropped by holding that there is no case for imposition of penalty on him. In view of the above, it was prayed that there is no case for imposition of penalty on the appellant in this case and accordingly requested for allowing the appeal filed by them.

4. On the other hand, learned Authorised Representative for Revenue reiterated the findings recorded by the Commissioner in the impugned order,

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

6. The short issue for consideration before the Tribunal in this case is,

(i) whether the appellant is in any way involved in the alleged import of fresh acrylic fibre/tow by mis-declaration and undervaluation, or not?

(ii) whether the appellant is liable for imposition of penalty under Section 112(a) and 114AA of the Customs Act, 1962 or not?

7. In order to address the above issues, we would like to refer the relevant legal provisions contained in 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*
> ***.....***
> *shall be liable,—*
> *(i) in the case of goods in respect of which any prohibition is in force…*
>
> *(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:*
>
> *(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 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),…..*
>
> *(v) in the case of goods falling both under clauses (ii) and (iii), to a penalty 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."*

[1]Penalty for use of false and incorrect material.

114AA. *If a person knowingly or intentionally makes, signs or uses, or causes to be made, signed or used, any declaration, statement or document which is false or incorrect in any material particular, in the transaction of any business for the purposes of this Act, shall be liable to a penalty not exceeding five times the value of goods."*

8.1 From plain reading of the legal provisions under Section 112(a) of the Customs Act, 1962, it is clear that a penalty may be imposed on a person, if it is established that in relation to 'goods' which are liable to confiscation under Section 111 ibid, such a person had done an act or had omitted to do an act, which had enabled violation of Customs Act or any other law, leading to confiscation of goods. In fact, the appellant who is the Chief Legal Officer of the Group company had stated that he and their company do not have anything to do with the importsinvolved in alleged customs violations, as the suppliers abroad and importers are separate business entities with no connection what so ever of their group company. Thus, it is not the case of the Revenue, that in the factual matrix of the present case, that the impugned goods were imported by the appellant, or that the appellant is in any way concerned with such import of goods.

8.2 Learned Commissioner of Customs, had discussed about the role of appellant, in detail at paragraph 5.16 of the impugned order, for coming to the conclusion on imposition of penalty on him. The same is extracted and given below:

> *"5.16 Shri Ashok Gupta played all the delay tactics to supply the required information. Further Shri Ashok Gupta always suppressed the fact that Mr. Birla and his family member are non-executive directors of M/s Thai Acrylic Fibre Co. Ltd., Thailand, during the relevant period of imports. I find that due to nonappearance and non-supply of details as undertaken by Sandeep Nevatia, the agency has been sending letters and mails and it was at first instance vide letter 11.02.2017, Shri Ashok Gupta as Chief Legal Officer has replied. Subsequently, I find that DRI has been addressing Shri Ashok Gupta vide letters dated 14.03.2017, 11.04.2017, 16.05.2017, 27.06.2017, 31.10.2017, 20.02.2018 and 06.03.2018 requesting non only for supply of details and documents but also to inform the any other representative/person concerned responsible. However, Shri Ashok Gupta being Chief Legal Officer kept on accepting the letters/mails of the department and not provided the requisite information or revealed the responsible persons details nor he denied that he should not be addressed for and on behalf of the company. Now at this stage after issuance of the SCN, he claims that he is not connected with the case, It cannot be expected from a responsible person who represented the company as Chief Legal Officer. Moreover,*

[1] Inserted by the Taxation Laws (Amendment) Act, 2006, w.e.f. 13-7-2006.

> *he waswell aware of the case and involvement of the company in the instant case and just dragged and misled the department knowing the consequences of legal action and trouble if he provided the requisite information/details. He is the main person acted camouflage and liable for penal action for his involvement of omission and commission under the provisions of Section 112(a) and 114AA of the Customs Act, 1962.*
>
> *5.17 As regards role of Shri Sandeep Nevatia, I find that all evidences squarely made against him as he being the sole representative of the supplier at the material time…..He acted upon for and behalf of the company and he and his company and other noticees were well aware of the issue and with malafide intention he avoided the investigation guilty of clutches of law….Hence, I find that Shri Sandeep Nevatia had played an active role in conniving with and facilitating the Noticee in the evasion of Customs duty and therefore rendered himself liable for penal action under the provisions of Section 112(a) and 114AA of the Customs Act."*

On perusal of the above findings in the impugned order, it clearly transpires that the appellant Shri Ashok Gupta is no where concerned with import of goods, and it is only Shri Sandeep Nevatia who was concerned with the evasion of customs duty in respect of imported goods. Further, the only reason for imposition of penalty on the appellants is that the details sought by DRI from him was not provided by him and there was delay in not providing requisite details, and non-cooperation on the part of the appellant. Inasmuch as there is no specific finding providing for having done an act or omitted to have done certain act leading to confiscation of imported goods, we are of the considered view that penalty under Section 112(a) ibid cannot be imposed on the appellant.

8.3 Further it is also on record, that the learned Commissioner of Customs did not confiscate the goods. In paragraph 5.21 of the impugned order, it is provided as follows:

> *"5.21 The goods are neither physically available for confiscation nor covered by any bond, and hence I refrain from confiscation and imposing redemption fine in lieu of confiscation…"*

From the above factual details, it is clearly proved that there is no confirmation of the proposal for confiscation of imported goods under Section 111(d) ibid. Hence imposition of penalty under Section 112(a) ibid without confiscation of imported goods does not have the sanction of law and thus, to this extent the impugned order imposing penalty under Section 112(a) on the appellant, is not legally sustainable.

8.4 It is also on record that in the proceedings held before the Additional Bench of Customs, Central Excise & Service Tax Settlement Commission at Mumbai, relating to the appellant Shri Ashok Gupta along with M/s Thai Acrylic Fibre Co. Ltd., a Final Order No. 08/Final Order/CUS/AG/2020 dated27.02.2020 was passed in favour of the appellant against penalty proposed under Section 112(a) and 114AA ibid. The relevant paragraphs of the said order are extracted and given below:

> *"6.3As regards penalty under Section 112 (a), it is seen from the language of the legal text of the section 112(a) that under the said provision, penalty is attracted only for action or omission or abetment rendering the goods liable for confiscation under Section 111 of the Act. …. It has been submitted by the ld. Advocate appearing for the co-applicants that the SCNs either in the body or in the charging section, do not propose any confiscation or liability to confiscation of the goods under section 111 of the Act. Hence, invocation of Section 112(a) for penalty is legally unsustainable. Perusal of the SCNs reveals that confiscation or liability to confiscation under Section 111 of the Act has not been invoked in the SCNs. Hence, the Bench agrees with the submission of the ld. Advocate and holds that in the instant case penalty under Section 112(a) of the Act is not sustainable.*
>
> *6.4 Now coming to the other section, namely, section 114AA of the Act, the legal text reads as under:-….The above provision was inserted in the Act, w.e.f. 13.7.2006….Keeping in view the above legal text of the Act, the role of each of the impugned individual co-applicant needs to be examined as to their penal liability.*
>
> *…*
>
> *6.13 **Shri Ashok Gupta***
>
> *From the role of co-applicant (Shri Ashok Gupta) as set out in the SCNs, it is seen that he did not have any role in imports or documentation relating to imports. He is the Chief Legal Officer of Aditya Birla Group. Apparently, the role as described in the SCN can at worst be described as delay or non-cooperation in providing for the requested information. There is no material evidence, nor allegation in the role set out in the SCN as to his liability under 114AA of the Act. We have held earlier that section 112(a) is not sustainable in the instant case. Hence there is no case for penalty on Shri Ashok Gupta.*
>
> *…*
>
> *<u>ORDER</u>*
>
> …
>
> *7.2 Shri Ashok Gupta: No penalty."*

Thus, we find that our above views at paragraphs 8.1 and 8.3 above that there are no grounds for imposition of penalty under Section 112(a) ibid and Section 114AA ibid, have also been supported by the order of the Settlement Commission as stated above.

9.1 From plain reading of the above legal provisions under Section 114AA of Customs Act, 1962, it is clear that it has been introduced for the first time in the said Act and brought into effect from 13.07.2016. The said provision lays down that a maximum penalty not exceeding five times the value of the goods is liable to be imposed in certain situations stated therein. We also find that the Customs Act, 1962 *inter alia*, provide for imposition of penalties under various sections such as Section 112, 114, 114A ibid which was in existence prior to the insertion of Section 114AA. Further, some more sections have also been introduced for imposition of penalty, subsequent to the introduction of section 114AA viz. Section 114AB, 114AC ibid.

9.2 Thus in order to ascertain the true intent of the legal provisions of newly introduced Section 114AA ibid, it is relevant to look into the existing legal provisions for imposition of penalty and the background of such new legal provisions. Section 111 ibid deals exclusively with situations covering confiscation of the imported goods, and Section 113 ibid deals exclusively with situations covering confiscation of the export goods. Consequently, penalty under Section 112 ibid deals with imported goods and penalty under Section 114 ibid deals with export goods. Section 114A ibid deals with penalty for short levy or non-levy of customs duty in certain cases. As the provisions of imposing penalty under Sections 114AB, 114 AC ibid have been brought into the law subsequent to the issue of Show Cause Notice in this case, there are arises no need to discuss the same for the present case.

9.3 From careful analysis of the above legal provisions it can be seen that Section 112 ibid deals with omission or commission of an action, in relation to goods, acquiring possession of goods, various actions such as carrying, removing, depositing, harbouring, keeping, concealing, selling or purchasing of such goods, all of which make such goods liable for confiscation. Similarly, Section 114A ibid deals with non-levy or short levy of customs duty arising on account of the reason of collusion or any wilful mis-statement or suppression of facts by any person. In contrast to the above, legal provisions under Section 114AA ibid does not mention about the goods which are liable for confiscation, but it deals with the situation of certain conduct of a person, in transaction of any business for the purpose of Customs Act, 1962. Any transaction for the purpose of customs law sans goods, can therefore be indicative that the various actions mentioned in Section 114AA ibid, such as making or signing of any declaration, statement or document which is false or incorrect, which may lead to such action that renders the person doing such action being liable for penalty, is without reference to the goods, and is only relating to declaration, statement or document without presence of goods. In the perspective of import of goods, the act of making any declaration or statement or documents for customs law starts from filing of Import Manifest under Section 30 ibid and filing of Bill of Entry under Section 46 ibid in case of licit import, when the vessel enters into the country/India; and in case illicit import when the smuggled goods enter the 'customs waters' for taking necessary action as provided under the Customs Act, 1962. Since, in all these situations elaborated above, as goods are involved, invoking the penal provisions under Section 114AA ibid is not appropriate, rather penal provisions under Section 112 or 114A is more appropriate.

9.4 Further, in the case of Sachin Kshirsagar Vs. Commissioner of Customs (Import-I), Mumbai – (2022) 1 Centax 199 (Tri.-Bom) the Co-ordinate Bench of this Tribunal have held that the personal penalty imposed on the Director of the assessee-appellant under Section 114AA of the Customs Act, 1962 is not sustainable and set aside the order. The relevant paragraph of the said order is extracted and given below:

> *"5. The enhancement of value of the impugned vessel is set aside in accordance with our findings supra. The sole issue that remains is the choice of the appropriate classification. The controversy is contentious and the alternative classification proposed by customs authorities is based upon reliance on technical features to distinguish it from a capability inherent in all vessels that put out to sea in terms of subordination to its principal function. With that complexity to be resolved, there is no scope for indicting the individuals in these proceedings for deliberate mis-declaration. That the benefit of an exemption has been sought to be availed does not, of itself, render such claim to be with intent to evade duty. Furthermore, the role of these individuals in the mis-declaration of stores and bunkers is not evident in the impugned order. The penalties imposed on the individuals are, accordingly, set aside to allow their appeals."*

In an appeal filed by the department against the said order of the Tribunal in Civil Appeal Diary No. 26805/2022, the Hon'ble Supreme Court had upheld the above order of the Tribunal and dismissed the Civil appeals filed by the department.

10. In view of the foregoing discussions and analysis, and on the basis of the judgements of judicial forum referred above, we are of the opinion, that the impugned order imposing penalty on the appellant under Section 112(a) and Section 114AA of the Customs Act, 1962, is not legally sustainable. Therefore, we are of the considered view, that the impugned order passed by the learned Commissioner of Customs does not stand the scrutiny of law and to the extent in has imposed penalty on the appellant, is liable to be set aside.

11. In the result, the impugned order dated 29.05.2020 to the extent it had imposed penalty on the appellant is set aside and the appeal is allowed in favour of the appellant.

(Operative portion of the Order pronounced in open court)

(S.K. MOHANTY)
MEMBER (JUDICIAL)

(M.M. PARTHIBAN)
MEMBER (TECHNICAL)

Sinha