Appellant Rep by: Shri J V Niranjan, Adv.
Respondent Rep by: Shri L Nandakumar, AR

CORAM: P Dinesha, Member (J)

Cus - The only issue is, whether the Revenue was justified in imposing penalty under Sections 112 (d) and 114AA of Customs Act, 1962 on assessee who was only a Customs Broker and not the importer - The findings recorded by Adjudicating Authority and Commissioner (A) are more or less reiteration of allegations contained in SCN - Further, it is not even established that the assessee had handled the work of clearance with any mala fide motive or any motive to make abnormal gain - It is also not pointed out anywhere in impugned order as to the nature of act undertaken by assessee and how the assessee knew or had reason to believe that the goods were liable for confiscation under Section 111 of Customs Act, 1962, before fastening with the liability under Customs Act, which is over and above the punishment prescribed for a Customs Broker under CBLR - The assessee has performed its duties as per CBLR in terms of licence granted to it - A perusal of impugned O-I-A makes it evident that the assessee did advise the importer as to the requirement of import licence, which appears to be a sufficient compliance insofar as Regulation 11 (d) is concerned because, getting the required licence was, in any case, the duty of the importer - Further, violation of Regulations 11 (d) and 11 (n) ibid would, in nutshell, require the exercise of due diligence by a Customs Broker which is akin to Regulation 13 (o) of CHALR Rules, 2004, which Regulation was the subject matter of appeal before the High Court of Delhi in case of Shiva Khurana - 2019-TIOL-178-HC-DEL-CUS - In view of the said decision, it becomes incumbent on Revenue to establish that the assessee had knowledge or reason to believe that the goods in respect of which it had undertaken customs clearances processes were liable for confiscation, to justify impugned penalties under Customs Act - Further, from a bare reading of Section 114AA, it is evident that the said Section could be invoked only on establishment of the fact that the declaration, statement or document made/submitted in transaction of any business for purposes of the Act is false or incorrect and therefore, without establishing that such declaration, statement or document was false or incorrect in any material particular, this Section cannot be invoked - The Revenue has not been able to clearly establish either the active role or even the passive role or any deliberate or mala fide act - It is clear that the Bill-of-Lading itself which was uploaded by shipper had given a different description of goods with the assessee being nowhere in picture and he is only responsible for filing the Bill-of-Exchange as per the description given in Bill-of-Lading; the shipper is allowed to go scot free - The Revenue has not been able to establish the mala fides which is quintessence of Sections 112 (a) and 114AA ibid and therefore, the impugned penalties are required to be deleted - Consequently, the impugned order which has confirmed the penalties questioned herein is set aside: CESTAT

Appeal allowed

Case laws cited:

Commissioner of Cus. (Exports), Chennai Vs. I. Sahaya Edin Prabhu - 2015-TIOL-212-HC-MAD-CUS... Para 2.3

Commissioner of Customs Vs. Shiva Khurana - 2019-TIOL-178-HC-DEL-CUS... Para 7.3.1

Buhariwala Logistics Vs. Commr. of Cus., New Delhi – 2015 (326) E.L.T. 170 (Tri. – Del.)... Para 7.3.2

Deepak Kumar Vs. Commr. of ICD, New Delhi – 2017 (358) E.L.T. 854 (Tri. – Del.)... Para 7.3.2

Prime Forwarders Vs. Commr. of Cus., Kandla – 2008-TIOL-513-CESTAT-AHM ... Para 7.3.2

Parekh & Sons Vs. Commr. of Cus. (P), Mumbai – 2002 (150) E.L.T. 1274 (Tri. – Mum.)... Para 7.3.2

Sameer Santosh Kumar Jaiswal Vs. Commr. of Cus. (Import-II), Mumbai 2018 (362) E.L.T. 348 (Tri. – Mum.) ... Para 8.2.1

Commissioner of Cus., Visakhapatnam Vs. M/s. Jai Balaji Industries Ltd 2018 (361) E.L.T. 429 (A.P.)... Para 8.2.2

FINAL ORDER NO. 41648/2019

Per: P Dinesha:

The only issue in this appeal is whether the Revenue was justified in imposing penalty under Sections 112 (d) and 114AA of the Customs Act, 1962 on the appellant who was only a Customs Broker and not the importer.

2.1 Shri. J.V. Niranjan, Ld. Advocate appearing for the appellant, contended inter alia that a Show Cause Notice dated 06.06.2017 was issued under Sections 28 and 124 of the Customs Act, 1962 on the importer, marking a copy of the same to the appellant herein; that in the whole of the Show Cause Notice, the only allegation levelled against the appellant is that the appellant did not inform the Revenue that the importer did not possess licence for import of R-22 gas; that even the request letter dated 21.04.2016 for amendment of the Bill-of- Entry by adding the second invoice was filed to include Chlorodifluoromethane (R-22 Gas); that the appellant did not present the imported goods for examination; that the appellant was liable for penalty under Section 112 (a) ibid for abetting smuggling of R-22 gas by the importer and on the appellant's failure to ensure compliance with Regulations 11(d) and 11 (n) of the Customs Broker Licensing Regulations, 2013 ('CBLR' for short); that the Revenue has not brought on record anything as to the prior knowledge to prove the act of abetment/collusion for import of R-22 gas, etc.

2.2 Ld. Advocate further submitted that the first Bill-of- Entry was filed on 06.04.2016 and request for amending the Bill-of-Entry was made vide letter dated 21.04.2016; that in response to one of the summons issued, the Proprietor of the importer namely, Shri. Praveen Kumar accompanied by one Shri. Kundan Kumar appeared before the SIIB authorities, who were let off by the investigating officers without even recording their statements. Ld. Advocate would also submit that the Revenue authorities extended the period of six months under Section 110 (2) of the Customs Act, 1962 for further investigation, but however, there were absolutely no allegations against the appellant; that the Revenue has not established the mens rea as far as the appellants are concerned to bring home the guilt for levying penalty and that the authorities did not conduct any investigation, much less a fair investigation to ascertain the whereabouts of authorized person of the importer namely, Shri. Kundan Kumar who had given the Rajasthan address, with the help of the local Customs authorities there.

2.3 He relied on the decision of the Hon'ble High Court of Judicature at Madras in the case of Commissioner of Cus. (Exports), Chennai Vs. I. Sahaya Edin Prabhu reported in 2015 (320) E.L.T. 264 (Mad.) = 2015-TIOL-212-HC-MAD-CUS

3. Per contra, Shri. L. Nandakumar, Ld. Departmental Representative appearing for the Revenue, while supporting the findings of the lower authorities also contended that, in the first place, the Bill-of-Entry itself did not contain sufficient details of the goods sought to be imported, but the appellant having sought for amending the Bill-of-Entry to include R-22 gas which required licence from the DGFT, did not even bother to ascertain whether the importer had the required licence. This, according to the Ld. Departmental Representative, constituted a serious lapse which is covered under Regulations 11 (d) and 11 (n) of the CBLR. He accordingly prayed for sustaining the penalty.

4. Rebutting the contentions of the Ld. Departmental Representative, Ld. Advocate for the appellant submitted that without admitting the guilt, the quantum of penalty imposed under Section 114AA of Rs. 10,00,000/- was without any basis when a penalty of Rs. 5,00,000/- has been levied on the authorized person of the importer.

5. I have carefully gone through the submissions made by both sides and also the documents placed in the Appeal Memorandum.

6.1 Relevant parts of Section 112 (a) and Section 114AA of the Customs Act, 1962 read as under :

"SECTION 112. Penalty for improper importation of goods, etc. — 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 .."

"SECTION 114AA. Penalty for use of false and incorrect material. –

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."

6.2 A conjoint reading of both the above provisions makes it clear that there should be an intentional or deliberate act or omission and even the motive is attributable to the act of abetment to do any act or omit to do any act. Hence, the requirement of mens rea becomes sine qua non for imposing penalty on the Customs Broker. Admittedly, the appellant being the Customs Broker has been fastened with the penalties on the ground that its activities amounted to abetment. Also 'abet' or 'abetment' is not defined in the Customs Act.

7.1 In the Order-in-Original, the Adjudicating Authority has inter alia confirmed the allegations with regard to non-presentation of the imported goods for examination and that the appellant had not informed the Customs Authorities about the non-possessing of licence by the importer for importing the R-22 gas while processing the amended Bill-of-Entry. It is also a fact borne on record contrary to

the above findings that the cargo was under detention from 01.04.2016 onwards and hence, there was nothing that the appellant being the Customs Broker was able to present. These allegations in my view, per se are not sufficient to fasten with the penalty of the nature impugned.

7.2 It is found that the findings recorded by the Adjudicating Authority and the Commissioner (Appeals) are more of less reiteration of the allegations contained in the Show Cause Notice. Further, it is not even established that the appellant had handled the work of clearance with any mala fide motive or any motive to make abnormal gain and nor do I find that there is any allegation as to the appellant having made any abnormal profit in connivance. It is also not pointed out anywhere in the impugned order as to the nature of the act undertaken by the appellant and how the appellant knew or had reason to believe that the goods were liable for confiscation under Section 111 of the Customs Act, 1962, before fastening with the liability under the Customs Act, which is over and above the punishment prescribed for a Customs Broker under the CBLR. The appellant has performed its duties as per the CBLR in terms of the licence granted to it. A perusal of the impugned Order-in-Appeal makes it evident that the appellant did advise the importer as to the requirement of import licence, which appears to be a sufficient compliance insofar as Regulation 11 (d) is concerned because, getting the required licence was, in any case, the duty of the importer.

7.3.1 Further, violation of Regulations 11 (d) and 11 (n) ibid would, in nutshell, require the exercise of due diligence by a Customs Broker which is akin to Regulation 13 (o) of the CHALR Rules, 2004, which Regulation was the subject matter of appeal before the Hon'ble High Court of Delhi in the case of Commissioner of Customs Vs. Shiva Khurana in CUSAA No. 45 of 2017 dated 14.01.2019 = 2019-TIOL-178-HC-DEL-CUS . The Hon'ble High Court after noting the Regulation (supra) has held as under :

"7. This court is of the opinion that the impugned order is justified in the facts and circumstances of the case. The reference to the verification of "antecedents and correctness of Importer Exporter Code (IEC) Number" and the identity of the concerned exporter/importer, in the opinion of this Court is to be read in the context of the CHA's duty as a mere agent rather than as a Revenue official who is empowered to investigate and enquire into the veracity of the statement made orally or in a document. If one interprets Regulation 13(o) reasonably in the light of what the CHA is expected to do, in the normal course, the duty cast is merely to satisfy itself as to whether the importer or exporter in fact is reflected in the list of the authorized exporters or importers and possesses the Importer Exporter Code (IEC) Number. As to whether in reality, such exporters in the given case exist or have shifted or are irregular in their dealings in any manner (in relation to the particular transaction of export), can hardly be the subject matter of "due diligence" expected of such agent unless there are any factors which ought to have alerted it to make further inquiry. There is nothing in the Regulations nor in the Customs Act which can cast such a higher responsibility as are sought to be urged by the Revenue. In other words, in the absence of any indication that the CHA concerned was complicit in the facts of a particular case, it cannot ordinarily be held liable.

8. As far as the decision in H.B. Cargo Services (supra) is concerned, the facts reflected in paras 5 and 9 facially show that the CHA played an active role. It is in these circumstances that in para 15 (which was relied upon by the Revenue), the Court made the following observations :

"15. While the punishment imposed on the CHA has to be commensurate with the gravity of the proved acts of misconduct as, on revocation of his license, the CHA would suffer, it must not be lost sight of

that, though it is the right of a citizen to carry on his business or profession, it is subject to reasonable restrictions and conditions which, in the present case, are stipulated under the CHALR [Worldwide Cargo Movers - 2010 (253) E.L.T. 190] = 2006-TIOL-424-HC-MUM-CUS . As noted hereinabove, blank shipping bills were issued by the partner and authorized representative of the respondent - CHA for a consideration of Rs.150/- per shipping bill. In cases involving corruption there cannot be any punishment lesser than the maximum i.e., revocation of the license. No other lesser punishment can be contemplated in such cases [State of T.N. v. K. Guruswamy - (1996) 7 SCC 114]. Any sympathy shown in such cases is totally uncalled for and opposed to public interest. The consideration received for the act of misconduct may be small or large. It is the act of corruption that is relevant, and not the quantum involved in such acts. [Ruston & Hornsby (I) Ltd. v. T.B. Kadam - (1976) 3 SCC 71; U.P. SRTC v. Basudeo Chaudhary - (1997) 11 SCC 370; Janatha Bazar (South Kanara Central Coop. Wholesale Stores Ltd.) v. Sahakari Noukarara Sangha - (2000) 7 SCC 517; Karnataka SRTC v. B.S. Hullikatti - (2001) 2 SCC 574; Rajasthan SRTC v. Ghanshyam Sharma - (2002) 10 SCC 330; Municipal Committee, Bahadurgarh v. Krishnan Behari - (1996) 2 SCC 714; U.P. SRTC v. Suresh Chand Sharma - (2010) 6 SCC 555; J.A. Naiksatam v. Prothonotary & Senior Master, High Court of Bombay - (2004) 8 SCC 653; Union of India v. Gyan Chand Chattar (2009) 12 SCC 78; NEKRTC v. H. Amaresh - (2006) 6 SCC 187; U.P. SRTC v. Vinod Kumar - (2008) 1 SCC 115]."

9. In the given circumstances, this Court is of the opinion that the decision in H.B. Cargo Services (supra) does not apply in the present case.

10. Having regard to the above discussions, this Court is of the opinion that there is no merit in the appeal; the CESTAT's impugned order is accordingly affirmed. The appeal is dismissed."

7.3.2 In view of the decision of the Hon'ble Delhi High Court (supra), it becomes incumbent on the Revenue to establish that the appellant had knowledge or reason to believe that the goods in respect of which it had undertaken customs clearances processes were liable for confiscation, to justify impugned penalties under the Customs Act. This view has also been reiterated by most of the Co-ordinate Benches of the Tribunal like:

(i) Buhariwala Logistics Vs. Commr. of Cus., New Delhi – 2015 (326) E.L.T. 170 (Tri. – Del.);

(ii) Deepak Kumar Vs. Commr. of ICD, New Delhi – 2017 (358) E.L.T. 854 (Tri. – Del.);

(iii) Prime Forwarders Vs. Commr. of Cus., Kandla – 2008 (222) E.L.T. 137 (Tri. – Ahmd.) = 2008-TIOL-513-CESTAT-AHM

(iv) Parekh & Sons Vs. Commr. of Cus. (P), Mumbai – 2002 (150) E.L.T. 1274 (Tri. – Mum.).

to name a few.

8.1 Further, from a bare reading of Section 114AA it is evident that the said Section could be invoked only on the establishment of the fact that the declaration, statement or document made/submitted in transaction of any business for the purposes of the act is false or incorrect and therefore, without establishing that such declaration, statement or document was false or incorrect in any material particular, this Section cannot be invoked.

8.2.1 In this regard, it is useful to refer to a recent decision of the Mumbai Bench of the Tribunal in the case of M/s. Sameer Santosh Kumar Jaiswal Vs. Commr. of Cus. (Import-II), Mumbai reported in 2018 (362) E.L.T. 348 (Tri. – Mum.) wherein, it has been inter alia held that "… from the reading of the above Section 114AA, it is observed that if the person knowingly makes the false declaration or signs any such document then only he will be liable to penalty under Section 114AA. In the present case, there is no case that the Directory of the company has done any act which is specified under Section 114AA. Even the enhancement of value was done on the basis of contemporaneous import, it cannot be said that the Director has done anything to mis-declare the value. Moreover, as discussed above, since there is no case of short payment or non-payment of Customs Duty, the Show Cause Notice itself was not warranted. Consequently, neither the penalty on the appellant-company nor on the Director was imposable."

8.2.2 The Hon'ble Andhra Pradesh High Court in the case of Commissioner of Cus., Visakhapatnam Vs. M/s. Jai Balaji Industries Ltd. reported in 2018 (361) E.L.T. 429 (A.P.) has clearly held that Section 114AA would not get attracted as "sine qua non for invoking the said provision is that it must be established that 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 the Act."

9. As noted by me in the earlier paragraphs, the Revenue has not been able to clearly establish either the active role or even the passive role or any deliberate or mala fide act. Further, the findings of the Adjudicating Authority (at paragraph 14) also give an indication as to the role of the appellant, which read as under :

"14. The steamer agents M/s. Seahorse Ship Agencies Pvt. Ltd. vide their letter dated 01/06/2016 submitted copy of online booking request received from the supplier M/s. Hengtai International Trading Ltd., wherein the description of goods was declared as "fabrics" and vide letter dated 24/06/2016 submitted copies of original Bill of Lading issued to the supplier and Bill of Lading instructions uploaded by the shipper. The description of goods as per the Bill of Lading are Water filter and Plastic toys."

From the above, it is clear that the Bill-of-Lading itself which was uploaded by the shipper had given a different description of the goods with the appellant being nowhere in the picture and the appellant is only responsible for filing the Bill-of-Exchange as per the description given in the Bill-of-Lading; the shipper is allowed to go scot free.

10. In the light of the above discussions and on an overall consideration of the facts and various decisions, I am of the view that the Revenue has not been able to establish the mala fides which is the quintessence of Sections 112 (a) and 114AA ibid. and therefore, the impugned penalties are required to be deleted. Consequently, the impugned order which has confirmed the penalties questioned herein is set aside.

11. The penalties therefore stand set aside and consequently, the appeal is allowed.