
(2024) 12 CESTAT CK 1247

In the Customs, Excise And Service Tax Appellate, New Delhi

Case No : Custom Appeal No. 146 of 2012

**S.B. Agarwal @APPELLANT @Hash Commissioner of Customs
@RESPONDENT**

Date of Decision : 23-12-2024

Acts Referred:

Customs Act, 1962 — Section 28, 28AB, 114AA, 167

Citation : (2024) 12 CESTAT CK 1247

Hon'ble Judges : Dilip Gupta, President (J); P. V. Subba Rao, Member (T)

Bench : Division Bench

Advocate : B.L. Narasimhan, Anurag Mathur, Saksham Garg, Rakesh Kumar

Final Decision : Allowed

Judgement

P.V. Subba Rao, J

1. S.B. Agarwal, proprietor, Appellant of M/s. Nimbark Textile Mills filed this appeal to assail the personal penalty of Rs.71,66,520/-imposed on him under section 114AA of the Customs Act, 1962, the Customs Act in Order-in-Original, Impugned order dated 31.01.2012 passed by the Commissioner of Customs, Jodhpur.

2. By the impugned order, the Commissioner decided the proposals made in the common Show Cause Notice dated 20.4.2011, SCN issued to 20 manufacturers including M/s. Nimbark Textile Mills and to 20 individuals who were the Proprietors/Directors/Partners of these manufacturers, including the appellant herein. The Commissioner considered the submissions made by all the appellants together and passed an order denying the benefit of the exemption under the EPCG scheme to the machinery imported by all the manufacturers, demanded duty under section 28 of the Customs Act along with interest under section 28AB of the Customs Act, imposed redemption fines and imposed penalties on the manufacturers and personal penalties under section 114AA of the Customs Act on the individuals.

3. Aggrieved, appeals were filed by the manufacturers and individuals. When

they were heard in 2017, the jurisdiction of the Commissioner of Customs (Preventive) Jodhpur who issued the SCN was in question. This Tribunal had remanded all matters to the Commissioner to decide the matters after final decision by the Supreme Court on the question of jurisdiction in the Special Leave Petition filed against the judgment of the Delhi High Court in Mangli Impex Limited vs. Union of India, 2016(339)ELT 605(Del.).

4. Revenue had filed appeals before the Rajasthan High Court assailing the orders of this Tribunal remanding the matters to the Commissioner. In some cases, the High Court upheld the remand orders of this Tribunal and those cases have since been before the Commissioner to decide. In some other cases, including this case, the High Court set aside the order of this Tribunal and remanded the matters to this Tribunal to decide.

5. With respect to this appeal, Revenue had filed Customs Appeal No. 35/2018 which was decided along with other appeals by the High Court by a common judgment and order dated 22.8.2019. The operative part of this judgment is as follows:

"8. Accordingly, the impugned orders in the appeals are hereby set aside and all the matters are remitted to the CESTAT which shall proceed to examine and decide the merits of appeals without being influenced by Mangli Impex (supra). At the same time, the final decision in Mangli Impex (supra), would bind all parties- on the issue of jurisdiction, so that there is no question of its having to be re-agitated all over again. Furthermore, this Court is of the opinion that till final decision is taken in Mangli Impex (supra), no coercive action should be taken against the assesses in the event of any adverse order, nor should any prosecution be launched against them. These too shall await the final outcome of Mangli Impex (supra)."

6. However, this appeal could not be decided as the question of jurisdiction of the officer issuing the SCN was also under consideration of the Supreme Court in several other appeals. The question was finally decided by the Supreme Court in Review Petition No. 400 of 2021 in Civil Appeal no. 1827 of 2018 in favour of the Revenue. In this judgment, the Supreme Court set aside Mangli Impex.

7. Hence, this appeal is listed today.

8. Learned authorised representative for the Revenue submitted that while this appeal regarding personal penalty on the appellant is before this Tribunal, the main appeal of the manufacturer M/s Nimbark Textile Mills has been remanded to the Commissioner and is awaiting decision. He prayed that this appeal may also be remanded to the Commissioner so that both appeals can be decided together by him.

9. Learned counsel for the appellant prayed that this may not be remanded to the Commissioner because personal penalty on the appellant, which is in dispute, cannot be sustained even if the case is decided against the manufacturer.

10. We have considered these submissions.

11. We find that penalty on the appellant and other individuals was imposed in the impugned order under section 114AA of the Customs Act which reads as follows:

"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."

12. A plain reading of the above section shows that a person shall be liable to penalty under this section if:

(a) a person makes, signs, uses or causes to be made, signed or used any declaration, statement or document which is false or incorrect;

(b) he does so knowingly or intentionally; and

(c) such declaration, statement or document is in transaction of business for the purposes of this Act.

13. If it is established that the person had knowingly or intentionally made, signed, used (or caused to be made, signed or used) a false declaration, statement or document in the transaction for the purpose of the Customs Act, then, he shall be liable to penalty under section 114AA of the Customs Act.

14. Section 114AA of the Customs Act does not provide that the person shall be penalised but it only states that the person shall be liable to penalty. The question which arises is what is the meaning of the expression 'liable to penalty'. The Concise Oxford Dictionary gives the meaning of 'liable' as follows:

'liable. Adj. 1 responsible by law; legally answerable. (liable to) subject by law to. 2. (liable to something) likely to do something. 3.(liable to) likely to experience (something undesirable): areas liable to flooding'.

15. Thus, the term 'liable' could either mean that one is responsible by law to do something or that one is likely to experience something undesirable. If one is liable to pay interest, for instance, it means one has an obligation to pay interest. However, if one is liable to penalty, it can only mean that one may be penalised. Thus, as per Section 114AA of the Customs Act, one who knowingly makes, signs, uses or causes to be made, signed or used a false declaration may be penalised. Nothing in this section says that such a person shall be penalised. The expression 'liable to' is used in several sections of the Customs Act and its scope was interpreted in the context of confiscation by the Delhi High Court in *Jain Exports (P) Ltd. vs. Union of India & Others*, 1987 (29) E.L.T. 753 (Del.). The High Court held that not only does the adjudicating authority have the discretion to decide whether or not to confiscate goods which are liable to confiscation, but it has to exercise this discretion judicially and not arbitrarily.

The relevant part of this order is as follows:

.....The language does necessarily imply that there is a discretion because the language is not "such goods shall be confiscated". On the other hand the language is "such goods shall be liable to confiscation". The Collector of Customs when acting under Section 167 obviously acting in a quasi-judicial capacity. When discretion is vested in such a quasi-judicial tribunal, such discretion must be exercised judicially and not arbitrarily. The Collector must decide in each particular case if there were circumstances which would call for the drastic punishment of confiscation. If there was a case in which discretion should have been exercised in favour of the importer, this was such a case.....

16. This decision was upheld by the Supreme Court, 1992 (61) E.L.T. 173 (S.C.). Interpreting the expression 'liable to confiscation', the Madras High Court held in *Sha Rikabdoss Bhavarlal vs. Collector of Customs, Mysore*, 2000 (125) E.L.T. 65 (Mad.) as follows:

"The third column says that if an offence under Item 8 is committed, the goods concerned "shall be liable to confiscation". ".....The learned Government Pleader had to concede that the Customs Authorities have got the discretion either to confiscate or not in a particular case. In this very case reference has been made to two other cases in which in spite of an offence having been committed, the party in each case has been let off with a warning, and without the goods being confiscated. The language does necessarily imply that there is a discretion because the language is not "such goods shall be confiscated". On the other hand the language is "such goods shall be liable to confiscation". The Collector of Customs when acting under Section 167 obviously acting in a quasi-judicial capacity. When discretion is vested in such a quasi-judicial tribunal, such discretion must be exercised judicially and not arbitrarily. The Collector must decide in each particular case if there were circumstances which would call for the drastic punishment of confiscation. If there was a case in which discretion should have been exercised in favour of the importer, this was such a case. The appellants had placed the order and the goods had arrived when admittedly the practice prevailing both with the merchants and with the Custom authorities permitted goods of the category which the appellants imported under a licence such as the appellants held. The Collector does not appear to have dealt with the case as if he was vested with judicial discretion because he has not given any reason why the drastic punishment of confiscation should have been imposed on the appellants whereas two other similar merchants who had committed the same offence had been let off with a warning.

16. Therefore on both the grounds, namely, that there was an error apparent on the face of the record, and that the Collector as a quasi-judicial tribunal had not exercised his discretion judicially, the order of the Collector should be quashed. We allow the appeal and the writ petition and quash the impugned order of the Collector dated 10th March, 1958. No order as to costs."

17. Thus, the meaning of the expression 'shall be liable to' confiscation or penalty in the Customs Act is that a penalty may be imposed on the person who falls under the section or, as the case may be, the goods which fall under the section may be confiscated. The adjudicating authority not only has the discretion but also an obligation to judiciously exercise it and decide whether to impose penalty or not or, as the case may be, confiscate or not confiscate the goods.

18. Considering this legal position, we now proceed to examine the penalty imposed on the appellant by the impugned order. Penalty has been imposed on the appellant as the proprietor of the manufacturer M/s. Nimbark Textile Mills. The SCN as well as the impugned order are common to all the manufacturers and the individuals and the allegations are also the same.

19. The case of the department and the finding in the impugned order against all manufacturers is that they had mis-declared the year of manufacture of the machinery which they were to import in the application form and the annexures submitted to the Directorate General of Foreign Trade, DGFT in order to obtain a licence under the Export Promotion Capital Goods Scheme, EPCG framed under the Foreign Trade (Development & Regulation) 1992 and the Foreign Trade Policy (2009-2014) framed under it. EPCG is a scheme under which DGFT issues a licence which entitles one to import capital goods at NIL or concessional rate of duty and using the capital goods so imported, goods must be manufactured and exported of a certain value.

20. The case of the department against the manufacturers is that by mis-declaring the year of manufacture of the machinery to be imported, the manufacturers obtained EPCG licences from the DGFT which they then used to import machinery, manufacture final goods and fulfil the export obligation. The mis-declaration of the year of manufacture of the capital goods was discovered only on investigation. Since the EPCG licence was obtained through mis-declaration, the machinery so imported was not eligible for exemption from duty and therefore, duty is recoverable along with interest and penalties.

21. It needs to be noted that the case of the department is not that the nature of goods or year of manufacture was mis-declared in the Bill of Entry or under any declaration made under the Customs Act. The allegation is that in the application made to the DGFT for EPCG scheme [under the Foreign Trade (Development & Regulation) Act, 1992 read with the Foreign Trade Policy 2009-2014], the manufacturers had mis-declared the year of manufacture of the machinery to be imported. Insofar as M/s. Nimbark Textile Mills of which the appellant is the proprietor is concerned, this matter is before the Commissioner to decide in the remand proceedings.

22. Even if the case is decided against M/s. Nimbark Textile Mills, the appellant herein can still not be penalised under Section 114AA of the Customs Act because this section renders one liable to penalty only in case of mis-declaration

with knowledge or intent in any proceeding under the Customs Act which is not even the allegation. Any mis-declaration before DGFT to obtain a licence is not a declaration in a proceeding under the Customs Act but a proceeding under Foreign Trade Policy framed under the Foreign Trade (Development & Regulation) Act, 1992. A plain reading of section 114AA of the Customs Act makes it evident that the appellant does not fall under its scope. Nothing in the impugned order shows that the appellant falls under this section.

23. To sum up:

- a) the alleged mis-declaration by the appellant before DGFT is not in any proceeding under the Customs Act and therefore, is not covered by section 114AA of the Customs Act;
- b) the specific acts or omissions of the appellant which led to the conclusion that the appellant had made, signed or used or caused making, signing or using any false declaration are not indicated in the impugned order;
- c) the knowledge and intent of the appellant have also not been specifically brought out in the impugned order; and
- d) the Commissioner also did not exercise his discretion to decide if penalty should be imposed or not on the appellant even if he(wrongly) concluded that the appellant was liable to penalty under section 114AA of the Customs Act.

24. For all the above reasons, the impugned order cannot be sustained insofar as the penalty imposed on the appellant under section 114AA of the Customs Act is concerned. The appeal is allowed and the penalty imposed on the appellant under section 114AA of the Customs Act in the impugned order is set aside. The appellant shall be entitled to consequential relief.

[Order pronounced on 23/12/2024]