

(2022) 02 CESTAT CK 0018

In the Customs, Excise And Service Tax Appellate Tribunal

Case No : Customs Appeal No. 50079 Of 2020

**Shri Ankur Agarwal, Director M/s Asia Pacific Impex Pvt. Ltd. Vs
Principal Commissioner?**

Date of Decision : 18-02-2022

Acts Referred:

Customs Act, 1962 — Section 1(2), 28(4), 28(8), 77, 111, 112, 112(a), 114AA, 124
Foreign Exchange Regulation Act, 1973 — Section 1(3)
Indian Penal Code, 1860 — Rule Section 3, 4

Citation : (2022) 02 CESTAT CK 0018

Hon'ble Judges : Delip Gupta, J;P. Venkata Subba Rao, Technical Member

Bench : Division Bench

Final Decision : Allowed

Judgement

1. This appeal has been filed by Ankur Agarwal, the appellant, Director of M/s Asia Pacific Impex Pvt. Ltd. to assail the order dated 14.10.2019 passed by the Principal Commissioner of Customs ICD, TKD, New Delhi, the Principal Commissioner to the extent it has imposed a penalty of Rs. 5,00,000/- on the appellant under section 112(a) of the Customs Act, 1962, the Customs Act as also a penalty of Rs. 10,00,000/- on the appellant under section 114AA of the Customs Act.

2. A show cause notice dated 16.01.2018 was issued by the Directorate of Revenue Intelligence to five persons including the appellant. It states that information had been received that certain importers of Melamine were indulging in evasion of anti-dumping duty by over valuating the goods imported from China. It needs to be noted that anti-dumping duty in terms of the Notification dated 19.02.2010 was the difference between landed value of the goods and USD 1681.49 per metric ton. Thus, by declaring the value of goods at a rate above USD 1550, the importers were avoiding anti-dumping duty. The show cause notice called upon M/s Arinits Sales Pvt. Ltd.; Ashish Chopra, Director of M/s Arinits sales; Ajay Kapur, Proprietor of M/s Chemical Connection; Amit Agarwal, Director of M/s Yug International Pvt. Ltd.; and Ankur Agarwal, Director of M/s Asia Pacific Impex Pvt. Ltd., to show cause notice.

3. The show cause notice mentions that from the statements of Ashish Chopra, Director of M/s Arinits Sales Pvt. Ltd. and Ankur Agarwal, Director of M/s Asia Pacific Impex Pvt. Ltd., the following position emerged:

(a) Ashish Chopra had shown purchase of the goods in his own company, M/s Kay Petrochem Ltd., Hong Kong, from Chinese suppliers and further shown that same goods to have been sold to M/s Asia Pacific Impex Pvt. Ltd., Hong Kong, a company owned by Ankur Agarwal;

(b) As per the direction of Ashish Chopra, the same goods were shown to have been supplied by M/s Asia Pacific Impex Pvt. Ltd., Hong Kong to M/s Arinits Sales Pvt. Ltd., New Delhi;

(c) The said transaction, i.e. sell and purchase of goods, was done on documents/ papers only and actually the goods were shipped from Chinese suppliers to M/s Arinits Sales Pvt. Ltd. directly;

(d) The correct value of the goods was USD 1180/MT, which was shown in the actual invoices submitted by the importer in his statements; and

(e) Excess/over amount of invoices which was remitted to so called supplier, M/s Asia Pacific Impex Pvt. Ltd., was adjusted between Ashish Chopra and Ankur Agarwal during local trading of goods.

4. The proposal made in the show cause notice dated 16.01.2018 to impose penalties under two different sections on the appellant was based on the proposition stipulated in paragraph 35.2 of the said notice, and it is as follows:

"35.2 It appears from the above discussion that Shri Ankur Agarwal, Director of M/s Asia Pacific Impex Pvt. Ltd., Hong Kong & Director of M/s Agarwal & Associates Impex Pvt. Ltd., Delhi have abetted in mis-declaration of value of goods as discussed above leading to evasion of Anti-Dumping Duty and rendering the goods liable to confiscation by way of providing their companies name and documents for the so called sale and purchase of Melamine to Shri Ashish Chopra imported vide bill of entry no. 587505 dated 20.06.2014, 5943046 dated 27.06.2014 and 6073680 dated 09.07.2014. As such, he appears to have rendered himself liable for penal action in terms of the provisions of Section 112, & 114AA of the Customs Act, 1962."

5. The show cause notice thereafter in paragraph 37.2 mentions:

"37.2 Now, therefore, Shri Ankur Agarwal, Director of M/s Asia Pacific Impex Pvt. Ltd., Hong Kong & Director of M/s Agarwal & Associates Impex Pvt. Ltd., Delhi is hereby required to show cause to the Commissioner of Customs (Export), Inland Container Depot, Tughlakabad, New Delhi as to why penalty should not be imposed upon him in terms of the provisions of Section 112 for having abetted the said offence and under the provisions of Section 114AA of the Customs Act, 1962, by way of providing the fabricated invoices pertaining to the goods imported vide bill of entry no. 5872505 dated 20.06.2014, 5943046 dated

27.06.2014 and 6073680 dated 09.07.2014 by M/s Arinits Sales Pvt. Ltd.”

6. A detailed reply dated 18.06.2019 was filed by Ankur Agarwal to the aforesaid show cause notice. However, the Principal Commissioner by order dated 14.10.2019 imposed penalty of Rs. 5,00,000/- under section 112(a) and a penalty of Rs. 10,00,000/- under section 114AA of the Customs Act upon the appellant.

7. Shri Ved Prakash Batra learned counsel appearing for the appellant made the following submissions:

(i) The Director of Revenue Intelligence did not have the jurisdiction to issue the notice in view of the decision of the Supreme Court in *Canon India Private vs. Commissioner of Customs*, 2021 (3) TMI 384- S.C;

(ii) No penalty was imposable upon the appellant as the transaction of sale-purchase of Melamine by M/s Asia Pacific Impex Pct., Hong Kong, was done in Hong Kong and the authorities constituted under Customs Act do not have jurisdiction beyond the territory of India;

(iii) There was proper purchase of 176 MT of Melamine by M/s Asia Pacific Impex Pvt. Ltd., Hong Kong, from M/s Kay Petrochem Ltd., Hong Kong, and thereafter sale to M/s Arinits Sales Pvt. Ltd., New Delhi. There is no such restriction under the existing law, both of Hong Kong and India. Therefore, the allegation of paper transaction has no merit and accordingly, the appellant was not liable to be penalised;

(iv) The appellant did not abet Ashish Chopra, Director of M/s Arinits Sales Pvt. Ltd., New Delhi in mis-declaration of the value of Melamine so as to attract penal provisions contained in section 112 of the Customs Act. Hence, no penalty was imposable upon the appellant under section 112 of the Customs Act;

(v) Penalty under section 114AA of the Customs Act was not imposable upon the appellant as the appellant had not done any transaction knowingly or intentionally so as to attract the provisions of section 114AA of the Customs Act;

(vi) The impugned order dated 14.10.2019 is liable to be set aside on the ground that it has been passed by the Principal Commissioner in gross violation of principles of natural justice inasmuch as the submissions made by the appellant to the said show cause notice dated 16.01.2018 have not been considered; and

(vii) Assuming but not admitting that penalty under section 112(a) of the Customs Act could be imposed impossible for abetment but no penalty could be imposed under section 114AA of the Customs Act. Moreover, no penalty can be imposed again for the same cause of action for which penalty was imposed under section 112 of the Customs Act.

8. Shri Sunil Kumar, learned authorised representative appearing for the department, however supported the impugned order and made the following submissions:

(i) The transactions between M/s Kay Petrochem Ltd. and the appellant, and that between the appellant and M/s Arinits Sales Pvt. Ltd. were only paper transaction with malafide intention to evade anti-dumping duty leviable on impugned goods and hence the provisions of the Customs Act were violated;

(ii) The ratio of judgment in Canon India is not applicable in cases of penalty imposed under section 112 of the Customs Act. The appellant was issued with show cause notice under section 124 of the Customs Act for imposition of penalty and no duty under section 28(4) of the Customs Act was demanded;

(iii) Imposition of penalty under section 112 of the Customs Act was correct in law as the appellant abetted M/s Arinits Sales Pvt. Ltd. to artificially inflate the transaction value of impugned goods; and

(iv) The appellant is not correct in submitting that the authorities did not have the jurisdiction beyond the territory of India in view of the decision of a learned member of the Tribunal in Prerna Singh vs. Commissioner of Customs (Import-II), Mumbai, 2020 (372) E.L.T. 610 (Tri.-Mumbai).

9. The submissions advanced by the learned counsel for the appellant and the learned authorized representatives appearing for the Department have been considered.

10. Leaned counsel for the appellant submitted that penalty could not have been imposed upon the appellant for the reason that the transaction noted in the show cause notice relating to sale and purchase of Melamine by M/s Asia Pacific Impex Pvt. Ltd. Hong Kong were done in Hong Kong and custom authorities had no jurisdiction under the Customs Act beyond the territory of India.

11. It would, therefore, be necessary to examine the relevant provisions of the Customs Act and the decisions.

12. Section 112 of the Customs Act deals with penalty for improper importation of goods and the same is reproduced below:

"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

(b) who acquires possession of or is in any way concerned in carrying, removing, depositing, harbouring, keeping, concealing, selling or purchasing, or in any other manner dealing with any goods which he knows or has reason to believe are liable to confiscation under section 111, 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 the value of the goods or five thousand rupees, whichever is the greater;

(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 :

Provided that where such duty as determined under sub-section (8) of section 28 and the interest payable thereon under section 28AA is paid within thirty days from the date of communication of the order of the proper officer determining such duty, the amount of penalty liable to be paid by such person under this section shall be twenty-five per cent. of the penalty so determined;

(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), to a penalty not exceeding the value of the goods or the difference between the declared value and the value thereof or five thousand rupees, whichever is the highest;

(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.”

13. A Division Bench of the Tribunal in *Shafeek P.K. vs Commissioner of Customs, Cochin*, 2015 (325) E.L.T. 199 (Tri.-Bang.), after placing reliance upon a decision of a learned Member of the Tribunal in *C.K. Kunhammed vs Collector of Central Excise & Customs*, 1992 (62) E.L.T. 146 (Tribunal), observed that the provisions of the Customs Act would extend only to the whole of India and could not be made applicable to a resident of Dubai. The relevant portion of the decision is reproduced below :

“9.1. Learned Advocate Shri Karan appearing for the appellant has assailed the impugned order on the point of jurisdiction as also on merits. It is the contention of the appellant that admittedly he is a resident of Dubai and has been staying there for over two decades. Even at the time of export of the alleged prohibited goods, i.e. in November 2012, he was not in India. His last visit to India was only in July 2012 and that too for a limited period of 7 days. He submits that inasmuch as the provisions of Customs Act, 1962 extend only to the whole of India, the same cannot be invoked and made applicable to a person who is resident of Dubai. For the above purposes, he relied upon Tribunal's decision in the case of *C.K. Kunhammed Vs. CCE [1992(62) ELT 146 (Tribunal)]* observing as under:-

6. I have carefully considered the submissions made before me. So far as appellant C.K. Kunhammed is concerned, admittedly he was abroad not only at the alleged time of commission of offence but also continued to be there even

later to the commission of offence and till date. Assuming for the purpose of argument that appellant C.K. Kunhammed had entrusted the gold biscuits in a foreign country, Doha that would not be an offence coming within the mischief of the Customs Act, 1962. The provisions of the Act extend only to the whole of India and not beyond India. Apart from it, the Collector of Customs & Central Excise, Cochin also has no jurisdiction under law to try a person in respect of something which was committed beyond India and in a foreign country which will not come within the mischief of the provisions of the Customs Act, 1962.....

9.2. Apart from above, he submits that there is a specific provision in Section 1(3) of the Foreign Exchange Regulation Act, 1973 specifically providing that the same applies to all citizens of India outside India and to branches and agencies outside India of companies or bodies corporate, registered or incorporated in India. Similar provisions are also available in Sections 3 and 4 of IPC whereas no such provision exists in the Customs Act, 1962. In the absence of any identical provisions in the Customs Act, the same cannot be invoked against a resident of a foreign country, even though an Indian.

13. Apart from holding in favour of the appellant on merits, we also find favour with the submissions of the learned advocate that the appellant being a resident of Dubai for the last 20 years, the provisions of the Customs Act, 1962 which only extend to the whole of India, cannot be invoked. For the said purpose, reliance by the learned advocate on the decision in the case of C.K. Kunhammed (supra) is appropriate. Revenue has not been able to show us any other decision laying to the contrary. As such, we find favour with the appellant on the point of jurisdiction also.

14. As a result, the impugned order is set aside insofar as the same imposes penalty of Rs.10 lakhs (Rupees ten lakhs only) on the appellant and the appeal is allowed with consequential relief.”

(emphasis supplied)

14. Another Division Bench of the Tribunal in *Guru Electronics Singapore Pte Ltd. vs Commissioner of Customs, Bangalore*, 2009 (240) E.L.T. 56 (Tri.-Bang.) also observed that since the provisions of the Customs Act extend only to the whole of India, proceedings against a company which is incorporated abroad cannot be sustained. The relevant portion of the decision is reproduced below :

“2. On a very careful consideration of the entire issue, we find that the company is incorporated in Singapore and the penalty is on the company. It is very evident that the provisions of the Customs Act extend to the whole of India. When this is the case, the authorities in India do not have jurisdiction over a company incorporated abroad. Hence the proceedings against a company which is incorporated abroad cannot be sustained in view of the lack of jurisdiction. Hence, we allow the appeal and set aside the penalty imposed by the Commissioner in the impugned order.”

(emphasis supplied)

15. Yet another Division Bench of the Tribunal in Commissioner of Customs, Central Excise & Service Tax, Hyderabad-II vs G.M.K. Products Pvt. Ltd., Customs Appeal No. 64 of 2010 decided on 20.01.2020 observed that at the relevant time, the Customs Act extended to the whole of India and not beyond the territorial jurisdiction of India.

16. A Division Bench of the Tribunal in Relax Safety Industries vs. Commissioner of Customs, Mumbai, 2002 (144) ELT 652 (Tri.-Mumbai) also observed that the Customs Act does not have extra territorial jurisdiction and the relevant portion of the decision is reproduced below :

"12. The other appeal (1776) by Himant Tank is against imposition of penalty on him of Rs. 25.00 lakhs. The Collector finds that he was a person living in the United States who was instrumental in supplying these goods, and in the misdeclaration of these goods. The contention on behalf of this appellant is that he was a resident in the United States and the provisions of the Customs Act would not apply to him. This contention has to be accepted as the Customs Act, 1962 does not have extraterritorial jurisdiction."

(emphasis supplied)

17. Thus, Division Benches of the Tribunal have repeatedly held that prior to its amendment on 29.03.2018, Customs Act was applicable only to the whole of India and not beyond India.

18. It is only by an amendment made on 29.03.2018 that the Customs Act has been made applicable also to any offence or contravention thereunder outside India by any person.

19. Learned authorised representative appearing for the department has however placed reliance upon the decision of a learned Member of the Tribunal in Prerna Singh. In this case, the issue of jurisdiction of the Customs Act and its application to the appellant situated outside India was primarily challenged. A perusal of the decision indicates that on behalf of the appellant reliance had been placed on the Division Bench judgment of the Tribunal in Shafeek P.K. and also on the decision of a learned Member of the Tribunal in C.K. Kunhammed but the learned Member confirmed the imposition of penalty upon the appellant. The relevant portion of the decision of the learned Member in Prerna Singh is reproduced below:-

"6. The issue of jurisdiction of Customs Act and its application to the appellant is primarily challenged in the present appeal, besides the legality of the Order of the Commissioner. Though the issue appears to be small it has wide ramifications. No Municipal law can ever be extended beyond the territorial boundaries of a country including its continental self and exclusive economic zone, whether or not there is express provision in the Act or statute to stretch the same beyond the country's territory since the same would amount to

encroachment upon the territorial authority of other State. It is therefore, defined in the Statute of the country that the said Act has its application within the territorial limits of the country. Likewise in case of penal statute, it is clearly defined that the "act or its violation" should have its effect and consequence within the territorial limit of the said country. If violation of provision of statute is committed within the said country, then the consequence in conformity to the legal provision of the country would ensue, no matter the violator is a resident of the country or an alien. It is, therefore, necessary to determine if the "act or its omission" committed is in violation of law and accordingly to punish the violator and not to determine if such violation has been committed by a legal person based in the Country or not.

7. Sovereign country asserts extra territorial jurisdiction in criminal laws though the principal basis of jurisdiction over crime is the territorial principle which permits a State in control of its territory to prescribe, adjudicate and enforce its law in the territory. The crime is said to be committed even partly in a state's territory when any essential constituent element itself is consummated there. Therefore, when an offence's adverse effect endangers a State's security or Government's function, extra territorial jurisdiction is enforced. Customs law from an international Criminal law prospective requires a consideration of the classification between Crime law and administrative law and the same is required to be placed under the administrative penal law though in a legal sense it is not penal but nevertheless retributive (Gist has been borrowed from the article titled "Criminal and Quasi-Criminal Customs Enforcement among the U.S., Canada and Mexico" written by Bruce Zagaris and David R. Stepp.)

8. In a nut-shell, the discussion above would reflect the principle that whether violation of an act has an adverse effect to the State's interest, the same violation is to be dealt by the State itself and the violator is to be penalised irrespective of his/her nationality or place of residence.. It is in this prospective, the jurisdiction of sovereign State is to be understood though the general understanding of jurisdiction is based on the nationality of the perpetrator since nationals of a State remained under the sovereignty and owe their allegiance to it even though they are free to travel and reside outside its territory. It is in this contest that Foreign Exchange Regulation Act 1973 prescribing application of it to all citizens of India residing outside India and to branches, agencies situated outside India is to be understood and also application of section 4 of IPC in the cited judgements of the above referred case laws. However, a comparison is required to be made between Section 3 & Section 4 of the Indian Penal Code concerning its application beyond the territorial jurisdiction of sovereign India. While Section 4 deals with application of IPC to extra territorial offences, Section 3 provides judicial power of punishment to any person for violation of any Indian law. Such primary distinction is not noticeable in the judgement of Shafeek P.K. v. CC, Cochin-2015 (325)ELT 199 cited Supra."

(emphasis supplied)

20. After having made the aforesaid observations, the learned Member also noted that the appellant had subjected to the jurisdiction of the Customs Act upon notice having been sent under section 108 of the Customs Act and concluded that penalty was rightly imposed.

21. It would be seen from a perusal of the aforesaid decision that though the Division Bench decision of the Tribunal in Shafeek P.K. and the decision of a learned Member of the Tribunal in C.K. Kunhammed had been placed, which decisions clearly held that at the relevant time the Customs Act extended only to the whole of India and not beyond the territorial jurisdiction of India, but a contrary view was taken. It appears that the amendment made in section 1(2) of the Customs Act with effect from 29.03.2018 was not brought to the notice of the learned Member.

22. The binding decision of the Division Bench of the Tribunal in Shafeek P.K. could not have ignored. In view of the Division Bench decision of the Tribunal, it has to be held that the Customs Act prior to 29.03.2018 was applicable only to the whole of India and not beyond the territorial jurisdiction of India. Penalty, therefore, could not have been imposed upon the appellant under section 112(a) of the Customs Act.

23. The impugned order dated 14.10.2019 passed by the Principal Commissioner, therefore, deserves to be set aside and is set aside. The appeal is, accordingly, allowed.

(Order Pronounced on 18.02.2022)