

(2021) 08 CESTAT CK 0041

In the Customs, Excise And Service Tax Appellate Tribunal

Case No : Customs Appeal No. 20075 Of 2021

Shri N A Jayaram

APPELLANT

Vs

Commissioner Of Customs, Mangalore-CUS

RESPONDENT

Date of Decision : 09-08-2021

Acts Referred:

Customs Act, 1962 — Section 114(i), 114AA, 129(E), 138B
Constitution of India, 1950 — Article 20

Citation : (2021) 08 CESTAT CK 0041

Hon'ble Judges : S.S. Garg, J

Bench : Single Bench

Advocate : Raghavendra, K.B.Nanaiah

Final Decision : Allowed

Judgement

1. The present appeal is directed against the impugned order dated 04.10.2019 passed by the Commissioner of Customs (Appeals), Bangalore whereby the learned Commissioner has reduced the penalty from Rs.10 Lakhs to Rs.5 Lakhs under Section 114(i) of the Customs Act, 1962.

2. Briefly the facts of the present case are that the officers of DRI, Regional Unit, Mangalore had received specific intelligence that five export containers cleared from ICD, Hassan on 20/21.01.2010 to Malaysia through Mangalore Port were not containing bentonite powder as declared by exporter M/s Pacific Impex, Bangalore but contained Muriate of Potash (hereinafter referred to as 'MOP'). MOP is a fertilizer, the export of which is restricted under the prevalent Foreign Trade Policy. Detailed investigation revealed that the appellant, Shri N.A. Jayaram of M/s Bilwa Labs, Bangalore had issued fictitious invoice for supply and transport of the export material i.e., MOP. Accordingly, a penalty of Rs.10,00,000/- was imposed on him vide Order-in-Original No. 05/2011 ADC dated 28.02.2011 as per section 114(i) of the Customs Act, 1962. Aggrieved by the OIO, the appellant had filed an appeal along with an application seeking waiver of pre-deposit of penalty and stay on the recovery proceedings before the Commissioner of

Customs (Appeals), Bangalore. The Commissioner of Customs (Appeals), vide Order No.25/2011 dated 08/09.11.2011 had found that there is a prima facie case against the appellant and directed the appellant to deposit a sum of Rs.5,00,000/- within fifteen days of the receipt of the said order. The appellant further sought for modification of the stay order. However, the Commissioner, Customs (Appeals) vide Order-in-Appeal No.232/2011 dated 21.12.2011 rejected the appeal on the ground that the appeal could not be heard in the absence of pre-deposit as per Section 129 (E) of the Customs Act, 1962 as ordered and further plea of the appellant was dismissed. The appellant subsequently filed an appeal before the CESTAT, Bangalore as mentioned at the first para above. In the light of the said order, since the appellant has paid Rs.1,00,000/- pre-deposit, the case has been taken up for decision on merits. Thereafter, the Commissioner, after following the due process, has reduced the penalty from Rs.10 Lakhs to Rs.5 Lakhs under Section 114(i) of the Customs Act, 1962. Hence, the present appeal.

3. Heard both the parties and perused the records.

4. Learned Counsel for the appellant submitted that the impugned order is not sustainable in law as the same has been passed without properly appreciating the facts and the law. He further submitted that the impugned proceedings were initiated on the basis of a SCN issued by the DRI Officers and the DRI Officers were not the proper officers during the relevant period of dispute and hence, the proceedings initiated by the DRI Officers was without jurisdiction and are vitiated by law. For this submission, he relied upon the following decisions:

? Commissioner of Customs Vs Sayed Ali, 2019 (26) GSTL 234 [Tri. 2011 (265) ELT 17 (SC)]

? Canon India Pvt. Ltd. Vs Commissioner of Customs, 2021 (376) ELT 3 (SC).

4.1. He also submitted that the imposition of penalty for abetment is hit by the principles of res judicata as the appellant has been issued with SCN dated 13.01.2011 for the same offence by Mysore Customs Commissionerate and the same has been decided finally by this Tribunal vide Final Order No.22738-22741/2017 dated 24.10.2017 by reducing penalty to Rs.2,50,000/- each under Section 114(i) and 114AA of the Customs Act, 1962. He further submitted that the proceedings on the same offence is hit by the principles of res judicata and barred by Article 20(2) of the Constitution of India. For this submission, he relied upon the following decisions:

? Punjab State Warehousing Corporation (conware) Vs CCE, Chandigarh-I, 2019 (26) GSTL 234 (Tri. Chan.)

? CCE, Customs & ST, Raipur Vs Shivalaya Ispat & Power Pvt. Ltd., 2018 (360) ELT 914 (Chattisgarh)

4.2. On merit also, the learned Counsel submitted that there is no evidence to prove the involvement of the appellant in the alleged commission of offences of

export of muriate of potash and on the other hand, the entire case is set up solely on the basis of statements of third party which cannot be treated as admissible evidence in the absence of cross-examination of the witnesses who made the statements in terms of Section 138B of the Customs Act, 1962. For this submission, he relied upon the following decisions:

? Indo Green Textile Pvt. Ltd. Vs Commissioner of Central Excise, Thane, Mumbai, 2007 (212) ELT 343 (Tri. Mumbai).

? Prasanta Sarkar Vs CC (Prev.), Mumbai, 2007 (209) ELT 220 (Tri. Mumbai).

? Rajendra Prasad Vs CC, Patna, 2001 (136) ELT 925 (Tri. Kolkatta).

4.3. He also submitted that it is clear from the statement of the appellant recorded on 09.02.2010, 08.04.2010 and 29.06.2010 that he had only issued invoices for supply of bentonite powder for a consideration. The bentonite powder is natural products and freely traded item and is not a manufactured commodity and the export of which is neither prohibited nor restricted. Mere issuance of invoices for a consideration for such goods is not an offence under the Customs Act and hence, the quation of imposition of penalty cannot stand in the eye of law. He also submitted that the invoices were addressed to a planter in Sakleshpur and he had no knowledge of alleged export of Muriate of Potash (MOP) in the guise of Bentonite powder and hence, the appellant cannot be held to be involved in abetting of the alleged export of prohibited item namely MPO. The appellant has not personally involved in export of prohibited goods by mis-declaration and hence, no penalty can be imposed on the appellant. He further submitted that the statements recorded by the DRI Officers do not have any evidentiary value and the said statements were obtained under threat and coercion which is clear from the statement of Shri Rajesh Balar though he was not involved in the alleged illegal export.

5. On the other hand, learned AR reiterated the findings of the impugned order.

6. After considering the submissions of both the parties and perusal of the material on record, I find that the only issue in the present case is whether the imposition of penalty under Section 114(i) of the Customs Act, 1962 on the ground of abetment of falsely signed the invoices used for improper exportation is justified under law. Further, I find that though the appellant has submitted that he has a good case on merit and submitted that Department has not been able to establish abetment of the appellant in the illegal export but he, during the course of argument, has relied upon the judgment of the Hon'ble Apex Court in the case of Canon India Pvt. Ltd. Vs Commissioner of Customs and Commissioner of Customs Vs Sayed Ali cited supra to buttress his argument that the SCN issued by the DRI is without jurisdiction because DRI Officers are not proper officers during the period of dispute and therefore, the SCN itself is bad in law. Further, I find that the imposition of penalty for abetment is also hit by principles res judicata as the appellant has been issued with SCN dated 13.01.2011 for the same offence by Mysore Customs Commissionerate and the

same was finally decided by this Tribunal vide Final Order No.22738-22741/2017 dated 24.10.2017 by reducing penalty to Rs.2,50,000/- each under Section 114(i) and Section 114AA of the Customs Act, 1962. Since on these two legal grounds, the SCN issued to the appellant as well as the imposition of penalty on him is not sustainable in law and therefore I set aside the penalty by relying upon the decision of the Hon'ble Apex Court in the case of Canon India Pvt. Ltd. Vs Commissioner of Customs cited supra. Hence, the present appeal is allowed by setting aside the impugned order.

(Order pronounced in Open Court on 09/08/2021)