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CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL, CHENNAI

REGIONAL BENCH – COURT NO. III

CUSTOMS APPEAL No. 41219 of 2013
[Arising out of Order-in-Appeal No.C.Cus.No.446/2013 dated 20.03.2013 passed by Commissioner of Customs (Appeals), Chennai]

M/s.V.R. Tools **Appellant**
No.7C, Maruthi Nagar,
Avarampalayam,
Coimbatore 641 006.

Vs.

The Commissioner of Customs, **Respondent**
Custom House,
Chennai 600 001.

APPEARANCE:

Shri Gokulraj L., Advocate
For the Appellant

Shri Vikas Jhajharia, Assistant Commissioner (Authorized Representative)
For the Respondent

CORAM :

Hon'ble Ms. Sulekha Beevi C.S., Member (Judicial)

Date of Hearing: 16.11.2021
Date of Pronouncement: 22.11.2021

FINAL ORDER No. 42437 / 2021

The appellant is aggrieved by the penalty of Rs.1,71,000/- imposed under Section 114AA of Customs Act, 1962.

2. Brief facts of the case are that appellant filed Bill of Entry dated 15.11.2011 for clearances of the imported goods namely

500 kgs. of Carbide Tips under Invoice No. TX 11102101 dated 21.10.2011 for a total value of USD 23750 FOB. On the basis of assessable value declared, the duty payable was Rs.3,26,215/-. The goods were classified under CTH 28499090. Thereafter, on 28.11.2011, the appellant made a request for amendment of the whole invoice itself including the change with regard to name of the supplier, unit price and the total value mentioned in the invoice submitted along with the Bill of Entry. Before permitting amendment, the goods were examined as per the directions of the Additional Commissioner (Group-2) and it was reported that the goods are rightly classifiable under CTH 8209. On a reasonable doubt, the case was transferred to SIIB. Statement of the importer Shri Kalyan Kumar of V.R. Tools (Appellant) as well as statement of Shri B. Manoj Kumar Nair, Marketing Staff of M/s.Green Channel Inter-Port Services Pvt. Ltd., (CHA) were recorded. It appeared to the department that the appellant sought for amendment of the declared invoice details with fabricated invoice details in order to evade payment of Customs duty. Subsequently, as the proceedings were initiated and the request for amendment of the details of the invoice was not considered by the Department, the appellant through his Advocate sought for re-export of the goods. After due process, the original authority vide Order-in-Original dated 24.12.2012 denied the request for re-export and imposed penalty of Rs.1,71,000/- on the importer under Section 114AA of the Customs Act, 1962. A separate penalty of Rs.58,000/- was imposed on Mr. S. Manoj Kumar Nair (CHA) under Section 114AA ibid. The proposal to penalize both the noticees under Section 117

was dropped. Aggrieved by this order, the appellant preferred an appeal before the Commissioner (Appeals) who vide order impugned herein rejected the appeal. The appellant is thus before the Tribunal.

2. The Learned Counsel Shri L. Gokulraj appeared on behalf of the appellant. He submitted that the appellant had placed an order for supply of 500 kgs. of Carbide Tips YG-8.2 S1203-25 at unit price of USD 14.18 per kg. and the total amount agreed was USD 7140. The foreign supplier with whom the appellant had entered into the transaction was M/s.Guangdong Yongjinxing (Group) Co. Ltd., China (hereinafter referred to as GY). The Ld. Counsel adverted to the Proforma Invoice dated 27.09.2011. Thereafter, the appellant made payment to the foreign supplier against the order placed by them through his bank on 10.10.2021. The bank statement showing foreign remittances made by the appellant for an amount of USD 7140 is produced. The appellant had entrusted CHA, M/s.Green Channel Inter-Port Services Pvt. Ltd. to get clearances of the goods. Only when the CHA informed the appellant that higher amount of duty has to be paid and the total value shown in the invoice is USD 23750, the appellant came to realize the mistake. So, the appellant requested for amendment of the details in the invoice since goods described in the invoice were the same. The appellant at that time was not able to get clarification and necessary documents from the foreign supplier. He pointed out that though the appellant had placed the order on GY, China, the invoices filed along with Bill of Entry seemed to have been issued by M/s.Tianxin Industrial Corporation

Cemented Carbide Tools Ltd. (hereinafter to referred to as TI). However, the consignee name was shown as the appellant-company (V.R. Tools). The quantity of the goods, description of the goods was also the same. However, the unit price was different. The total price shown was USD 23750. The appellant came to understand that a wrong invoice for higher value was sent by the sister concern of GY Group and the CHA had filed these documents along with the Bill of Entry after obtaining such documents from the shipping liner.

3. Later, on enquiries made with the supplier, it was confirmed vide their letter dated 29.03.2012 that the goods were supplied by M/s.TI, China the sister concern of GY Group and it was not intended to be supplied to the appellant. The appellant's foreign supplier then ordered appellant to re-export the goods so that the actual goods ordered by the appellant can be supplied. Though the appellant requested to permit reexport of goods, that was not allowed.

4. The appellants requested for reassessment of the goods by amending the documents under Section 149 of the Act on the bonafide belief that wrong invoice was sent by the foreign supplier. The request for re-export was denied by the authorities below without any valid reason.

5. Ld. Counsel asserted that it was a genuine mistake that the wrong invoice, packing list and documents pertaining to clearance of goods were obtained by the CHA from the shipping liner and filed along with Bill of Entry for clearance of the same. The CHA had not obtained documents from the importer (appellant). The

appellant came to know about the incorrect invoice only when the CHA asked them to pay a higher duty. The authorities below failed to accept that the mistake has occurred at the end of the foreign supplier who has sent wrong invoice through their sister concern.

6. The allegation by the department is that the appellant attempted to misuse provisions of Section 149 to undervalue the goods and evade customs duty. However, the penalty is imposed under Section 114AA. The allegation of misuse of Section 149 would not attract penalty under Section 114AA of the Act. The said Section 114AA provides for penalty in cases of use of false and incorrect documents. The Commissioner (Appeals) has observed that the declaration made in the invoice relates to the goods that have been imported and are correct. So also, the goods are not offending goods. In such circumstances, the allegation of use of false and incorrect documents so as to impose penalty under Section 114AA does not sustain. The Department also does not have a case that a false invoice was produced and assessment was made on the basis of such invoice. In the present case, the invoice that is filed with the Bill of Entry correlated with the goods that has been imported. However, the goods imported was not corresponding to the order placed by the appellant with the foreign supplier and on the impression that it was only a factual mistake, the appellant requested for amendment of their invoice. Only later, the appellant came to understand that the shipment was not as per the order placed by the appellant with the foreign supplier.

7. Ld. Counsel submitted that appellant has suffered a great deal. The goods for which the Bill of Entry was filed on 15.11.2011

have still not been permitted to be exported. Had the department allowed the said request for re-export, the appellant would have received the goods ordered by them. The appellant has suffered much financial hardship and mental agony. In such circumstances, the allegation against the appellant does not warrant imposition of penalty under Section 114AA of the Act. To support his contention, he relied upon the decision of the Tribunal in the case of *Commissioner of Customs, Sea, Chennai-II Vs Sri Krishna Sounds and Lightings* - 2019 (370) ELT 594 (Tri.-Chennai). He prayed that the appeal may be allowed.

8. Ld. Authorized Representative Shri Vikas Jhajharia appeared on behalf of the Revenue and supported the findings in the impugned order. He adverted to para-6 of the OIO and submitted that the first invoice issued for an amount of USD 23750 is the actual invoice and appellant ought to have paid duty on this invoice. Instead, the appellant tried to evade the payment of Customs duty by requesting for amendment of the invoice to a lesser amount. The second invoice is a fabricated one with the specific knowledge of the appellant. *Mens rea* of the appellant to misuse provisions of Section 149 is proved beyond doubt. The role of Mr.B. Manoj Kumar Nair for fabricating second invoice is also clear. Further, it is noted by the Commissioner (Appeals) that when the company profile of the supplier of the invoice for USD 23750 was examined on the website, it was seen that the said company is the original manufacturer of the goods imported and also deals with various other metallurgical products. The name of the supplier GY, does not figure in the list of Group Companies

producing such products. The said supplier is not dealing with the kind of goods imported by the appellant and the profile of supplier GY shows that they are manufacturer/dealers of sandal, slippers, shoes made of TPR, PVC, PU and EVA material; that there cannot be any nexus whatsoever between these two suppliers in so far as type of goods is concerned.

9. It is stated by Shri B. Manoj Kumar Nair, Marketing Staff of Green Channel Inter-Port Services Pvt. Ltd. (CHA) in his statement given on 06.03.2012 that he originally filed Bill of Entry dated 15.11.2011 based on the documents collected from the shipping liner. Along with the Bill of Entry, the invoice, packing list and all necessary documents are filed. However, there is no packing list produced by the appellant along with the invoice showing amount of USD 7410. This itself would show that the invoice for the amount of USD 23750 is the original invoice and that the appellant has created false invoice and requested for amendment of the invoice in order to evade Customs duty. The said act of the appellant attracts penalty under Section 114AA of the Customs Act, 1962. He prayed that the appeal may be dismissed.

10. Heard both sides.

11. The question arising for consideration in this case is whether the penalty imposed under Section 114AA of the Customs Act, 1962 is legal and proper. The issue revolves around the question whether the appellant had intended to undervalue the goods by requesting for an amendment of the invoice filed along with the Bill of Entry for clearance of the goods. The commercial invoice filed along with Bill of Entry is for an amount USD 23750 (FOB) dated

21.10.2011 and issued by the foreign supplier TI. The description of the goods in the said invoice is Carbide Tips YG-8.2 S1203-25. The quantity of goods is 500 kgs. However, the unit price is shown as FOB SHENZHEN as USD 47.50. The buyer name is shown as V.R. Tools (appellant herein). The invoice is issued by company TI, China. The contention of the appellant is that they had placed orders for goods with the company, GY, China. They have produced the proforma invoice dated 27.09.2011 issued by the Company, GY, China. It is also seen that the appellant has made foreign remittance of USD 7140 on 10.10.2011. The amount is shown to have been paid to the Company GY,China much before issuance of the commercial invoice dated 21.10.2011 for USD 23750 issued by Company TI, China. The Ld. A.R has strenuously argued that appellant has attempted to undervalue the goods by requesting for amendment of the invoice as to the amount stated in the invoice in order to evade Customs duty. The said argument does not impress me for the main reason that appellant has not requested for mere amendment of the amount in the invoice but also the amendment of the name of foreign supplier etc. as per the order placed by them. The appellant has submitted that they came to know about the mistake with regard to invoice only when the CHA informed them to pay duty to the tune of Rs.3,26,215/- which, according to them, was higher for the order placed by them. Thinking that it was a mistake in the invoice, they requested for amendment of the invoice amount as well as name of the foreign supplier. At this juncture, it has to be said that the description of the goods and the

quantity of the goods in both these invoices appeared to be the same.

12. Ld. Counsel has submitted that personal hearing was conducted on 23.12.2021 by the adjudicating authority. However, they could not provide necessary documents as they received explanation from their foreign supplier only on 26.12.2011. He adverted to the letter issued by the foreign supplier to the Company GY, China dated 26.12.2011. the said letter is reproduced as under :

"GUANGDONG YONGJINXING (GROUP) CO., LTD

Date :
Dec 26th, 2011

Have a Nice Day,

As per our telecon we had with you on Saturday, we are very regret to heard about the inconvenience caused by us at the time of clearance in customs your end for the reason of the wrong docs which was sent by our counter-part. We have very crystal clear about that our sister concern M/s.TIANXIN INDUSTRIAL CORP CEMENTED CARBIDE TOOLS LTD., who are looking only for our marketing division and they have no any knowledge about the shipping formalities, technical details and value of the cargo, etc.

Mr.Ja-Gadis-who is acting as a mediator between us is representing M/s.Tianxin Industrial Corp, sent the wrong invoice to you in his company's name without our knowledge. We think it may happened due to the absence of a proper communication between us at the time of shipment.

However, for your further action and smooth clearance of the cargo, we hereby once again sending a copy of our Proforma Invoice no:2011-9-27-1 Dt: September 27, 2011 and commercial Invoice No:2011VR01 Dt:Oct 5th, 2011 as per the payment received from you.

We extend our extreme sorry to the difficulties occurred by us and look for a long-term and fruitful association with you."

It is explained in the above letter that their sister concern M/s.TI China had sent the wrong invoice in the appellant's company name. The contention raised by the Ld. A.R is that on verification of the website, the company GY is not engaged in manufacture of the said products and that the company TI is not the sister concern of the company GY. Apart from the observations made in the impugned order, there is no evidence to support these findings. The letter issued by foreign supplier GY, China states that TI, China is their sister concern and there is no mistake in the invoice. Though the department alleges that invoice for USD 23750 is the original invoice and the invoice for USD 7140 is a fabricated invoice in order to undervalue the goods, it is not understood why the appellant should adopt the procedure under Section 149 to request for amendment if he intended to evade duty. Such request to the department would always put the documents to scrutiny. Would anyone take such risk if he intends to evade duty? The Ld.AR submitted that the appellant can thereafter remit the balance amount to the foreign supplier. There is no previous incidence put forth by the department to prove that the appellant has been indulging in such practice of requesting for amendment of invoice to a lower value and thereafter remitting the balance amount to the foreign supplier, in fact, in the present case, appellant has remitted only US 7140 to the foreign supplier and no further amount has been paid. In later correspondence, the foreign supplier, the Company GY, China has requested the appellant to reexport goods so that they can send the goods actually ordered by

the appellant. The letters issued by the Company GY, China dated 29.03.2012 is as under :

"Guangdong Yongjinxing (Group) Co., Ltd.

North High tech field, Economic development testing Zone, Chaozhou, Guangdong-52100,China

DATE : 29.03.2012

To

M/s.V.R.TOOLS
No.7C MARUTHI NAGAR,
COIMBATORE-6.

Dear Mr.R.Kalyana Kumar

We totally frustrated in clearance and re ship the merchandise of Carbide tips Shipped to you under B L No.0LC11100323CHEN dt.31st OCTOBER 2011. Which was wrongly shipped our shipping department by ignorance.

We annoyed of your activities and delay in progress to re ship the materials. Hence we instructed our shipping line to carry out from your end through proper channel and back to China. Upon confirmation from the shipping lines then only we can ship your merchandise."

"From,

Guangdong Yongjinxing (Group) Co., Ltd.

North High tech field, Economic development testing Zone, Chaozhou, Guangdong-52100,China

To:

Kind attn: Jannice Zhong/Gelen

Shenzhen D Port International Logistics Co. ltd

P 1102 Zhongly building South of RenMing Road,
Luohu District, Shgenzhen
Email:jannice@dportlogistics.com
Email:303508780@qq.com
Mobile:008615989315979 (Mr.Gelen)

Sub : **Return or Re-export of consignment Ref.BL No - OLC11100323CHEN Dt:31st Oct 2011.**

Dear Sir,

> This is with reference to above subject as well telecom discussion had with you, we shipped the consignment under booking reference **BL No - OLC11100323CHEN** Dated:31st Oct 2011 which is wrongly shipped to the buyer M/s.VR Tools, Coimbatore, Tamilnadu, India, hence we kindly request your line to organize necessary steps to bring back the said cargo with proper channel back to the origin in this regards we nominate you to handle this shipment."

Although the appellant requested for permission to re-export goods this was declined by the lower authority. It can be seen that appellant has not received the goods for which he paid US 7140 to the foreign supplier.

13. This apart, from the statement given by Mr. B. Manoj Kumar Nair, Marketing Staff of CHA, it is seen that he filed Bill of Entry on the basis of documents collected from the shipping liner and not from the appellant (importer). Had the CHA collected documents from the importer also before filing Bill of Entry, he would have come to know about the mismatch and would not have filed Bill of Entry in such manner. As per the Customs Broker Regulations, the CHA has to obtain documents from the importer before filing the Bill of Entry. The shipping liner receives goods from various suppliers. The goods imported as per the invoice for an amount of USD 23750 which was wrongly sent by TI, China to the appellant, contained invoice, packing list and necessary documents to file the Bill of Entry. The CHA has filed Bill of Entry on the basis of these documents without obtaining from the importer's copy. Only when the CHA informed the appellant to pay duty, did they realize there is some mistake with regard to invoice. Further as already stated, the Bill of Entry was filed on 15.11.2011 and appellant had requested for amendment on 29.11.2011. The immediateness of

the appellant in requesting for amendment on realising the difference in the invoice would show that mistake was a genuine one. It is also to be noted that the said mistake has not occurred on the side of the appellant but at the end of the foreign supplier. Department has not made any effort to obtain clarification or to ascertain from the foreign supplier as to whether appellant had placed for orders for US 7140 or USD 23750.

14. After appreciating the facts and the documents placed before me, I have to conclude that it was a genuine mistake of issuing wrong invoice which has been used by the CHA to file the Bill of Entry. The wrong invoice of USD 23750 was not given by the appellant, but the same was collected by CHA from the shipping liner. The appellant cannot be implicated for such mistake by imposing penalty. Moreover, the penalty imposed under Section 114AA is attracted only when there is deliberate falsification of documents in order to get undue benefit. The Tribunal in the case of *Commissioner of Customs, Sea, Chennai-II Vs Sri Krishna Sounds and Lightings* (supra) observed as under :

> **"6.** The Ld. AR has submitted that the Commissioner (Appeals) has set aside the penalty under Section 114AA for the reason that penalty has been imposed by the adjudicating authority under Section 112(a) and therefore there is no necessity of further penalty under Section 114AA. I find that this submission is incorrect for the reason that in the impugned order in paras 7 and 8, the Commissioner (Appeals) has discussed in detail the provision with regard to Section 114AA. It is seen stated that as per the Taxation Laws (Amendment) Bill, 2005, introduced in Lok Sabha on 12-5-2005, the Standing Committee has examined the necessity for introducing a new Section 114AA. The said Section was proposed to be introduced consequent to the detection of several cases of fraudulent exports where the exports were shown only on paper and

> no goods crossed the Indian border. The said Section envisages enhanced penalty of five times of the value of the goods. The Commissioner (Appeals) has analyzed the object and the purpose of this Section and has held that in view of the rationale behind the introduction of Section 114AA of the Customs Act and the fact that penalty has already been imposed under Section 112(a), the appellate authority has found that the penalty under Section 114AA is excessive and requires to be set aside. Thus, the penalty under Section 114AA is not set aside merely for the reason that penalty under Section 112(a) is imposed. After considering the ingredients of Section 114AA and the rationale behind the introduction of Section 114AA, the Commissioner (Appeals) has set aside the penalty under Section 114AA."

15. From the foregoing, I hold that penalty imposed against the appellant cannot sustain. The impugned order is set aside. Appeal is allowed with consequential relief, if any.

(Pronounced in court on 22.11.2021)

(**SULEKHA BEEVI C.S.**)
Member (Judicial)

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