

**Customs, Excise & Service Tax Appellate Tribunal
West Zonal Bench At Ahmedabad**

REGIONAL BENCH- COURT NO. 1

Customs Appeal No. 12900 of 2013-DB

(Arising out of OIA-382/2013/CUS/COMMR-A/KDL Dated-24/05/2013 passed by Commissioner of CUSTOMS-KANDLA)

Mgm Tradelink Pvt Ltd

Plot No. 46, Sector-1a,
Gandhidham, Gujarat

.....Appellant

VERSUS

C.C.-Kandla

Custom House, Near Balaji Temple,
Kandla, Gujarat

.....Respondent

APPEARANCE:

Shri. R. S. Sharma, Advocate for the Appellant

Shri. Shri. Himanshu P Shrimali, Superintendent (AR) for the Respondent

**CORAM: HON'BLE MR. RAJU, MEMBER (TECHNICAL)
HON'BLE MR. SOMESH ARORA MEMBER (JUDICIAL)**

Final Order No. A/ 11040 /2023

DATE OF HEARING: 24.04.2023
DATE OF DECISION: 28.04.2023

Somesh Arora

The present proceeding emanates from Order-In-Original bearing No: MP & SEZ/05/ADC/SS/Gr.-IV/2012-2013 dated 26.09.2012 passed by the Additional Commissioner, which on appeal was largely upheld by the Commissioner (Appeals) vide in order dated 24.05.2013.

2. On 18.7.2028 the appellant filed a refund claim for refund of Rs. 2,90,212/- which was rejected vide Order-in-Original No. KDL/75/FAK/AC/Ref/MPSEZ/08-09 dated 11.11.2008 by Assistant Commissioner (Refund), Mundra who held that the goods CTH 72163200 is eligible for concessional rate of duty @5% as per Sr. 190B of Notfn No.21/2002-Cus but since the appellant did not challenge the assessment order which has become final the Refund is not admissible.

3. Against rejection of refund claim; the appellant filed an appeal before Commissioner of Customs(Appeal), Kandla who vide Order- in-Appeal No. 421/2009/Cus/Commr(A)/KDL dated 17.9.2009 rejected the appeal holding that the assessment of subject bill of entry being unchallenged has attained finality and the assessment cannot be reopened.

4. Against rejection of appeal related to refund claim; the appellant filed an appeal before CESTAT which vide Final Order No.A/837/WZB/AHD/2010 dated 29.6.10 held that there was an assessment order on the bill of entry itself and in view of Hon'ble Supreme Court's judgment in the case of Priya Blue Industries the appeal was rejected.

5. Additional Commissioner, Custom House, Kandla vide Order-in- Original No.MP & SEZ/05/ADC/SS/Gr-IV/2012-13 dated 23.10.2012 rejected the classification of goods under CTH 72041000/72044900 and ordered classification under 72163200 of the First Schedule of Customs Act, 1975. The declared value was rejected and re- determined and fixed as USD 550 PMT (Rs. 47,35,574/-) and ordered for confiscation of imported goods and imposed redemption fine of Rs.17,00,000/- under Section 125(1) of Customs Act, 1962 and confirmed the demand for differential duty of Rs. 9,25,427/- and impose penalty of Rs 9,25,427/- under section 114A of the Customs Act, 1962.

6. The appellant filed appeal with Commissioner(Appeal) who vide (P- 22 Order-in-Appeal No. 382/2013/Cus/Commr(A)/KDL Dated Appeal 24.5.2013; held that there was no mens rea and that it was a case where the appellant had not exercised due diligence to ensure that misdeclaration is not effected; and reduced Redemption Fine from Rs. 17 Lakh to Rs. 12 Lakh and held that adjudicating authority has wrongly imposed penalty under Section 114A and modified the penalty imposed on the appellant from Rs 9,25,427/-

under Section 114A of Customs Act, 1962 to Rs. 4 Lakh under Section 112(a) of the Customs Act, 1962.

7. Aggrieved by the aforesaid order, the appellant has filed the present appeal, *inter alia*, taking ground that imposition of penalty of Rs. 4 Lakhs under Section 112(a) is not sustainable as they were never afforded opportunity to rebut it. In the Order-In-Appeal, the Commissioner levied the same under Section 112(a) as it could not find any *mens rea*, as was required as per the Order-In-Original which imposed penalty under section 114A. There was no show cause notice in the proceeding. The party has also contested imposition of fine of Rs. 12 Lakhs on the ground that market inquiry to check whether the redemption fine exceeded the market price as reduced by duty chargeable thereon, has not been conducted and therefore without such inquiry high arbitrary redemption fine could not have been imposed. The Advocate also, took various grounds regarding finality of assessment as well as two proceedings having been undertaken. He submitted that the modification in order regarding imposition of penalty as well as quantum of redemption fine by the Commissioner in accordance with provision of Section 128A (3) was improper and therefore, order is unsustainable in law.

8. Learned AR on the other hand relied upon order-in-Appeal and stated that all issues have been extensively dealt with by Commissioner (Appeals) including issue of final assessment and present proceedings being unrelated, as these arise from the proceedings under Section 124 of the Customs Act, 1962 and that the learned Commissioner (Appeals) has moved on from penal Section 114 to Section 112 simply to impose lesser penalty on the appellants under Section 112(a), wherein there is no requirement of *mens rea* and also considering that the goods which actually got imported were of quite high value which was accepted. The redemption fine was quite reasonable and therefore sustainable.

9. We have gone through the case law,(cited) as well as rival submissions. We find that the show cause notice was waived and enhancement of value was accepted by the appellant only, while seeking clearance of the goods. We, find merit in the submission made by the appellant, on the point of action in *personam*, that the Commissioner should not have imposed penalty under Section 112(a),while giving finding of the non- imposition of penalty under Section 114A, due to lack of *mens rea*. We find that such a course of action could have only been done by affording full opportunity to the appellant, including in relation to justification or otherwise of quantum of penalty, which as per records does not appear to be the case. Even under section 128 A(3) cited in the impugned order, Commissioner (Appeals) while deviating from show cause notice/Order-In-Original is required to do natural justice based inquiry before doing modification of this nature. Imposition of penalty u/s 112(a) therefore does not appear proper in the facts of this matter.

9.1 Since the goods imported were in the nature of offending goods having been mis-described in the Bill of Entry, the *action in rem* is still required to be legally scrutinised. It is a fact that, while imposing redemption fine no market inquiry to arrive at the correct quantum was done. The higher side of the imposable redemption fine as per Section 125 of the Customs Act,1962 is dependent upon such determination. However, with in this highest limit, redemption fine as a norm can be imposed to nullify profit likely to be earned through goods held liable to be confiscated. The decision of the Apex Court in 2011 (270) ELT 631 (S.C) in the matter of Commissioner of Customs Mumbai Vs. Mansi Impex also mentions that no hard and fast rule can be laid down for fixing quantum of redemption fine but the same has to be done, depending upon facts and circumstances of each case and cannot be done arbitrarily or as a precedent following the ratio of percentage of other case. At this belated stage, we find that the statutory course of

ascertaining the market price and reducing it by duty chargeable may not be feasible. However, the transaction value taken by the department and accepted by the appellants seeking release of goods was taken of Rs. 47 Lakhs approximately and as against this, the declared value was of Rs. 22 Lakhs and appellant had paid the total duty of approx. Rs. 12 Lakhs. The Commissioner (Appeals) has accepted that there has been a mistake and not deliberate misdeclaration. Accordingly, the intent to do import to earn profit out of it has to be construed as absent. A later date compromise with the foreign exporter leading to acceptance of offending goods, therefore is also a factor for consideration.

10. We also find that since, the matter pertains to year-2008, the remand at this stage may not serve any useful purpose. As the facts of the matter indicate a wrong dispatch, but the goods were eventually cleared at the behest of the appellants who agreed to take the release of goods even at the enhanced value, indicates that margin of profit even after paying duty was present. We, therefore, are inclined to reduce the redemption fine to a reasonable level at his stage, while upholding the confiscation of offending goods. Accordingly, we reduce the redemption fine to Rs. 4 Lakhs. However, in the facts of the matter, we set aside the penalty of Rs. 4 Lakhs imposed under Section 112(a) by the order of Commissioner (Appeals).

11. Order is modified accordingly. Appeal is partly allowed.

(Pronounced in the open court on 28.04.2023)

(RAJU)
MEMBER (TECHNICAL)

(SOMESH ARORA)
MEMBER (JUDICIAL)