

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
WEST ZONAL BENCH AT AHMEDABAD**

REGIONAL BENCH – COURT NO. 03

Customs Appeal No. 291 of 2012-SM

[Arising Out Of OIA-160/2012/CUS/COMMR-A-/KDL Dated-10/09/2012 Commissioner of Commissioner of CUSTOMS-KANDLA]

Jindal Fibres

Plot No. 49 & 58, S.No. 2,
Kandla Special Economic Zone, Gandhidham
Kutch,Gujarat

.....Appellant

VERSUS

C.C.-Kandla

Custom House,Near Balaji Temple,
Kandlagujarat

.....Respondent

APPEARANCE:

Shri. Rahul Gajera, Advocate for the Appellant
Shri. P. Ganesan, Superintendent (AR) for the Respondent

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

FINAL ORDER NO. A / 11507 /2023

DATE OF HEARING:23.06.2023

DATE OF DECISION:13.07.2023

SOMESH ARORA

Appellant an SEZ Unit at KASEZ filed following Home Consumption Bills of Entry for clearance of goods in DTA declaring as "Mix mutilated rags" & "Old and Used mutilated rags" falling under CTH 6310 (BCD 5%):

- i. BE no. 6954 dated 24.5.2011-27.400 MT
- ii. BE no. 6955 dated 24.5.2011 - 13.700 MT
- iii. BE no. 8049 dated 23.6.2011-90 MT

2. Officers of SIIB carried out examination and found 64.280 MTs of old and used clothes classifiable under CTH 6309 (BCD 10%) and held a view

that the said goods have been misdeclared and are liable for confiscation under the provisions of section 111(d) & (m) of the Act and importer is liable for penalty under section 112(a) of the Act. The officers placed the goods and five trucks carrying the goods under seizure.

3. Mr. Rakesh Singh, Government approved valuer determined the fair value of goods as Rs. 50,90,000/- and based on which differential duty was determined as Rs.7,06,028/-

4. The appellants vide their reply accepted their negligence and took full responsibility to pay fine/penalty and differential duty and waived SCN and personal hearing in the matter. The appellant submitted that incident occurred on account of negligence by junior staff.

5. The appellant deposited the entire amount of liability as adjudged and intimated to the appellant i.e..

i. Differential duty of Rs. 7,06,028/-

ii. Redemption Fine of Rs. 10,000,00/-

iii. Penalty of Rs. 4,00,000/-

iv. Redemption Fine on Trucks Rs. 1,75,000/-

5.1 OIO was issued in which it was held that appellant had wilfully misdeclared old and used clothes in the guise of cotton wiper with an intention to evade the customs duty. In that view it was ordered as follows:

i. Confiscate 64.280 Mts of old and used clothes under the provisions of section 111 (d) & (m) of the Act;

ii. However, I give an option to the importer to redeem the impugned goods on payment of redemption fine of Rs. 10,00,000 under section 125 of the Act;

iii. And five trucks on payment of Rs. 35,000 each in addition to payment of appropriate duties and other charges.

iv. Impose penalty of Rs. 4,00,000/- under section 112(a) of the Act;

V. Reject the declared value and re-determined the total value as Rs. 50,90,000 under Rule 9 of the Rules.

vi. Fine and penalty shall be paid in excess of applicable duty

5.2 OIA was passed upholding OIO; holding that *mens rea* is not relevant for liability to confiscation and penalty when the goods were found to be misdeclared. Aggrieved by the impugned order of Commissioner (Appeals) , appellants have filed the present appeal.

6. At the outset appellant submitted that the appellant is not contesting, duty and redemption fine on goods. Contest is only to penalty of Rs. 4,00,000/- under section 112(a) and redemption fine of Rs. 175,000 on conveyance,

6.1. The appellant submits that the stand taken by the appellant right from the investigation stage that there was no wilful misdeclaration; remains uncontroverted. It has been the submission of the appellant that their head office is at Panipat and their Unit at KASEZ was being supervised by junior staff, that appellant imported goods in to KASEZ in the normal course and after segregating only mutilated goods are removed and cleared into DTA. However, due to lack of supervision, the staff at KASEZ, inadvertently, cleared certain quantity of un mutilated clothes in five trucks. Learned adjudicating authority has given no reasons for holding that misdeclaration was wilful and further refrained from imposing penalty under section 114A and learned Commissioner (appeals) has not disputed the said stand of appellant but went on to hold that for liability of redemption fine and penalty no mens rea is required. It is thus established that even according to

department there was no wilful misdeclaration resorted to by the appellant; consequently imposition of penalty under section 112(a) is required to be set aside. The appellant in this regard relied upon the decision of this Hon'ble Tribunal in the case of MGM Tradelink Pvt Ltd - 2023 (5) TMI 50-CESTAT AHM.

6.2 It was submitted that entire amount of duty and penalty as ascertained by the proper officer was paid before issuance of OIO.

6.3 It is submitted that there is a statutory bar in imposition of penalty under sub-section 2 of section 28, where entire liability of duty as ascertained by the proper officer stands paid before issuance of notice itself.

6.4 Without prejudice to the aforesaid submissions, assuming for the sake of argument that misdeclaration in the bill of entries was wilful, even in that event penalty under the amended sub-section 5 of section 28 would have to be restricted to 15% of the differential duty which works out far lesser than Rs. 4,00,000/- imposed upon the appellant.

6.5 In view of above submission, penalty requires proportionate reduction. It is settled law that quantum of penalty should be commensurate to the offence.

7. Further, Section 111 does not contemplate imposition of redemption fine on conveyance. Secondly, there is otherwise also no reason given justifying imposition of redemption fine on trucks which were used for conveyance.

8. Learned Commissioner (appeals) clearly erred in going beyond the scope of case as was made in OIO by holding that Trucks were used for concealment. There is no case made out in OIO that trucks were used for concealment; trucks were used for conveyance only. Without prejudice to the aforesaid submissions, considering the mitigating factors as submitted

herein above; reduction in redemption fine to the minimum would be just and fair.

9. As against this, learned AR justified levy of penalty and redemption fine on the basis of detailed reasoning given in the order of Commissioner (Appeals). He placed reliance on various rulings to emphasize the point that once the goods are misdeclared and become liable to confiscation, penalty under Section 112 becomes justified. He placed reliance in this regard of 1993 (67) E.L.T 25 (S.C.) in the of PINE CHEMICAL SUPPLIERS VERSUS COLLECTOR OF CUSTOMS has also on VARSHA PLASTICS PVT. LTD VERSUS UNION OF INDIA as reported in 2009 (235) E.L.T. (193) (S.C.) as well as on the decision of Hon'ble High Court of Kerala in the matter of COMMISSIONER OF CUSTOMS VERSUS P.V. UKKRU INTERNATIONAL TRADE as reported in 2009 (235) E.L.T. 229 (Ker.).

10. Considered, the submission made by the appellant that goods i.e. "Old and used clothes" cleared by misdeclaring the same as Mix Mutilated Rags appeared due to mistake of employee is untenable as clearing in DTA at the relevant time would have normally brought a good profit to the appellant as the Foreign Trade Policy at the relevant time had made the Old and Used clothes as the restricted item and working in SEZ environment where checks and examination are kept at the minimum, greater care on the part of the appellant was warranted. Therefore, the Commissioner (Appeals) has rightly, relying upon the decision of the Apex Court in 1993 (67) E.L.T. 25 (S.C.) held that the goods are misdeclared, Section 112 gets attracted. This is specially so, when violation are accepted by the concerned party. Accordingly, the penalty under Section 112 (a) is sustainable, however, the same is reduced to Rs. 1,00,000/- (one lakh only), as the Apex Court has also held that only quantum of penalty remains justiciable. Accordingly, the penalty under Section 112(a) is sustained but stands reduced to Rs.

1,00,000/-, similarly, the redemption fine of Rs. 35,000/- each on five truck clearing , carrying goods when intercepted is also reduced to Rs. 10,000/- each from Rs. 35,000/-, as the truck were not offending goods, per se. It is made clear that apart from above, the other elements of duty and penalty etc. were not contested before this court.

11. Appeal is partly allowed in the above terms

(Pronounced in the open Court on 13.07.2023)

(SOMESH ARORA)
MEMBER (JUDICIAL)

PRACHI