

**IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL,
KOLKATA**

REGIONAL BENCH – COURT NO.2

Customs Appeal No. 75668 of 2014

(Arising out of Order-in-Original No. KOL/CUS/PORT/28/2014 dated: 31.03.2014 passed by Commissioner of Customs (Port) Custom House, 15/1 Stand Road, Kolkata-700 001)

Shri Ajay Kumar Singh

(M/s. Babhravi Exim Services, C/o. Sri Yogendra Bahadur Singh, MIG 4, GA 2, Block 4, Greenwood Park, New Town, Kolkata-700 156.)

...Appellant

VERSUS

Commissioner of Customs (Port), Kolkata

(Custom House, 15/1, Strand Road, Kolkata-700 001.)

...Respondent

APPEARANCE :

Present for the Appellant : Mr. B.N. Pal, Advocate

Present for the Respondent : Mr. Faiz Ahmed, Authorized Representative

CORAM:

HON'BLE MR. R. MURALIDHAR MEMBER(JUDICIAL)

HON'BLE MR. RAJEEV TANDON MEMBER (TECHNICAL)

FINAL ORDER No...76458/2023

DATE OF HEARING :16.08.2023

DATE OF PRONOUNCEMENT :24.08.2023

PER: RAJEEV TANDON

The Appellant is the partner of the Customs Broker firm Babhravi Exim Services and has assailed the Order in Original for imposition of penalty on

him under Section 112(a) and Section 114AA of the Customs Act 1962¹.

2. Briefly stated, the Directorate of Revenue Intelligence (DRI) on the basis of intelligence gathered, regarding illegal import of Chinese Batteries declared as Calcium Carbonate (Coated) kept surveillance on goods imported at the Haldia Port. DRI observed a consignment imported by M/s. S.D. Commotrade International, declared as Calcium Carbonate which was enabled by the present appellant through their Customs Broker firm Babhravi Exim Services.

3. The case of the appellant is that they had been engaged as authorized CHA by M/s. S.D. Commotrade International vide letter dated 01.10.2012 signed by one Mohammed Asgar said to be proprietor of M/s. S.D. Commotrade International. They contend that even prior to the issuance of the authorization letter they were approached by one Shri Raj Kumar Kothari and his business partner Shri Vinod Lachwani regarding import of Calcium Carbonate and that they had come to know of Mohammed Asgar only through an authority letter which was given to the appellant alongwith all requisite documents for import and movement of the container to the CFS by Shri Raj Kumar Kothari. Subsequently, they sought for KYC documents related to Mohammed Asgar through Shri Raj Kumar Kothari. The Bill of Entry was filed for the subject import of Calcium Carbonate with the DEPB Group on 01.11.2012 and was assessed on the next day. They add, that, as the clearance of goods warranted ADC's, NOC, they had sent an e-mail on 03.11.2012 at 10.23 A.M to the importer

1. The Act.

seeking the ADC NOC related papers duly filled alongwith the original copy of the certificate of origin. The appellant submits that in response, vide an e-mail on the very day at 12.45 P.M they received directions to recall the bill of entry. Subsequently, when the goods were examined by the DRI on 05.11.2012 in the presence of Mohammed Asgar, Raj Kumar Kothari and the appellant, they were found to be not conforming with the declaration/description of the goods and were seized being mis-declared goods.

4. We have heard the rival submissions on both sides at great length. It is the submission of the learned advocate that they were not at fault and were bonafidely of the view and acted in good faith. It is their contention, that if at all, their only lapse was handing over of blank documents for facilitating the movement of the cargo trucks from the port to the premises of AL Logistics the CFS.

5. It is an admitted position that the subject goods were found to be mis-declared upon examination. Thus goods declared as Calcium Carbonate were found to be AA size, 1.5 volt Chinese batteries of Zabai Brand and Ammonium Chloride, under import in each of the two containers CAXU-6973083 and TCKU-2667544 arrived on 21.09.12 at Haldia.

6. From the case records and investigations it has come out that Mohammed Asgar was actually a car driver of Shri Vinod Lachwani (Proprietor of PDM Impex) and the brain behind the import of mis-declared goods was Raj Kumar Kothari, also a business partner of Vinod Lachwani. In fact Raj Kumar Kothari, had been toying with the idea of the said mis-

declared import and had been sending feelers to the appellant for past few months and was admittedly in discussions with him in this regard, since the middle of June 2012. It is also an admitted position that Ajay Kumar Singh, the appellant herein had never personally interacted or met with Mohammed Asgar, till mid October 2012 for whom they were engaged as the CHA. The appellant admits that they were in constant touch with Shri Raj Kumar Kothari, for the impugned import. It is also an admitted position that all requisite documents like invoice, packing list, MSD sheet were handed over to the staff of the CHA firm of Shri Ajay Kumar Singh, Babhravi Exim Services by Shri Raj Kumar Kothari. Despite, this the appellants claims that he was under the bonafide belief that the goods under export were Calcium Carbonate and not mis-declared. The appellant admits to have discussed the subject imports with, both Raj Kumar Kothari and Vinod lachwani several times in the latter's office located at Muzaffar Ahmed Sheet, Kolkata.

6.1. For greater clarity of the factual matrix, it is necessary to advert to the following para of the notice:

"18. (f) Shri Ajay Kumar Singh, partner and main person of Babhravi Exim Services (CHA) though claimed in his statement dated 07.11.2012 that his firm was engaged as authorized Custom House Agent by M/s. S.D. Commotrade International having been authorized by one Md. Asgar stated to be the proprietor of the said firm under an authorization letter dated 01.10.2012, but it appears that he knew everything about the consignment in question. He stated in his statement dated 07.11.2012 that he was first contacted by Shri Raj Kumar Kothari who approached him directly at the Custom House Agent's hall on or around 14th or 15th June 2012. Since that date up to the end of September 2012, the said job was

discussed by him two/three times with Mr. Vinod Lachwani and Mr. Raj Kumar Kothari at their office situated at 110A, Muzaffar Ahmed Street, 4th floor, Kolkata-700016. He also stated that during their discussion both Mr. Lachwani and Mr. Kothari always impressed upon him that the item to be imported was Calcium Carbonate but those two persons never mentioned the names of Md. Asgar/S.D. Commotrade International. It was also admitted by him in his statement dated 07.11.2012 that the essential import documents related to the subject job, i.e. Invoice, Packing list, MSD sheet etc. were first handed over to his office staff by Mr. Kothari on 28.09.2012 and then only he came to know that the name of the importing firm was M/s S.D. Commotrade International. Even he knew Mr. Vinod Lachwani and Mr. Raj Kumar Kothari were the main persons and on receipt of the authorization letter dated 01.10.2012 he came to know the name of the proprietor or the concerned importing firm as Md. Asgar. Md. Asgar was brought to his office by Mr. Kothari during middle of October, 2012. Even he admitted that he was confirmed that Md. Asgar did not know the A, B, C, of the modus operandi in the smuggling activities related to the subject import consignment and he was also confirmed that the actual importer of the above consignment was Shri Vinod Lachwani and Shri Raj Kumar Kothari. He also admitted that he was tried to be convinced by the said actual importers i.e. Mr. Lachwani and Mr. Kothari to co-operate with the Customs Department. He also admitted that among other documents, the purported sale agreement dated 21st September 2012 signed between M/s. S.D. Commotrade International and M/s. Soltex petroproducts Ltd., 57/1, Malipanchgara Street, Liluah, Howrah-711204 was handed over to him in connection with prospective sale of the consignment under seizure. From the above it appears Shri Ajay Kumar Singh knew that Shri Vinod Lachwani and Shri Raj Kumar Kothari were the main person behind the consignment in

question who instructed and discussed the matter with him several times and later brought Md. Asgar in the picture with an obvious ill-motive and handed over authorization letter signed by said Md. Asgar. From the facts above, it appears Shri Ajay Kumar Singh aided and abetted Mr. Vinod Lachwani and Mr. Raj Kumar Kothari to import mis-declared items for evasion of Custom Duty for some monetary benefit for his acts and omissions rendering the goods liable to confiscation as mentioned in earlier para (e) Shri Ajay Kumar Singh appear to be liable to penalty under Section 112(a) of the Customs Act. 1962.”

(Emphasis Supplied)

7. In their defence, the learned advocate has stoutly relied upon an e-mail dated 03.11.2013 which they had mailed after assessment of the bill of entry on 2nd November. He refers to the copy of their letter dated 01.11.2013 addressed to the Safety Officer, Kolkata Port Trust requesting to indicate the nature of the goods, whether hazardous or non hazardous and advert to the Safety Officer's reply thereon that the goods Calcium Carbonate as non-hazardous. The appellant further contended that subsequently they received on 06.11.2013, a communication from Mohammed Asgar, proprietor of M/s. S.D. Commotrade International, stating that they had received a phone call from their foreign seller that by mistake wrong containers were shipped and they were thus constrained to abandon and relinquish the title to the goods hence, they sought to re-call the bill of entry.

8. For better appreciation of the legal position, it would be appropriate to dwell into Section 112 and Section 114AA. The same are thus indicated below:

"112. Penalty for importer 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, to a penalty [not exceeding the duty sought to be evaded on such goods or five thousand rupees], whichever is the greater;*

[(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 hereinafter 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.]

114-AA. Penalty for use of false and incorrect material.- *If a person knowingly or intentionally makes, signs or uses, or causes to be made, signed or used, any declaration, statement or document which is false or incorrect in any material particular, in the transaction of any business for the purposes of this Act, shall be liable to a penalty not exceeding five times the value of goods."*

9. It is observed that the show cause notice has been issued to the appellant for aiding and abetting the aforesaid illegal imports liable for confiscation (para 18 of the notice) and apparently no notice has been issued to the appellants for imposing penalty under Section 114AA. Thus, it is a foregone conclusion that having not been put to notice for imposition of penalty under Section 114AA, the appellant cannot be subjected to such a penalty, howsoever grave the case be. We are thus convinced that to the extent of imposition of penalty under Section 114AA of the act, the impugned order is bad in law and cannot be sustained.

10. Scrutiny of the evidence on record, the circumstances, repeated meetings between Raj Kumar Kothari and Vinod Lachwani with the appellants and all related facts only point to one thing that Shri Ajay Kumar Singh was contacted and handed over the stipulated job of clearance by Shri Raj Kumar Kothari and Shri Vinod Lachwani, and not the alleged actual

importer. This is even though the importation of the consignment was being discussed with the appellants from the middle of June 2012 and had been so done two/three times in past, finally materializing only during the month of November 2012. Given this factual input, and as a CHA aware of the day to day transactional requirements and clearance practices coupled with their obligations under the statute is sufficient enough to dispel the theory of being fooled and led into the aforesaid innocently. The import of Calcium Carbonate was discussed by the appellants with Raj Kumar Kothari and Vinod Lachwani repeatedly, even in the latter's office. Having come to know about the firm M/s. S.D. Comtrade International and Md. Asgar (Proprietor) on receipt of the authorization letter dated 01.10.2012 as early as in the middle of October, nearly two weeks before filing of the Bill of Entry, there is nothing to show by way of measures taken by the appellant as regards subject import vis-à-vis their promising role as a Customs Broker. Thus to believe the theory of innocently taken for ride with no mistake at the appellant's end belies complete logic. In fact, once having come to know the actual and complete identities of the importer and those brokering the deal viz. Raj Kumar Kothari and Vinod Lachwani and despite that signing of blank documents for shifting of the cargo from the port to the CFS or non-seeking of KYC particulars directly or undertaking appropriate verification, are nothing but a conscious act of omission and commission. If one were to believe in the appellant's defence, propriety would have demanded that the appellant ascertains the veracity of the matter. On the contrary, they ought to have confronted Raj Kumar Kothari and Vinod Lachwani as to why they did not wish to bring the actual importer to be in the forefront. As admitted by the appellants they went ahead and the bill of entry was filed on 01.11.2012 which was assessed to duty on 02.11.2012.

11. In view of above, it is quite evident that A.K. Singh by his wilful act, despite being aware of the whole factual matrix, has deliberately and consciously played alongwith the key conspirators of mis-declared imports and contributed to the illegal importation of battery and ammonium chloride by filing B/E mis-declaring the imported cargo as calcium carbonate. The appellant has this certainly rendered himself liable to penal action under Section 112(a) of the Customs Act 1962.

12. For the foregoing discussions and in view of our findings recorded above we find that no case is made out for waiver of penalty imposed under Section 112 (a) of the Act. However, in so far as the appellants have not been made noticee for imposition of penalty under Section 114AA of the Act, no penalty on them can therefore be imposed under the said section. We therefore discharge the appellant from the penalty imposed on them under Section 114AA of the Customs Act. The aforesaid Order in Original passed by the Learned Commissioner is upheld but for the said modification and the penalty imposed under Section 112(a) calls for no interference. The appeal filed is disposed of in the aforesaid terms.

(Pronounced in the open court on...24.08.2023.)

Sd/-
(R. Muralidhar)
Member (Judicial)

Sd/-
(Rajeev Tandon)
Member (Technical)

K.M.