

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 30.04.2015

CORAM:

THE HONOURABLE MR.JUSTICE R.SUDHAKAR
and
THE HONOURABLE Ms.JUSTICE K.B.K.VASUKI

Civil Miscellaneous Appeal No.2057 of 2011
& M.P.No.1 of 2011

Commissioner of Customs (Import)
Custom House,
No.60, Rajaji Salai,
Chennai - 600 001.

... Appellant
versus

1. M/s.Billiards Point,
Shed No.75, Anniah Reddy Industrial Estate,
FCI Godown,
Bangalore - 560 016.
2. Hon'ble Customs, Excise and
Service Tax Appellate Tribunal,
South Zonal Bench, Shastri Bhawan Annexe,
I Floor, 26, Haddows Road,
Chennai - 600 006.

... Respondents

PRAYER: APPEAL filed under Section 130 of the Customs Act against the order dated 17.4.2009 made in Final Order No.461 of 2009 on the file of the Customs, Excise and Service Tax Appellate Tribunal, South Zone Bench, Chennai.

For Appellant : Mr.Vikram Ramakrishnan

For Respondents : Mr.S.Jaikumar - R1
R2 Tribunal

J U D G M E N T

(Delivered by R.SUDHAKAR,J.)

This Civil Miscellaneous Appeal filed as against the order dated 17.4.2009 made in Final Order No.461 of 2009 on the file of the Customs, Excise and Service Tax Appellate Tribunal, South Zone

Bench, Chennai was admitted by this Court on the following substantial questions of law:

"(i). Whether the Customs, Excise and Service Tax Appellate Tribunal was justified in setting aside the penalty imposed under Section 112(a) of the Customs Act, 1962 without giving any reasons, when the adjudicating authority imposes deterrent penalty in order to stop the imports in violation of the Exim Policy (2002-2007)?

(ii) Whether the Customs, Excise and Service Tax Appellate Tribunal was justified in reducing the redemption fine imposed under Section 125 of the Customs Act, 1962 without giving any reasons, when the adjudicating authority imposes fine in order to stop the imports in violation of the Exim Policy (2002-2007)?"

2. The brief facts of the case are as follows:

The first respondent/importer had imported second-hand capital goods on the basis of bill of entry dated 09.09.2004 and sought clearance of the same without any import licence. The Customs Authorities, after examination of the goods and consideration of the report of the Chartered Engineer, came to the conclusion that the goods were more than 10 years old and it should be imported only under specific licence as required under Exim Policy 2002-2007. Since the goods were imported without any licence, the same were confiscated under Section 111(d) and (m) of the Customs Act, 1962 read with Section 3(3) of the Foreign Trade (D&R) Act, 1992 and penalty was imposed under Section 112(a) of the Customs Act. Since the importer insisted for early adjudication by waiving the show-cause notice and personal hearing, the Adjudicating Authority, vide order-in-original, confiscated the goods with an option for redemption thereof on payment of a fine of Rs.3.00 lakhs and imposed penalty of Rs.1.50 lakhs. Aggrieved by the said order of the Adjudicating Authority, the importer has filed an appeal before the Commissioner (Appeals), who, after hearing the submissions made set aside the confiscation and penalty holding that the new foreign trade policy 2004-2009, which came into effect from 01.09.2004, did not restrict import of second-hand capital goods. As against the said order of the Commissioner (Appeals), the Department has filed an appeal before the Tribunal. The Tribunal after considering the submissions made remanded the matter back to the Commissioner (Appeals) for fresh disposal after examining the issue in terms of Section 111(d) of the Customs Act. On remand, the Commissioner (Appeals), re-adjudicated the order and upheld the confiscation, redemption fine and penalty. The importer pursued the matter before the Tribunal. The Tribunal passed an order reducing the redemption fine and setting aside the penalty holding as follows:

"2. I have heard both sides. I find force in the submission of the appellants that the Commissioner (Appeals) was only required to consider the provisions

of Section 111(d) namely as to whether the import of second-hand capital goods without specific licence was valid. There was no mandate from the Tribunal regarding readjudication of the question of misdeclaration of value so as to warrant confiscation under Section 111(m). I, therefore, set aside the finding of the Commissioner (Appeals) regarding contravention of Section 111(m).

3. As regards contravention of Section 111(d), the issue stands settled as the relevant date for determination of violation of law is the date of shipment of the goods as held by the Tribunal in *Soni Ispat Ltd. Vs. Commissioner of Customs (Import), Nhava Sheva* [2007 (217) E.L.T. 274 (Tri.-Mumbai) which has been upheld by the Hon'ble Bombay High Court's decision reported in 2008 (229) E.L.T. A.182 (Bom.) [the Revenue's appeal against the Tribunal's order was rejected by the High Court]. I, therefore, uphold the contravention of Section 111(d). In the case of *Sony Ispat* (supra), the Tribunal has reduced redemption fine from Rs.8 lakhs to Rs.1 lakh and set aside the penalty and following the ratio of the above decision, I reduce the redemption fine to Rs.50,000/- (Rupees Fifty Thousand only) and set aside the penalty. The appeal is thus partly allowed."

3. Aggrieved by the order of the Tribunal reducing the fine and cancelling the penalty, the Department is before this Court.

4. Heard learned standing counsel appearing for the appellant and the learned counsel appearing for the Department and perused the materials placed before this Court.

5. Since the issue involved in this appeal centers around Sections 111(d), 111(m) and 112(a) of the Customs Act, it is apposite to extract the same for better clarity:

"SECTION 111. Confiscation of improperly imported goods, etc. - The following goods brought from a place outside India shall be liable to confiscation:

- (a)
- (b)
- (c)

(d) any goods which are imported or attempted to be imported or are brought within the Indian customs waters for the purpose of being imported, contrary to any prohibition imposed by or under this Act or any other law for the time being in force;

.....

(m) any goods which do not correspond in respect of value or in any other particular with the entry made under this Act or in the case of baggage with the declaration made under section 77 in respect thereof, or in the case of goods under transshipment, with the declaration for transshipment referred to in the proviso to sub-section (1) of section 54;"

6. Section 112 of the Customs Act provides for imposition of penalty, which reads as follows:

"SECTION 112. Penalty for improper 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 hereafter 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."

7. A plain reading of Section 112 of the Customs Act makes it clear that once confiscation is ordered, levy of penalty is automatic.

8. In the present case, the goods were contracted and shipped on 01.08.2004, i.e., when the import of second-hand machinery was not permitted. However, the bill of entry was filed on 09.09.2004. The importer taking advantage of the new Foreign Trade Policy, 2004-09, submitted that at the time of filing bill of entry, new policy had come into force permitting importation of second-hand machinery, the importer is entitled to import the second-hand machinery without any specific licence.

9. The Tribunal, having upheld the contravention of Section 111(d) of the Customs Act, had merely referred to the decision in the case of Soni Ispat Ltd. Vs. Commissioner of Customs (Import) and reduced the redemption fine from Rs.3.00 lakhs to Rs.50,000/- and set aside the entire penalty. There is no reason why the Tribunal had reduced the fine and set aside the entire penalty.

10. This Court in the case of Commissioner of Customs (AIR), Chennai V. A.P.Pinherio reported in 2014 (306) E.L.T. 349 (Mad) 2014 306 ELT, while upholding the penalty, held as follows:

"12. We have perused the show cause notice as well as the order of the Original Authority. It has been pointed out by the Department that the entire importation has been handled by the Managing Director of the company and all the correspondences between various Authorities were personally handled by the Managing Director and therefore, he was fully aware that the firm had imported the subject goods. Therefore, he cannot plead ignorance of the facts. Further more, the respondent had not questioned the order of confiscation or the imposition of duty. Thus, the order of confiscation has attained finality and there is no discretion vested under Section 112(a) of the Customs Act and there is no requirement to record a finding that there has been any wilful misstatement or concealment or suppression of facts, as is found under Section 114A of the Customs Act.

13. In such view of the matter, the Tribunal was not right in setting aside the penalty imposed on the Managing Director under Section 112(a) of the Customs Act. Further, it has to be pointed out that under

Section 112(a), any person, 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, shall be liable to pay penalty not exceeding the duty sought to be evaded on such goods or five thousand rupees, whichever is greater. Thus, considering the facts, the Managing Director is liable to pay penalty, which is fixed at Rs.5,000/-.

11. The Tribunal has not passed a speaking order justifying the reduction of fine and setting aside the penalty. Hence, we have no other option except to remand the matter back to the Tribunal to reconsider the issue afresh. Accordingly, the matter is remanded back to the Tribunal for passing a reasoned order. This Civil Miscellaneous Appeal is disposed of. No costs. Consequently, M.P.No.1 of 2011 is closed.

Sd/-

Asst.Registrar (CS III)

/true copy/

Sub Asst. Registrar

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To

The Customs, Excise and Service Tax Appellate Tribunal,
South Zone Bench, Shastri Bhavan Annex,
1st Floor, No.26, Haddows Road,
Chennai - 600 006.

Copy to

The Section Officer
VR Section,
High Court, Madras

1 cc to Mr.S. Jaikumar, Advocate, Sr. 24884

1 cc to Mr.Vikram Ramakrishnan, Advocate, Sr. 24186

C.M.A.No.2057 of 2011
& M.P.No.1 of 2011

JP (CO)
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