

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATE : 26.02.2015

CORAM

THE HONOURABLE MR. JUSTICE R.SUDHAKAR
AND
THE HONOURABLE MR. JUSTICE R.KARUPPIAH

C.M.A. Nos.2592 and 2593 of 2007

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

... Appellant in both the Appeals

- Vs -

1. M/s.Royal Impex,
CM Plaza No.4,
Harris Road, Pudupet,
Chennai - 600 002.

... 1st respondent in CMA.2592/2007

2. Shri.G.Ravikumar,
Prop. M/s. Royal Impex,
CM Plaza No.34,
Harris Road, Pudupet,
Chennai - 600 002.

... 1st respondent in CMA.2593/2007

3. Customs, Excise & Service Tax Appellate Tribunal,
South Zonal Bench,
Shastri Bhawan Annexe,
1st Floor, 26, Haddows Road,
Chennai - 600 006.

... 2nd Respondent in both the Appeals

Appeals filed under Section 130 of the Customs Act against the Final Orders No.1142, 1143 dated 28.11.2006 passed by the Hon'ble Customs, Excise, Service Tax Appellate Tribunal, Chennai received on 03.01.2007 and restore the O-in-O. No.1258/2003 dated 08.12.2003 passed by the Commissioner of Customs, Chennai.

For Appellant : Mr. Rajnish Pathiyel
For Respondents : Mr.Murugappan for R1
R2-Tribunal

COMMON JUDGMENT
(DELIVERED BY R.SUDHAKAR, J.)

These Civil Miscellaneous Appeal are filed by the Revenue as against the order passed by the Tribunal in Final Order No.1142 dated 28.11.2006 was admitted by this Court on the following substantial questions of law:

1. Whether in the facts and circumstances of the case, the order of confiscation of the imported goods under Section 111(f) and 111(i) of the Customs Act, 1962 is invalid in law?

2. Whether in the facts and circumstances of the case, the consequential imposition of penalty under Section 112(a) of the Customs Act, 1962 on the importer G.Ravikumar is vitated?

2. Before we could proceed further in the matter, the facts that are relevant to the present case will have to be first recorded.

The assessee is engaged in the business of importing and selling film rolls used in cars. The consignment of Retro Reflective Stickers arrived at the Port of Chennai in Line No.297 IM No.1311 by a Vessel, Tiger Star V-866 on 23.01.2001. Based on the information, the DRI took up investigation. The consequence of such search revealed as follows.

i) M/s.Royal Impex had imported a consignment declared to contain 75 Plastic Sticker Rolls (Retro-reflective sheetings) and declared the weight as 1530 kgs. The vessel arrived on 23.1.2001.

ii) Originally the container was declared as FCL and subsequently M/s. Tata NYK Transport Systems Ltd. Chennai was requested to declare the container as LCL and the gross weight of the consignment was indicated as 1530 Kgs on 12-1-01.

iii) On examination, the consignment was found to contain 675 retro reflective sticker rolls each measuring 150 ft x 2 ft with a total weight of 6650 kgs instead of the declared 75 rolls with a gross weight of 1530 kgs.

iv) Shri. Ravikumar, Proprietor of M/s. Royal Impex in his statement on 2-6-01 admitted that he had deliberately misdeclared the number of rolls and as well as the weight with an intention to clear the undelcared quantity without payment of duty.

v) Shri Ravikumar had submitted a representation

on 7-8-01 to the State Advisory board wherein he had submitted that the gross weight of 1530 Kgs as indicated in the Bill of lading had been corrected by foreign supplier as 7530 Kgs. However, M/s. Tata NYK transport Systems Ltd. Chennai in their letter dated 18-8-01 had informed that they had not received any request for amendment to the manifest either from the importer or the CHA.

vi) No Bill of Entry was filed by the importer. Therefore, the DRI officers arrived at the value of Rs.67,66,578/- by applying Rule 8 of Customs Valuation Rules, 1988.

vii) The false declaration of weight and quantity in the Bill of Lading had been done by the importer in collusion with the foreign supplier as admitted by Shri Ravikumar in his statement dated 2-6-01.

Therefore, a show cause notice dated 24.08.2001 was issued by the Directorate of Revenue Intelligence (DRI) to Ravikumar, Proprietor of M/s. Royal Impex to show cause as to why,

(i) the assessable value of 675 Numbers of retro-reflective sticker rolls should not be fixed at Rs.68,34,244/-;

(ii) the goods under seizure should not be confiscated under Sections 111(d), 111(f) and 111(i) of the Customs Act, 1962;

(iii) penalty should not be imposed on him under section 112(a) of the Customs Act, 1962.

3. M/s. Royal Impex (first respondent in C.M.A.No.2592 of 2007) replied to the show cause notice on 23.10.2002. It was contended that no bill of entry was filed. Therefore, the question of mis-declaration does not arise. It was further contended that Section 111(d) of the Customs Act is not applicable to the goods, as they are not prohibited or restricted items. They also contended that the other provisions like 111(f) and 111(i) of the Customs Act are not applicable to the facts of the present case. It is also stated that the quantity mentioned was a mistake and subsequently new bill of lading was filed, rectifying the error. The import manifest is filed by the steamer agent based on the Bill of lading and the importer has no role to play. It is also stated by the assessee that the statements given before the D.R.I were not voluntary and the issue of valuation was not raised and rebutted by the assessee. The counsel who has now argued before us appeared for the personal hearing before the Adjudicating Authority.

4. The objection raised by the assessee that Section 111(d) of the Customs Act is not attracted is accepted by the Commissioner, as there are no findings rendered thereon. However, the Commissioner held that the provisions of Section 111(f) and 111(i) of the Customs Act were attracted to the facts of the case and the same has been dealt with in detail. Accordingly, the Commissioner passed an order confiscating 675 Rolls of Retro-Reflective Stickers under Section 111(f) and 111(i) of the Customs Act, 1962 and allowed redemption, after increasing the value. He also imposed a penalty of Rs.10,00,000/- on G.Ravikumar @ Sticker Ravi under section 112(a) of the Customs Act, 1962.

5. Aggrieved by the said order of the Adjudicating Authority, both Shri.G.Ravikumar and M/s. Royal Impex filed appeals before the Tribunal contending that the confiscation does not arise in this case, primarily, on the ground that the Bill of Entry is not yet filed by them and hence the charge of mis-declaration has to fail as the event did not occur. Accordingly, the assessee cannot be made liable for the mistake in the Bill of Lading or Import Manifest.

6. After hearing both parties, the Tribunal allowed the appeals holding that the importer never filed any Bill of Entry declaring the value and other particulars of the goods. The Tribunal further held that the order of the Commissioner who sustained the absurdity of the DRI proceedings by an even absurd order has to be set aside.

7. Aggrieved by the order of the Tribunal, the Revenue is before this Court on the above-mentioned substantial questions of law.

8. Learned Standing Counsel appearing for the Revenue reiterated the contentions raised before the Commissioner and pleaded that the Commissioner's order clearly justified the confiscation under Sections 111(f) and 111(i) of the Customs Act, 1962.

9. Heard learned Standing Counsel appearing for the Revenue and the learned counsel appearing for the assessee and perused the materials placed before this Court.

10. Since the questions of law admitted by this Court did not cover the issue involved in these appeals, the same require to be re-framed. Hence, the following questions of law are re-framed for consideration:

- i) Whether the order of the Tribunal setting aside the order of confiscation passed under Section 111(f) and 111(i) of the Customs Act is erroneous?
- ii) Whether the order of the Tribunal setting

aside the levy of penalty under section 112-A of the Customs Act as against the importer G.Ravikumar is erroneous?

11. It is seen from the order of the Adjudicating Authority that neither any Bill of Entry was filed for more than two months, nor any one came forward to make a claim of the goods in question that were brought under Line No.297 and IM No.1311 on 23.01.2001. Only on 7.4.2001, i.e., after more than two months, the DRI officer seized the consignment on the basis of specific information that the weight of the goods were under declared. On verification, it turned out to be true. The actual quantity found was 6650 kg as against the declared quantity of 1530 kg of retro-reflective sticker rolls. In the import manifest, the number of rolls were found to be 675 as against the 75 rolls shown in the records. The Commissioner has held that the misdeclaration in the Import Manifest is a rectifiable error, only if the mistake is unintentional and the importer establishes to the satisfaction of the proper officer that the error occurred because of mistake, the import manifest can be amended with the approval of the proper officer. This is to ensure that the unscrupulous importer does not mis-declare and seek to amend the import document if they are caught. In the course of investigation, the DRI found that the importer knowing well that the goods mentioned in the Bill of Lading are lesser, maintained silence for more than two months after the arrival of the vessel, even though law mandates that the importer should clear the goods within 30 days of import.

12. In the course of investigation, the Department found that the supplier and the buyer are not new to each other. This is buttressed by the statement recorded from Ravikumar under Section 108 of the Customs Act on 2.6.2001, where he admits that he is aware of the mis-declaration. His statement is clear to the effect that his intention was to mis-declare the quantity and to evade the payment of duty. It is to be noted that the statement is refuted and retracted after four months. Further investigation in the case revealed that Tata NYK Transport Stems Ltd., in their letter dated 18.08.2001 had stated that they have not received any request for amendment of manifest either from the importer or from the CHA. The DRI, after noticing that the importer has been importing from the same supplier and the subject import is not the first consignment from the same supplier, placed before the adjudicating authority that it is a clear case of mis-declaration of import documents.

13. The details of the nature of such erroneous dutiable goods is not mentioned in the import manifest. The excess goods found concealed in any manner before unloading is stated in the order of

the Commissioner in paragraph Nos.9, 10, 11, 12 and 13, which read as follows:

9. Further investigation has revealed that Tata NYK Transport Systems Ltd., in their letter dated 18.8.2001 had informed that they had not received any request for amendment of the manifest either from the importer or from the CHA. This letter has been received after seven months from the date of importation which again shows that the contention of the importer that the quantity shipped was mentioned wrongly is incorrect. No evidence has been produced by the importer, other than bland statements, to prove that the misdeclaration of weight took place because of genuine mistake on the part of the shipper. I have also noticed from the records that the importer has been importing from the same supplier and the subject import is not the first consignment. It is difficult to believe that the supplier who is in Singapore did not choose to correct the mistake made in the Bill of Lading for more than two months, and that too, when he had supplied an excess quantity. It is also seen that the Invoice dated 11.1.2001 speaks of supply of 75 rolls valued at S\$ 11,137.50. It is also noticed that the packing details very clearly say that the import quantity is 5 cases and that in each case there are 15 rolls totally weighing 1530 Kgs, whereas the actual quantity received was 5 cases each containing 75 rolls totally weighing 6,650 kgs. However, I find that M/s. Royal Impex, in their reply to the Show Cause Notice had stated that there was a mistake in the bill of Lading and subsequently it was corrected to read 675 rolls weighing 7530 Kgs.

10. It is quite clear from the fact that the Bill of Lading had been amended to show 7530 Kgs, and 675 rolls rather than the correct quantity of 675 rolls and 6630 Kgs were done with an intention to show that there was probably a typographical error. Even the amended Bill of Lading only shows that the weight has been amended and not the No. of rolls which remain at 75 rolls.

11. It is also strange that while the quantity was amended in the Bill of Lading, none of the other things, including value, was amended.

It is extremely difficult to believe that a supplier can charge a higher amount for the same No. of rolls weighing 1/5th of the total weight. It is also noticed that the same supplier had been supplying the same consignment earlier too and the quantity supplied used to be about 2 cases each time.

12. However, the invoice details are not to be totally relied upon because of the fact that it was never produced to the department officially, but only recovered during the investigation. It is also to be noted that the order was placed in person and on that basis supply was made.

13. The fact that

(i) neither the Bill of Lading was amended nor any application made to the Steamer Agent for getting the import manifest amended.

(ii) no effort was made to file a Bill of Entry for more than two months, knowing fully well the provisions of Sec.28 of the Custom Act, 1962.

(iii) no reason has been given for the delay in filing the Bill of Entry.

(iv) Only the weight has been amended without changing anything else in the bill of Lading.

Show that whatever the importer is saying now is only an afterthought and the admission statement dated 2.6.2001 given by Shri G.Ravi Kumar reflects the factual position. In his reply to the Show cause Notice, Shri.G.Ravi Kumar had stated that his statement to DRI was not voluntary and mere statements are not sufficient to establish under-valuation. It is very important to note that Shri. Ravi Kumar has stated that mere statements will not be sufficient to establish under-valuation, but he has not stated as to what should be done about the under declaration of quantity and value in the subject consignment. He has also not explained as to why no application was made for amending the import manifest for more than seven months. He has produced an amended copy of the Bill of Lading without explaining why for more than two months no application was made to amend the import manifest and why no Bill of Entry was filed. It is strange that after investing a huge amount of money, no Bill of Entry was filed before the

Department to clear the goods for more than two months especially in view of the provisions of Section 48 of the custom Act, 1962. While the Bill of Lading was amended by the Shipper's Agent, if there is a mistake as regards quantity the amendment is made on the basis of a request made by the supplier and the importer. It is strange that no effort has been made in this regard.

13.2 In view of the above discussions, I hold that there is sufficient evidence on record to show that there was a clear understanding between the supplier and the buyer to quote a lesser quantity in the bill of Lading and also to give an impression to the Department that the quantity actually imported was less. Therefore, the provisions of Sec.111(f) is clearly attracted. As regards Sec.111(i), whatever found excess is taken to be as concealed. Especially, when it is an LCL container, if the officers happen to be lax in supervision and the custodian also co-operates, it is possible to get away with misdeclaration, even though the chances are remote. Concealment does not necessarily mean that there should be a false bottom or it should be covered by something else. Importation of excess quantity over and above what is declared in the bill of Lading is also concealment and therefore, I hold that Sec.111(i) is also attracted in this case. Therefore, the goods under seizure are liable to confiscation under Sec.111(f) and 111(i) of the custom act, 1962.

14. The Adjudicating Authority came to hold that Sri. Ravikumar was trying to be evasive of the whole import and did not even take steps to amend the import manifest for more than seven months as was observed by the Commissioner. The assessee, who has invested huge money, strangely did not even file the Bill of Entry before the Department for more than two months and tries to undo the wrongful act by saying that there was a mistake. The Commissioner, therefore, comes to hold that there was sufficient ground to come to the conclusion that the import is contrary to the provision under sections 111(f) and 111(i) of the Customs Act.

15. In paragraph 13.2 of the order of the Commissioner extracted supra, there is a clear finding that the dutiable goods, without being mentioned properly in the import manifest, were found concealed

with an intention to evade payment of duty. This act of the assessee/respondent is revealed in the course of investigation and by various conducts, as has been observed by the Adjudicating Authority. When the conduct of the assessee is to evade payment of duty, the provisions of Section 111(f) and 111(i) of the Customs Act get attracted even prior to the filing of Bill of Entry. It is not necessary that the Bill of Entry should be filed and that is a precondition for proceeding against a person, who is a importer, as defined under Section 2(26) of the Customs Act, 1962. Section 2(26) of the Customs Act reads as follows:

SECTION 2. Definitions. - In this Act, unless the context otherwise requires

(26) "importer", in relation to any goods at any time between their importation and the time when they are cleared for home consumption, includes any owner or any person holding himself out to be the importer

Once, the respondent falls within the scope of definition of importer and there is a violation of Section 111(f) and 111(i), in our considered view, the proceedings are justified and the order of the Commissioner, is in order.

16. We are of the considered opinion that the Tribunal erred in holding that since no Bill of Entry is filed to clear the subject import, there is no case of mis-declaration. The commissioner has not proceeded on the basis of Section 111(d) of the Customs Act. The Tribunal, however, misconstrued the appeal as one filed by the respondent in a case falling under section 111(d) which is not correct. It is a case of confiscation by invoking the provisions of Sections 111(f) and 111(i). Enormous material has been culled out by the Commissioner to justify invocation of Sections 111(f) and 111(i). The reasons given by the Commissioner on the basis of the admitted fact/statements and the documents established a case that the importers have, in fact, involved themselves in such an import which renders the goods liable for confiscation under sections 111(f) and 111(i) of the Customs Act. The Tribunal misdirected itself by holding that there is no question of mis-declaration as contemplated under Section 111(d), when the Commissioner has not proceeded with the matter in terms of Section 111(d) of the Customs Act. Hence, we have no hesitation to hold that the Tribunal order is erroneous.

17. If Section 111(d) is the basis of the adjudication order, we then probably would have accepted the reasoning of the Tribunal at first blush. But it is not so. When the evidence on record including the statement of the importer, clearly revealed a concerted effort to evade payment of duty in connivance with the shipper to show lesser

quantity of dutiable goods, it is certainly a case that falls under section 111(f) and 111(i) of the Customs Act. Hence, we have no hesitation to uphold and confirm the findings of the Adjudicating Authority. Accordingly, we find that the order of the Tribunal is erroneous. The department has not only proved the complicity of the importer in importing these goods in contravention of the provisions, but also proved that the importer has been regularly importing such goods.

18. Section 112(a) of the Act provides that in relation to any goods when any person does or omits to do any act, which act or omission would render the goods liable to confiscation under Section 111 of the act, he shall be liable to penalty not exceeding the value of the goods or five thousand rupees, whichever is greater in the following manner:

(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.

19. Since the goods are attempted to be improperly imported and that has been admitted by the importer, the consequence by way of penalty would follow. The Tribunal fell into error by stating that merely because the goods have been abandoned and bill of entry has not been filed, it is not a case for imposition of penalty. The right of a person to abandon the goods and seek exemption from payment of duty is under Section 23(2) of the act, but that does not absolve him of his liability to be proceeded against under the provisions of the act for any violation which renders the goods improperly imported and liable for confiscation. The penalty under Section 112(a) of the act is in relation to such conduct of improper importation of goods.

20. The plea of the importer that the import manifest is filed by the steamer and the importer has no role to play appears to be a fallacy. There is no explanation from the importer why the Bill of Entry was not filed or no effort was made to amend the import manifest for more than two months from the date of arrival of the vessel. At the first instance, as an importer, the first respondent chooses to abandon the goods. In the statement recorded by the customs authority, he has accepted that he had mis-declared the goods. The statement is not retracted. The complicity of the

importer in the improper import is, therefore, evident from the narration of facts as above.

21. Section 112 of the Act stands clearly attracted to the case of improper importation of goods by any person. The key words of Section 112(a) of the act are that in relation to any goods, if any person does or omits to do any act which act or omission would render such goods liable to confiscation under Section 111 of the Act, he shall be liable to pay penalty. In this case, the importer did not make a proper declaration in respect of the goods with an intent to evade payment of customs duty and, therefore, the consequence of penalty will flow automatically. In our firm view the Commissioner was justified in imposing penalty. We, therefore, answer the questions of law in favour of the Revenue and against the importer.

22. The Commissioner in his finding has clearly come to the conclusion, that the role of Sri.Ravikumar in such acts renders the goods liable to confiscation under Section 111(m). Therefore, penalty is also leviable. Hence, we have no hesitation to hold that such a levy of penalty is justified in the present case.

23. For the foregoing reasons, we pass the following order:

- (i) The questions of law reframed by this Court are answered in favour of the Revenue and against the assessee.
- (ii) The order of the Tribunal is set aside and the order of the Adjudicating Authority is restored.
- (iii) Consequently, the appeals filed by the Department are allowed. No costs.

Sd/-
Assistant Registrar

//True Copy//

Sub Assistant Registrar

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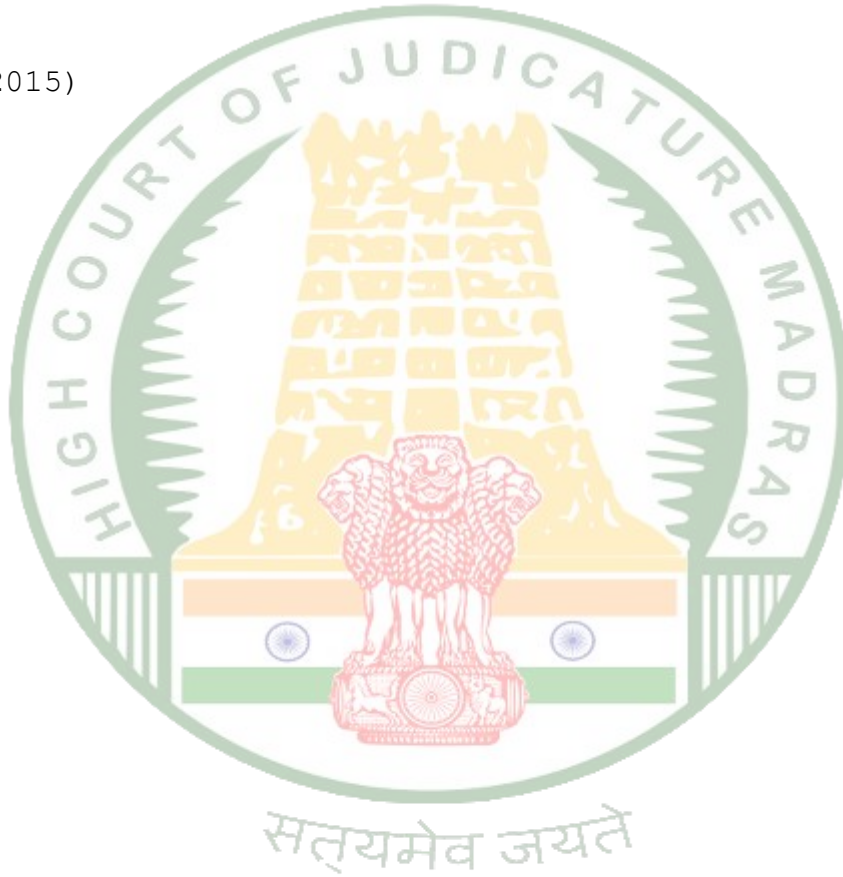
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+2cc's to Mr.Rajnish Pathiyil, Advocate, S.R.No.10972, 10970
+1cc to Mr.S.Murugappan, Advocate, S.R.No.10721

C.M.A.Nos.2592 & 2593 of 2007

JP (CO)
CA(07/04/2015)



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