

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATE : 13.03.2015

CORAM

THE HONOURABLE MR. JUSTICE R.SUDHAKAR
AND
THE HONOURABLE MRS. JUSTICE S.VIMALA

C.M.A. NO. 327 OF 2007

M/s.Novel Digital Electronics
No.122, Perambur High road
Perambur, Chennai - 12. ... Appellant

- Vs -

1. The Commissioner
Customs (Imports), Customs House
No.60, Rajaji Salai
Chennai 600 001.
2. The Customs, Excise & Service
Tax Appellate Tribunal
South Zonal Bench
Shastri Bhavan Annex Building
1st Floor, No.26, Haddows Road
Chennai, through its Asst. Registrar ... Respondent

Appeal filed under Section 130 of the Customs Act against the order dated 10.08.06 passed by the Customs, Excise & Service Tax Appellate Tribunal, South Zonal Bench, Chennai, made in Final Order No.727/2006.

For Appellant : Mr. Krishna Anand for
Mr.B.Satish Sundar

For Respondents: Mr. K.Mohanamurali for R-1

JUDGMENT
(DELIVERED BY R.SUDHAKAR, J.)

Aggrieved by the order of the Tribunal in allowing the appeal filed by the Revenue, the appellant/assessee is before this Court by filing the present appeal.

2. Though this appeal by the assessee was admitted as early as on 07.02.07, no substantial question of law was framed.

3. The facts, in a nutshell, are as hereunder :-

The appellant/assessee imported toys, viz., "Talking Parrot" classifying the goods under Bill of Entry No.28747 dated 3.6.97 under tariff heading 950380.01. The appraising group was of the view that the said goods is covered by Exim Code No.950349.09 and that it needed a Specific Import Licence. The plea of the appellant/importer is that the goods classified under tariff heading 950380.01 under exim code as 'other toys and models incorporating motor', though restricted, are allowed to be cleared under Special Import Licence. The Department took the view that specific import licence should be obtained for import of the said goods. The adjudicating authority was of the view that the goods imported are restricted items and consumer goods and not permitted to be imported without special import licence in accordance with the Public Notice issued. Since the importer did not produce a valid licence, it was held that the goods are liable for confiscation under Section 111 (d) of the Customs Act. Accordingly, the goods, valued at Rs.3,42,882/= were confiscated invoking Section 111 (d) of the Customs Act read with Section 3 (3) of the Foreign Trade (Development & Regulation) Act, 1992 with liberty to the assessee/appellant to redeem the same on payment of fine of Rs.6,80,000/= under Section 125 of the Customs Act and also imposed a penalty of Rs.68,000/= under Section 112 of the Act.

4. Against the said adjudicating order, the assessee preferred appeal to the Commissioner (Appeals), who passed an order in favour of the appellant holding that the classification of goods under tariff heading 950380.01, as pleaded by the appellant, is correct, which is more specific and that the classification as done by the department under the tariff heading 950349.09 as a toy incorporating motor is not correct.

5. The Department, aggrieved against such order, preferred appeal to the Tribunal. When the matter was taken up by the Tribunal for hearing, it appears that the issue on classification had been the subject matter of different views by the Tribunal and, therefore, the issue was referred to a Larger Bench in the case of Commissioner of Central Excise - Vs - Novel Digital Electronics (2006 (200) ELT 31 (Tri. LB)), wherein the Larger Bench of the Tribunal came to hold as under :-

"9. It will be noticed from the Exim Code of the relevant period that under the category of "Toys representing animals or non-human creatures", such toys which are other than stuffed fall under sub-heading 950349.00. Under that sub-heading, the import of toys of wood (950349.01) was free; import of toys of metal (950349.02) was restricted; import of other toys of plastic (950349.03), excluding 950310-950341, was restricted; and the import of "Others" (953049.09 i.e., other than those falling in

the preceding entries of the sub-heading 950349.00 was also restricted. Import of "other toys and models, incorporating a motor" (950380.01) was made free. It appears that earlier such imports were allowed under SIL.

10. In the present case, the motorized 'talking parrot' toy was made of plastic which was covered by fabric. Therefore, it was a toy covered by plastic and fabric. That would bring the said toy in the category "others" under the sub-heading 950349.09. In our opinion, therefore, "talking parrots" imported by the present respondent under the Bill of Entry No.28747 dated 3.6.97 would be classifiable under sub-heading 950349.09 and not under sub-heading 950380.01. Therefore, the ratio of the earlier decision of the Tribunal in CC - Vs - India Book House Ltd., decided on 11.12.2001 is, with respect, not correct and is therefore overruled. We hold that the Tribunal has, in Durga Toy Manufacturing Pvt. Ltd. - Vs - CC, Chennai, rendered on 10.4.2002 (Final Order No.448/2002) since reported in 2002 (144) ELT 699 (Tri.-Chennai), correctly classified the said goods, viz., 'talking parrot' toys incorporating motor under sub-heading 950349.09. The reference stands answered accordingly."

6. In view of the said decision of the Larger Bench, the Tribunal came to pass the following order :-

"The classification dispute in this appeal has been settled by the Tribunal Larger Bench as per Miscellaneous Order No.284/2006 dated 30.05.2006. Accordingly, the goods imported by the respondents, viz., a motorized toy "talking parrot" stands classified under ITC (HS) Heading 9503 49.09 as claimed by the Department. The importer (respondent) wanted the item to be classified under ITC (HS) Heading 9503 80.01. This claim has been rejected by the Larger Bench. Goods falling under ITC (HS) Heading 9503 49.09 were restricted for import during the material period. They were not importable otherwise than under specific licence. As the respondents did not produce any such licence, the original authority confiscated the goods under Section 111 (d) of the Customs Act with option for redemption on payment of fine of Rs.6.80 Lakhs. The authority also imposed a penalty of Rs.68,000/= on the party. This decision of the original authority was set aside by the learned Commissioner (Appeals), who chose to classify the goods under ITC (HS)

Heading 9503 80.01, for which no import licence was required. Now that the decision of the original authority stands upheld, we set aside the appellate Commissioner's order and allow this appeal of the Department."

Aggrieved against the said decision of the Tribunal, the assessee/appellant is before this Court by filing the present appeal.

7. Heard Mr. Krishna Anand, learned counsel appearing for the appellant/assessee and Mr. Mohanamurali, learned standing counsel appearing for the respondent/Department and perused the materials available on record.

8. When the matter was taken up for hearing, learned counsel appearing for the appellant/assessee fairly conceded that he is not canvassing the plea on confiscation of the goods, but only pleads in respect of the penalty stating that the issue of classification was the subject matter of debate in the proceedings before the Commissioner (Appeals) as well as before the Tribunal and all along the appellant/assessee was pursuing the matter under the bona fide belief that the claim as made by it was correct and, therefore, the invocation of Section 112 of the Act for imposing penalty is not justified. To support the said contention, learned counsel relied on the decision in the case of Akbar Badruddin Giwani - Vs - Collector of Customs (1990 (2) SCC 203 :: 1990 (47) ELT 161 (SC)), wherein, in similar circumstances, the Supreme Court set aside the penalty on a dispute arising on account of classification.

9. Though the appellant/assessee has raised three questions of law for consideration in this appeal, however, at the time of argument, he conceded that he is not canvassing those questions of law and would be satisfied if the penalty is set aside. In view of the said statement, this Court is not considering those questions of law, but is deciding the issue only on the question of penalty.

10. In Akbar Badruddin's case (supra), the Supreme Court had occasion to consider the issue of penalty imposed in similar circumstances and in the said decision held as under :-

"Before we conclude it is relevant to mention in this connection that even if it is taken for argument's sake that the imported article is marble falling within Entry 62 of Appendix 2, the burden lies on the customs department to show that the appellant has acted dishonestly or contumaciously or with the deliberate or distinct object of breaching the law.

60. In the present case, the Tribunal has itself specifically stated that the appellant has acted on the basis of bona fide belief that the goods were importable under OGL and that, therefore, the appellant deserves lenient treatment. It is,

therefore, to be considered whether in the light of this specific finding of the Customs, Excise & Gold (Control) Appellate Tribunal, the penalty and fine in lieu of confiscation require to be set aside and quashed. Moreover, the quantum of penalty and fine in lieu of confiscation are extremely harsh, excessive and unreasonable bearing in mind the bona fides of the appellant, as specifically found by the Appellate Tribunal.

61. We refer in this connection to the decision in *Merck Spares v. Collector of Central Excise & Customs, New Delhi*¹³, *Shama Engine Valves Ltd. v. Collector of Customs, Bombay*¹⁴ and *Madhusudan Gordhandas & Co. v. Collector of Customs, Bombay* wherein it has been held that in imposing penalty the requisite mens rea has to be established. It has also been observed in *Hindustan Steel Ltd. v. State of Orissa* by this Court that: (SCR HN p. 753)

"The discretion to impose a penalty must be exercised judicially. A penalty will ordinarily be imposed in cases where the party acts deliberately in defiance of law, or is guilty of contumacious or dishonest conduct, or acts in conscious disregard of its obligation; but not, in cases where there is a technical or venial breach of the provisions of the Act or where the breach flows from a bona fide belief that the offender is not liable to act in the manner prescribed by the statute."

11. Keeping the above principles as laid down by the Apex Court in mind, the only question that requires consideration by this Court in the present case is whether penalty levied by the department in the facts and circumstances of the instant case is justified.

12. On a careful scrutiny of the papers available on record, it is evident that during the entire proceedings the assessee/importer was trying to prove the classification of goods imported in its favour. While the Commissioner (Appeals) differed with the finding of the adjudicating authority, the Tribunal also, initially, on its part, was not clear, as there were two different views and, therefore, the matter was referred to a Larger Bench, which came to decide the issue once and for all. Thereafter, the present order came to be passed.

13. Therefore, it is clear that the assessee was all along pursuing the matter diligently under the bona fide belief that the classification as made by it is correct. However, this aspect has been lost sight of by the Tribunal, while upholding the order of the

original authority, whereby the penalty imposed on the assessee has also been confirmed.

14. As observed by the Supreme Court, penalty will ordinarily be imposed in cases where the party acts deliberately in defiance of law, or is guilty of contumacious or dishonest conduct, or acts in conscious disregard of its obligation; but not, in cases where there is a technical or venial breach of the provisions of the Act or where the breach flows from a bona fide belief that the offender is not liable to act in the manner prescribed by the statute.

15. In the case on hand, it is clear from the records that the assessee was pursuing the matter under the bona fide belief that the classification offered by it is correct. In such circumstances, it cannot be said that the act of the assessee was wilful, deliberate and dishonest, in that he wanted to avoid payment of duty, thereby evading tax liability. The present case falls squarely within the parameters as propounded by the Supreme Court in Akbar Badurddin's case (supra). However, the above aspect has been lost sight of by the Tribunal while confirming the order of the original authority in its entirety, which according to this Court, is per se not correct. Therefore, this Court is of the considered view that the penalty, as imposed on the appellant/assessee is not justified in the facts of the present case, which the Tribunal failed to set aside. For the above reasons, the issue is answered in favour of the appellant/assessee holding that no penalty is leviable on the facts of the present case and to that extent the order passed by the Tribunal is liable to be modified.

16. In the result, this appeal is disposed of modifying the order of the Tribunal in the above terms. However, in the circumstances of the case there shall be no order as to costs.

Sd/-
Assistant Registrar

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Sub Assistant Registrar

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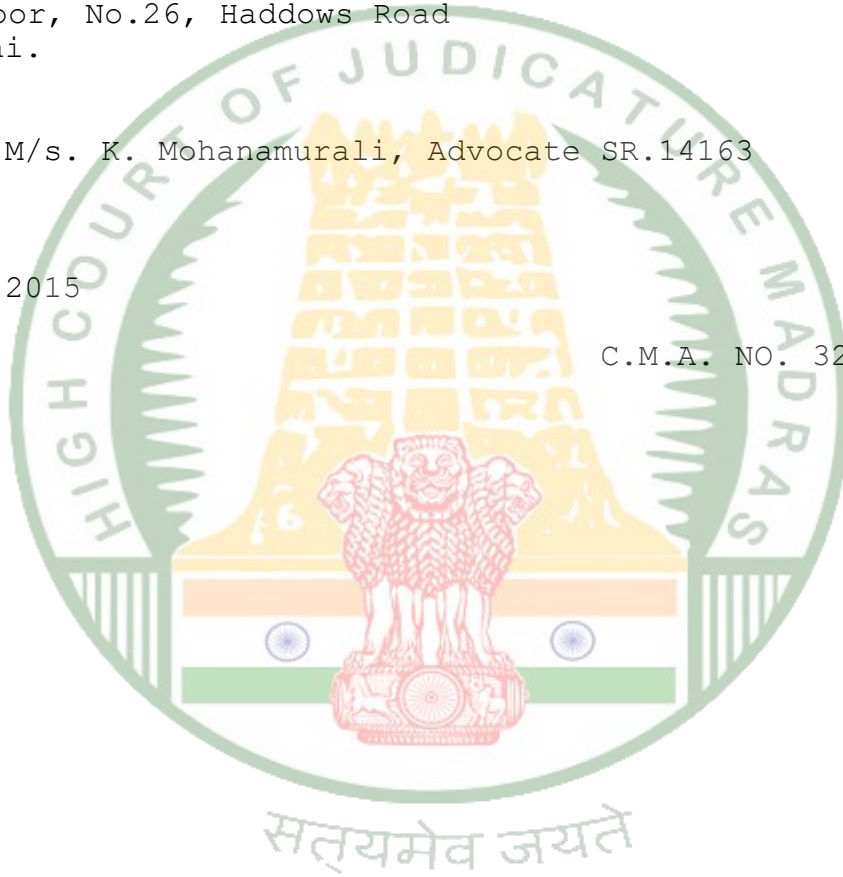
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+ 1 cc to M/s. K. Mohanamuralli, Advocate SR.14163

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