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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Decided on: 14.02.2017

+ **CUSAA 28/2016, C.M. APPL.39487-39489/2016**

PR COMMISSIONER OF CUSTOMS AIR CARGO CUSTOMS
(IMPORT) Appellant

Through : Sh. Sanjeev Narula, Sr. Standing
Counsel and Sh. Abhishek Ghai, Advocate.

versus

ESCORTS HEART INSTITUTE & RESEARCH CENTRE

..... Respondent

Through : Sh. M.P. Devnath with Sh. Abhishek
Anand and Sh. Yogendra Aldak, Advocates.

CORAM:

HON'BLE MR. JUSTICE S. RAVINDRA BHAT

HON'BLE MR. JUSTICE NAJMI WAZIRI

MR. JUSTICE S. RAVINDRA BHAT

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1. The question of law framed in this case is whether the Customs Excise and Service Tax Appellate Tribunal (CESTAT) erred in holding that "no penalty under Section 112 (a) of the Customs Act, 1962 could have been levied in the circumstances of the case."

2. The appellant filed a Bill of Entry dated 28.10.2002 through its CHA, Elecon Cargo Agency for the goods declared as "IS 1000 Fibre-Optic Endoscope Surgical System" classifying it under Customs Tariff Heading 9018.90 and claimed the benefit of concessional rate of duty under Serial No. 363 (A) List 37 Item No. 82 of Notification No. 21/2002 Cus, dated 01.03.2002 which covered various specific types of endoscopes. It claimed concessional duty @ 5% for accessories of the equipment under Serial No. 363 (B) - List 37 - Item No. 82 of the said Notification. The assessee was

issued a Show Cause Notice on 27th September 2004, to show why the goods, assessed provisionally, should not be finally assessed at the normal rate of customs duty @ 25% + 16% + 4% (effective 50.8%) by denying the benefit of claimed Customs Notification No.21/2002-S.No.363(A) and the differential duty amounting to ₹3,47, 63, 531 should not be recovered from M/s. Escorts Heart Institute & Research Centre Limited along with interest.....(iii) The subject goods, i.e. "da Vinci Surgical System" of the declared assessable value of ₹7,59,02,909 should not be confiscated under section 111 (m) of the Customs Act, 1962 for mis-declaration of description.(iv) Why penal action should not be taken against M/s. Escorts Heart Institute & Research Centre Limited, Shri Bhuvander Kaul, M/s. J. Mitra & Bros and M/s. Elecon Cargo Agency under Section 112(a)/114A of the Customs Act, 1962 for their respective active roles in the mis-declaration of the description of the goods in violations of the provisions of the Customs Act, 1962."

3. The respondent assessee replied to the Show Cause Notice, resisting the allegations. The Commissioner of Customs, i.e. the adjudicating official, held against the assessee respondent, by the Order-in-Original dated 8th June, 2007, observing that the invoice of the supplier described the goods as "Endoscopic Intuitive IS 1000 da Vinci Surgical System" and based on this and the other evidence collected held that the assessee was guilty of mis-declaration and denied the benefit of the said exemption notification and passed the order for differential duty and penalty for a like amount, i.e. ₹3,47,63,531/-. The adjudicating authority also held the indenting agent, M/s. J. Mitra & Bros and the CHA liable to penalty and imposed penalties.

The assessee/respondent appealed to the CESTAT. During the hearing, on its behalf, it was conceded that as regards the demand of duty, and confiscation of goods under Section 111(m) of the Customs Act, 1962, the issue was in effect settled against it in similar set of circumstances by CESTAT order in the case of *J. Mitra Bros Vs. CC, New Delhi* [2013 (288) ELT 305 (Tri.-Del.)] and the judgment of this Court in the case of *CC (I&G) Vs .Care Foundation* [2014 (302) TLT 181 (Delhi)]. The assessee nevertheless argued that no interest under section 28AB was recoverable because the demand was not raised/confirmed under Section 28, urging that even if the Order-in-Original were to be construed as made during finalization of the provisional assessment under Section 18, no interest could be demanded as the provision for interest liability was introduced on 13.07.2006 by insertion of Section 18 (3) while in the present case, the Bill of Entry was provisionally assessed on 28.10.2002 and that the interest cannot be demanded upon finalization even if such finalization was done after 13.07.2006. It cited several judgments to that effect including the case of *C.C.(Prev.) Vs. Goyal Traders* [2014 (302) 529 (Gujarat)] and *Sterlite Industries India Ltd. Vs. CC - 2008* (223) ELT 633 (Tri.-Chennai).

4. Before the CESTAT, in the case of the indenting agent and the importer (the assessee) reliance was placed on the judgment in *Care Foundation (supra)* to contend that imposition of penalty was unwarranted. After hearing rival submissions, the CESTAT set aside the demand of interest against the appellant and the penalty under Section 114A. It is in these circumstances that the Revenue has appealed to this court.

5. It is contended on behalf of the Revenue by Mr. Sanjeev Narula, that in *Care Foundation (supra)*, the judgment was premised on peculiar facts. Counsel highlighted that the court, in that judgment, held that, "*no exception can be taken to finding that since there was no demand under section 28 (8) of the Customs Act for duty, no penalty could have been imposed under that provision and consequently the penalty under Section 114A was not sustainable. The further reasoning that there could have been penalty under Section 112 but since that provision was not invoked, the direction to pay penalty at ₹ 2.34 Crores was not warranted in the circumstances, does not appear to be in error of law. For these reasons the court is of the opinion that the question of law framed has to be answered against the Revenue and in favour of the assessee*". It is submitted that in the present case, Section 112 (a) of the Act was invoked in the Show Cause Notice. If CESTAT was of view that penalty under Section 114A of the Customs Act, 1962 was not leviable then penalty Section 112 (a) of the Act should have been revived. Counsel also highlighted that penalty was leviable under Section 114A/112(a) of the Customs Act, 1962 and the same was confirmed by the adjudicating authority under Section 114A of the Act as they were found engaged in importation of goods by misclassification/mis-declaration with the intention to evade customs duty. It is argued that the soundness of this view is apparent, because the Commissioner of Customs' order, on the issue of differential duty at Para 49 (iii) and confiscation of the imported goods valued at ₹ 7,59,02,909/- under Section 114 (m) at Para 49 (iv) was not questioned. Counsel relied on a ruling of this court reported as *Avi Steels v Commissioner of Central Excise CEAC 6/2010* decided on 21.07.2010.

6. Counsel for the assessee, Mr. Devnath, argued that penalty was not imposable upon it, but conceded that in similar circumstances in the case of similar imports by *Care Foundation (supra)*, after taking into account similar contentions, the penalty upon it had been upheld by CESTAT which was further upheld by Delhi High Court by order dated 11.10.2013 except that the this Court reduced the penalty from ₹ 25 to ₹ 5 lakhs. Following the same ratio, the appellant pleaded that the penalty set aside by the Tribunal should not be interfered with. It was also argued that the differential duty had been paid, of a substantial amount. It was argued that since in respect of the same product, the issue of misdeclaration and the consequent penalty imposed had been decided in the other assessee's favour in the other cases, this court should not take a different view in the present case. Counsel also relied on *Amrit Foods v Commissioner of Central Excise 2005 (190) ELT 433 (SC)*.

7. At the outset, it is essential to notice the CESTAT's reasoning, which granted relief to the importer/assessee. The Tribunal held that:

"We have considered the contentions of all sides and perused the records. Para 47 of the show cause notice reads as under:-

"47. Hence, M/s. Escorts Heart Institute & Research Centre Limited, Okhla Road, New Delhi - 110025, Shri Bhuvander Kaul, M/s. J. Mitra & Bros, 20, Double Storey Market, New Rajinder Nagar, New Delhi & M/s. Elecon Cargo Agency, N-264-270, Raghubir Nagar, New Delhi are hereby called upon to show cause to the Commissioner of Customs (Import & General), New Custom House, Near IGI Airport, New Delhi-110037 as to why:- (i) The correct description of the goods imported under Bill of Entry No.389879 dated 28.10.2002 should not be treated as IS 1000 da Vinci Surgical System" and

not as "Fibre Optic Endoscope". (ii) The Bill of Entry No.389879 dated 28.10.2002, which was assessed provisionally, should not be finally assessed at the normal rate of customs duty @ 25% + 16% + 4% (effective 50.8%) by denying the benefit of claimed Customs Notification No.2112002-5.No.363(A) and the differential duty amounting to Rs.3,47, 63, 531 should not be recovered from Mis. Escorts Heart Institute & Research Centre Limited along with interest. (iii) The subject goods i.e. "da Vinci Surgical System" of the declared assessable value of Rs. 7,59,02,909 should not be confiscated under section 111 (m) of the Customs Act, 1962 for mis-declaration of description. (iv) Why penal action should not be taken against Mis. Escorts Heart Institute & Research Centre Limited, Shri Bhuvander Keul, Mis. J. Mitra & Bros and Mis. Elecon Cargo Agency under section 112a)1114A of the Customs Act, 1962 for their respective active roles in the mis-declaration of the description of the goods in violations of the provisions of the Customs Act, 1962."

It is evident from perusal of para 47 of the Show Cause Notice (quoted above) that the Show Cause Notice was for the finalisation of assessment of Bill of Entry dated 28.10.2002 which had been assessed provisionally. The Show Cause Notice does not mention Section 28 of the Customs Act, 1962 even in passing. The Show Cause Notice also does not mention as to under what provisions of law, the interest was sought to be recovered although the impugned order confirms interest under provisions of Section 28AB *ibid*. Perusal of Section 28AB *ibid* as it existed during the relevant period leaves no scope for ambiguity that the interest thereunder is chargeable only when the demand has been confirmed under provisions of section 28 *ibid*. Even if it is considered that the demand arises out of finalisation of provisional assessment in terms of Section 18 *ibid*, it has been settled by judicial pronouncements that no interest is recoverable on finalisation of provisional

assessments made prior to 13.07.2006 when the provision for interest liability were introduced in Section 18 *ibid* by inserting Section 18 (3) even if the finalisation of assessment took place after 13.07.2006. In the case of the *Sterlite Industries Vs. C.C.*, [2008 (223) ELT 633 (Tri -Chennai)] it was held that no interest is payable on the differential duty determined on finalisation of provisional assessment made prior to 13.7.2006 even if such finalisation took place after 13.07.2006. Similar view is held in the case of *C.C.(Prev.) Vs. Goyal Traders - 2014 (302) ELT 529 (Gujarat)*.

8. It is evident from the foregoing analysis that the Show Cause Notice did not raise the demand in terms of Section 28 *ibid*. The wording of Section 114A *ibid* makes it expressly clear that penalty under that Section is attracted when liability to pay duty or interest is determined under Section 28 *ibid*. Indeed, in the case *CC (I&G) Vs. Care Foundation (supra)*, involving similar facts and circumstances, Delhi High Court held as under:-

"6. In the opinion of this Court, no exception can be taken to the finding that since there was no demand under Section 28(8) of the Customs Act for duty, no penalty could have been imposed under that provision and consequently the penalty under Section 114A was not sustainable. The further reasoning that there could have been penalty under Section 112 but since that provision was not invoked, the direction to pay penalty at Rs.2.34 crores was not warranted in the circumstances, does not appear to be in error of law.

For these reasons the Court is of the opinion that the question of law framed has to be answered against the revenue and in favour of the assessee."

Thus, in the facts and circumstances of the present case, penalty under the section 114A *ibid* is simply not attracted. The above quoted para of the Delhi

High Court judgment also deals with Revenue's contention regarding penalty under Section 112 *ibid* which we (have to) respectfully follow.

9. For similar role of appellant No.2 in the case of import of the same item by *M/s. Care Foundation (supra)* involving similar facts and circumstances, and after considering similar contentions put forth by it, CESTAT upheld the penalty on it. In that case, the Delhi High Court vide its judgment dated 11.03.2014 in Customs Appeal No.9/2013 also upheld the appellant liable to penalty but reduced the same from ₹25 lakhs to ₹ 5 lakhs. We are persuaded by the contention of appellant No. 2 that as the facts and circumstances of the present case are similar to those obtaining in the case of *M/s. Care Foundation (supra)* and its role in that case was similar to its role in the case of imports by the appellant No.1, the penalty imposed should be reduced in the same ratio to ₹ 1 lakh.

10. Section 112 (a) and Section 114 of the Act 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,

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 higher."

SECTION 114A. *Penalty for short-levy or non-levy of duty in certain cases. - Where the duty has not been levied or has been short-levied or the interest has not been charged or paid or has been part paid or the duty or interest has been erroneously refunded by reason of collusion or any wilful mis-statement or suppression of facts, the person who is liable to pay the duty or interest, as the case may be, as determined under sub-section (8) of section 28 shall also be liable to pay a penalty equal to the duty or interest so determined :*

Provided that where such duty or interest, as the case may be, as determined under sub-section (8) of section 28, and the interest payable thereon under section 28AA, is paid within thirty days from the date of the communication of the order of the proper officer determining such duty, the amount of penalty liable to be paid by such person under this

section shall be twenty-five per cent of the duty or interest, as the case may be, so determined :

Provided further that the benefit of reduced penalty under the first proviso shall be available subject to the condition that the amount of penalty so determined has also been paid within the period of thirty days referred to in that proviso :

Provided also that where the duty or interest determined to be payable is reduced or increased by the Commissioner (Appeals), the Appellate Tribunal or, as the case may be, the court, then, for the purposes of this section, the duty or interest as reduced or increased, as the case may be, shall be taken into account :

Provided also that in case where the duty or interest determined to be payable is increased by the Commissioner (Appeals), the Appellate Tribunal or, as the case may be, the court, then, the benefit of reduced penalty under the first proviso shall be available if the amount of the duty or the interest so increased, along with the interest payable thereon under section 28AA, and twenty-five percent of the consequential increase in penalty have also been paid within thirty days of the communication of the order by which such increase in the duty or interest takes effect :

Provided also that where any penalty has been levied under this section, no penalty shall be levied under section 112 or section 114.

Explanation. - For the removal of doubts, it is hereby declared that -

(i) the provisions of this section shall also apply to cases in which the order determining the duty or interest under sub-section (8) of section 28 relates to notices issued prior to the date on which the Finance Act, 2000 receives the assent of the President;

(ii) any amount paid to the credit of the Central Government prior to the date of communication of the order referred to in the first proviso or the fourth proviso shall be adjusted against the total amount due from such person."

11. At the outset, this court is of the opinion that the question of law was inaccurately framed, because in the present case the invocation of the extended period of limitation has remained unchallenged; therefore, the Revenue's competence to demand differential duty has to follow, by virtue of Section 28. Given that penalty under Section 112 (a) cannot be imposed if penalty under Section 114A is invoked, the correct question of law therefore is whether the CESTAT erred in deleting the penalty under Section 114A in the facts and circumstances of this case.

12. On the facts, there is no dispute that the goods were mis-declared. This aspect was clearly alleged by the show cause, which inter alia, reads as follows:

"41. From the evidence gathered from tile records, brochures & manuals obtained during investigation, information gathered from various publications & articles appearing In the print media, the information obtained from various websites and from the statements of the persons connected with the lmport of "da Vinci Surgical System", it appears that the "da Vinci Surgical System" Imported by M/s Escorts Heart Institute & Research Centre and cleared vide Bill of Entry No, 389879 dated 28,10.2002 was not a "fibre optic endoscope" but was a state of the art "Robotic Surgical System" and that the said Robotic Surgical System can be used to perform complex surgeries with unprecedented control and precision. The endoscope Is just a small part of the said complex "Surgical System" and is used for viewing the inner portion of the body while the surgeon is carrying out the minimum invasive surgery

through the sophisticated robot and the programmed computer.

42. It has also been noticed that the All India Institute of Medical Sciences (AIIMS), New Delhi had also imported the same system from the same supplier and had filed Bill of Entry No. 506592 dated 21.6.2003 for the clearance of the same equipment, It Is noticed that the AIIMS had cleared the system by correctly describing the goods as "Surgical Robotic System for Cardiac Surgery". However, AIIMS had claimed the benefit of concessional rate of duty of 5% under Notification no. 51/96 and not under Notification no. 21/2002 claimed by M/s Escorts.

43. It has been noticed that a letter EHIRC/JVIED:EQPT/IMP/098 dated 28.10.2002 signed by Dr; Naresh Trehan, Executive Director, M/s Escort Heart Institute & Research Centre Limited had been submitted to the Deputy Commissioner of Customs, Air Cargo, New Deihi for the customs clearance of equipment under Bill of Entry No. 389879 dated 28.10.2002. In this letter, Dr. Naresh Trehan had written that "I confirm and believe that the said system Imported by our Institute is a fibre optic endoscope" & "the equipment namely, Intuitive Fibre Optic Endoscope along with accessories is covered under Notification No. 21/2002 Cus dated 0.3.2002 at S. No. 363 (A) & (8), List 37, Item no. 82".

44. Therefore, from the above discussion it is Quite evident that the "da Vinci Surgical System" imported by M/s Escorts Heart Institute & Research Centre Limited was a "Robotic Surgical System" and not a "Fibre Optic Endoscope" as declared In the Bill of Entry at the time of clearance. It Is also noticed that there is no other entry in the notification under which benefit of concessional rate of duty @ 5% is applicable to the robotic surgical system. It is noticed that in various brochures, the manufacturer had initially described the equipment as 'da Vinci Surgical System' and also in the initial correspondence between the Importer, supplier and the distributor. However, subsequently, the importer, M/s Escorts Heart Institute & Research Centre Limited changed the description of the system by adding the word "endoscopic" in their correspondence

with the suppliers. Moreover, the Importer had asked the distributor, M/s J. Mitra & Bros to obtain letters from the manufacturer, M/s Intuitive Surgical Inc, USA stating that the equipment was "Fibre Optic Endoscopic System" with the sole purpose of getting the equipment cleared from Customs at the concessional rate of customs duty @ 5% under Customs Notification no. 21/2002 - S. No. 363(A) as against the normal applicable customs duties @ 25% + 16% + 4% (effective 50.8%). Besides, the documents recovered by the Hyderabad Customs show that" the original pamphlet of the manufacturer was manipulated by the distributor, M/s J. Mitra & Bros by Interpolating the words "Endoscopic Coronary Artery Bypass System" in place of "Surgical System".

13. These led to findings relating to mis-declaration of the goods based on the invoice and purchase order of the goods, i.e as "Endoscopic Intuitive IS 1000 da Vinci Surgical System", showing that "what was ordered by M/s Escorts was da Vinci surgical system and what had been supplied as per the invoice was also da Vinci Surgical System and not an Endoscope as defined in various dictionaries. As such, mentioning the said item as "IS 1000 Fibre Optic Endoscope Surgical System and Accessories" in the Bill of Entry was a misdeclaration. Those findings have been accepted; they were unchallenged. The only issue, therefore, is whether the penalty levied under Section 112 (a) or Section 114A could have been interfered with. In this context, it is noticed that the Show Cause Notice had proposed confiscation of goods under Section 111 (m). Besides, it also stated as follows:

"(v) Why penal action should not be taken against M/s Escorts Heart Institute & Research Centre Limited, Shri Bhuvannder Kaul, M/s J. Mitra & Bros and Mis Elecon Cargo Agency under section 112(a) I 114A of tile Customs Act, 1962 for their respective active roles in the mis-declaration of tile description

of the goods in violations of the provisions of the Customs Act, 1962."

These facts, clearly distinguish the present case from those in *Care Foundation* (supra), where the Show Cause Notice did not invoke Section 112; the penalty was therefore set aside as untenable. The CESTAT therefore, set aside the penalty. Here, the Show Cause Notice invoked both sections 114A and 112. The Order-in-Original imposed a differential duty of ₹ 3,47, 63531/-. That duty amount has not been contested. Given that both the penal provisions were invoked, the question of deleting penalty could not have arisen.

14. As is noticed the precondition to impose penalty is the determination, after Show Cause Notice that non levy or short levy of customs duty was the result of mis-declaration. The Show Cause Notice was issued under the extended period, on account of the Revenue's contention that there was willful mis-declaration. The findings of the Commissioner clearly established the nature of the mis-declaration, i.e that instead of describing the products accurately, i.e. as da Vinci Surgical System it was described as an endoscopic surgical system. The Commissioner held inter alia, that:

"These facts go to prove that there was a pre-mediated plan to mis-declare the goods in order to incorrectly avail the benefit of exemption under notification no. 21/2002- Cus dated 1.3.02 thereby rendering the imported goods liable to confiscation and the importer, M/s Escorts liable for penal action as proposed in the show cause notice. On the same wounds Shri Bhuvander Kaul, Deputy General Manager (Medical Materials) of M/s Escorts, who was inter-alia looking after import of the equipment is also liable for penal action under Section 112 (a) of the Customs Act, 1962 as he is found to be having knowledge

of and also part of the entire plan to mis-declare the descriptions of the imported item to wrongly avail the exemption under the aforesaid notification."

In these given circumstances- and having regard to the clear terms of the Show Cause Notice, this court is of the opinion that the CESTAT could not have set aside the penalty, which is mandatory. What the Revenue could not have done (and in fairness, did not) was to impose penalty in addition, under Section 112 (a); this is because of fifth proviso to Section 114A which stipulates that "Provided also that where any penalty has been levied under this section, no penalty shall be levied under section 112 or section 114." The ratio in *Amrit Foods* (supra), according to this court, is distinguishable, because the Supreme Court held that in that case, the Show Cause Notice was unspecific about the provision, which dealt with several possibilities. In the present case, however the Show Cause Notice mentioned both provisions, which are clear. Moreover, the nature of the facts was made known with clarity in the Show Cause Notice.

15. In view of the above discussion, the impugned order of CESTAT is set aside; the question of law is answered in favour of the Revenue and against the assessee/respondent. The order of the Commissioner is accordingly restored. The appeal is allowed.

S. RAVINDRA BHAT
(JUDGE)

NAJMI WAZIRI
(JUDGE)

FEBRUARY 14, 2016