

IN THE HIGH COURT OF JUDICATURE AT MADRAS
DATED : 04.04.2019

CORAM

THE HONOURABLE MR.JUSTICE T.S.SIVAGNANAM
and
THE HONOURABLE MRS.JUSTICE V.BHAVANI SUBBAROYAN

Civil Miscellaneous Appeal No.1852 of 2009

Commissioner of Customs (Air),
Air Cargo Complex,
Meenambakam, Chennai-27. ... Appellant/Respondent

-vs-

1.M/s.Wipro Ltd.,
No.88, M.G.Road, S.B.Towers,
Bangalore-560 001. ... 1st Respondent/Appellant

2.Customs, Excise & Service Tax
Appellate Tribunal,
South Zonal Bench, Shastri Bhawan Annexe,
1st Floor, 26, Haddows Road,
Chennai-600 006. ... 2nd Respondent/Nil

Appeal under Section 130 of the Customs Act, 1962, to set aside the order dated 14.08.2007 made in Final Order No.1080 of 2007 in Appeal C/176/03 on the file of the Customs, Excise and Service Tax Appellate Tribunal, South Zonal Bench, Chennai.

For Appellant : Mr.V.Sundareswaran

For Respondent No.1 : Mrs.P.Jayalakshmi
for Mr.Akil Suresh

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JUDGMENT

(Judgment of the Court was Delivered by T.S.Sivagnanam, J.)

This appeal, by the appellant/Revenue, is directed against the order passed by the Customs, Excise and Service Tax Appellate Tribunal, South Zonal Bench, Chennai (for brevity "the Tribunal") in Final Order No.1080 of 2007, dated 14.08.2007 received by the appellant on 20.09.2007.

2.The above appeal has been admitted, vide order dated 17.07.2009, on the following substantial questions of law:-

"(i) Whether the CESTAT has been vested with the discretion to waive the imposition of fine and penalty under mandatory provisions of Section 112 (a) and 125 of Customs Act in a case of misdeclaration and misclassification of goods especially when it has upheld that duty liability of the first respondent on such misdeclaration/misclassification?

(ii) Whether the Tribunal is correct in holding that imposition of fine and penalty is not justified where the goods are liable for confiscation under Section 111(d) of Customs act, 1962?"

3.The Revenue is aggrieved by the order passed by the Tribunal by which, the Tribunal deleted the levy of redemption fine and penalty imposed on the respondent by the Commissioner of Customs (Air), Chennai, vide order dated 17.04.2003. The Tribunal held that the dispute involved was taken to the Tribunal and was decided in de nova proceedings as per the direction of the Tribunal, and the dispute is a classification issue involving interpretation of the tariff entry and therefore, the importer cannot be penalised for holding a different view of the applicable classification to the goods imported and accordingly, found imposition of fine and penalty on the respondent was not justified.

4.Mr.V.Sundareswaran, learned counsel appearing for the appellant/Revenue relied upon a decision of the Hon'ble Supreme Court in the case of Pine Chemical Suppliers vs. Collector of Customs (Bombay) reported in 1993 (67) ELT 25 (SC) and submitted that the Tribunal committed a serious error in coming to a conclusion that no penalty is imposable when the provisions of Section 112(a) of the Customs Act, 1962 (hereinafter referred to as "the Act") would automatically stand attracted, when the goods imported by the respondent were confiscated in terms of Section 111(d) of the Act.

5.The learned counsel also referred to the decision of the Division Bench of this Court in the case of Comex Co. vs. Collector of Customs Madras-I, reported in 1997 (96) ELT 526 (Madras) and submitted that mens rea is not required as a condition precedent for levying a personal penalty under Section 112(a) of the Act, as the theory contemplated thereunder is a civil obligation. Reliance was also placed on the decision of the Division Bench of this Court in the case of Commr. of Cus. (Imports), Chennai, vs. Nithi Tools (P) Ltd. reported in 2014 (306) ELT 228 (Madras).

6.Mrs.P.Jayalakshmi, learned counsel appearing for the respondent submitted that the levy of redemption fine is wholly

without jurisdiction, since no such proposal was made when the Tribunal in its earlier order, dated 14.12.2000, remanded the matter for de nova consideration in the case of Wipro Computers Ltd. vs. Commissioner of Customs, Chennai reported in 2001 (135) ELT 450 (Tri-Chennai). Therefore, it is submitted that the levy of redemption fine is without jurisdiction and therefore, rightly set aside by the Tribunal.

7. So far as the levy of penalty under Section 112(a) of the Act is concerned, it is submitted by the learned counsel for the respondent that the Tribunal rightly took note of the dispute which was pending, viz., classification dispute and therefore, it is not a case where penalty should have been imposed. The learned counsel placed reliance on the decision of the Hon'ble Supreme Court in the case of Northern Plastic Ltd. vs. Collector of Customs & Central Excise reported in 1998 (101) ELT 549 (SC) and the decision in the case of Akbar Badruddin Jiwani vs. Collector of Customs reported in 1990 (47) ELT 161 (SC).

8. The first question to be decided in the instant case is whether, redemption fine could have been imposed by the Commissioner in the order dated 17.04.2003. It is not in dispute that the order dated 17.04.2003 was passed by the Commissioner as a de nova proceedings pursuant to an order passed by the Tribunal remanding the matter for fresh consideration, vide order dated 14.12.2000. Therefore, it has to be seen as to whether there was any proposal at the first instance for levy of redemption fine. Admittedly, there was no such proposal for levy of redemption fine, as in the understanding of the original authority, the goods were not liable for confiscation, since the goods were not available and having been cleared and duty having been paid, no order of confiscation is possible. In this regard, the learned counsel referred to the decision of the Division Bench of this Court in the case of Commissioner of Customs, Tuticorin vs. Kamalabhai reported in 2015 (324) ELT 70 (Madras).

9. In our considered view, this question will not arise in the instant case because, the Department themselves reconciled to the fact that no redemption fine should have been imposed at the first instance and there was no such proposal when the adjudication took place at the option of the respondent/importer. Thus, when the proceedings ultimately came before the Tribunal and the Tribunal by order dated 14.12.2000, allowed the assessee's appeal and remanded the matter for fresh consideration, obviously, the adjudicating authority cannot start from the inception as if it is a fresh proceedings. Therefore, in our considered view, on facts, the decision in the case of Comex Co. (supra) cannot be made applicable to the instant case. Accordingly, we hold that the Tribunal rightly

deleted the redemption fine imposed on the respondent/importer.

10.Next, we move on to consider as to whether penalty was imposable. Admittedly, maximum penalty equivalent to the amount of duty payable has been imposed.

11.The argument of Mr.V.Sundareswaran is that there is no mens rea required to be established for levy of penalty under Section 112(a) of the Act, which makes it clear that 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 for payment of penalty.

12.It is submitted that in the instant case, the assessee had imported goods claiming that the goods are classifiable under Entry 8542 and contending that they have been right through importing the same under the said classification and all of a sudden, the Department took a stand that the goods are classifiable under heading 8473.30 and this having been held against the respondent/importer, Section 111(d) of the Act would stand attracted, as the goods imported by the respondent/importer require specific authorisation and consequently, the respondent/importer could not have availed the benefit of DEPB Scheme.

13.There could be no quarrel as to under what circumstances, Section 112(a) of the Act would stand attracted, but we are required to see as to how the Courts have interpreted the said provision. We are guided by the decision of the Hon'ble Supreme court in Akbar Badruddin Jiwani (supra) wherein, it was held that the appellant therein has acted on the basis of bona fide belief that the goods were importable under OGL and therefore, the appellant deserves lenient treatment. In the said case, the Hon'ble Supreme Court referred to the decisions in the case of Merck Spares v. Collector of Central Excise & Customs, New Delhi reported in 1983 ELT 1261; Shama Engine Valves Ltd. Bombay vs. Collector of Customs, Bombay reported in 1984 (18) ELT 533; and Madhusudan Gordhandas & Co. vs. Collector of Customs, Bombay reported in 1987 (29) ELT 904 wherein it was held that, in imposing penalty, requisite mens rea has to be established. The Hon'ble Supreme Court also referred to the decision in the case of Hindustan Steel Ltd. vs. State of Orissa reported in 1978 (2) ELT (J 159) (SC) wherein, it was held that the discretion to impose penalty must be exercised judicially; penalty will ordinarily be imposed in cases where the party acts deliberately in defiance of law, or his 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. The said decision was followed by a Division Bench of this Court in Novel Digital Electronics vs. Commr. Of Cus. (Imports), Chennai reported in 2015 (321) ELT 29 (Madras).

14.Mr.V.Sundareswaran, learned counsel for the respondent had placed reliance on the decision in Comex Co. (supra) and submitted that mens rea is not required as a condition precedent for levying personal penalty under Section 112(a) of the Act.

15.We find that in the said judgment, the decision of the Hon'ble Supreme Court in Akbar Badruddin Jiwani (supra) was referred to but, however, the same has not been specifically dealt with. As pointed out earlier, Mr.V.Sundareswaran, is right in contending that Section 112(a) of the Act which deals with penalty for improper importation of goods would stand attracted. But, however, the moot question is merely because the provision would stand attracted, whether in all cases penalty is imposable, that too, maximum penalty as in the instant case. The answer to the question lies in the decision in Akbar Badruddin Jiwani (supra). The respondent/importer had been contesting the classification issue which they are entitled to contest, since the respondent/importer's specific case is that they have been importing the very same goods for a long period of time and clearing the same under the heading 8542 and all of a sudden, the Department took a stand that the import is classifiable under heading 8473.70. Thus, ultimately, when the issue was decided against the respondent/importer, they accepted the classification and paid duty and interest. Therefore, facts and circumstances definitely warranted a lenient approach, though according to the Revenue, Section 112(a) of the Act would automatically stand attracted.

16.Mr.V.Sundareswaran placed reliance on the decision in Nithi Tools (P) Ltd. (supra). This decision was pressed into service to state that Section 112(a) of the Act would stand attracted and penalty is imposable. In the said case, the question was whether penalty imposed was justified or not and not whether the provisions of Section 112(a) would stand attracted or not. The Court after considering the facts of the said case, held that it would fall within the ambit of sub-Clause (a) of Section 112 of the Act and on facts, found that the importer was not able to satisfactorily explain the huge difference in quantity and accordingly, held that penalty is leviable under Section 112(a)(iii) of the Act. Thus, the said decision is distinguishable on facts.

17.Thus, taking note of the peculiar facts and circumstances of the case and the dispute being one of a classification dispute, and it is the Department which took a U-turn in the matter after a very long period, when the Department

was permitting the respondent/importer to clear the goods by classifying the same under chapter heading 8542, it is not a case where penalty could have been imposed. Thus, for the above reasons, we confirm the order passed by the Tribunal in this regard also.

18.In the result, the appeal filed by the Revenue stands dismissed and the substantial questions of law are answered against the Revenue. No costs.

Sd/-
Assistant Registrar

//True Copy//

Sub Assistant Registrar

abr

To

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

+1cc to Mr.V.Sundareswaran, Advocate, S.R.No.32958

+1cc to Mr.Akil Suresh, Advocate, S.R.No.33087

C.M.A.No.1852 of 2009

PA (CO)

RRS (18/06/2019)

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