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

Date of decision: 11.10.2019

+ CUSAA 195/2019, CM APPL. 30592/2019
COMMISSIONER OF CUSTOMS (IMPORT) Appellant
Through: Mr. Harpreet Singh, Sr. Standing
counsel with Ms. Suhani Mathur,
Adv.

Versus

M/S TRINETRA IMPEX PVT. LTD. Respondent

Through: Mr. Tarun Chawla, Adv.

CORAM:

HON'BLE MR. JUSTICE VIPIN SANGHI

HON'BLE MR. JUSTICE SANJEEV NARULA

SANJEEV NARULA, J. (Oral):

1. The present appeal under Section 130 of Customs Act, 1962 is directed against the final order No. 55775-55776/2017 dated 10.08.2017 passed by the Customs Excise and Service Tax Appellate Tribunal in Appeal No. C/53509/2015 whereby the appeal of M/s Trinetra Impex Pvt. Ltd./Respondent has been allowed and the penalties imposed under Section 112 (b) and 114AA of the Customs Act, 1962 (hereinafter as 'Act') on the Director of the Respondent have been set-aside.

2. Brief facts of the case are that M/s Trinetra Impex Pvt Ltd. is a holder of Customs House Agent (hereinafter as "CHA") license issued under Section 9(1) of the Customs House Agent Licensing Regulation, 2004. One M/s Anurag Trading Co. imported various goods such as vulcanizing press

machines, hydraulic splitting machines, hydraulic flashing machines, hydraulic shaving machines etc for supplying the same to Ordinance Equipment Factory (OEF), Kanpur. At the time of filing of Bills of Entries, the importer claimed exemption from customs duty under the Notification No. 39/96-Customs dated 23.07.1996 on the strength of Customs Duty Exemption Certificates (CDECs) purportedly issued by OEF, Kanpur. Subsequently, Customs Department received an input from the Chief Vigilance Officer, Ministry of Defence, Ordinance Factory Board, Kolkata through the Chief Vigilance Officer, CBEC, New Delhi informing them that the CDECs filed by M/s Anurag Trading Company had not been issued by OEF, Kanpur and that the importer had committed a fraud. On the basis of the aforesaid information, the Customs Department carried out investigations and pursuant thereto, a Show-cause notice dated 08.07.2011 was issued with respect to the Bills of Entries pertaining to the goods imported by M/s Anurag Trading Company without payment of duty on the basis of forged Customs Duty Exemption Certificates. Under the said show cause notice, penalties were also proposed against Sh. Kailash Gupta, Director of M/s. Trinetra Impex Pvt. Ltd., CHA/Respondent. On further investigation, another Show-cause notice dated 06.03.2013 was issued in respect of 39 Bills of Entries filed by M/s Anurag Trading Co. for the period between 14.08.1996 to 23.07.2006. In the said Show-cause notice as well, penalties were proposed against Mr. Kailash Gupta, Managing Director of the Respondent CHA. The aforesaid Show-cause notices were adjudicated vide common Order-in-Original No. 09-10/2015/SRB/Commissioner (Import) dated 30.06.2015 and a penalty of Rs. 5 lacs under Section 112 (a) of Act was imposed on Mr. Kailash Gupta, Managing Director of CHA in

respect of show cause notice dated 08.07.2011; and a penalty of Rs. 10 lacs was imposed under Section 112 (b) and Rs.5 lacs under Section 114 AA of the Act in respect of show cause notice dated 06.03.2013. For the sake of completeness, it would be appropriate to note that under the afore-noted Order-in-Original, the demand and recovery of customs duty and penalties were also ordered against the importer-M/s Anurag Trading Company. However, since the present appeal pertains only to the CHA, we are confining our probe into the impugned order to the extent it pertains to the penalties set-aside against the Respondent.

3. In the Order-in-Original dated 30.06.2015, it was held that it was imperative on part of the CHA to ensure that only valid and genuine exemption certificates were submitted with the Customs Department. It was held that since the Duty Exemption Certificates were found to be forged, notwithstanding the fact that the importer had handed over such certificates and affirmed the correctness and genuineness thereof, it was necessary for the CHA to have gone into the question of validity and the genuineness of the said documents. The CHA cannot take the plea of innocence and acting in good faith. Having failed to practice diligence in ensuring submission of correct information and proper documents, it was held that Section 112 (b) and Section 114AA of the Act would be attracted in respect of the show cause notice dated 06.03.2013. However, *viz-a-viz* show cause notice dated 08.07.2011, penalties were imposed only under Section 112 (a) of the Act.

4. The aforesaid order was challenged in appeal by the importer as well as the CHA. The said appeals were decided by a common order dated

10.08.2017, whereby the Central Excise and Service Tax Appellate Tribunal (hereinafter as 'CESTAT'), allowed the appeal of CHA in respect of both the show cause notices and set aside the penalties, holding that there was nothing on record to show that the CHA had any role to play in forging the certificates and misleading the customs authorities.

5. In the present appeal, the Customs Department impugns the order of the CESTAT allowing the appeal of the CHA, on the ground that the Tribunal was not justified in dropping the penalties, without considering the merits of the case. The Tribunal has failed to consider the failure on part of the Respondent in discharging its duties and responsibilities as a CHA. Mr. Kailash Gupta, the Managing Director of the Respondent company in his statement dated 05.03.2009 admitted that he knew that exemption certificates were signed by the General Manager, OEF, Kanpur and as per the relevant notifications, the certificates ought to have been issued by an officer not below the rank of Joint Secretary to Government of India, Ministry of Defence. Despite being aware of the above legal position, he did not exercise due care in checking the genuineness of the exemption certificates and carelessly accepted the version of the importer that the General Manager of the OEF was equivalent in rank to the Joint Secretary of Government of India. The CHA was obligated to verify whether the goods were eligible for exemption or not. Since it failed to discharge its statutory obligations, it is liable to the imposition of the penalty under of the Act.

6. We have heard Mr. Harpreet Singh, learned senior standing counsel for Customs Department at considerable length.

7. The relevant provision under the Act relating to imposition of penalty on the CHA are 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, subject to the provisions of section 114A, to a penalty not exceeding ten per cent. of the duty sought to be evaded or five thousand rupees, whichever is higher:

Provided that where such duty 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 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 penalty so determined.

(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 (ii), 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].”

(emphasis supplied)

“Section 114AA - Penalty for use of false and incorrect material-

*If a person **knowingly or intentionally** makes, signs or uses, or causes to be made, signed or used, any declaration, statement or document which is false or incorrect in any material particular, in the transaction of any business for the purposes of this Act, shall be liable to a penalty not exceeding five times the value of goods.”*

(emphasis supplied)

8. At this juncture, before we go delving into the merits of the case, it would be worthwhile to note that the Commissioner of Customs (General) had also initiated proceedings against the CHA under the provisions of Customs

House Agent Licensing Regulations, 2004, which culminated in passing of the order dated 12.05.2015 whereby a punishment of forfeiture of security deposit of Rs. 50,000 was imposed. The said order was impugned by the Customs Department before the Court by way of appeal under Section 130 of the Act before this Court titled as ***Commissioner of Customs (Import and General) New Delhi v. M/s. Trinetra Impex Pvt. Ltd***, CUSAA - 62/2017 on the ground that the punishment was not proportionate and commensurate with the allegations. The said appeal has been decided by an order dated 11.12.2017 and the appeal of the Customs has been dismissed *in limine*. The observations of the Court in the said order are germane and relevant for deciding the present appeal and same are being extracted hereinbelow:

“4. The importer M/s Anurag Trading Company, Kanpur had used forged documents purportedly issued by the Ordinance Equipment Factory, Kanpur. Director of the Respondent company had admitted that the exemption certificate was not signed by the General Manager of the Ordinance Equipment Factory, Kanpur and as per notification, the said certificate should be issued by an officer not below the rank of Joint Secretary to the Government of India in the Ministry of Defence.

5. The findings recorded both by the Commissioner of Customs (General) in the order dated 12th May, 2015 and the order passed by the Appellate Tribunal is primarily factual. The Commissioner of Customs, after examining the factual matrix had concluded though the Respondent had failed to discharge its duties and responsibilities properly, yet a harsher punishment was not justified. The Respondent's director had professed that they had been dealing with M/s. Anurag Trading Company, Kanpur since 2003, they had merely processed the documents and forwarded the same to the customs authority. It was the

obligation of the customs authorities to examine applicability and satisfaction of the condition of the exemption notification and genuineness of the documents submitted by the importer. While examining the documents, it did not strike them and there was no reason for them to suspect that the exemption certificate was not signed by the competent authority or that it was forged. Thus, they were unaware and not involved in forgery of the documents. They were also duped and were victims.

6. By our order dated 17th November, 2017, the appellant was asked to clarify when departmental action was taken against the officers of the department, who accepted the certificate. Custom officers had also accepted the documents without suspecting foul play and notwithstanding that the document was not signed by the approved officer.

7. Today, during the course of hearing, learned counsel for the appellant has handed over a copy of the letter written by the Assistant Commissioner (Legal) stating that no action appears to have been taken against the officers of the department, though statements of 11 officers were recorded. The reason was that nothing could be found to establish malafide intention of the officers and their connivance.

8. The Central Bureau of Investigation ('CBI') had also investigated the issue of bogus exemption certificate. They have not charge-sheeted the Respondent. As per the charge-sheet, placed on record, FIR under Section 120B of the Indian Penal Code read with Sections 420/467/468/471 of the Indian Penal Code has been filed against Mr. Shyam Mehrotra, Proprietor of M/s Anurag Trading Company, Kanpur and Mr. Anand Mehrotra, Manager and Authorized Signatory of M/s Anurag Trading Company, Kanpur and the proprietorship concern. CBI after investigating role and involvement of the Respondent and found that the CHA (the Respondent) had received a copy of the bill of exchange with zero customs duty duly signed by the then Custom officer. The CBI has also stated in the charge sheet that the Respondent CHA had retained photocopies of the said bill of exchange for its office records and had forwarded

the original copies of the same along with his bill to the importer for getting payments - thus clearly implying that the CHA had performed its part of the duties and no role in the forging of the bill of exchange. The Respondent's direct involvement with the importer i.e. the beneficiary was not established."

(emphasis supplied)

9. The incident that resulted in the initiation of parallel proceedings against the Respondent under Customs Broker Licensing Regulations and the Customs Act, 1962 is the same. Thus, the facts noted in the order dated 11.12.2017 assume significance and on perusal of the same, it clearly emerges that the Court considered the obligation of the Customs authorities to examine the applicability of the conditions of the exemption Notification and genuineness of the documents submitted by the importer. The Court also drew adverse inference on account of the fact that no departmental action had been taken against officers of the department. Pertinently, it was noted that the Central Bureau of India (CBI) had also investigated the issuance of bogus exemptions certificates and had not charge-sheeted the CHA. The charge-sheet was filed only against the proprietor of the importer and its authorized signatory and the proprietorship concern. The CBI in its charge-sheet recorded that the CHA had retained photocopies of the bills of exchange for its office records and had forwarded the original copies of the same along with his bill to the importer for getting payments. Thus, CHA's direct involvement with the importer was not established. This fact prevailed upon this Court in dismissing the appeal filed by the Customs Department, not finding it to be fit to impose harsher penalty.

10. Now coming to the facts of the present case. The facts noted above are not disputed before us, however, the Customs Department is aggrieved by the deletion of the penalties imposed on the CHA. In respect of the show cause notice dated 06.03.2013, penalty has been imposed under Section 112 (b) as well as 114AA of the Act. A perusal of the said provisions clearly reveals that the penalty under the said provisions can be imposed wherever there is an element of *mens rea* or conscious knowledge, which is a *sine qua non* for imposition of the penalty. This is evident from a plain reading of Sections 112 and 114AA of the Act, which uses the expressions “does or omits to do” , “or abets the doing or omission of such act”, “which he knows or has reason to believe are liable to confiscation under Section 111”- in Section 112 and “knowingly or intentionally” in Section 114AA . The facts of the case in hand do not reveal any such element of *mens rea* or conscious knowledge qua the importer. There is no active role attributed to the Respondent, which justifies the imposition of the penalty under Section 112 (b) and Section 114AA of the Act. Nothing has emerged even in the criminal investigation.

11. In respect of the show cause notice dated 08.07.2011, the imposition of the penalty has been made under Section 112 (a) of the Act in respect of the goods which have been held to be liable to be confiscated under Section 111 of the Act. Here, the imposition of the penalty on the CHA is founded on the ground that he has abetted the offence. Though, for imposition of penalty in respect of the cases falling under Section 112 (a) of the Act, *mens rea* may not be required to be proved as condition precedent, however, when it

comes to imposition of the penalty on an abettor, it is necessary to show that the said essential element/ ingredient is present. [Ref: *Amritlakshmi Machine Works v. The Commissioner of Customs (Import) 2016 SCC OnLine Bom 66.*]

12. In the present case, there is no element of *mens rea* or conscious knowledge which can be attributed to the CHA. The investigation carried out by the CBI and other facts reveal that the CHA acted *bona fide* and merely facilitated the imports on the strength of the documents which were handed over to him by the importer. There is no sufficient material on record to show that the CHA was actively involved in the fraudulent availment of the exemption by the importer, warranting levy of personal penalty. Therefore, we do not find any ground to interfere with the findings of the Tribunal vis-a-vis the Respondent.

13. Since, the present appeal does not raise any substantial question of law that requires any adjudication by this Court under Section 130 of the Customs Act, the appeal is dismissed *in limine* without any order as to costs.

SANJEEV NARULA, J

VIPIN SANGHI, J

OCTOBER 11, 2019

Pallavi