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

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Date of Decision: 18.05.2023

+ **CUSAA 88/2022 and CM APPL. 34721/2022**

M/S SEVILLE PRODUCTS LIMITED

..... Appellant

Through: Mr Karan Sachdev, Mr Kunal Kapoor and Mr Agrim Arora, Advocates.

Versus

COMMISSIONER OF CUSTOMS EXPORTS,
ICD-TUGHLAKABAD, NEW DELHI

..... Respondent

Through: Mr Satish Kumar, Senior Standing Counsel along with Mr Dhruv and Mr Atri Mandal, Advocates.

AND

+ **CUSAA 89/2022 and CM APPL. 34723/2022**

M/S SEVILLE PRODUCTS LIMITED

..... Appellant

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CORAM:

HON'BLE MR. JUSTICE VIBHU BAKHRU

HON'BLE MR. JUSTICE AMIT MAHAJAN

VIBHU BAKHRU, J. (Oral)

1. The appellant has filed the present appeals impugning a common order dated 07.12.2021 (hereafter '**the impugned order**') passed by the

Customs, Excise and Service Tax Appellate Tribunal (hereafter '**the Tribunal**'), whereby the appeals preferred by the appellant (Customs Appeal No.C/51953/2019-SM and Customs Appeal No.C/52105/2019-SM) were rejected.

2. The appellant had preferred the appeal, being Customs Appeal No.C/51953/2019-SM, against an order-in-appeal dated 02.05.2019 passed by the Commissioner of Customs (Appeals), whereby the appellant's appeal against an order-in-original dated 29.04.2016 was rejected. The appellant had preferred the appeal, being Customs Appeal No.C/52105/2019-SM, against an order-in-appeal dated 08.05.2019 passed by the Commissioner of Customs (Appeals) rejecting the appellant's appeal against an order-in-original dated 06.05.2016.

3. The appellant is essentially aggrieved by the levy of penalty under Section 112(a) of the Customs Act, 1962 (hereafter '**the Customs Act**'). In terms of the orders-in-original dated 29.04.2016 and 06.05.2016, the Adjudicating Authority had imposed penalties of ₹13,00,000/- (Rupees Thirteen Lacs) and ₹23,00,000/- (Rupees Twenty- three Lacs Only) under Section 112(a) of the Customs Act, respectively.

4. The aforesaid orders-in-original dated 29.04.2016 and 06.05.2016 were rendered pursuant to the show cause notices dated 11.08.2014 and 16.06.2014 issued by the Additional Director, DRI, respectively.

5. The nature of allegations made in the two show cause notices

mentioned above are similar and the contentions advanced on behalf of the appellant are also similar in material aspects. The grounds on which the impugned order is assailed are common and therefore the present appeals have been heard together.

The context

6. The appellant is an entity located in Dubai and is engaged in the business of supplying confectionary items such as wafers, cookies, toffees etc. The appellant has been exporting the said goods to various importers in India.

7. It is stated that the officers of Directorate of Revenue Intelligence (hereafter '**DRI**') had gathered intelligence that certain importers importing confectionary items from the appellant and M/s Kelsen Group AS, Denmark (hereafter '**the Kelsen Group**') were evading customs duty by under-invoicing the goods and mis-declaring the transaction value and the retail sales price. The *modus operandi* for such evasion was that the exporters were issued two invoices: one for a value lower than the actual consideration, which would be used for clearance of the goods; and the second invoice for the full amount of consideration. The Bills of Entries would be filed on the basis of the lower value invoice. The invoice for the entire consideration would not be disclosed. The consideration reflected in lower value invoices, on the basis of which goods were imported, were remitted through normal banking channels and reflected in the books of accounts of the exporters. However, the invoices issued for the balance portion was

collected by agents of the appellant and the Kelsen Group, in India.

Order-in-original dated 06.05.2016

8. The officers of DRI had found that M/s S.R. International (hereafter 'SRI') had imported the consignment of assorted confectionary from suppliers located overseas including the appellant, by under-invoicing and mis-declaring the goods. The premises of SRI and one Sh. Prakash Menon, who was the representative of the appellant located in India, was searched. In addition, the premises of one Sh. Srikant Panda, who was an Indian representative of the Kelsen Group, was also searched. During the course of investigation invoices raised by the appellant were recovered from the premises of its representative, Sh. Prakash Menon. It is stated that the invoices raised by the Kelsen Group were recovered from its representative, Sh. Srikant Panda. The concerned officers found that the values shown in the invoices recovered from the representatives of the appellant and the Kelsen Group were higher than the value declared by SRI to the Custom Authorities at the time of importing the goods in question. Thereafter, statements of various persons were recorded.

9. According to the officers of DRI, the evidence and material collected during the investigations established the allegation that confectionary items exported by the appellant and the Kelsen Group were cleared on the basis of false invoices reflecting values, which were lower than the real consideration paid by the importer for the said goods.

10. Show cause notices dated 16.06.2014 were issued to various

noticees including SRI, constituent partners of SRI, the appellant, the Kelsen Group, and their agents in India. The show cause notice proposed that penalties under Section 112, 114A and 114AA of the Customs Act be imposed on the importers (SRI). The other noticees including the appellant were called upon to show cause why penalty under Section 112(a) not be imposed.

11. Some of the noticees (five in number) filed applications under Section 127B of the Customs Act before the Principal Bench, Customs and Central Excise Settlement Commission, New Delhi (hereafter '**Settlement Commission**') for settlement of their liability. SRI settled its liability for short payment of customs duty, interest thereon and penalty on the amounts as determined by the Settlement Commission. The Settlement Commission also confined the penalties proposed to be levied against other applicants to specified amounts.

12. The appellant did not approach the Settlement Commission and the show cause notice dated 16.06.2014 was adjudicated by the Adjudicating Authority.

13. By an order-in-original dated 06.05.2016, the Adjudicating Authority found that SRI had entered into a conspiracy, *inter alia*, with the appellant to import food items by mis-declaring the value and the retail sale price. The overseas suppliers including the appellant had raised two sets of invoices for each consignment, one with lower value, which was submitted to the Customs Authority for clearance and the other setting out the correct value on the basis of which SRI had settled

their account with the appellant. Whilst the consideration reflected in the invoices for the lower value was transmitted through banking channels, the balance amount was paid to the appellant's Indian agent in cash and was remitted through *hawala*.

14. In particular, it was found that the appellant had supplied two consignments of assorted toffees to SRI and had actively participated in the conspiracy to evade custom duty by raising false invoices and receiving part of the consideration, as reflected in the invoice of a lower value, through banking channels and the remaining in cash through the appellant's Indian agent, Sh. Prakash Menon. The Adjudicating Authority held that the appellant was guilty of abetting the evasion of customs duty and accordingly imposed a penalty of ₹23,00,000/- (Rupees Twenty-three Lacs) on the appellant under Section 112(a) of the Customs Act.

15. The findings of the Adjudicating Authority were upheld by the Commissioner of Customs (Appeals) as well as the learned Tribunal.

Order-in-original dated 29.04.2016

16. Show cause notice dated 11.08.2014 was issued by the DRI in connection with the similar goods imported by M/s Jai Maa Ambey Impex (hereafter '**JMAI**'). The nature of allegation made in the said show cause notice was similar to the one made in the show cause notice dated 16.06.2014. In this case, as well, the importer (JMAI) and some of the co-noticees filed an application under Section 127B of the Customs Act before the Settlement Commission and accepted the

customs duty, interest and penalties as fixed by the Settlement Commission. The appellant did not prefer the said route. Accordingly, the show cause notice dated 11.08.2014 was adjudicated by the Adjudicating Authority. The allegations made in the show cause notice were found to be correct and by an order-in-original dated 29.04.2016, the Adjudicating Authority imposed a penalty of ₹13,00,000/- (Rupees Thirteen Lacs Only) on the appellant under Section 112(a) of the Customs Act.

17. The appeal preferred by the appellant before the Commissioner of Customs (Appeals) was rejected by the order-in-appeal dated 02.05.2019 and a further appeal preferred to the learned Tribunal was also rejected by the impugned order.

Reasons and conclusion

18. The findings that the appellant had participated in the conspiracy with the importers for enabling them to avoid customs duty were upheld by the Appellate Authority as well as the Tribunal. Concededly, the concurrent findings of fact cannot be disturbed in these proceedings. Further, no attempt has been made by the learned counsel to submit to the contrary.

19. The learned counsel for the appellant has confined the present appeals to assail the impugned order on three grounds. First, it is claimed that no penalty can be imposed under the Customs Act against an overseas supplier as the Customs Act does not have extra-territorial operation. It is submitted that the levy of penalty under Section 112(a)

of the Customs Act is thus wholly illegal and beyond the jurisdiction conferred under the Customs Act. Second, that since the proceedings against the importers and other co-noticees have been dropped pursuant to the said parties approaching the Settlement Commission, no proceeding for abetment and evasion of customs duty can be maintained against the appellant who is merely a co-noticee. The learned counsel for the appellant has relied upon the decisions in the cases of ***A.M. Ahamed & Co. v. Commissioner of Customs, Custom House & Anr.: 2022 SCC OnLine Mad 5274***; ***S.K. Colombowala v. Commissioner of Customs (Import), Mumbai: 2007 SCC OnLine CESTAT 2868*** and ***Union of India & Ors. v. Onkar S. Kanwar & Ors.: (2002) 7 SCC 591***. Third, it is submitted that the show cause notices issued by DRI are without jurisdiction as officers of DRI are not “proper officers”. The learned counsel for the Revenue had countered the aforesaid submissions.

20. The contentions that no penalty under Section 112(a) of the Customs Act can be imposed on the appellant as it is an overseas entity and the Customs Act does not have any extra-territorial operation, is unmerited. In the present case, the appellant was found to be complicit in clearance of the goods on the basis of false invoices issued by the appellant. It was also found that the appellant had collected part of the consideration for the goods in India, which was sent to it through *hawala*. The alleged offences have been committed within the territory of India. Thus, the contention that the levy of penalty under Section 112(a) of the Customs Act on the appellant was beyond the purview of

the Customs Act is wholly misconceived.

21. The learned Tribunal had considered the aforesaid contention and held as under:

“17. Having considered the rival contentions, I find that the charge of aiding and abetting have been established against the appellant company. I further find that the appellant company, though it was registered having Head Office in Dubai, but it was very much present in India through its Indian Representative – Sh. Prakash Menon. I further find that through its Indian Representative, the appellant company have actively colluded and abetted with the Indian importers by various acts of commission and accordingly penalty has been rightly imposed under Section 112(a) of the Act.

17.1 I further find that the facts before the Hon’ble Supreme Court in the ruling of ***Canon India Pvt. Ltd.***, (supra) are very different, inasmuch as there was no case of fraud and the original Bill of Entry was assessed on first check basis. Wherein in the present case there is admitted case of collusion and forgery plus concoction of documents, including presenting and filing of false and incorrect documents (invoice), to evade Customs duty by the importer and the appellant company. Further, the present proceedings are for imposition of penalty and not for demand of duty under Section 28(4). The show cause notice on this appellant is not under Section 28(4) of the Customs Act. Fraud vitiates everything. Accordingly, I uphold the impugned orders and dismiss the appeals.”

22. We find no infirmity with the aforesaid decision.

23. The contention that no penalty can be levied against the appellant since other co-noticees have settled the liability before the Settlement Commission is insubstantial. The show cause notices were issued to

several persons. The fact that other co-noticees had approached the Settlement Commission and had settled their liability cannot absolve the appellant of its liability under the Customs Act. The appellant had full opportunity to approach the Settlement Commission but it chose to contest the proceedings before the Adjudicating Authority. The learned counsel for the appellant has been unable to point out any provision in the Customs Act, which would automatically extend the benefit of an order passed by the Settlement Commission in respect of a party, to other noticees as well.

24. Reliance placed by the appellant on the decision of the Supreme Court in ***Union of India v. Onkar S. Kanwar*** (*supra*) is misconceived. The said decision was rendered in the context of Kar Vivad Samadhan Scheme, 1998 for settlement of disputes. The Government of India had also passed Kar Vivad Samadhan Scheme (Removal of Difficulties) Order, 1998 on 08.12.1998 clarifying that in certain cases “*the settlement in favour of the declarant under sub-section (1) of Section 90 shall be deemed to be full and final in respect of such other person also on whom a show-cause notice was issued on the same matter covered under the declaration.*”

25. As stated above, there is no provision in the Customs Act, which extends the immunity available to a party that has successfully settled the case before the Settlement Commission, to other persons. Thus, the decision in ***Union of India v. Onkar S. Kanwar*** (*supra*) has no application in the facts of the present case.

26. In *A.M. Ahamed & Co. v. Commissioner of Customs* (*supra*), the Madras High Court had referred to the decision of the Supreme Court in *Union of India v. Onkar S. Kanwar* (*supra*) and observed that the effect of the settlement mechanism, as provided under the Kar Vivad Samadhan Scheme, 1998, would be applicable where orders are passed by the Settlement Commission under Section 127C(5) of the Customs Act. In that case, the importer had approached the Settlement Commission and made a true and fair disclosure relating to the import of goods. Accordingly, the importer was granted immunity from prosecution and fine/penalty. The Madras High Court held that in the circumstances, it would be unfair to continue the proceedings against the Custom House Agent (CHA) in relation to the very same transaction. We are unable to agree with the said view. The decision in the case of *Union of India v. Onkar S. Kanwar* (*supra*) was founded on Kar Vivad Samadhan Scheme (Removal of Difficulties) Order, 1998. The said decision does not support the view that in cases where the importer approaches the Settlement Commission under Section 127B of the Customs Act and makes a true disclosure, all other persons who are complicit in evasion of tax duty would automatically acquire immunity from penalty or prosecution. It is relevant to note that in *Union of India v. Onkar S. Kanwar* (*supra*), the Supreme Court had rejected the contention that once the company entered into a settlement under the said Scheme, the Directors and Officers would also be covered under the immunity granted to the company. The relevant extract of the said decision is set out below:

“12. We are unable to accept this submission. Under the Kar Vivad Samadhan Scheme there is no adjudication on the subject matter of the demand notice or show cause notice. There is a settlement of the “tax arrears”. Even though the same show cause notice may call upon the Company and its Directors/Officers to show cause, there is a separate demand for “tax arrears” against the Company and a separate demand for “tax arrears” against the Directors/Officers. Thus each entity/person would have to file a declaration separately. The settlement is in respect of each declaration. Section 91 only gives immunity in respect of matters covered in the declaration. The matter covered in the declaration by the Company is the “tax arrears” of the Company. The declaration by the Company admittedly does not cover the tax arrears of the Directors/Officers. Thus they get no immunity under Section 91 on a settlement by the Company.”

27. In the present case, although the show cause notices were issued to various noticees, the proposal to impose penalties/liability were separate and severable. Discharge of liability of one of the noticees either by making payment without a contest, or by settlement before the Settlement Commission would not absolve the other noticees from their liability.

28. The contention that the officers of DRI had no jurisdiction to issue show cause notices to the appellant, is also unmerited. It is material to note that penalty has been imposed on the appellant under Section 112(a) of the Customs Act. The question as to levy of penalties is required to be adjudicated under Section 122 of the Customs Act. In the present case, the order was adjudicated by the Joint Commissioner of Customs and there is no dispute that he had the jurisdiction to

adjudicate the question of levy of penalty under Section 122 of the Customs Act.

29. The question as to whether the officers of DRI are proper officers for issuance of notice under Section 28 of the Customs Act does not arise in the present case. The learned Tribunal has rightly rejected the said contention on the ground that the show cause notice issued to the appellant was not under Section 28(4) of the Customs Act.

30. We are unable to accept that the present appeals raise any substantial question of law.

31. The appeals are accordingly dismissed.

VIBHU BAKHRU, J

AMIT MAHAJAN, J

MAY 18, 2023

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