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

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Date of decision: 24.01.2024

+ **CUSAA 107/2018**

HUGHES NETWORK SYSTEMS INDIA LTD Appellant

versus

COMMISSIONER OF CUSTOMS (IMPORT & GENERAL)
NEW DELHI Respondent

+ **CUSAA 113/2018 & CM APPL 15658/2018**

HUGHES COMMUNICATION INDIA LTD Appellant

versus

COMMISSIONER OF CUSTOMS (IMPORT & GENERAL)
NEW DELHI Respondent

Advocates who appeared in this case:

For the Petitioner: Mr. Karan Sachdev, Mr. Agrim Arora, Mr. Sumit Khadaria & Ms. Purvi Sinha, Advocates.

For the Respondent: Mr. Anurag Ojha, Senior Standing Counsel with Mr. Subham Kumar, Mr. Karan Aggarwal, Advocates.

Mr. Zoheb Hussain, Senior Standing Counsel for CBIC with Mr. Vivek Gurnani & Ms. Radhika Puri.

CORAM:-

HON'BLE MR. JUSTICE SANJEEV SACHDEVA

HON'BLE MR. JUSTICE RAVINDER DUDEJA

JUDGMENT

SANJEEV SACHDEVA, J. (ORAL)



1. Appellants impugn judgment dated 18.08.2017 passed by the Customs Excise Service Tax Appellate Tribunal (hereinafter referred to as the Tribunal) whereby the appeals filed by the appellants arising out of order-in-original dated 16.05.2014 have been dismissed.

2. By order dated 01.08.2018, while admitting these appeals for hearing the following question of law was framed for consideration:-

“Did the Tribunal fall into error in concluding that the appellants/assesseees were culpable and/or were liable to the penalty imposed under Section 112 of the Customs Act and that the goods were liable for confiscation, in the circumstances of the case?”

3. Appellant are in the business of *interalia* supplying various types of Very Small Aperture Terminal (hereinafter referred to as “VSAT”) and its components to various customers.

4. Appellants are authorized dealer of wireless equipment possessing a dealer possession license issued by Department of Telecom, Ministry of Communications and IT.

5. Appellants imported various components of VAST during December 2007 and March 2009.

6. It is not in dispute that the import was subject to production of a license from the Wireless Planning and Co-ordination Wing of the Department of Telecommunication (hereinafter referred to as the WPC Licenses). It is also not in dispute that subject import was carried out without a valid WPC license.



7. The issue arose when the Directorate of Revenue Intelligence found that the service providers to the appellants i.e. Alliance Strategies Ltd (ASL for short) which allegedly had the responsibility of obtaining the requisite WPC license, provided licenses that were forged and fabricated. Based on the said forged and fabricated license subject import was carried out. It is also not in dispute that custom duty as applicable was paid by the appellants.

8. Subject Show Cause Notice dated 06.09.2012 was issued to the appellants as also to ASL and other importers who had imported the goods using the forged WPC licenses obtained through ASL.

9. Appellants replied to the Show Cause Notice clarifying that there was no fraud played on their part and that they were not aware that the WPC licenses were forged. It was contended that the WPC licenses had been used by the appellants bonafidely believing them to be genuine.

10. By order dated 16.05.2014, the Commissioner of Customs adjudicated the Show Cause Notice and held that the goods that had been imported under the forged WPC licenses were liable for confiscation under Section 111(d) of the Customs Act, 1962 (hereinafter referred to as the Customs Act).

11. The Commissioner of Customs gave an option to the Appellants to redeem the goods under Section 125 (1) of the Customs Act on payment of redemption fine totalling to Rs 60 Lakhs. Further a



penalty of Rs 15 Lakhs each was imposed on each of the appellants under Section 112 (a) of the Customs Act. In so far as ASL was concerned a penalty of Rs 1.25 crores was imposed on it and individual Directors/Managers/employees of ASL were imposed penalty ranging from Rs 6 lakhs to 20 Lakhs.

12. We may note at this juncture that the value of the goods that were imported using the forged WPC licenses was Rs 3.13 crores.

13. Pursuant to the said order appellants deposited/paid the redemption fine and subject consignment was released without prejudice to the rights and contentions of the parties.

14. Learned counsel for the appellants submits that as the appellants had no *mens rea* and had no knowledge of the WPC licenses being forged, no penalty could have been imposed on the appellants. He further submits that since the goods was imported and the customs duty payable has been paid, the same could not have been confiscated in the absence of any *mens rea* on the part of the appellants.

15. Appellants thereafter filed an appeal before the Tribunal which has been dismissed by the judgment dated 18.08.2017 upholding the redemption fine as well as the penalty imposed on the appellants.

16. Learned counsel for the appellants submits that the quantum of redemption fine and the penalty imposed on the appellant is also on the higher side and disproportionate to the alleged conduct attributed
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to the appellants for the subject import.

17. Learned counsel relies on the decision in the case of *Akbar Badrudin Giwani v Collector of Customs, Bombay, (1990) 2 SCC 203* to contend that where the penalty and fine in view of confiscation is extremely harsh and excessive then the same is liable to be set aside. It was further contended that for the imposition of the penalty, the party must act deliberately in defiance of law or ought to be guilty of contumacious or dishonest conduct but not in cases where there is a technical or venial breach. Hence, in the facts of the present case, the redemption fine and penalty being harsh and excessive is liable to be reduced.

18. Further reliance is placed on the judgment of a Single Judge of this Court in *Jain Exports Pvt Ltd vs UOI, 2009 SCC OnLine Del 2575: (2010) 250 ELT 15* to contend that where discretion is given to the authority for imposition of penalty, said discretion has to be judicially exercised and cannot be arbitrary.

19. Reference may be made to section 111 (d) of the Customs Act which reads as under:-

***“Section 111 Confiscation of improperly imported goods, etc-
The following goods brought from a place outside India shall
be liable to confiscation:-***

(d) any goods which are imported or attempted to be imported or are brought within the Indian customs waters for the purpose of being imported, contrary to any

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prohibition imposed by or under this Act or any other law for the time being in force;”

20. Section 111 (d) of the Customs Act *inter alia* stipulates that any goods which are imported or attempted to be imported or are brought within the Indian customs waters contrary to any prohibition imposed by or under the Act shall be liable to confiscation.

21. In the instant case, it is not in dispute that WPC license had to be obtained from the wireless planning and coordination wing of the Ministry of Communication. It is also not in dispute that WPC licenses that were used for the purposes of import were forged and fabricated.

22. Consequently, provisions of Section 111 (d) of the Customs Act are clearly satisfied. Subject goods have been brought within the Indian custom water contrary to the prohibition imposed i.e. of having an import license. Resultantly, the goods were liable for confiscation.

23. There is no requirement in Section 111 of any *mens rea* for the contravention. The provisions become applicable on a strict liability principle. Once the goods are imported contrary to any prohibition imposed, the goods are liable for confiscation.

24. For the purpose of completeness, we may note that by the impugned order passed by the Tribunal, appeal filed by ASL was also dismissed.



25. We are informed that the Directors of ASL had impugned the said order before this court in CUSAA 155/2018. This Court had dismissed the appeal filed by the said Directors.

26. Reference may also be had to Section 112 to the Customs Act which reads as under:-

“Section 112 Penalty for improper importation of goods, etc

(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.....”

27. Section 112 (a) of the Customs Act lays down that any person who in relation to any goods *inter alia* does any act which would render such goods liable for confiscation is liable to penalty. Section 112(b) stipulates that any person who *inter alia* acquires possession of



any goods or is in any way concerned in carrying, removing, depositing, harbouring or deals with any goods which he knows or has reason to believe are liable for confiscation under Section 111 of the Customs Act, is liable to a penalty. The penalty stipulated is not exceeding the value of good or rupees five thousand whichever is greater.

28. Section 112 (a) of Customs Act also applies on a strict liability concept. It does not require any *mens rea*. Section 112 (a) of the Customs Act may be contrasted with the provisions of section 112 (b) of the Customs Act. It is clear that for Section 112 (a) to be applicable, no *mens rea* is required whereas for Section 112 (b) to be applicable *mens rea* or knowledge is required. The expression used in Section 112(b) is “*dealing with any goods which he knows or has reason to believe are liable to confiscation under section 111*”. Section 112(b) imposes an obligation on the authorities to establish *mens rea* and/or knowledge.

29. In the case of the appellants, Section 112 (a) of Customs Act has been applied which really is in the nature of *absolute liability*. Section 112 (a) of the Customs Act read with Section 111 clearly shows that the goods were liable to confiscation and for redemption thereof fine was to be imposed and further penalty liable to be imposed on the appellants.

30. Reference may also be held to provisions of Section 114 (AA) of the Customs Act which reads as under:

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“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.”

31. Section 114AA provides for penalty for use of false and incorrect material. Knowing and intentional use of false or incorrect material makes a person liable to penalty not exceeding five times the value of goods.

32. When section 112 (a) (i) of the Customs Act is contrasted with Section 114 AA it further establishes that where *mens rea* is established for use of false and incorrect material, the penalty could be five times the value of the goods. On the other hand penalty for improper importation of goods under section 112 (a) is not to exceed the value of the goods.

33. In the instant case, had the authorities applied Section 114AA, the penalty could have been upto five times the value of the Goods.

34. Reference may also be held to section 125 of the Customs Act which provides for option to pay fine in lieu of confiscation and stipulates that the fine shall not exceed the market value of the goods confiscated less duty chargeable thereon.

35. In the instant case, the value of the goods imported were 3.13



crores and the redemption fine imposed is Rs 60 Lakhs which is nearly 19% of the value of the goods and the fine imposed is Rs 15 Lakhs on each of the appellants which translates to about 4.75% (totalling to 9.5%) of the value of the goods.

36. As we have held the confiscation of the goods under section 111 and imposition of penalty under section 112 (a) of the Act are on a strict liability principal, the question of law

“Did the Tribunal fall into error in concluding that the appellants/assesseees that the appellants/assesseees were culpable and/or were liable to the penalty imposed under Section 112 of the Customs Act and that the goods were liable for confiscation, in the circumstances of the case?”

is answered in favour of the department/respondent and against the assesseees.

37. With regard to the submissions made by learned counsel for the appellants that the quantum of redemption fine and penalty imposed is harsh and excessive, we of the view that the same is within the discretionary powers of the authorities. Discretion has been exercised by the Commissioner of Customs of imposing penalty and fine and said discretion having been upheld by the Tribunal, does not give rise to a question of law, leave alone a substantial question of law and is a pure question of fact.

38. Be that as it may, as noticed here in above the redemption fine as well as penalty imposed could have been upto the value of the goods i.e. Rs. 3.13 crores, whereas in the instant case, the redemption



fine imposed is about 19% and the penalty on both the appellants cumulatively amounts to about 9.5% of the value of the goods.

39. We hold that the discretion has been judicially exercised by the Commissioner of Customs and even on facts of the case, does not warrant any interference.

40. Reliance placed by learned counsel for the appellants on the judgment in the case of *Akbar Badrudin Giwani (supra)* is misplaced, for the reason that we have found that the discretion in the instant case has been exercised judicially by the Commissioner of Customs.

41. In *Akbar Badrudin Giwani (supra)*, the Supreme Court also considered the proportionality of conduct *vis-a-vis* the quantum of penalty. In the present case the Commissioner of Customs could have imposed redemption fine and penalty each of 100% of the value of the goods but has restricted the redemption fine to 19% and penalty to 9.5%. We find that discretion has been judicially exercised and in fact has been exercised in favour of the appellants by not imposing a harsh or excessive penalty.

42. Similarly, the decision in the case of *Jain Exports Pvt Ltd (supra)* also does not further the case of the appellants. In *Jain Exports Pvt Ltd (supra)*, this Court has referred to the judgement of the Supreme Court in *Chairman Sebi vs Shriram Mutual Fund 2006 (5) SCC 361* wherein the Supreme Court has held that once contravention is established then the penalty has to follow and only



quantum of penalty is discretionary. As noticed in *Chairman Sebi (supra)*, in the present case discretion has been exercised by the adjudicating officer by imposition of lesser penalty than what could have been imposed under the provisions of the Customs Act.

43. In view of the above, the question of law is answered in favour of the authority/respondent and against the Appellants/Assessee. There being no infirmity in the impugned order warranting any interference, the appeals are dismissed.

SANJEEV SACHDEVA, J

RAVINDER DUDEJA, J

January 24, 2024/sk



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