CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL

NEW DELHI

PRINCIPAL BENCH – COURT NO. – IV

CUSTOMS APPEAL NO. 50181 of 2016

[Arising out of Order-in-Original No.15/2015/DPS/Pr. Commissioner dated 09.11.2015 passed by the Commissioner, Customs, New Delhi].

M/s. A.V. Global Corporation Pvt. Ltd. **...Appellant**
201, New Delhi House,
Barakhamba Road,
New Delhi-110001

VERSUS

Commissioner of Customs,
New Delhi (Import & General) **...Respondent**
New Custom House,
Near IGI Airport,
New Delhi.

APPEARANCE:

Mr. L.B. Yadav, Advocate for the Appellant
Mr.Rakesh Kumar, Authorised Representative for the Respondent

Coram:
HON'BLE DR.RACHNA GUPTA, MEMBER (JUDICIAL)
HON'BLE MR. P.V. SUBBA RAO, MEMBER (TECHNICAL)

DATE OF HEARING : 04/06/2024
DATE OF DECISION: 01/10/2024

FINAL ORDER NO.58758/2024

DR.RACHNA GUPTA

The present appeal has been filed to assail the Order-in-Original No.15/2015 dated 09.11.2015. The relevant factual matrix which has culminated into the impugned order is that appellant as the Customs House Agent (CHA) of M/s. Nestle India Ltd. had filed a Bill of Entry No.2047404 dated 06.05.2013 for

clearance of goods declared as "LC PUFA Mix Oil with Sofinol (edible grade)" having declared value of Rs.10,56,801/-. No examination was prescribed for the said Bill of Entry when it got facilitated by RMS. However, at the time of 'out of charge' of this consignment it was observed from the import documents that the importer had classified the goods under CTH 15079010 which covers the refined soyabean oil of edible grade but the goods in question was LC PUFA Mix Oil. The Mixed Oils are not covered under the CTH 150721515. The appropriate heading for classification of mix oil is CTH 15179090. Since the supplier of goods also mentioned the CTH 1517.90 in their invoice, the Department formed an opinion that the goods have wrongly been classified. Accordingly, the goods were seized under section 110 of the Customs Act 1962 on the reasonable belief that the same are liable to confiscation under section 111 of the Act.

1.1 The importer in the statement had accepted the classification under CTH 1517.90 even for the past 6 Bills of Entry and thus deposited a sum of Rs.38,43,921/- (including interest) which includes the amount involved in the Bill of Entry in question. The Department, however, found 19 past Bills of Entry having similar wrong declaration and involving an amount of Rs.2,46,75,612/-. Alleging that the importer deliberately and intentionally classified their goods under wrong CTH to evade the Customs duty and alleging that appellant being their CHA is an interested party in the clearance of the imported goods as no clearance from PHO/ FSSAI

was taken in respect of the said clearances, that the Show Cause Notice bearing No.71/2013 dated 08.08.2013 was issued not only on the importer but also on the CHA, present appellant proposing the imposition of penalty upon the appellant under section 112 (b) and Section 114 AA of the Customs Act, 1962. The said proposal has been confirmed vide the aforementioned Order-in-Original. Being aggrieved the appellant has filed the present appeal.

2. We have heard Mr. L.B. Yadav, Ld. Counsel for the appellant and Mr.Rakesh Kumar, Authorised Representative for the Department.

3. Ld. Counsel for the appellant has mentioned that the classification of goods has to be decided by the importer only. The importer herein i.e. M/s. Nestle India Ltd. is an expert in the field of nutrition. The composition, nature and characteristics of the goods imported by them were known to them only. Appellant has never been privy to those facts. The appellant was purely acting upon the instructions, documents and the clarification given by the importer. The reliance has been placed upon the contract dated 01.05.2007 between the appellant and the importer wherein the scope of contract is that the appellant shall prepare/ file Bills of Entry on receipt of necessary documents from the importer to get the Bills of Entries appraised and finalized and to take clearance from the concerned officers. The moment Department alleged that the classification mentioned in the Bills of Entry is wrong, the appellant CHA immediately tried to get clarifications from the

importers. Copies of various e-mails sent to the importer seeking clarification have been impressed upon.

3.1 It is further mentioned that the only allegation against the appellant is that appellant appeared to be the interested party in clearance of the goods under wrong classification. However, there is no iota of evidence on record vis-a-vis this allegation. Ld. Counsel submitted that the burden of proving the allegation was on the Department. Demand with respect to 19 past Bills of Entry (including one life Bill of Entry) was proposed. However, 14 thereof are the Bills of Entry which were filed prior 08.04.2011 i.e the date when the scheme of self assessment was introduced. The burden for those 14 Bills of Entry was definitely upon the Department. Even for the Bills of Entry post 8th April, 2011, the law remains same that the burden is on the Department to prove the allegations. Absence of any evidence is sufficient to show that penalty has wrongly been imposed upon the appellants.

3.2 It is further mentioned that, in fact, there is no allegation in the Show Cause Notice that the appellant was the interested party. Hence the adjudicating authority has committed an error while concluding against the appellant, that too, beyond the scope of Show Cause Notice. Ld. Counsel further has mentioned that the penalty imposed under section 112 (e) is not sustainable as the said provision has 5 sub-clauses but the show cause notice has not specifically invoked any of those clauses. The order imposing penalty is therefore liable to be set aside for want of specific

allegations in the Show Cause Notice. With respect to penalty imposed under section 114AA of the Act it is impressed upon that appellant had no role in classification of the goods. Importer only had to decide FSSAI clearance was also to be taken by the importer. The appellant filed the Bill of Entry under the bonafide belief that the goods were correctly classified. Otherwise also penalty under section 114 AA will be applicable only in those cases where export benefits are claimed without exporting the goods and presenting forged documents knowingly or intentionally whereas in the present case there is no such allegation. Thus, the penalty under section 114 AA can be imposed only on the fraudulent exporter. Hence, the order imposing penalty upon the appellant CHA is not legally sustainable. Same is prayed to be set aside and appeal is prayed to be allowed.

4. While rebutting these submissions, ld. D.R. has submitted that it is the Custom Broker / CHA who apart from filing the Bills of Entry is responsible for various activities including unloading and dispatch of said goods. He has to exercise due diligence as per the requirement of provision of Customs Broker License Regulation 2018 (hereinafter referred as CBLR). Scrutiny of documents is also the responsibility of the CHA. It is impressed upon that the supplier of the goods had mentioned the correct CTH but the appellant chose not to adopt the said correct classification. Changing the correct CTH can have no other outcome except evasion of Customs Duty. CHA was supposed to advice the

importer correctly. Since he has failed, it stands established beyond doubt that appellant CHA had abetted the act of importing goods under wrong classification with the known and deliberate attempt to evade Customs Duty. Thereby has committed the violation of CBLRs. Resultantly, the act invites the imposition of penalty. Hence, there is no infirmity in the order imposing penalty. Ld. DR has relied upon the decision of this Tribunal in the case of **Mahindra and Mahindra Ltd. vs. Commissioner of Central Excise, Mumbai reported in 2010 (249) ELT 182 (Tri-Bombay). Another decision in the case of Rajesh Maikhuri and Others vs. Commissioner of Customs (Exports) New Delhi reported in 2020 (371) ELT 561 (Tri-Del.)**

5. Having heard both the parties at length, perusing entire record of the appeal including the Show Cause Notice and the order under challenge, we observe that the basic allegation in the Show Cause Notice is that the importer had wrongly classified the goods under CTH 5079010 whereas the goods were required to be classified under 15179090. The importer M/s. Nestle India vide their technical writeup dated 10.05.2013 and 15.05.2013 had conveyed to the Department that they have imported a number of items for manufacture of their final products. Since the product imported was composed of 3 vegetable oils and was of food grade suitable for application in nutritional products that the importer was under *bonafide* impression that the product imported is classifiable under 1507. However, on being pointed out the importer initiated

the process of re-considering the classification not only this had voluntarily deposited the differential duty of Rs.38,43,921/- with respect to the past 6 bills of entry as brought to notice by the Department. These facts are sufficient for us to hold that the importer had misclassified the goods to be imported. But penalties are not imposable in every case of mis-declaration.

5.1 Law has been settled that mis-classification is different from mis-declaration. This Tribunal Calcutta Bench in the case of **Unique Plastic Industries vs. Commissioner of Central Excise Calcutta reported in 2002 (145) ELT 604** has held that wrong claim of classification or availing wrong benefit of exemption Notification by itself does not amount to suppression or mis-declaration unless there are certain facts which were required to be disclosed by the assessee but have not been disclosed. The Delhi Bench of this Tribunal also in the case of **Kirti Sales Corporation vs. Commissioner of Customs, Faridabad reported in 2008 (232) ELT 151 (Tri.-Del.)** has held that to constitute "misdeclaration" the declaration must be intentional. Misdeclaration cannot be understood as same as wrong declaration. The former is out of bonafide mistake and the later one is intentional. It has been held in the case that if there is no intentional or deliberate wrong declaration to attract the mischief of the Customs Act.

5.2 These decisions clearly established that the *mens rea* is a relevant fact for levy of penalty under section 112 of the Customs

Act and penalty cannot be levied based on the bonafide belief. Since the allegations since beginning are against the importer that he had wrongly classified the goods, the appellant from no stretch of imagination can be held liable for the said classification. We do not find a single evidence showing any instance of any benefit availed or even attempted to be availed by the appellant.

5.3 The imposition of penalty cannot be automatic. It has to pass the test of *mens-rea* as has been held by Hon'ble High Court of Punjab and Haryana in the case of **Commissioner of Customs, Amritsar vs. Kamal Kanpur reported in 2007 (216) ELT 21**. We find no evidence of presence of *mens-rea* at-least with the appellant CHA to deliberately and intentionally mention the wrong classification with an intent to evade the Customs Duty. Hon'ble Apex Court also in the case of **Hindustan Steels Ltd. vs. State of Orissa 1978 (2) ELT J 159 (SC)** has held that a penalty still ordinarily be imposed in cases where the party acts deliberately in defiance of law or is guilty of contumacious or dis-honest conduct or acts in conscious disregard of its obligation. It cannot be imposed in the cases where there is a technical or venial breach of the provisions of act or where the breach flows from a bonafide belief that the offender is not liable to act in the manner prescribed by the statute. Hon'ble Court also clarified that the discretion to impose a penalty must be exercised judicially.

6. In the light of the discussion, the main argument of the department that the appellant has violated the provisions of CBLR

is denied to be the sole ground for imposing penalty upon appellant CHA under section 112 B of the Customs Act, 1962. The order imposing penalty is therefore liable to be set aside for the said reason. Also for the reason that the Show Cause Notice has not invoked the specific sub clause of section 112B. The Apex Court in the case of **Amrit Food vs. Commissioner of Central Excise reported in 2005 (190) ELT 433 (SC)** has held that when a particular clause of the provision has not been invoked in the Show Cause Notice nor has been specified in the adjudication order. The order imposing penalty is waived and is liable to be set aside.

7. Coming to the penalty imposed under 114 AA the objective of section 114AA as was subsequently incorporated, is apparent from 27th report of the Standing Committee on Finance (2005) which proposed this new section consequent to the deduction of several cases of fraudulent export where the exports were shown only on paper and no goods crossed the Indian boarder. The Committee opined introducing provisions of levying penalty upon 5 times the value of goods as a right deterrent the Constitution Bench of Hon'ble Supreme Court in the case of **Kalpana Mehta Vs. Union of India in Civil Writ Petition No.558 of 2012** has held that the Parliamentary Committee Report is to be considered to see the purpose for which a statutory provision has been brought in. Since provision 114 AA is against the fraudulent exporters we hold that the same is wrongly invoked for penalizing the Customs House Agent. We draw our support from the decision of this Tribunal in

the case of **World-Wide Cargo vs. CCE, Bangalore reported in 2022 (379) ELT 120 (Tribunal- Bangalor**e). In the light of the above discussion, we hold that penalty even under 114AA has wrongly been imposed upon the appellant-CHA, same is liable to be set aside.

8. Above all, the burden of proof that the product is classifiable under a particular head is on the Revenue and must be discharged by proving that it is so understood by the consumers of product in common parlance as has been held by Hon'ble Apex Court in the case of **CCE vs. Vico Laboratories reported in 2005 (179) ELT 70.** There is no technical expert report produced by the Department. The voluntary part payment of differential duty by the importer can never be a ground for imposition of penalty upon the CHA.

9. In the light of entire above discussion, we hereby set aside the order under challenge. Consequent thereto, the appeal is hereby allowed.

[Pronounced in the open Court on 01-10-2024]

(DR. RACHNA GUPTA)
MEMBER (JUDICIAL)

(P.V. SUBBA RAO)
MEMBER (TECHNICAL)

Anita