CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
MUMBAI

WEST ZONAL BENCH

Customs Appeal No. 86864 of 2019

(Arising out of Order-in-Appeal No. MUM-CUSTM-APSC-APPELLANT-1332/18-19 dated 29.03.2019 passed by the Commissioner of Customs (Appeals), Mumbai III)

Mohammed Irfan Abdul K. Munshi **.....Appellant**
304, Rajkamal Apartment,
Raheja Complex, Opp. Yari Road,
Versova, Andheri (W), Mumbai

VERSUS

Commissioner of Customs, Air Cargo Complex **.....Respondent**
6th Floor, Awas Corporate Point,
Makwana Lane, Andheri Kurla Road,
Andheri (E), Air Cargo Complex,
Sahar, Mumbai

APPEARANCE:

Shri Sujay Kantawala, Advocate for the appellant
Shri D S Maan, DC(Authorised Representative) for the respondent

CORAM:
HON'BLE MR. AJAY SHARMA, MEMBER (JUDICIAL)

FINAL ORDER No: A/86158 / 2022

DATE OF HEARING : 22.11.2022
DATE OF DECISION : 08.12.2022

Per: AJAY SHARMA

Appellant herein has filed the instant appeal challenging the Order-in-Appeal dated 29.3.2019 passed by the Commissioner of Customs (Appeals)-II, Mumbai Zone-III by

which the learned Commissioner disposed of the Appeal filed by the appellant by reducing the penalty imposed on him from Rs. 16 lakhs to Rs. 10 lakhs.

2. The facts leading to the filing of the instant appeal are stated in brief as follows. On the basis of an intelligence, the Directorate of Revenue Intelligence, (DRI) gathered information that some importers had imported gold jewellery from Thailand without payment of Basic Custom Duty of 10% by misusing the benefit of exemption notification No.85/2004-Cus. Dated 31.08.2004 read with Notification No.101/2004-Cus. (NT) dated 31.08.2004. The consignment had been cleared only on payment of 1% Special Additional Duty (SAD) of Customs. Enquiry was initiated against M/s Damasy Retail Jewellery Pvt. Ltd, who had imported 07 consignments of studded gold jewellery from Thailand and cleared the same through Precious Cargo Customs Clearance Centre (PCCCC), Mumbai by availing the duty exemption benefit of the Notification No.85/2004-Cus. dated 31.08.2004 and consequent evasion of Custom Duty amounting to Rs.26,12,902/- which culminated into issuance of a Show Cause Notice dated 20.05.2014 to the importer i.e. the Company and its four (4) Directors including the Appellant herein and subsequently Adjudicated vide Order-in-Original No. ADC/DG/AP-SC/08/2014-15 dated 31.03.2015. The Adjudicating Authority denied the duty exemption benefit and confirmed the differential duty of Rs.26,12,902/- with interest and imposed a penalty of Rs.26,12,902/- along with interest under Section

114A on M/s Damasy Retail Jewellery Pvt. Ltd. and penalty of Rs.16,00,000/- under Section 114AA, 112(a) & 112(b) on Shri Mohammed Irfan Abdul K. Munshi i.e. the Appellant herein being one of the Directors of M/s. Damasy Retail at the time of filing of Bill of Entry dated 23.03.2009 and so far as other Directors are concerned proceedings against them was dropped. On appeal filed by the Appellant, the learned Commissioner upheld the penalty but its quantum was reduced from ₹16 lakhs to ₹10 lakhs. Instant appeal has been filed by the Appellant on the grounds that the adjudicating authority proceeded in most cryptic manner and adjudicated the show cause notice without considering relevant facts and while proceeding to adjudicate the show cause notice, in a hasty manner, simply rejected the submissions made by the appellant as devoid of merits thereby imposing unwarranted penalty on the appellant; that the import of studded gold jewellery covered by 7 Bills of Entry, relied upon in the impugned show-cause notice, took place during the period when the appellant was not the Country Head and had ceased to be so in the importer company, therefore the question of the appellant having committed any act or omission or having abetted in any act or omission does not arise, hence there is no basis to impose any penalty on the appellant.

3. Mr. Sujay N. Kantawala, learned counsel appearing for the appellant submits that penalty has wrongly been imposed on the appellant as although the concerned Bill of entry is of dated 23.3.2009, but much prior to that the appellant has resigned

vide his letter dated 28.11.2008 *(which was duly accepted by the company on 29.11.2008)* from the position of Country Head of the Company w.e.f. January, 2009 and thereafter he tendered his resignation from the Directorship of the Company also w.e.f. 31.3.2009 vide his resignation letter of 31.3.2009 alongwith Form 32. Learned counsel further submits that there was no allegation anywhere that the appellant was the beneficiary or about any illegal gain to the appellant from the import in issue and for his support learned counsel placed reliance on the *order dated 14.12.2017 of this Tribunal in Appeal Nos. C/708 to 710, 318,319,349 to 352/2008 in the matter of Pieco Electronics & Electricals Ltd. vs. CC (Import), ACC, Mumbai.* He also submits that no action has been taken by the department against any other employee of the company. Learned counsel also questioned the imposition of combined penalty both under Sections 112(a)&(b) and 114AA ibid. According to learned counsel there has to be bifurcation stating how much amount of penalty under which provision and in support of his submission, learned counsel placed reliance on the decisions of this Tribunal in the matter of *Benzo Chem Industries (P)Ltd. vs. CCE, Jalgaon; 2007(216) ELT 94 (Tri-Mum) and CC(Preventive), Mumbai vs. Ramesh A. Bachani & Ors.; 2000 (93) ECR 375 (Tribunal)*. According to learned counsel conscious knowledge was also not proved by the department anywhere. One more submission was raised by learned counsel about inordinate delay in passing the order by the 1st Appellate Authority i.e. the Commissioner

(Appeals). According to him, learned Commissioner concluded the hearing on 11.1.2018 but the impugned order was passed much belatedly on 29.3.2019 which, according to learned counsel, is against the mandate of expeditious disposal as per by Circular No. 732/48/2003-CX dated 5.8.2003 and also Section 128(4A) of the Customs Act, 1962. Per contra learned Authorised Representative appearing for Revenue submitted that the Bill of entry in issue is of dated 23.3.2009, which is well during the tenure of the appellant in the company and in the said consignment the value addition was ascertained at 16.15% as against declared 22%, therefore it's a clear case of mis-declaration for which the importer and the appellant, as Director, of the said firm was held responsible and rightly penalized. Learned Authorised Representative stressed on the point that the appellant was responsible for all the policy decisions which, according to him, includes the import of the goods from Thailand and availment of concessional benefit. According to him the decision to import goods and to take concessional benefit are not small decisions which can be made at managerial level. He justified the imposition of penalty under sections 112(a)&(b) and 114AA jointly. Learned Authorised Representative also relied upon the provisions of Section 140 of the Customs Act in support of his submission that the Director is also liable for the offence by a company. He further submits that the Certificate of Origin were not found proper and must have been obtained by fraud by the appellant in conspiracy with their foreign supplier.

4. I have heard Mr. Kantawala, learned counsel for the appellant and learned Authorised Representative for the Revenue and perused the case records including the synopsis/written submissions and the case laws cited by the respective sides. Although initially seven (7) Bills of entry were in issue but at the Adjudication level only on the basis of one Bill of entry dated 23.3.2009 penalty has been imposed on the appellant herein under Sections 112(a) & (b) and 114AA Customs Act without there being any finding of any *mens rea* on his part. The penalty has been imposed only on the basis that he was one of the Directors of M/s. Damasy Retail Jewellery Pvt. Ltd. at the relevant point of time. I have gone through the resignation tendered by the appellant on 28.11.2008 from the position of *country head* in which it has been specifically mentioned that he would not take any decisions after 30.11.2008 but still the Adjudicating Authority has imposed penalty on the appellant on the basis that he was the head of India operations of M/s. Damasy Retail Jewellery Pvt. Ltd. and observed as under:-

> "3.11. As regard to penalty proposed on notice 1 i.e Shri Mohammed Irfan Abul karim Munshi, Director of Damasy Retail Jewellery Pvt. Ltd. under Section 112(a) & (b) and 114A and 114AA of the Customs Act, 1962, I find from the written submissions dated 29.05.2014 that though he had submitted his resignation in Nov, 2008 but these resignation was submitted in the Registrar of Companies on 31.03.2009. Legally he was a director of the company till 31.03.2009 and till this date he was the director and in charge of India operation of this company as

per his own admission in his statement. The import of the said 7 impugned consignments of studded gold jewellery was started from 23.03.2009. During this period Shri Mohammed Irfan Abul karim Munshi was the Director and head of India operation of M/s Damasy Retail Jewellery Pvt. Ltd, Mumbai. Being head of the operation of India, he must have experience in the field of studded gold jewellery and he must have been aware of the condition of mimimum local value addition of 20% for the purpose of exemption from Custom Duty on the import of jewellery under FTA from Thailand. Hence, I conclude that, Shri Mohammed Irfan Abul karim Munshi was fully aware that in case of B/E no. 100617 dated 23.03.09 local value addition was 16.15 as elaborated at para 1.12 above and that the value addition of more than 20% had not been achieved but deliberately suppressed this fact and thus unduly claimed the exemption under Notification No. 85/2004 and exploited the Interim Rules of Origin issued vide Notification No. 101/2004 and instead of paying merit rate of duty of Rs.15,91,626/- just paid Rs.152997/- unduly claiming the benefit under the above said notification. Hence he is liable to penalty under section 112(a), (b) and 114AA."

5. A perusal of the show cause notice suggest that suppression, mis-statement etc. everything has been attributed to M/s. Damasy Retail Jewellery Pvt. Ltd. but in the said show cause notice there is no whisper about any suppression or misstatement or abatement on the part of the appellant. No role has been assigned or alleged against the appellant there in the Show-cause notice. He has been penalized merely because he

was the Director of the company during the relevant period. But both the authorities below have overlooked one fact that in his resignation letter dated 28.11.2008 while resigning from the post of country head, the appellant has specifically mentioned therein that he would not take any decisions after 30.11.2008 which in other words means that after that date he would not participate actively in any manner in the affairs of the company. Had the resignation been not there, still the department has failed to bring out any evidence on record suggesting any active role of the appellant in that single import/bill of entry in issue. It has not been established anywhere that the appellant is the beneficiary or has gained anything out of the import. In a similar situation in the matter of *Pieco Electronics & Electricals Ltd. (supra)* the Tribunal has set aside the penalties on the appellant therein on the ground that the appellant therein were not the beneficiary. I am unable to find any specific charges in the show cause notice or any evidence adduced by the department anywhere or any discussions in the orders of the authorities below which directly implicates the appellant for having falsifying or abetting in falsification/fabrication of any of the document. In none of the orders of the authorities below there is any discussion or finding regarding *mensrea* or unlawful gain to the appellant or attributing any knowledge on his part. The orders merely proceed on speculations as it uses the terms like *'the appellant must have* experience' or *'must have been aware'.* No penalty or conviction can be based merely on speculations.

There has to be some role assigned to that person corroborated by some concrete evidence on record. In my view no one can be penalised merely on the basis of speculations/doubt. I am also conscious of the provisions of Section 140 ibid, which has been heavily relied upon by the learned Authorised Representative in his submissions although that has not been invoked by any of the authorities below. The said section 140 covers the sections contained in Chapter XVI which consists of sections 132 to 140A. As per learned counsel in a way section 135(1)(b) which falls in that chapter, covers the cases falling u/s.112(b) and since the impugned order is bereft of any reasoning and/or finding qua knowledge and/or illegal gain to the Appellant from the one bill of entry in issue, therefore the penalty is liable to be set aside.

6. Generally a private limited company consists of Managing Director, Directors and other officers who have been appointed or authorised to act for and on behalf of the company and therefore the question arises how the department has choosen only the appellant for one single bill of entry of 23.3.2009 without assigning any role to him and without mentioning anywhere or without recording anywhere that the appellant was the only person concerned at the relevant time for the imports and for giving/submitting documents to the customs or other authorities for any import without the involvement of any officer or Director or Managing Director, if any, of the company. What about the other Directors against whom proceedings were dropped by the Adjudicating Authority, which was not appealed

against by the Revenue. If for the sake of argument I take it that they were not the Directors of the Company during the relevant period but it has not come anywhere that they were not in the Company at all during that period. It is not disputed that Damasy Retail Pvt. Ltd. filed 7 Bills of Entry and availed benefit of exemption notification and all the bills of entry were finally assessed by the *proper officer* and the goods were cleared then the question arises why only the appellant has been picked up and penalized. A specific query about why this pick and choose policy has been argued but the revenue failed to reply. Although penalty was reduced by the learned commissioner by recording the finding that during the period from November, 2008 to March, 2009 when the appellant was holding the charge of Director of the company only one consignment was cleared but without challenging the aforesaid finding by way of any appeal, learned Authorised Representative appearing for revenue tried to make out a new case by submitting by way of his written submissions that two invoices were cleared by the appellant during the aforesaid period, which in my opinion is not permissible. The learned Authorised Representative also tried to pitch it too high in his written submissions that he related the importing firm with M/s. Gitanjali Group of Companies in order to establish the seriousness of the alleged illegality committed by the appellant, without taking into account that the Adjudicating Authority has already dropped the proceedings against the said

Gitanjali Gems Ltd. which was the co-noticee along with the appellant.

7. I am in complete agreement with the learned counsel that imposition of combined penalty is not legally permissible. The authorities below have imposed the combined penalty on the appellant without specifically mentioning the quantum of penalty imposed under each provision separately. Penalty under each of the sections of the Customs Act has to be imposed separately as already held by this Tribunal in the matters of *Benzo Chem Industries (P)Ltd. (supra) and Ramesh A. Bachani (surpa)*. It is settled law that such combined penalty is not in accordance with the provisions of law and in the absence of exact amount of penalty attributable against the relevant provisions, the penalty imposed on the appellant is liable to be set aside. In this regard reliance is placed on the following paragraph from the *Tribunal's Order No.A/798 & 799/WZB/Ah'bad/07 dated 13.4.2007 in the matter of Gujrat Apar Polymers*, which discusses the law on this issue:

> *"3. After considering the submissions made by both sides and after having gone through the various relied upon judgments, I find that Tribunal in case of Singam Mark & Co. v. CCE Salem as reported in 2005 (189) E.L.T. 111 (Tri.-Chennai), has held that composite penalty under two different provisions of law can not be accepted without the requisite split up. Similarly, in case of Avdel (India) Private Ltd v CCE Mumbai reported in 2004 (171) E.L.T. 201 (Tri-Mumbai), Tribunal set aside the personal penalty on the ground that a composite penalty under Section 11AC and Rule 173Q is not permissible. In case of Lauls Ltd. v CCE, New Delhi reported in 2003 (158)*

E.L.T. 711 (Tri.-Del.), it was observed that in case of composite penalty, it cannot be made out as to which part is imposed under section 11AC and what amount is under rule 173Q. The Tribunal further observed that apportion of penalty cannot be done in appeal and accordingly set aside the personal penalty. Similarly, in case of Punjab Recorder Ltd. v. CCE, Chandigarh reported in 2001 (132) E.L.T. 41 (Tri.-Del.), penalty was set aside on the ground that a composite penalty imposed under Rule 173Q and under Section 11AC cannot be apportioned."

8. Now I am addressing the issue of inordinate delay in pronouncement of the impugned order. The submission of learned counsel is that although the argument before the first appellate authority were concluded on 11.01.2018 but the order was passed by the said authority much belatedly on 28.03.2019 i.e. after a period of more than one year which itself is sufficient to set aside the impugned order. Nowhere in the impugned order the reason for the said delay has been attributed to the Appellants. It is settled principle that the order needs to be passed within a reasonable period after the conclusion of hearing and the circular dated 05.08.2003 issued by Ministry of Finance, Deptt. of Revenue, Central Board of Excise & Customs, as placed on record by the learned counsel, specifically laid down the time period to a maximum of one month for issuance of order from the date of conclusion of hearing. Same time limit of one month has been reiterated in the later Circular No. 1053/02/2017-CX dated 10.03.2017 and in latest instruction dated 18.11.2021 issued by Ministry of Finance, Department of Revenue it has been emphasised that instructions issued vide

Master Circular dated 10.03.2017 should be adhere to. Of course, more than one year delay in passing the order is inordinate delay which has rendered the impugned order vulnerable. It has been held time and again that justice should not only be done but should appear to have been done and that justice delayed is justice denied. The Hon'ble Supreme Court in catena of decisions has laid down that an undue delay between conclusion of the arguments and delivery of judgement shakes the confidence of people in judicial system and affects the right of the parties.

9. On the basis of discussions held in the preceding paragraphs having regard to the totality of the circumstances, I am of the considered view that the impugned order is liable to be set aside and accordingly the Appeal filed by the appellant is allowed with consequential relief, if any, as per law.

(Pronounced in open Court on 08.12.2022)

(Ajay Sharma)
Member (Judicial)

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