

**Customs, Excise & Service Tax Appellate Tribunal
West Zonal Bench At Ahmedabad**

REGIONAL BENCH- COURT NO.3

Customs Appeal No.312 of 2012

(Arising out of OIO-KDL/COMMR/30/2012-13 dated 28/09/2012 passed by Commissioner of CUSTOMS-KANDLA)

Siddhnath Shipping

.....Appellant

Om Guru Shakti, Sector No. 1,
Plot No. 48/8, Behind Modern Scholl Oslo Society, Gandhidham,
Kutch, Gujarat

VERSUS

C.C.-Kandla

.....Respondent

Custom House,
Near Balaji Temple,
Kandla, Gujarat

With

Customs Appeal No.313 of 2012

(Arising out of OIO-KDL/COMMR/30/2012-13 dated 28/09/2012 passed by Commissioner of CUSTOMS-KANDLA)

Shakti Forwarders Pvt Ltd

.....Appellant

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APPEARANCE:

Shri Devashish, Advocate for the Appellant
Shri Rajesh Agarwal, Superintendent (AR) for the Respondent

**CORAM: HON'BLE MEMBER (JUDICIAL), MR. RAMESH NAIR
HON'BLE MEMBER (TECHNICAL), MR. RAJU**

Final Order No. A/10315-10316 / 2023

DATE OF HEARING: 20.12.2022
DATE OF DECISION: 23.02.2023

RAMESH NAIR

Both the appeals have been filed against Order-in-Original No. KDL/COMM2012-13 dated 28.08.2012 which is a *denovo* adjudication order passed by the Commissioner of Customs, Kandla.

02. Brief facts are that Shri Shailesh B. Bhagat, Proprietor of M/s Siddhnath Shipping who was also working as Power of Attorney holder of CHA in the name of M/s Shakti Enterprises, Customs House Agents, Gandhidham, had filed the Shipping Bill on behalf of exporter M/s Siddhnath Shipping, KASEZ, Gandhidham. The goods were declared and described as "Fancy Scarves Made from Polyester Knitted Fabrics and Fancy Dupattas made from 100% Polyester Filament Yarn" with declared value of US \$1.00 and \$1.6 per piece respectively in the Shipping Bill and invoice. The net weight of the cargo declared was 19002 Kgs. The consignment was consigned to M/s Saif Abu Al Maleh Trading, UAE. However on examination, the goods were found to be inferior quality and the net weight was only 1450 Kgs,, as against the declared net weight of 19002 Kgs, Thus it appeared to be a case of gross mis-declaration of the description as well as weight of the consignment. Further, investigation revealed that in fact M/s. Siddhnath Shipping received a consignment of goods containing Fancy Scarves (made from Polyester Knitted Fabrics) / Fancy Dupattas (made from 100% Polyester Filament Yarn) from M/s Cosmic Textiles Pvt. Ltd., 100% EOU, Jolwa, Surat under Cover of AR-3A all dated 21.01.2002. with corresponding excise invoices all dated 21.01.2002 describing goods as Fancy Dupattas (made from 100%PFY) and Fancy Scarves (made from Dyed Poly Knitted Fabrics). As per the documents, the subject consignment originating from the 100% EOU premises of M/s. Cosmic Textiles Pvt. Ltd. had been sent in full as per the details of AR-3As in the Kandla Special Economic Zone, which had been certified by the Preventive Officer of the Kandla SEZ. However this consignment was not available in the said premises, which suggested that the consignment covered by the AR-3As had been duly received by the trading unit of M/s Siddhnath Shipping and was clandestinely removed by them from their trading unit in the Kandla SEZ. Further, M/s Siddhnath Shipping had made a false declaration in the self – declared AR-4 dated 22.01.2022 and Shipping Bill to correspond with the description and weight of the goods covered by the above AR-3As, whereas on examination, the goods were found to be quite different and not in conformity with the goods re-warehoused as per the certificate of Superintendent (P&I), KASEZ. Hence it appeared that M/s Siddhnath Shipping, in collusion with M/s Cosmetic Textiles Pvt. Ltd. appeared to have willfully and consciously mis-utilized the facility by clandestinely diverting/ removing the final products viz. Fancy Scarves/ Fancy Dupatta and Committed offences under Section 111(d) and 111(j) of the Customs Act, 1962 is so far as removal of 19002 Kgs, disputed goods involving Custom

duty of Rs. 57,24,210/- is concerned. Accordingly a show cause notice was issued demanding customs duty and proposing confiscation of the goods and penalties on the Appellants. The show cause notice was adjudicated vide Order-In-Original dated 29.09.2005 wherein Learned Commissioner confirmed customs duty, confiscated 1450 Kgs. of inferior quality goods attempted to be exported and imposed redemption fine in lieu thereof and imposed penalties on Appellants under Section 114(ii) *ibid*. The said order passed by the Commissioner was challenged before the Tribunal and vide Order dated 19-01-2016 the matter was remanded by the Tribunal to the adjudicating authority for re-adjudication with certain directions. The Commissioner of Customs, Customs House, Kandla vide Order-In-Original dated 27.09.2010 re-adjudicated the matter wherein he confirmed the duty demand and imposed the penalties on Appellants. Thereafter, being aggrieved with the OIO dated 27.09.2010 appellants again filed appeals before the CESTAT and CESTAT vide its order dated 21.12.2011 once again remanded the case to the original adjudicating authority to reconsider the issue after observing the principles of natural justice. In the *denovo* adjudication, the original authorityvide impugned order again confirmed customs duty demand along with interest and imposed penalties. Aggrieved by such impugned order, the appellants are now before this Tribunal.

03. Shri Devashish Trivedi, learned counsel appeared and argued on behalf of the appellants. He submits that Learned Commissioner wrongly held that Appellant had clandestinely removed the goods from the KASEZ after receipts of the same from M/s Cosmic. The unit was under physical control of the customs and other zonal /security agencies and the allegation of clandestine removal was merely based on assumption and presumption. Learned Commissioner failed to appreciate that the Appellant had in fact entered for export of the same goods which were received by them from M/s Cosmic within about 2.00 hours after the receipts of the same. These facts can be verified from the vehicle register of KASEZ. It is clearly established that same goods, and in the same packaging, having same marks and number, which were received from M/s Cosmic were loaded into the container and there was no clandestine removal or diversion. The Learned Commissioner failed to appreciate that the department has not brought on record the crucial evidence of the drivers of the trucks who have transported the goods from Surat to KASEZ. The statements of drivers Shri Madanlal Sharam and Shri Khimji Vishrambhai Charan which were recorded by the CBI who have confirmed that the goods brought by them were directly

transferred into the container. The Learned Commissioner, though relied upon various other evidences collected by CBI, such as, Handwriting Expert's Opinion but failed to take cognizance of crucial evidences confirming that there is no clandestine removal but in fact the same goods which were received from M/s Cosmic were entered for export. The Learned Commissioner also failed to take into consideration the evidence of Smt. Damini Lakhiya, Preventive Officer who had inspected the goods and also supervised unloading of the goods from trucks and stuffing of the same directly into the containers. The said preventive officer was present right from the time of reaching of the Trucks, unloading of the goods and stuffing of the same into the container. The Learned Commissioner passed the order without considering the evidence of the officer and mechanically held that the goods which were received by the appellant were clandestinely removed. In fact the statement of the officer recorded by the CBI confirms these facts that there was no clandestine removal. There is no seizure and investigation by the SIIB, Customs House, Kandla in respect of goods which were alleged to have removed clandestinely. The impugned order is totally contradictory to the documentary evidence, and thus the same is required to be set aside.

3.1 He also submits that Learned Commissioner ought to have appreciated that the CBI Charge Sheet supported with the documentary evidences and the statements of the drivers are clear evidence and the said statements of the drivers have categorically established that the goods were clandestinely changed by M/s Cosmic at the originating station itself and the goods which were received in the KASEZ and exported were goods which were loaded at Ambaji Market Surat and these findings are available at page 7 of the CBI charge sheet, and thus the Learned Commissioner's finding that there is no indication in the CBI charge Sheet regarding the change of the goods by M/s Cosmic are totally erroneous. The SIIB has failed to conduct proper investigation in the present matter and they have not made any efforts to find out whether the goods were actually clandestinely removed, whether or not the goods were diverted or not? The SIIB has also ignored the facts that the goods were not actually diverted or clandestinely removed but the same goods were entered for export and thus any violation or evasion, if any, it was on the part of M/s Cosmic and Shri Natwar Malpani. The investigation conducted by the CBI has in fact confirmed that there was no clandestine removal as alleged in the show cause notice.

3.2 He argued that it has been confirmed by the investigation carried out by the CBI that in fact M/s Cosmic had not dispatched the goods from the 100% EOU of Cosmic, and Shri Malpani/Kulwant of M/s Cosmic had resorted to manipulations of weigh bridge slips and other documents to cover up their deeds. Learned Commissioner failed to appreciate that the mis-declaration of quantity, value and other particulars were resorted by M/s Cosmic / Shri Natwar Malpani in the Excise Invoices and their AR-3As so as to fulfill their export obligations and/or to evade duty without the knowledge of the appellant. The Learned Commissioner also failed to appreciate that M/s Cosmic was the beneficiary of exports. The goods were removed by M/s Cosmic from the 100% EOU against the Excise Invoices without payment of duty and they have not submitted any re-warehousing certificate in the division as is evident from the statement of Shri Malpani and thus M/s Cosmic were only liable to pay the duties/fine/ penalties in respects of the goods which were removed by them. In this regard the Learned Commissioner should have appreciated that the bank account at Surat was opened at the instance of M/s. Cosmic who were handling all operations relating to export right from procurement of export orders, supply of goods and receipts of remittances and thus nothing adverse can be viewed against the appellant merely because the bank account was opened at Surat and blank cheques were given to M/s Cosmic. Thus confirmation of the demand of duty from the appellant is totally illegal and erroneous and the same is require to be set aside.

3.3 He also submits that it is settled law that if the department alleges clandestine removal of goods then enquiry/ investigation must be conducted at the end of buyers of said clandestinely cleared goods, transporters, angadias, etc., No inquiry is conducted at the end of buyers or transporters. No positive evidence is found out by the officers during the investigation in regard to the alleged clandestine sales of goods from the premises of the Appellant. There is absolutely not tenable evidence found to indicate any clandestine clearance/ diversion of fancy scarves and dupattas from the premises of Appellant (KASEZ Unit). He placed reliance on the following decisions:-

- SAKEEN ALLOYS PVT. LTD. VS. COMMISSIONER OF CENTRAL EXCISE, AHMEDABAD – 2013(296)ELT 392(TRI. –AHMD) UPHELD BY HON'BLE GUJARAT HIGH COURT AND HON'BLE SUPREME COURT.

- VISHWA TRADERS PVT. LTD. VS. COMMISSIONER OF CENTRAL EXCISE, VADODARA – 2012(278)ELT 362 (TRI. AHMD.) UPHELD BY HON'BLE GUJARAT HIGH COURT AND HON'BLE SUPREME COURT.

3.4 He also argued that after making a detail findings vide Judgment dated 30.04.2015 the Hon'ble CBI Court has exonerated appellant herein completely. This concludes beyond doubt that the appellant has not committed any offence and the impugned order deserves to be quashed.

3.5 Without prejudice to the above, he also submits that in the present matter the period of dispute is January 2002 and thus the provisions of Central Excise Rules, 2001 which come into force on 01.07.2001 and remained in force till 28.02.2002 are the relevant Central Excise Rules which were in force at the relevant time. Thus as per Rule 17, the goods which are removed from a Free Trade Zone or a 100% EOU to the DTA are required to be removed under an invoice and on payment of appropriate amount of duty. The appropriate amount of duty is undoubtedly the duty which is levied and collected Under Section 3 of the Central Excise Act, 1944. It is important to mention here that prior to 11.05.2007, all excisable goods produced or manufactured in Free Trade Zone or a Special Economic Zone or by a 100% EOU were liable to excise duty which were to be collected at the rate of aggregate of the duties of Customs which would be leviable under the Customs Act, 1962 and the Customs Tariff Act, 1975 and thus for the purpose of rate of duty, the reference is required to be made to the Customs Act and the Custom Tariff Act whereas the nature of duty continues to be the Central Excise Duty, which is the appropriate duty required to be demanded under the provisions of the Central Excise Act, 1944 and Rules made there under. In the present matter demand of duty in respect of Free Trade Zone / EOU is made under the Customs Act which is totally erroneous. He placed reliance on the following decisions:-

- CCE VS. SURESH SYNTHETICS – 2007 (216)ELT 662 (SC).
- SARTHI TEXTILES – 2002(146)ELT 69(T)
- (III)VIKRAMISPAT -2000(120)ELT 800
- SAHELI SYNTHETIC PVT. LTD. 2002 (129)ELT 594 (TRI. MUMBAI)

3.6 He also submits that even if the duty of customs is demanded under the provisions of Customs Act, 1962, then there is no legally sustainable

case for calculating the assessable value of the goods as no basis whatsoever is given in support of the value arrived at in the show cause notice. The show cause notice refers to the standing order No. 7514/2000 dated 04.02.2000 of Mumbai Customs House and arrives at the assessable value of the goods. The goods cannot be assessed on the basis of standing orders and thus the very basis of arriving the assessable value is erroneous.

04. Shri Rajesh Agarwal, learned Superintendent (AR) supported the findings in the impugned order.

05. Heard both sides and perused the appeal records. On thorough analyzing the records, (i.e. impugned order, various documents, oral argument and written submission) placed before us, we find that the case of the Revenue proceeded on the premise that Appellant was engaged in diversion of goods in DTA clandestinely and fabricated the records to show that said goods were exported. The contention of the department in this case is that M/s Siddhnath got good quality goods from M/s Cosmic, EOU unit; re-warehoused them at his KASEZ unit which was registered as a trading unit with KASEZ; it diverted these goods to the Domestic Tariff Area (DTA) and in their guise attempted to export inferior quality goods, therefore liable to duty. We find that the allegation of clandestine removal of the goods from trading unit at KASEZ, which was under the physical control of the department, to the Domestic market no cogent evidence was produced by the revenue. Not a single customer is brought on records who has received the clandestine removed goods. No documentary evidence is produced in the form of transport receipts, delivery challans or any other documents relating to removal of disputed goods. No evidences produced regarding the receipts of payment against the clearances of disputed goods in domestic market. No transporter or any person are brought on records who has transported the disputed goods in domestic market. It is well settled that the charge of clandestine removal of goods, cannot be established on assumptions and presumptions. Such a charge has to be based on concrete and tangible evidence. In this context, reference may be made to *Oudh Sugar Mills Ltd. v. Union of India* - [1978 \(2\) E.L.T. J172](#) (S.C.), wherein the Apex Court has observed that demand of duty cannot be raised on the strength of assumptions and presumptions. There should be sufficient evidence of the removal of the goods alleged to have been manufactured and cleared without payment of duty. The charge of clandestine removal must be based on tangible evidence and not on

inferences involving unwarranted assumptions. This very principle of law had been applied by the Tribunal in a number of cases and out of those, few are, *Amba Cement and Chemicals v. CCE* - [[2000 \(115\) E.L.T. 502](#) (Tribunal) = 2000 (90) ECR 265], *Gurpreet Rubber Industries v. CCE* - [1996 \(82\) E.L.T. 347](#) and *Madhu Foods Products v. CCE* - [1995 \(76\) E.L.T. 197](#).

5.1 Further, in *Radha Madhav Corporation Ltd. v. CCE, Daman* [[2012 \(284\) E.L.T. 369](#)], the issue was raised in a case where the allegation was that there was clearance of plastic film in the guise of Lay Flat Tubing (LFT). The Revenue's case was based on statements of transporters and of the Director of the main appellant. The Tribunal held that the charge of clandestine removal is to be established on the basis of preponderance of probability and not on the basis of presumptions and assumptions. It was held that, on facts, there was no sufficient cogent, unimpeachable, relevant and credible material to establish the case of clandestine manufacture and clearance. After examining the facts of the case at length, it was held that a link between the documents recovered in the search and the activities of the appellant in their factory is required to be proved.

5.2 Therefore, in our view the present demand which has been confirmed against Appellant by the impugned order, is not based on evidence. Unless there is conclusive evidence that Appellant has clandestinely cleared the disputed goods without payment of duty, liability cannot be placed on Appellant on the basis of conjectures and surmises. Therefore, the demand based on assumption and presumption is not sustainable.

5.3 In the present matter we also observed that no goods were clandestinely removed by the Appellant. The goods which were received from M/s Cosmic under the cover of AR-3A No. 27, 28 & 29 all dated 21.01.2002 were entered for export and all the particulars as given in AR-3A same were declared in shipping bills as per the AR-3A and the central excise invoices issued by M/s Cosmic. The appellant was under the bona fide belief that the goods supplied by M/s Cosmic are same as per the declaration made in the Central Excise Invoices issued by M/s. Cosmic. Thus no clandestine removal was made and the same goods which were received were entered for export. The copy of charge sheet No. 15/02 dated 30.12.04 in case No. 4(A) 2002/ dated 20.02.2002 along with copy of statements of Preventive officers/ Drivers of Trucks / Weigh Bridge Operators, relevant vehicle register of SEZ etc., the statement (recorded by the CBI) of drivers

Shri Suresh Kumar Harjibhai Patel and Khimji Vishrambhai Charan have confirmed that the goods brought by Appellant were directly transferred into the container. Thus, said crucial evidences itself confirming that there is no clandestine removal of disputed goods but in fact same goods which were received from M/s Cosmic were entered for export.

5.4 When the investigation and the evidence brought on record were considered, it revealed that the goods which entered into the SEZ, the same goods have been presented for export. The SEZ is a bonded area and every movement of goods whether incoming or outgoing are recorded at gate register under the supervision of gate staff and customs. In the present case, there is evidence of entry of goods in the SEZ by the appellant M/s. Siddhnath Shipping whereas, there is no evidence of removal of goods from the SEZ in DTA. The demand of customs duty is on the pretext that the goods which have been cleared from EOU have entered in the appellant's SEZ unit and thereafter, the same was diverted into DTA. Even if it is presumed that the goods have been diverted before bringing into SEZ, the customs duty which is for the removal of goods from SEZ cannot be demanded. In the present case, it is evident from the investigation that the goods which have been received by the appellant and the same was presented for export were not cleared from the 100% EOU of M/s. Cosmic but the same were loaded at Ambaji Market, Surat. In such case, there is no change of goods which is loaded in the container and received in SEZ and presented for export. It is also on record that the goods are in the original packing and marka therefore, no doubt can be raised that the goods was changed enroute. We further find that the investigation could not bring any single evidence for unloading of the alleged original goods from the container and reloading in other transport vehicle for the transportation of the same. It is also not evident that the goods was sold to xyz person. Therefore, considering over all facts, it is not proved that the original goods were loaded in the container and the same was cleared from SEZ. If the contention of the revenue is presumably accepted that the appellant have cleared the original goods from their SEZ then, as per the allegation of investigation that the appellant have attempted to export the inferior quality of goods, the investigation could not bring on record particularly from the SEZ records that the disposal of the original goods and procurement of low quality goods in the guise of original goods. The entire case was based on the document but no physical movement or diversion could be established.

In this fact, the demand of customs duty is not sustainable and consequently, the confiscation of goods is also incorrect and illegal.

5.5 As per our above discussion and findings, the demand of customs duty on appellant is not sustainable on merit. Since we have decided the matter on merit, we are not going into other grounds raised by the appellant.

06. Accordingly, the impugned orders are set aside. Appeals are allowed with consequential relief.

(Pronounced in the open court on 23.02.2023)

(RAMESH NAIR)
MEMBER (JUDICIAL)

(RAJU)
MEMBER (TECHNICAL)

Mehul