

M/S CARPENTER CLASSIC EXIM P. LTD.
V.
COMMNR. OF CUSTOMS (IMPORTS) AND ANR.
Civil Appeal No. 3871 of 2006

FEBRUARY 12, 2009

[DR. ARIJIT PASAYAT AND DR. MUKUNDAKAM
SHARMA, JJ.]

Customs Act, 1962 :

s.114A, proviso — Evasion of customs duty by under-valuation of imported goods — Levy of penalty — Claim for benefit of reduced penalty in terms of proviso to s.114A — Held: On facts, not tenable — The fact that a part of the differential duty was paid before issuance of show cause notice was not a mitigating circumstance — Considering the background facts it cannot be said that the quantum of penalty imposed suffered from any infirmity.

It was alleged that the appellant-company under-valued its import consignments in order to evade payment of customs duty. Many incriminating documents were allegedly seized from the premises of the appellant. The statement of number of persons including 'R', the Managing Director of the company was recorded under s.108 of the Customs Act, 1962. On the basis of evidence on record, the Tribunal (CESTAT) held that there was under-valuation to the extent of 65% and accordingly it levied penalty on 'R' and 'T', a Director of the appellant-Company under s.112(a) of the Act as also on the appellant-company under s.114A of the Act.

In appeals to this Court, benefit of reduced penalty in terms of proviso to s.114A was claimed on the ground that even before the show cause notice was issued, to prove its bona fides, a sum of Rs. 25 Lakhs had been paid by the appellants.

A Dismissing the appeals, the Court

HELD:1. The relevant proviso in s.114A of the Customs Act, 1962 is applicable only where duty has been paid. In the instant case Rs.25 lakhs which is not whole of the differential duty is claimed to have been paid before the issuance of the show cause notice. The same is not a mitigating circumstance. [Para 7] [368-F, G]

2. CESTAT has not dealt with the question whether the quantum of penalty levied under s.114A is reasonable and fair. Eventhough there is no elaborate discussion regarding the quantum of penalty yet considering the background facts it cannot be said that the quantum of penalty imposed suffers from any infirmity. [Para 8] [368-A, B]

D CIVILAPPELLATE JURISDICTION : Civil Appeal No. 3871 of 2006

From the Judgement and Order dated 27.12.2005 of the Custom Excise Service Tax Appellate Tribunal at in F.O. No. 2239 of 05 & 2241 of 05

E WITH

Civil Appeal No. 3872 of 2002

S.K. Bagaria, S. Sukumaran, K. Rajeev, for the Appellant.

F Mohan Parasaran, ASG, Krishna Kumar, Shweta Garg, Anil Katiyar, Ashish Gopal Garg, B. Krishna Prasad, for the Respondent.

The Judgement of the Court was delivered by

DR. ARIJIT PASAYAT, J.

G 1. Challenge in these appeals is to the judgment of Customs, Excise and Service Tax Appellate Tribunal, South Zone, Bangalore (in short the 'CESTAT'). The orders in original passed by the Commissioner of Customs, Bangalore and Commissioner of Customs, Chennai were affirmed subject to H certain modifications.

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2. Seven appeals were filed against the Order-in-Original No.27/2004 dated 27.7.2004 by Commissioner of Customs, Bangalore and Order-in-Original No.2724/2004 dated 30.9.2004 passed by the Commissioner of Customs, Chennai. The details of the orders challenged before the CESTAT and the quantum involved are as follows :

Appeal No.	Appellant	Differential Duty	Redemption Fine	Penalty
C/428/04	M/s Carpenter Classic Exim (P) Ltd.	Rs.59,12,619/-	Rs.15,00,000/-	Rs.55,44,396/-
C/429/04	Ravi Karumbaiah, MD, CCEPL	-	-	Rs.10,00,000/-
C/433/04	Sanjeev Kabubur	-	-	Rs.1,00,000/-

Appeal No.	Appellant	Differential Duty	Redemption Fine	Penalty
C/436/04	M/s Carpenter Classic Exim (P) Ltd.	Rs.36,96,201/-	-	Rs.9,61,506/-
C/437/04	Ravi Karumbaiah, MD CCEPL	-	-	Rs.9,00,000/-
C/13/05	Thomas Mathew	-	-	Rs.5,00,000/-
C/06/05	Sanjeev Kabbur	-	-	Rs.7,00,000/-

3. Background facts as noted by the CESTAT are as follows :

The DRI Officers received intelligence regarding the undervaluation of imported goods by the appellants. The business premises and the residential premises of the concerned persons were searched and incriminating documents were seized. Statements of S/Shri Ravi Karumbaiah, Managing Director of

A M/s. Carpenter Classic Exim Pvt. Ltd., V.S. Chandan, CADD
Operator were recorded under Section 108 of the Customs Act
1962 (in short the Act). The residential premises of Shri Sanjeev
B Kabbur, Ex-Marketing Manager of the company were searched
and some documents were seized. Statement of Sanjeev Kabbur
C was also taken. Ms. Jagruthy Sevak was the Executive of the
appellant company, her statement was also recorded. The
investigations conducted revealed that Shri R. Karumbaiah, his
wife, Shri Thomas Mathew and his wife as Directors started M/
D s. Carpenter Classics Exim Pvt. Limited (in short 'CCEPL') as
a private limited company in the year 1995. The company
E decided to import their requirements of kitchens from Veneta
Cucine of Italy who are reputed manufacturers. Shri Karumbaiah
and Thomas Mathew hatched a conspiracy to undervalue their
F imports for increasing their profits in the local market. For this
purpose, they had prepared the invoices of the foreign supplier
and sent them to Italy. Thomas Mathew floated a front company
in the name of Proma SRL, the manipulated invoices were
G raised in the name of the above front company. These invoices
were filed by the appellant before the Customs officials for
H assessment. They made their first import in the year 1995
through ICD, Bangalore. The foreign suppliers invoice and
packing list had been signed by Shri Thomas Mathew on behalf
of M/s. Proma SRL. CCEPL communicated their requirements
along with the drawing to Proma SRL with a copy to Veneta
Cucine. Sometimes the orders were communicated directly to
Veneta Cucine. Proma SRL prepared the bill showing the actual
price in Lira and forwarded the drawings to Veneta Cucine.
Veneta Cucine in turn forwarded the confirmation order to Proma
SRL and CCEPL. These orders of confirmation indicated the
actual price of the products ordered in Liras. Veneta Cucine at
the time of loading of containers and shipment prepared their
own packing lists showing the order numbers of CCEPL and
the destination as CCEPL. CCEPL arranged for their
representatives to be present at the time of loading of the
containers at the factory premises of Veneta Cucine to ensure

not only proper loading but also to relabel the packages to make it appear that the shipment had been affected by Proma SRL. CCEPL presented the invoices prepared in the name of Proma SRL along with the Bills of Entry which showed substantially lower prices than what was actually charged by Veneta Cucine. In order to camouflage the entire conspiracy of under-valuation CCEPL collected a certain portion of their sales proceeds from certain customers in cash. The cash so collected was handed over by Shri R. Karumbaiah to Mr. Thomas Mathew for settling the account of Veneta Cucine. The portion containing the prices in the confirmation order has been cut out in almost all such documents ostensibly to hide the actual price from the customers. Thus, CCEPL substantially under-valued their import consignments in order to evade payment of customs duty. Similar modus operandi was adopted to import goods through Chennai Port also. On the basis of investigation, show cause notices were issued to the noticees. After observing the principles of natural justice, the adjudicating authorities at Bangalore and Chennai passed orders which were assailed before CESTAT.

Various stands were taken before the CESTAT. The CESTAT noted the fact that the Commissioner has observed that Ravi Karumbaiah has admitted that Proma SRL was a front company set up in order to get the documents in the name of the said company and to evade payment of customs duties. The appellants submitted that from the extract of the company's house record, it is clear that the Proma SRL is a genuine company which is in existence. Hence, it is clear that there are discrepancies in the statement recorded from Ravi Karumbaiah and as such it is clear that the statement was obtained under duress and coercion. It was submitted that the oversea suppliers have granted the appellants substantial discount on the listed price and it was for this reason that the prices mentioned in the invoices were deleted. It is a normal trade practice not to reveal the price of the product at which they are procured by the importer/wholesaler to a customer. This is done basically to

A prevent the customers from knowing the margin of profit enjoyed by a wholesaler/importer; otherwise customer will start bargaining.

B The CESTAT noted that the main charge against the appellants is that of under valuation of the imported goods using a particular modus operandi. Many incriminating documents were seized from the premises of the appellant. The statements were recorded under Section 108 of the Act from various persons. DRI investigation was taken up consequent to investigations made by Income Tax Department. It appears that C Ravi Karumbaiah was the Managing Director and the Chief Promoter of the company. Shri Sanjeev Kabhur was ex-marketing manager of the company and Shri Thomas Mathew was the Director of the appellant-company and also a Director of Proma SRL who issued the invoices relating to the imports. D Allegation was that with the help of Thomas Mathew invoices were issued by Proma SRL using it as a front. The actual suppliers of the imported equipment were M/s Veneta Cucine and other foreign companies. Investigations established that value of the imported goods as per Veneta Cucine was different E from those in the invoices of Proma SRL. The difference between the two values was settled by Thomas Mathew who collected differential sale amount during his visit to India and later settled the same with Veneta Cucine. This probably was the modus operandi. The revenue relied upon the following F documents:

• Photocopy of a Fax dated 21.4.1997, said to have been sent by Thomas Mathew bearing No.VC/CC/9708 dated 21.4.97 addressed to Anchise Ballestrieri and Vittorio Tollardo of Veneta Cucine S.PA. Treviso, Italy.

G • Photocopy of a fax message No.CCEPL/TM/089/97 dated 5.4.97, said to have been sent by Carpenter Classics to Thomas Mathew.

H • Photocopy of a fax message dated 8.10.98, said to have been sent to Thomas Mathew by Ravi Karumbaiah.

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- Photocopy of a letter No.CCEL/Proma/1362/97-98 dated 10.1.98 to have been sent by Carpenter Classics to Proma SRL. A
- Photocopy of Bill of quantity and Order confirmations of M/s. Veneta Cucine pertaining to shipment called India-13 and India-14 B
- Photocopy of packing list of M/s. Veneta Cucine pertaining to shipment called India-13 and India-14.

The CESTAT referred to the statements given by Shri Ravi Karumbaiah under Section 108 of the Act. It held that the conclusions were supportable as the evidence on record clearly established that there was under valuation to the extent of 65% with which Shri Thomas played crucial role in the nefarious activities. It was held that both Ravi Karumbaiah and Thomas Mathew were liable to penalty under Section 112(a) of the Act and the company was also liable to penalty under Section 114A of the Act. The differential duty was to be paid alongwith interest. The penalty however was deleted so far as Shri Sanjeev Kabbur is concerned. C
D

4. The primary stand is that even before the show cause notice was issued, to prove its bona fide, a sum of Rs.25 lakhs was paid. Reference is made by learned counsel for the appellant to the proviso to Section 114A of the Act. It is submitted that since reduction in the quantum is permissible, discretion is given in the matter of imposition of penalty. E
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5. Learned counsel for the respondents on the other hand supported the judgment.

6. Section 112(a) and Section 114A read as follows: G

“112(a) Penalty for improper importation of goods, etc. – Any person, -

(a) who, in relation to any goods, does or omits to do any act which act or omission would render such goods liable H

A to confiscation under section 111, or abets the doing or omission of such an act, or

114A- Penalty for short-levy or non-levy of duty in certain cases. - Where the duty has not been levied or has been short-levied or the interest has not been charged or paid or has [xxx] been part paid or the duty or interest has been erroneously refunded by reason of collusion or any wilful mis-statement or suppression of facts, the person who is liable to pay the duty or interest, as the case may be, as determined under sub-section (2) of section 28 shall also be liable to pay a penalty equal to the duty or interest so determined :

Provided that where such duty or interest, as the case may be, as determined under sub-section (2) of section 28, and the interest payable thereon under section 28AB, is paid within thirty days from the date of the communication of the order of the proper officer determining such duty, the amount of penalty liable to be paid by such person under this section shall be twenty-five per cent of the duty or interest, as the case may be, so determined :

Provided further that the benefit of reduced penalty under the first proviso shall be available subject to the condition that the amount of penalty so determined has also been paid within the period of thirty days referred to in that proviso :

Provided also that where the duty or interest determined to be payable is reduced or increased by the Commissioner (Appeals), the Appellate Tribunal or, as the case may be, the court, then, for the purposes of this section, the duty or interest as reduced or increased, as the case may be, shall be taken into account :

Provided also that in case where the duty or interest

determined to be payable is increased by the Commissioner (Appeals), the Appellate Tribunal or, as the case may be, the court, then, the benefit of reduced penalty under the first proviso shall be available if the amount of the duty or the interest so increased, along with the interest payable thereon under section 28AB, and twenty-five per cent of the consequential increase in penalty have also been paid within thirty days of the communication of the order by which such increase in the duty or interest takes effect :

Provided also that where any penalty has been levied under this section, no penalty shall be levied under section 112 or section 114.

Explanation. - For the removal of doubts, it is hereby declared that -

(i) the provisions of this section shall also apply to cases in which the order determining the duty or interest under sub-section (2) of section 28 relates to notices issued prior to the date on which the Finance Act, 2000 receives the assent of the President;

(ii) any amount paid to the credit of the Central Government prior to the date of communication of the order referred to in the first proviso or the fourth proviso shall be adjusted against the total amount due from such person."

7. The relevant proviso in Section 114A is applicable only where duty has been paid. In the instant case the claim that Rs.25 lakhs which is not whole of the differential duty is claimed to have been paid before the issuance of the show cause notice. The same is not a mitigating circumstance.

8. Above being the position, the appeal filed by the company is without merit and is dismissed. So far as appeal filed by Ravi Karumbaiah is concerned it is to be seen that the provision of penalty is not mandatory in the sense since

- A discretion is given. CESTAT has not dealt with the question whether the quantum of penalty levied under Section 114A is reasonable and fair. It appears that Ravi Karumbaiah was the Managing Director and Chief Promoter of the appellant company while Thomas Mathew who was the director of the appellant
- B company was also a Director of Proma SRL. Even though there is no elaborate discussion regarding the quantum of penalty yet considering the background facts it cannot be said that the quantum of penalty imposed suffers from any infirmity. Appeal filed by Ravi Karumbaiah is also dismissed. Accordingly both
- C the appeals are dismissed with no order as to costs.

B.B.B.

Appeal dismissed.