

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI.**

PRINCIPAL BENCH - COURT NO. II

Customs Appeal No.51059 of 2022-SM

(Arising out of Order-in-Appeal No.D-II/Prev./NCH/263/2021-2022 dated 16.06.2021 passed by the Commissioner of Customs (Appeals), New Customs House, New Delhi]

Atul Dhawan

Proprietor of M/s. Atul Traders,
6434, Katra Balyan,
Fatehpuri,
New Delhi-110 006.

Appellant

VERSUS

Commissioner of Customs,

New Customs House,
Near IGI Airport,
New Delhi.

Respondent

APPEARANCE:

Dr. G.K. Sarkar, Shri Prashant Srivastava & Shri Deepak Mahajan, Advocates
for the appellant.

Shri Ishwar Charan, Authorised Representative for the respondent.

CORAM:

HON'BLE MR. ANIL CHOUDHARY, MEMBER (JUDICIAL)

FINAL ORDER NO.51104/2022

DATE OF HEARING:03.06.2022

DATE OF DECISION:24.11.2022

ANIL CHOUDHARY:

The issue involved in this appeal is whether the appellant is the importer and whether the duty and penalty have been rightly demanded from him.

2. The brief facts are that Revenue inspected the goods imported by M/s. Dee Vee Posters (IEC No.0508019923) having its office at 38 B, Coronation Building, Fatehpuri, Delhi, who were engaged in importing and trading in goods. The goods imported vide bill of entry no.7050683 dated 13.10.2014 and bill of entry no.700535 dated 08.10.2014 through their Customs House

Agent – M/s. Unique International were inspected under Panchnama on 17.10.2014 and 24.10.2014 respectively. It appeared to Revenue that there are some mis-declared/un-declared goods, like the goods which were declared as Adhesive Tapes but on examination, the goods appeared to be PTFE Tapes. Further, the items like reading glasses (optical) of 'D & G' brand, SAIFI Brand with optical case and 3 D Dharmik pictures were found. Accordingly, the goods were seized and detained in the port area before out of charge.

3. During investigation, statement of Mr. Vivek Bansal, Proprietor of M/s. Dee Vee Posters was recorded, who, *inter alia*, stated that he procures the goods by personally visiting China or on email. For some of the goods like spectacles and its accessories, orders were placed by concerned persons, who were known through his CHA or other contacts. After import and receipt of the goods, he used to sell such goods by issuing invoice/bills in the name of different buyers, who placed orders for such goods and /or in the open market. Further, states that he was adding 5% margin on the goods. Further states that in some cases, he was not aware of the actual price of the goods and such goods were directly purchased by the buyers in India and he facilitates for the import and delivery. He also states that Atul Dhawan of Atul Traders (appellant) was mainly a buyer of lens, whom he knew through one Mr. Arora of Arora Optical.

4. Thereafter, follow-up search was made in the premises of this appellant and certain documents /mobile phones (Samsung – DUOS Model GT-19082) and one CPU (Make Odyssey) were seized for further investigation. The stock found in the godown valued at Rs.2,13,56,690/- was also detained alleging non-production of register at the time of search. Statement of Shri Atul Dhawan was recorded, who, *inter alia*, stated that he was engaged in trading of optical frames and glasses and optical

accessories and was registered with Sales Tax and also had IEC No.0595005454; that he had made last import in the month of July, 2013 and also stated that for procurement of goods, he also visited China to select the goods from the manufacturers as well as to inquire the rates. Thereafter, he places the orders for purchase through M/s. Dee Vee Posters, who import the goods and after loading their commission, sales the goods to him. Further, stated that he did not import in his own name as it was convenient and cheaper to import through M/s. Dee Vee Posters. He paid advance for the goods to Mr. Vivek Bansal, in case required or paid through RTGS at the time of purchase from M/s. Dee Vee Posters. He usually dealt in CR 39 glasses and frames, both imported as well as Indian. Further, stated that the value of the lenses /glasses was not based on thickness but on the basis of the power. The appellant also submitted stock statement for the period 1.4.2014 to 11.11.2014 (till the date of search). Further, investigation was made by Revenue from the suppliers, who supplied the goods to the appellant. The statements were recorded of the suppliers and most of them agreed to have supplied the goods to the suppliers as per invoices. One or more suppliers did state that they supplied some other goods. However, details were not mentioned in the invoices. Further, statement of the appellant was recorded on 8.4.2015 and 8.5.2015, wherein after seeing some data produced by Revenue stated to be obtained from the email/messages, which were accepted by the appellant as true value of the goods purchased /imported during the previous 12 months.

5. Another search was conducted by Revenue in the premises of the appellant under Panchnama on 22.07.2015 for stock verification of the goods. Further, statement of the appellant was recorded on 1.9.2015, wherein, he was confronted with the price of the different sizes of the CR lens, which were found from the data retrieved from his CPU /mobile.

6. Pursuant to investigation, show cause notice dated 10.11.2015 was issued demanding customs duty of Rs.24,50,416/- on the allegation that the appellant is the 'beneficial importer' and have willfully suppressed the actual import value with intent to evade duty and as such, the duty is recoverable under Section 28 of the Act by invoking the extended period of limitation.

7. The show cause notice, *inter alia*, alleged as follows:-

- (i) M/s. Atul Traders failed to prove the lawful possession of goods detained at his shop i.e. M/s. Atul Traders, 6434, Katra Balyan, Fatepuri, Delhi. Hence, it appears that he has procured the goods without any cover of Bill/Invoice and duty paying document, out of goods imported illegally in the country and which was the stock found in the possession of M/s. Atul Traders on 11.11.2014.
- (ii) No stock register has been maintained by M/s. Atul Traders as per statement of his chartered accountant i.e. Dinesh Kumar Gupta, it appears that the said goods were either being purchased without bill or in other words unaccounted means or illegal imports.
- (iii) All suppliers of M/s. Atul Traders as attributed in his stock statement dated 07.01.2015, has declined that they had supplied the specific types of lenses which were attributed to them in his stock statement submitted to Customs preventive.
- (iv) The investigations revealed that M/s. Atul Traders had illegally procured the goods detained on 11.11.2014 at his shop i.e. M/s. Atul Traders, 6434, Katra Balyan, Fetehpuri, Delhi for which invoices furnished by him were found to be

manipulated and suppliers had denied having supplied the goods, as claimed by Atul Traders in his stock statement, and which was admitted by him in his statement under Section 108 of the Customs Act, 1962 subsequently, and the value of same is required to be determined at Rs.1,12,49,769/- (Rupees One Crore Twelve lakhs forty nine thousand seven hundred sixty nine only) being the actual transactions value (as per the rates found in emails and DGOV circulars) under the customs valuation (Determination of value of imported goods) Rules, 2007.

- (v) The above said goods are required to be assessed in view of aforementioned allegations at Rs.1,12,49,769/- (Rupees One Crore Twelve lakhs forty nine thousand seven hundred sixty nine only) and the total duty of Rs.24,50, 416/- (Rs.Twenty Four lakhs Fifty Thousand Four Hundred and sixteen only) is required to be recovered from them under Section 28(4) of the Customs Act, 1962.
- (vi) M/s. Atul Traders because of their willful acts of omission and commissions in the evasion of duty have rendered themselves liable to penal actions under Section 114A and 114AA of Customs Act, 1962.
- (vii) The goods in the instant case have been imported by means of suppression of facts and mis-declaration of value with an intent to evade payment of customs duty by M/s. Atul Traders and therefore, the customs duty amounting to Rs.24,50,416/- (Rupees Twenty Four Lakhs Fifty Thousand Four Hundred Sixteen only) is liable to be demanded and recovered from M/s. Atul Traders under Section 28(4) of the

Customs Act, 1962. Besides, the interest is also liable to be demanded and recovered from M/s. Atul Traders under Section 28(4) of the Customs Act, 1962. Besides, the interest is also liable to be demanded on the delayed payment of the said differential duty under Section 28AA of the Act *ibid*. The importer had submitted false/ fabricated stock statement to justify his illegal imports to evade the customs duty. This act of omission and commission rendering the impugned goods liable to confiscation under Section 111 of the said Act. Therefore, the said M/s. Atul Traders are liable to penal action under Section 114 A and Section 114 AA of the Customs Act, 1962.

8. Show cause notice was adjudicated on contest vide order-in-original dated 2.1.2019 ordering confiscation of the goods under Section 111(m) valued at Rs.1,12,49,769/- with option to redeem the goods on payment of redemption fine of Rs.10 lakhs. Further, duty was demanded of Rs.24,50,416/- with respect to the goods covered under Panchnama dated 11.11.2014 and 22.07.2015 under Section 28, along with interest under Section 28 AA of the Act. Further, penalty of Rs.5 lakh was imposed on Mr. Atul Dhawan, Proprietor under Section 112 of the Act. Further, penalty of Rs.24,50,416/- was imposed on Mr. Atul Dhawan, Proprietor under Section 114AA of the Customs Act.

9. Being aggrieved, the appellant preferred appeal before the Commissioner (Appeals), *inter alia*, on the grounds that –

9.1 That duty has been wrongly demanded as the appellant is not the importer but only a trader, who buys or procures the goods from the local market as well as from the importer, who had imported the said goods.

Admittedly, the appellant have not filed the bill of entry nor placed any order to the foreign buyer nor made any payment to any overseas supplier. Further, it is not the case of the Revenue that the importers, from whom the appellant purchased the goods, were dummy importers and imports made by them have been financed by the appellant. None of the suppliers/importers have stated so in their statements recorded by the Revenue. The duty demand is wholly on assumptions and presumptions basis treating the appellant as importer, which is not sustainable. Reliance is placed on the following case laws:-

- **J.B. Trading Corporation Vs. Union of India -1990 (45) ELT 9 (Madras).**
- **Chaudhary International Vs. CCE-1999 (109) ELT 371 (TbI.)**
- **Bimal Kumar Mehra Vs. CC-2011 (270) ELT 280 (T).**

9.2 Even if a trader agrees to purchase the imported goods, imported by any IEC holder (a trader), who placed the orders, does not become the importer. There is no illegality in procuring the goods through an importer. Further, the importer has been defined as –

In Section 2(26) of the Act as – Importer, in relation to any goods at any time between their importation and the time when they are cleared for home consumption, includes any owner or any person holding himself out to be the importer. **‘Beneficial Owner’** was added in the definition of the importer w.e.f. 31.03.2017, as amended by Finance Act, 2017. Thus, during the relevant period, the importer is a person, who files bill of entry for import of goods and is so called and referred till such goods are cleared for home consumption.

9.3 Admittedly, in the facts of the present case, neither the appellant have imported nor have filed any bill of entry for home consumption. Reliance is placed on the ruling of the Kerala High Court in the case of **Proprietor, Carmel Export & Import Vs. Commissioner – 2012 (276) ELT 505.**

9.4 The whole case of the Revenue is based on the statements of the various importers, who supplied the goods to the importers and the Chartered Accountant of the appellant.

9.5 There is no admission by the appellant to the effect that he is the actual importer or have imported the goods in question. Even in view of the statements of the suppliers /importers stating that they had supplied some other goods than the goods found in the premises of the appellant, does not make him the importer.

9.6 Merely on the basis of the statements, the appellant cannot be treated as importer and duty cannot be demanded.

9.7 It is also urged that the allegation of undervaluation of the goods is vague, as no retrieved printouts or data from the mobile or CPU of the appellant have been made part of RUDs. Neither any email or DGOV Circulars have been made part of the RUDs.

9.8 Evidently, no panchnama has been drawn for retrieval of the data or documents from the CPU /mobile of the appellant. Thus, the whole case made by Revenue is based on the statements and so called inadmissible data is bad in law and on facts.

9.9 It is evident that reliability of the statements is also doubtful as the same were recorded by Revenue in its office on their computer and the appellant have signed bonafidely on the dotted line.

9.10 It is urged that an admission is not conclusive to the truth of the matter stated therein. It is only a piece of evidence, weight is to be attached

to the matter depending on the circumstances, under which statement is made.

9.11 Further, Revenue has erred in disbelieving the proper invoices and bills produced by the appellant in support of the stock, merely relying on the statement.

9.12 It is also urged that one of the suppliers of the appellant, Shri Vivek Kumar Bansal, Proprietor of M/s. Dee Vee Posters in his statement recorded on 1.5.2015 that he did not supply any goods to the appellant. In his subsequent statement dated 24.08.2015, Mr. Vivek Bansal stated that he had supplied optical frames and other goods to the appellant along with invoices during the period July 2014 to October, 2014. Thus, the statement of Vivek Bansal is contrary and self-contradictory.

9.13 Though Mr. Vivek Bansal has stated that he came to know the appellant through his CHA, Mr. Adil, but no statement of Mr. Adil was recorded to confirm this contention.

9.14 Admittedly, the appellant have purchased from the open market, post-import by other importers. The presumption is that the goods in the market are duty paid. Revenue have not brought any evidence on record to allege that the goods seized in the premises of the appellant were not duty paid, Save and Except vague guess work and /or bald allegation. The appellant have also prayed for cross examination of all the persons, whose statements have been relied upon, mainly the suppliers and the Chartered Accountant. Even otherwise, examination and cross examination of the witnesses in the adjudication proceedings is a statutory requirement as per Section 138 B of the Act, 1962. It is also urged that duty cannot be demanded from the appellant on presumptions and assumptions without adducing evidence that the goods were imported by the appellant. Reliance

is placed on the ruling of the Apex Court in the case of **Oudh Sugar Mills Ltd. Vs. Union of India - 1978 (2) ELT (J172) (SC)**.

9.15 It is also urged that the order of confiscation and demand of duty is also bad as from the perusal of the Panchnama dated 11.11.2014 and 22.07.2014, it is evident that it contains only a list of goods and only optical frames have been alleged to be imported. This fact is also supported by the statement recorded on 11.11.2014 of the appellant, wherein, he, *inter alia*, stated that, "I deal in CR-39 glasses ranging from -8 with 2 cylinders to +6 with 2 cylinders and frames both imported as well as Indian". It is thus submitted that the goods seized from the premises were containing both goods, imported as well as Indian, and Annexure to the Panchnama shows only 12800 pieces Optical Frame as imported, which attracts duty to the tune of Rs.52,630/- only (as per department's own calculation mentioned at page 19 of show cause notice). However, the said demand is also not sustainable as appellant has not imported any subject goods. It is pertinent to mention that nowhere, it has been stated by the appellant that all the items seized from their premises were imported one. Hence, the demand made in the show cause notice and confirmed by the impugned order-in-original is arbitrary and is not sustainable.

9.16 Further, urged that as the appellant is not the importer, the provisions of valuation and re-valuation under Section 114 of the Customs Act read with relevant Valuation Rules are not attracted. Further, the show cause notice is silent as to under which Rule or method, the goods have been re-valued. As the appellant is not the importer and have purchased the goods from the open market in India, the order of confiscation under Section 111(m) of the Act is bad. Section 111(m) provides for – that the goods brought from a place outside India shall be liable to confiscation, if any goods, which do not correspond in respect of value or in any other

particular, with respect to the entry (bill of entry) made under this Act. Thus, Section 111(m) only applies to the imported goods, which have been defined in Section 2(25) of the Act as – ‘import goods’ mean any goods brought into India from a place outside but does not include goods, which have been cleared for home consumption. Thus, in respect of the goods under dispute, admittedly, found and seized from the godown located in town of the appellant, are not the imported goods and thus, the provisions of Section 111(m) are not attracted on this appellant.

9.17 It is also urged that the adjudication order of confiscation, duty and penalties is bad as the show cause notice is vague for the reasons that it does not mention, under which particular clause of Section 111, the Revenue proposes to confiscate the goods. Section 111 has various clauses from (a) to (p). Unless the particular clauses are specified under which confiscation is proposed, a noticee is in dark as to what is the exact case of Revenue, which it is required to meet. Thus, the impugned order is fit to be set aside due to show cause notice being vague and not intelligible.

9.18 It is further urged that imposition of penalty under Section 112 is bad as penalty is attracted for violation of any Act or omission, which renders the goods liable to confiscation under the provisions of Section 111.

9.19 It is further urged that penalty under Section 114 AA is also not attracted, as admittedly, the appellant has not signed or used or caused to be made, signed or used any declaration, statement or document, which was false or incorrect in any particular, in the transaction of any business in respect of the imports/exports.

9.20 Admittedly, the appellant has not made any declaration or filed any documents under his signatures for the purpose of import/export under the provisions of Customs Act.

9.21 It is also urged that imposition of penalty simultaneously on the appellant firm and its proprietor is bad in law and on facts.

10. Ld. Commissioner (Appeals) by cryptic and non-speaking order was pleased to dismiss the appeal. Being aggrieved, the appellant is in appeal before this Tribunal.

11. Ld. Counsel for the appellant, Dr. G.K. Sarkar assailing the impugned order reiterates the aforementioned grounds, which were taken before the Commissioner (Appeals). He further urges that evidently, Mr. Vivek Bansal, Proprietor of M/s. Dee Vee Posters had in his statement stated that he has visited China for purchasing the goods for trade and had specifically stated that he had ordered the items like photo frames and its accessories. Further states that the order for spectacles and its accessories were placed by other persons, who were known through his CHA-Mr. Adil, and also stated that after importation, he sold the goods to the different buyers, who had ordered for such goods. He added 5% margin on the landed cost for such goods and also admitted that he knew Mr. Atul Dhawan (appellant).

12. One of the suppliers, Mr. Sunil Kumar Wadhwa, Proprietor of M/s. Ajay International in his statement dated 9.4.2015 had stated that he had imported glass lenses (finished lens/Rough Ophthalmic blanks) and Flints Buttons (used in making of Bi-Focal Glass) vide bill of entry mentioned against each invoice and had supplied the same to the appellant. Other suppliers also had tendered similar statements. Thus, it leaves no doubt that the goods have been imported by others/suppliers of the appellant.

13. It is urged that the appellant is a trader, who procures goods from the local market from the importers/traders. Under the provisions of the Customs Act, Customs duty is levied on the imported goods, and such duty is liable to be paid by the importers. Admittedly, the appellant is not the importer as he has neither filed the bill of entry nor held out himself to be

an importer with respect to any goods prior to issue of 'out of charge' by the Department. Admittedly, the appellant have not placed the purchase orders with the foreign suppliers neither made any payment for the alleged imports to such foreign suppliers. There is no illegality in identifying the goods to be imported from a source located outside India, and thereafter sourcing the goods through the regular importer. Admittedly, the appellant have not filed any bill of entry and thus, he cannot be held as an importer and duty cannot be demanded from him.

14. Reliance is placed on the ruling in the case of **J.B. Trading Corporation (supra)**, wherein the Hon'ble High Court held that no other person can claim to be the importer of the goods except the person shown in the manifest originally and after completion of the importation, there cannot be another importer for the very same goods. Accordingly, prays for allowing the appeal with consequential benefits.

15. Ld. Authorised Representative for Revenue relies on the impugned order.

16. Having considered the rival contentions, I find that admittedly, it is a case of town seizure. The goods found or available in the open market are presumed to be duty paid unless otherwise proved by the Department. Admittedly, in the facts of the instant case, Revenue have not brought any material on record that the goods seized from the shop/godown premises of the appellant, were not duty paid. Admittedly, the appellant have neither placed purchase orders with the foreign suppliers nor have made any payment to such foreign suppliers. Admittedly, the appellant have procured the goods from the importer(s) located in India after such importers brought the goods to the open market post out of charge granted by the Customs Department. I further find that all the suppliers, whose bills the

appellants have produced in support of the goods lying in his godown, have confirmed supply of goods against those invoices, although there are minor distortion in the statements. In view of the documentary evidence, oral evidence have got less weight and documentary evidence being more reliable cannot be ignored. As the appellant admittedly is not the importer, as defined under the provisions of the Customs Act, the impugned order confiscating the goods and demanding duty is bad in law and on facts. The impugned order is also bad for violation of the provisions of Section 138 B of the Act, which requires that the Adjudicating Authority is required to examine and offer for cross examination of the witnesses of the Revenue, which have not been done by the court below. There is no evidence that this appellant has financed the imports made by other importers/traders. Further, I find that the show cause notice is vague, as valuation of the goods has been done by the Revenue without any relied upon documents (copy of any retrieved documents from mobile /CPU of the appellant).

17. Further, re-valuation done on the basis of the statements is bad in law and on facts. That the appellant cannot be held as importer as the appellant have identified the particular goods available with the particular manufacturer/supplier available in the foreign country and thereafter, purchased the goods by placing orders with the importers located in India.

18. Evidently, no panchnama was drawn by Revenue for retrieval of data or documents from the CPU/mobile of the appellant. I find that reliance placed by Revenue on the statement of Mr. Vivek Kumar Bansal, Proprietor of M/s. Dee Vee Posters is bad on facts as the statements are self-contradictory. I further find that Revenue has not brought any evidence on record to allege that the goods found and seized in the premises of the appellant are smuggled goods. It is onus of the Revenue to give evidence for allegation that the goods are smuggled in nature. The appellant have stated

before the officer that he deals with imported goods and also Indian goods, but the goods were arbitrarily seized under Panchnama without recording reasons as to how the proper officer had reason to believe that the goods were liable to confiscation, at the time of seizure. Thus, I find that the seizure is bad under the provisions of Section 110 of the Act. I also find that the show cause notice is vague as it does not specify the particular clause of Section 111, under which the goods are liable for confiscation. Further, in the facts and circumstances, I find that imposition of penalty under Section 112 and 114 AA is bad.

19. In view of the aforementioned findings and observations, I allow this appeal and set aside the impugned order. The appellant shall be entitled to consequential benefits in accordance with law.

[Order pronounced on 24.11.2022]

(ANIL CHOUDHARY)
MEMBER (JUDICIAL)

Ckp.