

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
MUMBAI**

WEST ZONAL BENCH, MUMBAI

Customs Appeal No. 87464 of 2017

(Arising out of Order-in-Appeal No. MUM-CUSTOM-AMP-APP-507/17-18 dated 14.09.2017 passed by the Commissioner of Customs (Appeals), Mumbai Zone-III.)

M/s Neno Crystal

**Shop No. 03, Sant Kabir Road,
Near Ganesh Hareware, 12,
Shree Ranchhod Nagar,
Rajkot, Gujarat – 360 003**

.....Appellant

VERSUS

Commissioner of Customs (Import), Mumbai
New Customs House,
Ballard Estate,
Mumbai – 400 001

.....Respondent

APPEARANCE:

Shri N.D. George, Advocate for the Appellant
Shri Bhushan Kamble, Assistant Commissioner, Authorised Representative
for the Respondent

CORAM:

HON'BLE DR. SUVENDU KUMAR PATI, MEMBER (JUDICIAL)

FINAL ORDER NO. A/85298 / 2022

Date of Hearing: 14.01.2022
Date of Decision: 06.04.2022

Confirmation of fine and penalty by the Commissioner of Customs (Appeals), Mumbai Zone-III, at a reduced rate under Section 125 and Section 112(a) of the Customs Act, 1962, while setting aside other penal actions imposed vide Order-in-Original

including redemption of bank guarantee etc., has been assailed by the assessee in this appeal.

2. Factual backdrop of the case, in a nutshell, is that Appellant M/s. Neno Crystal, an importer, filed Bill of Entry No. 2962644 dated 12.08.2013 for clearance of Chatons (Beads) of size SS-19 onwards but on examination by the Expert, at the instance of Customs Official, he found presence of SS-12 size Beads in the sample examined by him, value of which is more than the declared size of SS-19 onwards. Matter was adjudicated upon and the adjudicating authority had held that the goods were liable for confiscation under Section 111(m) of the Customs Act, 1962. He also re-determined the value under Rule 5 of Customs Valuation Rules, 2007, appropriated the Customs duty paid by and recovered from the importer and allowed redemption of imported goods under Section 125 of the Customs Act against payment of fine of Rs. 20,00,000/- as well as imposed penalty of Rs. 14,00,000/- on the Proprietor of the firm.

3. Being aggrieved by the said order, Appellant-Proprietor of M/s. Neno Crystal preferred an appeal before the Commissioner of Customs (Appeals) Mumbai Zone-III who, in his reasoned order, gave a finding that there was no deliberate undervaluation or mis-declaration to avoid duty, no evidence concerning submissions of false invoice by the importer, revaluation was done without comparison of contemporary imports except the two Bills of Entry submitted by the importer himself, for which he had accepted the

claim of the appellant about classification, eligibility for exemption from CVD with consequential relief of refund, placing his reliance on the judgments of Hon'ble High Court of Mumbai in the case of *Starlite Corporation, Bombay Vs. UOI* [1989 (39) ELT 538 (Bom.)] and decision of this Tribunal at Bangalore in the case of *VMB Impex Vs. CCE* [2015 (321) ELT 522 (Tri.-Bang.)]. Further, he had held that allegations of under-valuation since is not backed by material evidence, re-determination of value could be considered as voluntarily statement of the importer under Section 108 of the Customs Act, 1962 but ultimately he confirmed the confiscation order despite explanation and evidence being submitted by the supplier during investigation itself concerning wrong shipment by referring to the judgment reported in *2013 (297) ELT 504 (Mad.)* in the case of *Commissioner of Customs (Sea), Chennai-I Vs. M.R. Associates* and that of the Hon'ble Supreme Court passed in the case of *Chariman SEBI Vs. Sri Ram Mutual Fund* reported in *2006 (5) SCC 361*, by holding that establishment of *mens rea* is not essential for imposing penalty for breach of "Civil Obligations". However, he reduced the fine and penalty amount substantially by holding that it should be commensurate with the offence committed by the Appellant and not to be harsh or excessively disproportionate. The legality of confirmation of fine and penalty is only assailed in this appeal.

4. During the course of argument learned Counsel for the Appellant Mr. N.D. George submitted that in view of the findings of the Commissioner (Appeals) referred above and in the absence of

margin of profit being worked-out so as to impose fine to wipe-out the margin of profit basing on Board's formula imposition of redemption fine would have no legal basis. Further, he also argued that in view of the decision of *VMB Impex cited supra* after exemption is granted from payment of CVD and enhancement of value being based on voluntary statement under Section 108 of the Customs Act, 1962 as well as in view of the judgment of Hon'ble High Court of Madras in the case of *Commissioner of Customs (Sea), Chennai-I Vs. M.R. Associates cited supra*, the ratio which was wrongly applied by the Commissioner (Appeals) holding justification for confiscation under Section 111(m) of the Customs Act, 1962, confiscation and penal provision invoked by the Commissioner (Appeals) would not sustain if the findings of the said judgment of the Hon'ble Madras High Court is meticulously studied, for which he sought for interference of this Tribunal in setting aside the fine and penalty confirmed by the Commissioner (Appeals), though at the reduced rate.

5. Learned Authorised Representative for the Respondent-Department Mr. Bhushan Kamble, in response to such submissions, had argued in favour of the reasoning and rationality of the order passed by the learned Commissioner (Appeals) and stated that it has been consistently held by Hon'ble Supreme Court in several of judgments referred in para 12 and 13 of the Commissioner (Appeals)'s order that *mens rea* is not a precondition for imposing penalty for breach of "Civil Obligations" and fine is imposed to wipe-

out the margin of profit and therefore the Commissioner (Appeals) had rightly confirmed fine and penalty while reducing its quantum, so as to make it commensurate to the offence committed that needs no intervention by this Tribunal.

6. I have heard submissions from both the sides. It would not be inappropriate to mention here that the Appellant's case is squarely covered by the judgment of Hon'ble Madras High Court in *Commissioner of Customs (Sea), Chennai-I Vs. M.R. Associates* cited supra wherein it was clearly held that enhancement of value based on voluntary statement concerning acceptance of value, may be for early clearance of goods, would not invoke penal provisions nor confiscation of goods can be made in lieu of redemption fine, and learned Commissioner (Appeals) has placed his reliance heavily on it but erroneously understood that in the said judgment there was confirmation of confiscation and redemption fine. Further, as could be noticed that the judgment of Hon'ble Supreme Court concerning non-availability of guilt mind was not a precondition for breach of "Civil Obligations" is also not placed in its proper perspective. The meaning of "Civil Obligations", in the legal parlance, is performance of certain action under the obligation of law which gives right of enforcing its performance to the other person in case of violation. In the instant case, as could be seen from the case record, Appellant had filed Bill of Entry on the basis of the item description mentioned by the supplier in the import document and had agreed to pay duty on the enhanced value after the same was found to be item of

different size. Learned Commissioner (Appeals) had observed in unequivocal terms that the same importer i.e. Appellant had cleared some goods at or around the same time at higher rate for which “deliberate undervaluation or mis-declaration to avoid duty is farfetched” (*underlined to emphasize*). More importantly, he had also observed that in valuation of imported goods, there is no place for minimum Customs value but appellant preferred not to challenge the departmental action. Therefore, it cannot be said that appellant had made a tie or contract for payment of higher value, so as to make him liable for violation of “Civil Obligations” for the purpose of imposing penalty on him and it has been settled through judicial precedent that voluntarily acceptance of higher value and willingness to pay the duty at the enhanced rate would exempt the Appellant from liability of confiscation and redemption fine [*Commissioner of Customs (Sea)* judgment, cited supra]. Hence the order.

ORDER

7. The appeal is allowed and Order-in-Appeal No. MUM-CUSTOMS-APP-507/17-18 dated 14.09.2017 passed by the Commissioner of Customs (Appeals), Mumbai Zone-III order to the extent of confirming reduced fine for confiscation and penalty are hereby set aside.

(Order pronounced in the open court on 06.04.2022)

(Dr. Suvendu Kumar Pati)
Member (Judicial)