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GOVERNMENT OF INDIA
MINISTRY OF FINANACE
DEPARTMENT OF REVENUE
Office of the Principal Commissioner RA and
Ex-Officio Additional Secretary to the Government of India
8th Floor, World Trade Centre, Cuffe Parade,
Mumbai- 400 005

F. NO. 373/45/SL/12-RA/2934 Date of Issue: 13.07.2022

ORDER NO. 204 /2022-CUS (SZ) /ASRA/MUMBAI DATED 12 .07. 2022 OF THE OF THE GOVERNMENT OF INDIA PASSED BY SHRI SHRAWAN KUMAR, PRINCIPAL COMMISSIONER & EX-OFFICIO ADDITIONAL SECRETARY TO THE GOVERNMENT OF INDIA, UNDER SECTION 129DD OF CUSTOMS ACT,1962.

Applicant : M/s Pan Asia Logistics India Pvt. Ltd.,
Lancor Westminster, 2nd Floor,
New No. 70 (Old No. 108),
2nd Street-Chandrabagh Avenue,
Dr.R.K.Salai, Mylapore,
Chennai- 600004.

Respondent: The Commissioner of Customs (Import), Chennai.

Subject : Revision Applications filed, under Section 129DD of Customs Act, 1962 against the Order-in-Appeal No. C.Cus No. 226/2012 dated 30.03.2012 passed by the Commissioner of Customs (Appeals) Chennai.

Remanded by the Hon'ble High Court of Madras for fresh decision vide its Order dated 08.09.2021 in Writ Petition No.12239 of 2013

ORDER

The present proceedings are in compliance of the Hon'ble High court of Madras, Order dated 08.09.2021 in Writ Petition No. 12239 of 2013 wherein the subject Revision Application is remanded back to the Revisionary Authority for fresh decision.

2. This Revision Application is filed by M/s Pan Asia Logistics India Pvt. Ltd. (herein after referred to as the applicant) against the Order-in-Appeal No. C.Cus No. 226/2012 dated 30.03.2012 passed by the Commissioner of Customs (Appeals) Chennai with respect of Order-in-Original No.13295/2010-MCD dated 25.10.2010 passed by Joint Commissioner of Customs (MCD), Custom House, Chennai.

3. Brief facts of the case are that M/s Komal Enterprises, situated at 11-167/2, 1st floor, Fathe Nagar, Hyderabad, imported 110 containers of MS Scrap/Plates from M/s Habib Ullah, Dubai out of which 70 containers were found to be empty as revealed from the investigation by the Docks Intelligence Unit. The applicant is a steamer agent for the two vessels and had filed IGM No. 15766/09 and 15773/09 as per the provisions of Section 30 ibid. On investigation by the DIU, it was found that the entire manifested quantity of 1942.17 MTs of MS Plates said to be loaded in the 70 containers were empty and not loaded. The original Adjudicating Authority after considering the applicant's submission concluded that the applicant did not account for 1942.17 MTS of MS Plates ex stock valued at Rs.3,28,39,484/- involving a duty of Rs.80,19,849/-. The Joint Commissioner of Customs (MCD) vide Order in-Original No. 13295/2010-MCD dated 25.10.2010 in F.No. IGM No. 15766/2009 MCD imposed a penalty of Rs.1,00,00,000/- on the applicant under Section 116 of the Customs Act, 1962 for failure to account for the short landing of 1942.17 MTs of MS Steel Plates.

4. Aggrieved over the aforesaid order, the applicant filed the appeal before Commissioner of Customs (Appeals), Chennai who after consideration of all the submissions rejected the appeal.

5. Being aggrieved by the impugned Order-in-Appeal, the applicant has filed this Revision Application under Section 129 DD of Customs Act, 1962 and the same was decided by the Joint Secretary (Revision Authority) to the Government of India vide

Order No.57/13-Cus dated 13.02.2013. The Revisionary Authority found that the penalty was rightly imposed on the applicant under Sec 116 of the Customs Act, 1962 and hence found that the Revision application filed by the applicant to be devoid of merits and rejected the same.

6. The applicant challenged the Revisionary Authority's Order by filing a Writ Petition bearing No.12239 of 2013 before the Madras High Court on the grounds that the said Order has been passed by an incompetent authority as the Joint Secretary (Revision Application), Government of India is equivalent to the rank of Commissioner of Central Excise and Customs who has passed the appeal Order. Hence an equal ranking official cannot pass both the orders of Revision and Order in Appeal. The Hon'ble High court of Madras, vide Order dated 08.09.2021 quashed the Order passed by the Revisionary Authority and on being informed that the Revisionary Authority had since been reconstituted, remanded the case back to the Revisionary Authority for deciding case afresh.

7. The grounds on which the applicant had filed the Revision application against the Order-in-Appeal No. C. Cus No. 226/2012 dated 30.03.2012 passed by the Commissioner of Customs (Appeals), Chennai, are as follows:

7.1 The applicant submitted that this is a case where admittedly FCL containers were carried and all the containers arrived with seals intact. Therefore, in law a carrier or his agent cannot be held liable for shortage. The issue in this case is penalty under section 116 of the Customs Act, 1962. But, none of the ingredients of section 116 are met in this case in as much as supplier has cheated the importer. As no goods were actually loaded and the applicant is neither master or agent nor operator or steamer agent thus outside the ambit of "person-in-charge" by definition in Section 2(31) ibid. They are actually Non Vessel Operating Common Carrier (NVOCC, for short, in shipping parlance). They undertake freight in their containers owned or leased and they issue Bill of Lading at load port and Delivery Order at destination. They filed manifest with the customs as enabled by the Notification No.111/2003-Cus. (N.T.) dated 9.12.2003. Otherwise, they are neither master of the vessel or agent of such master or vessel operator in India. In other words, the applicant is neither vessel operator or steamer agent and do not fall under the category "person-in-charge" of the conveyance.

7.2 The containers were accepted by agents on "said to contain" basis and both in the Bills of Landing as well as in the Import General Manifest, there are disclaimers. The declaration in the manifest is only with reference to the "said to contain" basis.

7.3 The Applicant had clearly explained to the respondent the factual position of the details of weight of each containers and seal numbers given by the shipper to the Dubai Port authorities, the same being uploaded in the Dubai Port website, applicant receiving the draft Bill of Lading from the shipper, matching the same with particulars on the Dubai Port website and thereafter issuing Bills of Lading to the shipper after final confirmation. Bills of Lading carried the express condition 'shippers load, stow count and seal and said to weigh, contain, measure clauses' in the absence of personal knowledge of the applicants herein about the quantity or the cargo laden. The containers are handled by the vendor, port authorities, truckers, CFS and the Line and not by the applicants herein. Applicants charged ocean freight by destination and the shipper paid the freight at Dubai.

7.4 The respondent erred in not following the order of the Bombay High Court in Shaw Wallace & Co. Ltd. (1986 Indlaw Mum 4668 - 1986 (25) ELT 948]). This judgement was passed by the agreement of parties thereto. He failed to appreciate that, precisely for this reason, and in the factual background in identical situation, Nhava Sheva customs authorities have not initiated any action. The respondent has not addressed this point at all. The relevant copies of the proceedings of the Nhava Sheva Customs are enclosed. The lower appellate authority too was appraised of this factual position vide letter dated 8.8.11. The department had issued a Public Notice No. 50 dated 20.03.1992 for FCL container assigned with seals intact, the person incharge can not be held liable.

7.5 This is a case of cheating by supplier to which applicant was never a party. The vessels in question, MSC PEGGY, having total capacity of 1700 TEUS was laden with a total 357/20' (24x20 Panasia) and 257/40' Nos. of containers and St. John Gracy with a total capacity of 1800 TUES was laden with a total of 135 TEUS (46 Panasia). These facts go to show that the number of empty containers are relatively less to make any appreciable difference to the ship balance. Without enquiring into

facts, going beyond the scope of the proceedings before the original authority, the respondent erred in straying into the realm of surmise and conjecture. Therefore, paragraphs 8, 9 and 10 of the impugned order are empty postulation de hors the facts of the case. The respondent cannot transcend the Show Cause Notice, which does not allege any conspiracy or fraud. He gravely erred in entering into assumptions and presumptions that were not there even in the Show Cause Notice. The respondent is not an expert on stability of ships or operation and navigation of ships. He has grossly erred in going into issues of which he personally has not knowledge. In paragraphs 11 and 12, the impugned order erred in casting a responsibility on the applicant to atleast randomly check weight, when there is no such requirement - commercially or legally. More so, when Dubai Port Authority receives the duly sealed containers and loads on board vessels.

7.6 It is not even the case in the Show Cause Notice that the applicant was party to any fraud. In paragraph 13 of the impugned order, the respondent has failed to appreciate that the applicant was not the person incharge of the vessel. The respondent's conclusion in paragraph 14 that the department will take exception only to empty containers and not to containers containing goods of any other description is illogical. In all the cases, role of the agent is same - that is, to go by the shipper's declaration and make the documentation (bill of lading) and import manifest) accordingly. It hardly matters if instead of X, there is Y (which the respondent strangely accepts) or instead of X, there is nothing. Logically, both mean the same, in the facts and circumstances. Paragraph 15 of the impugned order errs in stating that the onus of delivering the "weight" is on the applicant. The same is again illogical. The respondent failed to appreciate that internationally container agents go by the weight declared and do not check the individual weights of containers as a routine matter of practice. Millions of containers are moved world over. If each container has to be weighted as suggested by the respondent, the entire container movement will come to a stand still. It is impossible for every carrier to weigh every container. They rely on the weight declared by the shipper and weighment by the Port. Paragraph 16 of the impugned order fails to appreciate that the Shaw Wallace judgment laid down the guidelines on containerized cargo as well as other cargo. Paragraph 17 of the impugned order is again surmising about conspiracy or connivance without citing any evidence. As already stated, the applicant has no role legal or commercial to investigate into the matter. The

department is already on record that they are investigating other angles. The present case is purely confined to liability of a person in-charge of a conveyance, which is not attracted by applicants, as stated above. The lower appellate authority totally erred in confirming the penalty imposed by the original authority.

8. The Personal hearings in this case were fixed on 18.01.2022 and on the applicant's request another date was given on 03-02-2022. Shri S. Murugappan, Advocate appeared online for the hearing and submitted the earlier points. He submitted that Section 116 of Customs Act does not get attracted against them. He submitted that vessel agent was different. He further submitted that matter is covered by Shaw Wallace case of Mumbai High Court. He submitted that they were container agents and not vessel agents. He requested to drop the penalty.

9. Government has carefully gone through the relevant case records available in case files, oral & written submissions and also perused the impugned Order-in-Original, Order-in-Appeal and Hon'be High Court Order.

9.1. On perusal of records, Government notes that the applicants are the steamer agent of two vessels and filed IGM No. 15766/09 & 15773/09 as per provision of section 30 of Custom Act 1962 in respect of 1942.170 MTs of MS Plates Exstock. But on investigation by Dock Intelligence Unit (Container Tracking Cell), on weighment found that entire manifested quantity of 1942.170MTS of MS plates Exstock valuing Rs.32839484/- involving duty of Rs.8019849/-said to be contained in 70 containers was not landed/short landed and all 70 containers were empty. Original authority after due process of law, vide impugned order-in-original imposed a penalty of Rs.1,00,00,000/- on the applicant steamer agents under section 116 of Custom Act 1962, for their failure to satisfactorily account for the not landed or short landed of above said total manifested quantity of goods. In appeal, Commissioner (Appeals) after considering their submissions rejected the appeal filed by the applicant. The issue to be decided in this case is whether the imposition of penalty in terms of Section 116 of the Act is proper and justified.

9.2. Government notes that chapter VI of the Customs Act, 1962 provides the provisions relating to conveyances carrying imported (or exported) goods. Section 30 stipulates delivery of import manifest or import report with true declaration therein. Further Import Manifest (Vessel) Regulations, 1971 provides the nature condition

and position (including status) to be truly declared as per respective declaration form. It is therefore quite clear that "Manifest" is to be considered a basic legal documents and the declarations made therein are to be taken as legal submissions for the purpose of further actions under the relevant provisions of Customs Act, 1962. Similarly, Chapter V of the Act provides for levy and assessment of Customs duties and Section 13 thereof when read with provisions of Bill of Entry (Form) Regulations, 1976 provides the procedure for import documentation. Further for levy/calculation of penalty, the provisions of Section 116 of the Customs Act, 1962 unambiguously stipulates the levy of penalty not exceeding twice the amount of duty.

9.3 Government observes that person-in-charge of conveyance is responsible for any short-landing or non-landing of goods. As per definition in Section 2(31) of Customs Act, 1962, person-in-charge of the conveyance is the master of the vessel. There is no dispute in the matter that all the total quantity of impugned goods as per relevant documents was found short. The steamer agent is an agent of carrier, appointed under Section 148 of Customs Act, 1962. The liability of the agent so appointed by the person-in-charge of the conveyance stipulated under Section 148 is as under :-

> ***"148. Liability of agent appointed by the person in charge of a conveyance. –***
>
> *(1) Where this Act requires anything to be done by the person in charge of a conveyance, it may be done on his behalf by his agent.*
>
> *(2) An agent appointed by the person in charge of a conveyance and any person who represents himself to any officer of customs as an agent of any such person in charge, and is accepted as such by that officer, shall be liable for the fulfilment in respect of the matter in question of all obligations imposed on such person in charge by or under this Act or any law for the time being in force, and to penalties and confiscations which may be incurred in respect of that matter."*

The said provision of Section 148 makes it clear that such agent shall be liable for fulfilment of all obligations imposed on such person in-charge by or under this Act or any law for the time being in force and to penalties and confiscation which

may be incurred in respect of that matter. The Applicant had prepared Bill of Lading and had filed by IGM therefore the applicant acted on behalf of person in charge. As such applicant is liable to penal action under Section 116 *ibid* in this case matter. This case, Government finds that Shri Sunil in his statement recorded has stated that they were the steamer agents and are therefore responsible for delivering the manifested quantity.

9.4 The Applicant has also contended that there was no Mensrea on the part of person-in-charge and therefore penalty cannot be imposed. To understand the penal provision, the relevant Section 116 is extracted as under :-

> ***"116. Penalty for not accounting for goods.*** *- If any goods loaded in a conveyance for importation into India, or any goods transshipped under the provisions of this Act or coastal goods carried in a conveyance, are not unloaded at their place of destination in India, or if the quantity unloaded is short of the quantity to be unloaded at the destination, and if the failure to unload or the deficiency is not accounted for to the satisfaction of the Assistant Commissioner of Customs or Deputy Commissioner of Customs, the person-in-charge of the conveyance shall be liable, -*
>
> *(a) In the case of goods loaded in a conveyance for importation into India or goods transshipped under the provisions of this Act, to a penalty not exceeding twice the amount of duty that would have been chargeable on the goods not unloaded or the deficient goods, as the case may be, had such goods been imported;*
>
> *(b) In the case of coastal goods, to a penalty not exceeding twice the amount of export duty that would have been chargeable on the goods not unloaded or the deficient goods, as the case may be, had such goods been exported."*

The said provision stipulates that penalty is to be imposed for not unloading the goods which were loaded in the vessel for importation into India. As per the IGM, invoices and Bills of Lading the quantity in the 70 containers is given as 1942.170 MTs of MS Plates which in absence of any evidence, to contrary, was loaded in the

ship. The same is on record and was corroborated with concerned invoices in terms of quantity and value. The port officials have also shown that 1942.170MTs had been loaded into 70 containers. The applicants have already declared the same in the necessary Bills of Lading for these 70 containers and it is also seen from the statement recorded of Shri Sunil (the Branch Manager of the applicant), that they checked with the authorities of Dubai Port and after final confirmation from the shipper they released the original Bill of lading. Government notes further in the instant case the applicants had given undertaking to perform or to procure performances of the entire transport from place at which the goods are taken in charge to the place designated for delivery in the bill of lading. They have also undertaken responsibility for the acts and omission of any person of whose services makes use for the performance of the contract evident by the bill of lading. Hence Government finds the applicant's responsibility do not merely stop with providing the containers in which the cargo was stuffed. They have accepted the responsibility of delivering the cargo properly at the port of delivery as a person-in-charge of conveyance.

9.5 The provision of Section 116 makes it clear that penalty is imposed for not unloading the goods which were loaded in vessel for importation into India. In this case, the short-landing of goods is not denied by the applicant. Moreover, the applicant, being steamer agent cannot claim that he was not aware of short shipment and 1942.17 MTs weight not loaded on the ship gone unnoticed. Therefore, the penalty was rightly imposed on the applicant.

9.6 Government notes that for interpreting the provisions of law, Hon'ble Supreme Court in the case of *M/s. ITC Ltd.* v. *CCE Delhi* - 2004 (171) E.L.T. 433 (S.C.) and *M/s. Paper Products Ltd.* v. *CCE, Vadodara* - 1999 (112) E.L.T. 765 (S.C.) has held that ordinary and natural meaning of words of statutes has to be strictly construed without any intendments or any liberal interpretation. In view of these principles laid down by Hon'ble Supreme Court, the penal action is rightly taken against steamer agent under Section 116, by the lower authorities.

9.7. The Government finds that the applicant has relied upon the judgment in case of *M/s. Shaw Wallace & Co. Ltd. Vs. ACC & othrs.- 1986 (25) E.L.T. 948 (Bom.).* In this case, penalty under Section 116 of Customs act, 1962 was imposed on the agent of person in charge of conveyance on the grounds that Ullage report of Bulk liquid

cargo showed marginal difference from the quantity mentioned in the Bill of Lading. The facts of the instant case are entirely different where entire cargo has not been accounted for. This cannot happen without active involvement of applicant.

9.8 The Government finds that the said judgement have been distinguished by the Hon'ble High Court of Madras in the judgement while deciding Writ Petition filed by M/s Carvel Logistics Pvt. Ltd. Vs. JS(RA)- 2013 (293) ELT 342 (Mad.) and the same has been Affirmed in 2016 (338) ELT 266 (Madras High Court). It is held that :-

> *"**15.** Various expressions found in the statute have been defined in Section 2 of the Act, which was ushered in by the Parliament to curb the dents on the revenue caused. Sub-section (31) of Section 2 defines the expression "person-in-charge" in the following words :*
>
> *"(31) "person-in-charge" means, -*
>
> *(a) in relation to a vessel, the master of the vessel;*
>
> *(b) in relation to an aircraft, the commander or pilot-in-charge of the aircraft;*
>
> *(c) in relation to a railway train, the conductor, guard or other person having the chief direction of the train;*
>
> *(d) in relation to any other conveyance, the driver or other person-in-charge of the conveyance;'*
>
> .....
>
> .....
>
> ***20.** From a conjoint reading of Sections 2(31), 30, 31, 116 and 148 of the Act, it becomes clear that the person-in-charge of a conveyance together with the person acting on his behalf as his agent or for the matter any other person acting on his behalf by lodging import manifest under Section 30 of the Act, equally becomes liable for payment of the penalty.*

21. *In fact, the Supreme Court in "British Airways PIC v. Union of India" [2002 (2) SCC 95 = AIR 2002 SC 391) = 2002 (139) E.L.T. 6 (S.C.)] has considered the combined effect of Sections 2(31), 116 and 148 of the Act and held as under :*

"The scheme of the Act provides that the cargo must be unloaded at the place of intended destination and it should not be short of the quantity. Where it is found that the cargo has not been unloaded at the requisite destination or the deficiencies are not accounted for to the satisfaction of the authorities under the Act, the person-in-charge of the conveyance shall be liable in terms of Section 116 of the Act. Besides the person-in-charge of the conveyance, the liability could be fastened upon his agent appointed under the Act or a person representing the officer-in-charge who has accepted as such by the officer concerned for the purposes of dealing with the cargo on his (officer-in-charge) behalf. Assuming that the appellants are neither the officer-in-charge within the meaning of Section 2(31) of the Act nor his agent, it cannot be denied that they shall be deemed to be a person representing the office-in-charge to the officers of the customs as his agent for the purposes of dealing with the cargo off-loaded from the aircraft of the appellants carrier."

22. *Learned single Judge has followed the above principle enunciated by the Supreme Court in British Airways PIC's case (referred to supra) while dismissing the present writ petition, from out of which the appeal arises.*

23. ....

24. *Now turning to the judgment* ***rendered by the learned Single Judge of Bombay High Court in Shaw Wallace and Co. Ltd.'s case (referred to supra), over which heavy reliance was placed by the learned counsel for the appellant it is clearly distinguishable.***

25. ***Certain guidelines as agreed to/suggested by the counsel for both sides have been provided for in Paragraph No. 8 of the said judgment, for enabling smooth exercise of functions under***

the provisions of the Customs Act by all concerned including the persons-in-charge of the conveyance, their agents and the customs authorities. Guidelines formulated in a judgment are intended for guidance of all concerned in conducting their affairs. When statutory obligations and responsibilities have to be discharged, there, perhaps, cannot be an exhaustive list of guidelines that can be formulated. Courts, generally, do not lay down, very precisely, guidelines for universal application. The facts and circumstances of each case have got to be kept in view. Therefore, guidelines spelt out in Shaw Wallace and Co. Ltd.'s case by the learned single Judge of the Bombay High Court cannot be treated as an exhaustive enumeration of all the legal principles applicable on the subject, but they should be understood and construed as sound and workable rules evolved for ironing out the creases noticed. By their very nature, guidelines are parameters to be kept in view while working out the provisions of a statute whole thing apart, it is cardinal principle that a judgment cannot be read like a statute and a judgment is only significant for what it decides and lays down as ratio.

26. *Similarly, the reliance placed upon the judgment in Seahorse Shipping & Ship-Management Pvt. Ltd.'s and Marine Container Services' cases (referred to supra) is also not appropriate, particularly in view of the fact that these subsequent judgments have not noticed the binding judgment rendered by the Supreme Court in British Airways PIC's case (referred to supra) earlier.*

27. In view of what has been set out by us supra, we are of the opinion that the appellant, for all practical purposes, is liable to be treated as "any other person" if not as an agent of the "person-in-charge" of the conveyance and hence liable to suffer the penalty as provided for under Section 116 of the Act. We see no reason whatsoever to interfere with the order passed by the learned single Judge and this appeal fails. Accordingly, the

appeal stands dismissed. No order as to costs. The miscellaneous petitions are closed."

10. Government finds that the rationale of the aforesaid Hon'ble High Court judgments are squarely applicable to this case and also finds the same binding since the said judgement is rendered by the jurisdictional High Court. In the light of the above observations and respectfully following the aforesaid judgments of the Hon'ble High Court cited above, Government rejects the revision applications filed by the applicant as being devoid of merits and holds that the penalty has been rightly imposed under Section 116 of Customs Act, 1962.

11. This Revision application is disposed off on the above terms.

(SHRAWAN KUMAR)
Principal Commissioner & Ex-Officio
Additional Secretary to Government of India

ORDER No 204 /2022-CUS (SZ) /ASRA/Mumbai DATED 18 .07.2022

To,

M/s Pan Asia Logistics India Pvt. Ltd.,
Lancor Westminster, 2nd Floor,
New No. 70 (Old No. 108),
2nd Street-Chandrabagh Avenue,
Dr.R.K.Salai, Mylapore,
Chennai- 600004.

Copy to:

1. The Commissioner of Customs (Post-Import), Customs House, 60, Rajaji Salai, Chennai-600001
2. The Commissioner of Customs (Appeals), Customs House, 60, Rajaji Salai, Chennai-600001.
3. The Joint Commissioner of Customs (MCD), Customs House, 60, Rajaji Salai, Chennai-600001
4. Sr. P.S. to AS (RA), Mumbai
5. Guard file