REGISTERED
SPEED POST

F. No. 373/344/SL/2014-RA
GOVERNMENT OF INDIA
MINISTRY OF FINANCE
(DEPARTMENT OF REVENUE)

14, HUDCO VISHALA BLDG., B WING
6th FLOOR, BHIKAJI CAMA PLACE,
NEW DELHI-110 066

Date of Issue 18/10/22

Orders No. 320 /22-Cus dated 17.10.2022 of the Government of India passed by Sh. Sandeep Prakash, Additional Secretary to the Government of India under section 129DD of the Custom Act, 1962.

Subject : Revision Application under Section 129 DD of the Customs Act, 1962, against the Order-in-Appeal No. 1007/2014 dated 24.06.2014 passed by the Commissioner of Customs (Appeals), Chennai.

Applicant : M/s MSC Agency (India) Pvt. Ltd., Chennai.

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

ORDER

A Revision Application bearing no. 375/344/SL/2014-RA dated 26.09.2014 has been filed by M/s MSC Agency (India) Pvt. Ltd., Chennai (hereinafter referred to as the Applicant), against the Order-in-Appeal No. 1007/2014 dated 24.06.2014, passed by the Commissioner of Customs (Appeals), Chennai. The Commissioner (Appeals) has, vide the impugned Order-in-Appeal, upheld the Order-in-Original, passed by the Additional Commissioner of Customs, MCD, Seaport, Chennai, bearing no. 21873/2013 dated 11.09.2013, vide which penalty was imposed upon the Applicant herein under Section 116 of the Customs Act, 1962.

2. Brief facts of the case are that M/s Chloride Alloys India Ltd., Kolar, Karnataka imported 06 containers wherein the goods had been declared as 'RE-Melted Lead Ingots' from M/s Itus International FZE, Sharjah, UAE. On examination, the said 06 containers were found to contain only empty metallic chemical drums instead of the declared goods and the containers were found to have a net weight of 10.15 Mt's against the declared weight of 149.965 MTs of "RE-Melted Lead Ingots". The Applicant is a steamer agent for the vessel and had filed IGM No. 2029419/31.01.2012 (Line No 129 and 130) as per the provisions of Section 30 of the Act ibid. The original authority after considering the Applicant's submissions concluded that the Applicant did not account for shot landing of 149.965 MTS of 'Re-Melted Lead Ingots' valued at Rs. 1,38,40,317/- involving a duty of Rs. 28,98,301/-. The Additional Commissioner of Customs (MCD), vide aforesaid dated 11.09.2013, imposed a penalty of Rs. 50,00,000/- on the Applicant under Section 116 of the Customs Act, 1962 for failure to account for the short landing of 149.965 MTs of 'Re-Melted Lead Ingots'. Aggrieved, the Applicant filed an appeal before Commissioner of Customs (Appeals), Chennai who vide Interim Order dated 09.01.2014 ordered the Applicant to pre-deposit the entire amount of penalty of Rs. 50 lakhs before deciding the case on merits. Subsequently, the Appellate Authority vide Order-in-Appeal dated 24.06.2014, rejected the appeal.

3. The instant revision application has been filed on the grounds that the shipowners, while accepting FCL containers, do not certify the weight, quantity

quality etc., and also do not have the obligation to weigh the containers before accepting the containers; that the various clauses on the Bills of Lading about the terms and conditions exclude the carrier from any liability or responsibility for the mis-declaration of weight, quality, quantity and if there was any shortage of weight, quality, quantity etc., the carrier could not be made liable either under the general or under any of the provisions of the Customs Act; that the suits for receipt of cargo, filed by the consignee against the Applicant and others were dismissed by the Hon'ble Madras High Court by order dated 19th November 2012 in, Chloride Alloys (India) Ltd Vs. Itus International Fze and 4 Others (A. No. 2521, 2522 and 2449 of 2012 in C.S. No. 385 of 2012), which held that the claim against the carrier was unfounded and baseless; that the Appellate Authority failed to appreciate that when clauses as "shippers load, stow and count" and "Particulars furnished by the shipper-not checked by the carrier-carrier not responsible" as qualifying remarks are incorporated in the bill of lading and also form stipulations of the contract of carriage, and the particulars in the Bills of Lading are entered by the carrier based on the information furnished by the shippers, the carrier is not responsible; that the carrier by signing the Bill of Lading for amount with the qualification, merely means to say that the weight represented to them was as declared by the shipper and they had no actual knowledge thereof and that the statements in the bills of lading as regards, contents of the containers and weight would not be binding on the carrier and it would be for the shipper or consignor to prove that the consignments loaded on board the ship were of the same weight and the contents were of the same nature and the value was of the same figure as those noted in the bills of lading; and that that the carrier as well as the Applicant cannot be made liable under Section 116 of the Customs Act, as the containers were entrusted for carriage in a sealed condition on FCL basis by the shipper and the containers were discharged in Chennai in 'seals intact' condition; that as per clause 5 of the Bill of Lading, the carrier's responsibility ceases once the cargo had been discharged from the vessel at the delivery port and when the cargo was moved out of the discharge port in seals intact condition and once FCL containers were unloaded from the vessel in "Seals

intact" condition then the vessel owner cannot be held responsible for any short landing or be made liable to pay penalty.

4. Personal hearing was fixed on 23.09.2022, 26.09.2022 and 14.10.2022. In the hearing held, in virtual mode, on 14.10.2022, Sr. P. Giridharan, Advocate appeared for the Applicant and reiterated the contents of the revision application and the written submissions dated 11.10.2022. He highlighted that when the containers were discharged at the Port, the seals of the loading port were found to be intact. Therefore, as a carrier they had discharged their duty and no case is made out against them. Hon'ble Madras High Court has, vide judgment dated 21.12.2018, in Application No. 7066 of 2018 in CS No. 385 of 2012, dismissed the civil suit filed by the importer against them. None appeared on behalf of the Respondent department nor any request for adjournment has been received. Therefore, the matter is taken up for decision on the basis of records.

5. The Government has carefully examined the matter. The Applicant has assailed the penalty imposed, mainly, on the grounds that as per commercial arrangement between them and the Shipper, the cargo was accepted on the basis of particulars furnished by the Shipper and were not checked by the carrier. Therefore, they cannot be held responsible for any 'Short Shipment'/'Short Landing'. Secondly, with reference to the judgment of Hon'ble Bombay High Court in the case of Shaw Wallace & Co. Ltd. *{1986 (25) ELT 948 (Bom.)}*, it is contended that the seals of the container were intact and, hence, penalty under Section 116 is not tenable. The Government observes that the arrangement between Shipper and the principals of the Applicants herein, where the cargo was accepted on the basis of particulars furnished by the Shipper, was a commercial arrangement between the Shipper and the Applicant. Further, this being a commercial arrangement may absolve the Applicant/principal from any financial claims, damages, etc. which may be levied upon them by the Shipper at a later stage but such a commercial arrangement between the two private parties cannot absolve the Applicants of the statutory obligation placed upon them under Section 116 read with Section 148 of the

Customs Act, 1962. The judgment of the Hon'ble Bombay High Court in the case of Shaw Wallace & Co. Ltd. (supra) does not support the case of the Applicant herein, in as much as, in the case of Shaw Wallace & Co. Ltd., certain guidelines were issued in the background of practices followed at the Bombay Port Trust and the Customs in early 1980s. The Government also observes that the Hon'ble Supreme Court has, in the case of *British Airways PLC. Vs. Union of India {2002 (139) ELT 6 (SC)}*, elaborated the scope of penalty under Section 116 in following terms:

"9. 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 incharge of the conveyance, the liability could be fastened upon his agent appointed under the Act or a person representing the officer incharge who was accepted as such by the officer concerned for the purposes of dealing with the cargo on his (officer-in-charge) behalf."

Further, in the case of *Commissioner of Customs (Imports), Mumbai vs. Patvolk {2006 (202) ELT 411 (Bom.)}*, a Division Bench of Hon'ble Bombay High Court itself has followed the judgment in British Airways PLC (supra) and repelled the challenge to penalty imposed upon agent of the person incharge of the conveyance under Section 116. Therefore, the present contentions of the Applicants are not acceptable. Other case laws relied upon by the Applicants are not applicable in view of declaration of law by the Apex court in British Airways case.

6. During the course of personal hearing, it has been contended that the issue regarding as to whom/which end the goods were short shipped/landed was decided by the Hon'ble Madras High Court, vide Order dated 21.12.2018, in Application No. 7066 of 2018 in CS No. 385 of 2012. The concluding part of the Hon'ble High Court's Order is re- produced as under:

"

7 Conclusion :

(a) As the contentions raised by plaintiff in opposition to summary judgment application have been carefully considered, examined and rejected in the dispositive reasoning supra, this Commercial Division has no difficulty in coming to the conclusion that while the Carrier is entitled to succeed in the summary judgment application (having the suit dismissed as against the carrier), i.e., defendants 2 to 5, it is axiomatic and a matter of corollary that plaintiff will be entitled to a decree against shipper / first defendant. To be noted, the suit being decreed against first defendant is not merely because it is axiomatic qua dismissal against defendants 2 to 5, but also because of independent considered conclusions arrived at by this Commercial Division that the documents in the suit file show that the suit consignment was not weighed and loaded in the Load Port. Further to be noted, though the instant summary judgement application has been taken out by defendants 2,4 and 5, as alluded to supra, for all practical purposes, there are three entities to this litigation viz., plaintiff consignee, first defendant shipper and defendants 2 to 5 Carrier (MSC Group). Therefore, if plaintiff is not entitled to succeed against the carrier, it follows as a sequittur that plaintiff has no real chance of succeeding against defendants 2 to 5. Therefore, it is appropriate to dismiss the suit against defendants 2 to 5 carrier while decreeing it against first defendant shipper.

(b) It is for the first defendant to come before this court and establish that it had actually loaded Remelted lead ingots and not aluminium metal drums. Very importantly, the payment for the said consignment has been made by plaintiff to first defendant. First defendant having received the entire sale consideration for suit consignment has bounden duty to come before this court and establish that it has discharged all its legal obligations by loading in the Load port the entire suit consignment, i.e., Remelted lead ingots, for which it has received full consideration. First defendant has not chosen to do that. Merely because first defendant has not chosen to do that, it may not be appropriate to mulct the carrier with liability, particularly when the legal position emerges clearly that the contract of carriage in the instant case is such that the carrier cannot be held liable after having handed over the containers with seals intact condition, vide EIRs which have been referred

to supra. To be noted, the decision that there shall be a decree against first defendant is not merely on the ground that first defendant has been set ex parte, but it is on the grounds which have been alluded to supra in the summary judgment, as in the considered opinion of this Commercial Division, a careful analysis of suit file placed before this Commercial Division, reveals that first defendant has no real prospect of successfully defending the claim and therefore, this summary judgment in the light of the memo of plaintiff which is treated as an application for summary judgment by plaintiff qua first defendant. In other words, the summary judgement against first defendant is not only on the ground that first defendant has been set ex parte.

(c) The conduct of the first defendant shipper in having received the entire consideration for suit consignment and evading service in the usual conventional mode compelling the plaintiff to resort to substituted service and ultimately, not even coming before this Court to explain and to say that suit consignment was in fact loaded in the Load Port (if that be so) or to set out its stated position in any other manner is clearly vexatious. Though one can say that this is not false or vexatious defence in every sense of the term, in the considered opinion of this Commercial Division, it qualifies as a vexatious way of defending a suit warranting compensatory costs. Considering the claim, nature of the lis and the trajectory of litigation thus far, it is deemed appropriate to impose exemplary / compensatory costs of Rs. 5,00,000/- (Rupees five lakhs only).

8. Decision :

A. No. 7066 of 2018 is allowed. Suit in C.S. No. 385 of 2012 is dismissed against defendants 2 to 5. C.S. No. 385 of 2012 is decreed against first defendant with costs and exemplary / compensatory costs."

From a plain reading of the above said judgment, it is apparent that, in this case, the Hon'ble High Court has held the case against the Shipper and discharged the Applicant herein as the Shipper had not come before the Hon'ble High Court to establish that it had actually loaded the entire quantity of Remelted lead ingots and

not aluminium metal drums. Thus, the suit has been held against the shipper and the Applicant has been discharged due to the shipper not joining the proceedings to establish his case and there is no authoritative pronouncement by the Hon'ble High Court that the goods were indeed not loaded in full quantity by the shipper. As such, this order of the Hon'ble High Court can not be cited to absolve the Applicant herein from its liability under the Customs Act.

7. In view of the above, it is held that the penalty has been correctly imposed on the Applicant herein under Section 116 of the Act ibid. However, keeping in view the facts and circumstances of the case, the penalty imposed is reduced from Rs. 50,00,000/- to Rs. 5,00,000/-.

8. The revision application is disposed off in above terms.

(Sandeep Prakash)
Additional Secretary to the Government of India

M/s MSC Agency (India) Pvt. Ltd., Lancor Westminster, 1st Floor, KGN Towers, No. 62, Ethiraj Salai, Egmore, Chennai-600004.

Order No. 320/22-Cus dated 17-10-2022

Copy to:

1. The Commissioner of Customs, Customs (Port-Import), Customs House, 60, Rajaji Salai, Chennai-600001.
2. The Commissioner of Customs (Appeals), 60 Rajaji Salai Custom House, Chennai-600001.
3. Sh. P. Giridharan, Advocate, "Vanguard House" 3rd Floor, No 48, Second Line Beach, Parrys, Chennai-600001.
4. PA to AS(RA).
5. Guard File.
6. Spare Copy.

ATTESTED

Praveen Negi
Supdt. AS(RA)