

2013 (4) ECS (166) (Tri – Ahd)

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
WEST ZONAL BENCH, AHMEDABAD
COURT**

**M/s Crystal Polymers Impex.
Vs.**

Commissioner of Customs, Kandla

Appeal No.: C/274, 275, 276, 277 & 385/2008 - SM

Arising out of : OIO No. KDL/COMMR/16/2008 dated 31.3.2008

Passed by : Commissioner of Customs, Kandla

Represented by :

Shri Rama Rao, Advocate

For the appellant

Shri K.J. Kinariwalla, A.R.

For the respondent

CORAM:

MR. H.K. THAKUR, HON'BLE MEMBER (Technical)

Date of Hearing: 25.10.2013

Date of Decision: 15.11.2013

ORDER No. A/11611 – 11615/2013 dated 15/11/2013

“Adjudicating Authority has imposed penalties upon all the appellants by holding that “Castor Oil” exported by the appellants were liable to confiscation for violation of Sec 113 (d) of the Customs Act 1962. Sec 113 (d) of the Customs Act 1962.” [Para 5]

“Export orders of castor oil were required to be executed by the appellants within the parameters of SEZ Schemes and the goods were required to be directly transferred from SEZ unit to the port of shipment.” [Para 5.3]

“Procuring the goods by outsourcing from DTA units is not a routine procedure and is required to be allowed by the appropriate authority in genuine cases. Such outsourcing was to be used for fulfilling the export obligation of the appellants and has to be a category of Castor Oil being manufactured on sub contracting from a DTA unit. An approval given by the Development Commissioner to outsource a material by trading does not mean that permissions required by other controlling departments was not required as the fulfillment of export obligation is also supervised by Customs. Taking of permission required to be taken under the Customs Act 1962 and the procedure prescribed there under, will amount to imposition of a prohibition for the purpose of Sec. 2 (33) of the Customs Act 1962.” [Para 6]

“Penalty under Sec 114 (i) is attracted, on an act committed by the exporter, with respect to goods liable to confiscation, as soon as the goods are brought into a customs area for export in violation of the prohibitions/restrictions. An offence is thus committed by the appellants and can not be wiped away by the fact that attempts of the appellants were successful.” [Para 8]

Per : H.K. Thakur, Mr. :

1. These appeals have been filed against Order In Original No. KDL/Commr/16/2008 dated 31.3.2006 passed by Commissioner of Customs, Custom House, Kandla, imposing penalties on all the appellants.
2. Brief facts of the appeals are that appellant units procured and exported ‘Castor Oil’ directly after procuring the same from the units situated in Domestic Tariff Area without following the procedure prescribed under Sec. 11 (1) of the Foreign Trade Development and Regulation Act 1992 read with para 18 (c) of Appendix 14 II of Export and Import Policy 2002 – 07 and CBEC Circular No. 26/2003 – cus dated 1.4.2003 for not taking necessary permission. These acts of the appellants have been held to be a violation of Sec 113 (d) of the Customs Act 1962 by the Adjudicating Authority and accordingly penalties have been imposed upon the appellants under Sec. 114 (i) of the Customs Act 1962.
3. Sh. B. Rama Rao (Advocate) appearing on behalf of the appellants argued that the impugned goods have not been confiscated by the adjudicating authority and accordingly penalties can not be imposed upon the appellants under Sec. 114 of the Customs Act 1962 as per CESTAT, Chennai Bench judgment in the case of K Kamla Bai Vs. Commissioner of Customs & Central Excise, Trichy [2005 (186) ELT 459 (Tri. - Chennai)]. It was also his case that there was no prohibition under Exim Policy for the export of Castor Oil and therefore, the provision of Section 113 (d) of the Customs Act 1962 can not be invoked, especially when the export

goods were not confiscated. It was also argued that appellants had the permissions from DGFT for trading in Castor Oil and could procure Castor Oil from DTA units and export by such outsourcing. It was argued by the Learned Advocate that if the export of Castor Oil is not prohibited under Exim Policy, the same can not become prohibited because of mere failure on the part of an exporter to abide the condition of Exim Policy making them liable to confiscate under Sec. 113 (d) of the Customs Act 1962.

4. Sh. K J Kinariwala (AR) appearing on behalf of the Revenue argued that as per para 25 of the Show Cause Notice dated 6.9.2006 appellants were required to follow certain procedures and required to obtain certain permission from the Customs Officers as per CBEC issued Circular No. 26/2003 – cus dated 1.4.2003. As the appellants have not followed the required procedure and also did not take the statutory permissions required, penalties have been correctly imposed. He relied upon the judgment of Kolkata High Court in the case of M/s Eureasian Equipments and Chemicals vs. CC and Others [1980 (i) ELT 38 (cal.)].
5. Heard both sides and perused the case records. The issue required to be deliberated is whether penalties can be imposed upon the appellants under Sec. 113 (d) of the Customs Act 1962. Adjudicating Authority has imposed penalties upon all the appellants by holding that “Castor Oil” exported by the appellants were liable to confiscation for violation of Sec 113 (d) of the Customs Act 1962. Sec 113 (d) of the Customs Act 1962 is reproduced below:

“Sec. 113 (d). any goods attempted to be exported or brought within the limits of any customs area for the purpose of being exported, contrary to any prohibition imposed by or under this Act or any other Law for the time being in force;

- 5.1. The word “prohibition” has been derived from the word “prohibit” which means to forbid by law or authority. Sec 2 (33) of the Customs Act 1962 defines prohibited goods as follows:

“Sec. 2 (33). prohibited goods” means any goods the import or export of which is subject to any prohibition under this Act or any other law for the time being in force but does not include any such goods in respect of which the conditions subject to which the goods are permitted to be imported or exported have been complied with;

- 5.2. Section 11 (1) of the Foreign Trade Development and Regulation Act 1992 and para 18 (c) of the Exim Policy 2002 – 07 are reproduced below:

- “i). Section 11(1) of the Foreign Trade Development and Regulation Act, 1992 reads:

Section 11 : Contravention of provisions of this Act, rules, orders and export and import policy:-

No export or import shall be made by any person except in accordance with the provisions of this Act, the rules and orders made there under and the export and import policy for the time being in force.

- ii) Provisions of Para 18 (C) of Appeals 4 – II of Export and Import Policy 2002 – 07 reads as under:

The export orders so procured shall be executed within the parameters of SEZ Schemes and the goods shall be directly transferred from the SEZ unit to the port of Shipment.”

- 5.3. It is observed from the above provisions that export orders of castor oil were required to be executed by the appellants within the parameters of SEZ Schemes and the goods were required to be directly transferred from SEZ unit to the port of shipment. Appellants have been granted necessary permissions by the Development Commissioner, Kandla SEZ for general trading of all imported goods and indigenous goods with the condition, inter – alia, that trading in local purchases will be permitted to all the items except those listed in the prohibited list for import and export. CBEC Circular No. 26/2003. Cus dated 1.4.2003 was relied upon by the Revenue to argue that permission/approval of commissioner of Customs was required for outsourcing the requirement from the DTA units. Para 3 of this Circular is reproduced below:

“3. It may be noted that before allowing such sub-contracting of production in DTA, the jurisdictional Assistant Commissioner/ Deputy Commissioner shall satisfy himself of the bonafide necessity of such sub-contracting of production in DTA. This facility may not be allowed in routine manner to the units. It is not the intention of the Government to allow the unit to parcel out the manufacturing into DTA or to other EOU/EHTP /STP /SEZ under normal circumstances, but to help the units to overcome genuine difficulties and to enable units to meet the sudden demand of goods for exports which is in excess of production capacity of the existing unit. Further, it may be ensured that while giving permission for subcontracting of production in DTA or to other EOU/STP/EHTP/SEZ units, the past antecedents of the units as well as job-working units should also be verified and in case of any misuse of serious nature noticed in the

past or due to any other reasons, where it is felt that there is no justification per such permission or there are high chances of abuse of such facility, such permission may be denied with the approval of Commissioner of Customs. All the other conditions including furnishing of bank guarantee etc. as stipulated in the Circular No. 65/2002-Cus dated 7-10-2002 shall apply mutatis-mutandis in case of subcontracting of production into DTA.”

6. It is seen from the above circular that procuring the goods by outsourcing from DTA units is not a routine procedure and is required to be allowed by the appropriate authority in genuine cases. Such outsourcing was to be used for fulfilling the export obligation of the appellants and has to be a category of Castor Oil being manufactured on sub contracting from a DTA unit. An approval given by the Development Commissioner to outsource a material by trading does not mean that permissions required by other controlling departments was not required as the fulfillment of export obligation is also supervised by Customs. Taking of permission required to be taken under the Customs Act 1962 and the procedure prescribed there under, will amount to imposition of a prohibition for the purpose of Sec. 2 (33) of the Customs Act 1962.
7. Appellants have relied upon the judgment of Chennai Bench in the case of K Kamla Bai vs. Commissioner of Customs & Central Excise, Trichy (Supra) to the effect that no penalties can be imposed under Sec 114 if the offending goods are not confiscated under Sec 113 (d) of the Customs Act 1962. As the goods are already exported hence these are not liable to confiscation. In this regard, it may be relevant to mention that the same issue has already been settled by Hon'ble Calcutta High Court in the case of M/s Eurasian Equipments & Chemicals vs. Commissioner of Customs and Other (Supra). In that case the issue before the Hon'ble Court was whether or not goods exported in violation or prohibition/restriction imposed under Sec. 12 (1) of the Foreign Exchange Regulation Act 1947 will be deemed to be violation leading to penalty, with respect to goods already exported, under Sec. 114. In that case as it was argued by the appellants that penalties under Sec. 114 of the Customs Act 1962 can only be imposed with respect to 'export goods' which are not yet exported. Para 26 to 30 of the order passed by Calcutta High Court in the above case are relevant and are reproduced below:

“26. It is quite clear that violation of any prohibition or restriction imposed under Section 12 of the Foreign Exchange Regulation Act 1947 will result in a violation, of the prohibition or restriction under Section 11 of the Customs Act 1962 by virtue of the deeming provisions contained in Section 23A of the Foreign Exchange Regulation Act; and necessarily, all the provisions of the Customs Act which may be attracted because of

violation Section 11 of the Customs Act will have effect. The question is whether the violation of the prohibition or restriction imposed under Section 11 of the Customs Act will attract the provisions of Sections 113 and 114 of the Act in a case where goods had already been exported. The answer to this question will depend on proper construction of the relevant provisions of the Customs Act and of the provisions contained in Section 113 in particular. Section 113 lays down conditions when export goods become liable to confiscation. It makes provision as to under what circumstances 'export goods' incur the liability to confiscation. Section 113 does not deal with actual confiscation of the goods or the physical possibility of confiscation thereof. It only provides that 'export goods' shall be liable to confiscation, if any of the conditions stipulated in Section 113 are satisfied, in other words, it makes provision as to the incurring of liability to confiscation of the 'export goods'. Section 113(d) makes it clear that 'export goods' shall incur the liability to confiscation if the goods are attempted to be exported contrary to any prohibition imposed by or under the Customs Act or any other law for the time being in force. 'Export goods' as defined in Section 2(19) of the Customs Act means 'any goods which are to be taken out of India to a place outside India'. Any goods which are to be taken out of India to a place outside India will incur the liability to confiscation under Section 113(d), if the said goods are attempted to be exported contrary to any prohibition imposed by or under the Customs Act or any other law for the time being in force. The liability to confiscation arises and is incurred as soon as the 'export goods' are attempted to be exported contrary to any such prohibition and attempt to export the goods must necessarily precede the actual exportation of the goods. The liability of the goods to confiscation, therefore, arises as soon as the said goods are attempted or sought to be exported contrary to such prohibition. This liability which "accrues or arises as soon as the attempt to export the goods is made is in no way dependent and has not been made dependent on the possibility or feasibility of actual confiscation of the goods. This accrued liability of the goods to confiscation clearly attracts Section 114 of the Customs Act which provides that any person who in relation to any goods, does or omits to do any act, which act or omission would render such goods liable to confiscation under Section 113 or abets the doing or omission of such an act, shall be liable to penalty as provided in the said Section. With the incurring of liability of the goods to confiscation under Section 113, any person who in relation to such goods has done or omitted to do any act which act or omission has rendered such goods liable to confiscation under Section 113 or abets the doing or omission of such an act, renders himself liable to penalty under Section 114. On a proper construction of Sections 113 and 114 of the Customs Act with reference to the language used in the said sections this position,

in our opinion, clearly emerges. We fail to appreciate how the accrued liability of the goods to confiscation with the attempt made for exporting the same contrary to prohibition is extinguished or wiped out with the said illegal attempt succeeding, resulting in the actual exportation of the goods. A plain reading of Section 113 of the Customs Act providing for liability to confiscation of export goods and of Section 2(19) of the Act defining 'export goods' does not appear to indicate or suggest that the accrued liability to confiscation is so extinguished or wiped out. It may be noticed that this liability to confiscation attaches to the goods at the time the goods are sought to be exported contrary to prohibition and at that point of time the goods which are to be taken out of India to a place outside India have not been taken out of India to a place outside India. In other words at the point of time when the liability to confiscation accrues, the goods are 'export goods' well within the meaning of the definition of export goods in Section 2(19) of the Act.

27. In our opinion, this appears to be the proper interpretation of Sections 113 and 114 of the Customs Act, applying the well settled principles of construing the said sections with reference to the language used therein. This interpretation further appears to be in accord with the objects for which this particular legislation has been enacted by the Parliament.

28. We have earlier set out the provisions of Section 11 of the Customs Act which confers power on the Central Government to prohibit importation or exportation of goods for purposes mentioned therein. These purposes indeed cover very wide fields. Some of the purposes for which the prohibition may be imposed as stated in Section 11(2) are, prevention of smuggling, prevention of shortage of goods of any description and prevention of the contravention of any law for the time being in force. Section 113 provides for liability of the goods to confiscation in case of any violation of the prohibition imposed under Section 11 of the Act and Section 114 provides for personal penalty for those whose acts or omissions render the goods liable to confiscation under Section 113. To construe the said sections to mean that Section 114 can only be attracted when the goods are attempted to be exported and will have no application when goods have in fact been exported will defeat the purpose and object for which the said provisions have been introduced. The submissions that the legislature has so intended by using the words 'attempt to export' in Sections 113 (a), (b) and (d) and the analogy of the offence of attempt to commit suicide given in this connection are, in our opinion, misleading and devoid of merit. An attempt to commit suicide is indeed an offence and the act of committing suicide resulting from the successful attempt may not be

considered to be an offence. This is so for the simple reason that once a person attempting to commit suicide succeeds in his attempt he places himself beyond the reach of law and no punishment is intended to be inflicted on the dead person or his heirs and legal representatives by imposing any fine or penalty, as they may in no way be liable or responsible for the said act. As we have earlier observed, the liability of the goods to confiscation arises under Section 113(d), as soon as the goods are attempted to be exported and the attempt to export the goods necessarily precedes the actual export of the goods. Goods become liable to confiscation as soon as the attempt is made. There is no provision in the Act to suggest that this accrued liability is wiped out or extinguished with the exportation of the goods. It may be that after the goods had in fact been exported the liability of the goods to be confiscated may not be enforceable by actual confiscation of the goods. Personal penalty of any person who, in relation to the goods, does or omits to do any act which act or omission renders the goods liable to confiscation under Section 113 or abets the doing or omission of such an act has been provided in Section 114. This provision is attracted as soon as the goods incur the liability to confiscation under Section 113 and such liability, as we have earlier held, arises when the goods are attempted to be exported contrary to any prohibition. It is to be noted that at the time when the goods are sought to be exported they are undoubtedly 'export goods' within the meaning of Section 2(19) of the Customs Act. The liability of personal penalty provided in Section 114 of the Act, which arises with the accrual of the liability of the goods to confiscation under Section 113 of the Act at the stage of the attempt to export the said goods, clearly remains and the said liability is capable of enforcement. In the case of illegal export of any good's contrary to prohibition the effect may be that the liability of the goods to confiscation which arises and accrues may not be capable of enforcement but the personal liability which arises with the accrual of liability of the goods to confiscation can be enforced and by enforcement of the personal liability the offender can still be brought to book and this kind of offence may be checked. We must, therefore hold that by virtue of Section 23A of the Foreign Exchange Regulation Act 1947 the provisions of Sections 113 and 114 of the Customs Act 1962 are attracted, when there is a contravention of Section 12 (1) of the Foreign Exchange Regulation Act 1947 in relation to goods which had in fact been exported. This was indeed the first question which came up for consideration before the Division Bench and has been referred to the Full Bench and our answer to this question is therefore in the affirmative.

29. An order by the proper officer permitting clearance and loading of the goods under Section 51 of the Customs Act does not affect the position.

30. We have earlier noticed that under Section 113 of the Customs Act export goods incur the liability to confiscation at the stage when they are attempted to be exported.”

8. The above case law was not brought to the knowledge of the Chennai Bench while deciding the case of K Kamla Bai vs. Commissioner of Customs and Central Excise, Trichy (supra) which is thus distinguishable. In view of the law laid down by Calcutta High Court, confiscation of goods under Sec 113 (d) is an independent act from the penalties imposable under Sec. 114 (i) of the Customs Act 1962. Penalty under Sec 114 (i) is attracted, on an act committed by the exporter, with respect to goods liable to confiscation, as soon as the goods are brought into a customs area for export in violation of the prohibitions/restrictions. An offence is thus committed by the appellants and can not be wiped away by the fact that attempts of the appellants were successful. Therefore, penalties under Sec. 114 (i) of the Customs Act 1962 have been rightly imposed.

9. In view of the above appeals filed by the appellants are rejected.

(Pronounced in Court on 15/11/2013)