The 'or' & 'and' debate - s.114A of Customs Act

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High Court recently dismissed two Appeal Nos 09 & 10 of 2017 filed by the Commissioner of Customs and Service Tax, Bangalore in the cases of M/s Sony Sales Corporation - **2021-TIOL-425-HC-KAR-CUS** and M/s Krishna Sales Corporation -**2021-TIOL-439-HC-KAR** vide two separate Orders, both dated 10.02.2021, holding as under:

> ***"From perusal of the relevant extract of Section 114A, it is evident that the language employed by the legislature is plain and unambiguous and the provision contains a positive condition with regard to levy of penalty equal to duty or interest and does not contain any negative condition. The expression used is 'or' which is disjunctive between duty or interest and further use of expression as the case may be clearly suggest that aforesaid provision refers to two different persons and two different situations viz., one in which a person will be liable to duty and in other he may be liable to pay interest only and provides that in both the situations the person liable to duty would be liable to penalty equal to duty and person liable to interest would be liable to penalty equal to interest. Therefore, in view of law laid down by constitution bench of Supreme Court, the word 'or' cannot be interpreted as 'and'."***

The issue of quantum of penalty under Section 114A has been hanging fire since insertion of the Section in the Customs Act, 1962 vide the Finance Act, 1996. Initially, the adjudicating authorities had mostly imposed penalties equal to duty and not equal to duty & interest. However, some enthusiasts in the department had other view which led to issue of the so-called clarification by the enthusiastic Board vide Circular No. **61/2002-Cus** dated 20.09.2002 to the effect that the penalty under Section 114A shall be equal to the duty **and** interest thereon.

In tune with the Circular, the orders imposing penalty equal to only duty were reviewed and appeals were filed by the department.

In the following reported cases, the department consistently lost all such cases before Mumbai and Bangalore Benches of CESTAT:

- Appeal Nos. C/496 of 2007 in the case of M/s Mangalore Refinery and Petrochemicals Ltd - 2014 (313) E.L.T. 353 (T);

- Appeal No C/666 of 2007 in the case of M/s Sony Sales Corporation;

- Appeal No C/667 of 2007 in the case of M/s Krishna Sales Corporation;

Both (b) & (c) above were decided against the department . However, the department carried the matters further to Karnataka High Court where again it lost.

- Appeal Nos. 613 to 618 of 2008 in the case of M/s Bharti Airtel Ltd & Ors - **2012-TIOL-746-CESTAT-BANG;**

- Appeal Nos C/875 to 880 of 2010 in the case of M/s Jewel Art, Unit-II and others - **2019-TIOL-627-CESTAT-MUM**;

- Appeal No C/991 of 2010 in the case of Fenil Enterprises;

- Appeal Nos C/26709, 26710 and 26713 of 2013 in the case of B. Suresh Vaudev Baliga and Ors - **2015-TIOL-1461-CESTAT-BANG**;

- Appeal Nos C/26707 and 26712 of 2013 in the case of M/s 3D Networks Pvt. Limited and another - **2016-TIOL-3100-CESTAT-BANG**;

- Appeal No 90086 of 2014 in the case of Vs M/s Sesa Sterlite Ltd - **2019-TIOL-1181-CESTAT-MUM**; and

- Appeal No. C/89309 and 89316 of 2018 in the case of M/s Aban Offshore Limited - **2019-TIOL-1082 CESTAT-MUM**.

It is trite law that the Circulars issued by the Board are binding on the quasi-judicial authorities as held by the Supreme Court in the case of Ranadey Micronutrients Vs. Collector of Central Excise - **2002-TIOL-184-SC-CX**
. Therefore, after issue of the said Circular in the year 2002, the adjudicating authorities started imposing penalties under Section 114A equal to duty & interest.

In spite of the above categorical statement of law and losing all the cases it filed, not once but number of times in the past nine years, the department is yet to mend its ways. Rather, in cases where the adjudicating authorities dared to adhere to the avowed judicial discipline and imposed penalty equal to only duty, the department dutifully reviewed such Orders and made the same adjudicating authorities to file Appeals against their own Orders giving rise to frivolous litigation and increasing cost of transaction, considering that the department has so far lost all the cases.

The moot question is whether the said Circular still continues to be binding on the quasi-judicial authorities and if that be so, what will happen to the Principle of Judicial Discipline so important and dear in a Rule of Law based society coupled with various pronouncements of Supreme Court including Kamlakshi Finance Corporation - **2002-TIOL-484-SC-CX-LB**
wherein the feeder Bombay High Court had passed strictures against the quasi-judicial authorities for not following the orders of appellate authorities. The departmental officers are really in a bind - between the deep sea and the devil kind of situation.The dictum is that judicial discipline should prevail over the binding nature of the Circulars.

One more issue that crosses the mind is as to whether the amount of penalty can be left indeterminate and that is what is going to happen when the penalty equal to duty and interest is imposed and the duty still remains to be paid leaving crystallization of the interest amount in abeyance.

Conclusion

In the changed scenario, where the department is seen taking various proactive measures to promote ease of doing business and reduce cost of transaction, the said Circular should be given a quiet burial by its graceful withdrawal.

This will be a boon in pandemic era and simultaneously reduce the huge pendency of appeals.

[The author retired as Additional Director, DRI and the views expressed are strictly personal.]