

**Customs, Excise & Service Tax Appellate Tribunal
West Zonal Bench At Ahmedabad**

REGIONAL BENCH-COURT NO. 3

Customs Appeal No. 11695 of 2014- SM

(Arising out of OIO-SUR-EXCUS-002-COM-086-13-14 dated 31/01/2014 passed by Commissioner of Central Excise, Customs and Service Tax-SURAT-II)

Tejinder Singh Makkar

.....Appellant

21-B, Land Breeze,
52, Pali Hill, Bandra, W, Mumbai, Maharashtra.

VERSUS

C.C.E. & S.T.-Surat-ii

.....Respondent

New C.Ex Building...Opp. Gandhi Baug,
Chowk Bazar, Surat, Gujarat – 395001

WITH

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APPEARANCE:

Shri. G.B Yadav, Advocate for the Appellant

Shri Vijay G. Iyengar, Assistant Commissioner (AR) for the Respondent

CORAM: HON'BLE MEMBER (JUDICIAL), MR. RAMESH NAIR

Final Order No. A/ 11619 - 11620 /2023

DATE OF HEARING: 31.03.2023

DATE OF DECISION: 28.07.2023

RAMESH NAIR

This appeal is directed against order-in-original dated 31.01.2014 passed by the Commissioner of Customs, Central Excise and Service Tax , Surat –II whereby the Commissioner has imposed penalty under section 112 (b) of Customs Act, 1962 and Rule 209 A of Central Excise Rules, 1944. The penalties were imposed on appellant being mediator acting as

a broker in dealing with all trading of advance licence which was forged or obtained fraudulently.

2. Shri G.B. Yadav, Learned Counsel appearing on behalf of the Appellant at the outset submits that under the identical facts of the case and the issue involved there were more than 50 show cause notices were issued. In one of the show cause notice, in the appellant's own case this Tribunal by majority order reported at T. S. Makkar Vs. Commissioner of Central Excise, Surat - 2014 (312) ELT 247 (Tri.Ahmd) set aside the penalties imposed under Rule 209 A of Central Excise Rules, 1944 and Section 112 (b) of Customs Act, 1962. He submits that in view of the aforesaid decision, in this case also penalties are not sustainable.

3. Shri Vijay G. Iyengar, Learned Assistant Commissioner (AR) appearing on behalf of the Revenue reiterates the finding of the impugned order.

4. I have carefully considered the submission made by both the sides and perused the records. I find that the appellant has acted as broker between the seller of advance licence which are either forged or obtained fraudulently. Under the identical set of facts there were many cases made out. In one of the case decided by this Tribunal's majority decision, the appellant having the same alleged role, the penalty was set aside. In this case of the appellant himself, in the said decision there were difference of opinion between the Member (Judicial) and Member (Technical) thereafter on the basis of the third Member's view, the matter was finally decided by the majority order. The order of the third member is reproduced below:-

" This Difference of Opinion is listed before me as per orders of Hon'ble President for deciding the points of difference arose between the Bench while deciding the Appeal No. E/855/2009.

26. *Following Difference of Opinion are indicated:-*

(i) Whether in the facts and circumstances, it has to be held that Shri T.S. Makkar was aware that the licences were fake, forged or fictitious as held by Member (Technical) or it has to be held that Shri T.S. Makkar was not aware of this fact as held by learned Member (Judicial)?

(ii) Whether it can be held that all the evidences relating to Shri R.K. Gupta have not been further investigated by DRI as held by learned Member (Judicial) or whether it has to be held that DRI had made serious efforts to trace him as held by Member (Technical)?

(iii) Whether in the facts and circumstances of the case it has to be held that the appellant was not aware of misuse of the licences by M/s. Kay Bee Tex Spin Ltd. for showing fictitious export and therefore appellant cannot be held to be aiding and abetting the said 100% EOU as held by learned Member (Judicial) or it has to be held that Shri T.S. Makkar was aware that no goods would be cleared but only paper transactions will be made and therefore he could be said to be aiding and abetting duty evasion as held by Member (Technical)?

(iv) Whether in the facts and circumstances of the case, it can be said that Shri T.S. Makkar did not deal with the goods and therefore is not liable to penalty in view of the decision of the Tribunal-LB in the case of M/s. Steel Tubes of India Ltd. as held by learned Member (Judicial) or it has to be held that he is liable to penalty having dealt with the goods as held by Member (Technical)?

27. I have carefully gone through the orders passed by the Hon'ble Brother Members, the points of difference, oral and written submissions of both the sides, and the entire voluminous records before me. This matter has arisen before me as third Member consequent upon differences of opinion between the learned Member (Judicial) and the learned Member (Technical) of the regular Bench, which considered the appeal in the first instance. The essential facts of the case have been given in sufficient detail in the orders passed by the learned Member (Judicial) and the learned Member (Technical)?

28. I proceed to answer the points of difference as follows -

1st point : Whether in the facts and circumstances, it has to be held that Shri T.S. Makkar was aware that the licences were fake, forged or fictitious as held by Member (Technical) or it has to be held that Shri T.S. Makkar was not aware of this fact as held by learned Member (Judicial).

29. There is no dispute on the fact that there exists no direct clinching evidence, oral or documentary, proving awareness on the part of the appellant that the licenses were fake, forged or fictitious. Therefore, what is to be considered is whether the circumstances would suggest such awareness of the appellant on the test of preponderance of probability. In para 19.2 the learned Member (Technical) has recorded his findings on this point while holding that the appellant was aware about the fake, forged or fictitious nature of the licences. His reliance has been mainly on oral statements suggesting that -

(i) A heavy premium of 30% was payable coupled with understanding that no supplies would be made and there would be only paper transactions,

(ii) The appellant told Shri R.C. Jain that AROs could be used by textile companies particularly EOUs for fulfilling their export obligations and if the suppliers were not genuine AROs could fetch 30 to 35% premium,

(iii) The appellant ensured that he got all the documents from the 100% EOUs sent to Shri R.K. Gupta, got them endorsed and returned to the 100% EOU.

30. He also relied on involvement of the appellant and Shri R.C. Jain in a case relating to forgery of shipping bills and DEPB licences detected by DRI, wherein they were arrested and detention orders under COFEPOSA were issued against them. On the other hand, the learned Member (Judicial) observed in para 13 that there was no evidence on record to show that it is the present appellant who had either himself forged the advance licences or has pumped the same into the market. The expressions fake, forged or fictitious - nowhere came on record in the statements of any of the persons, including the present appellant. It nowhere stood admitted by the appellant that he was aware of the fact of said licences being forged. The Revenue has heavily relied on the findings recorded by the learned Member (Technical). However, it is seen that procurement of licences from Shri R.K. Gupta has not been disputed anywhere. It is also not disputed that other persons namely Shri K.D. Sharma and Shri Nitin Rastogi also used to buy licences from Shri R.K. Gupta. Filing of anticipatory bail by Shri R.K. Gupta is also not in dispute. The Member (Judicial) has also recorded in her findings in para 14 that Shri Manoj Goyal in his statement dated 28-12-2001 admitted having purchased the licences at a premium of 33-34%, however the same was being paid by 100% EOU to Shri R.C. Jain. No evidence suggests that the present appellant sold the licences directly to 100% EOU on such premium. In absence of any cogent evidence, although circumstances may raise grave suspicion, I am unable to hold that the appellant was aware that the licences were fake, forged or fictitious.

2nd point : Whether it can be held that all the evidences relating to Shri R.K. Gupta have not been further investigated by DRI as held by learned Member (Judicial) or whether it has to be held that DRI had made serious efforts to trace him as held by Member (Technical)?

31. Member (Judicial) on this point held that the efforts made by DRI officers to locate Shri R.K. Gupta, has not resulted in any fruitful result. The appellant during the course of his interrogation, also disclosed the names of one Shri K.D. Sharma and Shri Nitin Rastogi as the persons who used to buy licences from Shri R.K. Gupta. These persons have also admitted the same. Not only that, he also disclosed the case file number where Shri R.K. Gupta has filed anticipatory bail in Sessions Court of Delhi. Shri R.K. Gupta's affidavit was also on record. No evidence of further sincere investigations on all these evidences by DRI is forthcoming. In para 19.3 the learned Member (Technical) has culled out the efforts made by the DRI. After recording that the appellant informed in his statement dated 5-11-2003 regarding filing of anticipatory bail by Shri R.K. Gupta in the Court of District Sessions Judge, Delhi along with case number of the same, the learned Member also examined whether the fact that Shri R.K. Gupta was not traced by the DRI can help the appellant in any way. However, it is seen that no serious efforts to trace Shri R.K. Gupta, by taking help of Shri Nitin Rastogi, Shri K.D Sharma. the court records in the Court of District Sessions Judge, Delhi are forthcoming from the records. It therefore appears that no serious efforts were made to locate Shri R.K. Gupta, and I have no hesitation to hold so.

3rd point : *Whether in the facts and circumstances of the case it has to be held that the appellant was not aware of misuse of the licences by M/s. Kay Bee Tex Spin Ltd. for showing fictitious export and therefore appellant cannot be held to be aiding and abetting the said 100% EOU as held by learned Member (Judicial) or it has to be held that Shri T.S Makkar was aware that no goods would be cleared but only paper transactions will be made and therefore he could be said to be aiding and abetting duty evasion as held by Member (Technical)?*

32. *Oral statements of the following persons from M/s Kay Bee Tex Spin Ltd., the 100% EOU unit, have been relied upon -*

- (i) Shri Manoj Omprakash Goyal, Director of the 100% EOU,*
- (ii) Shri Omprakash Ramvilas Agarwal, Director of 100% EOU,*
- (iii) Shri Dharmesh Sharadchandra Chunawala, employee of another group company of the said 100% EOU,*
- (iv) Shri Jai Singh Chahar, authorized signatory of the said 100% EOU.*

33. *However, none of these oral statements implicated the appellant by any direct or indirect reference to the appellant's role in either misuse of the licenses or fictitious export/sales of yarn. These statements point accusing finger towards M/s. Amar Brothers and Shri Puneet Rungta for fictitious sale/dispatch of goods, and towards Shri R.C. Jain and Shri Puneet Rungta regarding procurement of licence/ARO. There is no evidence whatsoever to establish that the appellant was known to M/s. Kay Bee Tex Spin Ltd., so as to even remotely infer any aiding and abetting with the said 100% EOU on such basis.*

34. *In this light, it appears that solely on the basis of the appellant's oral statement, it cannot be established that he was aware that no goods would be cleared but only paper transactions will be made. Moreover, when it is established that the appellant was not even known to the concerned directors/persons of the said 100% EOU, the question of aiding and abetting them would not arise.*

4th point : *Whether in the facts and circumstances of the case, it can be said that Shri T.S. Makkar did not deal with the goods and therefore is not liable to penalty in view of the decision of the Tribunal-LB in the case of M/s. Steel Tubes of India Ltd. as held by learned Member (Judicial) or it has to be held that he is liable to penalty having dealt with the goods as held by Member (Technical)?*

35. *It is trite that to attract penalty, the penal provisions would require strict interpretation. Even if the present appellant dealt with the licences, he has not dealt with any goods in any manner nor is there any such allegation. Without dealing with the goods in any manner whatsoever, in the facts of the instant case, the ratio laid down in the Larger Bench decision of this Tribunal in case of M/s. Steel Tubes of India Ltd. v. CCE, Indore as reported in [2007 \(217\) E.L.T. 506](#) (T-LB) would be a binding precedent, wherein it was held that penalty is imposable under Rule 209A only if excisable goods are dealt with by the person concerned with knowledge of liability of confiscation, and that even where any person has issued only invoices without actual movement of the goods, the said rule*

cannot be pressed into service for imposing penalty. The following judgments relied by the appellant were also to the same effect.

1. [2004 \(165\) E.L.T. 206](#) (Tri.-Del.) Kamdeep Marketing Pvt. Ltd. v. C.C.E., Indore
2. [2004 \(178\) E.L.T. 578](#) (Tri.-Chennai) D. Ankineedu Chowdary v. C.C.E., Chennai.

36. I am not persuaded to accept that these precedents would not have a binding effect in the facts of the instant case. These decisions are specific on the very issue in question, and are not where there is a mere passing observation, without there being same or similar issue in question. These precedents are authority for what had been actually decided, deducible from the application of law to the facts and circumstance of case, and not some conclusion based upon facts which may appear to be similar. In absence of any evidence of the involvement of the appellant in dealing with the goods in any manner whatsoever, the ratio of these judgments is squarely applicable in the instant case. I also find that the judgment of Hon'ble Supreme Court in *Corporation Bank v. Saraswati Abharanasala* reported in [2009 \(233\) E.L.T. 3](#) (S.C.) is in a different context and is an authority for adopting purposive construction rather than strict construction to find the object of the Act, relating to a matter involving denial of refund of tax realised by the State from the petitioner therein. The Hon'ble Supreme Court was pleased to direct refund with interest by adopting purposive construction rather than strict construction. The issue in hand however is of imposition of penalty, and hence I am of the view that strict construction would have to be given to penal provisions, unlike any beneficial provision.

37. In the instant case neither the appellant has dealt with or transacted for the goods in any manner, nor has it been established that he was aware about forged/fake nature of the licences. Therefore in such peculiar facts of the case none of the judgments cited by the Revenue and relied by the learned Member (Technical) would have any application.

38. In *Sachidananda Banerjee, A.C.C., Calcutta v. Sitaram Agarwala* reported in [1999 \(110\) E.L.T. 292](#) (S.C.) the Hon'ble Supreme Court was concerned with third persons who had nothing to do with the actual import but might have come in possession of smuggled goods, knowingly, after they had been smuggled. While confining to the facts of the said case it was held that respondent Sitaram was concerned in dealing with the goods, as he with previous agreement or arrangement went to purchase an article which he knew to be smuggled, notwithstanding that the act stopped at an attempt to purchase. In these circumstances even though Sitaram had not come into actual possession of the smuggled gold before the police intervened, there was no doubt that he was concerned in dealing with prohibited goods. The Hon'ble Supreme Court therefore was of opinion that the Hon'ble High Court was in error in holding simply because the purchase was not complete that Sitaram was not concerned in dealing with the smuggled gold which was found with the Chinese accused. It is not the case of the Revenue that similar fact situation arises in the present appellant's case. Even the ratio laid down in binding precedents of this Tribunal and the Larger Bench, is in no way contrary to what the Hon'ble Supreme Court has held in *Sachidananda Banerjee's* case. In the instant case, neither the appellant

dealt with the goods, nor had agreed to deal with the goods in any manner whatsoever so as to attract penalty under Rule 209A.

39. *Since, none of the acts referred to in Section 112(b) of Customs Act, 1962 are proved against the appellant, imposition of penalty under Section 112(b) also cannot sustain.*

40. *Therefore, in the facts and circumstances of the case, the appellant is not liable to penalty as held by learned Member (Judicial). Registry is directed to place the file before the Bench for further action."*

From the above decision it can be seen that the present appellant involved in the above case was similarly placed broker for advance licence and by the majority decision, the penalties were set aside. Considering the above decisions, I am of the view that since same facts and issue were involved, following the aforesaid decision in the present case also the penalties are not sustainable.

5. Accordingly, the same are set aside, impugned order is modified to the above extent. Appeals are allowed in the above terms.

(Pronounced in the open on 28.07.2023)

RAMESH NAIR
MEMBER (JUDICIAL)

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