CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL

<u>NEW DELHI</u>

PRINCIPAL BENCH

Customs Appeal No. 51960 of 2019 [SM]

[Arising out of Order-in-Appeal No. (C CUS/D-II/ICD/PPG/183-184/2019-20 dated 24.05.2019 passed by the Commissioner (Appeals), Customs, New Delhi]

Shri Naresh Kumar **...Appellant**
AF-24C, Shalimar Bagh,
New Delhi

VERSUS

Commissioner of Customs **...Respondent**
Inland Container Depot, Patparganj,
New Delhi

<u>APPEARANCE:</u>

Mr. Chinmaya Seth & Arvind Kumar Seth, Advocates for the Appellant
Ms. Tamanna Alam, Authorised Representative for the Respondent

Coram: HON'BLE MRS. RACHNA GUPTA, MEMBER (JUDICIAL)

DATE OF HEARING/DECISION:12.11.2021

FINAL ORDER No. 52003/2021

<u>RACHNA GUPTA</u>

In the present appeal the order of Commissioner (Appeals) bearing No.183-184/2019-20 dated 24.05.2019 has been assailed. The facts in brief are as follows:-

2. The Department, on the basis of intelligence received from some exporters based in Delhi involved in the export of carpets, fabrics etc. fraudulent export of hand-woven carpets by various

companies as mentioned in the Table in Show Cause Notice No.8722 dated 14.08.2013, Mr.Sajjan Kumar was found to be the kin-pin and the mastermind against the said exports with an intent to have the duty draw-back wrongly and fraudulently. Vide the aforesaid Show Cause Notice, the appellant has been proposed to be burdened with the penalty under Section 114 (iii) and Section 114AA of the Customs Act, 1962 on the allegations of aiding and abetting said Mr. Sajjan Kumar so as to make those fraudulent exports of hand woven carpets and to wrongly avail the corresponding duty draw back. The said proposal of imposition of penalty has been confirmed initially vide Order-in-Original No.44/2016 dated 26.09.2016. The appeal whereof has been rejected vide the Order-under-challenge. Being aggrieved, the appellant is before this Tribunal.

3. I have heard Mr. Chinmaya Seth & Mr. Arvind Kumar Seth on behalf of the appellant and Ms. Tamanna Alam, ld. D.R. on behalf of the Department.

4. Ld. Counsel has mentioned that a common Show Cause Notice was served upon the present appellant as well as upon the another Inspection, namely, Subhash Chand. It has been mentioned that a common Order in Appeal has been passed against the appellant as well as said Subhash Chand. Two separate appeals were filed by both these Inspectors. The appeal of Inspector Subhash Chand has already been disposed of vide Final Order of this Tribunal bearing No.51657/2021 dated

13.07.2021 vide which the penalty against Subhash Chand has been set aside.

5. Ld. Counsel has impressed upon that Naresh Kumar is absolutely similarly placed. In addition, it is submitted that Naresh Kumar was freshly appointed Inspector at the said relevant time and was not even given the initial training. The impugned Inquiry was marked to Inspector Subhash Chand and the present appellant, Inspector Naresh Kumar was directed to join with the motive of training/ learning. Ld. Counsel has requested for same relief, as has already been extended in favour of said Subhash Chand to be extended. It is finally submitted that there is no iota of any evidence proving alleged abetting on part of these Inspectors. The order under challenge is accordingly prayed to be set aside and appeal is prayed to be allowed.

6. While rebutting these submissions ld. DR has acknowledged the said final order No.51657/2021 in Appeal No.C/52193/2019. However, at the same time ld. DR has made emphasis upon the correctness of the findings of Commissioner (Appeals) in the order under challenge. Paras 5.5 and 5.6 of the orders have been relied upon. Ld. DR has thus prayed for upholding the said order. Appeal in hand is accordingly prayed to be dismissed.

7. After hearing the rival contentions, perusing the record as well as the aforesaid final order with respect to Co-Inspector Shri Subhash Chand, I observe and hold as follows:

8. The present appellant alongwith Shri Subhash Chand were assigned the duty of Market Inquiry to ascertain the fair value of exported hand-woven carpets. During the subsequent investigations, the Department found that the firms which were investigated by these 2 Inspectors were not at all competent to provide the fair market rate of the hand woven carpet, none of them being involved in the trade of carpets at the said relevant time. It is owing to said lacuna on the part of both these Inspectors that the afore mentioned Show Cause Notice was served upon them, proposing penalty under Section 114 (iii) and 114AA of the Customs Act. It is perused that for penalty to be imposed under both these sections there has to be such act or omission which may facilitate export of such goods, which are otherwise liable for confiscation. In addition, the person committing such act or such omission should be doing so knowingly with an intention to facilitate the export of such goods which otherwise is not permissible.

9. In the present case apparently and admittedly, the act / omission on part of the appellant in improperly conducting the Inquiry of the fraudulent export of hand-woven carpets is the act after the impugned fraudulent export got unearthed and after the mastermind behind those export, Shri Sajjan Kumar, had already availed the unreasonable, unjustified, illegal duty draw-back benefit. There is no evidence for the present appellant to at all be the beneficiary of the said illegal benefit being drawn by said Shri Sajjan Kumar. I observe that there is the admission on part of

said Shri Sajjan Kumar about being involved in the export of hand-woven carpets with an intent to make unreasonable duty draw-back benefit. Irrespective the said statement has been retracted, but there is no iota of utterance in any of the statements of Shri Sajjan Kumar about the present appellant or the Co-Inspector Shri Subhash Chand to ever have facilitated him prior he exported those carpets. In absence thereof, the only lacuna on part of the present appellant is that they conducted inquiry about fair market rate of the hand-woven carpets from such firms which were later found to not at all to be involved in export of carpets and hence were not competent to provide any information to these Inspectors about the rate of the carpets. This act, to my opinion, is nothing more than an act of conducting investigation negligently in casual and improper manner. These Inspectors, in their statements have acknowledged them to be casual while conducting the impugned investigation. The said casualness, to my opinion, may amount to lapse in performance of duty and may be called as inefficiency on the part of these Inspectors including the appellant, but from no stretch of imagination the said lapse in performance can be called as abetment.

10. To constitute a criminal offence of abetment as punishable as defined under Section 107 of Indian Penal Code, 1862, there has to be an intention to instigate, to conspire or to aid/facilitate a person to do or abstain from doing something, which is a defined penal offence and that the abettor is the part of the

conspiracy with an intent to draw back benefit out of the alleged offence. Apparently and admittedly, there is nothing on record produced by the Department to show the involvement of the appellant and the Co-Inspector for insighting or conspiring with or aiding or facilitating said Sajjan Kumar at the stage prior he made the exports. There is no evidence for the appellant and the Co-Inspector to be the beneficiary of the amount of duty draw-back illegally availed by said Sajjan Kumar. Accordingly, the statement of the appellant and co-Inspector Shri Shri Subhash Chand though is an admission for conducting Inquiry in improper and casual manner but has wrongly been considered by Commissioner (Appeals) to be an admission for committing an act of abetting the fraudulent export of hand-woven carpets i.e. the goods, which were liable for confiscation. It cannot be the evidence of knowledge and intention of the appellant to facilitate the export of said prohibited goods. I draw my support from the decision in the case of **Boria Ram vs. Commissioner, Customs reported in 2017 (354) ELT 661 (Tri.-Del.**) also following the findings in the Final Order No.51657/2021 in Appeal No. C/52193/2019. I hold that the Adjudicating authorities have wrongly held the act and conduct of the appellant as an act of abetment. In para 5.5 as impressed upon by ld. DR also Commissioner has specifically noted that the act of the appellant is that of conducting an inquiry in a casual manner. As already held above, the said act is not sufficient to constitute a penal offence as that of abetment for the impugned fraudulent exports.

11. For imposition of penalty under Section 114AA the information should knowingly be false. There should have been an intention to give false or incorrect statement. But as already mentioned above that lapse in obtaining the correct information from improper source cannot be called as an intentional act of giving wrong information. Hence no question arises for imposition of penalty. I draw my support from the decision in the case of **Hem Chand Gupta & Sons Versus Commissioner of Cus.(ICD), New Delhi 2015 (330) ELT 161 (Tri. – Del.**), where the Hon'ble Tribunal was pleased to pass the following:

> *"41. So far as imposition of penalty is concerned mens rea plays a vital role to determine quantum thereof. That aspect was not looked into in the adjudication. Mechanically penalties have been imposed in page 77 of the adjudication order without stating any reason as to imposition and determination of quantum thereof, which appears to be disproportionate, in existence of conflicting evidence on record."*

12. The findings of Commissioner (Appeals) are therefore, set aside. Consequent to entire above discussion, the appeal in hand is hereby allowed.

[Dictated and pronounced in the open Court]

(RACHNA GUPTA)
MEMBER (JUDICIAL)

Anita