TELEGRAM : CEGCANAL
Website : www.cestat.gov.in

REGISTERED / AD
Email : delhi@cestat.gov.in

CUSTOMS. EXCISE & SERVICE TAX APPELLATE TRIBUNAL
PRINCIPAL BENCH, WEST BLOCK No.2, R.K.PURAM, NEW DELHI - 110066
CUSTOMS APPEAL BRANCH

Appeal No. C/971-972 /2005 - CU[DB] Date 24/09/2008

Assistant Registrar
C.E.S.T.A.T, New Delhi

To :
KISHAN CHAND
E-27, BHAGWAN DASS NAGAR,
EAST PUNJABI BAGH, NEW DELHI – 110026.

KISHAN CHAND Appellant

Vs

THE COMMISSIONER OF CUSTOMS (G) NEW DELHI Respondent

I am directed to transmit herewith a certified copy of **Final order No.** C/342-343 2008 CU[BR] dated 03.09.08 passed by the Tribunal under Section 129, (B) of the Customs Act.1962 & Financial Act 1994 relating to Service Tax

Assistant Registrar
(Customs Appeal Branch)

Copy to :
1. Respondent
THE COMMISSIONER OF CUSTOMS (G) NEW DELHI
NEW CUSTOM HOUSE, NEAR IGI AIRPORT, NEW DELHI
2. Adv. / Consult MR. J.P. KAUSHIK, ADV.
A-14/3 SFS, SAKET , NEW DELHI – 17.

3 S.D.R
4 J.C.D.R.
5 Bar association, CESTAT, New Delhi
6 M/s. Deeparchi Publications, M-93, Marg. 46, Saket, New Delhi 110017
7 M/s Centax Publictions (P) Ltd., 1512-B, Bhishm Pitamah marg, Opp. ICICI Bank of Defence Colony, New - 3
8 Excise & Customs cases, B-37, Sector -1, NOIDA - 201301 Gautam Budh Nagar, (U.P.)
9 Raghuraman's 44-B, Regal Flat,Shipra Suncity, Indirapuram - 201010,Ghaziabad, DT, U.P.
10 Nidheshak publications, I.P.Estate, new Delhi
11 Taxmann Allied Service Pvt Ltd., 21/35, West Punjabi Bagh, New Delhi - 110026
12 Commercial Laws of India Pvt Ltd Post Bag No. 1033, No.70(Old No. 88), Thyagaraya Road, T. Nagar,Chennai
13 Taxindiaonline.com Pvt.Ltd, B-XI/8183,Vasant Kunj, New Delhi - 110070
14 Easy Service Tax Online Dot Com Pvt.Ltd.407A,Iscon Mall,Above Star India Bazar,Satellite Road,Ahmedabad-1
15 Office Copy
16 Guard file

Assistant Registrar
(Customs Appeal Branch)

CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI

PRINCIPAL BENCH - COURT NO. 1

Customs Appeal Nos. 971 & 972 of 2005

(Arising out of order-in-original No. 22/M.D. Singh/2005 dated 19.09.2005 passed by the Commissioner of Customs (G), New Delhi)

DATE OF HEARING : 03.09.2008
DATE OF DECISION : 03.09.2008

FOR APPROVAL AND SIGNATURE :

HON'BLE MR. JUSTICE S.N. JHA, PRESIDENT
HON'BLE MR. M. VEERAIYAN, MEMBER (TECHNICAL)

1.	Whether Press Reporters may be allowed to see the order for publication as per Rule 27 of the CESTAT (Procedure)Rules, 1982 ?.	Yes
2.	Whether it should be released under Rule 27 of the CESTAT (Procedure) Rules, 1982 for publication in any authoritative report or not ?	Yes
3.	Whether their Lordships wish to see the fair copy of the Order ?	Seen
4.	Whether Order is to be circulated to the Departmental Authorities?	Yes

Shri Kishan Chand .... **Appellant**
M/s K.C. Bearing Co. .... (Rep by Sh. K.K. Anand, Adv.)

VERSUS

CC, New Delhi .... **Respondent**
(Rep. by Sh. A.K. Madan, DR)

CORAM : HON'BLE MR. JUSTICE S.N. JHA, PRESIDENT
HON'BLE MR. M. VEERAIYAN, MEMBER (T)

Final ORDER NO. C/342-343/08

PER M. VEERAIYAN :

These two appeals are against the order no. 22/M.D. Singh/2005 dated 19.09.2005 which was passed in *de novo* proceedings in pursuance of the Tribunal's order dated 07.11.2003.

2. Heard both sides.

3. The relevant facts, in brief, are as follows:

(a) The appellant firm was a partnership firm with Shri Karam Chand and Shri Kishan Chand as partners and was dealing in ball bearings. In pursuance of search operations, seizures have been made of ball bearings numbering 1,58,395 and valued by the Customs at Rs. 2,50,34,750/- (the valuation is also under dispute);

(b) The statement of Shri Karam Chand was recorded on 25.05.1998 in the Customs House premises; after the statement was over, he has stayed overnight and given another statement on 26.05.1998 (there is a dispute whether Shri Karam Chand stayed voluntarily overnight at the Customs House or he was detained forcibly).

(c) Shri Karam Chand in his statements, *inter alia*, submitted that the annual turn over of his firm was around Rs. 40 lacs and his brother Shri Kishan

Chand was only a sleeping partner and attending to works relating to accounts; he did not have import documents for the seized ball bearings; he used to purchase some quantity of foreign ball bearings with bills from certain firms; he used to purchase rest of the ball bearings without bills from dalals who told him that the ball bearings have been imported from Nepal. Towards the end of his statement on 25.05.1998, he identified the seller of the ball bearings by the name Billa (who according to the Department was one J.S. Anand @ Billa reportedly involved in other cases of smuggling of ball bearings). He also ~~rated~~ stated that stock of ball bearings numbering around 25,000 which was in stock as on 31.03.1998 were disposed of before 14.04.1998 and that the entire quantity of stock which was seized were procured by them during 16.04.1998 to 20.04.1998.

(d) He was arrested and produced before the Magistrate on 27.05.1998 and he complained before the Magistrate that he was detained, threatened and made to right statement that he was suffering from diabetes and he was feeling uneasiness and pain in heart. On the orders of Magistrate, he was admitted to the jail hospital. However, he was not granted bail and was in the jail for about two months;

(e) No statement was taken from Shri Kishan Chand and no summons were also issued to him for the purpose of recording his statement. Shri J.S. Anand who was identified as Billa by Shri Kishan Chand, was summoned several times but he did not appear and give statement;

(f) On the basis of show cause notice issued, original authority passed orders confiscating the ball bearings and imposing penalty on Shri Karam Chand, Shri Kishan Chand and Shri J.S. Anand. On appeal, the order of the Commissioner was set aside by the Tribunal and the matter was remanded.

(g) In the meanwhile, Shri Karam Chand expired.

(h) In the *de novo* proceedings, Commissioner has ordered confiscation of the goods whose value was taken as Rs. 2,50,34,750/-, but allowed to be redeemed on payment of fine of Rs. 50 lacs. He imposed a penalty of Rs. 20 lacs on Shri Kishan Chand and a penalty of Rs. 20 lacs on Shri J.S. Anand. It appears that no appeal has been filed by Shri J.S. Anand.

4.1. Learned advocate, appearing for the appellant, *inter alia* made the following submissions :

(a) The ball bearings are not the goods notified under Section 123 or Chapter IV-A of the Customs Act. Therefore, the burden of proof that the goods are smuggled lies on the Department; merely because the goods are of foreign origin, no presumption can be raised that the same have been smuggled, especially because during the relevant time the ball bearings were freely importable and tradable without restriction;

(b) The Department has not adduced any reliable evidence about smuggled nature of the seized ball bearings. The only evidence is the statement of late Shri Karam Chand, which was also hear say in nature. He has not stated that the goods were smuggled, but only submitted that the dalal, from whom he purchased had mentioned that they are smuggled from Nepal. Subsequently, he has changed his version that ball bearings have been procured from one Billa, (who has been identified by the Customs as J.S. Anand);

(c) The statement of Shri Karam Chand was not voluntary. It was not believable that a person with poor health conditions stayed voluntarily overnight at the Customs House and resumed the statement very next day. Further, he has made the retraction at the earliest opportunity i.e when he was produced before the Magistrate. There was no corroboration to his statement; in fact, no statements have been taken from Shri Kishan Chand and from Billa @ J.S. Anand. He was only asked about the import documents and he admitted that as he had not imported the goods, import documents were not with him. He was not specifically asked about the documents regarding procurement of goods locally;

(d) All these ball bearings were procured legally from traders like M/s V.K. Traders, M/s Vishwakarma Eng. Works; M/s Goel Bearing Corpn. and payments for the same were made by cheque. He also submitted extracts of ledgers and bank statements which according to him corroborated payments to the tune of Rs. 15 lacs paid so far through cheques towards procurement of ball bearings valued about Rs. 27 lacs and the payments have been made. He also submitted that in view of the seizure and confiscation, they could not promptly make payments to various dealers, who supplied the goods;

4.2 In respect of the appellant, Shri Kishan Chand, no statement has been recorded from him. There was only the statement of Shri Karam Chand wherein he mentioned that Shri Kishan Chand was only a sleeping partner looking after only the accounts, merely based on this conoticee statement, no penalty can be imposed on him. Further, there is no specific adverse finding against Shri Kishan Chand in the order-in-original.

4.3 In view of the above, he seeks allowing of the appeals filed by both the appellants.

5. Learned DR made the following submissions :

(a) The statement of Shri Karam Chand was voluntary. There is a claim that stock available as on 31.03.1998 stood disposed of by 14.04.1998, as stated by Shri Karam Chand. A particular variety of ball bearings 18,000 numbers which were shown as stock was not found in the seized quantity (that variety was not available for seizure), indicates that substantial quantity stood disposed of by them as seen from their own records, therefore, to claim that about 25,000 ball bearings were disposed of by 14.04.2008, as stated by Shri Karam Chand, appears to be correct;

(b) The claim that he was forcefully ~~declined~~ detained overnight at the Customs House is not correct. He has also not made any such allegation before the Magistrate. It is his submitted that though he was allowed to go back home after the statement was recorded on 25.05.1998, he chose to stay back and continue the statement on 26.05.1998. Though he made a retraction before the Magistrate, the same was not given credence by the Magistrate as could be seen by the fact that he was remanded and the remand was also extended and he was in the jail for about two months. The statement that they were having the purchase documents and they had no occasion to produce the same before the adjudicating authority before he passed the first adjudicating order is not acceptable if it was true that they were having the documents, it is unbelievable that they have chosen not to present before the investigating Officer or before the Magistrate to obtain bail;

(c) the ledger and bank statements produced on behalf of the appellant may not deserve to be accepted as out of Rs. 27 lacs, payment was shown to have been made only to the tune of Rs. ~~30~~ 15 lacs and most of them having been paid nearly after six months to two years after the seizure took place. He also submits that though they have claimed to have purchased ball bearings worth more than Rs. 25 lacs during a short period of five to six days from M/s V.K. Traders, M/s Vishwakarma Eng. Works; M/s Goel Bearing Corpn. etc., but Shri Karam

Chand in his statement while mentioned about some other traders from whom they have been purchasing without bills.

(d) He submits that once the goods of foreign origin were seized and the concerned person admitted that they were smuggled in nature the burden of proof shifts to the person from whose possession the goods have been seized.

6.1. We have carefully considered the submission from both sides. There is no direct evidence of smuggled nature of ball bearings from Nepal. While it is admitted that the ball bearings are of foreign origin, the only evidence is in the statement of Shri Karam Chand who submitted that the same were according to the dalals smuggled from Nepal. This evidence is of hear say in nature. In the later part of the very same statement, he has changed his version claiming that the goods were purchased from one Billa. The change of version has further weakened the admission. ~~the~~ Such evidence could be accepted only if some corroboration is available. We find the statement of Shri Karam Chand stands retracted before the Magistrate at the earliest opportunity i.e on 27.05.1998. Further, he was also admitted to hospital due to ill health, whether arising out of ill treatment or otherwise. Therefore, we not only do not find corroboration for the statement of Shri Karam Chand, but we also find veracity of the statement has got further diluted because of the timely retraction by Shri Karam Chand. Corroboration, perhaps, could have been obtained if the statement of Shri J.S. Anand, who has supplied the bearings, was recorded. This too has not been done and the Department has missed the opportunities.

6.2 The issues like whether 25,000 numbers of ball bearings could be disposed of in a few days or about 1,50,000 pieces of ball bearings could be purchased in a few days are questions relating to demand and supply and market conditions and we do not propose to deal with these issues on the basis of suspicion as there are no reliable evidence to contradict those claims.

6.3 At the time of seizure of ball bearings, the value has been recorded as Rs. 2,50,37,750/-. Learned advocate for the appellant submits that this value is highly exaggerated. According to him they were ball bearings meant for electrical fans and the value adopted by the seizing Officer was very ~~mud~~ much on the higher side. We are of the opinion that in the absence of specification of the ball bearings in the Panchnama, linking with import documents relating to import of identical goods or similar goods to show the value arrived at, we feel it may not be advisable to accept the value in the Panchnama. Panchnama is reliable for the quantum of goods seized and may not be reliable for the value mentioned therein. Further two Panch witnesses, who were reportedly ~~were~~ in the same trade have given their views that the value adopted is on the higher side, during the cross-examination. Under these circumstances, we do not find any reason to reject the value of the bearings to be only Rs. 27 lacs as claimed by the learned advocate. However, it is only an academic issue as we are holding that there is no evidence of smuggled nature of the bearings and we are not sustaining the confiscation of the ball bearings.

7. Therefore, we allow both the appeals with consequential relief.

(Dictated and pronounced in the open Court on the 3rd day of September, 2008)

(JUSTICE S.N. JHA)
PRESIDENT

(M. VEERAIYAN)
MEMBER (TECHNICAL)

Golay