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

Appeal No. C/757 /2007-SM[BR]   Date 23/05/2008

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

To :
SHRI SUNIL KUMAR GUPTA

C-6/7, KRISHNA NAGAR, DELHI-110051

SHRI SUNIL KUMAR GUPTA   Appellant

Vs

C.C.(PREVENTIVE)   Respondent

I am directed to transmit herewith a certified copy of **Final order No.** 818 /2008 –SM[BR] dated 16.5.2008

passed by the Tribunal under Section 129, (B) of the Customs Act,1962 & Financial Act 1994 relating to Service Tax

Assistant Registrar

(SM Appeal Branch)

Copy to :
1. Respondent

C.C.(PREVENTIVE)

NEW CUSTOM HOUSE, NEAR I.G.I. AIRPORT, NEW DELHI 110037.
2. Adv. / Consult

MR. V.K. AGRAWAL, ADVOCATE

B-82, LAJPAT NAGAR, PART-II, N DELHI

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 Delhi -
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 60017
13. Taxindiaonline.com Pvt.Ltd, B-XI/8183,Vasant Kunj, New Delhi - 110070
14. Office Copy
15. Guard file

Assistant Registrar
(SM Appeal Branch)

IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
West Block No.2, R.K.Puram, New Delhi-110066.
Principal Bench, New Delhi.

Customs Appeal No.757/07-SM

Date of Hearing : 19.3.08
Date of decision : 16.5.08

[Arising out of Order-in-Original No.06/Commr/JMS/07 dt.28.9.07 passed by the Commissioner of Customs, New Delhi)

For approval and signature:
Hon'ble Mr. P.K.DAS, MEMBER JUDICIAL

1.	Whether Press Reporters may be allowed to see the Order for publication as per Rule 27 of the CESTAT (Procedure) Rules, 1982?	:	No.
2.	Whether it would be released under Rule 27 of the CESTAT (Procedure) Rules, 1982 for publication in any authoritative report or not?	:	
3.	Whether their Lordships wish to see the fair copy of the order?	:	
4.	Whether order is to be circulated to the Department Authorities:	:	

M/s. Sunil Kumar Gupta — Appellant

Versus

CC(Preventive),New Delhi — Respondent

Appearance

Sh. V.K.Agarwal, Adv. For Appellant

Sh. B.S.Suhag, Authorised Representative(DR)For Respondent

Coram: Hon'ble Mr. P.K.Das, Member Judicial

Final Order No. 818/08-SM(BR)

Per P.K.Das:

The appellant filed this appeal against imposition of penalty of Rupees one lakh only under Section 112(b) of the Customs Act,1962.

2. The relevant facts of the case in brief are that on 28.11.03, the Customs Officers searched the godown at 9/735, Subhash Road, Prem Gali, Gandhinagar, Delhi-110031 owned by Smt. Manju Gupta, wife of the appellant. The godown was underlocked. Shri Dinesh Gupta brother of the appellant was present in the premises and informed the officers that one Shri Tiwari, a broker in the market was using this godown on rental basis, Shri Tiwari was not traceable. The locks of the godown were broken in presence of Panchas and Shri Dinesh Gupta. The Customs Officers found 89 cardboard boxes, containing 890 bales of suiting quality polyester fabrics of foreign origin measuring 22,272 yards valued Rs.13,36,320/- which was seized by the Customs Officers. Shri Dinesh Gupta in his statement dt.28.11.03 stated that the godown was owned by Smt. Manju Gupta, wife of his elder brother Shri Sunil Gupta and they had rented out the premises to one Shri Tiwari about two months back. He could not inform the address of Shri Tiwari. At the request of the Customs Officers, he stated that they would try to trace out Shri Tiwari and bring him before the Customs Authorities. Thereafter the Customs Officers recorded the statement dt.2.12.03, 22,12.03 and 12.5.04 of the appellant but the appellant failed to provide the residential address or any telephone number of Shri Tiwari. The adjudicating authority confiscated the foreign origin polyester fabric and option was given to the appellant to reedem the same on payment of fine of Rs.3 lakhs and imposed penalty of Rs.one lakh on the appellant.

3. Ld. Advocate on behalf of the appellant submits that the appellant is neither the owner of the premises, nor the owner of the goods and therefore, penalty is not justified. He submits that the appellant is not owner of the goods, even that there is no material produced by the revenue to establish that the goods are smuggled nature and the imposition of penalty on the appellant is unjustified. He further submits that there is no foreign marking on the seized goods and confiscation of goods and penalty are not warranted. He relied upon the decisions of the Tribunal as under:

1. Goel Bearing Co. vs CC, New Delhi
   2002(147)ELT.166(Tri.-Del.)

2. Naveed Ahmed Khar vs CC, Bangalore
   2005(182)ELT.494(Tri.-Bang)

3. Ram Binoy Prasad vs CC, Patna
   2001(132)ELT.721(Tri.-Kolkata)

4. Sadbhavana vs CC, Indore
   2003(158)ELT.652(Tri.-Del.)

4. Ld. DR on behalf of the Revenue reiterates the findings of the Commissioner of Customs. He submits that the appellant failed to produce any evidence to establish that the godown was given on rent to Shri Tiwari. He further submits that in reply to SCN, the appellant contended that Shri Tiwari met with him even that the appellant had not given his address or telephone number to the Customs officers. He also submits that owner of goods is not disclosing his identity to claim the confiscated goods and thereby it is established that the goods are smuggled nature and penalty was

rightly imposed on the appellant. He relied upon the decision of the Hon'ble Calcutta High Court in the case of Commissioner of Customs(Prev.)W.B.Kolkata vs Suresh Kumar Nyollywalla reported in 2006(204)ELT.525(Cal.)

6. After hearing both the sides and on perusal of the records, I find that the appellant failed to produce any evidence in support of their contention that the godown in question was rented to one Shri Tiwari. It is seen from the order that the appellant in his statements dt.2.12.03, 22.12.03 and 2.5.04 stated that he was not able to ascertain the residential address or any telephone number of Shri Tiwari. In reply to SCN, it was contended by the appellant that Shri Tiwari for the reasons best known to him preferred not to join investigation and avoid his appearance. It has further been contended that later on the appellant met with Shri Tiwari and the appellant had mentioned to him that he can claim the goods directly from the Customs Department. It is surprising to note that the appellant after seizure met with Shri Tiwari even that he had not given the address and telephone number or any information of Shri Tiwari to the Customs Officers. So, it is established that the appellant acted in connivener with the owner. It is also established that the goods are smuggled nature, as the owner of the goods had not claimed release of goods. So, the contention of the Ld. Advocate is that the Revenue failed to discharge the burden of proof to establish the goods are smuggled nature, without any substance. The Hon'ble Calcutta High Court

in the case of Suresh Kumar Nyollywalla(supra) observed that the fact that nobody is taking responsibility of goods itself suggest that those are smuggled goods and the Revenue has discharged the burden of proof. The relevant portion of the decision of the High Court in the case of Suresh Kumar Nyollywalla(supra) is reproduced below:

> "9. In our view, if a person carries on business of transportation, it is his duty to check up what items it is transporting. Merely because the consignor has given a particular description of the items sought to be transported, a transporter is not bound to accept that as correct. As a transporter, it has a primary duty to verify the items so that contraband articles are not passed out through it. The transporter must also be sure that the consignor is disclosing his genuine address and identity and that can be easily verified by either demanding production of voter identity card or other recognized identity cards such as, driving licence, Bank pass-book, ration card etc. and retaining a zerox copy thereof or accepting payment from such consignor for transportation through account payee cheque. It is true that in this case, the confiscated items were non-notified under Section 123 of the Act, but if we accept the contention of the learned advocate for the transporter that his client had no liability at all to verify the contents, in such a case, even notified items may be illegally transported and in such a case, the transporter would take the selfsame plea that he had no liability in the matter even if the consignor is not traceable. If the alleged consignor declares his consignment as a box containing fruits and if it is ultimately found to be a coffin containing decomposed dead body of a man, the transporter cannot evade his liability by feigning ignorance of the contents. In the case before us, the declared consignors having been found to be fictitious persons and two of them although not fake but having denied their liability by not claiming the ownership of the goods, in our view, the Revenue has discharged the burden of proving that those are really smuggled goods when the transporter is even unable to place its clients, viz., the alleged consignors, for answer and the two named consignors denied having booked those articles. The fact that no body is taking responsibility of the goods, itself suggests that those are smuggled goods and thus, the appellant has discharged the burden of proving the fact that those are smuggled goods. Therefore, in this case, there was no just reason

for arriving at the conclusion that the appellant had failed to discharge the burden of proving that those were smuggled goods.

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27. In the case of Extrusion v. Collector of Customs, Calcutta(supra), a Division Bench of this court held that in the matter of imposition of redemption fine and/or penalty, mens rea and/or conduct and/or attending extenuating circumstances are material and relevant. According to the Division Bench, to impose or inflict punishment on a person who is not guilty is against all the canons of natural justice and fair play and even otherwise, merely because the goods are liable to confiscation, it is not always necessary to impose a fine in lieu of confiscation. In the case before us, we are convinced that the transporter has not done its duty by verifying items of the goods declared by the consignors and has also not taken reasonable care to detect whether the consignors were disclosing their true identity and in such a case, once it is established that even the owners are not disclosing their identity to claim the confiscated goods nor are they charging the transporter for non-delivery, the conclusion is overwhelming that the transporter acted in connivance with the owners. We, thus, find that the principle laid down in the decision of Extrusion(supra) has no application to the facts of the present case.

* * * * * * *

30. In view of what have been stated above, we set aside the order of the Tribunal and direct not only confiscation of the goods and truck but also imposition of personal penalty upon the transporter with option to redeem the truck on the payment of money imposed by the original authority. We, however, find that no order of imposition of penalty should be imposed upon the two named consignors who denied their liability and it has not been established beyond doubt that they really concealed their identity before the transporter and are the real owners of the goods.

* * * * * *

7. In the present case, the seized goods were found at the godown of the appellant's wife . The appellant in his statement stated that the godown was rented to Shri Tiwari. But he failed to produce any evidence in support his

contention. It is pertinent to note that in reply to show cause notice, the appellant stated that he met with Shri Tiwari, even that he had not given any information of Shri Tiwari to the Customs Officers. In the facts and circumstances of the case, it appears that the appellant deliberately had not disclosed the identity of owner of goods. In any event, it is not believable that the property had been given on rent, without knowing anything about the tenant. It is also noted that there is no attempt on the part of the appellant to disclose the identity of the tenant. So, the imposition of penalty is justified. In view of the decision of the Hon'ble Calcutta High Court, there is no need to discuss the case laws of the Tribunal, cited by the Ld. Advocate.

8. So, I find that penalty imposed on the appellant is justified. However, on the facts and circumstances of the case and particularly taking into account of the amount of redemption fine imposed by the adjudicating authority, the penalty is reduced from Rs.one lakh to Rs.60,000/- and otherwise the appeal is rejected.

Order pronounced in the open Court on 16/5/08).

(P.K.Das)
Member Judicial

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