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

Appeal No. C/639 /2005 - CU[DB] Date 29/09/2009

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

To : MUKESH KUMAR GUPTA.
R/O T-134, PALLAVPURAM, PHASE-II.
MEERUT – 250 110. U.P.

MUKESH KUMAR GUPTA Appellant

Vs

C.C. MEERUT I Respondent

I am directed to transmit herewith a certified copy of Final order No. C/406/ 2009 CU[DB] dated 15.09.09 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
C.C. MEERUT I. EXCISE CHOWK. UNIVERSITY ROAD.
MANGAL PANDEY NAGAR. MEERUT - 250005.
2. Adv. / Consult

3 S.D.R
4 J.C.D.R.
5 Bar association. CESTAT. New Delhi
6 Director Publications. Customs. Excise. I.P. Estate. New Delhi
7 M/s Centax Publictions Pvt Ltd., 1512-B, Bhishm Pitamah marg. Opp. ICICI Bank of Defence Colony, New Delhi - 3
8 Commercial Laws of India Pvt Ltd. Post Bag No. 1033. No.2(Old No. 36), Vaithyaram Street, T. Nagar,Chennai -17
9 Raghuraman's 44-B. Regal Flat.Shipra Suncity. Indirapuram - 201010.Ghaziabad. DT. U.P.
10 M/s Manupatra Information Solutions Pvt Ltd. Excise & Customs Cases B-37. Sector - 1. Noida - 201301. Gautam Budh Nagar. (UP)
11 M/s. Deeparchie Publications. M-93. Marg. 46. Saket. New Delhi 110017
12 Taxindiaonline.com Pvt.Ltd. B-XI/8183.Vasant Kunj. New Delhi - 110070
13 Taxmann Allied Service Pvt Ltd.. 21/35. West Punjabi Bagh. New Delhi - 110026
14 Easy Service Tax Online Dot Com Pvt.Ltd.407A.Iscon Mall.Above Star India Bazar.Satellite Road.Ahmedabad-15
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Assistant Registrar
(Customs Appeal Branch)

IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
West Block No. 2, R.K. Puram, New Delhi – 110 066.
Principal Bench, New Delhi

COURT NO. II

Customs Appeal No. 639 of 2005

DATE OF HEARING : 20/8/09.

[Arising out of the Order-in-Original No. 14/Commr./MRT-I/2005 dated 06/06/2005 passed by The Commissioner of Customs & Central Excise, Meerut.]

Shri Mukesh Gupta — Appellant

Versus

CCE, Meerut — Respondent

Appearance

Shri Mukesh Gupta, I.P. – for the appellant.

Shri Sansar Chand, Authorized Representative (DR) – for the Respondent.

CORAM : **Hon'ble Shri D.N. Panda, Judicial Member**
Hon'ble Shri Rakesh Kumar, Technical Member

Final Order No. C/406/09 Dated : ____________

ORDER

Per. D.N. Panda :-

The appellant himself appeared to argue his case in this appeal. The charge against the appellant was while the appellant was Superintendent of ICD Meerut he allowed clearance of certain imports in spite of misdeclaration of the country of origin of the goods. DRI intercepted the goods so cleared from the ICD Meerut on 18/07/2000 and seized the consignment relating to bill of entry No. 26 of 17/07/2000. That seizure was the basis with all surrounding circumstances to bring this appellant to the charge of abetment of commitment of offence of misdeclaration escaping notice of customs authority from levy of appropriate duty. The appellant was examined soon after inspection by the DRI and his oral evidence was recorded and brought to record. While the appellant was serving as superintendent there was an Inspector called Shri Ajay Kumar who was also serving in the same ICD. When the goods arrived at the ICD and bill of entry was filed that was recorded by the said inspector as per his oral evidence made by him on 7/8/2000 (appearing at page 136 of the appeal folder). But when examination of the contents of the container was required, such examination was done by the appellant which is patent from page 131 showing the copy of the bill of entry existing in appeal folder. The nature of examination conducted by the appellant reads as under :-

> "Examined the goods and checked twenty pallets in both the containers and found the goods viz. bill bearing as per invoice/packing list."

2. The appellant, upon examination as above allowed the materials to go to the hands of the importer. The moment goods reached the place of the importer, that became subject matter of interception by DRI. Finding misdeclaration of the goods in the consignment, Revenue proceeded to adjudicate the case of the importer and other connected persons in terms of the order-in-original No. 51/COMMR/MRT/2001 dated 29/10/2001 with the consequences as reflected in page 153-154 of the paper book filed by the appellant. Against that adjudication, the appellant and importer Shri Ashwani Kumar Jain and other person called Balbir Singh Sethi came in appeal to Tribunal in appeal No. C/78-

79/02-NB-A dated 24/02/04. It was registered in appeal No. C/172/02-NB. That was disposed off on 18/06/04. So also the appellant was subjected to adjudication in terms of order-in-original No. 51/COMMR/MRT/2001 dated 29/10/2001. Against that order, the appellant came to the Tribunal on the ground that the appellant was dealt under the law without issue of notice and nothing can be done behind his back. Tribunal, by final order No. A/205/03- NB (C) dated 1/4/03 remanded the matter to the learned Adjudicating Authority to grant fair opportunity of trial to the Appellant. That was done by the learned Adjudicating Authority in terms of the impugned order dated 6/6/05 against which the appellant is again in appeal before the Tribunal in second round of litigation.

3. The allegations made against the appellant as to his nexus of the clearance of the goods under misdeclaration as to value and country of origin was examined in denovo adjudication. Learned Adjudicating Authority made serious effort to examine entire issue in terms of paragraph 32 to para 37 of the impugned order. That authority came to the conclusion that the appellant had violated rule of duties and acted in breach of trust imposed on him and his negligence to examine bill of entry No. 26 dated 17/7/2000 in accordance with law came to light, resulting in loss of revenue for which denovo adjudication was held to be justified with levy of penalty of Rs. 10,00,000/- (Rupees Ten Lakh) against the appellant. While examining the matter, learned authority below had examined entire evidence before him including oral evidence of the inspector Shri Ajay Kumar and did not find the appellant innocent.

4. The appellant himself present today argues that he has not made the goods liable to be seizure and confiscat ion when he has rightly

examined the goods and his result of examination appears at page 131 of appeal folder. Goods seized by DRI on 18-19th July 2000 in the premises of the importer was not the same as that was examined by the appellant in the ICD while clearing the goods in terms of bill of entry No. 26 dated 17/7/2000. According to the appellant who is a Superintendent, he is not required to physically examine the goods but the Inspector appointed for such purpose was to carry out that activity. The Inspector being entrusted with such duty, he was examined by the Investigation. But he gave contradiction statement to escape charge against him so as to bring the appellant to charge. When the Inspector had examined the goods and allowed the same to escape from custom's notice, this appellant should be absolved of liability to penalty.

5. The appellant further submits that principal importer was let off by order of Tribunal dated 18/6/04. Accordingly this appellant cannot be held guilty by the impugned order. The appellant fully agreed with description of goods he had examined and allowed the same to go. But DRI made out a case against him recording evidence from the importer against the appellant. But such statement was subsequently retracted. A Deputy Commissioner was incharge of the ICD. But he was not brought to record for the allegation made by DRI. Similarly the Inspector Shri Ajay Kumar did not face charges although he failed in his duty. The appellant pleaded that he shall be benefited by the decision of the Apex Court in the case of **Bhola Ram Kushwaha vs. State of Madhya Pradesh** reported in **2000 (93) ECR 577 (SC)**. So also to the immunity under Section 155 of the Customs Act, 1961 following decision of the Tribunal in the case of **CC, New Delhi vs. M.I. Khan** reported in **2000 (120) E.L.T. 542 (Tribunal)**.

6. Learned DR Shri Sansar Chand supports the order of the learned Commissioner. He submits that the appellant had not carried out examination of the goods lawfully in discharge of his duties. He has simply allowed the container to go out of ICD by an apparent examination of the contents as well as country of origin. The Inspector Shri Ajay Kumar has categorically given evidence that he had not examined the container which was subject matter of bill of entry No. 26. The documents do not show examination of the container by the Inspector. The appellant who was incharge of the ICD for examination of the goods had allowed the goods to go with misdeclarations. Therefore penalty was imposed on him under the law.

7. Heard both sides extensively and perused the record.

8. There is no dispute that certain goods covered by bill of entry No. 26 had entered ICD on 17/7/2000. There is also no dispute that the Appellant and Inspector Shri Ajay Kumar were on the relevant of time acting as Superintendent and Inspector in that ICD respectively. There is also no dispute that the endorsement made on page 131 of the appeal folder was made by the appellant on 17/7/2000. There is also no dispute about the description of the endorsement at page 151.

9. The only dispute raised by the appellant is he was not the examiner of the goods. Appellant's contention that he directed the Inspector Shri Ajay Kumar to examine the goods does not come out from any evidence for the reason that Shri Ajay Kumar on 18/7/2000 by his oral evidence stated that the appellant while acting as superintendent told him that he will take the case of examination of the imported cargo. This is apparent from page 133 of the appeal folder. The inspector also at page 134 categorically stated that he had not examined the goods. This evidence he has given when the statement of

the appellant was confronted to him. This is a clear rebuttal, shifting the burden of proof to the appellant by the inspector concerned. Added to that, the Inspector no doubt agreed that he has made the entry of bill of entry in the record, but he stated that he was not the examiner of the goods. This is apparent from page 138 of the appeal folder exhibiting . his oral evidence recorded on 7/8/2000. He further stated in his evidence on 7/8/2000 that the appellant himself endorsed the examination report and the bill of entry and had given the pass out order. Also he stated that he was not aware of the reason why the appellant endorsed the examination report when he claimed to have not conducted examination. He reiterated that without physical examination of the goods the appellant took care of the consignment by himself. He repeatedly refused as to the examination conducted by him and reinforced his evidence stating that he was not aware as to why the appellant had given false statement. Cross examination of the said inspector appearing at page 140 also shows that he has not examined the questioned consignment.

10. There is no doubt that oral evidence was the only basis to initiate proceedings against the appellant. But such basis was well founded in view misdeclarations about the offending goods which was established by seizure by DRI on 18/7/2000. The appellant did not object at any time why he should not be allowed to inspect the goods in the presence of DRI and importer to know basis of seizure. It is also true that there is nothing on record as to drawing of Panchnama in the presence of Appellant. The oral evidence of Inspector as above and appellant's own involvement as above remained un-rebutted. Also there is nothing to speak that misdeclared goods were not allowed by the appellant to leave the ICD and by no means interest of revenue was prejudiced by Appellant. When no piece of evidence was led by Appellant to speak in

favour of the appellant, the appellant is not entitled to be absolved from the charge and liability to penalty.

11. In the course of examination it was noticed that the Inspector Shri Ajay Kumar is also part of system who agreed in page 137 that he has entered the bill of entry in the records of the ICD. He had the responsibility of recording the rate of duty and other particulars of the bill of entry. In the same page also he has stated that the bill of entry was processed by him on the basis of bill of entry recorded. While the matter stood, thus, it is surprising how the Inspector was not made a party to the adjudication for finding truth whole investigation evidence was only relied all along. Certain relief was given to the principal importer by the appeal order of the Tribunal appearing at page 158 of the appeal record when the said importer appealed, reducing redemption fine from Rs. 1,00,00,000/- (Rupees one crore) to Rs. 50,00,000/- (Rupees Fifty Lakhs). Therefore penalty imposed on the present appellant appears to be disproportionate.

12. We examined pleading of the appellant as to his contention that he shall be benefited by the decision of the Apex Court in the case of Bhola Ram Kushwaha vs. State of Madhya Pradesh (supra). It was noticed that the said case related to prosecution under NDPS Act. The conviction in that case did not base on contradictory evidence. But in the present case, there is no contradictory evidence at all when the Inspector Shri Ajay Kumar succinctly and repeatedly stated against the appellant that the appellant was cause to allow the consignment to go without being examined by him (Inspector). Even endorsement given at page 131 by the appellant is proved to be false. When the evidence of the Inspector categorically brings out that the appellant told him that he shall take care of the consignment and he shall examine the consignment, there

was no contradiction in evidence. Therefore appellant's case is far away from the fours ..... of apex court decision.

13. The appellant relied on the decision of the Tribunal in the case of CC, New Delhi vs. M.I. Khan (supra) is in relation to immunity granted under Customs Act, 1962. In that case, the Commissioner himself had dropped the proceeding which was found to be without any legal infirmity. The appellant submits that he should have been served a notice under Section 155 of Customs Act, 1962 before proceeding against him. We do appreciate that he has right to raise a legal plea althrough that he had not earlier raised in the first round of litigation before the Tribunal. But we do not find any merit in the plea for the reason that the immunity granted under Section 155 of the Customs Act, 2001 is to bar the proceedings initiated in respect of an officer who has acted bonafide in accordance with law. This is a case where we find the act of the Appellant otherwise and he has acted in defiance of law. For contravention of the provision of Section 112 of the Customs Act, 1962, the appellant was given due notice, bringing out that his failure of duty was conscious and deliberate breach of law calling for a penalty under Section 112 (a) readwith Section 114A of the Customs Act, 1962. This is patent from the show cause notice appearing in the appeal folder at page 76 to page 109. We do agree that immunity to the public servant is granted to protect him if he has acts on good faith and any proceeding initiated by any third party is barred. Any suit filed against a public servant or a prosecution initiated against him or any other legal proceedings made against him is subject to test of immunity if he has acted on good faith. There is nothing found to consider the case of appellant in that light. To protect public servant Section 155 of Customs Act has safeguard provision of notice before initiation of proceeding. The appellant's case is that he has faced charge under Customs Act, 1962 itself for violation

of Section 112 readwith 114 of the Customs Act, 1962. Therefore Section 155 of Customs Act, 1962 is not attracted.

14. Lastly so far as the quantum of penalty is concerned we do appreciate that the division of duty between Superintendent and Inspector as well as knowledge of the Inspector about the consignment were features of the case. These are mitigating factors. Therefore limiting the **penalty on the appellant to Rs. 5,00,000/- (Rupees Five Lakhs)** as against Rs. 10,00,000/- (Rupees Ten Lakh) imposed by the order of adjudication would meet end of justice. In the result appeal is allowed partly.

(Dictated and pronounced in open court)

(D.N. Panda)
Judicial Member

(Rakesh Kumar)
Technical Member

PK