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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/38 - 40 /2009 – SM [BR] Date 11/01/2010

Assistant Registrar
C.E.S.T.A.T, New Delhi
To :
1. M/S GREEN EXPRESS TRANSPORT SERVICE,
2. SHRI TEJINDERJIT SINGH S/O SHRI HARCHARNJIT SINGH
3. SHRI G. KANNAN,
4141, IST FLOOR,NAYA BAZAR,NEW DELHI-110006.

M/S GREEN EXPRESS TRANSPORT SERVICE, Appellant

Vs

C.C.(PREVENTIVE) Respondent

I am directed to transmit herewith a certified copy of **Final order No.** 43 – 45 / 2010 –SM[BR] dated 7.1.2010 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. PRABHAT KUMAR ADV.
B-51, [BASEMENT] SARVODAYA ENCLAVE [NEAR MOTHER INTERNATIONAL SCHOOL NEW DELHI

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
(SM Appeal Branch)

CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL, West Block No. 2, R.K. Puram, NEW DELHI

COURT No. III

CUSTOMS APEPAL NO. 38 to 40 of 2009-SM

[Arising out of Order-in-Original No. 11/Commr/JMS/2008 dated 23rd October, 2008 passed by the Commissioner of Customs (General), New Delhi]

Dated of hearing/~~decision~~: 8th December, 2009
Date of Decision : 07-01-2010

For approval and signature:

Hon'ble Mr. Rakesh Kumar, 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?	
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 Departmental authorities?	

M/s. Green Express Transport Service,
Shri Tejinderjeet Singh,
Shri G.Kannan Appellants

Vs.

C.C. (Preventive), New Delhi Respondent

Appearance:

Shri Prabhat Kumar, Advocate for the appellants;
Shri V.K. Saxena, Jt. CDR for the Revenue

Coram:

Hon'ble Mr. Rakesh Kumar, Member (Technical),

FINAL ORDER NO. 43-45/2010-SM (BR) **dated**

Per RAKESH KUMAR:

M/s. Green Express Transport Service (hereinafter referred to as the Appellant company) had taken a rail wagon on lease from Railways and the same was being operated as Parcel Van between Chennai and Delhi by attaching it to trains between Chennai and Delhi. Shri Tejinder Jeet Singh is the Director of the Appellant company and Shri G. Kannan is the Manager of the Appellant company at Chennai. On 10.12.2005, on information that smuggled goods are being sent to Delhi through the parcels, being booked by the Appellant company at Chennai, the officers of Commissionerate of Customs, Delhi (Preventive), searched the Central Cargo Complex of Lahori Gate Railway Station, Delhi in presence of two pancha witnesses and on examination of the parcels of the Appellant company, foreign origin goods valued at Rs. 13,10,125/- was recovered from parcels covered by bilties No. 45630, 45631, 45632 and 45633 all dated 8.12.2005. On 11.12.2005 and 13.12.200 further searches were conducted and miscellaneous foreign origin goods valued at Rs. 59,39,320/- was recovered from parcels covered by bilties No. 45659, 45661 & 45662 all dated 9.12.2005. The goods valued at Rs. 13,10,125/- and Rs. 59,39,320/- recovered from the parcels booked by the Appellant company for delivery to various persons in Delhi8, were placed under seizure. The seized goods were video cameras, still cameras, video batteries, CD players, car Stereos, lithium cells, video head cleaners, cordless phones, calculators, scotch whiskey, and articles of apparel. After inquiry with Shri Jai Prakash, Delivery Manager of the Appellant company at Delhi, Shri G. Kannan, the Manager of the Appellant company at Chennai, other employees of the Appellant company at Delhi, and Shri Tejinder Jeet Singh, Director of the Appellant company and also inquiry with various consignors and the available consignees a show cause notice dated 2.6.2006 was issued for –

(a) confiscation of the seized goods collectively valued at Rs. 72,49,445/-;

(b) imposition of penalty on the consignees;

(c) imposition of penalty on the Appellant company, Shri Tejinder Jeet Singh, Director of the Appellant company, Shri Dalip Sabharwal, Shri Jai Prakash and Shri J. Panwar, Delivery Manager of the Appellant company at Delhi, and Shri G. Kannan, Branch Manager of the Appellant Company at Chennai; and

(d) imposition of penalty on various freight forwarders through whom the parcels had been booked.

1.1 The show cause notice dated 2.6.2006 was adjudicated vide order-in-original No. 11/Commr/JSM/08 dated 23.10.20008 passed by the Commissioner of Customs (Preventive), New Delhi by which –

(a) The seized goods valued at Rs. 63,94,045/- confiscated without any option to redeem the same on payment of fine as no persons came forward to claim the ownership of the goods;

(b) the remaining goods valued at Rs. 8,55,000/- were ordered to be released;

(c) penlty under Section 112(b) of the Customs Act, 1982 of Rs. 5,00,000/- was imposed on the appellant company, and penalties of Rs. 1,00,000/-, Rs. 20,000/-, Rs. 20,000/-, Rs. 20,000/- and Rs. 50,000/- were imposed on Shri Tejinder J. Singh, Shri Jai Prakash, Shri Dalip Sabharwal, Shri Jaswant Panwar and Shri G. Kannan, respectively, and

(d) penalties of different amounts were imposed on various consignees/freight forwarders.

1.2 These three appeals have been filed by the Appellant company, Shri Tejinder J. Singh and Shri G. Kannan.

2. Heard both sides.

3.1 Shri Prabhat Kumar, Advocate, the learned Counsel for all the three Appellants made the following submissions:-

(1) The Appellant company had obtained a Railway wagon on lease from Railways which was being used for operating a parcel service between Chennai and Delhi by attaching the wagon to the trains between Chennai and Delhi. Besides the transport by rail, the Appellant company also use the trucks and lorries. The Appellant company, operates as a "Commerce Carrier" for point to point carriage of the goods and they

book the goods in packed condition on "Said to Contain" basis on proforma of receipt, known as "goods receipt"/"bilty". At the destination, the delivery is given against consignee's copy of the bilty/G.R. The booking of parcel/packages on "Said to Contain" basis is done b y the booking clerks and at the destination, the delivery is given by the delivery clerk. The person booking the parcel were individuals or freight forwarder who were booking the parcels in bulk. Since the Appellant company was booking the parcels on "said to contain" basis, it cannot be assumed that the Appellant company as commerce carrier had knowledge about the contents of the parcels.

(2) The goods seized are video cameras, still cameras, batteries, Gillete blade, C.D. Players, Calculators, Scotch whisky, and articles of apparel. None of them goods are those of which import is prohibited or any item covered by Section 123 of the Customs Act, 1962. Therefore, even if the Appellant company's booking clerk had opened the parcel, it would not be possible for them to ascertain as to whether the goods are illicitly imported, as all such goods are imported through legal channels only. Some of the seized cameras are 10 years old.

(3) The address of consignee and consignor was mentioned in the GRs/bilties on the basis of the details in this regard given by the consignor. It is not possible for the Appellant company to verify the address before accepting the consignments.

(4) There is absolutely no evidence of involvement of either Shri Tejinder J.Singh or the employees of the Appellant company. There is no evidence that they were aware of the smuggled nature of the goods. Therefore, the provisions of Section 112(b) of the Customs Act, 1962 are not attracted in case of the Appellants.

(5) The Appellants do not open the parcels booked by them. They are not even authorized to do so. Hence, they can not be aware of the actual nature of the goods booked.

2.2 Shri V.K. Saxena, the learned Jt. CDR, while defending the impugned order with regard to penalty on the Appellants, made the following submissions:-

(1) The Appellant, as per their agreement with Railways regarding lease of the wagon, could not book any "contraband goods" for transportation in the wagon. They have not taken sufficient precaution in this regard, as in a number of cases, complete address of the consignee and consignor are not given on the GRs. Sri G. Kannan, Manager of Chennai branch of the Appellant company in his statement has stated that the details of goods, complete address of consignee/consignor were not mentioned due to "heavy booking", "stiff competition" or "knowing the persons booking by name and face", which shows that the necessary precautions were not taken by the Appellants.

(2) Hon'ble Calcutta High Court in the case of CC(P), West Bengal vs. Suresh Kumar Nyollywala, reported in 2006 (204) ELT 525

(Cal.) has upheld the penalty on the transporter when the declared consignors were found to be fictitious person. Tribunal in the case of Ashok Kumar vs. Commissioner of Customs, New Deli, reported in2003 (153) ELT 186 (Tri. – Del.) observing that before accepting any consignment for carriage, a carrier should inter alia make sure that it does not contain any offending goods which are liable for confiscation under Section 111 of Customs Act, 1962, upheld the penalty on the Appellant, a carrier under Section 112(b) ibid. The ratio of this judgment of the Tribunal is squarely applicable for the facts of this case. Same view has been taken by the Tribunal in the case of A.N. Shukla vs. C.C., Lucknow, reported in 2005 (187) ELT 269 (Tri.-Del.).

(3) As per the provisions of the Carriers Act, 1865, a common carrier is required to mention value and complete description of the goods and complete address of the consignors.

(4) The goods valued at Rs. 63, 94,045/- have been confiscated under Section 111(d) of the Customs Act, 1962 as the consignees did not come forward to claim the ownership and produce evidence of their legal importation. The Appellant being the carrier cannot escape the liability of penalty.

2.3 In rejoinder, Shri Prabhat Kumar, Advocate, made the following submissions:-

(1) The 'prohibited commodities" referred to in the Apellant company's lease agreement with the Railways are not the goods imported

in contravention of the provisions of Customs Act, 1962 but the items like drugs, explosives, offensive or dangerous goods.

(2) Complete address had been recorded in respect of the parecels from which the goods allegedly liable for confiscation under Section 111 of the Customs Act, 1962 had been recovered.

(3) When the goods in packages had been booked without opening the packages on 'said to contain' basis and there is no evidence that the appellant company or its Director or employees had knowledge about contents being liable for confiscation under Section 111 of the Customs Act, penalty under Section 112 (b) cannot be imposed on the Appellants. In this regard reliance is placed on the following judgements:-

(a) CCE, Chennai vs. Manju Chemicals, reported in 2003 (159) ELT 264 (Tri.);

(b) C.C. (Prev.), West Bengal vs. Precious Carrying Corpn. Ltd., reported in 2003 (159) ELT 1025 (Tribunal);

(c) Harish Kumar vs. C.C., Delhi, reported in 2002 (147) ELT 1113 (Tri.-Del.);

(d) Rajdoot Road Carrier vs. C.C., Lucknow, reported in 2000 (118) ELT 146 (Tribunal), wherein it was held that carrier of goods is not required to check and verify the contents of the packages and to ensure that the goods are not of smuggled nature.

(e) Sardar Tirath Singh vs. C.C., Patna, reported in 1999 (113) E.L.T. 501 (Tribunal).

3. I have carefully considered the submissions from both the sides and perused the records. There is no dispute about the facts that –

(a) the Appellant company operating Chennai – Delhi parcel service by rail by taking wagon on lease from Railways, is a common carrier;

(b) the person booking the parcels are either individuals or freight forwarders/ couriers who book the parcels in bulk;

(c) the parcel are accepted for carriage without being opened and are booked, on 'said to contain' basis, and

(d) imported goods like video cameras, still cameras, video batteris, Lithium cells, cordless phones, CD players, car stereos, scotch whisky, articles of apparel, etc., totally valued at Rs.72,47,445/- were recovered from the parcels at Delhi on 10.12.2005, out of which goods valued at Rs. 63,94,045/- have been confiscated under Section 111 of Customs Act, 1962, as the consignees did not come forward to claim the goods.

The point of dispute is as to whether the Appellants while booking the goods, which have been ordered to be confiscated, for carriage and transporting those goods knew or had reason to believe that the same are liable for confiscation so as to attract the penal provisions of Section 112 (b) of Customs Act, 1962,

4 As per the provisions of Section 112 (b) ibid, "any person who acquires possession of or is in any way concerned in carrying, removing,

depositing, harbouring, keeping, concealing, selling or purchasing, or an any other manner dealing with any goods which he knows or has reason to believe are liable to confiscation under section 111, shall be liable fo penalty as prescribed in clause (i) to (v) of Section 112. From the language of Section 112(b) it is clear that for imposition of penalty under this clause on a person, involved in carrying, removing, keeping, concealing etc. of goods, which have been held to be liable for confiscation under Section 111, the knowledge or reason to believe on the part of the person about the liability of the goods for confiscation is necessary and the burden to prove its existence would be on the Revenue. However, in this case, it is seen that neither Shri Tejinder J. Singh, Director of the Appellant company, nor any of its employees, - Shri Jai Prakash, Shri Dalip Sabherwal, Shri Jaswant Panwar or Shri G. Kannan, have said anything in their statements which can be treated as admission of knowledge about smuggled nature of the goods booked by them. The goods were brought to the Appellants packed in packages/parcels which were booked without being opened for examination on 'Said to contain' basis. The adjudicating authority has imposed penalty on the Appellants on the ground that the GRs in respect of the goods which have been ordered to be confiscated, do not mention the consignee's address, as a result of which, the consignees not being traceable at their address, the investigating agency cannot trace the owner and the smuggling channel is effectively protected. In my view, the ground for penalizing the appellant is not correct as just from omission on the part of the booking clerk in writing complete address of the consignor on the GRs, when complete address of the consignee had been written, it cannot be concluded that the Appellants had knowledge about the smuggled nature of the contents of the parcels more so, when the goods like video camera, still camera, Gillet razor, Lithium cells, CD players, Cordless phones, readymade garments are imported through legal channels also and are not the goods whose import is absolutely prohibited and even if the contents of the parcel of these goods had been verified by opening the same, it would have been difficult for the Appellants to ascertain as to whether the same have been legally imported. Moreover, Tribunal in the case of Rajdoot Road Carriers vs. C.C. Lucknow (supra) has held that a carrier of goods is not required to check and verify the contents of packages to ensure that the same are not of smuggled nature. Same view has been taken by the Tribunal in the case of Harbans Singh Narula vs. Commissioner of Customs reported in 1998 (100) ELT 282 wherein the Tribunal held that "a person running a transport company could not be expected to know or be aware of the contents of each of the hundreds of packages which must have passed through their office when there is no specific evidence to show that the transporter knew or had reason to believe that packages, in question, contained contraband and that there is no legal requirement for names and addresses of consignees and consignors to be mentioned, as insistence of this requirement would, in practice means refusing to accept a large number of packages for carriage". Therefore, just from the omission to mention full address of the consignor in some GRs by the person booking the parcel for carriage, it cannot be concluded that the Appellants had knowledge or has reason to believe about smuggled nature of the contents of the parcels. Tribunal in the case of Harish Kumar vs. C.C., New Delhi (supra) and C.C. (Pre), West Bengal vs. Precision carrying Corpn. Ltd. (supra) has held that mere probability of the transporter having knowledge about the smuggled nature of the goods being transported is not enough to impose penalty on him and for this purpose, some positive evidence about his involvement is necessary. Such positive evidence about the Appellant's involvement is lacking in this case.

5. Judgement of Hon'ble Calcutta High Court in the case of CC(Pre), West Bengal vs. Suresh Kumar Nyollywalla, cited by the learned D.R. is not applicable to the facts of this case as in this case, the Appellant company is a commerce carrier booking the parcels without opening to check their contents on 'Said to Contain' basis and in each Chennai-Delhi trip the wagon may contain a large number of parcels booked by different persons. In the case of C.C.(Pre), West Bengal vs. Suresh Kumar Nyollywalla, there was evidence of connivance of the transporter with the owners of the goods while in this case, the parcels were being booked for carriage without opening the same on "Said to Contain" basis. In any case, a transporter in a border area prone to smuggling, accepting

huge quantity of imported electronic goods without any documents and without insisting on any proof of identity from the consignors and where the consignors or consignees have not made any complain about non-delivery, cannot be compared with this case, where the Appellant, a common carrier, operating parcels service by rail book a large number of parcels daily from different persons. In the case of A.N. Shukla vs. Commissioner of Customs, Lucknow (supra) the entire truck load of foreign origin goods had been booked by one person whom the transport could not identify. In the case of Ashok Kumar vs. C.C., New Delhi (supra), the transporter had admitted his knowledge of smuggled nature of the goods being carried, while this is not so in the case of the Appellant herein. Thus none of the judgements cited by the learned D.R. are applicable to the facts of this case.

6. In view of the above discussion, I hold that there is no positive evidence to prove that the Appellants had knowledge or had reason to believe the smuggled nature of the goods recovered from the parcels. In view of this, the impugned order imposing penalty on the Appellants under Section 112 (b) of the Customs Act, 1962 is not sustainable and the same is set aside. The appeals are allowed.

(Pronounced in the Open Court on 7/1/10)

(RAKESH KUMAR)
MEMBER (TECHNICAL)

RK