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
SINGLE MEMBER APPEAL BRANCH

Date 23/02/2010

Appeal No. C/11 - 12 /2009 – SM [BR]

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

To :
C.C. LUCKNOW
5TH AND 11TH FLOOR, KENDRIYA BHAWAN,
SECTOR -H, ALIGANH, LUCKNOW 226024.
C.C. LUCKNOW

Appellant
Vs
Respondent

SH SHEO SHANKER JAISWAL

I am directed to transmit herewith a certified copy of **Final order No**. 259 -260 / 2010-SM[BR] dated 16.2.2010 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

1. SH SHEO SHANKER JAISWAL
2. SMT. MALTI DEVI JAISAWAL,
S/O KRI KISHORI LA JAISWAL(PROP AKASH TRADER) R/O ETWA BAZAR, P.O-ETWA BAZAR DISTT-SIDDARTH NAGAR

2. Adv. / Consult SHRI K.K. ANAND ADV.
A-5, BASMENT LAJPAT NAGAR-III,
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
15 LAWCRUX Advisors Pvt Ltd. LAW House.1-8.Sector - 10. Faridabad 121003 (Haryana)
16 Office Copy
17 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.11-12/09

[Arising out of Order-in-Appeal No.55 & 56-CUS/ALLD/08 dt.20.11.08 passed by Commissioner(Appeals), Allahabad)

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 Department Authorities:	:

CC(Prev.), Lucknow — Appellant

Versus

Sh. Sheo Shanker Jaisawal &
Smt. Malti Devi Jaisawal — Respondent

Appearance

Sh. S.N.Srivastava, DR for Appellant

Sh. Asmita Nayak, Adv. For Respondent

Date of decision: 16.2.2010
Final Order No. 259-260/2010 SM-(BR)

Per Rakesh Kumar:

The facts giving rise to this appeal filed by the Revenue in brief are as under:

1.1 On 8.6.07, the Police Officer of Siddarth Nagar, a place near Indo Nepal Border, intercepted a Tata Turbo Truck No.UP-51

T/0733 loaded with 300 bags of sugar valued at Rs.2,10,000/-. The driver of the truck was Shri Abdul Khaliq. The truck loaded with sugar was detained and handed over to the customs as it appeared that it was going to Nepal. A statement of the driver Shri Abdul khaliq was recorded on the spot under Section 107 of the Customs Act,1962 and he told that the sugar was loaded from the firm of M/s. Rajesh Kumar Deepak Kumar, Baharaich owned by M/s. Akash Traders, Burdpur, Distt. Siddarth Nagar whose proprietor is Sh. Sheo Shankar Jaiswal and same is being taken to Nepal through Village Ganwaria. The sugar alongwith the truck was placed under seizure. Subsequently, statement of Sh. Sheo Shankar Jaiswal, proprietor of Akash Traders and owner of the sugar was recorded on 16.6.07 under Section 108 of Customs Act,1962 and while admitting the ownership of the sugar, he stated that the same was being transported to his own firm situated at Burdpur and that the police Officers have illegally detained the same. The owner of the truck was found to be one Smt. Malti Devi, wife of Sh. Kishori Lal Jaiswal, father of Sh. Sheo Shankar Jaiswal. Shri Abdul Khaliq was arrested on 8.6.07 and was released on bail next day. The driver Sh. Abdul Khaliq was medically examined on 9.6.07 after being bailed out and Doctor conducting his medical examination reporting certain injuries. Thereafter, the driver made a complaint in the Court of CJM on 21.6.2007 against the police for demanding money and beating him. However, on the basis of the statement of driver informing that the sugar was going to the transported to Nepal a show cause notice was issued proposing confiscation of the sugar alongwith truck and also imposition of penalty on Sh. Abdul Khaliq, truck owner as well as Shri Sheo Shankar Jaiswal, proprietor of the sugar under seizure. The show cause notice was adjudicated by the Additional Commissioner vide order dt.31.3.08 by which the truck alongwith the sugar was ordered to be confiscated. The sugar, however, was allowed to be redeemed on payment of redemption fine of Rs.5,000/- and in respect of the truck, the owner was given an option to redeem the same on payment of redemption fine in lieu of confiscation of Rs.20,000/-. Besides this penalty of Rs.5,000/- each on Sh. Sheo Shankar Jaiswal, Mrs. Malti Devi Jaiswal and penalty of Rs.4,000/- on Sh. Abdul Khaliq, truck driver was imposed under Section 14 of Customs Act. On appeal to Commissioner(Appeals), the Commissioner(Appeals) vide order-in-appeal dt. 20.11.08 set aside the Additional Commissioner's order. It is against this order that these appeals have been filed by the Revenue.

2. Heard both the sides.

2.1 Shri S.N.Srivastava, the learned DR, pleaded that truck was loaded with sugar had been intercepted at a place very close to Indo Nepal Border; that no documents regarding transportation of the sugar had been produced; that statement of the truck driver on the spot clearly indicated that the sugar was going to be transported to Nepal; that the statement given by the driver has not been retracted; that though a complaint of demanding money and beating has been lodged against the police on 21.6.07, the same is long after the date of incidence and the same is only an after thought, that the Commissioner(Appeals) while allowing the appeal, has not taken into account the statement given by the truck driver and that in view of this, the impugned order is not correct.

2.2 Ms. Asmita Nayak, Advocate, the learned Counsel for the Respondent, pleaded that the Department's case against the appellant is based only on the statement of Sh. Abdul Khaliq, driver; that other than this, there is no other evidence that the sugar loaded in the truck was going to be smuggled into Nepal; that the statement had been obtained under duress, which is clear from the presence of injuries found during the medical examination of the driver on 9.6.07, that a complaint lodged by the driver against the police before the CJM on 21.6.07 is still pending before the Court of CJM; that the Commissioner(Appeals) in the impugned order has observed that the statement of the driver was recorded by the Customs in the presence of the police officers; that this fact is also clear from para 12 of the order-in-original, that when the statement of driver had been recorded in the presence of police, the same losses its validity that the statement of the driver has been recorded under Section 107 of the Customs Act,1962 and there is nothing on record to show that the officer who had recorded the statement of the driver, had been duly authorized for this purpose by the Commissioner; that statement under Section 107 of the Customs Act,1962 can be recorded only by an officer of Customs empowered on this behalf by the Commissioner of Customs by a general or special order; that Hon'ble Gujarat High Court in the case of UOI vs Abdulkadar Abdulgani Hasmani reported in 1991(55)ELT.497 has held that the statement under Section 107 of the Customs Act,1962 must be recorded by a duly empowered officer; otherwise it would be of no evidentiary value; that merely on the basis of statement of truck driver, which has been recorded in the presence of police officers, allegation cannot be made that the sugar loaded in the truck was going to be smuggled into Nepal; that in this regard, she relied upon the Tribunal's judgment in the case of Chinna Chikwa vs CC, Allahabad reported in 2001(137)ELT.787, Ram Goyel vs CC(Prev.), West Bengal reported in 2002(147)ELT.913 and Ajay Kumar vs CC, Patna reported in 2002(149)ELT.997. She also cited the judgment of the Tribunal in the case of Babu Ahmad vs CC. Lucknow reported in 2002(150)ELT.1018 wherein it was held that the statement of witness recorded by customs authorities when witness was in police custody is not admissible as evidence as per the provisions of Section 26 of the Indian Evidence Act.

3. I have carefully considered the submissions from both the sides and perused the records. The truck loaded with sugar had initially been seized by the police on 8.6.07 and thereafter the same was handed over to the customs. The Department's case that the sugar was going to be smuggled to Nepal is based only on the statement of truck driver Sh. Abdul Khaliq recorded on the spot. However, from the Additional Commissioner's order in para 12 of the order and the Commissioner(Appeals)'s observation, it is seen that the driver's statement had been recorded in the presence of the police officers. In my view on this very ground itself the statement loses its evidence value under the provisions

of Section 26 of the Indian Evidence Act. Moreover, it is also seen that the statement of the driver had been recorded under Section 107 of the Customs Act and in terms of the judgment of the Hon'ble Gujarat High Court in the case of UOI vs Abdulkadar Abdulgani Hasmani(supra), statement recorded under Section 107 of the Customs Act,1962 would be admissible as evidence only if the same has been recorded by an officer duly empowered in this behalf by a general or special order of the customs while in this case, there is no such evidence showing that this statement of the driver had been recorded by an officer duly authorized by the Commissioner. The presence of injuries found on the driver during his medical examination on 9.6.07 also indicates that the statement of the driver had been recorded under duress. Moreover other than the statement of the driver, there is no corroborative evidence indicating that the sugar loaded in the truck was going to the smuggled into Nepal. In view of these circumstances, I hold that there is no infirmity in the impugned order. The Revenue's appeals are dismissed.

Order dictated in the open Court.

(Rakesh Kumar)
Member (Technical)

km