IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL, NEW DELHI, PRINCIPAL BENCH NEW DELHI
COURT-IV

Date of Hearing/ Decision : **07.03.2017**

Appeal No. C/52976,53004,53007/2016 -CU (DB)

[Arising out of the Order in Original No. OIO-SRB/COMM/ACE/16/2016 dated 19.08.2016 passed by Commissioner of Customs, New Delhi]

Shri Boria Ram, Superintendent … Appellant
Shri Ashok Kumar Indora, Inspector
Shri B.N. Gandhi

vs.

Commissioner of Customs, New Delhi … Respondent

Appearance:

Rep. by Shri BB Sharma, Shri Piyush Kumar and Ms. Neelam Murpana, Advocates for the Appellants
Rep. by Shri K. Poddar, DR for the respondent

Coram: Hon'ble Mrs. Archana Wadhwa, Member (Judicial)
Hon'ble Mr. V. Padmanabhan, Member (Technical)

Order No. 52181-52183/2017 –CU (DB)

Per Mrs. Archana Wadhwa

All the three appeals are being disposed of by a common order as they are arising out of the same impugned order of Commissioner of Customs vide which penalty of Rs. 25,000/- stands imposed on each of the two appellants Shri Boria Ram, Superintendent of Customs and Shri Ashok Kumar Indora, Inspector of Customs under the provisions of Section 114(i) and 114(iii) of the Customs Act, 1962. In addition, a penalty of Rs. 5 Lakhs stand imposed upon Shri B.N. Gandhi, proprietor of Customs Broker firm M/s. B.N. Gandhi.

2. After hearing both the sides duly represented by Shri BB Sharma, Shri Piyush Kumar and Ms. Neelam Murpana, ld. Advocates for the Appellants and Shri K. Poddar, ld. DR of the Revenue, we find that the matter relates to exports of garments in the name of M/s. Royal Trading and M/s. Classic Enterprises. The shipping bills so filed by the CHA were checked by the Inspector as also by the Superintendent and let export orders were passed. The matter thereafter, was taken up by SIIB, Air Cargo for further investigation and it was found that there was misdeclaration in respect of the quantum of the ladies skirts as also there was over valuation of the goods. After investigation, the matter was taken up for adjudication.

3. As the challenge in the present appeals is only to imposition of penalty on the said three appellants, we take up their cases individually.

(i) **Appeal No.C/53004/2016 SHRI ASHOK KUMAR INDORA, INSPECTOR**

On going through the order, we note that penalty stands imposed upon the said appellant on the ground that he has not done proper examination of the consignment inasmuch as, 500 pieces per package were declared whereas, 400 pieces of garments per package were found. Further, the garments in question were of extremely low quality which were visible on a routine examination. For imposing penalty of Rs. 25,000/- on Shri Ashok Kumar Indora, the Commissioner has observed as under:-

> "I find that Shri Ashok Kumar Indora, Inspector whose duty was to check these very parameters did not bring the said discrepancy of quantity and inferior quality of the said goods to the notice any of his senior officers and also failed to

> state correct facts in the examination report entered in the EDI System but instead stated in his examination report that 'DOCS SEEN BY DC SHED AND AS DIR O/E AS PER S/R AND FOUND THE GOODS AS PER DOCS." Nowhere in his examination report he has mentioned about the poor/ substandard quality and short quantity of garments against the 20 Shipping Bills under consideration. It is pertinent to mention here that the goods in question were found to be of inferior/ substandard quality and were not fit for being exported as per Market Enquiry and opinion of Textile Committee. I have also gone through the contents of the Panchnama dated 11.05.2015 which has been drawn on the spot by the investigating officer in r/o conducting examination of shipments covered by the impugned 20 Nos of Shipping Bills and drawing of representative sample out of said shipments in the presence of two independent witnesses and Shri Amit Kumar, Representative of CHA and do not find any legal infirmity in the sad Panchnama dated 11.05.2015 as contended by Shri Ashok Kumar Indora, Inspector in his submission. Therefore, contentions raised by him do not hold ground and thus, cannot be sustained. I find that facts are circumstances clearly establishes that Shri Ashok Kumar Indora, Inspector who was responsible for examining the goods in question and was duty bound to give correct and true examination report about the exact quantity and quality of the impugned goods, have failed to discharge his official duty. Accordingly, due to above said omissions and commissions on his part, he has rendered himself liable for penalty under Section 114 of the Customs Act, 1962.

As is seen from the above, the adjudicating authority has imposed penalty on the said Inspector on the ground that he has failed to discharge his official duty properly. We are afraid that the said reasoning cannot be adopted for imposition of penalty in terms of Section 114 of the Act, inasmuch as there is nothing on record to show that there was any *mensrea* on the part of the said appellant so as to abet the illegal export. The Hon'ble Supreme Court in the case of UOI vs. J. Ahmed – AIR 1979 SC 1022, has held that lapses or lack of efficiency would not *ipso facto* constitute a misconduct to attract the penal provisions. As such, in the absence of any evidence to suggest that the appellant had connived with the exporter, we are of the view that non-performance of the duty, by itself, would not call for any penal action on the said appellant. Accordingly, the penalty imposed upon him is set-aside.

(ii) **<u>Appeal No. C/52976/2016 – SHRI BORIA RAM, SUPERINTENDENT</u>** -

The Commissioner has imposed penalty on the said Superintendent by observing that he has passed the let export order, which is not a mere formality but has legal requirement to be fulfilled by the Superintendent diligently and the law places a great responsibility on the officer to ensure that the government revenue is not siphoned by such fraudulent means. For better appreciation of the reasons adopted by the adjudicating authority for imposition of penalty, we reproduce the relevant paragraph from the impugned order:-

> *"I find that the above contentions are not acceptable since the noticee was responsible for ensuring that the examination done by the Inspector under his supervision was proper. The 'Let Export Order' was given by him is not a mere formality. It is a legal required to be fulfilled by a Superintendent of Customs diligently and the law places a great legal responsibility on the officer to ensure that government revenue is not allowed to be siphoned off by such fraudulent means. He does not require any further instructions to carry out his duties properly. The onus of satisfying himself that the goods sought to be exported are as per declaration made in the shipping bills is his and his alone. Since the goods were being exported to a sensitive place like Dubai and there have been several instances of frauds of similar nature in the past, therefore, being the supervisory officer, he should have been more vigilant and should have ensured that the consignment was examined by Shri Ashok Kumar Indora, Inspector carefully and properly or should have called for samples of the garments or should have examined/ seen the goods before giving LEO to the consignment keeping in view the huge Drawback amount involved and sensitive destination of the export consignment. It is evident that Shri Boria Ram, Superintendent has performed his duty in a casual manner and failed to apply due diligence before giving Let Export Order to consignments as many as twenty in numbers. In view of the above, it is established that he has failed to discharge his official duty and due his said omissions and commissions, he has rendered himself liable for penalty under Section 114 of the Customs Act, 1962."*

The said appellant has contended that the let export order was given by him as he found the examination report of the Inspector as satisfactory.

Any lapse in performance of duty can, at the most, be considered as inefficiency which will not lead to any charge of abetment or connivance, thus attracting the penal action. We agree with the appellant that dereliction of duty cannot be held to be punishable act in the Customs Act. There is neither any allegation much less any evidence on record that such dereliction of duty is on account of culpable mind. There is no statement of either person to show that the Superintendent was aware of the discrepancy in the consignment. As such, in the absence of any evidence to reflect upon the said appellant's role to play in the alleged misdeclaration and by following the Tribunal decision in the case of *Khem Singh vs. CC, Kandla – 2014 (307) ELT 718 (Tri. Ahmd.)*, we hold that imposition of penalty upon the said appellant is not justified and the same is accordingly, set-aside.

(iii) **Appeal No. C/53007/2016 – SHRI B.N. GANDHI PROP. CHA FIRM**

On going through the impugned order, we find that the adjudicating authority has observed that the Customs Broker has acted without obtaining the authorization from the exporters and as per the provisions of Customs Broker Licensing Regulations, 2013, he is expected to conduct the "Know Your Customer" verification inasmuch as, the exporters are not traceable physically, the appellant is liable to penalty. The said findings of the Commissioner stands contested by drawing our attention to the fact that authorization was available in the file and the appellant has followed the 'Know Your Customer norms' by verifying correctness of IEC Code identity of the clients and finding the clients from the declared addresses by using reliable authentic documents. Merely because the exporters have not come forward and the Revenue has not able to trace them, by itself cannot be held to be a reason for concluding the *mens rea* against the CHA or to upheld the charge of abetment or collusion with the exporters. Ld. Advocate submits that in fact, all the relevant details of the exporters are still available in the web-site and the findings of the Commissioner are liable to be set-aside.

Having gone through the impugned order, we find that the main reason for the adjudicating authority to impose penalty on the said CHA is that, he has failed to follow the provisions of CHA Regulations, 2013 and they have not adhered to the requirements and thus, are guilty of filing the shipping bills, in utter disregard to the provisions, placed on them by the Regulations. If that be so, we are of the view that violation of any of the provisions of the Customs Broker Licensing Regulations, 2013 would result in revocation of his license, in terms of the said Regulation and in the absence of any evidence to the contrary, will not call for any penalty on the CHA. Actually, we are informed that the proceedings for revocation of these license were undertaken, resulting in passing of order against him. On appeal, the said order of revocation was set-aside by the Tribunal vide its Final Order No. C/A/55604/2016-CU (DB) dated 05.12.2016.

Further, the Tribunal in the case of *M/s. Shiva Khurana vs. CC, New Delhi,* vide its Final Order No. 55914/2016 dated 15.12.2016, has set-aside the penalty of Rs. 50 Lakhs imposed on the assessee on more or less identical grounds. For better appreciation, we reproduce Para 5 of the said order:-

> "5. In this case, penalty has been imposed on the appellant for not verifying the credential of the exporter. We find that at the time of filing of shipping bills, the exporter has produced IEC and ICE gate statements and other 11 documents to verify their address and same was not being disputed. It is not required for the appellant to verify the address of the exporter/importer physically. Therefore, we hold that the appellant has taken due care while processing the export documents to check credentials of the exporter. In these circumstances, no penalty is imposable on the appellant in the light of decision of this Tribunal in the case of Falcon India vs. Commissioner of Customs [2015 (326) ELT 728 (Tri-Del)] wherein this Tribunal has observed as under:
>
> > *"3.The facts narrated above itself would show that the suspension of licence was revoked on both occasions on the finding that the appellant has complied with the KYC norms. Though the authority has stated this, the penalty is seen imposed by a self contradicting ground that however, the documents being fake, there was no due diligence on the part of the appellant. It is stated in the impugned order that there is no evidence to conclude that the CHA had prior knowledge that the importer was bogus. When the licence has been revoked with a clear cut finding that the appellant has complied with the KYC norms then I do not find any justifiable ground to impose penalty. The appellant has succeeded in establishing a case in his favour."*

As such, by following the above decision, imposition of penalty of Rs. 5 Lakh on the appellant is not justified. Accordingly, we set-aside the same.

4. In view of the above, all the three appeals are allowed with consequential relief to the appellants, if any.

[Order dictated and pronounced in the open court]

(**V. Padmanabhan**)
Member (Technical)

(**Archana Wadhwa**)
Member (Judicial)

KL.