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. IV

DATE OF HEARING : 12/05/2017.
DATE OF DECISION : 12/05/2017.

Customs Appeals No. 112 and 139 of 2009 (SM)

[Arising out of the Order-in-Original No. 28/ACE/JJ/2008 dated 18/12/2008 passed by The Commissioner of Customs, New Custom House, New Delhi.]

Shri B.K. Pabri	]	Appellants
Shri Rajiv Kumar Meharwal	]	

Versus

CC (Export), New Delhi	Respondent

Appearance

Shri J.M. Sharma, Consultant (for Shri B.K. Pabri) and Shri Bhasin Sethi, Advocate (for Shri Rajiv Kumar Meharwal) – for the appellants.

Shri K. Poddar, Authorized Representative (DR) – for the Respondent.

CORAM : **Hon'ble Shri B. Ravichandran, Member (Technical)**

Final Order No. 53330-53331/2017 Dated : 12/05/2017

Per. B. Ravichandran :-

These two appeals are against common impugned order dated 18/12/2008 of Commissioner of Customs, Air Cargo Complex, New Delhi. This order is passed by the Commissioner as per the direction of the Tribunal vide final order dated

19/05/2005. The issue involved in these appeals is relating to liability of both the appellants who for penalty under Customs Act, 1962. The appellants as officers of Customs were involved in processing of export goods, and alleged to have abetted an improper transaction which will render the goods liable for confiscation. Such action of abetting was held to be proved against both the appellants by the Original Authority who imposed penalty of Rs. 1,00,000/- and Rs. 2,00,000/- respectively on the appellants under Section 114 (iii) of Customs Act, 1962.

2. The brief facts of the case are that M/s Zap Fashion, New Delhi have filed 10 shipping bills on 15/06/2001 under DEPB-cum-drawback scheme for export of silk tops. Suspecting possible mis-declaration of these items, investigations were varied out and on completion of the investigation, proceedings were initiated against the exporter for claiming ineligible export benefits by way of drawback/DEPB. The case was adjudicated and the Original Authority who vide his order dated 30/09/2003 held that the declared value of Rs. 18.63 crores was not correct and the value is re-determined as Rs. 5 lakhs. He confiscated the goods and allowed them to be redeemed on payment of Rs. 10 lakhs. The Original Authority also imposed penalties of Rs. 10 lakhs on Shri Pawan Kumar, held to be involved in the export of the said consignment and penalty of Rs. 5 lakhs on Shri Rajiv Kumar Meharwal, Inspector of Customs and Rs. 2 lakhs on Shri B.K. Pabri, Superintendent of Customs. On appeal by the officers

of Customs, the Tribunal remanded the matter back to the Original Authority for a fresh decision after providing the relied upon documents to the officers. The present impugned order was passed on such direction. I note that even in the present order it has been recorded that the said relied upon documents are not available and the same could not be provided to the appellants. The Original Authority, however, proceeded to impose penalty of Rs. 1 lakhs (Shri B.K. Pabri) and Rs. 2 lakhs (Shri Rajiv Kumar Meharwal) for abetting the act or omission in respect of export goods which made the goods liable for confiscation. The Original Authority recorded that, being a qua-judicial authority it is sufficient for him to examine "preponderance of probability", and proof beyond doubt as required in criminal proceedings are not required to be considered.

3. The learned Counsel for Shri Rajiv Kumar Meharwal, submitted that the Department initiated disciplinary proceedings in terms of CCS (CCA) Rules, 1965 against the appellant. The disciplinary Authority on conclusion of the proceedings found the appellant guilty of violation of CCS (Conduct) Rules, 1964 and ordered reduction of pay by 5 stages for a period of 5 years. On appeal, Commissioner of Customs (Exports), as Appellate Authority, set aside the order of the Disciplinary Authority and exonerated of appellant, of all charges. The learned Counsel submitted that the disciplinary proceedings are with reference to same impugned exports and, as such, no penalty under Customs Act can be imposed, as the Department itself found the officer

has not violating the conduct rules. He relied on the decision of the Tribunal in **Suraj Prakash vs. CC, New Delhi** reported in **2017 (49) S.T.R. 376 (Tri. – Del.)**.

4. The learned Counsel for Shri B.K. Pabri submitted that the directions of the Tribunal have not been complied with by the Original Authority. The crucial documents based on which the charge against the appellant was sought to be established were not provided to the appellant. The charge of abetting inviting penalty under Section 114 of Customs Act has to be established by the Revenue. Any amount of suspicion or even negligence on the part of the officer cannot be considered for penalty under Section 114. There should be evidence of a positive act with knowledge on the part of the appellant, to invite a penal provisions of Section 114. He further contended that the appellant has not processed/assessed or signed any of the documents covering the impugned shipment. During the material time there was no procedure of passing let export order by the proper officer on the assessment document. He also stated that in similar set of facts the appellant was put to notice for penalty under Customs Act and the Original Authority has dropped the proceedings against the appellant, which was affirmed by the Tribunal, reported in **2010 (253) E.L.T. 273 (Tri. – Del.)**.

5. The learned AR reiterated the findings of the Original Authority.

6. I have heard both the sides and perused the appeal records. The only point for decision is the liability of the appellant for penalty under Section 114 (iii) of the Customs Act for their act/omission during the course of their performance as customs officers, dealing with export cargo. It is seen that the Original Authority has recorded that the documents which are central part of the proceedings were not available, to be supplied to the appellants. The records of the original let export order certificates were also not available and could not be supplied. The Original Authority proceeded to examine various case laws and available evidence before arriving at the conclusion. In fact, one of the points relied on by the Original Authority is voluntary statement dated 12/10/2001 of Shri Rajiv Kumar Meharwal and certain records of telephone conversation of both the appellants with persons involved in export of the impugned consignment.

7. It is apparent that in the absence of documents based on which allegations were made, the whole proceedings against the appellants become seriously jeopardized. The attempt by the Original Authority to rely on certain incidental and collateral evidence is also not found sustainable. None of these evidences will lead to the conclusion based on "preponderance of probability" as stated by the Original Authority. Even for such preponderance of probability evidences are required. The presumptions and possible inferences by deciding authority cannot substitute evidences.

8. Further, in the case of Shri Rajiv Kumar Meharwal, the Department itself found him as not indulging in any punishable activity in terms of CCS (Conduct) Rules. In such situation, a penalty under Customs Act on the same activity cannot be sustained. In this conclusion, I rely on the decision of the Tribunal in **Suraj Prakash** (supra), wherein the Tribunal held that when disciplinary proceedings under CCS (CCA) Rules, 1965 are dropped, penalty under Customs Act cannot be imposed on the same charge against the officers.

9. Further, it is relevant to note that to impose penalty under Section 114 (iii) on the officers of customs, it is necessary to establish with supporting evidence, a positive act on the part of the officers to abet a omission or an act of another person which will render the connected goods liable for confiscation under Section 113. Failure, if any, in discharge of duty assigned or negligence on the part of the Custom Officer by itself cannot bring in penal consequence in terms of the said section. Such negligence or failure may attract departmental proceedings for violation of the service rules. For Customs Act, irrespective of the fact whether the person is an officer of custom or any other person, penalty for an offence of abetting can be imposed only on establishing a positive act on abetment of another person’s act or omission which will make the connected goods liable for confiscation. On careful consideration of the evidence on record and submission made by the appellant, I find that there is no sustainable ground to impose penalties under Section 114 on the

appellants in the present case. Accordingly, the appeals are allowed by setting aside the impugned order.

(Dictated and pronounced in open court)

(B. Ravichandran)
Member (Technical)

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