IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL,

WEST BLOCK NO.2, R.K. PURAM, NEW DELHI-110066

Date of Hearing: . 27/9/2018
Date of Pronouncement: 12.11.2018

Appeal No. C/52173-52177/2018-DB & C/52594/2018

Sr. No.	Case No	Impugned Order Detail's	Date of Impugned Order	Passed By	Appellant	Respondent
1.	C/52173/2018-DB	OIA-01/COMMR/CUS/IND/CAA/2018	24/05/2018	COMMISSIONER OF CGST & CENTRAL EXCISE-INDORE(Appeal)	SHRI SUBHASH PANDEY	C.C.E. & S.T.-INDORE
2.	C/52174/2018-DB	OIO-01/COMMR/CUS/IND/CAA/2018	24/05/2018	COMMISSIONER OF CGST & CENTRAL EXCISE-INDORE	SHRI VINAYAK JOSHI	C.C.E. & S.T.-INDORE
3.	C/52175/2018-DB	OIO-01/COMMR/CUS/IND/CAA/2018	24/05/2018	COMMISSIONER OF CGST & CENTRAL EXCISE-INDORE	SHRI GOVINDRAM MALVIYA	C.C.E. & S.T.-INDORE
4.	C/52176/2018-DB	OIO-01/COMMR/CUS/IND/CAA/2018	24/05/2018	COMMISSIONER OF CGST & CENTRAL EXCISE-INDORE	SHRI RAJESH PURANIA	C.C.E. & S.T.-INDORE
5.	C/52177/2018-DB	OIO-01/COMMR/CUS/IND/CAA/2018	24/05/2018	COMMISSIONER OF CGST & CENTRAL EXCISE-INDORE	SHRI MANGILAL CHOUHAN	C.C.E. & S.T.-INDORE
6.	C/52594/2018-DB	OIO-01-COMMR-CUS-IND-CAA-2018	24/05/2018	COMMISSIONER OF CGST & CENTRAL EXCISE-INDORE(Appeal)	S CHATTARAJ	-C.C.E. & S.T.-INDORE

Appearance:

Present for the Appellant : Shri Alok Barthwal, Advocate (Item No. 1 to 5)
Shri Sameer Chakraborty, Sr. Advocate (Item No. 6)
Shri Abhjit Biswas, Advocate

Present for the Respondent : Shri Rakesh Kumar, D.R.

Coram: HON'BLE MR ANIL CHOUDHARY, MEMBER (JUDICIAL)
HON'BLE MR. BIJAY KUMAR, MEMBER (TECHNICAL)

FINAL ORDER NO. 53253-53258/2018

Per : Bijay Kumar :

All these 6 appeals arises out of common OIO No. 01/COMMR/CUS/IND/CAA/2017 dt. 24.05.2018 passed by Commissioner of CGST & Central Excise, Indore. The impugned order emanates from SCN No. VIII(CUS)15-04/2014/Adj-I/15009 dated 12.8.2014 in which these appellants are co-noticee. The issue involved in this appeal is whether penalty under section 114 (i) and 114 (iii) of the Customs Act, 1962 is imposable upon the departmental officer namely Shri S. Chattaraj, Assistant Commissioner Customs, Shri Mangilal Chouhan, Superintendent (Now Retired), Shri Rajesh Purania (Inspector), Shri Govind Malviya (Superintendent), Shri Subhash Pandey (Inspector) and Shri Vinayak Joshi Superintendent (Now Retired).

2. As all the appeal arises from common adjudication order; issue we take all the appeals for consideration and disposal by this common order for the sake of convenience.

3. The facts that arises for consideration is that the appellants during the material period of time were performing their duties at ICD Dhannad and ICD Kheda, District Pithampur in the various capacities as the departmental officers. One, Shri Kirit Shrimankar, the alleged exporter of fabrics and readymade garments, was, alleged to have exporting goods under dummy IECs i.e (Import –

Export Code) under claim of Duty Drawback/ DEPB schemes by resorting to mis-declaration of description and value of export goods. The case was investigated by the DRI, Mumbai which culminated into issuance of aforesaid Show Cause Notice. During the course of investigation the exported goods were called back from the port of export and the samples were drawn and sent for test report. These samples of readymade garments exported through ICD Dhannad / Kheda to Dubai which were exported in two containers. The show cause notice for proposing demand and imposing penalty on all these co-noticees, mainly relied upon the opinion of experts, who opined that the export goods were made with intention to export under duty drawback scheme and that subsequently were found to be of sub-standard / poor quality indicating that the goods (export garment) could be stock lots / reject. The show cause notice contended that the declared value of export of 1308 Export consignment therefore, appeared to be liable for rejection in terms of provision of Rule 8 of CVR (E), 2007 read with section 14(1) of the Customs Act, 1962. That Shri Kirit Shrimankar was found to be actual exporter of goods and has exported the same using dummy exporter at the strength of various IEC code. The Show Cause Notice, thus, proposed to reject export value of goods and proposed to recover the drawback and confiscation of export goods. In case of Appellants, it was alleged that they knew Shri Kirit Shrimankar as proxy/ benami exporter using dummy IECs in relation to exported goods. In case of Shri S. Chattraj, (Appellant No. 6), it was alleged that Call Detail Record analysis showed that the appellant having a regular interaction (427 times during the material period) with Kirit Shrimankar, which evidences that he had close contact with the said person. Further appellant, Shri Chattraj, attended the marriage ceremony of Kirit Shrimankar's son at Mumbai in January 2013 as guest and availed the flight tickets to and fro travel for self and his family and stayed with his family in a five-star hotel in Mumbai and that the entire trip and stay was financed by Kirit Shrimankar. It had allegedly come on record that the appellants used to be entertained in the 'guest house' set up by the said alleged "syndicate". In case of other Appellants it was alleged that they had facilitated fraudulent exports and further that the Inspectors viz Shri Rajesh Puarania (Appellant No. 4) and Shri Subhash Pandey (Appellant No. 1) had made and received some calls with Shri Kirit Shrimankar. The Appellants contested the charges of show cause notice on various grounds.

4. The adjudicating authority vide the impugned order besides confirmation of demand of exports benefit and imposition of penalty against Kirit Shrimankar and others, and also imposed penalty upon the present appellants. A penalty of Rs. 25,00,000/- on Shri Chattraj (Appellant No. 6) and of Rs. 10 Lakhs each on other

Appellants (Appellant Nos. 1, 2, 3, 4 & 5) was imposed under Section 114 (i) and (iii) of the Customs Act, 1962.

5. Being aggrieved the appellants are in appeal before this Tribunal.

6. The Ld. Senior Counsel, Dr. Samir Chakraborty, appearing for Shri S. Chattraj, submits that the evidences of call records between Shri Chattraj, attending marriage ceremony of Kirit Shrimankar's son at Mumbai and availing flight tickets for the self and his family, staying in hotel at expenses of Shri Kirt Shrimankar cannot ipso facto leads to conclusion that the Appellant was involved in alleged overvaluation of export goods along with the exporters. That it is only an allegation that he was entertained at guest house of Kirit Shrimankar (Main Noticee) whereas there is no evidence of same. The DRI/Department has not brought on record the transcript of the phone calls between Shri Kirit Shrimankar and subject appellant to support the allegations made against the appellant. He relies upon Tribunal's order in case of ***Shafeek P.K. Vs. Commr. of Customs*** 2015 (325) ELT 199 (T) and ***Khemani Purshottam Mohandas*** Vs. CC 2017 (354) ELT 275 (T) to show that in absence of any transcript of alleged conversation, the appellant cannot be penalised. He also submits that none of the purported findings leads to evidence of any

wrongdoing by the Appellant. (No. 6) That, the shipping bills were provisionally assessed at the time of exports, samples were drawn and sent to Textiles Committee, Mumbai for testing of export samples. It was only after receipt of test report on the exported samples and realization of sale proceeds of exports; the drawback was sanctioned or other export benefits were given to the exporter. None of the documents/ evidences contradicting the above facts has been brought on record. He also points out that the undervaluation allegation is based upon the report of the expert valuer Shri Bipin Suri and Shri Jerry John. However, there is no aversion in show cause notice as to how both these persons are expert valuers. It was also impressed upon that there is no professional qualification of these persons or their recognition from any institute or even the customs department. Further, as per Ld. Sr. Advocate there is nothing on record to show the said persons are experts in textiles. That only on the basis of letters given by the said persons that they are having more than 25 years of experience, the show cause notice has accepted the same. Ld. Advocate further submits that in case of called back consignments under Shipping Bill No. 400614 and 400615 both dt. 18.05.2013, the Consulate General of India at Dubai had given a report that the value declared by the importer at Dubai was only Rs. US$ 11465.55 equivalent at Rs. 6,22,664/-,but this report was itself rejected by the DRI authorities and they redetermined the value of the subject export goods at Rs.

49,50,137/- which is nearly 8 times higher than value declared by the Dubai Importer. No evidence of export of like goods has been brought on record. Therefore, the redetermined value is itself conclusive evidence that no reliance can be placed upon the report of Consulate General, the ld. Sr. Advocate states that according to him there is no evidence of any wrongdoing on the part of Appellant, and hence no penalty is imposable.

7. Shri Alok Barthwal, ld. Counsel appearing for the other Appellants submits that the Appellants were working as per instructions given to them by their Seniors and also as per various instruction, Trade Notice etc. issued from time to time by the Department. As the exports were assessed provisionally and the samples of export goods were drawn which were sent to Textiles Committee Lab. Mumbai, till the receipt of report from them no action to grant export benefit was in India. The same is an affiliated body governed by Ministry of Textiles. Govt. of India. The physical examination of export goods was carried out as per prescribed examination norms. That only after receipt of examination report from Textiles Committee and realization of exports proceeds, the exports benefits were given to the exporters. The Appellants were working strictly as per the procedure and instructions and no wrongdoing was committed by them. Shri Kirit Shrimankar was representing himself as an representative of exporter and hence

only few calls were made to him in case of any query. That prior to posting of the present appellants, the other predecessor officers were also deputed on same position in case of same IECs. The Appellants merely followed the same procedure which were being followed in past at these ICDs. The predecessor officers were let off on the ground that they handled less number of consignments as compared to Appellants. This analogy adopted by the adjudicating authority is erroneous. The exports proceeds were realized by the exporter in case of sanctioned drawback and hence there is no reason to hold them responsible as held in case of ***C.C Air Cargo (Export) Vs. Sam Merchandising Pvt. Ltd***. - 2013 (288) ELT 418 (TRI – DEL). There is no evidence that the Appellants knew Shri Kirt Shrimankar as benami exporter. There is no evidence of Appellants receiving any favour from Shri Kirt Shrimankar or any other. The Ld. Counsel relies upon following judgments in support of his contention:

(i) ***Harvinder Singh Vs. CCU (Exports)*** 2015 (328) ELT 512 (T-Mum)

(ii) ***CCU Vs. Hargovind Export,*** 2003 (158) ELT 496 (T)

(iii) ***CCU Vs. M.I. Khan,*** 2000 (120) ELT 542 (T)

(iv) ***Sunshine Overseas Vs. CCU 2011 (263) ELT 617 (T)*** as upheld vide ***Commissioner Vs. Sunshine Overseas***, 2013 (296) ELT A122 (Guj)

8. Per contra Shri Rakesh Kumar, ld. AR appearing for the Revenue supports the impugned order. He further submits that this is case where substantial unintended benefits have been taken by one Shri Kirt Shrimankar, with the connivance of the departmental officers. The nexus between him and departmental officer is evident from the telephonic conversations with Shri Kirt Shrimankar is evident from call data record and other evidence such as availing Guest House facility and stay at five Star Hotel during the marriage ceremony of Shrimankar's son by the noticee No. 6 (Shri Chattaraj),

9. After hearing both the sides we find that the Show Cause Notice and adjudicating authority in case of Shri S. Chattaraj has held him liable for penalty on the basis of telephonic conversation between him and Shri Kirit Shrimankar, attending marriage of Kirit Shrimankar's son at Mumbai and the expenses of hotel and travel being borne by Shri Kirit Shrimankar. However, we find that the said instances nowhere infer that Shri S. Chattaraj was in conspiracy with Shri Kirit Shrimankar towards exports of overvalued and sub standards goods. There is no transcript of phone calls made between these two to reach a conclusion that the said conversation was in order to cause fraudulent export. Our views are also based on Tribunal's Orders in case of ***M/s Shafeek P.K. V/s Commissioner of Customs -*** 2015 (325) E.L.T. 199 (T), the relevant extract of the order is as under:

> "**11.3.** Otherwise also, we find that the entire case of the Revenue rests upon the sole retracted statement of Shri Antony Morris. Even if according to the Revenue, the said retraction was only a mechanical retraction and as an afterthought, inasmuch as no force was used to obtain the same, we find that as per the settled law, statement of a co-accused cannot be held as sufficient to nail another person, unless there is an independent corroborative evidence to that effect. The adjudicating authority has nowhere doubted that the appellant was in Dubai during the period of seizure and had only visited India during the last week of July, 2012. <u>However he has relied upon the call data records showing telephonic talks between the appellant with Shri Kannan and Shri Antony Morris. What was the subject matter of the conversations during the call records has not come on record.</u> Merely on the basis of such call records, it cannot be concluded that the appellant was the kingpin of smuggling operations, as concluded by the adjudicating authority. It may be observed here, even at the cost of repetition, that except Shri Antony Morris, no other person has named the appellant in the detailed statements recorded by the Revenue. If the goods were meant for the appellant, admittedly the other concerned and connected accused persons would have known about him and would have disclosed the name of the appellant. Not even Shri Kannan, who according to the Revenue, is the kingpin of smuggling operations in India, had mentioned about the appellant. As such, we agree with the learned advocate that the retracted statement of a co-accused cannot be adopted as an evidence to conclude against the appellant, without any other independent corroborative evidence."

And ***Khemani Purshottam Mohandas Vs CC, CSI Airport, Mumbai -*** 2017 (354) E.L.T. 275 (T). The relevant extract of the order is as below :

"**5.** I find that the smuggling of gold bars illegally by Shri Khemani Purushotam Mohandas is absolutely not under dispute. Therefore ld. Commissioner has rightly confiscated the gold bars. As regard the prayer of the appellant that the confiscated goods should have been allowed to redeem on payment of fine, I am of the view that it is discretion of the adjudicating authority to allow redemption of goods or to absolute confiscate this discretion is to be based on the fact of individual case. Present case is clear case of smuggling of gold into country therefore ld. Commissioner exercising his discretionary power confiscated the gold bar absolutely. Looking to the nature of the case, I do not find any illegality in the action of the ld. Adjudicating authority for absolute confiscation of the gold bars, therefore absolute confiscation is upheld. Since Shri Khemani Purushotam Mohandas was caught red handed having possession of smuggled gold penalty was rightly imposed upon him. Therefore the same is also not required any interference. As regard the penalties imposed on Shri Jitendra N. Jeswani and Shri Narendra P. Jeswani father and son duo, the only evidence found was <u>frequent mobile calls between both the appellant and Shri Khemani Purushotam Mohandas. In this regard I observed that department could not produce details of conversion of mobile calls. Secondly, Shri Khemani Purushotam Mohandas referred to one Shri Ashok Bhojwani for talking on the mobile and he did not talk to both the Jeswanis. Department could not produce any evidence to establish that both the appellants Shri Jitendra N. Jeswani and Shri Narendra P. Jeswani were conspirator in the smuggling of goods. Though on the basis of telephone calls there is serious suspicion that these both persons are involved in the conspiracy of the smuggling of the gold but in my view the suspicion, whatever grave in manner, cannot take the form of evidence particularly when there is no corroborative evidence is available. I am therefore of the view that as per the available material being not sufficient, penalties on Shri Jitendra N. Jeswani and Shri Narendra P. Jeswani are not sustainable, as a result :</u>

Appeal of Shri Khemani Purushotam Mohandas is (a) dismissed.

Appeal of Shri Jitendra N. Jeswani and Shri Narendra P. Jeswani (b) are allowed."

Only on the basis of familiarity between the two, it cannot lead to inference of Appellant having committed any illegal act. In case of other, who are Inspectors & Superintendents, we find that there is no evidence of these Appellants getting any favour from Shri Kirit Shrimankar or any other person. Even in case of Inspectors, Shri Rajesh Purania and Shri Subhash B. Pandey, we find that they have made few calls to Shri Shri Kirit Shrimankar, which cannot itself lead to the conclusion or suspicion that they were in any sort of arrangement / understanding with Shri Kirit Shrimankar to cause fraudulent exports. The said Appellants were clearing export goods as per the prevailing norms. No evidence is coming out from the Show Cause Notice that these Appellants know or had any reason to believe that Shri Kirit Shrimankar is a benami exporter or a person causing fraudulent exports at the relevant time when the export benefit was granted to them. It is also pertinent that all the exports undertaken under the supervision of the Appellants were made after provisional assssements of the goods and drawal of samples, which were sent to the Textile Committee, Mumbai for testing. The Textile Committee Lab is approved to examine nature of the textile goods. It was only after receipt of test report from the Textile Committee, Mumbai and the realization of exports proceeds, that the drawback was sanctioned to the exporters. It is not coming from the Show Cause Notice that the noticees were aware of the activities of Shri Kirit Shrimankar before the grant of export benefit at the strength of different IEC code. We also find that the Adjudicating authority has set aside the proposal to impose penalty upon the predecessor officers on the ground that the consignment handed by the said officers were very less. In our views, when the allegations and instances against all the officers are same, in that case, the reasoning adopted by the adjudicating authority to impose penalty upon the Appellants is patently erroneous. Also, we find that in the show cause notice, Shri Ankit Mehta was accused of making payment to Rs. 750/- per consignment to the Inspectors. However, the adjudicating authority has himself discarded the said statement of Shri Ankit Mehta on the ground that the statement of Shri Mehta stands retracted by him and thus not reliable. In such circumstances, when the appellants are not accused of getting any illegal gratification or advantage from the alleged exporter, they cannot be held responsible for any alleged evasion of duty or causing fraudulent exports. Our views are also based upon the Tribunal order in case of ***CCU, New Delhi Vs. Hargovind Export*** 2003(158) ELT 496 (Tri, Del), ***CCU, New Delhi Vs MI Khan*** 2000 (120) ELT 542 (Tri) and orders relied upon by the Appellants.

10. In view of our above findings and discussion we hold that there is no reason to impose penalty upon the Appellants under Section 114 (i) and (iii) of the Customs Act. We at this stage want to

make it clear that we have only examined the role of the various appellants only in the case at hand.

11. Accordingly, the penalty imposed upon all the Appellants is set aside with consequential reliefs, if any.

(Pronounced in Court on…………………………….)

(Anil Choudhary) Member (Judicial)	(Bijay Kumar) Member (Technical)

RM