CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
New Delhi

PRINCIPAL BENCH

Customs Appeal No. 53651 of 2018-DB

(Arising out of Order-in-Original No. 24/2018/RNS/COMMR./IMP/ICD/TKD dated 31/08/2018 passed by Commissioner of Customs, ICD, Import, Tughlakabad, New Delhi)

Commissioner of Customs(Import)
[Inland Container Depot,
Tughlakabad, New Delhi] **Appellants**

Versus

Chandan Kumar Jain **Respondent**
[D-403, Ashiana Apartment,
(Opp. Sai Baba Mandir)',
Mayur Vihar, Phase-1,
Near Samachar Apartment, New Delhi]

Appearance
Shri Sunil Kumar, Authorized Representative, for the appellant
Shri Piyush Kumar, Advocate for the respondent

CORAM: **Hon'ble Shri Anil Choudhary, Member (Judicial)**
Hon'ble Shri Bijay Kumar, Member (Technical)

Date of hearing: 21.12.2018
Date of decision: 27.05.2019

Final Order No. 50745/2019

Per Bijay Kumar

1 The present appeal has been filed by the Revenue against the order dated 31/08/2018 passed by ld. Commissioner, ICD, Tuglakabad, New Delhi by which he has dropped the proceedings against the appellant under Customs Act, 1962 (herein referred to as 'Customs Act')

1. Brief facts of the case are that acting on an intelligence the Directorate of Revenue Intelligence (hereinafter referred to as DRI), regarding that M/s

AMP Enterprises, WZ/25D-2, Shop No. 3 Ground Floor, Krishan park, Tilak Nagar, New Delhi (hereinafter referred to as importer) has imported restricted items, by concealment in the two containers bearing Nos. CRXU1551372 and GCUU3009545, the clearance of aforesaid two containers were stopped and these containers were re-examined by the officers of DRI, which was earlier assessed and examined by the officers of Inland Container depot (ICD). Scrutiny of import documents revealed that these consignments have been imported vide Bill of Entry No. 9865457 dated 16/04/2013 filed in the name of the importer, which was declared to contain 3000 cartons of A-4 size copier paper at declared value of Rs. 13,30,776. The Bill of Entry was filed by Customs House Agent (CHA), M/s Prahalad Singh. The Bill of Entry was filed online from the CHA office by Shri Dinesh Kumar Bapodia. Examination on these containers, by the DRI officer on 20/04/2013 under punchanama in presence of punchas witness, revealed that the containers contained 1,400 cylinders of HCFC-22 (also known as refrigerant gas R-22), which were concealed behind 472 cartons of copier paper. The refrigerant gas, was seized and further investigations were also taken up. It was found that one Shri Manish Jalhotra and Shri Rupender Singh Chadha had entered into a conspiracy to smuggle restricted R-22 gas cylinders in guise of copier paper. During the course of investigation, Shri Rupender Singh Chadha appeared before the Investigating Officer of DRI on 13/06/2013 and surrendered a laptop computer, a Samsung phone and an I-phone5 for investigation. Out of these surrendered instruments the DRI subjected the I-phone to forensic examination, under record of proceeding (ROC) dated 13/06/2013, and took the printouts of audio files contained in the said I-phone. This Record of proceedings was conducted by Central Forensic Science Laboratories,(for short CFST)Chandigarh. The CFSL retrieved data in the form of two audio files. The appellants name appeared in one of the audio file, along with same conversations. In his statement, dated 5/09/2013, the appellant stated that though voice in audio files at certain places could be his, however, he categorically denied having met Shri Rupender Singh Chadha any time. The DRI latter obtained the voice sample of Shri Rupender Singh Chadha and that of Respondent and forwarded them for further investigation to CFSL for matching of the voice found in the audio files extracted from I-phone 5 as stated above. On completion of investigation, the impugned Show Cause Notice dated 17/04/2014 was issued to the respondent for imposition of penalty under Section 112 of Customs Act, 1962. In adjudication proceedings the charge of imposition of penalty on the respondent was dropped by the Adjudicating Authority.

2. Being aggrieved by the impugned order, regarding dropping of penalty against the appellant, the Revenue has preferred this appeal, on the ground that audio files extracted from I-phone 5 of Shri Rupender Singh Chadha, the main conspirator, clearly demonstrate that he had conspired to smuggle the prohibited good, namely, R-22 gas. The review order was passed by the committee of Chief Commissioner under Provisions of 129 (D) (2) of Customs Act against the impugned order on the ground that in addition to audio conversation there are other evidences against the respondent in the statement given by one, Shri Rakesh Kumar, who was examined by the DRI

during the investigation. As per review order the Respondent has aided and abetted Shri Rupender Singh Chadha.

3. Ld. AR on behalf of the Revenue submits that that CFSL report has clearly opined that the voice sample found in the audio file of I-phone 5 pertained to the respondent. It has clearly been found that the respondent was in regular touch with Shri Rupender Singh Chadha the mastermind of the syndicate and has also held meeting with him and tried to help him in clearance of detained consignment. By this act of helping Shri Chadha, the Respondent has committed offence punishable under the Customs Act. Ld. Adjudicating Authority has ignored this vital aspect of the investigation and dropped the imposition of penalty against the respondent.

4. Per contra, Ld. Advocate on behalf of the appellant submits that the respondent has never been involved in assessment or examination of the detained consignment. In respect of reliance placed on the voice recording, allegedly found in the printout taken from I-phone 5 surrendered by Shri Rupender Singh Chada, learned advocate submitted that those are unreliable, unsubstantiated and incoherent and hence not admissible piece of evidence, so as to penalise respondent under Customs Act.

5. His submissions in respect of audio recording are as under;

(i) Shri Rupender Singh Chadha in his statement recorded on 05.08.2013 (RUD-38 to the SCN) had categorically stated that he did not recognize any of the voice.

(ii) The said mobile phone was forensically examined on 13.06.2013 by one cyber expert Shri Mohit Kumar under record of proceeding procedure dated 13.06.2013 (RUD 20 to the SCN) which did not contain any finding regarding any audio file found in the said phone.

(iii) The phone was forensically re-examined again on 30.07.2013 by another cyber expert when two audio files were found on the said I-phone which were copied on 4 DVDs for further examination.

(iv) In the record of proceedings dated 30.07.2013 pertaining to forensic examination, name of the Naveen Kumar, cyber expert was typed and mentioned but which was stucked off and name of Shri Manish Kumar was mentioned, however, the said cutting was neither countersigned or authenticated by any one nor any reason was given for substitution of cyber expert either in Record of Proceedings or Show Cause Notice.

(v) The forensic examination was not carried out in the presence of any independent panch witness but only in the presence of DRI officers and Shri Rupender Singh who has surrendered the phone.

(vi) The DRI while forwarding the samples to CESL categorically requested them to examine the date and time of recording, identification of voices, and also to identify as to whether the recorded conversation was between the two person or more than two persons, but in reply CFSL though opined that the voice exhibits of questioned speaker are similar to the voice exhibits of samples speaker i.e of Respondent with high probability but did not identify the other voices and did not give answer the query conversation is between two persons or more than two and also despite of Shri Rupender Singh Chadha’s voice sample having been taken did not give any opinion about the presence of his voice in the audio files extracted from I-phone.

(vii) The report is also conspicuously silent regarding the query of date of the recording but has opined that the audio file was modified on 30.07.2013 at 15.11 hrs.

(viii) Contrary to finding of CFSL regarding non-intentional editing in the audio file, the respondent had obtained a report from independent expert, who after audiometric examination, had opined that the said audio clips were infact tampered with. Ld. Commissioner, however, has rejected that report on the sole ground of having been obtained by a private agency.

(ix) Referring to the transcript, (RUD 37 to the SCN) Ld. Advocate pointed out that the audio file contained following pertinent incoherencies:

(a) Inaudible (35 times)

(b) Not clear (19 times)

(c) Long silence

(d) Silence for some time'

(e) Speaking to someone else on phone.

(f) Says something which is not audible.

(g) Some name not clear.

(h) Not clear.

(x) Shri Rupender Singh Chadha in his statement dated 05.08.2013 had categorically stated that he did not recognize any of the voice contained on the audio files in question.

6. In view of the above submissions, ld. counsel submitted that placing reliance on these audio file for holding respondent guilty would be contrary to legal provisions regarding their admissibility in evidence.

7. Ld. Adjudicating Authority in the instant case has though held the audio file as an admissible piece of evidence, but observing that the conversation recorded in the said audio file admittedly took place subsequent to filing of B/E; examination of goods and clearance thereof; and therefore cannot be construed as an act of omission or commission or abetment to render the goods liable for confiscation or respondent liable to penalty. Ld. Commissioner also held that the respondent was neither involved in the assessment nor examination of the subject consignment or even the supervision which was within the jurisdiction of the another Assistant Commissioner. Thus there were no direct or indirect role of the appellant in getting the impugned consignment cleared from the Customs. Therefore, Ld. Commissioner has rightly held that no case of imposition of penalty under Section 112 of Customs Act, 1962 was made out against the respondent.

8. Herd the parties and perused the appeal records.

9. As both the sides have heavily relied upon the audio conversation extracted from the I phone 5 belonging to Shri Rupender Singh Chadha , we have carefully examined the facts regarding recovery of said phone; retrieval of the audio file from the said phone; CFSL report; and the transcripts alleged a conversation found therein. We have also perused the finding of Ld.

Commissioner in respect of said audio file as recorded in para 94.1.1 to 94.1.7 of the impugned order.

10. We are not in agreement with Revenue's contention that the conversation proved respondent's involvement in clearance of impugned consignment for following reasons;

(a) When DRI intercepted the consignment, those had already been examined and passed out of Customs charge was already given by the inspector and the Superintendent. Thus, there is no allegation/ evidence of influencing any of the officer in clearing the container by the respondent.

(b) There is no evidence to suggest that the respondent was in contact with any of the other co-noticees. The DRI had resumed the mobile phones of Manish Jalhotra, Rupender Singh, Dinesh Kumar Badopalia, Shri Prahlad Singh, Shri Gulshan Singh and examined them during the course of investigation but in the entire Show Cause Notice there is no allegation about the respondent having ever been received or made any call to any of them. The Revenue's contention that there were telephone calls between respondent and Rakesh Kumar, so as to cast aspersion on the respondent's conduct is not valid especially when Shri Rakesh Kumar was neither held to be a conspirator nor a co-noticee in the impugned Show Cause Notice.

(c) No one, who has been indicted in the Show Cause Notice as conspirators, have ever insinuated the respondent in any manner.

(d) Though Ld. DR referring to paragraph 22(vii) of the Review Order, relating to Rakesh Kumar's Statement has contended that the statement clearly depicted respondent's involvement in clearance of contraband goods, R-22 gas. We have perused the said paragraph in Review Order and also paragraph 34.2 of Show Cause Notice and find that averments in both the paragraphs relate to incidents after the import and seizure of subject goods and do not in any manner prove that respondent was instrumental in import or clearance of subject goods. Otherwise also, in our opinion, holding the respondent guilty on the basis of audio recording is beyond justification as even Shri Rupender Singh Chadha in whose phone recordings were found, has not recognized the voice or context of said recording. The retrieval was not made in presence of independent witness and the report of CFSL is not conclusive as conversation is not clear at many places/ inaudiable/paused, rendering it inadmissible as evidence. The audio recording as observed by the DRI and Ld. Commissioner in the impugned order is dated 11.05.2013 after the clearance of the cargo and detention/seizure by the DRI. Thus, in our view, the audio recording cannot be construed as an admissible piece of evidence relating to import and clearance of contraband which took place on 16.04.2013 and 20.04.2013 respectively. Thus, we do not find any discrepancy in the finding of Ld. Commissioner regarding that respondent was neither involved in assessment nor examination of the consignment, and hence h vad no direct or indirect role in the clearance of consignment and thus case of imposition of penalty under Section 112 had not been made out against him.

11. In view of above analysis, we do not find any infirmity in the impugned order as far as it relates to respondent and dismiss the appeal filed by the Revenue. We make it clear that we have not examined the correctness or otherwise of the impugned order pertaining to other noticees.

(Pronounced in open court on 27.05.2019)

(BIJAY KUMAR)	(ANIL CHOUDHARY)
MEMBER (TECHNICAL)	MEMBER (JUDICIAL)

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