IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL, KOLKATA
EASTERN ZONAL BENCH : KOLKATA

REGIONAL BENCH - COURT NO.2

Customs Miscellaneous Application No.76056 of 2017 (COD for Cross Objection)
(On behalf of Respondent)
Customs Appeal No.75638 of 2017
And
Customs Cross Objection No.76055 of 2017

(Arising out of Order-in-Original No.49/COMMR/CUS/SLG/2016-17 dated 09.02.2017 passed by Commissioner of Customs, Central Excise & Service Tax, Siliguri.)

Shri Subodh Das
(Son of Late Sunil Das, Deshbandhu Para, Ward No.10, Dhupguri, District: Jalpaiguri, Pin-735216, West Bengal.)

...Appellant

VERSUS

Commissioner of Customs, Central Excise & Service Tax, Siliguri

.....Respondent
(C.R. Building, Haren Mukherjee Road, Hakim Para, Siliguri-734001.)

WITH

(i) Customs Miscellaneous Application No.76064 of 2017 (COD for Cross Objection), Customs Appeal No.75662 of 2017 And Customs Cross Objection No.76063 of 2017 (Md. Tashin Shah Vs. Commissioner of Customs, Central Excise & Service Tax, Siliguri); (ii) Customs Miscellaneous Application No.76058 of 2017 (COD for Cross Objection), Customs Appeal No.75663 of 2017 And Customs Cross Objection No.76057 of 2017 (Shri Anil Kumar Jain Vs. Commissioner of Customs, Central Excise & Service Tax, Siliguri); (iii) Customs Miscellaneous Application No.76060 of 2017 (COD for Cross Objection), Customs Appeal No.75695 of 2017 And Customs Cross Objection No.76059 of 2017 (Shri Barun Saha Vs. Commissioner of Customs, Central Excise & Service Tax, Siliguri); (iv) Customs Miscellaneous Application No.76066 of 2017 (COD for Cross Objection), Customs Appeal No.75723 of 2017 And Customs Cross Objection No.76065 of 2017 (Shri Surojit Ghosh @ Mithun Ghosh Vs. Commissioner of Customs, Central Excise & Service Tax, Siliguri); (v) Customs Miscellaneous Application No.76062 of 2017 (COD for Cross Objection), Customs Appeal No.75795 of 2017 And Customs Cross Objection No.76061 of 2017 (Shri Binod Kumar Pandey Vs. Commissioner of Customs, Central Excise & Service Tax, Siliguri);

(Arising out of Order-in-Original No.49/COMMR/CUS/SLG/2016-17 dated 09.02.2017 passed by Commissioner of Customs, Central Excise & Service Tax, Siliguri.)

APPEARANCE

S/Shri Arijit Chakraborty, Advocate for Shri Subodh Das and Arnab Chakraborty, Hasmukh Kundalia & Ms.Anushka Mondal, Advocates for other Appellant (s)
Shri A.K.Singh, Authorized Representative for the Respondent (s)

CORAM: HON'BLE SHRI P.K. CHOUDHARY, MEMBER(JUDICIAL)
HON'BLE SHRI RAJU, MEMBER(TECHNICAL)

MISCELLANEOUS ORDER NO. 75251-75262/2021
FINAL ORDER NO. 75842-75847/2021

DATE OF HEARING : 23 August 2021
DATE OF DECISION : 20 December 2021

P.K. CHOUDHARY :

The present Miscellaneous Applications (COD for Cross Objection) have been filed by the Respondent Department for condoning the delay in filing the Cross Objections before the Tribunal.

2. In view of the submissions, as made by the learned Authorized Representative for the Respondent Department and the reasons as mentioned in detail in the said Miscellaneous Applications, the delay in filing the Cross Objections before the Tribunal, is condoned and the Miscellaneous Applications (COD for Cross Objection) are allowed. With the consent of both the sides, the Appeals are taken up for final hearing.

3. All the six appeals are against the common Order-in-Original No.49/COMMR/CUS/SLG/2016-17 dated February 9, 2017 passed by the Commissioner of Customs, Central Excise & Service Tax, Siliguri Commissionerate. By the impugned order the learned Commissioner has absolutely confiscated under Section 111(b) of the Customs Act, 1962 (hereinafter referred to as "the Act") a consignment of 82.92 MT of Betel Nuts on the ground of the same being of foreign origin which had been smuggled from Myanmar to India. The learned Commissioner

also confiscated the four carrier trucks under Section 115(2) of the Act, but allowed redemption of the vehicles upon payment of redemption fines of Rs.6,70,000/-, Rs.5,25,000/-, Rs.6,50,000/- and Rs.1,80,000/- respectively. He also directed adjustment of the said redemption fines from the Security Deposits of Rs.10,60,000/-, Rs.5,25,000/-, Rs.6,50,000/- and Rs.2,88,152/- respectively made by the respective truck owners at the time of provisional release of the seized trucks. The learned Commissioner further imposed the following penalties upon, *inter alia*, the appellants herein under Section 112(a) and/or Section 112(b) of the Act:

(i) Shri Subodh Kumar Das : Rs. 1,00,000/-.

(ii) Md.Tashin Shah : Rs. 10,00,000/-

(iii) Shri Anil Kr. Jain : Rs. 5,00,000/-

(iv) Shri Barun Saha : Rs. 1,00,000/-

(v) Shri Surojit Ghosh : Rs. 1,00,000/-

(vi) Shri Binod Kumar Pandey : Rs. 10,00,000/-

Penalties have also been imposed under other 14 show cause noticees of amounts varying between Rs. 5,00,000/- and Rs. 10,000/-. However, the records reveal that no appeals have been preferred by them against the penalties imposed.

4. The case of the Revenue is that four consignments of Betel Nuts (hereinafter referred to as the "said goods"), were loaded on four trucks at godowns in Falakata and Dhupguri of West Bengal for onward transportation to various parts of the country and were brought into India from Indonesia via Indo-Myanmar border through unauthorized route at Manipur for disposal by changing the packages from one bearing foreign markings to indigenous ones, under cover of fake/fictitious/forged transportation documents by aides of the appellants, Md. Tashin Shah, Binod Kumar Pandey and Narayan Agarwal, in connivance with the other Noticees. The said goods were

seized by the officers of the Directorate of Revenue Intelligence, Siliguri Regional Unit ("DRI") on March 2, 2016 at the toll plaza at National Highway 31. Investigation was completed thereafter by the DRI authorities, during which statements of drivers and helpers of the trucks as well as the other Noticees were recorded. Thereafter, a Show Cause Notice dated September 8, 2016 was issued by the Additional Director General, DRI, Kolkata, requiring the Noticees to show cause as to why the said goods should not be confiscated under Section 111(b) of the Act, the four carrier trucks used for transporting the said goods should not be confiscated under Section 115(2) of the Act and penal actions should not be taken against the noticees under Section 112(a) and 112(b) of the Act for smuggling and transportation of the said goods. The said Show Cause Notice after adjudication by the Commissioner resulted in the impugned order, being aggrieved whereby the instant appeals have been preferred by the respective Appellants.

5. The learned Commissioner in the impugned order has held that the said goods were of foreign origin and the Appellants have been found to be engaged in masterminding, organising, smuggling, transporting, dealing and keeping the seized consignment of the said goods and hence were liable to absolute confiscation under Section 111(b) of the Act and the appellants were liable to penalty under Section 112(a) and/or Section 112(b) of the Act. The said conclusion has been arrived at by the learned Commissioner on the following findings:

(i) The occupants of the 4 trucks carrying the said goods at the time of their seizure, being the drivers and their helpers, admitted to having realised the smuggled nature of the said goods and having witnessed at the time of loading the said goods on to the trucks, the transfer of the said goods from packages bearing foreign marks to those without;

(ii) The said goods had no verifiable ownership, source of procurement and no verifiable destination and that the records produced by the appellants in this regard were found to be fictitious and not genuine.

6. We have heard the learned Counsel for the Appellants and Shri A.K. Singh, learned Authorized Representative for the Department.

7. Shri Arijit Chakraborty, learned Advocate on behalf of the Appellant in Customs Appeal No.75638 of 2017 (Subodh Das Vs. CC) submitted as under:

(i) The Appellant Shri Subodh Kumar Das was shown the photographs of his residential house. During recording of the Statement he categorically stated that there is no incidence of storing any Betel Nuts or loading of the same from his residential premises on or about 01/02.03.2013. Regarding photographs shown to him the same are of white colored two storied building which is his residential premises. There is some vacant land of another owner which is used for keeping his vehicles. None of his family members is engaged in the trade of Betel Nuts.

(ii) From the statement of Tashin Shah it is evident that he had previous transaction with Shri Asit Pal in the year 2015. However, Shri Asit Pal has denied knowing Md. Tashin Shah in his statement dated 13.05.2016. However, Asit Pal has identified the godown belonging to him. Mr. Tashin Shah has categorically stated that goods were loaded from the Godown of Shri Asit Pal. As such contradictory statements of co-accused cannot be the basis for implicating Subodh kumar Das. Moreover, Asit Pal is not a party in the present proceedings in spite of statement dated 21.03.2016 of Md. Tashin Shah disclosing his transaction with Shri Asit Pal.

(iii) The case of the department against the Appellant Subodh Kumar Das is that two drivers had identified his residential premises as place of loading of Betel Nut in their respective vehicles. Apart from these two statements of the said two derivers there is no other evidence on record to even suggest his involvement in the said seizure.

(iv) Learned Advocate relied upon following decisions to contend that on the basis of statement of co-accused no penal action can be drawn unless such statements are corroborated with other persons.

a) MOHTESHAM MOHD. ISMAIL VS. SPL. DIRECTOR, ENFORCEMENT DIRECTORATE
[2007(220) ELT 3 (SC)]

b) ASSISTANT COLLECTOR, CUSTOMS VS. AMRIK SINGH
[2014 (301) ELT 170 (P & H)]

c) COMMISSIONER OF CUSTOMS, EXPORT VS. VIKRAM SINGH DAHIYA
[2010 (260) ELT 180(Del)]

d) COMMISSIONER OF CUSTOMS, AHMEDABAD VS. DIPAKBHAI P. VYAS
[2009(245) ELT 150(Guj)]

e) COMMISSIONER OF CUSTOMS VS. SHAMBHU NATH
[2009(239) ELT 427(ALL)]

f) COMMISSIONER OF C. EX., SHILLONG VS. GUWAHATI CARBON LTD.
[2009(243) ELT 307 (Tri-Kolkata)]

(v) The Appellant had prayed for the Cross Examination of two drivers which was denied. He had prayed for the Cross Examination of Shri Asit Pal and Md. Tashin Shah which was also denied.

(vi) There was no investigation caused at the Appellant's residential premises by the investigating authority. No verification was done to find out whether there is any so called godown at his residential premises. In absence of it allegation of loading of Betel Nuts from his residential premises does not stand. Consequently the penalty imposed on the Appellant is liable to be set aside. The learned Advocate further pointed out that no photographs have been relied upon in the Show Cause Notice and there are no charges brought against Shri Asit Pal. Cross examination as prayed for in his reply to Show Cause Notice has been denied.

(vii) The Impugned Order imposing penalty upon the Appellant Subodh Kr. Das under Section 112(a) & (b) of the Act is illegal and bad in law and the Appeal is prayed to be allowed.

8. It has been contended on behalf of the other Appellants as under:

(i) The Appellant, Md. Tashin Shah carries on business as a merchant trader dealing in purchase and sale of diverse varieties of Betel Nuts, an agricultural produce grown in abundance in Jalpaiguri and Cooch Bihar districts of West Bengal and in Assam, Arunachal Pradesh, Tripura and Meghalaya. Md.Tashin Shah carries on the business as sole proprietor of two firms, in the name and style of Shree Sai Trading Co., Vivekananda Para, Dhupguri and HAMD Enterprise, Bairatinagar, Dhupguri. Both the firms are in Dhupguri, District: Jalpaiguri, West Bengal. Both the firms are duly registered with concerned VAT/Central Sales Tax authorities. Md.Tashin Shah is also assessed to Income Tax and holds Income Tax PAN NO: BBUPS6880G.

(ii) Md.Tashin Shah regularly purchases indigenous varieties of Betel Nuts grown in North Bengal and North Eastern Parts of India and sometime purchases indigenous varieties of Betel Nuts which are grown in other parts of the country and sells indigenous Supari to his respective buyers throughout India. He does not deal in any foreign origin Betel Nuts of whatsoever nature or variety.

(iii) Being agricultural produce, purchase and sale of Betel Nuts are regulated by the Regulated Market Committees of West Bengal in terms of Section 17(i) of the West Bengal Agricultural Produce Marketing (Regulation) Act, 1972. Small cultivators of Betel Nuts sell their produce in the local markets and/or haat and/or mandi which are under respective District Regulated Market Committees and their Sub-Divisional offices. These Marketing Committees levy and collect cess/fees from' purchasers of agricultural produce which includes Betel Nuts/Supari and issue money receipts for the market fee paid making necessary entries in their market fees registers, which are checked and verified by their respective check posts.

(iv) Between 1st May 2015 and 29th February 2016, Md. Tashin Shah had made purchases and sale of indigenous Betel Nuts for his sole proprietorship concern, Shree Sai Trading Co. As on 29th February 2016, the stock of betel nuts in the said concern was 59390 kgs which he had sold on 1st March 2016 to three buyers, details whereof are as under:-

Sl. No.	**Buyer**	**Details/particulars**	**Consignment details**
01.	M/s Satnam Traders CW/249 Sanjay Gandhi Transport Nagar, Delhi – 110042 TIN No. **07426992066**	297 Bags of Betel Nuts net weight 23760 kgs @ Rs.81//- per kg. Tax Invoice Sl. No: 85/Falakata dated 01.03.2016 Total Amt. Rs.19,24,560/- Add 2% CST Rs.38,491/-Grand Total Amt. Rs.19,63,051/-.	Regulated Market Committee money receipt No: 0262410 Book No: 145249 Levy Fee paid Rs.19246/- dated 01.03.2016 place of dispatch Falakata dated 01.03.2016 **Transporter** M/s. Tirupati Cargo 2nd Mile Sevak Road, Siliguri consigned from Falakata to Delhi Consignment Note No: 18 dated 01.03.2016 **Lorry No**: **NL01L8734**

02.	M/s Yash Chirag Brothers Shop No. 16, CorporationBuildingMaskasath, Itwari Nagpur (Maharashtra) TIN No. **27440738943**	200 Bags of Betel Nuts Net Weight 15800 kgs @ Rs.65/- per kg. Tax Invoice SI. No: 88/Falakata dated 01.03.2016 Total Amt. Rs.10,27,000/- **Add CST** Rs.20,540/-. Grand Total Rs. 10,47,540/-.	Regulated market Committee Receipt No: 0262408 Book No: 145249 Levy Fee Rs. 10270/- **Transporter**Tirupati Cargo 2nd Mile Sevak Road, Siliguri, Consignment Note No:21 dated 01.03.2016 Consigned from Falakata to Nagpur Lorry No: CG04JA/2966.
03.	M/s. Shree Ambica Trading Co. Vishwash Complex, Raval Petrol Pump Unjha (Gujarat) TIN No: **24540302728**	248 Bags of Betel Nuts (Betel Nuts Dust) Net weight 19780 kg.@ Rs.81/- per kg. Tax Invoice SI. No: 87/Dhupguri dated 01.03.2016. Total Amt. Rs.16,02,180/-Add CST Rs.32,044/- Grand Total Rs.16,34,224/-.	Regulated Market Committee Receipt No: 0178789 Book No:143576, Levy Fee Rs.16,021/- dated 01.03.2016 place of dispatch: Dhupguri**Transporter**: Tirupati Cargo 2nd Mile Sevak Road, Siliguri, West Bengal, Consignment Note No: 20 dated 01.03.2016 Consigned from Dhupguri to Unjha Lorry No: RJ39GA/2522.

(v) Between 1st January 2015 and 29th February, Md. Tashin Shah had made purchases and sale of Betel Nuts for his sole proprietorship concern, HAMD Enterprise, and, as on 29.02.2016, stock of Betel Nuts in the said concern was 23620 kgs, which the said Appellant sold to Shree Ambica Trading Co., Vishwash Complex, Opposite Raval Petrol Pump, Unjha (Gujarat) TIN No: 24540302728. Details of the said sale are as under:-

1 bag Jeera (Betel Nuts) @ Rs.81/per kg

295 Bags Betel Nuts @ Rs.81/per kg

Net Weight 23620 kgs Total Rs.19,13,220/-

Add CST Rs.38,264/-

Grand Total Rs.19,51,484/-

Tax Invoice No: 96/Dhupguri dated 01.03.2016

Transporter : Tirupati Cargo, 2ndMile Sevak Road, Siliguri

Consignment Note No: 25 dated 01.03.2016

Consigned from Dhupguri to Unjha

Lorry No: RJ04GB3729.

(vi) On 2nd March 2016 the four consignments which were loaded on four trucks (two loaded at Falakata and two loaded at Dhupguri), accompanied with all required papers namely, money receipt of levy fees paid to respective Regulated Market Committees, Original Buyer's copy of respective Tax Invoices, Form "B" issued under Central S.T. (R&T) Rules, Form-3 of the West Bengal VAT Rules, respective consignment notes covering each of the consignment, were intercepted and detained/seized by the officers of DRI, Siliguri Regional Unit, Siliguri at Ghosh Pukur Toll Plaza on National Highway 31. Drivers and helpers, a total of 9 persons of the said trucks, were taken to the office of the Siliguri Regional Unit of DRI, where their statements were recorded. They were then arrested under Section 104 of the Act and produced before the Court of Learned Additional Judicial Magistrate on 3rd March 2016. Petitions of retraction of statements filed by drivers were kept on the record of the court and their bail prayers were rejected.

(vii) Thereafter, in course of follow up enquiry by DRI officers, statements of various other persons were recorded, including the truck owners/ occupants and the Show Cause Noticees, including Md. Tashin Shah, under Section 108 of the Act.

(viii) Thereafter the Show Cause Notice dated September 8, 2016 was issued, which was duly replied to in the form of 'Written Notes of Submissions' and submitted at the time of personal hearing. The prayer for cross-examination of several persons whose statements were relied upon was also requested but however was denied. The impugned order was thereafter passed.

9. It is further contended by Shri Arnab Chakraborty, learned Advocate that the impugned order has erred both in law and on facts in confiscating the said goods under Section 111(b) of the Act and imposing penalties upon the five Appellants (Appellant Nos. 1 to 5) under Section 112(a) and/or (b) of the Act on the following grounds:

(i) *Foreign origin of the said goods not established*

(a) The said goods were locally sourced and was being sold for indigenous consumption only. They are not of foreign origin and that they were instead purchased from the local markets and/or haat and/or mandi through the proprietary concerns Shree Sai Trading Co., Dhupguri and HAMD Enterprises, Dhupguri of Md. Tashin Shah, both located in Jalpaiguri District of West Bengal.

(b) The sale/purchase of agricultural produce such as the said goods, i.e., Betal Nuts, are regulated by the respective District Regulated Market Committees and their Sub-Divisional Offices in terms of the West Bengal Agricultural Produce Marketing (Regulation) Act, 1972 (henceforth, "APM Regulation Act"). These Market Committees levy and collect a cess/fees on purchasers of agricultural produce which includes the said goods, i.e., Betel Nuts and issue money receipts. In the instant case, the seized consignment of the said goods had been purchased on payment of such cess under the APM Regulation Act.

(c) Falakata and Dhupguri markets are one of the biggest markets for Betel Nuts and have often been cited as such in newspapers as well as in several judgments and orders.

(d) Though alleged in the said impugned order that "most" witness statements recorded during the subject investigation, acknowledged that the said goods had been smuggled into the country from Myanmar, such assertion is factually incorrect. Out of the 36 statements recorded, only 9 statements all dated March 2, 2016, being that of the occupants of the trucks carrying the said goods which were seized, contained an identically worded observation that during loading of the said goods, they realised each in their purported independent capacity that the said goods had been smuggled into India from Indonesia through Myanmar. The drivers of the trucks who gave such statements however, within a day of them being taken into custody by the DRI, retracted their statements before the Chief Judicial Magistrate, Siliguri on March 3, 2016. Such fact of retraction has been omitted entirely from the discussion and findings contained in the impugned order, although the Appellant during the personal hearing and in its written submissions dated October 5, 2016 had brought such fact of retraction of statements by the drivers of the seized trucks to the attention of the Commissioner.

(ii) *Unreliable witness statements*

(a) The said statements dated 2.3.2016 of the 9 occupants of the trucks are also unreliable and do not appear to have been voluntarily tendered as alleged in the said impugned order. The purported statements, all dated 2.3.2016, of the said 9 occupants of the seized trucks, are almost identical. A substantial portion of the words used as well as the sentences incorporated, and the overall layout, format and length, as well as the purported observations in the said statements are almost verbatim reproductions of each other. For instance, an identically worded sentence about the said goods being purportedly smuggled, appears in exactly the second paragraph in all 9 statements of the said 9 occupants of the seized trucks carrying the said goods. Apart from such observation, there are numerous other portions of the said witness statements of the said 9 occupants that are identically constructed and/or worded. It is coincidental that allegedly independent and voluntary statements given by 9 different individuals, who all claim to be not very literate, all bear so many similarities. Since none of the said 9 occupants knew how to write properly, and required the concerned DRI officer to type their narrations, it is likely that the independence, uniqueness and veracity of the statements have been compromised by the process of such transcription. It is also not verifiable from the records if the statements were provided by the said 9 occupants in each other's presence, in which case, there would be a serious risk of contamination of witness memory.

(b) Besides further anomalies and contradictions detailed in the course of hearing, in any event no reliance can be placed on the said statements in view of denial of the Appellant's request for cross-examining them and the 2 Panchas/Panchnama witnesses. In the said impugned order, the Commissioner purport to justify such denial on the following basis:

> "So far as to the demand of Md. Tashin Shah for seeking cross-examination of drivers of seized carrier trucks is concerned, I observe that occupants of the said carrier trucks had described the true facts in course of their statements dated 02/10.03.2016 and on so recorded under Section 108 of the Customs Act, 1962, also affirmed by Md. Tashin Shah in his statements and it is a material piece of evidences collected by the DRI officers in course of investigation.
>
> Hence, I find that the cross-examination of drivers would not serve any purpose. [sic]"

(c) The said impugned order is silent as to why the said 2 Panchas were not allowed to be cross-examined. In the third paragraph of all the 9 statements tendered, the said occupants have stated that specimen samples of the said goods had been drawn by the DRI. However, the Panchnama and the Seizure List dated 2.3.2016 do not mention any sample of betel nuts being taken in apparent contradiction of the said statements dated 2.3.2016 of the occupants of the seized trucks. Reliance was placed on decision of the Tribunal in *Continental Warehousing Corpn. (NhavaSeva) Ltd. V CC, Tuticorin, 2018 (8) G.S.T.L. 300 (Tri. - Chennai)*.

(d) Since the said 9 occupants of the said seized trucks were all made parties to the instant dispute and subject to penalties under Section 112(a) or 112(b) of the Act, they are co-noticees/co-accused of the appellants herein. Given the patent absence of any corroborative evidence that would establish the foreign origin of the said goods, and the patent unreliability of the said statements of the said occupants of the seized trucks, the Commissioner has, by denying the cross examination of such witnesses, passed the said impugned order in disregard of established legal principles, and has sought to admit and rely on irrelevant, otiose, inconsistent and wholly unreliable statements of such witnesses for passing the said impugned order.

(iii) *Burden of proof on Department not discharged*.

(a) The said goods are not notified goods under Section 123 of the Act. Therefore the burden of proving the foreign origin of the said goods lies heavily on the Department, which it has failed to discharge. Reliance in this regard was placed on the decision of the Tribunal in Laxmi Narayan Sharma v. CC, Patna, 2002 (142) ELT 74 (Tri-Kolkata) and the decision of the Hon'ble Calcutta High Court in Commissioner of Customs (Preventive), WB, Calcutta v. DungarmalMohata, 2006 (200) ELT 522 (Cal.).

(iv) *Goods having indeterminate source cannot lead to a presumption of smuggling*

(a) It is not disputed in the said impugned order that the said goods were loaded onto the seized trucks in North Bengal, well inside the international border with Myanmar. It is also not disputed that the said goods were being transported to locations inside the country, particularly in Delhi, Gujarat and Maharashtra. In such circumstances even presuming though denying that the ownership of the said goods, their procurement source and destination for onward supply were unverifiable and the covering documents for the said goods were fictitious, there can still be no presumption of the said goods being of a foreign origin. There must be evidence of the said goods having a foreign origin in order for the provisions of the Act to have any application thereto, and the respondent authorities to have any jurisdiction over the said goods or make the stated demands impugned herein. Reliance was placed on *Smt. Laltanpuii* v. *CC*, *2020 (12) TMI 377 - CESTAT KOLKATA*.

(v) *Therefore conditions of Section 111(b) of the Act cannot be said to have been satisfied.*

(vi) *Conditions for imposing penalties under Section 112(a) and 112(b) also not satisfied.*

(a) In view of Section 111 of the Act not being invocable for the reasons aforesaid, there can also be no basis for imposing penalties on the appellants abovenamed under Section 112 (a)/(b) of the Act, the conditions precedent thereto, not being fulfilled in the present case.

(b) Without prejudice to the aforesaid, even otherwise, there is no explanation as to how the penalties were quantified or how any discretion in its imposition was exercised by the Commissioner. Such omission renders the said impugned order arbitrary, and non-speaking.

(vii) It is therefore prayed that all the five appeals be allowed and the impugned order, in so far as it is against them, be set aside, with consequential relief.

10. Shri A.K. Singh, learned Authorized Representative, appearing for the Department reiterated the findings of the Commissioner in the impugned order and further submitted as under:

(a) Pursuant to the investigation and seizure of the said goods on March 2, 2016 by the Directorate of Revenue Intelligence (DRI), Kolkata Zonal Unit, and by relying on their discoveries as set out in the Show Cause Notice bearing DRI F. No. 06/CL/IMP/DRI/SLG/2015-16/361 dated August 26, 2016, it is correctly found by the learned Commissioner in the impugned order that the said goods had been smuggled into India from Indonesia via Myanmar through the Indo-Myanmar border at Manipur and brought to Falakata and Dhupguri for onward transportation of the same to various parts of the country.

(b) The occupants of the 4 trucks carrying the said goods at the time of their seizure, being the drivers and their helpers, admitted to the smuggled nature of the said goods and having witnessed at the time of loading the said goods on to the trucks, the transfer of the said goods from packages bearing foreign marks to those without.

(c) The said goods had no verifiable ownership, source of procurement, and no verifiable destination and that the records produced by the Appellants in this regard were found to be fictitious and not genuine.

11. We have heard the parties through video conferencing and have carefully perused the appeal records.

12. Section 2(39) of the Act defines “smuggling” in relation to goods to mean “any act or omission which will render such goods liable to confiscation under Section 111 or Section 113”.

13. Section 111 of the Act, as sought to be invoked by the said impugned order provides that “The following goods brought from a place outside India shall be liable to confiscation: ... (b) any goods imported by land or inland water through any route other than a route specified in a notification issued under clause (c) of section 7 for the import of such goods.”

14. Hence, for any smuggling to occur, the goods in question must enter India from a place outside India. The foreign origin of the said goods is thus imperative in order for Sections 111(b) and Section 2(39) to be.

15. It is an undisputed fact that betel nuts are not goods notified under Section 123 of the Customs Act. Hence, no adverse presumption against the appellants could be made about the said goods being smuggled or being of a foreign origin. The burden of proving the foreign origin of the said goods lies heavily on the Department.

15.1 In the case of *Commissioner of Customs (Prev.), WB, Kolkata Vs. Sudhir Saha, 2004 (172) ELT 26 (Cal)*, the Division Bench of the Calcutta High Court while holding that betel nuts not being a notified goods under Section 123 of the Customs Act, 1962, further held that the burden to prove the smuggled nature of the said goods was on the Department and the same could not be shifted to person from whom such goods were seized. In para 5 of the judgment it was held as under:

> “*5. In the present case, admittedly, betel nuts seized is not a notified goods under Section 123. Therefore, Section 123 cannot be attracted to the goods seized in the present case on account of its being non-notified. Section 123 applies only in respect of goods, which are smuggled goods and smuggled goods means something suggesting their foreign origin and their recent importation from abroad, as was held in Shanti Lal Mehta Vs. Union of India, 1983 (14) ELT 1715. In the present case, goods are of*

> *foreign origin, which is an admitted fact. Though allegedly the owner had admitted the goods to be smuggled but ultimately he retracted his statement, therefore, in such circumstances, the burden of proof lies on the department as was held in Santosh Gupta Vs. Union of India, 1990 (48) ELT 210 = 1991 (33) ECR 380*."

The facts of the instant case are also similar. Herein also the alleged confessional statements were retracted at the earliest opportunity by the concerned persons. Consequently, the burden of proof to establish smuggled nature of the seized goods was on the Department which it has completely failed to discharge. From the impugned order we find that the conclusion arrived at as regards the foreign origin of the said goods and the smuggled nature by the adjudicating authority is based on surmises and conjectures. The goods were seized far away from the international border in the interior of North Bengal from trucks/warehouses. It is an undisputed fact that betel nuts are sold in the adjoining State of Assam, Monipur as well as the said North District of West Bengal and their adjacent area. In such circumstances, in the absence of any evidence to the contrary disclosed it has to be concluded that the Revenue has been unable to establish the smuggled nature of the seized goods and thus discharged the burden of proof cast upon the Revenue in this respect. In this respect reliance is placed upon the decision of this Bench of the Tribunal in the case of *Kukil Das Vs. Commissioner of Customs*, *2004 (177) ELT 345 (T)*. In this respect reliance is also placed upon the decision of the Principal Bench of the Tribunal at New Delhi in the case of *MaqsoodAlam Vs. Commissioner of Customs, 2015 (324) ELT 162 (T)*.

15.2 In the case of *Smt. Laltanpuii Vs. Commissioner of Customs (Prev.), 2020 (12) TMI 377 –CESTAT KOLKATA*, in para 10 of the order, this Bench of the Tribunal has observed and held as under:

"10. The issue for consideration in the instant case is to see whether Revenue has established the allegation that the seized betel nuts are of foreign origin and are smuggled. Ongoing through the records of the case, it is seen that Revenue bases its case on the certificate issued by Arecanut Research and Development Foundation (ARDF), Mangalore and the fact that the owners could not establish the Indian origin of the arecanut. Regarding the allegation against Smt. Laltanpuii, it is averred in the OIO that although she submitted a number of purported purchase vouchers, she could not tell the detailed address or contact numbers of the sellers; purchaser issued the vouchers and not the sellers; the signatures of sellers appear to be forged; Smt. Laltanpuii has given contradictory statements and retracted them; Shri Shashi Chowdhury, who is alleged to have been involved in this case as a consignee, was a habitual offender and was involved in smuggling of arecanut seized in earlier cases; the drivers stated that after proceeding some distance on Guwahati Kolkata Road they were asked to come back to Guwahati. We find that the evidence collected by investigation could establish a reasonable doubt as to the origin of arecanut. But the same is not enough to prove the smuggled nature of the arecanut. We find that investigation was only in the direction to conclude that there was no proof for indigenous and licit procurement of betel nut seized and that the claim of the appellants cannot be verified in some cases. We find that the betel nut is not notified under Section 123 of the Customs Act, 1962 and therefore, the burden of proof lies with the department to prove the same. It's not just enough to prove by negative inference. Allegation requires to be proved by cogent and positive evidence. We find that no

such positive evidence has been put forth by the department. There is not even a reference or narration as to how and wherefrom the impugned goods are smuggled. We find that the Tribunal in the case of Dharmendra Kumar Jha 2016 (344) ELT 264 (Tri-Kol) held that betel nut is not a notified commodity under Section 123 of the Customs Act, Act 1962 and the onus is on the department that seized goods were in fact smuggled into India. We find that the department has not discharged its burden."

15.3 In the case of *Laxmi Narayan Sharma* Vs. *Commissioner of Customs, 2002 (142) ELT 74 (T)* it has been held by this Bench of the Tribunal as under:

"*12. We find that the betel nut is a non-notified item under the provisions of Section 123 of the Customs Act, 1962. As such, the onus to show that the goods are of foreign origin and have been smuggled into the country lies heavily upon the Revenue. The adjudicating authority has referred to certain circumstantial evidences which are also in the nature of doubts being expressed by him. The Tribunal in a number of cases assailed that the opinion of the local traders is not sufficient to hold the goods to be of foreign origin. The Spices Board and Central Plantation Crops Research Institute who are approached for ascertaining the country of origin of the betel nuts, have also shown their inability to find out the same. In these circumstances, we agree with the learned Consultant's contention that the Revenue has failed to prove the foreign origin of the nuts at the first instance. We further note that the circumstantial evidences referred to by the adjudicating authority also does not prove beyond doubt that the goods were smuggled into the country, though the same may raise certain doubts about the smuggling character of the same, However, they cannot be given the place of evidence, especially when the goods are non-notified and the*

> *Revenue is duty-bound to produce sufficient positive and tangible evidence to reflect upon the smuggled character of the betel nuts. Accordingly, taking all these factors into account, we find no justification for confiscation of the betel nuts and the truck involved and for imposition of personal penalties upon the appellants. Their appeals are allowed with consequential reliefs to them*."

In this respect reliance may also be made to the decision of the Calcutta High Court in the case of *Commissioner of Customs (Preventive), WB, Calcutta Vs. Dungarmal Mohata, 2006 (200) ELT 522 (Cal)* wherein the Division Bench of the Hon'ble Calcutta High Court observed as under:

> "*28. ....The revenue in the present case failed to establish the smuggled character of the goods and failed to establish that the betel nuts were of foreign origin. The Tribunal rightly came to the decision that statement of trade opinion of local traders cannot prove foreign origin of the goods and in number of cases it was held that in cases involving betel nuts trade opinion cannot be equated with opinion of expert. We have earlier expressed our finding that in the instant matter the trade opinion cannot be relied upon as the four persons whose statements were recorded were not available for cross-examination before the Commissioner of Customs (Preventive), West Bengal. The learned Tribunal rightly held that the revenue has not been able to discharge the burden placed on them*."

16. In the instant case we find that documents on record show that the said goods were purchased from the local markets and/or haat and/or mandi located in Jalpaiguri district of West Bengal; the sale/purchase of agricultural produce, such as Betel Nuts, are regulated by the respective District Regulated Market Committees and their sub-Divisional Offices in terms of the West Bengal Agricultural

Produce Marketing (Regulation) Act, 1972. These Market Committees levy and collect a cess/fees on purchasers of agricultural produce, including Betel Nuts. There are designated checkposts near the Falakata and Dhupguri markets in West Bengal where the fee/cess paid on the said goods is verified by State authorities. In the instant case from copies of the receipts on record evidencing the market fee paid by the appellant it is evident that the seized consignments of the said goods had been purchased on payment of such cess under the APM Regulation Act.

16.1 Further, it is seen that the said goods when seized were contained in bags with no foreign markings on them. The place of seizure was also within the country, at the Ghoshpukur Toll Plaza near Siliguri in the North of West Bengal. During the course of the investigation undertaken by the DRI, no other incriminatory material was obtained, either from the raids conducted or in course of interrogating witnesses, that would indicate that the said goods were sourced from outside India. No specimen packet/bag with any foreign markings, or any import document or any invoice or other record that would establish that the said goods had a foreign origin, was recovered from the appellants or any other party.

16.2 It is not disputed in the said impugned order that the said goods were loaded onto the seized trucks in North Bengal, well inside the international border with Myanmar. It is also not disputed that the said goods were being transported to locations inside the country, particularly in Delhi, Gujarat and Maharashtra.

16.3 In the impugned order the Commissioner observes that “there may be a possibility that the subject Betel Nuts too are of foreign origin and were smuggled to India”. This finding is based entirely on a presumption for which there is no legal or factual basis disclosed.

16.4 There can be presumption of the said goods being of a foreign origin. There must be evidence of the said goods having a foreign origin in order for the provisions of the Act to have any application thereto.

16.5 The genuineness of substantial market receipts issued from Dhupguri and Falakata markets have also not been disputed. By the statements dated 15.3.2016 and 19.3.2016, the Alipurduar Collector has confirmed the 2 specimen market fee receipts to have been issued by him.

16.6 It is also widely acknowledged that Betel Nuts are indigenously grown and consumed, and there is no restriction or prohibition in their cultivation, sale, purchase or consumption in the country. Transactions that have been undertaken entirely within the domestic tariff area cannot attract the provisions of the Act and the rules thereunder.

16.7 Further in the instant case no testing of the seized goods through any accredited agency was caused for determining any constituent property or characteristic that would indicate or establish foreign origin of the said goods.

16.8 The only evidence on the basis of which the proceedings were initiated and the impugned order has been passed are the 9 (nine) statements, all dated 02.03.2016, of the occupants of the trucks carrying the seized goods, who are also co-noticees and the statement dated 15.03.2016 of the appellant, Md. Tashin Shah. However, from the record of the court proceedings of the Court of the learned Chief Judicial Magistrate, Siliguri, it is seen that all the said persons, who were arrested and produced before the said Court, had retracted their statements before the Chief Judicial Magistrate, Siliguri on March 03, 2016, i.e., within a day itself. Similarly, it is on record that Md. Tashin Shah had also retracted on 16.03.2016 his statement dated 15.03.2016 before the learned Additional Chief Judicial Magistrate, Siliguri, before whom he was produced after arrest. In the case of *Directorate of Revenue Intelligence Vs. Mahendera Kumar Singhal, 2016 (333) ELT 250 (Del)*, the Hon'ble Delhi High Court dealing with the similar case as in the instant case where the confessional statements made before the DRI authorities were retracted at the earliest opportunity when produced before the Magistrate after arrest the Revenue's plea that the retraction was not valid and legal was held to be not acceptable. The Hon'ble High Court, *inter alia*, relying upon the decision of the Hon'ble Supreme Court in *Vinod Solanki Vs. Union of India, 2009 (233) ELT 157 (SC)*, observed as follows:

> "*12. In Vinod Solanki V. Union of India (supra), the Supreme Court explained that where the confessional statement made by accused was retracted, the Court has to be conscious about the manner in which retraction has been made and other relevant factors. It was observed that a retracted confession could be used as a corroborative piece of evidence but cannot form the sole basis for returning a finding of guilt. In Union of India Vs. Bal Mukund (supra), in the context of confessional statement under Section 67 of the NDPS Act, the Supreme Court noticed that there can be conviction only if there is an independent corroboration of the retracted statement. In Noor Aga Vs. State of Punjab (supra), the said position was reiterated. The Court held that where the confessional statement was retracted, the burden shifted on the prosecution to prove that it was made voluntarily. It was pointed out that the confessional statement made by the accused while in custody was weak in nature.*"

There being no such independent corroboration in the instant case, the Revenue has failed to discharge its onus and hence the said retracted statements cannot be relied upon.

16.9 In the instant case we also find that there is no discussion on the retraction of statements made on oath by the Appellants. Moreover in the present case the witnesses who implicated the Appellant were not produced for cross-examination, inspite of specific request made on behalf of the Appellant. The learned Commissioner rejected the request for cross-examination on the ground that since the occupants of the carrier trucks had allegedly described the true facts in course of their statements dated March 2/10, 2016 made under Section 108 of the Customs Act, which were affirmed by the Appellant, Tashin Shah in his statement, the same were material piece of evidences collected by the DRI Officers in course of investigation and hence the cross-examination of the drivers could not serve any purpose. Such finding of the learned Commissioner is contrary to settled principles. In the case of *Andaman Timber Industries Vs. Commissioner of C.Ex., Kolkata, [2015 (324) ELT 641 (SC)]*, dealing with a similar case where a case of undervaluation of excisable goods was decided only on the basis of statement of two witness, the Hon'ble Supreme Court held as follows:

> "*6. According to us, not allowing the assessee to cross-examine the witnesses by the Adjudicating Authority though the statements of those witnesses were made the basis of the impugned order is a serious flaw which makes the order nullity inasmuch as it amounted to violation of principles of natural justice because of which the assessee was adversely affected. It is to be borne in mind that the order of the Commissioner was based upon the statements given by the aforesaid two witnesses. Even when the assessee disputed the correctness of the statements and wanted to cross-examine, the Adjudicating Authority did not grant this opportunity to the assessee. It would be pertinent to note that in the impugned order passed by the Adjudicating Authority he has specifically mentioned that such an opportunity was sought by the assessee. However, no such opportunity was granted and the aforesaid plea is not even dealt with by the Adjudicating Authority. As far as the Tribunal is concerned, we find that rejection of this plea is totally untenable. The Tribunal has simply stated*

> *that cross-examination of the said dealers could not have brought out any material which would not be in possession of the appellant themselves to explain as to why their ex-factory prices remain static. It was not for the Tribunal to have guess work as to for what purposes the appellant wanted to cross-examine those dealers and what extraction the appellant wanted from them*."

This decision of Hon'ble Supreme Court is fully applicable to the facts of the instant case.

16.10 In view of the factual analysis above and respectfully following the principles laid down in the aforesaid decisions of the Hon'ble Supreme Court, High Court and the Tribunal and applying the principles laid down therein, we are of the view that the Department has failed to establish that the said goods are smuggled goods.

17. Once the conclusion that the said goods are smuggled goods is held to be unsustainable, confiscation of the said goods under Section 111(b) of the Customs Act and imposition of penalties upon the Appellants are also unsustainable.

18. We find that the Appellant, Md. Tashin Shah, in Customs Appeal No.75662 of 2017, has claimed ownership of the seized goods and has prayed for direction that the said goods be returned to him. The claim of the said Appellant is based on the documents of sale and purchase of the said goods through his sole proprietorship concerns, money receipts issued by the District Regulated Market Committee at Falakata and Dhupguri and consignment notes issued to the transporters. There is no objection from any other Appellant or person disputing such claim of ownership on the part of Md. Tashin Shah. We find that the documents produced by the said Appellant are in his favour. Therefore Md. Tashin Shah is to be regarded as owner of the said goods. The

said goods are thus required to be returned to the said Appellant, Md. Tashin Shah.

19. In the premises, the impugned order is set aside and all the Appeals are allowed, with consequential relief to the Appellants. Cross Objections, filed by the Respondent Department, also get disposed of.

(Order pronounced in the open court on 20 December 2021.)

Sd/
(P.K. CHOUDHARY)
MEMBER (JUDICIAL)

Sd/

(RAJU)
MEMBER (TECHNICAL)

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