IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
WEST ZONAL BENCH AT MUMBAI

APPEAL NO: C/168/2012

[Arising out of Order-in-Original No: COMMR/TKG/ADJN/30/2008-09 dated 31st March 2009 passed by the Commissioner of Customs, Airport, Mumbai.]

Mahinder Pal Singh … ***Appellant***

versus

Commissioner of Customs ()
Airport, Mumbai ***…Respondent***

Appearance:

Shri GB Yadav, Advocate for appellant

Shri R Kumar, Assistant Commissioner (AR) for respondent

CORAM:

Hon'ble Shri C J Mathew, Member (Technical)
Hon'ble Shri Ajay Sharma, Member (Judicial)

Date of hearing: 24/08/2018
Date of decision: 06/09/2018

ORDER NO: A/87271 / 2018

Per: C J Mathew

Shri Mahinder Pal Singh, who has been imposed with a penalty of ₹ 30,00,000/- under section 112(a) of Customs Act, 1962 is in appeal against order-in-original no. COMMR/TKG/ADJN/30/2008-09 dated 31st March 2009 of Commissioner of Customs, Chatrapati Shivaji International Airport, Mumbai on the ground that the goods intercepted at the time of arrival of passengers did not have anything to do with him. Briefly stated, as narrated by Learned Counsel for appellant, one Shri Mohamed Sohail Abdul Rehman, arriving from Hong Kong by Air India flight no. AI-311 on the night of 8th March 2007, had connived with two passengers, Mr. Jitendra Sharma and Mr. Neeraj Jain, travelling on the domestic leg from Delhi to Mumbai to transpose baggage labels and thus evade detection of 'mobile memory cards and adaptors' upon landing at Mumbai. Consequent upon interception and on the basis of investigation, proceedings were initiated against the passengers and also against the appellant.

2. It is the submission of Learned Counsel that appellant was brought under scanner of the investigation only on the basis of a statement of Jitendra Sharma on 7th August 2007 which, though retracted three days later, did not deter commencement of investigation against the appellant.

3. According to him, retracted statements are precluded from validating action against a noticee unless corroborated by other evidence. Furthermore, he questioned the sanctity of a letter from Saz International Tours and Travels, purportedly implicating the appellant when it was not a statement as envisaged in section 108 of Customs

Act, 1962.

4. According to Learned Counsel, the manner in which the appellant had been implicated sowed doubt about the conclusion as the initial response of the only passenger who had elaborated upon the instigation by two other persons, and whom the investigators were unable to proceed, had not implicated the appellant. It is, therefore, contended by him that the statement of Jitendra Sharma, who had initially denied the existence of any instigators and, moreover, had later confessed to being at odds with the appellant and had attempted to falsely implicate, is not admissible evidence. It is further submitted that neither the statements of the appellant or of any other person is inculpatory.

5. Learned Authorised Representative, *per contra*, drew attention to the voluntary statement of Jitendra Sharma 7^{th} August 2007 and, more particularly, to the invoices which refer to appellant as well as the letter issued by the travel agent highlighting his role in providing wherewithal to the passengers.

6. Having considered the rival submissions, we take note that the appellant was neither a passenger nor was he present at the time of interception of the ‘memory cards and adaptors’. He, however, operates a business in trading of similar items and had some business relationship with one of the domestic passenger. We also take note

that, admittedly, the statement of Jitendra Sharma was entirely retracted and that a plausible explanation to exact revenge by implicating the appellant has also been suggested.

7. Even if the statements are exculpatory and the retracted statement is discounted, the corroborative evidence in the form of the letter dated 20th August 2007 from the travel agent cannot be discounted. It is clearly mentioned therein that the appellant is a regular customer who used to book tickets on phone and used to send Mohamed Sohail to collect the tickets. Surprisingly, in the statement of appellant, he did admit to purchasing of tickets for his own travels but claimed inability to recollect the identity of messenger deployed for making payment and for collecting the tickets. The contention of Learned Counsel that reliance cannot be placed on the letter of 20th August 2007 as it could not be categorized as a statement recorded under section 108 of Customs Act, 1962 is not acceptable as the said provision empowers the designated official to call for records and documents or to record statement. Consequently, the two are not envisaged as complementary events but are, well and fully, mutually exclusive.

8. Reliance placed by him on the decision of the Hon’ble High Court of Bombay in *State v. Yakub Ahmed [2000 (125) ELT 113 (Bom.)]* does not advance the case of appellant as that decision was

rendered in the context of the competence of the officer exercising powers under section 108 of Customs Act, 1962 which is not in dispute here. Likewise, the decision of the Tribunal in *Coolwesl Automobile Engineers v. Commissioner of Central Excise, New Deli [2007 (207) ELT 615 (Tri.Del.)]* is not applicable as it deals with the format in which a relied upon statement has been drawn up. On the other hand, in the present investigation, the travel agent was issued with a letter for production of documents in exercise of powers under section 108 of Customs Act, 1962 by a gazetted officer. Consequently, the covering letter does not fail the test of reliability for the purposes of section 108 of Customs Act, 1962. In the light of retracted statements, this corroborates the involvement of appellant in facilitating the travels as ascertainable from the invoices which are not controverted. The scope of material that could build up evidence to link an individual with an alleged offence has been appreciated by the Hon'ble Supreme Court in *Naresh J Sukhawani v. Union of India [1996 (83) ELT 258 (SC)]* while holding that

> *'3. The Joint Secretary to the Government, the revisional authority, has held that the evidence and the statement given by Mr. Dudani incriminates the petitioner. This was established with reference to the photographs and other intrinsic material. On that basis, he concluded that Mr. Dudani incriminated himself and the appellant in passing off foreign currency out of India, i.e., to Hong Kong. It was accordingly held that the contravention was established. It is contended that the statement of co-accused could be used*

> *only to corroborate other evidence as one of the circumstances under Section 30 of the Evidence Act. But it cannot be used as substantive evidence without corroboration from other independent evidence. Except the statement of Dudani, there is no other independent evidence. Mr. Dudani's evidence cannot be pressed into service to arrive at the conclusion that the petitioner is involved in the passing off foreign currency out of India.*
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> *4. It must be remembered that the statement made before the Customs officials is not a statement recorded under Section 161 of the Criminal Procedure Code, 1973. Therefore it is a material piece of evidence collected by Customs officials under Section 108 of the Customs Act. That material incriminates the petitioner inculpating him in the contravention of the provisions of the Customs Act. The material can certainly be used to connect the petitioner in the contravention inasmuch as Mr. Dudani's statement clearly inculpates not only himself but also the petitioner. It can, therefore, be used as substantive evidence connecting the petitioner with the contravention by exporting foreign currency out of India. Therefore we do not think that there is any illegality in the order of confiscation of foreign currency and imposition of penalty. There is no ground warranting reduction of fine.'*

9. We, therefore, do not find any flaw in the finding of the original authority that a conclusion can be derived from the contents of a statement, retracted though, in conjunction with material evidence of purchase of the tickets that were utilized by others whose complicity in the smuggling has not been controverted. The implicating of the appellant as the main stem of this operation would appear to us to

have been established on the basis of this corroborative evidence.

10. Accordingly, we do not find any merit in the appeal which we dismiss.

(Pronounced in Court on 06/09/2018)

(Ajay Sharma)
Member (Judicial)

(C J Mathew)
Member (Technical)

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