Govind Sharma Vs. Commissioner of Customs

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Court : Customs Excise and Service Tax Appellate Tribunal CESTAT Mumbai

Decided On : Nov-06-2006

Reported in : (2007)(213)ELT585Tri(Mum.)bai

Judge : K Kumar, A Wadhwa, A T K.K.

Appellant : Govind Sharma

Respondent : Commissioner of Customs

Judgement :

2. Appeal No. C/425/06 along with Stay Petition has been filed by Shri Bhagwan Sippy. The ld. Counsel for this appellant submitted that Shri Bhagwan Sippy is an employee of CHA. The appeal filed by this appellant is for setting aside penalty amount Rs. 3 lacs imposed by the Commissioner.

3. Similarly Appeal No. C/431/2006 alongwith Stay Petition has been filed by Shri Mukesh Bhanushali against imposition of penalty of Rs. 3 lacs on him by Commissioner under Section 114 of the Customs Act, 1962.

The appeal filed by this appellant is for setting aside penalty amount of Rs. 3 lacs imposed by the Commissioner.

4. Appeal No. C-429/06 alongwith Stay Petition has been filed by Shri Jayesh Gala against the imposition of penalty of Rs. 10 lacs under Section 114 of the Customs Act, 1962.

5. Appeal No. 430/06 alongwith Stay Petition has been filed by Shri Govind Sharma against the imposition of penalty of Rs. 10 lacs under Section 114 of the Customs Act, 1962.

6. As regards the appeal of Shri Bhagwan Sippy, it is seen from the finding portion of the Commissioner's Order that he has denied in his written submission dated 31-10-05 the allegation made against him in the Show Cause Notice. The contention is that it is incorrectly mentioned in the Show Cause Notice that he was the partner of M/s.

Bharat Overseas Communicators, instead he was only an employee of the said CHA Firm, that statement of Shri A.M. Pakhre Suptd. of Customs was recorded by DRI on 31-5-2005 under Section 108 and he stated that "Yes, sample of electrodes was shown to me by Mr. Yogesh Kumar, as it being engineering product, I presumed the declared value to be correct and I relied upon the report given by Mr. Yogesh Kumar. This is conclusive proof that no facts were hidden, concealed of suppressed in any manner by the Appellant from the proper officer of Customs in respect to the genuineness of the exports goods with regards to description, quality and value before the granting the "Let Export Order", that he has not done Customs clearance worked by himself. The Customs clearance of the goods in question was done by Shri Shantaram L. Chaudhary, an employee of the CHA.7. As regards the handing over of the 3 blank letter heads it was done on account of exigencies of urgency, specially in view of the outstandings of port Nhavasheva in order to avoid delay. These letter heads were used for obtaining office permission for manual processing of the shipping bills. Official permission has been granted by Joint Commissioner of Customs, as it was a genuine case and permission was granted for manual processing for these shipping bills. The goods declared were as per the description only for alleged variation in quality and value of the goods. The goods cannot be liable to confiscation under Section 113(b) of the Customs Act, 1962 since they were neither dutiable nor prohibited goods even otherwise goods are also not under confiscation under Section 113(i), they were taken to Customs area under the cover of shipping bills, duly processed and were also examined, consequently no penalty is imposable on the appellant under Section 114 of the Customs Act, 1962 that the CHA-11/658 had obtained a proper authorization letter from the exporter M/s Payal Exim with the photo copy of I.E. quote number and these documents were submitted before the Customs authority, it has been proved that the exporter documents were genuine, consignments were declared genuine in terms of description, quality and value. It is clearly proved that there were no facts hidden, concealed or suppressed by appellants as employee of his CHA Firm. There was no mala fide intention on the part of the appellants as an individual or as an employee of the CHA Firm.

That being the position, ld. Counsel for the appellants submitted that the penalty imposed may be set aside. The Commissioner in his findings has interalia recorded that there was no correlation between the goods stuffed in container and related shipping bills, certainly do not bear any identification marks to correlate them with respective shipping bills for Electrodes bearing 3 different brand names were found, whereas shipping bills did not mention any brand names, the qualities and sizes found did not tally etc.

8. Shri Mukesh Bhanushali: The ld. Counsel for this appellant submitted that Shri Mukesh Bhanushali, is assistant of Shri Jayesh Gala. Ld.

Counsel further submits that the Commissioner has passed ex parte order against the appellant, despite the request for adjournment made by him.

Therefore, the proceedings against Shri Mukesh Bhanushali are in clear violation of principles of natural justice and are liable to be set aside. He has also submitted that the goods are neither prohibited nor dutiable.

9. The Commissioner in his findings against Shri Mukesh Bhanushali recorded that he has failed to submit his written reply. He has also not appeared for personal-hearing except that Commissioner has recorded that Shri Mukesh Bhanushali failed to rebut the allegations made against him in the show cause notice. No other findings has been recorded against him.

10. Shri Jayesh Gala : So far as Shri Jayesh Gala is concerned, ld.Counsel for the appellant inter alia submitted that there is no corroborative evidence against the appellant. No material on record to show that the appellant was involved in aiding

and abetting the offence. Ld. Counsel submitted that the impugned order against this appellant has been passed ex parte despite the adjournment request being made by the appellant. The request was made to keep the proceedings in abeyance, as applications for compounding were pending before the Chief Commissioner, that the goods in question are neither dutiable nor prohibited, appellant has retracted his statement, statement of Shri Yogesh Kumar Preventive Officer was recorded on 7-2-2004 and it has categorically deposed as under: He had examined cargo in the 20 shipping bills of M/s. Payal Exim and the report thereon was written by him.

The goods were found as declared in the Shipping Bills - gate latches. No Samples were drawn and the Invoice attached to the Shipping Bills was seen for the purpose of valuation.

(a) He was satisfied with the declared value and moreover his Superintendent in-charge accepted the declared value.

He was satisfied with the declared value as per his experience, knowledge and judgment.

He had followed the examination order and during 10% examination of goods he had not found any discrepancy and other material in the containers.

That after going through the statement of Shri Gala he submitted that he did not know Shri Gala and that amount of Rs. 4,00,000/- was never given to him.

That the statement of Shri Gala might have been given under pressure or duress.

(c) The Shipping Bills, examined by Shri Yogesh Kumar were countersigned by Shri A.M. Pakhre, Superintendent of Customs and 'Let Export' order was granted by the said Superintendent.

(d) From the statement of Shri S.P. Punjabi, assistant Commissioner, it could be seen that the declared value had been assessed as fair.

It is submitted that when the consignments were approved for exports by the Departmental Officers after due examination it cannot be alleged that there was any attempt to perpetuate any fraud or to overvalue any consignment attributed to the Appellant.

The Commissioner in his findings against the appellant has recorded that the appellant has failed to file his written submissions and also failed to appear for personal hearing and has held that he played the role in attempted export to fraud.

11. Shri Govind Sharma : Ld. Counsel appearing on behalf of the appellant inter alia submitted that the ld. Commissioner has passed ex parte order against the appellant though a request for adjournment was made. Therefore, the impugned order has been passed in gross violation of the principles of natural justice and as such impugned order is liable to set aside on this ground alone, that ld. Commissioner should have appreciated that the seized goods are neither prohibited nor dutiable, that this appellant was working with the CHA and has not rendered any goods liable for confiscation, that the statement was obtained by coercive measures, the statement was retracted on 23-4-2004 before the Hon'ble Chief Metropolitan Magistrate; Ld. Commissioner has grossly erred in relying upon the statement of this appellant that over valuation per se can't result in the availment of DEPB as export value has to be realized first for the incentive to be available; in the present case the investigation has disclosed no under hand dealing or any under transaction and no investigation in fact has been carried out with the foreign buyer, the allegations against the appellant were misconceived and unwarranted and the order imposing the penalty is not sustainable and this has to be set aside inter alia on the following grounds: (a) The consignments were examined by the Custom Officers and Let Export' orders were also issued for the said consignments, (b) The statement of Shri Yogesh Kumar, Preventive Officer, was recorded on 7-6-2004 and he had specifically deposed that: He had examined the cargo under the 20 shipping Bills of M/s. Payal Exim and the report thereon was written by him.

The goods were found as declared in the Shipping Bills - gate latches. No Samples were drawn and the Invoice attached to the Shipping Bills was seen for the purpose of valuation.

He was satisfied with the declared value and moreover his Superintendent in-charge accepted the declared value.

He was satisfied with the declared value as per his experience, knowledge and judgement.

He had followed the examination order and during 10% examination of goods he had not found any discrepancy and other material in the containers.

That after going through the statement of Shri Gala he submitted that he did not know Shri Gala and that amount of Rs. 4,00,000/- was never given to him.

That the statement of Shri Gala might have been given under pressure or duress.

(c) The Shipping Bills, examined by Shri Yogesh Kumar were countersigned by Shri A.M. Pakhre, Superintendent of Customs and 'Let Export' order was granted by the said Superintendent.

(d) From the statement of Shri S.P. Punjabi, Assistant Commissioner, it could be seen that the declared value had been assessed as fair.

It is submitted that when the consignments were approved for exports by the Departmental Officers after due examination it cannot be alleged that there was any attempt to perpetuate any fraud or to overvalue any consignment attributed to the Appellant.

12. The Commissioner in his findings has recorded that this appellant has failed to file written submissions and did not appear on the date of personal hearing, it is clear that he has failed to rebut any of the allegation levelled against him as such held him liable for penal action under Section 114 of the Customs Act 1962.

13. After hearing, perusal of the records, we find that the Commissioner has nowhere given his findings with regard to the goods being prohibited or dutiable. The appeal of Shri Yogesh Kumar, who was also a co-accused in the above proceedings and on whom a penalty of Rs. 3 lacs was imposed by the Commissioner has been allowed and the penalty set aside as per order No. A408-409-WZB/06/CSTB dated 3-4-06 [2006 (201) E.L.T. 66 (Tribunal)] along with other

appeals in paras 7 & 8 Tribunal has recorded as under: I/We find that the entire case rests upon the retracted statement of Shri Jayesh Gala, who has claimed to be the agent of the exporters and his statement has not stood the test of cross examination as the Commissioner has rejected the appellants request to cross examine him. We further note that the inspection report of the appellant, on the shipping bill has been countersigned by the Superintendent of Customs Shri Pakhare, that the order to verify the fair declared value of electrodes was earned out by verification with the local purchase invoice of electrodes, that samples of electrodes were shown to the Superintendent who presumed that the declared value was correct and also relied upon the report of the appellant. It is also an admitted position that it is not a job of the examiner to arrive at the correct valuation of the goods and therefore even though he had been directed to verify the declared fair value of the electrodes and he had done so with reference to their local purchase price, he cannot be held liable if the valuation is found to be in correct. As regards his failure to detect that the electrodes were of three brands, this is not relevant for the reason that the goods were found to be Steel Welding Electrodes as declared and therefore there was no mis-declaration of the goods. In the case of gate latches the appellant verified the value with reference to the invoices attached to the shipping bills, during 10% examination of the goods which was directed to be earned out by him, he did not notice, any discrepancy and the finding that he failed to detect that the goods were of three brands is again not relevant in the face of the fact that the goods were found to be gate latches as declared. As regards the finding that he failed to detect mis-declaration of quantity, has stand that there was no mis-declaration of quantity in respect of the percentage of goods examined by him has not been rebutted by the Revenue. In this case also Shri Pakhare the Customs Superintendent has countersigned examination report of the appellant, after being satisfied with the report.

8. In the above circumstances, we agree with the appellants that the material on record is not sufficient to uphold the charge of siding and abetting so as to visit the appellant with penal consequences.

We, therefore, set aside the penalties imposed upon him under both orders, and allow the appeals.

14. Therefore, keeping in view of above, we dispense with the predeposit and take up the appeals themselves for disposal at the stay stage itself. Looking to the totality of the case we find that the penalties imposed are harsh and on higher side.

We therefore, consider it reasonable to reduce the penalty amount as under: 15. I have perused the above order proposed by my learned brother Member (Judicial). I am of the view that since the matter was listed for hearing of stay application only and the orders were received for passing orders on stay application only, no final orders can be passed without putting revenue to notice who did not get the full opportunity of presenting its case on merits and matter was argued briefly for forming a prima facie view in the matter. In view of this I refrain from passing a final order and instead proposing an order under Section 129E regarding pre-deposit of penalty.

16. For better appreciation it would be necessary to briefly narrate the facts of the case. The present matter is regarding overvaluation of export when on a specific intelligence received by DRI the containers which were examined by the customs for exports were intercepted and re-examination was carried out. On re-examination it was found that the goods did not correspond to those mentioned in the export invoices either in quantity or quality or value. The examination report at page 3 and 4 of the order-in-original brings out glaring inconsistencies in as much as against 60000 pieces declared, pieces found were 132480, against 102240, 106920 and 81000 pieces no quantity whatsoever was found. Similarly for another category against 291600 pieces only 54270 were found which clearly established that the goods did not correspond with the invoices and the declaration made in the shipping bill regarding quantity. The goods were found to be of three brands which were never mentioned in the shipping bill or in the examination report.

Enquiries from the supplier of the goods from whom it was procured revealed that as against procurement price of Rs. 25 Lakhs the value declared was Rs. 12.68 Crores. The goods were found to be of very inferior quality as per the opinion of the persons dealing in the electrodes. The goods were allegedly exported by M/s Payal Exim, a proprietary concern having Shri Govind Sharma as its proprietor.

Shri Govind Sharma in his statement has named the person from whom goods were procured by payment in cash and admitted that the firm's address given by him did not belong to him but was of another firm M/s Hema Exports. He also knew one Shri Ashok Bhai staying in Dubai under whose guidance the goods were exported and that even though steel electrodes do not have a market in Dubai goods were shipped to Dubai at the say of Shri Ashok Bhai who used to send the remittances and the difference in declared F.O.B. value shown in the export invoices and the actual value was returned back to Shri Ashok Bhai in cash through one. Shri Pawan Kumar, as suggested by Shri Ashok Bhai, that after receipt of the export remittances Shri Ashok Bhai used to contact him on phone and ask him to hand over money in cash to Shri Pawan Kumar. He further admitted that since welding electrodes attracted higher DEPB @ 17%, he thought of exporting welding electrodes by overvaluing them. He also stated that cash payment of Rs. 4 Lakhs was made to Shri Jayesh Gala who has taken the task of clearing the goods through custom officer by bribing them. The goods were transported to ICD through trucks and enquiries with the RTO revealed that the addresses of the truck owners were fake and the owners were not staying in those premises. The fact of overvaluation of goods was in the knowledge of Shri Jayesh Gala who in his statement recorded on various dates admitted that Shri Govind Sharma has informed him about the overvaluation of the goods and that he has bribed Custom officers to get the necessary clearances. The mobile number of Shri Ashok Bhai of Dubai and the Angadia through whom the payment of Rs. 6 Lakhs was made were also given but the address, mobile number of Angadia was found to be fake. Shri Jayesh Gala undertook the clearance of the goods though he was not a CHA nor its employee but was working in the name of M/s Bharat Overseas Communicators and Shri Bhagwan Sippy, Chief Executive of Bharat Overseas CHA No. 11/658 allowed his licence to be used by Shri Jayesh Gala on payment of certain amount in respect of the shipping bills handled by Shri Jayesh Gala. Shri Mukesh Bhanushali was the other associate of Shri Jayesh Gala who was accompanying Shri Jayesh Gala during the custom clearance work and was in the knowledge of the fraudulent export undertaken through Shri Jayesh Gala. In view of all these facts, show cause notice was issued to M/s. Payal Exim, Shri Govind Sharma, Shri Jayesh Gala, Shri Bhagwan Sippy, Shri Bhanushali and Shri

Yogesh Kumar (Preventive Officer) proposing reduction of FOB value from Rs. 12,68,47,247/- to Rs. 30,83,736/- denying DEPB benefits and proposing confiscation of goods and imposition of penalties. The charge against Shri Yogesh Kumar (Preventive Officer) was that he colluded Shri Jayesh Gala in overvaluing the goods by not properly examining the goods. The show cause notice was confirmed by the Commissioner who reduced the FOB value as suggested and ordered confiscation of goods with option to redeem the same on a fine of Rs. 15 Lakhs and imposed a penalty of Rs. 10 Lakhs each on Shri Govind Sharma and Shri Jayesh Gala and Rs. 3 Lakhs each on Shri Yogesh Kumar and Shri Mukesh Bhanushali. Appeal filed by Shri Yogesh Kumar has already been decided by the Tribunal and the penalty imposed on him has been set aside. The other notices namely Shri Govind Sharma, Shri Bhagwan Sippy, Shri Jayesh Gala, Shri Mukesh Bhanushali are in appeal before us.

17. The learned Counsel for Shri Govind Sharma submitted that the learned Commissioner has passed ex parte order against the appellant though request for adjournment was made and this has resulted in the denial of principle of natural justice. It was further submitted that the seized goods are neither prohibited nor dutiable and the goods were therefore not liable for confiscation. The appellant was working with the CHA and his statement was retracted before the Hon'ble Chief Metropolitan Magistrate and therefore cannot be relied upon. The goods were examined by the custom officers, who has accepted the declared value and the value was also accepted by the Superintendent-in-charge.

He has not found any discrepancy in the goods and has stated that he did not know Shri Jayesh Gala at all and was never paid Rs. 4 Lakhs as alleged by Shri Jayesh Gala and in view of the same no penalty can be imposed on him. Great emphasis was laid on acquittal of Shri Yogesh Kumar who was also a co-accused in the above proceedings and on whom a penalty of Rs. 3 Lakhs was imposed pleading that once no allegation survive against Shri Yogesh Kumar, the same cannot be held against Shri Govind Sharma.

18. Similar pleas were made in respect of Shri Jayesh Gala as the order against him was ex-parte and the statement made by him were retracted and the co-

accused Shri Yogesh Kumar has already been acquitted.

19. The learned Counsel for Shri Bhagwan Sippy stated that Shri Sippy was not a partner but employee of CHA and once the goods were examined and found as per the declaration by the custom officer, the CHA cannot be held guilty of the same. Blank letter head has been signed by him in order to meet in emergency situation and a proper declaration was obtained from the exporter, M/s Payal Exim with a photo copy of IE Code number. No facts were hidden and therefore no penalty can be imposed.

20. As regards Shri Mukesh Bhanushali, it was submitted that ex parte order has been passed against him and the Commissioner has simply confirmed the allegation in the show cause notice without giving any finding.

21. The learned D.R. on the other hand submits that all the notices except Shri Yogesh Kumar and at a later stage Shri Bhagwan Sippy has been avoiding a series of summons issued to them and were absconding.

The statements were initially retracted but retraction was later on rebutted and they have affirmed the facts in their subsequent statements. Shri Jayesh Gala, Shri Govind Sharma and Shri Mukesh Bhanushali have not responded to the show cause notice at all nor attended the personal hearing on the ground that they have applied for compounding of offence to the Chief Commissioner. It was submitted that compounding is only in respect of prosecution and not for imposition of fine and penalty and the fact that they have approached for compounding establish that they confessed the offence committed by them.

22. I find that there is enough evidence with the revenue to show that Shri Jayesh Gala and Shri Govind Sharma have knowingly indulged in over valuation of export goods with intent to get undue DEPB benefits and acquitted of Shri Yogesh Kumar does not help them in any manner in as much as Shri Yogesh Kumar has been acquitted on the ground that as a examiner it is not his job to arrive at correct valuation of the goods and therefore even though he was directed to verify the declared value of the electrodes, he had done so with reference to their local purchase price and he cannot be held liable if the valuation is found to be

incorrect. As regards his failure to defect that the electrodes were of three brands it has been held that since the goods were in any case steel welding electrodes charge of mis-declaration cannot be established. Further Shri Yogesh Kumar in his reply has submitted that out of 20 shipping bills he was required to examine the fair value only in respect of one shipping bill and that the examination order did not required him to check the brands. As regards mis-declaration of quantity, he has stated that there was no declaration in the quantity inspected by him which was only 10%. This in no way holds that there was no over valuation of the goods or mis-declaration of the quantity and quality or that there was no submission of wrong invoices by the exporter working through Shri Govind Sharma and Shri Jayesh Gala. The examination report brings out vast difference in the quantity which has not been disputed nor is opinion of the experts regarding inferior quality of the goods has been disputed. Over valuation is supported by the deposition of Shri Shekhar Bhai through a letter sent by him which under no circumstances can be said to be under coercion or duress stating that he has been paid Rs. 25 Lakhs in cash and has given per piece value according to size etc. The statements of Shri Jayesh Gala & Shri Govind Sharma have been retracted but later on reaffirmed and such reaffirmation was informed to Chief Technical Magistrate and therefore retraction looses all significance. Reference to Shri Ashok Bhai, Pawan Bhai, Shekhar Bhai with their mobile number cannot be tutored statement. For confiscation the goods have to correspond in value and description and in case of mis-declaration, goods are liable to confiscated under Section 113(i) after the amendment. Thus there is strong prima facie evidence against Shri Govind Sharma and Shri Jayesh Gala. As regards Shri Bhagwan Sippy it appears that by allowing Shri Jayesh Gala to work on his licence without knowing the exporter himself, he has abetted in the fraudulent export and so is the case with Shri Mukesh Bhanushali who associated in clearance business of Shri Jayesh Gala. The merits of this evidence can be examined at the time of final hearing but no prima facie case has been made out for complete waiver. I therefore order Shri Jayesh Gala and Shri Govind Sharma to deposit a sum of Rs. 4 Lakhs each towards penalty and Shri Bhagwan Sippy and Shri Mukesh Bhanushali Rs. 50,000/- each within 8 weeks from the date of the receipt of the order and on such compliance there shall be waiver from pre-deposit of the balance amount of penalties.

Since there is a difference of opinion between Member (Technical) and the learned Member (Judicial), the following points of difference of opinion may be put up to the Hon'ble President for referring the matter to the 3rd Member for resolving the issue.

(1) Whether in the facts of the case where the matter has been heard only for stay a final order can be passed without putting revenue on notice that the matters is being finally decided.

(2) Whether order of Member (Technical) proposing pre-deposit of penalties on the four appellants is to be preferred over the order of Member (Judicial) dispensing with the pre-deposit of entire penalty or vice versa.

23. The difference of opinion referred to me as a 3rd Member is limited to the issue as to whether the appeals can itself be disposed off without putting the revenue on notice, when the matter was listed and heard on stay petitions. It is seen that the matter was heard on 13-7-2006 in respect of the stay petitions filed by the applicants and orders reserved. Subsequently, Ld. Member (Judicial), vide the present order, disposed off the appeals itself by reducing the quantum of penalties imposed upon the applicants and without insisting on any pre-deposit. Ld. Member (Technical) has observed that inasmuch as the matter was listed for passing orders on stay petitions, and revenue did not get opportunity to present their case on merits, and it was not appropriate to dispose off the appeals. He accordingly directed the applicants to deposit part amount as a condition of hearing of their appeal.

24. After hearing both sides, I agree with the Ld. Member (Technical).

When the matters were originally listed for stay, arguments were advanced by both sides on stay petitions only and the decisions reserved, disposal of the appeals itself without putting the revenue on notice was not appropriate. No doubt appeals can be disposed off at the time of hearing of the stay petitions itself but, in my views, it is necessary to put both the parties on notice as regards the disposal of the appeals. When the matter was only heard on stay petition and orders reserved, disposal of the appeals subsequently would prejudice the case of the revenue. As such I agree with the order passed by the Ld. Member (Technical). He (sic)(The) files may be sent to the original Bench for recording of final order.

In view of above we order pre-deposit of Rs. 4 Lakhs each towards penalty' by Shri Jayesh Gala and Shri Govind Sharma and Rs. 50,000/- by Shri Mukesh Bhansali within 8 weeks from the date of receipt of the order and on such compliance there shall be waiver of pre-deposit of the balance amount of penalties. Failure to comply shall result in dismissal of appeal without further notice. Compliance to be reported on 2-3-2007.