

2014 (3) ECS (241) (Tri - Mum)

In The Customs Excise & Service Tax Appellate Tribunal
West Zonal Bench, Mumbai

MR. NIRMAL KUMAR RATHI

Vs

C.C. (IMPORT), MUMBAI

Date of Hearing: 27/05/2014

Date of Decision: 06/06/2014

C1COD/93983/14, C/Stay 93600, 93984, 93596, 93597, 93598 & 93599/14-
Mum

In Appeal No. C/86026, 85738, 86026, 85734, 85735, 85736 & 85737/14-
Mum

(Arising out of Order-in-Original No.137/2013/CAC/CC (I)/AB/Gr.II
B dtd. 29.11.2013 passed by the Commissioner of Customs (Import),
Mumbai)

Appearance:

Shri V.S.Nankani, Advocate

For the Appellant

Shri P.M.Saleem, Commr.(A.R.)

For the Respondent

CORAM:

Hon'ble Mr. Ashok Jindal, Member (Judicial)

Hon'ble Mr. P.K.Jain, Member (Technical)

Order No. S/506-511/14/CSTB/C-I

M/1000/14/CSTB/C-I

"Examination of the e-mail indicated that the goods imported are being under-declared and customs duty is paid on the declared value. The amount corresponding to the declared value was being paid to the supplier through normal banking channels. The additional amount being the differential between the actual transaction value and the declared value was being sent to the supplier through various means including through hawala or through telegraphic transfers from various places like Singapore etc. "(Para 3)

Per: P.K.Jain:

The applicant shri Nirmal Kumar Rathi has filed application for condonation of delay in filing the supplementary appeal. In view of the fact the main appeal was filed within time and it is on the objection raised by the Registry. the supplementary appeal has been filed, the delay is condoned.

- 2 The brief facts of the case are that M/s. S.S .Sales Corporation and M/s. Laminate Distributors (India) are partnership firms of different members of Rathi family. S.G.Sales Corporation's main office is based in Jaipur and they have other offices in Mumbai and Hyderabad. The imports are being made through Mumbai and Nhava Seva by the Mumbai Office. Laminate Distributors (India) is based in Kolkata and the imports made by the said firm are cleared through Kolkata Port. Further, the said firm is not importing the goods on its own but are being imported by S.G.Sales Corporation and are being sold to them on high seas sale basis.
3. The two firms are in the business of importing Medium Density Fibre Board with veneer Face. This item is being imported from M/s. Metro Panel Company Ltd., Thailand. In addition, they are also importing Soft Board, Hard Board and Hard Board (cut size) from other suppliers. Based upon a specific information that the said firms are under declaring the value as also the quantity of the goods being imported, investigations were conducted which included searches of their offices in Hyderabad, Mumbai and Jaipur. In brief, during the search, two Hard Disks and one Laptop were seized from Mumbai Office and one Hard Disk was seized from Jaipur Office. In addition, other documents relating to imports were also seized. The three Hard Disks and the Laptop were sent to the Government Examiner of Questioned Document, Directorate of Forensic Science, Hyderabad. The said agency retrieved the data from the said Hard Disks/ Laptop. The data was mainly e-mails approximately 400 in number spread over years and with different suppliers. These e-mails were relating to pricing, shipment details, asking for differential amounts. Examination of the e-mail indicated that the goods imported are being under-declared and customs duty is paid on the declared value. The amount corresponding to the declared value was being paid to the supplier through normal banking channels. The additional amount being the differential between the actual transaction value and the declared value was being sent to the supplier through various means including through hawala or through telegraphic transfers from various places like Singapore etc.
4. Searches at the Mumbai Office were conducted in the presence of Shri Rakesh Rathi, the partner and the main person with deals with the supplier and Importation of the goods. M/s. S.G.Sales Corporation vide letter dated 17.04.07 stated that panchanama proceedings on 28.3.2007 were

not proper etc. This letter was written after 20 days of the actual panchanama proceedings. The fact that the Hard Disks/Laptop were recovered during search proceedings is not under dispute. Further the report received from the government Examiner of Questioned Documents is pertaining to; two Hard Disks/Laptop. The details about these Hard Disks/Laptop recorded at the time of seizure and the report received from the said Government Examiner also tallies. The e-mails retrieved was shown to Shri Gopal Rathi who after going through the e-mails stated that all the above pages are e-mails in connection with their firms day to day activities and these e-mails are addressed to M/s. S.G. Sales and also to Shri Rakesh Rathi. Shri Gopal Rathi also explained various details in the e-mails. On asking specific questions, Shri Gopal Rathi stated that he does not want to comment on that. His statement further admitted that the declared amount was sent to the supplier through regular banking channels and he further stated that he does not wish to state anything about the prices of Medium Density Board with Veneer Face indicated in the e-mails. Statement of Shri Nirmal Kumar Rathi, son of Shri Gopal Rathi was also recorded wherein he stated that the work of import in Mumbai was done by Shri Rakesh Rathi who is in a better position to explain. The statement of Shri Rakesh Rathi was also recorded on 26.11.2007 wherein after going through the panchanama dated 28.3.2007 stated that the said panchanama was drawn in his presence and confirms the detail of Hard Disk/Laptop mentioned in the report of Government Examiner of Questioned Document. Shri Rakesh Rathi did not question the panchanama proceedings dated 28.3.2007 (which were questioned vide letter dated 17.4.2007). Shri Rakesh Rathi also explained the contents of the e-mails and from where it has been received. He also explained after going through pages 160 to 407 of the Annexure to the Government Examiner of Questioned Documents Report that the said e-mails addressed to metro@ksc.th.com from his e-mail id ramrakswa@hotmail.com in connection with the purchase of Medium Density Board with Veneer Face from M/s. Metro Panel Co. Ltd. Shri Rakesh Rathi also explained that 'sample' means amounts sent by T/T (Telegraphic Transfer) for purchase of goods. Shri Rakesh Rathi also admitted that the declared amount is sent by regular banking channels. On specifically asking to explain as to why there is a difference between the prices in respect of the goods imported and declared to the customs and the prices mentioned in e-mails for the same products

Shri Rakesh did not state anything about the same and stated that the said e-mails are self explanatory. S/Shri Gopal Rathi, Rakesh Rathi & Nirmal Kumar Rathi vide their common affidavit dated 29.11.2007 addressed to the Joint Director, DRI, Hyderabad retracted the statements even through these were in Jaipur as per their request and not in Hyderabad or Mumbai Jt. Director, DRI after going through the said affidavit informed that the retraction given by the above individuals are not based on facts and that the deposition made by them are supported by the corroborative evidences available on record. They were also asked to appear before the Jt. Director, DRI, Hyderabad alongwith evidences in support of their claim. However, none of the persons appeared. Large number of statements including those of customers, CHA, shipping agents were recorded and based upon the investigations, demand notices were issued which were adjudicated by the Commissioner, wherein he has confirmed demands and also imposed penalties under various sections.

5. Shri Nankani, Ld. Advocate appeared on behalf of the applicants and his main thrust in the arguments was that panchas were not produced for cross-examination. In fact the cross-examination was allowed and one day the panchas did come though late. and when they came the Commissioner had to go for solve meeting. Later on, the applicant advocate was not available. On another date fixed by the Commissioner, the said panchas did not appear. Another contention of the Ld. Advocate was that they had asked for cross-examination of the Asstt. Government Examiner who had prepared the said report. However, the same was not allowed by the Commissioner in spite of the fact that in the report itself it is indicated that Shri M. Krishna, Asstt. Government Examiner will be available- for giving the evidences. The Ld. Advocate's main contention was that Hard Disks and Laptop when seized were not signed by Shri Rakesh Rathi. Further, it is not known why the investigating officer took about a month time to send the said instruments to the Directorate of Forensic Science Hyderabad. Ld. advocate further stated that there is no reason why the Directorate of Forensic Science took 5 months to submit the report. These all indicate that the report is not reliable. Contention of the Ld. Advocate was that e-mail idramrakswb@hotmail.com did not bear his e-mail address and most of the e-mails are on the same id and therefore the information available in the e-mails is not relevant for deciding the issue. The Ld. advocate's main contention was

that the matter must be remanded to the Commissioner to permit cross-examination of Asstt. Government Examiner as also the panchas to bring out the truth. The Id. advocate also submitted number of case laws to prove that it is absolutely necessary that the principles of natural justice are followed while adjudicating the case.

6. Ld. Commissioner (A.R.) on the other hand opposed the stay petitions. Ld. Commissioner (AR) argued that it is not in dispute that the hard disks/ Laptop were recovered from their Mumbai Office and Jaipur Office. It is also not in dispute that the responsible person Shri Rakesh Rathi was present in Mumbai office and panchanama was drawn in his presence including the recovery of the said instruments. Panchanama clearly indicates that the hard disks were placed in a green coloured envelope and sealed with paper slips containing pancha's signature. The hard disk number and other details of the Laptop were recorded in the panchanama and the same were forwarded to the Government Examiner of Questioned Documents. The report clearly indicates the same numbers. Further, the e-mails retrieved runs into almost 400 pages over a period of time and not on a particular day. The e-mails mainly addressed to the id ramrakswa@hotmail.com which belongs to applicants as has been admitted by Shri Rakesh Rathi in his statement dated 21.11.2007. Ld. Commissioner (A.R) has also stated that in almost all the e-mails it is clearly written that e-mails are meant for Shri Rakesh Rathi. Ld. Commissioner (A.R.) also stated that even the details regarding the visit of Shri Rakesh Rathi to Bangkok was found in the e-mail which tallied with the passport which was later submitted by Shri Rakesh Rathi. Ld. Commissioner (A.R) further; argued that in a large number of cases, e-mails are at time when certain consignments were dispatched/received in India, the detail given in the e-mails tally with the details found in various documents i.e. container numbers are same, quantities of the goods etc. In such a situation, it is incorrect to doubt the authenticity regarding the recovery of e-mails and the

applicants having found no answer to their misdeeds are trying to take shelter in the name of violation of principles of natural justice. In fact, it is not even shelter but misuse of such principles. He further stated that the Commissioner's order does not speak anything about pressing of cross-examination of the panchas and Asstt. Government Examiner. In fact, the letter from the Directorate

of Forensic Science itself indicates that he could be called for giving the evidences. The Id. Commissioner (A.R) argued that applicant did not press for the cross-examination for Asstt. Govt. Examiner during the personal hearing, even though they might have written for the same in the reply or subsequent replies. As far as the cross-examination of panch witnesses, the Id. Commissioner (A.R.) argued that panchanama was drawn in the presence of Shri Rakesh Rathi his signed on the panchanama. Even the letter relating to panchanama was written after 20 days. Moreover, during his subsequent statement, Shri Rathi has confirmed the contents of the panchanama and the fact that the said panchanama was drawn in his presence. Under the circumstances, even the exercise of calling the punch witnesses is of no consequence and is only a delaying tactics for the adjudication process. In the search normal import documents and Hard Disk/Laptop were recovered. It is not the case that these do not belong to them. Ld. Commissioner (AR) stated that at this stage they cannot disown all the e-mails which have been received over a period of years and are found tallying with the details of imports, price etc. which would not be known to any one else. Under the circumstances, since the declared value is not the actual transaction value and the actual transaction value was as per the show-cause notice, the differential duty confirmed is correct and the applicants may be asked to deposit the entire amount of duty alongwith interest and penalties.

7. We have considered the submissions. We have also gone through the show case notice as also the adjudication order and statements given by Shri Gopal Rathi, Shri Rakesh Rathi and Shri Nirmal Kumar Rathi on 26/28.11.2007 as also panchanam drawn on 28.3.2007. We have also gone through the e-mails which have been retrieved by the Directorate of Forensic Science, Hyderabad and forwarded it. We find that panchanama was drawn on 28.3.2007 in the presence of Shri, Rakesh Rathi who has also signed it. The panchanama only list the documents taken over by the officers and recovery of hard disks/laptop. For 20 days, there was no difficulty with this panchanama but on 17.4.2007, applicants wrote letter to DRI. Even Mire they have not questioned the recovery of documents or Hard Disks/Laptop. We also note that the e-mails are at the address ramrakswa@hotmail.com. In many of the e-mails the name of Shri Rakesh Rathi is mentioned in the address part of it. However, when we go through the

contents of the e-mails we find that in almost all the e-mails the names of Gopal Rathi/Rakesh. Rathi is mentioned in the content part. The details of the e-mails have not only been confirmed by Rakesh Rathi but explained also including the e-mails address of different suppliers. We also note that in his statement dated 28. 1.2007 Shri Rakesh Rathi has admitted that the said e-mails address is theirs and we have no hesitation in assuming that the said e-mail address and e-mails are pertaining to the applicants and applicants alone. There is no explanation what-so-ever from the applicant twhy the e-mails of someone else if it all, should be available In their Hard Disks/Laptop. In any case, the details in e-mails precisely correspond with the imports made, quantity, value etc. e-mails indicate date time and are over a period of years. The e-mails clearly indicate that the declared prices in the documents were not the real transaction value. Shri Rakes Rathi was asked to explain such details and he did not state anything about this aspect but stated that the said e-mails are self-explanatory. It is to be noted that Shri Rakesh Rathi as also Shri Gopal Rathi explained the contents of all the e-mails is numbering about 400, so recovered. Even if one was to tamper the information, nobody can provide such details and therefore contents cannot be even tampered. Under the circumstances, we do not find prima facie case for the applicants. The fact that cross-examination of panch witnesses asalso the Asstt.Government Examiner could not take place, prima facie in the facts and circumstancesof present case is not a case of violation of principles of natural justice. We also note that during the statements Shri Rakesh Rathi as well as Shri Gopai Rathi have confirmed the contents of panchanama. In fact the panchanama was drawn and was signed by Shri Rakesh Rathi. The only objection that is being raised is that the envelope containing the Hard Disks/ Laptop was not got signed by him though signed by panchas. Another objection raised by the applicants advocate is that there is no reason as to why the department took much time to send to the hard disks/laptop to the Directorate of Forensic Science, Hyderabad for report. We note that these instruments were recovered from Mumbai and Jaipur office and the whole investigation was being co-ordinated at the DRI, Hyderabad. Obviously, after the recovery of the said instruments' these have to be first sent to DRI Hyderabad. We find that the total gap is 22 days which is considered as normal and this cannot be considered as abnormal delay. In fact, applicant has taken 20 days to write a lever about

panchanama. Ld. Advocate's another contention was that by Directorate of Forensic Science has taken by 5 months to sent the report. Ld. advocate also argued that as per his information, the whole process of recovery would not take more than few minutes. We are not impressed with the said argument. Every organization has number of jobs to be done at any point of time and has their own priority list and they attend to the work as per the said priority/number. We do not know whether the whole exercise can be done in a matter of few minutes as claimed but the time taken by the Directorate of Forensic Science by itself cannot be used to question their report. In this Tribunal we are hearing the cases of 2004 and in many cases it takes only 15 -20 minutes to decide. It cannot be said that there is no reason why the Tribunal should take .10 years to decide the matter which will just take 15-20 minutes. The integrity of this Tribunal cannot be questioned on such argument. Similarly, integrity of the Directorate of Forensic Science cannot be questioned on the basis of few months taken by them. We note that while recording the statements, Shri Rakesh Rathi or Shri Gopal Rathi has not questioned the contents of the e-mail, in fact that explained each and every e-mail and it is only when questioning about the payment of differen ial amount that they did not explain and just stated that the matter is Jelf-explanatory. We also find from the impugned order that larger number of Bills of Entry have been co-related with the e-mails including the container number and this adds to the authenticity and Correctness of the retrieved data. We note that even the details of the visit of Shri Rakesh Rathi found in the e-mail tallies with the details in the passport which was submitted by Shri Rathi much after getting the report from the Directorate of Forensic Science. We also note that vide letter dated 29.11.2007 applicants filed retracting their statements which were recorded in Jaipur, as per their request. The letter did not elaborate what is wrong in the statements. Moreover when Jt. Director, DRI asked them to present themselves for recording they chose not to present themselves.

8. We have also gone through the large number of case laws submitted by the Ld. advocate. In the peculiar facts and circumstances of the present case wherein panchanama was drawn in the presence of Shri Rakesh Rathi one of the applicants who has signed the panchanama, the fact that Hard Disks/laptop recovered in his presence, the detail

of the same are tailing with that of given in the report of Government Examiner of Questioned Documents and the details retrieved by the Government Examiner of Questioned Documents running into 400 e-mails over a period of years and the explanation of these e-mails by the applicants, in our view, the case laws submitted are not applicable. We do not consider it necessary to discuss each one of these in the present stay petitions.

9. Under the circumstances, we are of the view that the applicants have not able to make out a prima facie case for waiver of duty. However, keeping in view the facts and circumstances of the case, the applicants (M/s.S.G.Sales Corporation & M/s. Laminate Distributor (India) are directed to deposit 50% of the duty demanded within a period of eight weeks. On deposit of the same, pre-deposit of the remaining amount of duty, penalty in respect of S.G.Sales Corporation and Laminate Distributors (India) is waived. As far as the penalty on Shri Rakesh Rathi, Shri Nirmal Kumar Rathi and Gopal Rathi is concerned, we find that they have actively participated in the evasion of the customs duty. However, keeping in view the facts and circumstances of the case, we direct them to deposit 20% of the penalties imposed on them within eight weeks from the receipt of this order. On deposit of the same pre-deposit of the remaining amount of penalties imposed on each of them is waived and recovery thereof is stayed during the pendency of the appeals. Compliance is to be reported on 13/08/2014.
10. Stay petitions re disposed of in the above terms.
(Pronounced in court on 6/6/2014)