

2014 (4) ECS (250) (Tri. - Ahd.)

In the Customs Excise & Service Tax Appellate Tribunal,
West Zonal Bench, Ahmedabad

SHRI DEVKUMAR KAPTA

V/s.

CC., KANDLA

Date of Hearing: 15/7/2014

Date of Decision: 21/8/2014

Customs Appeal No. C/1337/2005

(Arising out of OIO No.KDL/Commr/41/2005 dtd 31.3.2005 passed by
The Commissioner (A), Customs, Kandla.)

Appearance:

1. Shri Paritosh Gupta (Adv.)

2. Shri P M Dave (Adv.)

For the Appellant

Shri Alok Srivastava (AR)

For the Respondent

CORAM:

Mr. M.V. Ravindran, Hon'ble Member (Judicial)

Mr. H.K. Thakur, Hon'ble Member (Technical)

(Order No. A/11505/2014 dtd 21/8/2014)

“Shri Dev Kumar Kapta has played a very active role in the clearance and diversion of goods and has worked as an authorised signatory of the importer and not as a salaried employee of the CHA. Appellant was well aware of the facts that imported goods cleared under the bills of entry were meant for free distribution among the earthquake victims of Gujarat at the time of import. it is evident that he was aware of the duty free clearances in the name of charitable trust and knowingly the names of M/s Radhe Yarn and M/s Radhe Textiles of Mumbai were typed by him after applying white ink and thereafter xerox copies of fabricated bills of entry were sent with the truck for the transportation out of Gujarat. That appellant has also admitted that he was authorised by Shri Vipulgar Gusai, President of Shivam Development Trust, Bhuj, for clearance and attending other work on behalf of the said Trust.” (para 6)

“Appellant has not merely acted as a paid employee of M/s Kandla Clearing Agency but as an active participant in the act of diverting imported goods meant for free distribution under exemption Notification No. 7/2001-cus.” (para 7.3)

Per: Mr. H.K.Thakur:

This appeal has been listed for hearing in view of order dated 10/7/2012 passed by the Gujarat High Court in the Tax Appeal No. 624 of 2010 filed by Commissioner of Customs against Shri Devkumar Kapta with respect to order No. A/1923-1927/ WZB/AHD/2009 passed by this Bench in Appeal No.C/1335 to 1337 and C/868 and 869 of 2005. Appeal filed by Shri Dev Kumar Kapta before CESTAT was numbered as E/1337/2005-DB.

1. The order was passed by the High Court on the following question of law:

“Whether in the facts and circumstances of the case, the Tribunal has committed substantial error in setting aside penalty of Rs 25 lacs under Section 112(b) of the Customs Act 1962 on the respondent.”

2. Hon’ble Gujarat High Court passed the following order :

“ Reasons are a soul of any judicial order and good and proper reasoning makes its body strong. That being lacking in the impugned order, we hereby remand the matter to the Customs, Excise and Service Appellate Tribunal, West Zonal Branch, Ahmedabad directing it to decide the matter afresh after giving notice to the parties and hearing them. The Tribunal is directed to pass reasoned order.

As per the above discussion, we hold that the Tribunal committed an error in passing the impugned order. The question formulated above is accordingly answered in affirmative.”

4. Tax Appeal No. 624/2010 was filed by the Revenue in the High Court against a common order dt 25/8/2009 passed by CESTAT, Ahmedabad where Shri Dev Kumar Kapta was one of the appellants. A penalty of Rs 25 lakh was imposed upon the present appellant by the Adjudicating authority under OIO No. KDL/COMMR/41/2005 dt 31.3.2005. Appellant was attending to the day-to-day clearance work of the CHA and was authorised by a Power of Attorney for clearance of goods of one Shri Nopaji Lakhamji Charitable Trust, Mumbai and has signed the Bills of Entry and other documents of the Trust in such capacity. Imported goods were cleared by the importer by availing the benefit of Notification No. 7/2001-Cus dt 27/1/2001, as amended, which exempts the imported goods from Customs Duty when intended for donation for the relief and rehabilitation of people affected by the earth quake in the state of Gujarat. An intelligence was gathered by the Directorate of Revenue Intelligence that importers M/s Nopaji Lakhanmaji Charitable Trust, Mumbai, and M/s Development Trust, Bhuj were involved in misusing the benefit available under Notification No. 7/2001-cus by diverting the imported goods for other purpose to places outside

Gujarat. A vehicle transporting the imported old and used woollen and synthetic readymade garments was seized by DRI on Delhi-Jaipur Highway. After detailed investigation a show cause notice dt 26/3/2002 was issued, inter-alia, to the appellant. Appellant did not file reply to the show cause notice and also did not offered the personal hearing but seem to have submitted written submission later that he was not involved in the case. Adjudicating authority, therefore, imposed a penalty of Rs 25 lakhs upon the appellant.

5. Shri P M Dave (Adv.) and Shri Paritosh Gupta (Adv.) appeared on behalf of the appellant. It was argued by the Learned Advocate Shi P M Dave that appellant is a paid employee of the CHA M/s Kandla clearing Agency and was drawing a salary of Rs 5000/- as correctly mentioned in CESTAT's order dtd 18/8/2009 while setting aside the penalty upon the appellant. It was his case that appellant has acted as an employee of the CHA under the instructions of his superiors and was not getting benefited in any manner by the diversion of the imported goods. That diversion of imported goods after importation was a post importation act for which no penalty can be imposed upon the appellant under Sec. 112(b) of the Customs Act 1962. That even if penalty is held to be imposable penalty of Rs 25 Lakh is highly excessive. Ld. Advocate relied upon the following case laws in support of his argument that an employee working upon the instruction of the employers can not be visited with a penalty:
 - i) Harish Maganbhai Patel - 2010(255) ELT.71 (Guj)
 - ii) Hitesh Kumar Patel - 2009(245) ELT.858 (Tri. Ahmd)
 - iii) R K Ispat Udyog - 2007 (211) ELT.460 (Tri. Del)
 - iv) Associated Plastics and Rayons - 2007(210) ELT 524 (Ti. Ahmd)
 - v) Welcome Drus & Pharmaceuticals Ltd - 2007(213) ELT.710(Tri. Del.)
 - vi) Vinod Kumat - 2006(199)ELT.705 (Tri. Del.)
 - vii) Z. U. Alvi - 2000 (177)ELT.69.9Tribunal)
6. Shri Alok Srivastava (AR) appearing on behalf of the Revenue argued that Shri Dev Kumar Kapta has played a very active role in the clearance and diversion of goods and has worked as an authorised signatory of the importer and not as a salaried employee of the CHA. He made the Bench go through the statements of Shri Suresh Kumar Bhatia, available in para 8 & 9 of the OIO dt 31/3/2005, to drive home the point that that appellant was well aware of the facts that imported goods cleared under the bills of entry were meant for free distribution among the earthquake victims of Gujarat at the time of import. That as per statements of Shri Dev Kumar Kapta, available

in Para No. 14 of the OIO also it is evident that he was aware of the duty free clearances in the name of charitable trust and knowingly the names of M/s Radhe Yarn and M/s Radhe Textiles of Mumbai were typed by him after applying white ink and thereafter xerox copies of fabricated bills of entry were sent with the truck for the transportation out of Gujarat. That appellant has also admitted that he was authorised by Shri Vipulgar Gusai, President of Shivam Development Trust, Bhuj, for clearance and attending other work on behalf of the said Trust. Learned AR thus defended the order of imposition of penalty upon the appellant.

7. Heard both sides and perused the case records. Hon'ble Gujarat High Court has remanded the case of imposition of penalty upon the appellant to this Bench for deciding the matter afresh by passing reasoned order. The question framed in Para 2 above was thus in the affirmation by the jurisdictional Gujarat High Court. The issue before us for disposal is whether penalty imposed upon the appellant under Sec. 112 of the Customs Act 1962 is justified or not.

7.1 Role played by the appellant Shri Dev Kumar Kapta is reflected in Para 8, 9 and 14 of the OIO dt 31/3/2005 passed by adjudicating authority and these Paragraphs are reproduced below :

- 8) Statement of Shri Suresh Kumar Bhatia were recorded on 3.10.2001, 11.10.2001 and 20.10.2001 in his statement dated 3.10.29001 he interalia stated that he is the representative of M/s Kandla Clearing Agency. Gandhidham: that in case of M/s Kandla Clearing Agency. Shri Dev Kumar Kapta informed him that they had received import documents of two trusts viz., M/s Nopaji Lakhmji Charitable Trust and M/s Shivam Development Trust from Motilal Saraf of M/s Radha Yarn P Ltd that for these trusts two bill of entry No. 8835 and 8836 both dated 25.9.2001 were filed for self clearance that Dev Kumar Kapta had signed as authorised signatory of the Trust; that he has knowledge that the goods cleared under the Bills of Entry were for free distribution among the earth quake victims of Gujarat that Shri Motilal Saraf had arranged for transportation and accordingly. Shri Prakash Poonia of New Standard Roadways approached him on 28.09.2001 evening for delivery of goods; that accordingly the goods were cleared on 29.9.2001 vide Gate Pass No. 6 and 7 dated 29.09.2001 of M/ Shivam Development Trust, Bhuj, and Gate Pass No. 39 and 40 dated 29.9.2001 of Shri Nopaji Lakhmji Charitable Trust of Mumbai that for the goods cleared vide Lorry Receipt No. 1830 to 1833 of New Standard Roadways Gandhidham the consignee was M/s Radha Yarn P Ltd, Panipat.

- 9) In his statement dated 11.10.2001 Shi Suresh Bhatia inter-alia stated that he is authorised executive of M/s Kandla Clearing agency and M/s Varsh Exports; that since they have stopped activities for clearance from M/s Kandla Clearing Agency. Shri Shantilal Jain directed him to get the clearance of the goods pertaining to charitable trust in self authorising Shri Dev Kumar Kapta as an authorised signatory of the charitable Trust namely Nopaji Lakhmaji Charitable Trust and Shivam Development Trust; that accordingly Shri Dev Kumar Kapta, cleared the goods in self capacity that he was fully aware that the goods imported in the name of Charitable Trusts were meant for free distribution among the Gujarat Earthquake victims; that however as per the directions of Shri Shantilal Jain and Shri Motilal Saraf, he was arranging the transportation to Panipat and other places by using the Bill of entry of Radha Yarn P Ltd., Panipat; that as per the direction of Shri Motilal Saraf he had directed Shri Prakash Poonia of M/s New Standard Road Ways to exchange the Builty for twelve consignment that after clearance of the goods, the builties were replaced with the new builties for GIDC Gandhidham; that Shri Shantilal Jain is one of the trustee of Napaji Lakhmaji Charitable Trust that he does not know the trustees of other three charitable trust.

14) Statements of Shri Dev Kumar Kapta was recorded on 3.10.2001 and 11.10.2001 in which he inter-alia stated that he is Working with M/s Kandla Clearing Agency and attending the day to day clearance work and other routine activities that their authorised signatory Shri Shantilal D Solanki expired and no other authorised signatory was in the company as such the work regarding clearance of the goods were supervised by him; that therefore the document are filed in self clearance that for the clearance of the goods pertaining to Shri Nopaji Lakhmaji Charitable trust he was authorised by Shri Shantilal Jain by Power of Attorney that accordingly he had signed all the papers alongwith Bs/E pertaining to Shri Nopajai Lakhmaji Charitable Trust that for other parties he was received the papers from Shri Suresh Bhatia; that after clearance from the customs, the transportation and further disposal of the goods were carried out under the supervision of Shi Suresh Bhatia and Shri Motilal Saraf. In his statement dated 11/10/2001, he inter-alia stated that as per the directions of Shri Suresh Bhatia he was attending to the work relating to duty free clearance in the name of Charitable Trust and after clearance he was handing over the copy of the Bs/E pertaining to M/s Radha Yarn and M/s Radha Textiles, that the address of M/s Radha Yarn and M/s Radha Textile is of Mumbai in the Bills

of Entry, however after putting the white ink, he was typing the address of Panipat and zerox copy of fabricates Vs/E were sent with the trucks that he had been authorised by Shri Vipulgar Narangar Gosai. President of Shivam Development Trust for clearness and for attending other work on behalf of the said Trust; that the said documents were received by him from Shri Suresh Bhatia.

- 7.2 It is observed from the above facts on record that appellant Shri Dev Kumar Kapa informed Shri Suresh Kumar Bhatia, representative of M/s Kandla Clearing Agency, that they had received import documents of two posts M/s Nopaji Lakhamji Charitable Trust and M/s Shivram Development Trust from Motilal Saraf of M/s Radha Yarn Pvt Ltd. Appellant signed as authorised signatory in the Bills of Entry No 8835 and 8836 both dt 25.9.2000, for self clearance. It is also evident from the statement of Shri S K Bhatia that appellant was having the knowledge that the goods cleared under the said Bills of entry were for free distribution among the earthquake victims of Gujarat. As per the statement dt 11.10.2001 of Shri S K Bhatia activities of M/s Kandla Clearing Agency had stopped so Devkumar Kapta (appellant) filed bills of entry in self. After clearance of goods from the customs appellant applied white ink and changed the names of the importers to M/ Radha Yarn and M/s Radha Textiles which were not situated in the state of Gujarat. The zerox copies of the fabricated bills of entry were taken by the appellant and given for transportation through the truck. From the above facts on record, it can not be said that appellant was a paid employee of M/s Kandla Clearing Agency and was only acting on the instructions of his employer. Therefore, the case laws relied upon by the Learned Advocate of the appellant are not applicable to the facts and circumstances of the present case and are thus distinguished. Shri Dev Kumar Kapta was authorised by the importers and field bills of entry in self on behalf of the importers. He not only filed and cleared the imported goods on behalf of the importers knowing fully well the nature of imports but also fabricated the bills of entry used for diverting the goods meant for free distribution to earthquake victims in Gujarat to places outside Gujarat.
- 7.3 From the above factual matrix appellant it is observed that appellant has not merely acted as a paid employee of M/s Kandla Clearing Agency but as an active participant in the act of diverting imported goods meant for free distribution under exemption Notification No. 7/2001-cus. The duty free

clearance of goods under this exemption notification was subject to condition (i), (ii), and (iii) of the Notification. As these conditions have not been fulfilled the seized goods become liable to confiscation under Sec. 111(0) of Customs Act 1962, as proposed in the show cause notice dt 26/3/2002 and correctly confirmed by the adjudicating authority. As the appellant has played an active role in import and diversion of imported goods conditionally exempted under Notification No. 7/2001-cus hence penalty is correctly imposable upon the appellant under Sec. 112 of the Customs Act 1962. However, looking to the value of confiscated goods (Rs 49.25 lacs and RS 15.26 lacs), and what could have been the intended benefits out of such diversion, it is felt that penalty of Rs 25 lakh imposed by the Adjudicating authority is excessive. In the interest of justice, we reduce the penalty imposed upon the appellant from Rs 25 lacs to Rs 5 lacs under Se. 112 of the customs Act 1962.

8. In view of the above observations, appeal filed by the appellant is only allowed to the extent indicated in Paragraph 7.3 above.

(Pronounced in the Court 21.8.2014)