

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL  
NEW DELHI.**

PRINCIPAL BENCH,  
COURT NO. IV

**CUSTOMS APPEAL NO. 51899 OF 2021 (SM)**

[Arising out of the Order-in-Appeal No. CC (A)/Customs/D-II/ICD/TKD/Export/  
619-621/2021-22 dated 19/07/2021 passed by The Commissioner (Appeals),  
New Customs House, New Delhi – 110 037.]

**Shri Satyender Singh,**  
R/o K-363, Street 6-C, Mahipalpur Extension,  
New Delhi –110 037.

**Appellant**

VERSUS

**Commissioner of Customs,**  
ICD (Export), Tughlakabad,  
New Delhi – 110 020.

**Respondent**

**APPEARANCE**

Ms. Reena Rawal, Advocate, Shri Mayank Sharma, Advocate and Shri  
Rajat Mishra, Advocate – for the appellant.

Shri Mahesh Bhardwaj, Authorized Representative for the Department.

**WITH  
CUSTOMS APPEAL NO. 52205 OF 2021 (SM)**

[Arising out of the Order-in-Appeal No. CC (A)/Customs/D-II/ICD/TKD/Export/  
619-621/2021-22 dated 19/07/2021 passed by The Commissioner (Appeals),  
(Airport & General), New Customs House, New Delhi – 110 037.]

**M/s VKL Cargo Movers LLP,  
(Earlier known as M/s On Time Logistics)**  
F-5/6/7, Ground Floor, Vishwarkarma Colony, M.B. Road,  
New Delhi –110 044.

**Appellant**

VERSUS

**Commissioner of Customs (Export),**  
Inland Container Depot, Tughlakabad,  
New Delhi – 110 020.

**Respondent**

**APPEARANCE**

Shri Mayank Sharma, Advocate – for the appellant.

Shri Mahesh Bhardwaj, Authorized Representative for the Department.

**AND**  
**CUSTOMS APPEAL NO. 52293 OF 2021 (SM)**

[Arising out of the Order-in-Appeal No. CC (A)/Customs/D-II/ICD/TKD/Export/619-621/2021-22 dated 19/07/2021 passed by The Commissioner (Appeals), (Airport & General), New Customs House, New Delhi – 110 037.]

**Shri Jayant Vikram,**  
R/o D-8, Bindapur, DDA Flats Pocket-3,  
New Delhi –110 059.

**Appellant**

VERSUS

**Commissioner of Customs (Export),**  
Inland Container Depot, Tughlakabad,  
New Delhi – 110 020.

**Respondent**

**APPEARANCE**

Shri Rajat Mishra, Advocate – for the appellant.

Shri Mahesh Bhardwaj, Authorized Representative for the Department.

**CORAM: HON'BLE DR. MS. RACHNA GUPTA, MEMBER (JUDICIAL)**

**FINAL ORDER NO. 50621-50623/2023**

DATE OF HEARING : 03.03.2023.

DATE OF HEARING : 09.05.2023.

**RACHNA GUPTA**

Present order disposes of three appeals arising out of same show cause notice and same orders of adjudication. Facts, in brief, are as follows :-

M/s National Enterprises, Narela filed 10 shipping bills for clearance of the goods declared as "Polyester Flooring covering classified" under ITC (HS) No. 57019090 and filed claim of duty drawback of 9.1% ad-velorem and also the claim of Focus Product Scheme. Officers of Directorate of Revenue Intelligence

(DRI) got an intelligence, about some unscrupulous exporters are availing export incentives under duty drawback and FPS (benefit of Focus Product Scheme) by mis-declaration the exported goods, as floor covering of manmade fibre, and also the value thereof and based thereupon they examined the consignments under shipping bill No. 5115958, 5115964, 5115957, 5115956, 5115961, 5115960, 5115967 all dated 21.09.2014 and 5217212, 5127198 and 5127207 all dated 22.09.2014 for export of Floor Covering (Braided) of Man-made fibre with total declared FOB value of the export goods as Rs. 4,37,52,827/- and claim of drawback of Rs. 39,81,507/-. On checking the goods were found to be machine and made floor coverings. Samples were drawn and sent for testing and Goods were seized.

2. The investigating team found that M/s National Enterprises has two Directors Daljit Singh and Satyender Singh. They hired a CHA namely Ontime Logistics, now known as VKL Cargo (i.e. the appellant) which was owned by two partners namely Umesh Chand Dhyani and Jayant Vikram/appellant. Shri Satyender Singh /appellant was the G-Card holder and Shri Shameshwar Sharma was controlling the activities of exporting firm M/s National Enterprises. After recording the statements of all concerned under Section 108 of Customs Act, 1962 and after conducting the market survey and obtaining the test sample report that a show cause notice No. 22/15/19746 dated 28.09.2015 followed by Corrigendum No. 20/15/8798-809 dated 08.06.2018 was served upon 9 persons including the exporter and the CHA and all the

persons found working for both of them proposing the re-determination of the goods, denial of claim, duty drawback, confiscation of goods as far as the exporter is concerned and the penalties were imposed not only on the exporter/their representators/but also on the representatives of the CHA. The said proposal was confirmed vide order-in-original No. 245/2018 dated 02.11.2018, the appeal against the said order has been rejected vide order-in-appeal No. 619-621/2020-21 dated 19.07.2021. Being aggrieved, three appellants out of 9 co-noticees are before this Tribunal.

3. I have heard Ms. Reena Rawal, Shri Mayank Sharma and Shri Rajat Mishra, learned counsel for the appellant and Shri Mahesh Bhardwaj, learned authorized representative for the Department.

4. It is submitted on behalf of the appellant that penalty upon the appellants has been imposed merely on the basis of statements of Shri Umesh Chand Dhyani of M/s Ontime Logistics and Shri Akhilesh Kumar Singh, the Documentation Officer of M/s Ontime Logistics, Shri Shameshwar Sharma, the representator of M/s National Enterprises and the Directors of M/s National Enterprises. It is submitted that no opportunity of cross-examination was ever given to the appellants. It is mentioned that law has been settled that no statement can be relied to fasten any charge on any person which has been recorded at his back without affording him the opportunity to cross-examine the

person making the statement. The decision in the case of **Laxmi Export Ltd.** reported as **2002 (143) E.L.T. 21 (S.C.)** has been relied upon. It is further mentioned that the CHA firm M/s Ontime Logistics is the proprietorship firm of Shri Umesh Chand Dhyani, but this fact has miserably been ignored by the Adjudicating Authority. In his absence, no case can be made out against his G-Card holder or any other employee of the firm. Appellant Shri Jayant Vikram has unnecessarily been implicated. He had no authority to act for CHA firm. There is otherwise no evidence of alleged connivance of the appellants with the exporter in over-valuation or mis-classification of the goods. Also only 4 export consignments out of 10 were handled by the appellants Satyender Singh and Jayant Vikram in bonafide discharge of their duties as employee acting in furtherance of instructions of their employer and on the basis of documents/declaration furnished by the exporter.

4.1 It is impressed upon that Shameshwar Sharma for exporter had categorically stated that appellants verified the KYC documents as well as the premises of the exporters nothing has ever been stated by the appellants about any knowledge about the product in the consignment and the value thereof. The statement that Jayant Vikram had seen the product costing for Rs. 300/- per piece is highly insufficient an evidence to hold that he along with other appellants in-connivance with the exporter had abated the mis-declaration and over-valuation of the goods under export. In absence of any evidence about monetary

benefits to any of the appellants no abatement can be alleged against them as far as the claiming of over-valued duty drawback and the excess benefit under FPS are concerned. While relying upon the decision in the case of **Haroon Haji Abdulla versus Statement of Maharashtra** reported as **1999 (110) E.L.T. 309 (S.C.), Kunal Travels (Cargo) versus CC (I&G), IGI Airport, New Delhi** reported as **2017 (354) E.L.T. 447 (Del.)** and the Tribunal decision in the case of **Ontime Logistics versus Commissioner of Customs, Indore** vide final order No. 52104 of 2016 dated 08.06.2016, learned counsel has prayed for setting aside of the order under challenge and for thereof the appeals to be allowed.

5. While rebutting the submissions, learned Departmental Representative has mentioned that during investigation the exporting firm was found non-existent at the given address. The address of the Directors were also found incomplete. It was sufficient violation of the obligations of CHA. Though CHA was found to be a proprietorship firm of Shri Umesh Chand Dhyani, but he has specifically stated that the entire work of his firm used to be undertaken by Shri Jayant Vikram and his G-card holder Satyender Singh. The representatives of exporter Shri Shameshwar Sharma has corroborated the involvement of Shri Jayant Vikram and Satyender Singh of M/s Ontime Logistics/VKL Cargo. It is mentioned that since the company was penalized there was no necessity for penalizing the proprietor thereof simultaneously.

5.1 Hence there is no infirmity when no case is made out against the Proprietor of CHA Mr. Umesh Chand Dhyani. It is further mentioned that M/s National Enterprises was the first time exporter hence the CHA was required to be more vigilant specially when the goods declared were such which invite more duty drawbacks. The CHA and its employees have acted negligently with the sole intent to connive with the exporter to proceed with mis-declaration of description and value so as to get more drawback and FPS Scheme benefits impressing upon no infirmity the order under challenge. Three of the appeals prayed to be dismissed.

6. Having heard the rival submissions of both the parties.

7. I observe and hold as follows :-

The entire findings are based on the statement of Jayant Vikram as was recorded on 8 January 2015 where he stated that there is partnership agreement between Satyender Singh – G-card holder and Shri Umesh Chand Dhyani, proprietorship of CHA. But it is observed that there is no such partnership agreement on record. Contrary thereto there has been the statement of Shri Umesh Chand Dhyani as was initially recorded on 8 January 2015 itself where he stated that he had an agreement with Jayant Vikram with regard to handling of the export consignments. He only used to manage the exporter clearance charges and other matters related to export

consignment. Jayant Vikram only had handled the impugned export consignments. It is observed that later Shri Umesh Chand Dhyani vide his subsequent statement dated 23.11.2015 contradicted saying that Jayant Vikram was not the controller of his CHA firm, he was merely a part time employee engaged in marketing/soliciting business on behalf of his firm. It is also observed that no agreement even between said Umesh Chand Dhyani and Jayant Vikram is placed on record. Hence none of these statements can be relied upon at least for penalizing Jayant Vikram and Satyender Singh. Otherwise also Section 9-D of Central Excise Act which talks about the admissibility of the statements makes it mandatory for any statement to be admissible into evidence only after the maker of statement has duly been cross-examined by the concerned person.

7.1 Hon'ble Delhi High Court of Punjab & Haryana in the case of **M/s Ambika International versus Union of India** reported as **2016 TIOL 1238 (High Court of Punjab & Haryana)** and also in the case of **G-tech Industries versus Union of India** reported as **2016 (239) E.L.T. 209 (P&H)** has held that unless a person is examined in terms of Section 9-D and unless the affected parties is given an opportunity to cross-examine him, no reliance can be placed on any statement recorded under Section 14 of Central Excise Act. In that case also the entire demand was based on third party investigation and statement given by the third party. No single document was found issued by the



appellant nor there was a confessional statement of the appellant.

8. Based on the same ground even the statement of Shamshevar Sharma cannot be read as an evidence to penalize the present appellants.

9. I further observe that M/s National Enterprises had tried to export 10 consignments by committing mis-declaration of description as well as the value of the goods to be exported and that the allegations have been confirmed, goods have been confiscated and the penalties have been imposed upon the exporters and their representatives. None of them have come forward to challenge the orders against them. As such the orders qua them have attained finality. But the said fact cannot be read as a ground for holding that the present appellants i.e. the CHA firm its G-card holder and its employee would have abated with the exporter. Abatement has nowhere been defined under Customs Act, however, Section 107 of Indian Penal Code defines abatement as follows :-

“107 – Abatement of a thing : A person abets the doing of a thing who

First – Instigates any person to do that thing; or

Secondly – engages with one or more other person or person in any conspiracy for the doing of that thing, if any act or illegal omission takes place in pursuance of that conspiracy for the doing of that thing ; or

Thirdly – Internationally aids, by any act or illegal omission, the doing of that thing.

Explanation 2 – whoever, either prior to or at the time of the commission of an act, does anything in order to facilitate the commission of that and thereby facilitates the commission thereof, is said to aid the doing of that act”.

10. The perusal makes it clear that extending aid in commission of crime is the gist of offence of abatement. The only allegation in the show cause notice against the appellants is that Shri Shameshwar Sharma had shown a sample of export goods to Jayant Vikram which appeared to be costing at around Rs. 300/- per piece as contrary to the value declared @ 19.80 per U.S.\$ per square meter. This particular statement is highly insufficient to fall under the above definition of Section 107 of IPC.

11. On the contrary it is coming apparent from the statements that KYC documents were duly forwarded by Shri Shameshwar Sharma to appellant Shri Satyender Singh and that necessary verifications were made by and on behalf of the CHA firm. Though at the addresses mentioned in the KYC the firm was not found existing, however, both its Directors were found available at the given respective addresses. None of them denied to be the Directors of the exporting firm M/s National Enterprises nor they have denied for the 10 shipping bills to have been filed in the name of their firm. Thus, there is no evidence on record to prove that KYC documents submitted with the appellants were false and that no proper verifications were got done by the CHA.

12. The CHA are merely but processing agent on documents of clearance of goods through Customs House. They are not the Inspector to inspect the genuineness of transactions nor they have any allegation to look into the information receive from the exporter/importer. Though it is onus to expect CHA to enquire into and verify of import-export code given by each client for each transaction but when such code is presented there is a prima facie presumption about it to be correct because while issuing the code necessary background check should definitely has been done by the Customs Authorities. However, CHA is not the person who is supposed to check physically that the goods mentioned in the shipping bills reflect truth of the consignment sought to be exported. The CHA or its Proprietor or the employees cannot be attributed with mens-rea, for the alleged act of mis-declaration unless and until there is a cogent evidence against them.

13. As already discussed above, except the statements that too full of contradictions and that none of the deponents were being cross-examined by the appellant herein it is held that there is no evidence to attribute the said mens-rea with the appellants to abate with the exporter for gross mis-declaration in description and value of the consignment.

14. From the entire above discussion, it is clear that there is no such evidence on record which may prove knowledge with the appellants about the alleged mis-declaration. In such

circumstances, the order imposing penalties upon the appellants is now sustainable. The said is order is therefore set aside. Consequent, thereto all the three appeals are allowed.

(Order pronounced in open court on 09/05/2023.)

**(DR. RACHNA GUPTA)**  
**MEMBER (JUDICIAL)**

PK