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

Appeal No. C/519/2009

Arising out of Order-in-Original No: 26/2009/CAC/CC/RBT, Dated: 24.02.2009
Passed by the Commissioner of Customs (Export), Mumbai - I.

Date of Hearing: 25.02.2019
Date of Decision: 25.02.2019

MANOJ SRIVASTAVA

Vs

COMMISSIONER OF CUSTOMS (EXPORT PROMOTION) MUMBAI - I

Appellant Rep by: Shri Anil Balani with Shri Rohan Balani, Adv.
Respondent Rep by: Shri R Kumar, Assistant Commissioner AR

CORAM: C J Mathew, Member (T)
Ajay Sharma, Member (J)

Cus - Appellant, an officer appointed under the Customs Act, 1962 has been imposed with penalty of Rs.1 lakh and contends that the principles of natural justice has not been adhered to by the adjudicating authority - appeal to CESTAT.

Held: It appears that the evidence against the appellant on his alleged involvement with the ineligible availment (of DEPB benefits/scrips) are the forensic reports and his admitted association with the assessment of the shipping bill - principles of natural justice mandate that in the absence of corroborative evidence, oral/written deposition should be subjected to test for attaining credibility - It is the right of an accused, especially in the context of reliance on opinions of experts, to be granted an opportunity to discredit an allegation by confronting the expert whose opinion is preemptory and without any reasoning - foundation for upholding the allegations have not been properly laid and a structure built on a weak foundation does not survive - matter remanded to original authority for compliance with principles of natural justice: CESTAT [para 4, 5]

Matter remanded

Case law cited:

Ram Wadhaya, Prahlad Nagar, Meerut v. Collector of Central Excise, Meerut [1984 (15) ELT 492 (Tribunal)]...Para 2

FINAL ORDER NO. A/85489/2019

Per: C J Mathew:

This appeal of Shri Manoj Srivastava, an officer appointed under Customs Act, 1962, who has been imposed with penalty of Rs.1,00,000/- in impugned order-in-original no. 26/2009/CAC/CC/RBT dated 24th February 2009 of Commissioner of Customs (Export), Mumbai, contends that principles of natural justice had not been adhered to by the adjudicating authority.

2. According to Learned Counsel for appellant, he was one of the many noticees in a matter relating to export of pharmaceutical drugs by certain entities who, by manipulating/forging particulars in shipping bill, had allegedly obtained scrips under the 'Duty Entitlement Pass Book (DEPB) Scheme in the Foreign Trade Policy and the present dispute is specific to three of the 181 shipping bills in which the total FOB value of exports was substituted with the enhanced amounts of Rs.29,14,59,690/-. It is pointed out by the Learned Counsel that it was alleged that, after the final assessment of the shipping bill was recorded by the appellant the remark 'pending TR' was interpolated by him subsequently. Learned Counsel points out that penalty under section 114 of Customs Act, 1962 is to be invoked only against a person who, in relation to any goods, was evidenced to have committed an act or omitted to do any act that rendered these goods liable to confiscation or had abetted in any such act or omission. According to him, even if the shipping bill was tampered with, which is denied, the penal provision can follow only from evidenced act or omission in relation to the goods that were exported. The allegations against the appellant, according to him, is based on the report of Central Forensic Laboratory (CFL) of the Central Bureau of Investigation (CBI) and the forensic report of the Government Examiner of Questioned Documents (GEQD) which are bereft of any analysis leading to the conclusion therein. It is also pointed out that none of the statements recorded during the investigation implicate the appellant as having contributed to the tampering. It is further contended that the first and second copy of the shipping bills against which the goods were shipped are not available and were produced in evidence. He also contends that the plea for cross-examination of the expert, whose evidences has been relied upon, and which, in the absence of any other corroborative evidence, was critical and, despite denial, was not allowed by the adjudicating authority. He draws attention to the acquittal of the appellant in proceedings under section 135 of Customs Act, 1962 and contends that this would suffice to immunize the appellant from any other penal action under Customs Act, 1962 also. He placed reliance on the decision of the Tribunal in *Ram Wadhaya, Prahlad Nagar, Meerut v. Collector of Central Excise, Meerut [1984 (15) ELT 492 (Tribunal)]*, holding that

'5. It would appear to us on a perusal of the papers and on the submissions made in the course of the hearing that -

(a) in the case of Kanungo & Co. v. Collector of Customs (1983 E.L.T. 1486), all that was held was that persons who have given information need not be examined in the presence of the person against whom the proceedings have been initiated and it is not a mandatory requirement that he should

be allowed to cross-examine such informants. Failure to afford any such opportunity does not amount to a violation of the principles of natural justice. It did not, however, appear if the Appellant in that case requested for permission to cross-examine the informants and such permission, despite the request, was turned down. For aught we know, no such request was made at the appropriate time and yet the failure to examine the informants or to grant permission to cross-examine them was made a grievance of, later;

(b) it cannot be said that an expert who had given an opinion, the sole basis for a decision in the case, is on the same footing as an informant. Failure to offer him for cross-examination despite request once and again for reasons which, on their face, are untenable appears to militate against the principles of natural justice;

(c) this apart, it had been held in a number of cases by the Supreme Court that -

(i) expert opinion, is by its very nature, weak and infirm and cannot of itself form the basis for conviction. It is unsafe to base a conviction solely on expert opinion without substantial corroboration [AIR 1977 S.C. 1971 - (Magan Bihari Lal v. The State of Punjab) - wherein were cited -

(i) AIR 1957 S.C. 381

(ii) AIR 1963 S.C. 1728

(iii) AIR 1964 S.C. 529

and (iv) AIR 1967 S.C. 1326];
(ii) the evidence of a handwriting expert, unlike that of a fingerprint expert, is generally of a frail character and its fallibilities have been quite often noticed. The Court should, therefore, be wary to give too much weight to the evidence of a handwriting expert [AIR 1973 S.C. 1346 - Bhagwan Kaur v. Shri Maharaj Krishan Sharma - citing A.I.R. 1954 S.C. 316];

(iii) the evidence of experts can never be conclusive as it is merely opinion evidence [(1963) 3 S.C.R. 722 - Ishwari Prasad v. Mohammad Isa];

(iv) the Court can, of course, refuse to rely upon the opinion of an expert which is unsupported by reasons (A.I.R. 1959 S.C. 488);

(v) the Court must satisfy itself by such means as are open that the opinion may be acted upon. One such means open to the Court is to apply its own observation to the admitted or proved writings and to compare them with the disputed one, not to become a handwriting expert but to verify the premises of the expert in one case and apprise the value of the opinion in the other case. The comparison depends on an analysis of the characteristics in the admitted or proved writings and the finding of the same characteristics in a large measure in the disputed writing. In this way, the opinion of the deponent, whether expert or other, is subjected to

scrutiny and although relevant to start with becomes "probative"-per Justice Hidayatulla in A.I.R. 1967 S.C. 1326 (Fakhruddin v. State of Madhya Pradesh);
(d) in this case, the conclusion of the adjudication authority is solely based on the opinion of the handwriting expert-untested in cross-examination, uncorroborated by any independent evidence (like e.g. evidence of customers whose names were recorded in the slips of papers or account books seized), and unscanned by the adjudicating authority himself. Indeed, it is almost as if his opinion is the final word on the question of identity of the handwriting in the disputed documents. Nor do we know what reasons, if any, he had given in his opinion. Strangely enough, his opinion is not on record;

(e) further, mere entries in account books, even if genuine and thus relevant and admissible in evidence, require to be corroborated by independent additional supporting evidence which may consist of vouchers, bills, or oral evidence proving the transactions in the account books.
6. For the aforesaid reasons, we hold that there is no material to sustain the penalty under Section 74 of the Act. We, therefore, allow the appeal and direct that the penalty in a sum of Rs. 5000, if paid, is to be refunded to the Appellant. Needless to say that the order of the adjudicating authority, in so far as the seized gold and gold ornaments are concerned, is not interfered with by us.',
as relevant when penal proceedings rest entirely on expert opinion which is substantially different from controversies pertaining to relevancy of statements that are not tested in cross-examination.

3. Learned Authorised Representative submits that all these issues had been examined in detail by the adjudicating authority who confirmed the alteration of the triplicate copy of the shipping bills which enabled the mis-use of the scheme by the perpetrator.

4. It would appear that the evidence against the appellant on his alleged involvement with the ineligible availment are the forensic reports and his admitted association with the assessment of the shipping bill. The principles of natural justice mandate that, in the absence of corroborative evidence, oral/written deposition should be subjected to test for attaining credibility. Furthermore, the Tribunal in re Ram Wadhaya did examine the various judicial decisions pertaining to statements and to expert opinion before concluding that the two are to be treated differently.

5. It is the right of an accused, especially in the context of reliance on opinions of expert, to be granted an opportunity to discredit an allegation by confronting the expert whose opinion is peremptory and without any reasoning. That is possible only upon being offered crossexamination and being furnished with documents. We are of the opinion that the foundation for the upholding of the allegations has not been properly laid. The structure built on such weak foundation does not survive. Accordingly, we

remand this matter back to the original authority for compliance with principles of natural justice and due consideration of the submissions made by the appellant before that authority.

(Pronounced in Court)