

**Central Administrative Tribunal
Principal Bench**

OA No.1768/2013

New Delhi, this the 24th day of March, 2017

**Hon'ble Mr. Justice Permod Kohli, Chairman
Hon'ble Mr. K. N. Shrivastava, Member (A)**

Srikant Kumar Mohapatra
Assistant Director
Directorate General of Inspection
Customs and Central Excise
Drum Shape Building
IP Bhawan, IP Estate,
New Delhi. ... Applicant.

(By Advocate : Shri Piyush Kumar with Ms Tanvi Piyush)

Versus

1. Union of India
Through Secretary (Revenue)
Ministry of Finance,
Department of Revenue,
North Block,
New Delhi.
2. Chief Commissioner of Customs
Custom House, 15/1 Strand Road,
Kolkata 700001. Respondents.

(By Advocate : Shri Rajeev Kumar)

: O R D E R (ORAL) :

Justice Permod Kohli, Chairman :

The applicant was issued charge sheet dated 16.12.2005 under Rule 14 of CCS (CCA) Rules, 1965 requiring the applicant to submit his reply within ten days. The applicant vide his reply dated 26.12.2005 denied the allegations. The Disciplinary Authority, i.e.,

Commissioner of Customs (Airport and Administration) Kolkata, ordered regular departmental inquiry against the applicant, and vide order dated 10.05.2006 appointed one Rajender Nagar, Joint Commissioner of Customs, Customs House, Kolkata as Inquiry Officer. The Inquiry Officer on completion of inquiry submitted his report dated 15.10.2007 holding some of the charges as "not substantiated" and some charges "partly substantiated".

2. The Disciplinary Authority vide his letter dated 02.06.2008 served a copy of the Inquiry Report upon the applicant for his response within fifteen days. The applicant has submitted his reply vide letter dated 04.06.2008. It is stated that applicant's peers and juniors were promoted vide office order dated 19.11.2010 in the grade of Assistant Commissioner w.e.f. 10.09.2008 withholding the applicant's promotion on account of pendency of disciplinary proceedings. The Disciplinary Authority while disagreeing with some of the observations of the Inquiry Officer's report to some extent referred the matter for second stage advice to the Central Board of Excise & Customs (CBEC) recommending dropping of charges against the applicant. However, the Chief Vigilance Officer of CBEC did not agree with the opinion of the Disciplinary Authority and recommended imposition of major penalty. The Central Vigilance Commission (CVC) vide order dated 23.02.2011 concurred with the opinion of the CVO, CBEC. The Disciplinary Authority

served the copies of U.O. Note and CBEC's advice dated 23.02.2011 to the applicant vide his letter dated 17.03.2011 for his response within ten days. The applicant responded to the U.O Note vide letter dated 18.03.2011. He was also granted personal hearing by the Disciplinary Authority on 28.03.2011. The Disciplinary Authority vide order dated 30.06.2011 held the applicant guilty of contravention of the provisions of Rule 3 (i), (ii) and (iii) of CCS (Conduct) Rules, 1964 and imposed penalty of reduction of his pay by one stage for a period of six months w.e.f. 01.07.2011 without cumulative effect, with further direction that on expiry of the period of six months, reduction would not have the effect of postponing his further increments of pay. Aggrieved by the aforesaid order, the applicant preferred an appeal before the Appellate Authority, i.e., Chief Commissioner of Customs, Kolkata under Rule 23 of the Central Civil Service (Classification, Control and Appeal) Rules, 1965. During the pendency of the appeal, the Disciplinary Authority issued Corrigendum dated 04.08.2011 amending the quantum of punishment from six months to sixty months citing typographical mistake. The applicant raised additional grounds before the Appellate Authority. The Appellate Authority vide its order dated 15.11.2011 modified the order imposing a minor penalty of Censure under Rule 11 (i) of Central Civil Service (Classification, Control and Appeal) Rules, 1965 holding the applicant guilty of only procedural lapse.

3. The present OA has been filed seeking following reliefs:-

- "a) Set aside and quash Order-in-Appeal No.-VIII (48) 69/CC/KOL/CUS/11/6624/6603 to 6605 dated 15.11.2011 passed by the learned Appellate Authority the Chief Commissioner of Customs, Kolkata Zone, inflicting penalty of Censure and Allow consequential relief;
- b) Set aside and quash Order-in-Original No.F No.S21(Misc)-02/2004(Vig)Pt.1 dated 30.06.2011 passed by the Disciplinary Authority , the learned Commissioner of Customs (Airport and Administration), Kolkata
- c) Set aside and quash Memorandum No.S21(Misc)-02/2004 dated 16.12.2005 issued by the Disciplinary Authority, the learned Commissioner and
- d) Pass such other or further order(s) in favour of the applicant as this Hon'ble Tribunal may deem fit and proper in the facts and circumstances of the instant case and in the interest of justice."

4. The charge against the applicant reads as under:-

"That Sh. Srikant Kumar Mohapatra @ S. K. Mohapatra s/o Sh. Mahendra Chandra Mohapatra while posted as Appraiser, DEPB (Import) Group 7, Customs House, 15/1, Strand Road, Kolkata during 1999 failed to maintain absolute integrity and devotion to duty and acted in a manner which is unbecoming of a Govt. Servant in as much as that he, along with Sh. S. K. Chatterjee, the then Asst. Comm., DEPB (Import) Group 7, Custom House, Kolkata, had concluded the Final Assessment of all the 12 Shipping Bills of Ramapati Exports bearing No.139 dt. 3.6.99 for Rs.41,38,680/-, 141 dtd. 3.6.99 for Rs.41,38,680/-, 140 dtd.3.6.99 for Rs.41,38, 680/-, 142 dtd. 3.6.99 for Rs.41,38,680/-, 122 dtd. 2.6.99 for Rs.41,38,680/-, 123 dtd. 2.6.99 for Rs.41,38,680/-, 64 dtd. 2.6.99 for Rs.41,38,680/-, 63 dtd. 2.6.99 for Rs.41,38,680/-, 67 dtd. 2.6.99 for Rs.41,38,680/-, 66 dtd. 2.6.99 for Rs.41,38,680/-, 65 dtd. 2.6.99 for Rs.41,38,680/- and 62 dtd. 2.6.99 for Rs.41,38,680/-, on the basis of the false declaration made by the Exporter regarding the FOB value and PMV of the exported item without taking any steps to ascertain the PMV of the consignment through market enquiry.

That Sh Srikant Kumar Mohapatra by his aforesaid acts jeopardized the financial interest of the Customs Department

which caused loss to the department to the tune of Rs.96,18,682/- by way of excess DEPB benefit claimed and availed by the exporter.

That Sh. Srikant Kumar Mohapatra totally flouted the established procedures and guidelines a man of ordinary prudence ought to have followed and by his aforesaid act/acts committed gross misconduct and thereby contravened Rule 3 (i) (ii) (iii) of CCS (Conduct) Rules, 1964."

Similar allegations are made in regard to three more orders passed by applicant while dealing with cases of other exporters in the charge memo. The applicant was accused of making false assessments in respect to certain shipping bills for export of decorative glass beads under Duty Entitlement Pass Book Scheme during the period 1999 when he was posted as an Appraiser in Kolkata Custom House.

5. In para 4.2 of the OA, the applicant has referred to the cases of four exporters, viz., M/s Ramapati Exports, M/s Transworld Impex, M/s M. M Exports and M/s R. G. Sales (P) Ltd. whose shipping bills for export of decorative glass beads under Duty Entitlement Pass Books were examined. It is stated that the item under export was new and the declared value appeared to be on higher side, the applicant prepared a Note Sheet and brought this fact to the notice of the then Assistant Commissioner (DEPB), and thereafter under his orders assessed the shipping bills provisionally subject to verification of representative samples, Present Market Value (PMV) and Bank Realization Certification (BRC) over the export proceeds. It is also mentioned that two other Appraisers posted along with the

applicant, namely, Rajesh Kumar Singh and Ashish Sadhu Khan also processed the shipping bills of the aforesaid exporters. The consignments were exported after due physical examination by the officers posted at the export examination shed after drawing a sample in terms of the instructions for perusal of the Appraising Group. It is also mentioned that after completing the formalities at the export shed, the exporter presented the shipping bills along with representative samples drawn by the Shed Officers duly sealed and under covering letters addressed to the Assistant Commissioner (DEPB) along with other requisite documents viz., BRC, Procurement Invoice etc., or finalization of shipping bills. It is also the case of the applicant that the sealed bags containing the representative samples were opened in the presence of Assistant Commissioner (DEPB) Group, and on visual examination, the same were found to be decorative finished glass beads and, therefore, as instructed by the Assistant Commissioner (DEPB), the applicant scrutinized the documents and finding nothing amiss put up the file to the concerned Assistant Commissioner for orders for finalization of the shipping bills. The file was approved by the Joint/Additional Commissioner, in-charge of the DEPB Group, on the basis of the documents. It is stated that on the basis of intelligence, the SIB of the Custom House initiated investigations in the exports affected by the four exporters named above. Based upon the investigations, show

cause notices were issued to three out of four exporters, namely, M/s Ramapati Exports, M/s R. G. Sales Pvt. Ltd. and M/s M. M. Exports.

Regarding the fate of the aforesaid show cause notices, the applicant has mentioned as under:-

“ (i) M/s Ramapti Exports – the then Commissioner dropped the proceedings against the exporter, Department preferred appeals before the Kolkata CESTAT, Hon’ble High Court of Kolkata and finally before the Hon’ble Supreme Court but lost at all stages. Later, the Department issued a second Show Cause Notice in this case adducing fresh evidences however, in that case also the Department has since lost the matter before the CESTAT, Kolkata. The order has since been accepted and the case against M/s Ramapati Exports has since been closed.

ii) M/s Transworld Impex – In this case the Additional Director General of Foreign Trade, New Delhi vide Order-in-Appeal No.11/3/2000-ECA dated 17.04.2000 held that the FOB value and PMV declared in the Shipping Bills were just and proper and in view of the same the Department did not issue any Show Cause Notice to the party under Customs Act.

iii) In the cases of other two exporters namely M/s M.M. Exports and M/s R.G. Sales Pvt. Ltd., the Show Cause Notices issued under Customs Act, 1962 are still pending before the Adjudicating Authority since 2005 however as the facts, evidences and the charges are identical and the issue has already been decided by the Hon’ble Supreme Court in the matter of M/s Ramapati Exports the fate of the aforesaid two matters are also going to be the same.”

6. The grievance of the applicant is that on the one hand, action against the exports was set aside by the Courts, and on the other hand, on the same allegations, disciplinary proceedings have been initiated against him.

7. The applicant has also brought to our notice that findings of the Inquiry Officer are perverse in nature. In para 21 of the Inquiry Officer's report, the following findings have been returned.

"21. The C.O. recommended provisional assessment to his A.C(DEPB) which was in order, he recommended final assessment on the basis of PMV determined on the basis of procurement invoices submitted by exporters in terms of para 4(ii)(b) of Ministry's Circular No.69/97-cus dated 8.12.97 which is one of the method for determination of PMV and the final assessment was completed on the orders of Additional Commissioner (DEPB) who was in charge of SIB also, therefore, it cannot be substantiated legally that the C.O. totally flouted the established procedure and guidelines. However, he did not propose the determination of PMV on the basis of market enquiry through SIB in spite of an initial element of doubt in respect of FOB value and PMV hence it can be considered as an act of negligence on his part, therefore, the charge is partly substantiated. "

In the above report, the Inquiry Officer relied upon Circular No.69/97-Cus dated 08.12.1997. The applicant has placed on record copy of the same and has referred to para 3 of it regarding determination of PMV. The same reads as under:-

"3. Determination of PMV

(i) Manufacturers- Exporters.

- (a) As regards Manufacturers-Exporters who export under AR4 form, where the AR4 value is declared as the PMV, the same shall be accepted.
- (b) Where the Manufacturer-Exporter declared PMV which is higher than the AR4 price, (as PMV is inclusive of transportation costs and domestic duties and taxes) the higher PMV declared may be accepted up to 150% of AR4 value (exclusive of excise duty). Market enquiry may be caused only if PMV is more than 150% of AR4 price, and

exporter does not agree to lower the PMV below the 150% mark.

- (c) Where the Maximum Retail Price (MRP) is required to be printed on the products as per the Weights & Measures Act, the MRP indicated on the products may also be accepted as PMV.
- (d) For the products for which manufacturers have a Printed Price list, or a Catalogue indicating the local price of the products, the price indicated on the price list/catalogue shall be accepted as PMV."

It is stated that in terms of the aforesaid circular, the applicant was not required to determine PMV, and thus there was no violation of the circular. The applicant has also referred to the findings of the Disciplinary Authority vide order dated 13.11.2011, which reads as under:-

- "i) In the matter of provisional assessment and subsequent final assessment of the impugned shipping bills, the C.O. was not the Proper Officer. He brought the facts to the notice of his superior officers and carried out their orders;
- ii) No material suppression of facts has been alleged against the C.O. by anybody at any stage;
- iii) At the time of finalisation, the C.O. did not have with him the evidences subsequently addressed by SIB, DRI & CBI during their investigations;
- iv) The C.O. witnessed export of glass beads at about the same price by four different exporters to four different unrelated foreign buyers. Hence, the consignments served as contemporaneous evidence of value for one another. There was no other contemporaneous evidence of value before the C.O. for rejecting the exporters' declaration;
- v) There was no alter/information/intelligence against the four exporters. There is no evidence on record to show that the C.O. was aware about the fictitious nature of the procurement invoices submitted by the exporters;

- vi) The final assessment were done on the basis of the representative samples, BRCs and the procurement invoices, submitted by the exporters for determination of PMV in terms of para 4(ii)(b) of the Ministry's Circular, only, on the orders given by the C.O.'s superior authority;
- vii) The export price pattern was in the knowledge of not only the C.O. but also the A.C., DEPB, Addl. Commissioner (DEPB), who was in charge of SIB also, and Commissioner (Port). Nobody suspected over-valuation.
- viii) The then Addl. Commissioner (DEPB & SIB) has stated before the I.O. that for the DEPB and DEEC schemes, delay is not appreciated by the Department and as per the normal practice, BRCs were considered to be the basis for finalisation;
- ix) The decision to assign market enquiry for determination of PMV was required to be taken by the A.C. (DEPB) as the Proper Officer under section 18 of the Customs Act, 1962 in terms of para 5 read with para 6 of Ministry's Circular No.69/97-Cus., who did not think it necessary. The Additional/Joint Commissioners (DEPB) also did not assign any market enquiry to SIB and were satisfied with the documents/evidences on record and gave orders for finalisation.
- x) When everybody was satisfied and nobody suspected over-valuation, it would not be proper to single out the Charged Officer and say that he violated established procedures and guidelines by not proposing market enquiry through SIB;
- xi) In any case, the allegation of violation of the established procedures and guidelines has been set to rest by the concurrent findings of the adjudicating Commissioner, the Hon'ble CESTAT and the Hon'ble Supreme Court of India."

After recording these findings, the matter was referred for second stage advice of CVC recommending not to further pursue the charges and to drop the charges against the Charged Officer, but the CVO

disagreed with the recommendations of the Disciplinary Authority only on the ground that non conduct of market inquiry at the appropriate time, and non-preservation of samples led to vitiation of the case subsequently built by the department and resultant acquittal of the noticees to the detriment of revenue. From the impugned order, it appears that when the matter was considered after the opinion of CVO, the Disciplinary Authority changed. The subsequent Disciplinary Authority recorded as under:-

“I also agree and endorse the findings of the Inquiry Officer that the charges enumerated in para 6 & 7 hereinabove are not legally substantiated for the reasons mentioned therein. However, the Inquiry Officer, after recording the said findings has observed that in view of the high value of the impugned exports and an initial element of doubt at the time of provisional assessment, the C.O. should have proposed determination of PMV through market enquiry by SIB to A.E. (DEPB) which the C.O. did not do and therefore, the charges on the aforesaid scores are partially substantiated. The CVO has observed that the single act of mission in his part in his failure to propose market inquiry, which has been held proved by the Inquiry Officer, jeopardised the Govt. revenue and resulted in the adjudication proceedings and appeals before the CESTAT and the Apex Court falling through, which amounts to gross negligence and dereliction of duty on his part warranting imposition of major penalty on the CO which has been accepted by the CVC.....”

From the above, it is evident that the successor Disciplinary Authority merely acted on the advice of the CVO. Once, the predecessor Disciplinary Authority had noted as many as 11 points holding that the charges are not proved his successor was under an obligation to record his disagreement with the earlier findings of the Disciplinary Authority, but the successor Disciplinary Authority

imposed the penalty merely on the basis of CVO's observations without, in any manner, contradicting the opinion of his predecessor which was based upon appreciation of material on record.

8. Apart from that, admitted position is that the Exporters have won their cases right up to Hon'ble Supreme Court through adjudicatory process. The adjudicatory process is as effective as any detailed analysis by any competent court. It is not a criminal case where the benefit of doubt has been given to the Exporters. Once the allegations against the Exporters have not been proved, the applicant cannot be punished on any basis. The successor Disciplinary Authority could not have ignored the findings recorded by the predecessor Disciplinary Authority merely because opinion of the CVO was different.

9. In view of the above circumstances, though while exercising power of judicial review, this Tribunal cannot sit as a court of appeal, however, we find that the successor Disciplinary Authority has imposed penalty without due application of mind, and merely acted as a post office and imposed penalty on the advice of CVO. The predecessor Disciplinary Authority when applied its mind found that the charges "not proved". The successor Disciplinary Authority was under an obligation to have considered the opinion of his predecessor, and in the event of disagreement, should have recorded

valid reasons. Nothing seems to have been done. The impugned order is perverse in nature and is thus liable to be quashed.

10. The Original Application is accordingly allowed. Orders impugned in this OA are hereby quashed. No order as to costs.

(K. N. Shrivastava)
Member (A)

(Justice Permod Kohli)
Chairman

/pj/