



CENTRAL ADMINISTRATIVE TRIBUNAL
CALCUTTA BENCH
KOLKATA

OA No.350/01855/2015

Date of hearing: 02.06.2016

Dated of order: ~~02.06.2016~~
01.07.2016

PRESENT:

THE HON'BLE MR. JUSTICE V.C.GUPTA, JUDICIAL MEMBER
THE HON'BLE MS. JAYA DAS GUPTA, ADMINISTRATIVE MEMBER

Shri R. Srinivasa Naik, son of R.Sakria Naik aged about 48 years, working as Additional Commissioner, Office of the Director General Audit, Customs, Central Excise & Service Tax, Kolkata Zonal Unit, Bamboo Villa, 4th floor, 169, A.J.C.Bose Road, Kolkata-700 014, residing at No. 10, Portland Park, Burdwan Road, Alipore, Kolkata-700 027.

..... Applicant

-Versus-

1. Union of India through the Secretary to the Govt. of India, Ministry of Finance, Department of Revenue, North Block, New Delhi-110 001.
2. The Secretary, Ministry of Finance, Department of Revenue, Central Board of Excise and Customs, North Block, New Delhi-110 001.
3. The Chairman, Central Board of Excise and Customs, Department of Revenue, North Block, New Delhi-110 001.
4. The Secretary, Union Public Service Commission, Dholpur House, Shahjahan Road, New Delhi-110 069.
5. Shri M.Dwivedi, Member Settlement Commission (Retd.) & Inquiry Officer, A-2005, Vishnu Shivam Apartment, New Vishnu Shivam Mali, Kandivali (East), Mumber-400 101.

..... Respondents

For the Applicant :Mr.S.K.Dutta, Counsel
For the Respondents :Mr.S.Banerjee, Counsel

ORDER

JUSTICE V.C. GUPTA, JM:

This OA has been filed by the Applicant (Shri R. Srinivasa Naik) under Section 19 of the A.T. Act, 1985 seeking the following reliefs:

"a) An order quashing and/or setting aside the impugned charge sheet dated 3rd October, 2011 and the entire proceedings held there under including the tentative disagreement note on inquiry report along with the inquiry report served upon the applicant by a Memorandum dated 23rd September, 2013/ 1st October, 2013 as well as further action on the basis of the said note;

b) An order quashing and/or setting aside the order of penalty dated 23rd October, 2015.

c) An order directing the respondents to grant and extend all consequential benefits to the applicant which the applicant would have been entitled to had there been no proceedings against the applicant.

d) An order directing the respondents to produce/cause production of all relevant records;

e) Any other order or further order/orders as to this Hon'ble Tribunal may seem fit and proper."

2. Heard the learned counsel for both sides and gone through the record with the help of learned counsel for the parties.

3. According to the Applicant, while he was working as Director in the Office of the Joint Secretary (Port), Ministry of Shipping, New Delhi, he was served with a Memorandum of Charges dated 3rd October, 2011 alleging misconduct occasioned



during the period from 22.12.2002 to 28.07.2004 i.e. about 7-9 years earlier. At that time he was posted as Joint Commissioner at Belapur Commissionerate. He contested such issuance of charge sheet through his written statement of defence. But without considering his written statement of defence in its proper perspective, the authorities concerned proceeded with the enquiry. According to the Applicant, although there was a decision in his favour by the Adjudicating Authority in a parallel proceeding, yet he was held guilty and ultimately imposed with the punishment of withholding of increment for one year without cumulative effect without adversely affecting his pension. This penalty order caused supersession by his juniors. There being no provision for appeal against an order imposing punishment by the President of India, as in the instant case, this OA has been filed by him seeking the reliefs cited supra.

4. The Respondents filed a Reply giving the details under what circumstances the charge sheet was necessitated to be issued to the applicant. It has been stated that M/s. Akshay Export (Warehouse) under Belapur Commissionerate was involved in getting clearance of imported goods viz. Fabrics, Electronic/Electrical Goods from Bonded Warehouse under DFRC (Duty Free Replenishment Certificate), DEPB (Duty Entitlement Pass Book Scheme) and DEEC (Duty Exemption Entitlement Certificate) Licenses improperly and without following TRA/RA



procedure and without observing the prescribed procedure as specified in Circular No. 72/2003-Cus dated 11.08.03 in spite of the Commissioner's direction to follow the prescribed provisions stipulated in Circular No. 72/2003 -Cus dated 11.8.03 and to ensure debiting of duty from related Licences for earlier clearances. It was found that 13 DEPB Licences submitted by M/s. Akshay Export for duty exemption at the time of clearances had already been used and debited in EDI (Electronic Data Interchange) system at JNCH (Jawaharlal Nehru Custom House) leaving insufficient or no balance for further debits. Belapur Commissionerate, thereafter, issued three SCNs (Show Cause Notices) demanding customs duty of 987.63 lakhs. In the said notice nine officers were made noticees alleging that they appeared to have colluded with M/s. Akshay Export by not verifying the technical characteristics of the imported goods which were in the sensitive list. In the instant case, the vigilance investigation by the West Zonal Unit of Directorate General of Vigilance was completed on 12.05.2010 confirming the allegation.

It has been stated that the investigations revealed that at the relevant time, the applicant was posted as Joint Commissioner in Belapur Commissionerate and looking after the Technical matters of Commissionerate. Apart from the above, as Joint Commissioner he was supervising the work of Taloja Division and the said Private Bonded Warehouse of M/s. Akshay Exports



was situated in the jurisdiction of Taloja Division. During his tenure, Supdt. (Tech.) /AC (Assistant Commissioner, Taloja submitted a note dated 03.08.04 seeking orders for proper procedure to be followed in clearances of imported goods to M/s. Akshay Export. The Applicant in his initial noting dated 11.8.2004 showed disagreement with the points raised by the Supdt. (T)/AC, Taloja except the procedure suggested for clearance against DDEC Script. There was agreement by all three officers to the extent that "as log for each licence is maintained at the Port of registration, TRA in favour of AC Taloja would suffice to allow the benefit under particular scheme as the amounts get debited in the licence" which was in tune with Departmental instructions. When the matter was put up to Commissioner for orders, he gave a direction on 12.8.04 to the JC to "discuss the full procedure" and on 13.8.2004 the applicant sought discussion with AC Taloja. The file is silent as to whether or not any discussions took place with the Commissioner as sought and whether the applicant received any further directions from the Commissioner. However, on 13.8.2004 the applicant issued directions contrary to his own note stating that "in case the RAs are not issued from the Port of Registration, a debit entry may be made in the licence and officers would ensure that the same is debited in the computer system at the Port of Registration" which was contrary to the Board's circular. Even at this stage, the applicant did not put up the matter



to the Commissioner for post facto approval. M/s Akshay Export claimed difficulties in obtaining RAs/TRAs from the port of Registration. In such circumstances, the applicant before giving any decision was essentially required to ascertain reasons for non issuance of TRA from the Port of Registration which he did not do. Being a senior officer of the Department, the applicant would have known that his decision was against the interest of revenue. He failed to give clear direction as to how his officers would implement his directions. Not even on a single occasion, did he ascertain from his subordinate officers whether they faced any difficulties in getting confirmation from Port of Registration on debiting the duty amount in EDI system and whether the direction given by him was working smoothly without jeopardizing revenue. He knew that M/s. Akshay Export was not submitting TRA/RAs and clearances were allowed under different export incentive schemes. Therefore, the applicant was required to closely monitor and take prompt and proper action for the past as well as the future clearances. By his acts of omission and commission, the applicant facilitated M/s. Akshay Export in exploiting the situation by producing DEPB licence already used/exhausted in EDI system and thereby defrauded the exchequer to the tune of Rs. 33, 04, 242/- and also facilitated M/s. Akshay Export to clear goods against DFRC and advance without obtaining a TRA/RA from the Customs House of Registration. Because of such failure on the part of Applicant to



act as per direction of the Government he has rightly been imposed with the minor penalty and hence, the Respondents have prayed for the dismissal of this OA.

5. The facts of the matter are that a major penalty charge sheet under Rule 14 of the CCS (CC&A) Rules, 1965 was issued to the Applicant on 3rd October, 2011 (A/11), containing six Article of Charges which reads as under:

"Article of Charge- I:

Shri R.Srinivasa Naik, Joint Commissioner was in charge of technical section (18.6.2004 to 28.7.2004) and Taloja Division (22.11.2002 to 30.12.2002 & 18.6.2004 to 28.7.2004) in which M/s. Akshay Exports, Private Bonded Warehouse was situated. A matter of difficulty in obtaining TRA/RA and irregularities related to it was brought to him. The Commissioner directed him to discuss the matter. He did not discuss the matter but instead gave directions to subordinates on 18.8.2004 that – "in case the RAs are not issued from the Port of Registration, a debit entry may be made in licence and ensure that the same is debited in computer system at the Port of Registrastion" contrary to the departmental Circular No. 72/2003-Cus dated 11th August, 2003 (issued under F.No. 605/87/2003-DBK). M/s. Akshay Exports exploited the situation by producing the DEPB licences already used in EDI System at JNCH, leaving no balance for further debits at Taloja causing a revenue loss of Rs. 32 lakhs to the govt.

Article of Charge-II

Shri R.Srinivasa Naik passed on incorrect instructions in the file and made it look like as if these instructions have come from the Commissioner in allowing clearances without RA/TR. Shri R.Srinivasa Naik avoided putting up the said file again to the Commissioner for his perusal/post facto approval of decision taken by him. If the instructions are as per the discussions with the Commissioner, the same should have been got approved post facto as per the procedure of office procedure manual.



Article of Charge-III

Shri R.Srinivasa Naik, had passed on incorrect instructions that in case the RAs are not issued from the Port of Registration, a debit entry may be made in licence and ensure that the same is debited in computer system at the Port of Registration". He however did not ensure that the instructions issued by him have been complied by debiting entries in computer system at the Port of registration because of which M/s. Akshay Exports had produced completely utilised DEPB licences and re used them to clear goods without payment of duty against those (already utilised) licences.

Article of Charge-IV

Shri R.Srinivasa Naik, was in charge of technical section (18.6.2004 to 28.7.2004) and Taloja Division (22.11.2002 to 30.12.2002 & 18.6.2004 to 28.7.2004) holding charge of Technical Section as well as Taloja Division. He has passed on the instructions on the Note Sheet side of the file No. V Gen (3) Akshay/BE/04/Pt.I on 18.8.2004 directing the subordinates that "in case the RAs are not issued from the Port of Registration, a debit entry may be made in licence and ensure that the same is debited in computer system at the Port of Registration." This was conveyed to AC Taloja/Range Officers. However, Shri R.Srinivasa Naik, Joint Commissioner did not issue a suitable Standing Order and Public Notice for the guidance of staff and trade.

Article of Charge-V

Shri R.Srinivasa Naik was in charge of Taloja Division in which M/s. Akshay Exports were situated, he failed to ensure that the ex bond Bills of Entry in respect of M/s. Akshay Exports were marked for audit to see that all the requirements are fulfilled and the export promotion benefit claimed by the importer was proper and eligible to them.

Article of Charge-VI

Shri R.Srinivasa Naik failed to properly supervise the actions of his subordinate officers inasmuch as that import clearances were allowed in absence of RA/TRA



though no debits were being made in the EDI system at the port of registration in case of DEPB licences and even without registering the licences at the Port of registration in case of DFRC licences. Thus he failed to take all possible steps to ensure the integrity and devotion of duty of the government servants for the time being under his control and authority, while he posted at Joint Commissioner Central Excise, Belapur."

6. The Applicant submitted his written statement of defence denying the charges. The Disciplinary Authority after considering the defence submitted by the applicant, appointed IO and PO to enquire into the allegation levelled against the applicant in the charge sheet. The IO submitted its report on 21.08.2013. The conclusion reaching by the IO reads as under:

"6.10.CONCLUSION:

In view of my observations and findings as enumerated above, I hold that the charge that the directions dated 18.08.2004 issued by the CO were issued without discussion with the Commissioner and that these directions were contrary to the Circular No. 72/2003-CUS dated 11.08.2003, stands proved.

However, it is on record that goods were being cleared without TRA/RA at the Custom Bonded Warehouse, Taloja even before issue of these directions and the Commissioner, Central Excise, Belapur in his adjudication Order dated 06.06.2012 held that the said directions dated 18.08.2004 agreed with the procedure laid down in the Public Notice No. 74/2003 dated 08.07.2003.

All other charges are not proved as discussed in my findings."

7. The Disciplinary Authority did not agree with the report of the IO and consequently, he supplied the report of the IO, along with the dissenting note to the Applicant/Charged Officer giving



him an opportunity to submit his defence. The applicant submitted his written statement of defence. The disciplinary Authority after considering the written submission of defence submitted by the applicant, disagreed with the view point of the Applicant/CO and referred the matter to the UPSC for advice/recommendation. The UPSC sent its finding to the Secretary, Ministry of Finance, Department of Revenue, Central Board of Excise customs i.e. the Administrative Authority of the Applicant/CO on 15.07.2015. The conclusions drawn by the UPSC are as under:

"Article – I.

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5.4 (a)(v) The Commission is in agreement with the conclusion of the IO that Shri S.R. Bhatti was not sure whether the matter had been discussed with the Commissioner by the CO and it seemed to be only his impression that the matter had been discussed before the directions vide note dated 18.8.2004 were recorded by the CO. Further, when the file was again submitted to the Commissioner vide note dated 13.12.2005 (RUD.S-11), he had clearly recorded therein that 'surprisingly the file was not discussed'. This sequence of events indicates that there is neither any evidence/substantiation nor any corroboration of this matter having been discussed between the CO and the Commissioner despite the written directions asking for discussions. In the light of above, the Commission observe that this component of the charge is proved against the CO.

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5.4(b)(vi) The Commission is in agreement with the findings of the IO that the observations made by the Adjudicating Authority dated 6.6.2012, in para 54 of the order to the effect that directives of the CO agreed with the procedure from July 2003 onwards i.e. post Public Notice No. 74/2003 do not appear to be in conformity with the procedure and guidelines laid down

(Signature)

in Circular No. 72/2003, 73/2003 and 74/2003. It is also seen that the Chief Commissioner, Central Excise, Mumbai-II vide his letter dated 3.10.2013 had inter-alia pointed out that observations of the Adjudicating Authority in para 40 of the order dated 6.6.2012 (RUD.D-4) are patently incorrect as can be made out from the Public Notices No. 73/2003 and 74/2003, as the Public Notice No. 73/2003 clearly states that the existing procedure is being modified for fast clearance of import consignments from Air Cargo Complex, Jawahar Custom House, CFS Mulund against DEPB licenses verified by the Commissionerate and the Public Notice No. 74/2003 only mentions the four Custom Houses i.e. Air Cargo Complex, Jawahar Custom House, New Custom House and CFS Mulund and speaks of clearances of imported cargo at the ports other than the Port of Registration. There is clearly no reference in the Public Notice about the clearance from a Private Bonded Warehouse in a Central Excise Commissionerate.

(vii) The Commission observe that it has been clearly established that the contention of the CO that his directive dated 18.8.2004 in the file was in conformity with Public Notice No. 73/2003 and 74/2003 is not sustainable and that the directive of the CO to allow clearance of goods in the absence of TRA from the Port of Registration by debiting licence was not in conformity with Public Notice No. 72/2003 and therefore this component of the charge is proved against the CO.

(viii) However, the Commission also observe that the direction of the CO that in case the RAs are not issued from the port of registration, a debit entry may be made in the licence and it may be ensured that the same is debited in the computer system at the Port of Registration, was not a new practice initiated by him and was in vogue even earlier as has been stated by Shri D.S. Dalvi (SW-3) and Shri S.R. Bhatti, (SW-2) in their depositions before the inquiry. A matter of difficulty in obtaining RA was brought to the notice of the CO through note (RUD.S-10) and the directions given by the CO were in the context of that note.

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Hence it cannot be said that it was a new practice entirely introduced by the CO and this therefore becomes a mitigating factor as far as this element of charge is concerned.

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5.4(c)(x) The Commission observe that the above discussions clearly indicate that the revenue loss has occurred due to failures at various levels i.e. the Appraiser at JNCH, the Port of Registration who failed to make entries of the debits on the hard copy of the licences, the concerned officers of the Custom Bonded Warehouse Taloja, who failed to ensure the debits entry of the license at the Port of Registration as directed by the CO, or even to confirm whether the debit entries in respect of the clearances being given by them were being made in the EDI computer system at the Port of Registration or not; and the prevalence of the faulty system of giving clearances without RA/TRA at Custom Bonded Warehouse, Taloja even before the directions given by the CO.

The Commission also observe that there appears to have been considerable conclusion regarding the interpretation of various Customs Circulars and Public Notices issued in respect of issues dealing with import cargo at different customs facilities and bonded warehouse. A number of circulars and notifications were issued in quick succession under the EXIM Policy 2002-07 and FTP 2004-2009 in regard to DFRC, DEPB &DEEC schemes. These include notifications 46/2002 -CUS dated 22.4.2002 in respect of DFRC, 45/2002-CUS dated 22.04.2002 in respect of DEPB, 43/2002-CUS dated 19.4.2002 in respect of DEEC. The detailed instructions issued regarding issue of TRAs under DEEC scheme vide circular No. 14/94 dated 1.6.94 were revised/amended on several occasions i.e. vide Circular No. 12/95 dated 20.2.1996, 51/95 dated 24.05.1995, 117/95, dated 17.11.1995, 54/96 dated 29.6.1996. Similar in respect of DFRC scheme Circular No. 33/2000-CUS dated 2.5.2000 and Notification No. 48/2000-CUS dated 25.4.2000 were also issued. Likewise in respect of DEPB scheme notification 34/97 CUS dated 7.4.1997 followed by Board Circular 10/97 dated 17.4.1997 was issued, which laid down the



procedure to be followed and was further modified by circular 91/98-CUS dated 17.12.1998 and 85/99-CUS dated 25.6.1999 in connection with the RA/TRA facility. Subsequently, Circular No. 68/2000 dated 18.8.2000 was issued superseding Board Circular No. 16/99-CUS dated 7.4.1999 which permitted import under DEPB scheme at Customs bonded warehouses through TRA procedure. This was again revised vide circular No. 72/2003 dated 11.8.2003, Public Notice No. 73/2003 dated 30.6.2003, and finally vide Public Notice 74/2003 and 8.7.2003 issued by Commissioner Customs (EP), Mumbai. In the face of such a large number of circulars and notifications it appears that there was some confusion in regard to applicability to various export exemption schemes. In fact the Adjudicating Authority i.e. Commissioner Central Excise, Belapur under whose jurisdiction PBW Taloja is located had recorded in his adjudication order dated 6.6.2012 that public notice No. 74/2003 dated 8.7.2003 had the effect of extending the application to all DEPB/DFRC/DEEC/EPCG/DFCEC schemes and was not limited only to DEPB scheme as stated in the earlier Circular No. 68/2000. In fact as has already been stated above, the Commissioner Central Excise, Belapur after elaborate discussions and analysis of the various circulars and their rationale and applicability to various schemes concluded that the noting of the Joint Commissioner, Taloja Division, Belapur (i.e. the CO) dated 18.8.2004 in which the subordinate officers at the Divisional Level were directed to ensure debit entry in license and ensure their debit in the computerized system at the Port of Registration in such cases where TRA were not issued from the Port of Registration as being in consonance with public notice 74/2003 dated 8.7.2003. He was also of the view that in the circumstances of the case, the officers dealing with the case of M/s. Akshay Exports had carried out their duties in the best possible manner under the given circumstances. He further concluded that allegations of collusion of the Divisional officials with M/s. Akshay Exports were arbitrary and devoid of any conclusive evidence.

The Chief Commissioner, Central Excise Mumbai Zone-II, while commenting on a reference

received from Director General Vigilance in this regard however, felt that the conclusion arrived at by the Adjudicating Authority i.e. Commissioner, Central Excise Belapur was incorrect as the clearance of imported goods against the DEPB/DFRC and DEEC schemes without production of TRA in a Private Bonded Warehouse in a Central Excise Commissionerate is against all established norms and instructions issued from time to time. He was of the view that Public Notice No. 74/2003, which had been quoted by the Adjudicating Authority was applicable only to 4 Customs Houses i.e. Air Cargo Complex, Jawahar Customs House, New Customs House and CFS Mulund and not to a Private Bonded Warehouse in a Central Excise Commissionerate. However, the Chief Commissioner also could not apparently find any evidence of fraud or collusion by the subordinate officials of the Belapur Division. Citing the view of the Committee of Chief Commissioners which had agreed with the conclusion arrived at by the Adjudicating Authority as being correct and legal in the face of the evidences available on record, the Chief Commissioner declined to review the reasoning adopted by the Adjudicating Authority or the comments given by the Adjudicating Authority in respect of the correctness or otherwise of the procedure adopted by the officers. He was simply of the view that the observations of the Adjudicating Authority i.e. Commissioner, Central Excise, Belapur in regard to the applicability of Public Notices No. 73/2003 dated 30.6.2003 and 74/2004 dated 8.7.2003 to PBWs under Central Excise Commissionerate was patently incorrect.

The Commission thus observe that there appears to be considerable confusion in the views taken by various senior officials of the Excise Department at Mumbai. Moreover, the issue of several circulars and notifications around the year 2002, when the EXIM Policy was perhaps introduced, appears to have also created some ambivalence in the interpretation of the applicability of the various circulars to different schemes. Consequently, in the face of the above mentioned discussions and appreciation, it would not be out of place to give benefit of doubt in this regard to the CO in respect of the element of charge.



(xi) The Commission, thus in agreement with the IO, observe that given the circumstances of the case and the fact that no collusion or mala fide could be established against the CO, the charge on the CO of being responsible for revenue loss of Rs. 32 lakhs suffered by the Government as a result of the deliberate exploitation of the rules and instructions, being promulgated in quick succession in respect of exemptions permissible under various Customs schemes, by M/s. Akshay Exports, Taloja could not be conclusively established.

(xii) The Commission thus observe that Article I of the charge is partly proved against the CO.

Article of Charge II.

5.4.2(vi) The Commission observe that even though it has been established that the matter had not been discussed by the CO with the Commissioner, the fact that the CO in his defence has been putting the entire onus in respect of the instructions given by him on the Commissioner and categorically contends that the directions written by him on file were given only after discussing the matter with the Commissioner, cannot be ignored. If any verbal directions had been given as claimed by the CO, then it was necessary for the CO to get the same confirmed in writing at the earliest possible in accordance with the provisions of the Manual of Office Procedure (RUD.S-24). Had the CO put up the file to the Commissioner at the time of recording his directions vide his note dated 18.8.2004, the complications arising in this case resulting in misuse of the facility by M/s Akshay Exports could perhaps have been avoided.

(vii) The Commission in agreement of the DA thus observe that Article of Charge II is proved against the CO.

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Article of Charge III

(vii) Having regard to the context and nature of the charge, Commission is in agreement with the DA

that considering the revenue implications and the CO being a senior officer with only one bounded warehouse under his charge, should have been concerned about the correct compliance of his instructions and instituted a monitoring mechanism to ascertain whether any difficulties were being faced in their implementation. However, the CO has acted in a casual manner by giving a new set of instructions, not obtaining his superior's (Commissioner) approval, in respect of these instructions, and then failing to monitor their implementation. **The Commission thus observe that Article of Charge III is established against the CO.**

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Article of charge IV.

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5.4.4(vii) The Commission observe that there is force in the contention of the CO that no rule or orders have been quoted under which it was mandatory on his part to issue a Public Notice or a Standing Order on the subject. Even though the CO has invited attention to the instructions of the Board issued vide Circular No. 49/Cus/94 dated 2.2004, which lays down the contingencies under which public notices are to be issued, no specific instructions have been quoted either by the CO or the DA in relation to the Standing Orders. The contention of DA that when a new procedure has been devised by the CO which required action on the part of other offices also i.e. the Port of Registration for making entry in the licence/Computer System, it was necessary on the part of the CO to lay down the procedure to be followed in the form of detailed guidelines (or Standing Order) elaborating the manner in which the decision taken by the CO was to be implemented, in consultations with the Port of Registration where the licence was to be eventually debited; is without any supportive instructions which have been violated by the CO in this regard. This point has also been agitated by the CO and accepted by the IO. Consequently it appears that

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this charge is vaguely worded. It is also noted that the DA has also not commented on the contention of the CO of no instructions or rules having been quoted by the DA which had been violated by the CO in relation to this charge. The Commission thus observe that this charge cannot be held as decisively proved against the CO.

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Article of Charge V

5.4.5(vii) The Commission observe that a perusal of the records of the case indicates that no specific instructions have been quoted that mandated the CO to mark or ensure marking of the Ex-bond bills of entry for concurrent audit. DA's comments that the CO had worked in a Customs House and being an experienced officer, he was aware of the importance of Audit and specifically more so in this case because the CO had ordered a new procedure, which was not in line with CBEC Circular can amount to only an observation not supported by any departmental circular or guidelines in this regard. It has not been established by the prosecution that the CO was responsible for getting the Ex-bond bills of entry audited. The Commission thus observe that, as per the instruction issued by the Asst. Commissioner, Belapur Division to the Range, the bills of entry were required to be sent to the Audit section of the respective customs house, and that it was the duty of the concerned revenue officers of the Belapur Division, viz Inspectors, Superintendent of the Division and the Asst./Deputy Commissioner to ensure that the ex-bond bill of entry in respect of M/s Akshay Exports are marked for audit to see whether all the requirements are being fulfilled and whether the export promotion benefit being claimed by the importer was proper and eligible or not. As other officials were made specifically responsible in this regard, no direct responsibility appears to devolve on the CO.

(viii) In view of above, the Commission observe that there is no basis for holding the CO

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responsible for not marking the Ex-bond bills of entry for audit and therefore this charge cannot be held as proved against him.

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Article of charge VI

5.4.6 (vi) The Commission observe that there is merit in the submission of the CO that the work regarding the clearances of the goods from the custom bonded warehouse in the jurisdiction of the Belapur Division falls within the jurisdiction of the Asst./Dy. Commissioner and therefore they should have exercised proper supervisory control over their subordinates in day to day functioning of the office and ensured that the instructions given by the senior officials were properly complied with. Moreover, an officer of the level of the CO cannot be held responsible for the lapses on the part of a hierarchy of junior officials unless such lapses were found to have been specifically brought to his notice and despite which there is evidence of his failure to act. It is well established that it is the responsibility of the immediate superior officer to ensure devotion to duty of the officer subordinate to him and all the senior officers in the hierarchy cannot be held responsible in this regard. In view of this, the Commission observe that this charge is not proved against the CO.

5.5 The Commission thus observe that Article of Charge I is partly proved Articles of Charges II & III are proved, and Articles of Charges IV, V and VI are not proved against the CO.

5.6 The Commission further observe that the Charges proved against the CO establish more a lack of care and attention towards his duties and responsibilities rather than in intentional collusion or malafide on his part. While there is no doubt that the CO had given clear directives that in case the RAs are not issued from the Port of Registration, a Debit Entry be made in the license and data of the same



should also be entered in the computer system at the Port of Registration, the CO being in a senior position should have been aware of the implications of acceding clearances of imported goods without RA/TRAs in accordance with the new procedure introduced under the EXIM Policy at the PBW, Taloja, particularly as there was only one such facility under the charge of the Commissioner, Central Excise, Belapur. The CO therefore should perhaps have established some monitoring procedure regarding the compliance of the instructions, which he failed to do. It has also come on record that this procedure had not been initiated by the CO but was prevalent even earlier to his posting at Belapur and apparently remained unchecked by all the concerned officers. Moreover, it can also not be ignored that the fraud committed by the importer was a result of failures by multiple agencies and not the CO alone, for example the Appraisers in JNCH who, despite instructions, failed to make entries of the data in the hard copies of the license which was also a significant factor in the same licenses being incorrectly utilized twice for clearances.

6. In the light of their findings, as discussed above and also keeping in view all other aspects relevant to the case, the Commission consider that the ends of justice would be met in this case if the penalty of "withholding of one increment of his pay for a period of one year without cumulative effect and not adversely affecting his pension" is imposed on the CO, Shri R. Srinivasa Naik. They advise accordingly."

8. The advice/recommendation of the UPSC was supplied to the applicant giving an opportunity to submit his representation, if any. He also submitted his representation. After considering the representation of the Applicant/CO vis-a-vis the



findings of the UPSC, the Disciplinary Authority vide order No. 30/2015 dated 23rd October, 2013 (A16) awarded a minor punishment though a major penalty proceedings were initiated against the applicant. The punishment imposed on the applicant reads as under:

"Now, therefore, the Disciplinary Authority imposes the penalty of "withholding of one increment of pay for a period of one year without cumulative effect and not adversely affecting his pension "on Shri R.Srinivasa Naik, Additional Commissioner. It is ordered accordingly."

9. From the pleadings it appears that the adjudicating proceedings had also taken place in the matter on the same issue concerning the applicant/CO and orders were passed by the adjudicating authority. The adjudicating authority i.e. Commissioner, Central Excise Belapur Commissionerate gave a categorical findings that the present applicant had carried out their duties in the best possible manner under the given circumstances and the finding given by the adjudicating authority has been approved by the Committee headed by the Chief Commissioner that the conclusion arrived at by the Adjudicating Authority is correct and legal to this effect.

From the record, it further reveals that departmental appeal has been filed against the order of the adjudicating authority. It is not on record as to whether such appeal has been



admitted and any interim order has been passed or the same has finally been disposed of.

It is also not known whether M/s. Akshay Exports filed any appeal against the order of adjudicating authority or not or any appeal if filed, was disposed of or not. So we proceed to take it granted that no interim order has been passed during the pendency of the appeal with regard to implementation of the order passed by the adjudicating authority.

Now coming to the main issue pertaining to enquiry conducted against the Applicant/CO it is material to mention that during the course of enquiry, the applicant requested to inspect six documents which were relevant and pivotal to the case. He was permitted by the IO to inspect those six documents. But only how only TWO documents out of SIX were allowed to inspect. The order of the IO in this regard is extracted herein below:

"4. The CO submitted a letter dated 03.10.2012, where he has listed 6 documents and has explained the relevance of the same in the instant proceedings. He requested that these documents may be supplied to him as his defence documents. The IO allowed inspection of these documents by the CO and directed the PO to arrange inspection of these documents before the next date of hearing."

It has been alleged by the learned counsel for the applicant that serious injustice and prejudice has been caused to the applicant for not allowing him to inspect the six documents and



it has been adversely affected the interest of the applicant in defending his case for want of all the documents.

It was further contended that so far as financial loss is concerned, the applicant has been exonerated from the charge as per the advice of the UPSC which was also accepted by the DA.

There is a categorical finding of the UPSC and DA that there is no collusion of the Applicant with M/s. Akshay Exports and he acted bona fide and he cannot be held responsible for any financial loss caused to the Department. It has been stated that the order which the applicant/CO passed, which according to him was passed after consultation with the Commissioner, it was observed that the order passed by the applicant was not a new practice but the adjudicating authority as well as DA categorically held that it was on the basis of the long standing practice prevalent in the department.

There is another categorical finding by the DA that after existing policy several circulars and orders were passed from time to time and that the possibility of confusion in the minds of the enforcing wing of the department cannot be ruled out. Hence in view of the above, the proceedings ended in a case of major penalty into a minor penalty.

On the contrary, the respondents' counsel submitted that the IO as well as the UPSC and the DA categorically came to the conclusion that the order passed by the applicant/CO in 2004



was against the procedure. Hence, he was awarded the minor penalty because there was no mala fide intention established against the applicant. Therefore no interference in the matter is required. The department had relied upon the documents supplied during the course of enquiry with a view to establish the case of the department and non inspection of all the documents which are not form part of the memo of the charge shall not in any way give any reason to interfere in the order of punishment.

We have considered the submissions of the rival parties and perused the voluminous records with the aid and assistance of the counsels of respective parties.

The advice of the UPSC is mostly based on the disagreement of the findings record by the adjudicating authority. The adjudicating authority while adjudicating the cause acted in a judicial side and not in administrative side. Similarly, the Appellate or Revisional Authority exercising powers also acted in judicial capacity. The orders passed by them are sacrosanct and cannot be allowed to challenged except in accordance with the established procedure of law i.e. by filing appeal or revision and unless the findings are set aside, the same shall operate and the said order cannot be superseded in exercising the power in administrative side. Therefore, the Departmental proceedings and the decisions arrived at on the basis of difference of opinion with

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the adjudicating authority by the UPSC or DA cannot be allowed to prevail.

So far as the factual matrix is concerned, the adjudicating authority has categorically held that the applicant has acted bona fide without any collusion and his order is based on the existing practice of the department. Therefore, there is nothing against the applicant in passing the order.

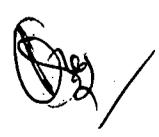
So far as the question of prejudice is concerned, the IO allowed the applicant to inspect six documents after considering its relevancy to the matter. So it cannot be said that those documents were not at all relevant. We are not aware what was the relevancy of those documents and how it affects the interest. We are not aware what amount of prejudice has been caused by not allowing to inspect all those documents or handing over copies thereof to the applicant. But in the given circumstances it cannot be said that once the IO felt the documents sought to be inspected are relevant for the defence non availability of FOUR documents for inspection would certainly cause prejudice to the applicant that too keeping in mind that the proceedings have been initiated after a lapse of more than seven years from the date of the alleged misconduct. The Hon'ble Supreme Court time and again directed the authorities that the disciplinary proceedings should be initiated without any unnecessary delay and should be concluded as



expeditiously as possible so that no prejudice can be caused to the delinquent.

Although it is a minor penalty but it has serious consequence on the service career of the applicant. Therefore, the findings arrived at by the IO which is contrary to the decision of the adjudicating authority cannot lightly be taken. In the circumstances, we infer that the DA was so lenient that in a major penalty charge he imposed a minor penalty of "withholding of one increment of pay for a period of one year without cumulative effect and not adversely affecting his pension". It show that the disciplinary authority was also of the view that the alleged misconduct is virtually a technical breach of procedure.

It is well settled principle of law that the procedure is meant to facilitate the process of adjudication and to arrive at a just conclusion after adhering the principles of natural justice. The Rule or procedure is handmaid and can be changed in the circumstances of the case to do complete justice after adhering to the principles of natural justice. Here in the instant case, the procedure is always changing by issuing different orders by the Commissioner or by the Senior Authorities. So there is no known established procedure to be adhered to by the subordinate officers. This finding has been endorsed by the DA himself. If it is so, the alleged misconduct, if allowed to prevail then it would at the most be a case of negligence.



It is also well settled law that negligence would not amount to misconduct unless that negligence is proved to be the result of mala fide exercise of power to get undue benefit by the wrong doer. In this case, the DA has categorically held that there was no collusion of the applicant with the M/s. Akshay Export. There is no mala fide on his part and what he has done in terms of the order and practice prevailing in the department since long.

As such the alleged negligence on the part of the applicant cannot constitute a misconduct within the meaning of law as held by the Hon'ble Apex Court in case of **D.V. Kapoor vs Union Of India And Ors**, reported in 1990 AIR 1923= 1990 SCR

(3) 697 and in the case of **Union of India and others vs J. Ahmed** reported in 1979 SC 1022. Consequently imposition of

punishment on the basis of such negligence cannot be allowed to sustain. The applicant is a senior officer of the Department and if punishment is allowed to sustain it would become difficult for such senior officers to discharge their duties in free and fair manner with due sincerity.

Negligence as stated herein above does not amount to misconduct and we are of the view that in such a circumstances, it cannot be held that the applicant has committed any misconduct so as to be allowed to suffer by the order of punishment as imposed on him.



In view of the discussions made above, we feel that imposition of minor penalty (though proceedings were started under major penalty) is not justified. Hence, the order of punishment is quashed/set aside. The Applicant shall be entitled to all the consequential benefits within one month from the date of communication of this order.

10. In the result, this OA succeeds to the above extent.

There shall be no order as to costs.

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(Jaya Das Gupta)
Member (Admn.)

01/07/2016
(Justice V.C.Gupta)
Member (Judl.)

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