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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

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+ CUSAA 1/2010

RAKESH ARORA Appellant
Through: Ms.Shikha Sapra, Advocate

versus

COMMISSIONER OF CUSTOMS Respondent
Through: Mr.Satish Kumar, St.Counsel

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+ CUSAA 8/2010

ASHOK KUMAR JHA Appellant
Through: Ms.Shikha Sapra, Advocate

versus

COMMISSIONER OF CUSTOMS Respondent
Through: Mr.Satish Kumar, St.Counsel

CORAM:
HON'BLE MR. JUSTICE SANJIV KHANNA
HON'BLE MR. JUSTICE R.V.EASWAR

ORDER
22.11.2011

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Having heard learned counsel for the parties, the following
substantial question of law is framed:-

Whether the Customs Excise and Service Tax Appellate Tribunal has disposed of and decided the appeals filed by Rakesh Arora and Ashok Kumar Jha in accordance with the mandate and requirements of Section 112 of the Customs Act, 1962?

2. As these appeals arise out of a common order passed by the Customs, Excise and Service Tax Appellate Tribunal (tribunal, for short) and as similar contentions and issues have been raised, these appeals are being disposed of by a common order.

3. The appellants herein had filed appeals before the tribunal, impugning orders passed by the Commissioner of Customs dated 18.11.2005 imposing penalty of Rs.20 lacs and Rs.5 lacs on Rakesh Arora and Ashok Kumar Jha, respectively.

4. Learned counsel for the appellant has drawn our attention to the impugned order, reasoning and the discussion therein. The relevant portion of the impugned order reads as under:

“ 4. Heard both sides and perused the record.

5. At page 43 of the Order-in-Original, Id. Commissioner has brought out that Bill of Entry No.105930 dated 25th June, 03 has given rise to the cause of action against both the Appellant, there was importation of small quantity of synthetic rubber SBR 1502. On 31st July 2003, the DRI Authorities examined the container bearing No.MSKU 8059340 and MAEU 8205935 containing the impugned goods along with synthetic rubber. The examination revealed that 6,51,610 pcs. of bearings, 414 pairs of shoes and 2 Horse Lane Premium gold plated dinner

sets were concealed by synthetic rubber and such goods did not find place in the Bill of Entry filed by the Appellant. Such a fact was established in Adjudication. Investigation had gathered oral evidence recorded from various persons. Oral evidence of Shri Ajay Uppal recorded on 4th Aug. 2003, in no uncertain terms proved that there was concealment of the impugned goods by a small quantity of synthetic rubber which was the goods stated to have been imported through Bill of Entry submitted. He disclaimed the goods. That brought the Appellant Shri Rakesh Arora to charges noticing that he was a person behind above import. Shri Rakesh Arora failed to prove his innocence and failed to dissociate himself leading evidence to prove his innocence. He made deliberate attempt to escape from the course of investigation. This is also proved on record since Revenue could succeed to enforce his attendance through the order passed by a Magisterial Court. Oral evidence of Shri Ajay Uppal showed that for a small consideration of Rs.6000/- P.M., he was used as benamidar for the Appellant. That remained uncontroverted. Shri Ajay Uppal also proved the concealed goods.

6. When the Authorities further proceeded to examine how the transactions were dealt. Authorities also found that a bank account in the name of above concern was opened at the instance of Shri Rakesh Arora consequent upon introduction by Shri Ajay Kartik for opening such account in the Corporation Bank at Noida. This clearly proved that had Shri Rakesh Arora not been concerned or connected with M/s.A.U. international, he would not have opened the Bank Account. All these evidence establish that Shri Ajay Uppal was certainly a benamidar and for a remuneration of Rs.6000/- P.M. he was merely a name lender for the undisclosed principal Shri Rakesh Arora. There was nothing contradictory evidence brought to record by Shri Rakesh Arora for his defence.

7. The department had also considered evidence of Shri Ashok Kumar Jha. Shri Rakesh Arora failed to discard that evidence to get immunity from penalty. Shri Jha stated that M/s A.U.International was a brain child of Shri Rakesh Arora. Also he stated that Shri Ajay Uppal was the conduit to deal under the name and style of M/s A.U.International. Shri Rakesh Arora was real owner of that concern. Entire material having been brought to record and nothing been controverted to dissociate Shri Rakesh Arora from M/s A.U. International, the said Appellant is not entitled to any immunity under the law. Therefore penalty of Rs.20.00 lakhs imposed by Authority below is confirmed against him.

8. So far as the involvement of Shri Ashok Kumar Jha is concerned, it appears that he had conscious knowledge about the activity of M/s A.U. International, Shri Rakesh Arora and Shri Ajay Uppal. Law never permits abetment of offence, Shri Ashok Kumar Jha has proved himself to be one of the agents of the malicious design against REvenue. His oral evidence was also against him proving his nexus to the offence. He was aware of the import documents given by Shri Ashok Arora. Therefore his involvement cannot be ignored. There is also no cogent evidence to rule out his active involvement with the entire chain deceitful import. Having no alternative to appreciate innocence of Shri Ajay Kumar Jha, penalty of Rs.5.00 lakhs imposed by Authority below, on him is also confirmed.

9. In the result, both Appeals are dismissed.
(Dictated & pronounced in open Court)”

5. It is apparent from the aforesaid paragraphs that the tribunal has not specifically referred to the contentions of the appellant and rejected the same after making reference to evidence, statements and material

on record but general observations and findings have been recorded. These findings are inferences but do not refer to the primary material or evidence on the basis of which findings have been recorded. For example, in paragraph 5, it is mentioned that in the container, ball bearings, shoes and premium gold plated dinner sets were concealed in synthetic rubber and such goods were found and these were not mentioned in the Bill of Entry. It is not clear whether this fact was disputed or denied by the appellants but the tribunal has recorded that “such fact was established in adjudication”. The adjudication order was subject matter of the appeals and under challenge before the tribunal. In the subsequent sentence, the tribunal has mentioned that oral evidence was recorded during investigation but no details of the witnesses and statements made by them is indicated. The oral evidence relied upon by the authorities was required to be examined and considered while dealing with the contentions raised by the appellants. It is stated that Rakesh Arora was the person behind the import but details of the evidence or material on the basis of which said finding has been recorded is not stated. Introduction for opening a bank account is an incriminating circumstance which is stated but there is no discussion or reference to other evidence, material and oral testimonies. It is further recorded that Ajay Uppal had stated that he was working as a benamidar for Rakesh Arora and in his oral evidence

had admitted that he was being paid Rs.6000/- per month. The contention of the appellant is that the same is self-exonerating and should be read and accept after referring to corroborative material. There is no reference to the contentions raised by Rakesh Arora on the said aspect. Reference is not made to the stand of Rakesh Arora, the same is not dealt with and rejected.

6. Similarly, with regard to Ashok Kumar Jha, it has been held that he had “conscious” knowledge about the activities but no evidence or material has been discussed to state as to on what basis the said inference has been drawn. It has been recorded that his oral evidence was against him and proves his nexus to the offence. However, the said oral evidence has not been discussed and quoted in the impugned order.

7. The tribunal, being the first appellate authority and the final fact finding authority, is required to deal with the contentions raised, consider and refer to the evidence and material on record and then record findings of fact. Of course, the tribunal is not the first or the original authority but this does not mean that it has to only refer to the inferences drawn without adverting to the material and evidence on the basis of which the said inference has been drawn. It must deal with the contentions raised by the appellants and accept or reject the same on

the basis of material and evidence on record. (see *CIT v. Walchand & Co. {1967} 3 SCR 214 and Omar Salay Mohd. Sait v. CIT, AIR 1959 SC 1238*)

8. In view of the aforesaid discussion, the question of law mentioned above is answered in negative and in favour of the appellants and against the respondent, the Commissioner of Customs and an order to remit is passed. The appeals will be decided afresh.

9. The appellant will appear before the Registrar of the tribunal on 16th December, 2011 at 11:30 a.m. where a date of hearing will be given.

10. It will be the duty of the learned counsel for the parties to inform their clients. It is clarified that we have not expressed any opinion on the merits of the contentions of the appellants and the order passed by the Commissioner.

Dasti.

SANJIV KHANNA, J.

R.V.EASWAR, J.

NOVEMBER 22, 2011

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