(2020) 12 CESTAT CK 0054

In the Customs, Excise And Service Tax Appellate Tribunal

Case No : Customs Appeal No. 76851 Of 2019

Shri Swarup Mondal @Hash Commr. Of Customs (Preventive), Kolkata

Date of Decision : 23-12-2020

Acts Referred:
Customs Act, 1962 — Section 112, 123

Citation : (2020) 12 CESTAT CK 0054

Hon'ble Judges : P. K. Choudhary, J

Bench : Single Bench

Advocate : Arijit Chakraborty, Prabir Bera, S.S.Chattopadhyay

Final Decision : Allowed

Judgement

1. The appellant is in appeal against the Order-in-Appeal No. KOL /CUS (CCP) / AA /294 /2019 dated 01.05.2019 passed by the Principal

Commissioner of Customs(Appeals), Kolkata whereby his appeal has been rejected by the Lower Appellate Authority and imposition of penalty of

Rs.1,00,000/- upon him by the Adjudicating authority vide Order-in-Original No.05/ADJN/CL/AC/MLDN/2018-19 dated 27.11.2018 has been upheld.

The appellant is in appeal against the impugned order on the Grounds, in brief, -

i) Since the alleged recovery and seizure was initially made by the BSF and subsequently was handed over to the Customs authority, burden of proof

in terms of Section 123 of the Customs Act, 1962 shall not be applicable in the present case;

ii) Imposition of penalty under Section 112 of the Customs Act, 1962 upon the appellant without satisfying principle conditions of such provision is bad

in law; &

iii) The proceeding of adjudication without supplying the relied upon documents, is bad in law.

2. The learned Advocate appearing on behalf of the appellant has referred to the Order-in-Original dated 27.11.2018 passed by the Assistant

Commissioner of Customs, Maldah Customs Division, Maldah wherefrom it is evident that separate penalties were imposed upon the present appellant

i.e. Swarup Mondal and one Ujjal Mondal in the present case. In a separate appeal, vide Order-in-Appeal No. KOL /CUS (CCP) /AA /293 /2019

dated 01.05.2019, the Appellate Commissioner has been pleased to allow the appeal of said Ujjal Mondal by setting aside the penalty imposed upon

him. It appears that against the common Adjudication Order, two separate Orders-in-Appeal were passed by the Appellate Commissioner and by the

impugned order, penalty upon the present appellant has been upheld. Paragraph 11 to 15 of the impugned order as appearing at page nos. 38, 39 & 40

of the present appeal are the findings of the Appellate Commissioner wherein he has held that there is no dispute regarding the recovery and seizure

of gold bars from the appellant and the appellant has accepted the misconduct in his statement, but failed to justify his legal procurement of the seized

goods. After placing reliance upon a judgment of this Tribunal in the case of R.K. Angangbi Singh â?"Vs- Commissioner of Customs (Prev.), Shillong

[2018(361) ELT 1062 (Tri- Kol)] it has been held that the Lower adjudicating authority has rightly passed the order of confiscation and the imposition

of penalty upon the present appellant has been upheld.

3. The Ld. Advocate appearing for the appellant has drawn attention of this Bench to the Grounds of Appeal appearing at page nos. 27 & 28 of the

present appeal as was preferred before the learned Commissioner (Appeals) wherein it was categorically pointed out by the appellant that he had no

prior knowledge or reason to believe about the alleged confiscable and smuggled nature of the goods. It was also contended by the appellant before

the Lower Appellate Authority that the provision of Section 123 of the Customs Act, 1962 are not applicable to the facts of the present case. The

appellant had also complained about the nonsupply of relied upon documents alongwith the Show Cause Notice prior to completion of adjudication of

the present case by the Adjudicating authority. It is contended on behalf of the appellant that none of such Grounds have been considered by the

Appellate Commissioner while passing the impugned order. The impugned order has been passed in a mechanical and arbitrary manner without consideration of the facts and circumstances of the case.

4. Ld. A.R. appearing on behalf of the Revenue respondent has reiterated the findings of Appellate Commissioner and contended that from the

statement, as re-produced at internal page 3 of the Show Cause Notice dated 14.08.2018, of the present appellant it is evident that the appellant had

consciously involved himself in the smuggled activity and hence, penalty has been rightly imposed upon him.

5. Heard both sides through video conferencing and perused the appeal records.

6. The learned Commissioner (Appeals) should have verified the facts prior to dismissal of the appeal of the appellant. It is not in dispute that the

Show Cause Notice dated 14.8.2018 was issued without appending any relied upon documents though it had placed reliance upon several documents

such as BSF seizure, Customs inventory, statements of different persons, Assay report etc. The imposition of penalty upon the present appellant by

the Adjudicating authority is based upon such documents. It is a settled position of law that a Show Cause issuing authority is required to provide

copies of all relied upon documents along with the Show Cause Notice. When the authority wants to rely upon such documents, it is incumbent upon

them to provide copy of such documents to the noticee and non-supply of such copies of relied upon documents to the noticee renders the process of

adjudication void ab-initio.

7. In the case of Commissioner of Central Excise, Ludhiana â?"Vs Gulab Industries Pvt. Ltd. [2015 (316) ELT 657 (P&H)], the Honâ??ble High

Court of Punjab & Haryana at Chandigarh has held as follows :-

â??8. We have heard counsel for the parties, perused the impugned order as well as the order passed by the adjudicating officer and are

sanguine, in the correctness of our opinion, that the case in hand may disclose collusion, or to put it politely, negligence on the part of

certain officers. It is rather surprising that an officer of the rank of Additional Commissioner, was not aware that he is required to append

all relevant documents with the show cause notice, and if not appended, to provide copies to the noticee within reasonable time, before

proceeding to adjudicate the show cause notice. Admittedly, documents were not supplied to the respondent. The negligence does not end

here. The appellate authority granted time to the Department to furnish documents to the respondent so that it could reply to the show cause

notice but this opportunity also did not elicit any response, compelling the appellate authority to reverse the order passed by the

adjudicating officer for violation of principles of natural justice. The Tribunal has dismissed the appeal and the application for restoration,

on the ground of violation of principles of natural justice.

9. While we find no error in the impugned orders as far as violation of principles of natural justice are concerned, we cannot ignore the

fact that negligence or collusion by officers, enjoined with duty to collect taxes, detect evasion and/or to impose penalties, etc., cannot be a

ground to allow a delinquent to go scot-free. Where an order discloses violation of principles of natural justice, it is incumbent, while

setting aside such an order, to remand the matter instead of allowing a defaulting party to go scot-free. The appellate authority as well as

the Tribunal, while holding that principles of natural justice have been violated, should have remanded the matter to the adjudicating

officer after serving all relevant documents upon the respondent to decide the matter afresh.

10. In view of what has been stated hereinabove, we allow the appeal in part and while affirming that order passed by the adjudicating

officer is vitiated for violation of principles of natural justice, modify order passed by the Tribunal by directing that the matter shall be

taken up by the adjudicating officer from the stage of issuance of show cause and after furnishing all relevant documents to the respondent

and granting adequate opportunity to present its defence, decide the matter within three months of parties putting in appearance before

him, on 9-9-2013â??.

8. In the present case also, order passed by the Lower adjudicating authority without supplying such relied upon documents along with the Show

Cause Notice and finalizing adjudication of the matter w.r.t. the present appellant was bad in law. However, the Adjudication Order has already

merged in two separate Orders-in-Appeal with respect to different noticee as recorded hereinbefore. Pertinent to observe that there is no appeal

against Order-in-Appeal No. KOL /CUS (CCP) /AA /293 /2019 dated 01.05.2019 w.r.t. noticee no. 2 of the Show Cause Notice dated 14.08.2018.

Since such Order-in-Appeal setting aside penalty upon the said noticee has reached its finality, no fresh proceeding against such noticee can be drawn

at this stage.

9. Ideally, the orders imposing penalty upon the present appellant and confirming the same by the Appellate Authority below are required to be

quashed on the ground of violation of principles of natural justice, but as held by the Honâ??ble High Court supra, an alleged wrong doer cannot be

allowed to go scot free on such ground alone. Similarly, the right of noticee in getting the relied upon documents and appropriate opportunity of

defence upon maintaining the principles of natural justice cannot be denied.

10. Accordingly, I set aside the impugned Order-in-Appeal dated 01.05.2019 in connection to the present appellant as well as imposition of penalty

upon him under the Order-in-Original dated 27.11.2018 and remand the matter to the original Adjudicating Authority i.e. the Assistant Commissioner

of Customs, Maldah Customs Division, Maldah for adjudication of the case afresh w.r.t. the present appellant being noticee no. 1 in the Show Cause

Notice dated 14.8.2018 after providing authenticated copies of all relied upon documents to the present appellant. It is needless to say that a

reasonable opportunity of submission of reply to the Show Cause Notice after going through the relied upon documents and an opportunity of personal

hearing will be granted to the appellant by the original Adjudicating authority before the matter is decided denovo. I make it clear that the present

remand is restricted to the present appellant only and it does not affect the orders already passed in connection to other noticee in the proceeding.

Parties are at liberty to take all points during the course of denovo adjudication by the Adjudicating authority in accordance with law. Since the matter

pertains to a seizure affected on 13.3.2018 by the Customs authority, it is expected that the Adjudicating authority will take all endeavour to re-

adjudicate the matter as expeditiously as possible without allowing any unnecessary delay.

11. With the above directions, the appeal is allowed by way of remand to the Original Adjudicating Authority.

(Pronounced in the open court on 23.12.2020)

