Customs, Excise & Service Tax Appellate Tribunal
West Zonal Bench At Ahmedabad

REGIONAL BENCH- COURT NO.3

SERVICE TAX Appeal No. 10526 of 2020
[Arising out of OIO -STC-4-54-O&A-15-16 dated 17/03/2020 passed by Commissioner of Central Excise, Customs and Service Tax-SERVICE TAX – AHMEDABAD]

JMC PROJECTS INDIA LTD **.....Appellant**
A-104, Shapath-4, Opp Karnavati,Ahmedabad
Ahmedabad, Gujarat

VERSUS

C.S.T.-SERVICE TAX – AHMEDABAD **.......Respondent**
7 Th Floor, Central Excise Bhawan, Nr. Polytechnic
CENTRAL EXCISE BHAVAN, AMBAWADI,
AHMEDABAD,GUJARAT-380015

APPEARANCE:
Shri Jigar Shah, Advocate for the Appellant
Shri Sharad Airan, Assistant Commissioner (Authorized Representative) for the Respondent

CORAM: HON'BLE MEMBER (JUDICIAL), MR. RAMESH NAIR
HON'BLE MEMBER (TECHNICAL), MR. RAJU

FINAL ORDER NO. A/ 11295 /2020

DATE OF HEARING : 10.11.2020
DATE OF DECISION:17.11.2020

RAMESH NAIR

This Appeal is directed against the order of Principal Commissioner communicated by the Superintendent whereby the request of the appellant for granting of cross-examination of the witnesses has been denied in the proceeding of Show Cause notice No DGCEI/AZU/36-58/2015-16 dated 20.10.2015.

2. Shri Jigar Shah, Learned Counsel appearing on behalf of the appellant submits that in the Show Cause Notice various statements of various persons were relied upon. Some of the witnesses are third parties. The demand in the show cause notice was issued relying on those statements without any documentary evidence. He further submits that the Adjudicating authority denied the cross –examination without any proper basis. In support of his submission, he placed reliance on this tribunal's judgment in the case of Kudrat Corporation final order No A/11131/2020 dated 29.07.2020.

3. On the other hand, Shri Sharad Airan, Learned Assistant Commissioner (Authorized Representative) appearing on behalf of the revenue submits that the Adjudicating Authority rejected the request for cross- examination by

giving proper reason. He further submits that the statements which were relied upon in the show cause notice were not retracted. Therefore, the appellant cannot be allowed cross-examination of witnesses. He placed reliance on following judgments:

- 2010(261)ELT(Mad)- AL Jalaludeen Vs. Dy Dir.Of Enforcement Directotrate, Chennai.
- 2006,(194) ELT 290(Tri-Del) – Jagdish Shanker Trivedi Vs.CC, Kanpur
- 1997 (89) ELT 646 (SC)- Surjeet Singh Chhabra Vs. Union of India.
- 2001(138) ELT 556 (Tri-Kol)- Fortune Impex Vs. CC, Calcutta.
- 1996 (81) ELT 320 (Tri) – Calicut Rubber Company Vs. CCE,Cochin
- 2001 (142) ELT 224 (GOI)- G Subramanian
- 2018 (15) GSTL 298 (Tri- Bang)- Paragon Steels P Ltd Vs. CCE, Calicut
- 2020(371) ELT 814 (Tri- Mum)- Spenta Multimedia P Ltd Vs. CC, Nhava Sheva-II

4. We have heard both sides and perused the records. We find that there is no dispute that the witnesses of which cross-examination has been sought for by the appellant have given their statements during investigation and such statements were relied upon in the Show cause notice. Some of the statements given by the third parties. The appellant for making their effective defence wish to cross-examine the witnesses. In our view the appellant should be given all the opportunity for making their defence including the cross- examination. Denial of cross- examination will amount to unfair justice in the case and also violation of principles of natural justice. The identical issue has been considered by this tribunal in the case of Kudrat Corporation (Supra) were in the following judgments was passed:

> *"4. We have heard both sides and perused the records. We find that the Adjudicating Authority has given precisely the reasoning for the rejection of the request of the cross examination of the witnesses in para 6 of the order which is reproduced below: "6. The request for cross examination of SIO who recorded the statements of the witnesses and who obtained technical opinion on the subject issue, I find that the relied upon documents have already been 3 | P a g e C / 1 0 2 5 2 / 2 0 2 0 provided alongwith Show Cause Notice and the cross examination of the SIO shall not bring out any new facts other than the facts which have already been recorded in the statements and in the technical opinions. The request for cross examination of 11 persons is not maintainable as nothing new is likely to come out and will only delay adjudication proceedings. In this regard, I refer to the judgment of Hon'ble High Court of Kerala in the case of N.S. Mahesh reported as 2016 (331) ELT 402 (Ker.) wherein the Hon'ble Court upheld the denial of cross examination of the departmental officers." From the above finding, the Adjudicating Authority has stated that the request for cross examination of 11 persons is not maintainable as nothing new is likely to come out and will only delay adjudication proceedings. We do not agree with the Adjudicating Authority that only due to likelihood of delay in adjudicating proceeding, the cross examination can be denied. There is no shortcut in the adjudication process. It is a fact on record that except SIO, all other persons have either given the statements under section 108 of the Customs Act, 1962 or taken their stand by way of letters. Shri Ashok Prasad and Shri Bipin Kumar have admittedly given the technical opinions which have been taken on record as evidence in the Show Cause Notice. Therefore, these evidences were used*

against the appellant. During the adjudication proceeding, any evidence can be admitted only when the witness is cross examined under section 138 B which is reproduced below: SECTION 138B. Relevancy of statements under certain circumstances. — (1) A statement made and signed by a person before any gazetted officer of customs during the course of any inquiry or proceeding under this Act shall be relevant, for the purpose of proving, in any prosecution for an offence under this Act, the truth of the facts which it contains, - (a) when the person who made the statement is dead or cannot be found, or is incapable of giving evidence, or is kept out of the way by the adverse party, or whose presence cannot be obtained without an amount of delay or expense which, under the circumstances of the case, the court considers unreasonable; or (b) when the person who made the statement is examined as a witness in the case before the court and the court is of opinion that, having regard to the circumstances of the case, the statement should be admitted in evidence in the interests of justice. 2) The provisions of sub-section (1) shall, so far as may be, apply in relation to any proceeding under this Act, other than a proceeding before a court, as they apply in relation to a proceeding before a court. From the plain reading of the above section, particularly, clause (b) of sub section 1 of section 138(b), it is clear that the statement made and signed by person before the Custom Officer can be admitted as evidence when the person 4 | P a g e C / 1 0 2 5 2 / 2 0 2 0 who made the statement is examined as a witness in the case before the court and the court is of opinion that, having regard to the circumstances of the case, the statement should be admitted in evidence in the interests of justice. In the above section, no exception is provided or any discretion is provided for the Adjudicating Authority to allow or not to allow the cross examination. Particularly, in the present case, when the appellant have vehemently requested the cross examination of the witnesses. The Adjudicating Authority cannot have his own assumption and presumption that whether anything will come out from the process of cross examination. It is up to the defendant that whether the cross examination will help for his defence. The cross examination is a vital part of principles of natural justice. Therefore, we are of the view that the appellant should be allowed cross examination, the witnesses except the SIO. The SIO is part of the investigation and the Show Cause Notice has relied upon various statements, letters and opinions. Therefore, the cross of SIO is unwarranted. As per our above discussion, we hold that the learned Principal Commissioner being adjudicating authority shall grant cross examination of witnesses as requested by the appellant. Accordingly, the appeal is allowed in the above terms."

5. In view of the above judgment which is self explanatory, when the noticee seeks for cross examination of witnesses, in the interest of justice and as mandated in section 9D of Central Excise Act, 1944, the Adjudicating Authority is under legal obligation to grant cross-examination of witnesses to the noticee. Therefore, the appellant's prayer for seeking cross- examination of witness is just and proper and the same is allowed.

6. Consequently the impugned order is set aside. Appeal is allowed.

(Pronounced in the open court on 17.11.2020)

RAMESH NAIR
MEMBER (JUDICIAL)

RAJU
MEMBER (TECHNICAL)

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