

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL,
WEST ZONAL BENCH : AHMEDABAD**

REGIONAL BENCH - COURT NO. 3

EXCISE Appeal No. 12085 of 2013-DB

[Arising out of Order-in-Original/Appeal No 57-COMMR-2013 dated 30.04.2013 passed by Commissioner of Central Excise-RAJKOT]

Indu Overseas Pvt. Limited

.... Appellant

Special Shed 23/1/a, GIDC, Shanker Tekri,
Udyognagar, JAMNAGAR, GUJARAT

VERSUS

Commissioner of Central Excise & ST, Rajkot

.... Respondent

Central Excise Bhavan, Race Course Ring Road,
Income Tax Office, Rajkot,
Gujarat-360001

WITH

(i) CUSTOMS Appeal No. 12442 of 2013 (K D THAKKAR)

(ii) CUSTOMS Appeal No. 12443 of 2013 (KETAN H BHANUSHALI)

**(iii) EXCISE Appeal No. 12086 of 2013 (PRAHALADRAI INDERMAL
JHANDAR)**

(iv) EXCISE Appeal No. 12942 of 2013 (ANAND PATEL)

(v) EXCISE Appeal No. 13021 of 2013 (NITIN D SINGALA)

[Arising out of Order-in-Original/Appeal No 57-COMMR-2013 dated 30.04.2013 passed by Commissioner of Central Excise, CUSTOMS (Adjudication)-RAJKOT, Arising out of Order-in-Original/Appeal No 57-COMMR-2013 dated 30.04.2013 passed by Commissioner of Central Excise, CUSTOMS (Adjudication)-RAJKOT, Arising out of Order-in-Original/Appeal No 57-COMMR-2013 dated 30.04.2013 passed by Commissioner of Central Excise-RAJKOT, Arising out of Order-in-Original/Appeal No 57-COMMR-2013 dated 30.03.2013 passed by Commissioner of Central Excise-RAJKOT, Arising out of Order-in-Original/Appeal No 57-COMMR-2013 dated 30.03.2013 passed by Commissioner of Central Excise, Customs and Service Tax-RAJKOT]

APPEARANCE :

Shri Paresh V. Sheth, Advocate and Shri Vikash Mehta, Consultant for the Appellant
Shri Rajesh K Agarwal, Superintendent (AR) for the Respondent

**CORAM: HON'BLE MR. RAMESH NAIR, MEMBER (JUDICIAL)
HON'BLE MR. C.L. MAHAR, MEMBER (TECHNICAL)**

DATE OF HEARING : 28.04.2023

DATE OF DECISION: 26.06.2023

FINAL ORDER NO. 11322-11327/2023**C.L. MAHAR :**

The main appellant is M/s. Indu Overseas Pvt. Limited, a 100% Export Oriented Unit, engaged in the manufacture of brass parts and accessories from imported duty free brass scrap under EOU scheme. The manufacture/ assessee were undertaking export of manufactured brass parts and accessories as well as they were also clearing in the domestic tariff area on payment of duty as per the permission obtained by them from the authorities.

2. Working on the intelligence, the officers of DRI started investigation against the importer/assessee on the allegation that the 100% EOU unit are engaged in exporting brass items after regularly inflating the weight of the consignments in the export/ deemed export documents with an objective to wrongly claim fulfillment of their export obligation. After detailed investigation, a show cause notice dated 17.01.2012 was issued to the importer/ assessee namely Indu Overseas Pvt. Limited and most of the other appellants which have filed appeals here. The matter was adjudicated by impugned order-in-original dated 30.03.2013 wherein mostly the allegations made in the show cause notice have been confirmed by the Adjudicating Authority. The appellants are before us against the said impugned order-in-original.

2.1 At the very beginning the learned Advocate appearing for the appellants contended that there is gross violation of principles of natural justice. In this matter, at the time of adjudication they have asked for the cross-examination of the persons namely, Shri Nitin Dinesh Singala, Shri

Sanjiv Kumar Durgpal Singh, Shri Anand C. Patel and Shri Bhavesh S. Shah but no cross-examination was granted. It has further been contended that the Adjudicating Authority behaved in an arbitrary manner and had not accepted the demand of cross-examination of the above mentioned persons. The Adjudicating Authority has confirmed the Customs demand as well as imposed penalty in gross violation of the laid down principles of natural justice. Learned Advocate further added that the statement of above mentioned persons have neither been corroborated with the documentary evidences nor cross-examination has been allowed and therefore it was wrong on the part of the Adjudicating Authority to draw conclusion without verification of the statements of above mentioned witnesses.

3. We have also heard the Shri Tara Prakash, learned Deputy Commissioner (Departmental Representative).

4. We have heard both the sides. We find that the impugned order-in-original has been passed without providing for cross-examination of the witnesses whose statements were recorded and relied upon by the authorities. We are of the view that it is necessary on the part of the Adjudicating Authority to accord opportunity of cross-examination of witnesses whose statements have been used as an evidence in the matter. It is mandatory for Adjudicating Authority to follow the principles of natural justice. The adjudication order passed without allowing cross-examination is an act of gross violation of natural justice. We find that, on this issue, this Tribunal in the case of *Patidar Products vs. CCE & ST, Bhavnagar in Appeal No. E/11756/2017, [Final Order No. A/11216-11224/2022 dated 18.10.2022]* considering various High Court judgments and the Supreme Court judgment, passed the following order:-

“4.3 A conjoint reading of the provisions therefore reveals that a statement made and signed by a person before the Investigation Officer during the course of any inquiry or

proceedings under the Act shall be relevant for the purposes of proving the truth of the facts which it contains in case other than those covered in clause (a), only when the person who made the statement is examined as witness in the case before the court (in the present case, Adjudicating Authority) and the court (Adjudicating Authority) forms an opinion that having regard to the circumstances of the case, the statement should be admitted in the evidence, in the interest of justice. The legislative scheme, therefore, is to ensure that the statement of any person which has been recorded during search and seizure operations would become relevant only when such person is examined by the adjudicating authority followed by the opinion of the adjudicating authority then the statement should be admitted. The said provision in the statute book seems to have been made to serve the statutory purpose of ensuring that the assessee are not subjected to demand, penalty interest on the basis of certain admissions recorded during investigation which may have been obtained under the police power of the Investigating authorities by coercion or undue influence. Undoubtedly, the proceedings are quasi criminal in nature because it results in imposition of not only of duty but also of penalty and in many cases, it may also lead to prosecution. The provisions contained in Section 9D, therefore, has to be construed strictly. Therefore, unless the substantive provisions contained in Section 9D are complied with, the statement recorded during search and seizure operation by the Investigation Officers cannot be treated to be relevant piece of evidence on which a finding could be based by the adjudicating authority. A rational, logical and fair interpretation of procedure clearly spells out that before the statement is treated relevant and admissible under the law, the person is not only required to be present in the proceedings before the adjudicating authority but the adjudicating authority is obliged under the law to examine him and form an opinion that having regard to the circumstances of the case, the statement should be admitted in evidence in the interest of justice. Therefore, we would say that even mere recording of statement is not enough but it has to be with full conscious application of mind by the adjudicating authority that the statement is required to be admitted in the interest of justice. Indeed, without examination of the person as required under Section 9D and opinion formed as mandated under the law, the statement recorded by the Investigation Officer would not constitute the relevant and admissible evidence/material at all and has to be ignored. We have no hesitation to view that in the present matter Ld. Pr. Commissioner committed illegality in placing reliance upon the statements of persons which was recorded during investigation when his examination before the adjudicating authority in the proceedings instituted upon show cause notice was not recorded nor formation of an opinion that it requires to be admitted in the interest of justice.

4.4 The Learned Adjudicating authority relied upon a decision of the Hon'ble Supreme Court in the case of *Surjeet Singh Chhabra v. Union of India* reported in 1997 (89) E.L.T. 646 (S.C.) and held that cross -examination of witness is not necessarily required to be allowed. However, in the case of *Surjeet Singh Chhabra* (supra). the gold was recovered at the airport and Surjeet Singh Chhabra admitted the smuggling of the gold. In these circumstances, when Surjeet Singh Chhabra retracted from statement, the Hon'ble Supreme Court held that the statement made under Section 108 of Customs Act, even retracted, can be used against Surjeet Singh Chhabra. In the present case, the facts are different.

4.5 We find that the Supreme Court in *Lakshman Exports Ltd.* 2002 (143) E.L.T. 21 (S.C.) (supra) while considering proceedings under the Central Excise Act, 1944 has held that, a noticee has a right to cross-examine the persons making statements against the noticee. The relevant para of judgment read as under:

"In an adjudication proceeding which is adversarial in nature, a party adducing evidence through a natural person is required to allow cross-examination of such

natural person, to the other side. In the present case apparently the prosecution was relying upon evidence adduced by natural persons in the proceeding. The prosecution, therefore, ought to have allowed such persons to be cross-examined. The petitioner made a request to the adjudicating authority for an opportunity to cross-examine. Such request was made by the written notes of defence. The adjudicating authority took such written request on record. However, it did not allow the petitioner to cross-examine the prosecution witness. It did not deal with the request for cross-examination, in the impugned order. It is not necessary that, a party to a proceeding, specify the reason why it requires the cross-examination of the witness. When, a contesting party in adversarial litigation adduced evidence through a natural person, it results in a corresponding right to the opposite party in such adversarial proceeding to cross-examine such natural person. In absence of such cross-examination being allowed or facilitated the evidence given by such natural person has no evidentiary value and cannot be relied upon. The adjudicating authority not having considered the request for grant of cross-examination of the prosecution witness, the impugned order stands vitiated by breach of the principles of natural justice. The impugned order is quashed. This order will not prevent the adjudicating authority to proceed afresh from the stage reached on April 25, 2018 or from such stage it deems appropriate. It is expected that, the adjudicating authority will keep the request of the petitioner to cross-examine the witnesses noted in its written notes of defence, in accordance with law."

In *Swadeshi Polytex Ltd. v. CCE, Meerut* [2000 (122) E.L.T. 641 (S.C.)], it was held that if the Adjudicating Authority "intends to rely upon the statement of any such persons, the Adjudicating Authority should give an opportunity of cross examination to the appellant".

A similar view has been taken by the Hon'ble High Court of Delhi in the case of *Basudev Garg* 2013 (294) E.L.T. 353 (Del) (*supra*). The relevant portion of the order is reproduced below :-

"14. The Division Bench also observed that though it cannot be denied that the right of cross-examination in any quasi-judicial proceeding is a valuable right given to the accused/Noticee, as these proceedings may have adverse consequences to the accused, at the same time, under certain circumstances, this right of cross-examination can be taken away. The court also observed that such circumstances have to be exceptional and that those circumstances have been stipulated in Section 9D of the Central Excise Act, 1944. The circumstances referred to in Section 9D, as also in Section 138B, included circumstances where the person who had given a 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 and expense which, under the circumstances of the case, the Court considers unreasonable, it is clear that unless such circumstances exist, the Noticee would have a right to cross-examine the persons whose statements are being relied upon even in quasi-judicial proceedings. The Division Bench also observed as under :-

"29. Thus, when we examine the provision as to whether the provision confers unguided powers or not, the conclusion is irresistible, namely, the provision is not uncanalised or uncontrolled and does not confer arbitrary powers upon the quasi-judicial authority. The very fact that the statement of such a person can be treated as relevant only when the specified ground is established, it is obvious that there has to be objective formation of opinion based on sufficient material on record to come to the conclusion that such a ground exists. Before forming such an opinion, the quasi-judicial authority would confront the assessee as well, during the proceedings, which shall give the assessee a chance to make his submissions in this behalf, it goes

without saying that the authority would record reasons, based upon the said material, for such a decision effectively. Therefore, the elements of giving opportunity and recording of reasons are inherent in the exercise of powers. The aggrieved party is not remediless. This order/opinion formed by the quasi-judicial authority is subject to judicial review by the appellate authority. The aggrieved party can always challenge that in a particular case invocation of such a provision was not warranted."

The Hon'ble Madras High Court in the case of *Veetrag Enterprises v. Commissioner of Customs - 2015 (330) E.L.T. 74 (Mad.)* has observed as under :

"8. While considering the value of cross-examination, the Apex Court in Ayaaubkhan Noorkhan Pathan's case (cited supra) held thus :

"Cross-examination is one part of the principles of natural justice :

23. A Constitution Bench of this Court in State of M.P. v. Chintaman Sadashiva Vaishampayan, AIR 1961 SC 1623, held that the rules of natural justice, require that a party must be given the opportunity to adduce all relevant evidence upon which he relies, and further that, the evidence of the opposite party should be taken in his presence, and that he should be given an opportunity of cross-examining the witnesses examined by that party. Not providing the said opportunity to cross-examine witnesses, would violate the principles of natural justice."

A mere reading of the above said proposition clearly shows that the rules of natural justice require that a party must be given an opportunity to adduce all relevant evidence upon which he relies and further that the evidence of the opposite party should be taken in his presence by giving an opportunity of cross-examining the witnesses examined by that party. In the present case, neither any speaking order has been passed nor the respondent justified in not permitting the petitioner to cross-examine the above said eight witnesses. Thus, such attitude of the respondent shows that the petitioner was not given fair opportunity to defend their case, therefore, not providing an opportunity to cross-examine the above said eight witnesses, in my view, would violate the principles of natural justice. Accordingly, the impugned order is set aside and the respondent is directed to permit the petitioner to cross-examine the above said eight witnesses and pass appropriate orders on merits and in accordance with law. Such exercise shall be completed by the respondent within a period of 45 days from the date of receipt of a copy of this order.

9. In fine, for the reasons stated above, the writ petitions stand allowed. No costs. Consequently, connected miscellaneous petitions are closed."

4.6 From the above discussions and following the judgments cited above, we are of the considered opinion that the denial of cross-examination is unjustified. The decision relied by the Ld. Adjudicating authority are on different facts and distinguishable. Non-production of witnesses for cross-examination, it was held, is violative of principles of natural justice. All these judgments in the matter of cross-examination are at the stage of adjudication. The law, therefore, at that stage, need not be elaborated, as it is the right of an assessee in the event the Revenue seeks to rely on the statements of witnesses recorded by it and whose statements are sought to be relied upon at the stage of adjudication to make available the said witnesses for cross-examination so that it could be established whether the statements recorded from the said witnesses have been voluntarily given and/or are relevant for the issue or based on personal knowledge or hearsay and the like. The object, being that a Tribunal or Court conducting a proceeding either before the Court or quasi judicial tribunal in adjudication, must have the true evidence and shift the evidence to weed out the chaff from the grain. Another

reason being to satisfy itself that the person whose statement was recorded had made it voluntarily and based on his personal knowledge or legal records which can come out in cross-examination. This is to ensure the Court or Tribunal or the authority conducting the proceeding arrives at the correct conclusion based on tested evidence before it. The issue also is no longer *res integra* in view of the large number of judgements of the Supreme Court.”

5. We follow the above order and set-aside the impugned orders-in-original and remand the matter back to the original Adjudicating Authority for passing a fresh order after allowing opportunity of cross-examination of the witnesses. The appeals are allowed by way of remand to the Adjudicating Authority.

(Pronounced in the open court on 26.06.2023)

(Ramesh Nair)
Member (Judicial)

(C L Mahar)
Member (Technical)