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

REGIONAL BENCH-COURT NO. 3

CUSTOMS Appeal No. 10358 of 2022- DB

[(Arising out of OIA-MUN-CUSTM-000-APP-318-320-21-22 dated 17/03/2022 passed by Commissioner of CUSTOMS-AHMEDABAD)]

D D INTERNATIONAL PVT LTD ....**Appellant**
26 The Mall Amritsar
Amritsar, Panjab

VERSUS

C.C.-MUNDRA ......**Respondent**
Office of the Principal Commissionerate of Customs,
Port User Buld. Custom House Mundra, Mundra
Kutch, Gujarat- 370421

WITH

(i) CUSTOMS Appeal No. 10359 of 2022- DB (SALIL BHATIA)
(ii) CUSTOMS Appeal No. 10385 of 2022- DB (MS V ARJOON)
(iii) CUSTOMS Appeal No. 10336 of 2022- DB (MAHENDRA T GANATRA)
(iv) CUSTOMS Appeal No. 10346 of 2022- DB (VIJAY GOEL)
(v) CUSTOMS Appeal No. 10350 of 2022- DB (MS GOEL INTERNATIONAL PVT LTD)

[Arising out of OIA-MUN-CUSTM-000-APP-315-317-21-22 dated 17/03/2022 passed by Commissioner of CUSTOMS-AHMEDABAD]

APPEARANCE:
Shri Stebin Mathew & Shri Paritosh Gupta Advocate for the Appellant
Shri Himanshu P Shrimali, Superintendent (AR), for the Respondent

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

Final Order No. 10275-10280/2024

DATE OF HEARING: 11.10.2023
DATE OF DECISION: 31.01.2024

RAMESH NAIR

These appeals are filed against the following respective Orders-in-Appeals passed by Commissioner (Appeals), Ahmedabad. Since, issues involved in these appeals are common, hence taken up together for disposal.

Appeal No.	Name of Appellant	OIA	Demand
C/10358/2022	M/s D.D International	MUN-CUSTM-000-APP-318 to 320-21-22 dtd. 17.03.2022	Penalty of Rs. 50 Lakhs each Under Section 114 and 114AA of the Act

C/10359/2022	Shri Salil Bhatia,	MUN-CUSTM-000-APP-318 to 320-21-22 dtd. 17.03.2022	Penalty of Rs. 30 Lakhs each under 114 and 114AA of the Act.
C/10385/2022	M/s V. Arjoon	MUN-CUSTM-000-APP-318 to 320-21-22 dtd. 17.03.2022	Penalty of Rs. 28 Lakhs each under 114 and 114AA of the Act.
C/10346/2022	M/s Goel International	MUN-CUSTM -000-APP-315 to 317-21-22 dtd. 17.03.2023	Penalty of Rs. 30 Lakhs each under section 114 and 114AA of the Act.
C/10350/2022	Shri Vijay Goel	MUN-CUSTM -000-APP-315 to 317-21-22 dtd. 17.03.2023	Penalty of Rs. 20 Lakhs each under section 114 and 114AA of the Act.
C/10336/2022	Shri Mahendra T. Ganatra	MUN-CUSTM -000-APP-315 to 317-21-22 dtd. 17.03.2023	Penalty of Rs. 13 Lakhs each under section 114 and 114AA of the Act.

1.1 Briefly, the facts of the present case are that the acting upon a specific information regarding diversion of export shipments of Rice to UAE in place of Iran making of false entries in the shipping bills declarations with regards to actual destination of the export consignment, DRI, New Delhi initiated an investigation into the exports of rice to Iran by M/s Goel International Pvt. Ltd. and M/s. D.D. International Pvt. Ltd. During the statement of various persons including the directors of the appellants and employee of the customs brokers and Proprietor of M/s Chaitanya Freight Forwarders were recorded. Upon conclusion of the investigation, detailed show cause notices were issued to the appellants in respects of the consignments of Rice, exported by the appellants, alleging, inter-alia, that the export goods were diverted to UAE despite the fact that shipping bills and other export documents reflected Bandar Abbas (Iran) as the port of discharge; the remittance against the said exports were required to be brought in convertible foreign currency instead of India Rupees. The show cause notices were adjudicated vide order-in-original dated 10.12.2020 and 27.11.2020 wherein, the Adjudicating authority has held that the goods is liable for confiscation under section 113(*i*) and 113(*d*) of the Customs Act 1962 and imposed the penalties under section 114 of the Customs Act 1962 and under section 114AA of the Customs Act 1962 read with Section 11(1) of the Foreign Trade (Development & Regulation) Act 1992, Rule 11 and 14(2) of the Foreign Trade (Regulation) Rules, 1993 read with provisions of Section 50 of the Customs Act 1962. Being aggrieved by the impugned orders Appellants filed Appeals before the Commissioner (Appeals), who *vide* impugned order-in-appeals upheld the orders of Adjudicating authority and dismissed the appeals filed by the Appellant. Aggrieved, the appellants have filed these Appeals before CESTAT.

2. Shri Stebin Mathew and Shri Paritosh Gupta, learned Advocates appeared for the appellants and submits that evidence in the form of statements was even otherwise not adducible as evidence as the procedure prescribed under Section 138B of the Act has not been followed. The law on the said subject is well settled and the Hon'ble Courts have time and again emphasized that irrespective of the issue of cross-examination, the adjudicating authority is required under the law to examine the witnesses whose statements is sought to be relied upon in the adjudication proceedings. This issue was also highlighted before the authorities below, but the said mandate has been brushed aside and no findings have been given for not following the same. Judgments on the said issue clearly holds that failure to adhere to the said requirement would result in the statements becoming inadmissible in evidence and could not be relied upon to prove the case against the appellants.

2.1 He also submits that the proceedings also suffer from gross violation of principles of natural justice inasmuch as statements of the witnesses were relied upon to establish the case against the appellant without giving the appellant an opportunity to Cross Examine the witnesses to test the veracity and accuracy of the statements.

2.2 He argued that allegation of 'diversion' is based on presumption and assumption and is not supported by any tangible material on record. To prove the case of 'diversion of goods', the department ought to have caused inquiries with not only the foreign buyers but also regarding the discharge and domestic clearance of the goods at Dubai. In the present case however, the inquiries conducted by the department have been exclusively limited to the recording statements of exporter and CHA, who have no control over the goods once the they are shipped from India. Merely because the goods have been rerouted through Dubai does not by itself conclusively establish the case that the goods have been diverted and consumed in Dubai. Payment have also been received from the buyer in Iran. No allegation much less any evidence has been brought on record to doubt the genuineness of the transaction between the appellant and the Iranian Buyers. Thus, it is clear and evident that the case made out by the department is entirely on the premises of assumption and presumption.

2.3 He further submits that confirmation of demand on the premise of infraction on part of the exporter also overlooks the legal position that the ownership and title of the goods came to be vested with the foreign buyer when the alleged diversion took place. The provisions of the Indian Bills of Lading Act clearly provides that the ownership of the goods would stand transferred upon issuance of the bill of lading. By virtue of the said provision, upon issuance of the bill of lading, the consignee of the goods would become the owner of the goods and would be free to deal with the goods. In the present case, the re-routing of the goods was indisputably done at the behest of the consignee after the goods were cleared from customs and bill of lading was generated for the said consignments. This being the case, the appellants as exporter of the goods cannot be held liable for any infraction or breach. The Circular 999/2015-CX dtd. 28.02.2015 categorically stipulates that in an export transaction the transfer in property takes place when LEO is issued at the port where the Shipping Bill is filed.

2.4 He also submits that the department has failed to adduce any evidence to show an illegal gain or benefit to the appellant for adopting the purported modus operandi. The absence of such illegal gain or benefit during the course of investigation and adjudication proceedings, clearly establishes that the case has not only been initiated but also confirmed merely on the basis of suspicion. Perusal of the show cause notice and the impugned orders would show that no evidence has been brought on record to show any illegal gain or benefits to the appellant for adopting the said modus operandi. There is no dispute to the fact that there is no prohibition on export of rice to Dubai. This being the case, there was no reason for the appellant to divert the goods to Dubai in garb of exporting the same to Iran. There is no scheme or other benefits which are entailed on exporting the goods to Iran. Overall exports made by the appellants clearly shows that most of the consignments i.e., Several shipping bills, have been directly exported to Iran and only in 2 shipping bills, the goods had to be rerouted through Dubai.

2.5 He further submits that in order to invoke provision of Section 114, the department has proposed and confirmed confiscation of the goods under Section 113(d) & (i) of the Act. Section 113(d) provides for confiscation of the goods if the same are attempted to be exported contrary to any prohibition imposed by or under this Act or any other law for the time being in force. In the present however, there is no prohibition on export of rice to Dubai, as alleged. Hence, even if the allegation of the department is accepted, provisions of Section 113(d) would not at all be applicable to the facts of the present case.

2.6 He also submits that Section 113(i) on the other hand, provides for confiscation in respect of value or on any material particular with the entry made under this Act. The use of the phrase 'material particular' has to be read in context of the Act meaning that the same relates to matter which would have implication on imposition of any duty or benefit which is extended under the Act. In the present case, there is no short-payment of duty or misuse of any benefits by the appellant and hence, incorrect entry in the shipping bill even if accepted, would not be of any material particular. Hence, even the said Section would not have any bearing to the facts of the present case.

2.7 He also submits that original as well as Appellate Authority failed to appreciate that once the LEO's were granted and the goods were shipped on board of the vessel, keeping in view of the provisions of Section 149 of the Customs Act, 1962, no amendment in Shipping Bill could have been permitted as contended by the impugned notice and confirmed by the impugned orders. In absence of any violence under Customs Act the proceedings are without jurisdiction.

2.8 He also argued that the entire case of the department proceeds on inadmissibility of receipt of consideration in Indian Rupees and suggests that the same should have been received in freely convertible foreign currency. The said matter relates to exclusive jurisdiction of the authorities under the FEMA/ Foreign Trade Policy/ Foreign Trade (Development and Regulation) Act and the Customs Authorities would have no jurisdiction in this regard. Reference may be made to Para 2.41 of the extant Foreign Trade Policy which clearly provides that even in cases where no consideration is received for the said consignments exported from India; action, if any can be initiated only by the concerned officers udder the said Act and not the Customs officers empowered under the Customs Act.

2.9 Shri Paritosh Gupta Learned counsel appeared on behalf of the Appellant M/s. V. Arjoon, CHA submits that diversion of goods to Dubai after clearance for Iran was not brought to the notice of Customs authorities at the port of export by exporters or shipping lines, because cargo had already left Indian waters and had reached Jebel Ali and Exporters/Shipping Line had not requested for any amendment in the Shipping Bill. That no *malafide* can be attributed to the CHA in the absence of any motive to unlawfully derive any gain. The Role of the CHA is to file shipping bills on the basis of the documents provided by the exporter. Appellant always taken due care in preparing true and correct documents and hence it cannot be alleged that there was a mis-declaration on the part of the CHA. Further, it is also a fact that the exporter is responsible to remit the foreign remittances in the foreign currency, this responsibility cannot be passed on to other person.

3. Shri H.P. Shrimali, Learned Superintendent (AR) appearing on behalf of revenue reiterates the findings of OIAs.

4. Heard both sides and perused the records of the case. We find that the case of the department is that Appellants had filed the Shipping Bills/Export documents for export of goods *i.e.* Rice to Iran but the goods were delivered at UAE. The remittance was received in Indian Rupees from Iran instead of free convertible foreign currency. Thus, there appeared to be mis-declaration on part of Appellant. The revenue in support of allegations rely upon the statements of Director, CHAs and the officials of Shipping Lines. However We find that these persons were not examined in the adjudication proceedings even after the request of Appellant and as such their statements are not admissible as evidence under the provisions of

Section 138B of Customs Act, which provides that - if an authority in any proceedings under the Act wants to rely upon the statement of any person (made during enquiry), such person is required to be examined as witness and if the adjudicating authority finds the evidence of the witness 'admissible', then such witness should be offered for cross-examination and only thereafter the evidence is admissible. In absence of compliance with the provision of Section138B of the Act, the statements are not admissible as evidence. Section 138B of the Customs Act, 1962 reads as under:-

> ***"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) *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 interest 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."*

4.1 We also find that the rejection of cross-examination in the impugned matter tantamount to violation of principles of natural justice. Request for cross-examination has been denied and the witnesses have not been examined despite specific reliance by the appellant on Section 138B. 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."'

4.2 We also find that in the present matter all the documents in respect of disputed consignments were in the name of Iranian buyers. There is nothing on record to show that the said documents were amended at any stage so as to permit import of goods at UAE. Further Revenue nowhere produced any documentary evidence to show that the exports documents produced by the Appellant were false and fabricated. Therefore once all the export documents were in the name of Iranian buyers there was no scope for clearance of the goods in UAE and its subsequent sale. Further department nowhere disputed the foreign remittance of impugned consignments in Indian Rupees from Iran. Without conducting any verification related to the said documents only on the basis of statements of persons it cannot be concluded that the impugned goods was not delivered in Iran.

4.3 We also noticed that in the case of food products the goods which are exported to Iran required Phytosanitary Certificate with each consignment which is issued by the Ministry of Agriculture and Farmer Welfare, Government of India. These certificates are required to be enclosed with each consignment and these certificates are issued by the officials of Ministry of Agriculture and Farmer Welfare, Govt. of India after proper inspection of each consignment. In the present case we have gone through the Phytosanitary Certificates produced by the Appellant. Each of these Phytosanitary Certificate carries e-Registration No. , the name of the exporter in India and consignee in Iran, number of bags and its quantity etc. There is no allegation or any evidence that the said certificates were amended at any stage in order to get the goods cleared in a country other than Iran.

4.4 We further find that Appellant lost the ownership of the goods as soon as 'let export order' was issued by the Customs authorities. After the said let export order it was the responsibility of the Shipping Lines to ship the goods to the foreign buyer and the exporter having no control over the goods. Hence, Appellant cannot be held responsible if the importer situated at Iran had given instruction to change the port from Bandar Abbas port to Jabel Ali port as after the 'let export order' was issued by the Customs authorities it was the importer at Iran who became the owner of the goods. In support of this finding we rely upon the CBEC Circular No. 999/2015-CX dated 28-02-2015. This circular is with regard to at what point of time the transfer of property takes place in cases of exports. The CBEC has categorically provided that after the let export order is issued the transfer of property can be said to have taken place at the port where the shipping bill is filed by the manufacturer exporter. Further the Hon'ble Apex Court in the case of *Collector of Customs,* v. *Sun Industries*1988 taxmann.com 598 (SC)/1988 (35) E.L.T. 241 has held in categorical terms that in case of exports the title of the goods gets transferred to the buyer as soon as the ship carrying goods crossed territorial waters of India.

4.5 We also find that in the present matter none of buyer at Iran have claimed that the goods have been short shipped/not received by them. None of the remittance receipts furnished to the concerned Bank, have been objected to by the concerned Indian Bank. None of the remittance receipts have been alleged to be fake. As per RBI regulations payment against exports can be received from consignee (foreign buyer) as shown in export documents and cannot be received from any other party. Therefore the contention of revenue that payment has come from third party and not from actual buyer in UAE not supported by any evidences, is not sustainable.

4.6 Without prejudice, we further observe that in this case the only allegation and finding against Appellant is that they had violated para 2.53 of the FTP *i.e.* to say that since according to the Customs the goods were actually exported to UAE, the payments should have been received in convertible foreign exchange. The whole case revolves around irregularities in respect of receipt of currency with regard to exported goods. We find that these violations relate to post export conditions. There is no doubt that any violation relating to foreign exchange are covered under FEMA, 1999 and not under the Customs Act. Though the show cause notice invoked Section 113(*d*) and 113(*i*) of the Customs Act but these provisions were invoked by only alleging violation of para 2.53 of the FTP and section 8 of FEMA, 1999. Therefore there was no violation of Customs Act in any manner. There is no dispute about the description of the goods, its quantity and value. The export of rice was neither prohibited nor restricted. It is a well settled law that in respect of alleged violation of foreign exchange, it is the erstwhile FERA authorities or FEMA authorities who are competent to initiate the proceedings against the party. In support of this finding we rely upon the law laid down by this Tribunal in the case of *Chinku Exports* v. *Commissioner of Customs* 1999 taxmann.com 753 CEGAT New Delhi/1999 (112) E.L.T. 400 (Trib). This judgment has been upheld by the Hon'ble Apex Court as reported in 2005 (184) E.L.T. A36. This judgment has been followed by this Tribunal in the case of *Hillari Computer Exports (P) Ltd.* v. *Commr. of Cus.,*2006 (199) E.L.T. 636 (Tri. Bang.) and in the case of *Bank of Nova Scotia* v. *Commissioner of C. Ex (Adj)* 2008 taxmann.com 1302 (Bang. - CESTAT)/2009 (233) E.L.T. 260. Though the first two judgments relate to period when FERA was in operation whereas the third judgment in the case of Bank of Nova Scotia relates to period when FEMA came into operation wherein it has been held that if at all there is violation of FEMA and the related regulations suitable action lies with the enforcement authorities and Reserve Bank of India. It has further been held that with regard to the violations of Exim policy, adjudication can be done only by authorities notified under section 13 of Foreign Trade (Development & Regulation Act), 1992. Hence, in the facts of the present case since it was only a case of alleged violation of the provisions of Foreign Trade (Development &

Regulation Act) and rules made there under as well as that of Foreign Exchange Management Act, the Customs authorities did not have jurisdiction to issue the show cause notice for said violation.

4.7 The identical issue under same investigation and involving almost identical facts in the case of Bansal Fine Foods Pvt. Ltd. Vs. Commissioner of Customs, Mundar (2023) 5 Centax 109 (Tri.-Ahmd) the Tribunal passed the following order:-

<u>Facts</u>

"2. Briefly, the facts of the present case are that the appellant M/s Bansal Fine Foods Pvt. Ltd. had exported Rice under 8 Shipping Bills which were originally booked for Iran, but investigation revealed that the consignment were delivered to Jabel Ali, UAE and hence violated the provisions of para 2.40 and 2.53 of the Foreign Trade Policy. Accordingly, show cause notice dtd. 4-6-2018 was issued and after due process of law the adjudicating authority had held that the goods is liable for confiscation under section 113(i) and 113(d) of the Customs Act 1962 and imposed the penalties under section 114 of the customs Act 1962 and under section 114AAof the Customs Act 1962 read with Section 11(1) of the Foreign Trade (Development & Regulation) Act 1992, Rule 11 and 14(2) of the Foreign Trade (Regulation) Rules 1993 read with provisions of Section 50 of the Customs Act 1962. Being aggrieved with the impugned order Appellants filed Appeals before the Commissioner (Appeals), who vide impugned order-in- appeal upheld the order of the Additional Commissioner, Customs House, Mundra and dismissed the appeals filed by the Appellant. Aggrieved, the appellant have filed these Appeals before CESTAT.

3. xxxxx

4. xxxxx

5. Heard both sides and perused the records of the case. We find that the case of the department is that M/s Bansal Fine Foods Pvt. Ltd. had filed the Shipping Bills/Export documents for export of goods i.e Rice to Port Bandar Abbas (Iran); but the goods were delivered at UAE (Jabel Ali Port). The remittance was received in Indian Rupees from Iran instead of free convertible foreign currency. Thus, there appeared to be mis-declaration on part of Appellant. The revenue in support of allegations rely upon the statements of Director, CHAs and the officials of Shipping Lines. However We find that these persons were not examined in the adjudication proceedings even after the request of Appellant and as such their statements are not admissible, as evidence under the provisions of Section138B of Customs Act, which provides that - if an authority in any proceedings under the Act wants to rely upon the statement of any person (made during enquiry), such person is required to be examined as witness and if the adjudicating authority finds the evidence of the witness 'admissible', then such witness should be offered for cross-examination and only thereafter the evidence is admissible. In absence of compliance of the provision of Section 1388 of the Act, the statements are not admissible as evidence. Section 1388 of the Customs Act, 1962 reads as under;-

> *"1388. 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 interest 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.

" 5.1 We also find that the rejection of cross-examination in the impugned matter tantamount to violation of principles of natural justice. Request for cross-examination has been denied and the witnesses have not been examined despite specific reliance by the appellant on Section 1388. 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."

5.2 We also find that in the present matter all the documents in respect of disputed consignments were in the name of Iranian buyers. There is nothing on record to show that the said documents were amended at any stage so as to permit import of goods at UAE. Further Revenue nowhere produced any documentary evidence to show that the export documents produced by the Appellant were false and fabricated. We find that once all the export documents were in the name of Iranian buyers there was no scope for clearance of the goods in UAE and its subsequent sale its beyond imagination to assume that the goods in question have not arrived to Iran but cleared in UAE for home consumption. Further department nowhere disputed the foreign remittance of impugned consignments in Indian Rupees from Iran.

5.3 We also noticed that in the case of food products the goods which are exported to Iran required Phytosanitary Certificate with each consignment which is issued by the Ministry ofAgriculture and garment welfare, Government of India. These certificates are required to be enclosed with each cover, and these certificates are issued by the officiare required to be enclosed and Farmer Welfare, Govt. of India after proper inspection of each consignment. In the present case we have gone through the Phytosanitary Certificates produced by the Appellant. Each of these Phytosanitary Certificate carries e-Registration No., the name of the exporter in India and consignee in Iran, number of bags and its quantity etc. There is no allegation or any evidence that the said certificates were amended at any stage in order to get the goods cleared in a country other than Iran.

5.4 Without prejudice, we further find that Appellant lost the ownership of the goods as soon as 'let export order' was issued by the Customs authorities. After the said let export order it was the responsibility of the Shipping Lines to ship the goods to the foreign buyer and the exporter having no control over the goods. Hence, Appellant cannot be held responsible if the importer situated at Iran had given instruction to change the port from Bandar Abbas port to Jabel Ali port as after the 'let export order' was issued by the Customs authorities it was the importer at Iran who became the owner of the goods. In support of this finding we rely upon the CBEC circular No. 999/2015-CX dated 28-02-2015. This circular is with regard to at what point of time the transfer of property takes place in cases of exports. The CBEC has categorically provided that after the let export order is issued the transfer of property can be said to have taken place at the port where the shipping bill is filed by the manufacturer exporter. Further the Hon'ble Apex Court in the case of Collector of Customs, Calcutta v. Sun Industries reported in 1988 (35) ELT 241 has held in categorical terms that in case of exports the title of the goods gets transferred to the buyer as soon as the ship carrying goods crossed territorial waters of India.

5.5 We also find that in the present matter none of buyer at Iran have claimed that the goods have been short shipped /not received by them. None of the remittance receipts furnished to the concerned Bank, have been objected to by the concerned Indian Bank. None of the remittance receipts have been alleged to be fake. As per RBI regulations payment against exports can be received from consignee (foreign buyer) as *shown in export documents and cannot be received from any other party. Therefore the contention of revenue that payment has come from third party and not from actual buyer in UAE not supported by any evidences not sustainable.*

5.6 Without prejudice, we further observe that in the case the only allegation and finding against Appellant is that they had violated para 2.53 of the FTP i.e. to say that since according to the Customs the goods were actually exported to UAE, the payments should have been received in convertible foreign exchange. The whole case revolves around irregularities in respect of receipt of currency with regard to exported goods. We find that these violations relate to post export conditions. There is no doubt that any violation relating to foreign exchange are covered under FEMA, 1999 and not under the Customs Act. Though the show cause notice invoked Section 113(d) and 113(/) of the Customs Act but these provisions were invoked by only alleging violation of para 2.53 of the FTP and section 8 of FEMA, 1999. We therefore hold that there was no violation of Customs Act in any manner. There is no dispute about the description of the goods, its quantity and value. The export of rice was neither prohibited nor restricted. It is a well settled law that in respect of alleged violation of foreign exchange, it is the erstwhile FERA authorities or FEMA authorities who are competent to initiate the proceedings against the party. In support of this finding we rely upon the law laid down by this Tribunal in the case of Chinku Exports v. Commissioner of Customs, Calcutta reported in 1999 (112) ELT 400 (Trib)/1999 taxmann.com 753 (CEGAT New Delhi). This Judgment has been upheld by the Hon'ble Apex Court as reported in 2005 (184) ELT A36. This Though the first two judgments relate to period when FERA was in operation whereas the third judgment in the case of Bank of Nova Scotia relates to period when FEMA came into operation wherein it has been held that if at all there is violation of FEMA and the related regulations suitable action lies with the enforcement authorities and Reserve Bank of India. It has further been held that judgment has been followed by this Tribunal in the case of Hillari Computer Exports (P.) Ltd. v. Commr. of Cus., Visaskhapatnam reported in 2006 (199) ELT 636 and in the case of Bank of Nova Scotia v. Commissioner of C.Ex (Adj), Bangalore reported in 2009 (233) ELT 260 (Tri.-Bang). with regard to the violations of Exim policy, adjudication can be done only by authorities notified under section 13 of Foreign Trade (Development & Regulation Act), 1992. Hence we hold that in the facts of the present case since it was only a case of alleged violation of the provisions of Foreign Trade (Development & Regulation Act) and rules made there under as well as that of Foreign Exchange Management Act, the Customs authorities did not have jurisdiction to issue the show cause notice for said violation.

5.7 In respect of the Appeal filed by M/s. V. Arjoon, CHA, we find that the CHA had filed shipping bills as per the documents provided to him by exporter. Therefore the bonafide act of the Appellant cannot be doubted. The act of filing the export documents for customs clearances shows that the appellant has no mens rea and filed the documents being a bona fide facilitator. Further, in any event of the matter, since we have already held that the goods were ultimately delivered to the buyers at Iran, there is no justification for imposing penalty upon the appellant, therefore, the osed penalty imposed on the appellant is set aside.

6. In view of the above discussion, the order of the Commissioner (Appeals) is set aside and all the appeals filed by the Appellants are allowed with consequential relief, if any as per law."

From the above judgment, it can be seen that the facts are identical in as much as the allegation of the department is that the export of Rice were originally booked for Iran but the same were delivered to Jebel Ali, UAE hence violated the provisions of Para 2.4 and 2.5 3 of Foreign Trade Policy. Accordingly, the assessee was liable for penalties. In the present case the similar facts are involved therefore the ratio of the above judgment is squarely applicable in the present case and on that basis also the impugned orders are not sustainable.

4.8 In respect of the Appeal filed by M/s. V. Arjoon, CHA, we find that the CHA had filed shipping bills as per the documents provided to him by exporter. Therefore the *bona fide* act of the Appellant cannot be doubted. The act of filing the export documents for customs clearances shows that the appellant has no *mens rea* and filed the documents being a *bona fide* facilitators.

4.9 Further we also find that the Appellant Shri Mahendra T. Gantra, Proprietor of M/s. Chaitanya Freight Forwarders had rendered only support services and had never acted as customs brokers. Appellant has not made, signed or used any declaration before the customs authorities. Further, in any event of the matter, since we have already expressed that the goods were ultimately delivered to the buyers at Iran, there is no justification for imposing penalty upon the appellants, therefore, the penalty imposed on all the co-appellants is also set aside.

5. In view of the above discussion, the order of the Commissioner (Appeals) is set aside and all the appeals filed by the Appellants are allowed with consequential relief, if any, as per law.

(Pronounced in the open court on 31.01.2024)

(RAMESH NAIR)
MEMBER (JUDICIAL)

(RAJU)
MEMBER (TECHNICAL)

Raksha