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

REGIONAL BENCH-COURT NO. 3

**Custom Appeal No. 10172 of 2024 - DB**

(Arising out of Order in Original MUN-CUSTM-000-COM-020-23-24 dated 01/02/2024 passed by Commissioner of Customs, Custom House Mundra, Kutch)

**G K ENTERPRISES** **........Appellant**
Proprietorship of Shri Gugan Kumar Aggarwal
Located at-2746, Gali No.6,
Chuna Mandi, Pahargunj,
Delhi- 110055

*VERSUS*

**Commissioner of CUSTOMS - Mundra Customs** **......Respondent**
CUSTOM HOUSE, Mundra,
Office of the Principal Commissioner of Customs,
Mundra, Kutch,
Mundra Port & SPL Economic Zone,
Mundra- 370421

**APPEARANCE:**
Shri Devashish K Trivedi, Advocate, Appeared for the Appellant
Shri Tara Prakash, Deputy Commissioner (AR) Appeared for the Respondent

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

**Final Order No. 11549/2024**

DATE OF HEARING: 29.04.2024
DATE OF DECISION:12.07.2024

**RAMESH NAIR**

This appeal is directed against the Order-In-Original No. MUN-CUSTM-000-COM-020-23-24 dtd. 01.02.2024 passed by the Principal Commissioner of Customs, Customs House, Mundra, Kutch.

1.1 The brief facts of the case are that an information was received by the DRI that Appellant were wrongly availing the benefit of the preferential rate of duty under Notification No. 46/2011-Cus. dtd. 01.06.2011 (Indo- ASEAN FTA,) in connivance with supplier Mr. Sanjay Jain through his firms/ company M/s Excelvantage Global Ltd., (HK), M/s Excelvantage Global Ltd., British Virgin Island, China and M/s EVG Metal Industries SDN BHD, Malaysia as the items imported by M/s G.K. Enterprises , i.e Cold Rolled Stainless – Steel Coils Grade 410S/Magnetic Stainless Steel Cold Rolled Coil Grade 410S from Malaysia and declared to be of Malaysian Origin, were in fact, of Chinese Origin and were routed through Malaysia to wrongly avail the benefit of preferential duty and other applicable duties, on the said items, at the time of import.

1.2 Acting on the said information searches at the office –cum-godown premises of Appellant were conducted. Statement of Mr. Sanjay Jain and Mr.Gugan Kumar, Proprietor of M/s G.K. Enterprises was recorded. The investigation revealed that Appellant had imported the goods from Malaysia under the fake invoices availed the benefit of the Notification No. 46/2011-Customs dtd. 01.06.2011. The certificate of Origin submitted by the appellant were not genuine. Accordingly, show cause notice dated 22-2-2013 was issued to the appellant proposing denial of the benefit of Notification No. 46/2011-Cus. dtd. 01.06.2011, confiscation of goods, demand of Customs duty along with interest and penalty.In adjudication, Ld. Commissioner vide impugned order rejected the benefit of Notification No. 46/2011 –Cus and confirmed the duty demand along with interest and penalty. Aggrieved, the present appeal has been filed by the Appellant before this Tribunal.

2. Shri Devashish K. Trivedi, Learned Counsel appearing on behalf of the appellant submits that in today's age of globalization, appellant used to contact one Sanjay Jain who was based in China. Shri Sanjay Jain in turn used to contact one M/s D.M Aluminium and Steel Manufacturing, Malaysia. Said Company had different Directors viz. Md. Umar Bin NadeemShikoh and Md. Usman Bin NadeemShikoh and was totally different entity then the Company of Mr. Sanjay Jain i.e M/s. Excelvantage Global Ltd., Hongkong. The goods were received from Malaysia under packing list, commercial invoice, etc, of DM Aluminium and Steel Manufacturing. Documents such as MILL Inspection Certificate, Bill of Lading, Fumigation Certificate, County of Origin Certificate, clearly evidencing that the goods were of Malaysian Origin and were supplied by DM Aluminium and Steel Manufacturing, Malaysia were received along with the goods. Since the Appellant used to contract Mr. Sanjay Jain of M/s Excelvantage Global Ltd., China, the Appellant is used to make payment towards the goods received from DM Aluminium and Steel Manufacturing, Malaysia to the said Company. Appellant understand that there was nothing wrong if a person based in China used to supply the goods originating from Malaysia of a Malaysian Company from Malaysia. He placed reliance on the Judgment in the case of OLAM Enterprises India Pvt. Ltd. Vs. Commissioner of Customs, Tuticorin 2018(362)ELT 378 (Tri. Chennai)

2.1 He also submits that after almost five years, the DRI recorded statement of the proprietor of the Appellant, viz. Mr.Gugan Kumar Agrawal . They have also recorded the statement of Shri Sanjay Jain, who was at that time in India. They had also recovered email correspondence in between Appellant and the staff of Shri Sanjay Jain, in regard to placing of order for Malaysian Origin Goods from Malaysia being supplied by DM Aluminium and Steel Manufacturing. Sanjay Jain is said to have admitted that the goods supplied from Malaysia under invoice of DM Aluminium and Steel Manufacturing was in fact originating from China. Before the Adjudicating Authority, appellant had requested to afford opportunity of cross examination of Sanjay Jain on the ground that apart from his statement, there was absolutely no evidence which could lead to suggest that the goods were of Chinese Origin. No investigation was carried out at the end of the Malaysian Company. No inquiry/ verification of Certificate of Origin was made at MIIT (the authority of Malaysia who had issued certificate of origin). No inquiry was made at the end of the company who has done fumigation of the goods in Malaysia, issued Mill Inspection certificate in regards to the goods, issued Bill of Lading from Malaysia etc.

2.2 As regard the statement of Shri Gugan Kumar, proprietor of Appellant, he submits that in the whole statement it was clear that the goods were of Malaysia Origin only. At one place, he wanted to say that other people in Delhi are doing unscrupulous activity of receiving goods originating from China through Malaysia route, however he was not doing the same. But the DRI officer had typed the statement differently. Initially, this was not realized by the Appellant. However, immediately on realizing the same, an affidavit explaining the same is submitted by the appellant with this appeal memo.

2.3 He argued that in the aforesaid circumstances, the allegations levelled against the Appellant cannot be believed. The statement of Shri Sanjay Jain requires to be discredited as no opportunity of cross examination of Sanjay Jain was granted by the Adjudicating authority. He placed reliance on the following judgments:-

(i) Andaman Timber Industries Vs. Commissioner of C.Ex. Kolkata – 2015(324)ELT 641 (SC)
(ii) BasudevGard Vs. Commissioner of Customs – 2013(294) ELT 353 (Del.)

(iii) Commissioner of Central Excise, Meerut-I Vs. Parmarth Iron Pvt. Ltd. -2010(260)ELT 514 (All.)
(iv) Jindal Drugs Pvt. Ltd. Vs. Union of India 2016(340)ELT 67 (P&H)
(v) G. Tech Industries Vs. Union of India -2016(339)ELT 209 (P&H)
(vi) Commissioner of C.Ex., Ahmedabad –II Vs. Gujarat Cypromet Ltd. – 2017 (345)ELT 520 (Guj.)
(vii) Balaji Enterprises Vs. Union of India 2018(362)ELT 94 (Guj.)
(viii) Mulchand M. Zaveri Vs. Union of India
(ix) Manek Chemicals Pvt. Ltd. Vs. Union of India 2016(334)ELT 302 (Guj.)

3. On other hand, Shri Tara Prakash, Learned Deputy Commissioner (AR) appearing on behalf of the Revenue reiterates the findings of the impugned order. He placed reliance on the following judgments:-

(i) Shard Ramdas Sangle Vs. Commissioner of C.Ex. &Cus., Aurangabad. – 2017(347)ELT 413 (Bom.)
(ii) Patel Engineering Ltd. Vs. Union of India -2015(323)ELT A73 (SC)
(iii) Kanungo & Co. Vs. Collector of Customs, Calcutta and Others-1983 (13)ELT 1486 (SC)

4. We have heard both the sides and perused the records. We find that the case of the department in the present matter is that Appellant were wrongly availing the benefit of the preferential rate of duty under Notification No. 46/2011-Cus. dtd. 01.06.2011 (Inod –ASEAN FTA), in connivance with Supplier Mr. Sanjay Jain, through his firms/companies. As per the revenue goods imported by the Appellant from Malaysia and declared to be of Malaysian origin, were, in fact, of Chinese Origin and were routed through Malaysia to wrongly avail the benefit of preferential duty and other applicable duties, on goods, at the time of import. On contradiction, we find that all the documents viz. Bill of Entry of import, packing list, commercial invoice, Mill Inspection Certificate, Bill of Lading for Port-to –port Transport, Fumigation Certificate, Certificate of Origin –ASEAN –India Free Trade Area Preferential Tariff clearly shown that the goods in questions were imported from Malaysia and that they are of Malaysia Origin. Appellant have adduced sufficient proof to establish that the impugned goods are Malaysia Origin.

4.1 We also noticed that in the disputed matter the Revenue without getting confirmation from the Malaysia Government about their doubt of authenticity of the country of origin certificate and activity of respective suppliers of the goods proceeded to deny the benefit in respect of COOs issued by Supplier to the appellant is not genuine and consequently denied Exemption Notification No. 46/2011, dated 1-6-2011 and consequential demand was confirmed. We find that as per the documents submitted by the appellants it appears that there is no doubt on the authenticity of the documents. At the time of import the Customs department had also examined the goods and all the documents and officers of customs was fully satisfied that Malaysian Origin goods were imported from Malayasia, they had not objected to the imports. However, to clear any doubt it is the burden on the department to get the verification from the Malaysia Government regarding authenticity of Certificate of origin and activity of supplier who supplied the goods to the Appellant which has not been discharged by the department in the present matter.

4.2 In the present matter revenue in support of allegations rely upon the statements of Shri Sanjay Jain and Shri GuganKumar. However we find that said 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 with the provision of Section138B of the Act, the statements are not admissible as evidence. Section138B 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."*

4.3 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 Section138B. 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."'*

4.4 We also find that in the present matter the Supplier of the goods at Malaysia nowhere have claimed that the goods have been supplied were Chinese origin. It appears that the allegations were very serious but no cogent material was collected to substantiate these allegations. It is settled law that in case of difference between documentary evidence and oral evidence the former should be given precedence and later should be ignored. In view of the settled law, we are of the view that the statements of persons cannot be relied upon or the same cannot be the sole basis to confirm the charge against the appellant as the same is contrary to documentary evidence which is in the form of Commercial Invoices, MILL Inspection Certificate , Packing List, Bill of Lading for Port to Port, Country Origin Certificate, Bill of Entry etc. Our views that documentary evidence will prevail over oral evidence in case of contradiction between them are based upon the judgment of Tribunal in the cases of *Philip Fernandes* v. *Commissioner* - 2002 (146) E.L.T. 180, *R.P. Industries* v. *Collector* - 1996 (82) E.L.T. 129 and *Commissioner* v. *Latex Chemicals* - 2005 (181) E.L.T. 138 (Tri. - Del.).

5. In view of our above observations and findings, we are of the view that the demands confirmed against Appellant is not sustainable. We therefore set aside the impugned order and allow the appeal with consequential reliefs to the Appellant.

*(Pronounced in the open court on 12.07.2024)*

**(RAMESH NAIR)**
**MEMBER (JUDICIAL)**

**(RAJU)**
**MEMBER (TECHNICAL)**

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