CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
SOUTH ZONAL BENCH
BANGALORE

Appeal(s) Involved:

C/20713/2019-SM

[Arising out of No. COC-CUSTM-000-APP-31/2019-20 dated 10/07/2019 passed by Commissioner of CUSTOMS , COCHIN(Appeal)]

S R Kapoor & Sons
Xl/5483 Kovilvattom Road
ERNAKULAM
COCHIN
682035

Appellant(s)

Versus

C.C-Cochin-cus
CUSTOM HOUSE, WILLINGDON ISLAND
COCHIN
KERALA
682009

Respondent(s)

Appearance:

Shri P.A.AUGUSTIAN, ADVOCATE
FAIZEL CHAMERS, PULLEPADY CROSS ROAD,
COCHIN-682018

For the Appellant

Shri Gopakumar, Jt. Commissioner(AR)

For the Respondent

Date of Hearing: 08/08/2019
Date of Decision:19/08/2019

CORAM:
HON'BLE SHRI S.S GARG, JUDICIAL MEMBER

Final Order No. 20654 /2019

Per : S.S GARG

The present appeal is directed against the impugned order dt. 10/07/2019 passed by the Commissioner(Appeals) whereby the Commissioner(Appeals) has rejected the appeal of the appellant.

2. Briefly the facts of the present case are that the appellant is regularly importing Galvanised Iron (GI) Wires and other items through different ports in India and while importing GI wire,

specifications given by the overseas supplier, it is declared under India Trade classification (Harmonised System) (ITC HS) as 72172020 and is cleared in the past without making any change in the declaration of HSN. Appellant had filed Bill of Entry No.9559481 dt. 08/01/2019 for the clearance of GI wire 0.7 mm, 25kg roll (Galvanized Iron Wire) and Bill of Entry No.9598155 dt. 10/01/2019 for the clearance of seven items which include GI wire dia 0.56mm 25kg/roll, 2Mts among other six items. The disputed goods were self assessed under declared CHT 72172020. The goods imported under the two Bills of Entry were examined by the proper officer at CFS who reported that BIS is applicable on GI wire imported. As per S.O.3966(E) dt. 13/08/2018 issued by Ministry of Steel, 'Mild Steel wire for general engineering purposes' is covered under IS 280:2006 w.e.f. 18/12/2018. Since the importer has not produced the BIS certificate for the item, the goods appeared to be in violation of Foreign Trade Policy rendering the goods liable for confiscation under Customs Act, 1962. The adjudicating authority on completion of the required procedure, confiscated the goods under Section 111(d) of the Customs Act, 1962 and imposed a penalty of Rs.1,50,000/- on the importer under Section 112(a) of the Customs Act, 1962 vide the Order-in-Original dt. 29/05/2019. Aggrieved by the said order, appellant filed appeal before the Commissioner(Appeals) who rejected the same.

3. Heard both sides and perused records.

4.1. Learned counsel for the appellant submitted that the impugned order has been passed without properly appreciating the facts and the law. He further submitted that the appellant imported two cartons in December and it was detained by the respondent on the ground that one of the item in the said container required BIS certificate. He further submitted that as evident from Para 9 of the Order-in-Original, personal hearing was conducted on 25/02/2019 and since then the appellant had repeatedly submitted that the goods imported by the appellant is not falling under the category of goods which required BIS. Appellant had also submitted the details regarding exemption of the goods on transitional arrangements of FTP. But when there was undue delay in responding to the request even for clearance of remaining goods which did not require BIS certificate, the appellant was compelled to file a Writ Petition before the Hon'ble High Court and only during the pendency of the said Writ Petition, remaining goods were released. He further submitted that in spite of the specific direction from the Hon'ble High Court, respondent failed to conclude the proceedings within the time stipulated by the High Court. Thereupon the appellant was forced to initiate contempt of court proceedings and to cover up the lapse in complying with the order of the High Court, the impugned order was passed and the goods were confiscated and penalty was imposed. He further submitted that the show-cause notice was issued without furnishing copies of relied upon documents. Further the impugned Order-in-Original was issued without providing even one day time for submitting reply to the show-cause notice before personal hearing and hence the adjudication proceedings violated the principles of natural justice and results in arbitrariness. He further submitted that the adjudicating authority issued the show-cause notice on 28/05/2019 and as stated in interim reply, handed over the copy of the same to the Customs Broker of the appellant at 5 PM. As per the show-cause notice, appellant was directed to make reply to show-cause notice and personal hearing fixed at 10 to 12 AM on very next day i.e. on 29/05/2019. The request for furnishing the copy of the relied upon documents including the examination report referred in para 2 of the show-cause notice and test report referred in para 16 of the show-cause notice, but the copies of both the documents relied in the show-cause notice were not furnished with the show-cause notice. Thereafter the appellant vide letter dt. 29/05/2019 requested to issue copies and sought a week time for personal hearing. Appellant also requested to extend an opportunity for cross-examination of the examining officer who conducted the preliminary examination of the goods, examiner who conducted the lab test in Cochin Customs House but without considering the said request, considering the appearance of co-noticee in show-cause notice as on behalf of the appellant, Order-in-Original was passed. He also submitted that there is no reasonable opportunity extended to the appellant for personal hearing and therefore the impugned order is illegal and unsustainable. He also submitted that the law is well settled that documents not supplied with show-cause notice cannot be relied in any further proceedings. In support of this, he relied upon the decision in the case of Kellogg India Pvt. Ltd. Vs. UOI [2006(193) ELT 385 (Bom.0] wherein the Bombay High Court has held as under;-

> ***43.*** *The rules of natural justice are the minimum standards of fair decision-making imposed on persons or bodies acting in a judicial or quasi-judicial capacity. Where the relevant person or body is required to determine questions of law or fact in circumstances where its decisions will have a direct impact on the rights or legitimate expectations of the individuals concerned, an implied obligation to observe the principles of natural justice arises. One of the shades of the rules of natural justice is a right to fair hearing. The right to fair hearing required that an individual shall not be penalised by a decision affecting his rights or legitimate expectations; unless he has been given prior notice of the case against him and a fair opportunity to answer the same and to present his own view point.*
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> ***44.*** *Right to fair hearing involve prior notice of hearing; opportunity to be heard together with right to legal representation. Generally, when an oral hearing is conducted, the parties must be allowed to call witnesses, make submissions and cross-examine the witnesses called by others. Where an oral hearing is necessary, it has been laid down in number of reported judgments that the Tribunal must : (a) consider all relevant evidence which a party wishes to submit; (b) inform every party of all the evidence to be taken into account, whether derived from another party or independently; (c) allow witnesses to be questioned; and (d) allow to comment on the evidence and argument on the whole case. The last two rights include right of cross-examination.*
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> ***45.*** *The opportunity to cross-examine involves not only notice of the adverse material but also a sufficient interval of time to prepare for cross-examination. The notice of the adverse material and opportunity of cross-examination is necessary because wherever the opponent has declined to avail himself of the offered opportunity, it must be supposed to have been because he believed that testimony could not or need not be disputed at all or be shaken by cross-examination. In this view of the matter, right to cross-examine or to have opportunity to effectively exercise that right is*

an essential part of principles of natural justice. [See 2002 (143) E.L.T. 21 (S.C.); 2001 (136) E.L.T. 9 (Bom.); 2002 (141) E.L.T. 24 (A.P.); 2000 (86) DLT 1 (DB) and 1978 (2) E.L.T. (J 502) (Delhi)].

4.2. It is his further submission that the concept of Rule of Law would lose its validity if the instrumentalities of the state are not charged with the duty of discharging these functions in a fair and just manner. Thus non-supply of documents, not extending opportunity for cross-examination and not providing even one day time for submitting reply to show-cause notice before personal hearing etc are patent irregularity in any adjudication proceedings, violation of principles of natural justice results in arbitrariness and for this reason the impugned order is liable to be set aside.

4.3. the other submission of the learned counsel is that appellant made declaration of the goods as GI Wire and there is no admissible evidence to allege that goods imported by the appellant is falling under the category of mild steel as alleged. In fact the appellant made declaration of the goods as Galvanised Iron Wire of 0.7mm under HSN code 72172020 as evident from the Bill of Entry as per invoice and there is no allegation regarding the mis-declaration of any such particulars. Thus there is no reason or admissible evidence to allege that goods imported by the appellant is falling under the category of mild steel or otherwise to bring it under the ambit of Notification issued vide S.O. 3966(E) dt. 13/08/2018 and to demand BIS certificate as per IS 280:2006. He also submitted that though the size of 0.56 is mentioned in IS 280:2006 standards covering 2 MTs of GI wire under Bill of Entry No.9598155 dt. 10/01/2019, GI Wire of 25 MT under Bill of Entry No.9559481 dt. 08/01/2019 is of 0.7 mm and said size is not included in IS 280:2006. He further submitted that even if it is assumed that the goods imported by the appellant required BIS certificate, the adjudicating authority and the appellant authority failed to appreciate that the date of implementing the notification issued vide S.O. 3966(E) dt. 13/08/2018 is 18/12/2018. Further as per Chapter 1A of the Hand Book of Procedures introduced in 2017-18 as part of Foreign Trade Policy 2015-2010 w.e.f. 05/12/2017, specific provision is made to meet transitional arrangements wherein 1.05 it is stated that "in case an export or import that is permitted freely under FTP is subsequently subject to any restriction or regulation, such export or import will ordinarily be permitted, not withstanding such restriction or regulation, unless or otherwise stipulated. This is subject to the condition that the shipment of export or import is made within the original validity period of an irrevocable commercial letter or credit, established before the date of imposition of such restrictions". According to learned counsel, in the appellants case, advance payments were made on 29/10/2018 and 13/11/2018 as evident from the documents submitted along with the appeal and the appellant imported the goods prior to 18/12/2018. Therefore the finding regarding the non-compliance of Import Policy is totally unsustainable in law. He further submitted both the authorities have failed to appreciate that even if it is assumed that the goods imported by the appellant can be imported only by producing BIS Registration certificate, import of such goods without the above certificate is in breach of the relevant provisions of the FT(D&R) Act, 1992, coming within the ambit of the expression "any other law for the time being in force" used in clause (d) of Section 111 of the Customs Act. and the goods imported by the appellant are liable for confiscation, even then the respondents ought to have allowed the redemption of the same against payment of fine as per Section 125 of the Customs Act, 1962.

5. On the other hand, the learned AR defended the impugned order.

6.1. After considering the submissions of both the sides and perusal of the material on record, I find that both the authorities have completely failed to follow the principles of natural justice in passing the orders. The original authority issued the show-cause notice in a hurry on 28/05/2019 and the same was served on the appellant at 5pm on the same day and the appellant was directed to file reply next day before 10 to 12AM and further the copies of the relied upon documents in show-cause notice were not furnished with the show-cause notice and when the appellant filed its letter dt. 29/05/2019 requesting the original authority to issue the copies and sought a week's time for personal hearing and to reply to the show-cause notice, the same was not considered and no personal hearing was granted and original order was passed confiscating the goods and imposition of penalty. The entire procedure followed by the original authority appears to be in gross violation of the principle of natural justice. It is pertinent to mention that the appellants have been importing the same goods for the last so many years and no objection was raised regarding the classification of the imported goods. Further when the goods were not released for a long time, the appellant was compelled to file a Writ Petition before the Hon'ble High Court and during the pendency of the case before High Court, some of the goods where no BIS was required were released, that too after the expiry of around 3 months from the date of filing the Bill of Entry. Further, the Hon'ble High Court directed the respondent to pass order regarding the classification within 3 weeks from 10/04/2019 but the original authority did not bother about the order passed by the Hon'ble High Court and issued the show-cause notice only on 28/05/2019 when the appellant filed a contempt proceedings before the Hon'ble High Court and in order to save himself from the contempt proceedings, the original authority without following the principles of natural justice, passed the original order. Further I find that in the matter of Kellogg India Pvt. Ltd. cited supra by the appellant, the Hon'ble Bombay High Court has categorically held that rules of natural justice are the minimum standards of fair decision making imposed on persons or bodies acting in a judicial or quasi-judicial capacity. But in the present case, I find that without following the law on the point, the original authority has passed the order in complete violation of natural justice and on this ground alone, the impugned order is liable to be set aside.

6.2. Further as far as merit is concerned, I find that the appellant is covered by the transitional provisions as contained in Foreign Trade Policy. In this case, the appellant made advance payment on 29/10/2018 and 13/11/2018 as evident from the documents produced on record and imported the goods prior to 18/12/2018 which is the date up to which the goods could be imported without insisting on BIS certificate. Both the authorities have completely ignored the saving clause of the Transition Policy and misinterpreted the exclusion clause in the transitional provisions as provided in the FTP 2015-2010. Further I find that the absolute confiscation was not warranted under the law even if for the sake of arguments, we presume that the goods imported by the appellant can only be imported on producing BIS certificate and the said goods were imported in breach of the regulations of the FTP Act, then also, the goods are liable to confiscation but should have been allowed to be redeemed the same against payment of find as per Section 125 of the Customs Act.

7. In view of my discussion above, I am of the considered view that the impugned order is totally illegal and has been passed arbitrarily without following the basic principles of natural justice and on merit also, the appellant is covered by the transition provision as covered under FTP. In view of this, I hold that the impugned order is not sustainable in law and therefore I set aside the same and direct the original authority to immediately release the goods on payment of appropriate duty. Thus the appeal is allowed with consequential relief, if any.

8. Before parting with the judgment, I am constrained to observe that in the present case even the goods which admittedly did

not require BIS certificate were illegally detained and was only released when the appellant filed a Writ Petition in the Hon'ble High Court of Kerala. The high handedness of the adjudicating authority, is writ large when he failed to conclude the proceedings within the time stipulated by the Hon'ble High Court in their order dt. 10/04/2019. Further the appellant was also compelled to initiate contempt of court proceedings before the Hon'ble High Court and in order to save himself from the contempt of court, the adjudicating authority hurriedly issued the show-cause notice dt. 28/05/2019 and served the same at 5 PM on the same day and directed the appellant to file reply to the show-cause notice by 10 to 12AM on the next day i.e. 29/05/2019. It is pertinent to note that no relied upon documents were supplied to the appellant along with show-cause notice and when the appellant vide letter dt.29/05/2019 requested for a week time to file reply, the adjudicating authority without considering the request of the appellant and without affording an opportunity of hearing absolutely confiscated the goods and also imposed a penalty of Rs.1,50,000/- under Section 112(a) of the Customs Act, 1962 on the appellant. Heaven was not going to fall had the adjudicating authority given one week time to file reply by the appellant. The conduct of the adjudicating authority from the very beginning appears to be totally biased and to harm the interest of the importer who appears to be small time importer and the size of the imported consignments is also not very big. The insensitive approach of the adjudicating authority is going to damage the policy of the Government of India relating to ease of doing business by small traders like the appellant. It appears that the adjudicating authority has deliberately violated the principles of natural justice to harm the interest of the appellant. Adjudicating authority has no regards for the orders passed by the High Court. Unfortunately the first appellate authority has also not applied its judicial mind and routinely confirmed the Order-in-Original. Therefore keeping in view of the conduct of the adjudicating authority in this case from the very beginning, I am constrained to observe that Order-in-Original was passed with mala fide intention by violating the principles of natural justice. Therefore in the interest of justice, I impose a fine of Rs.25,000/- (Rupees twenty five thousand only) on the adjudicating authority (Shri B.G. Krishnan, Joint Commissioner) which shall be paid by him from his salary. The said fine is to be paid within two months from the date of receipt of this order in the Chief Minister’s Distress Relief Fund, Kerala. He is also advised to be careful in future while passing the orders.

(Order was pronounced
in Open Court on 19/08/2019)

S.S GARG
JUDICIAL MEMBER

Raja...