IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL, EASTERN ZONAL BENCH: KOLKATA

Cus.Appeal Nos.460,541,542,543 & 544/09

[Arising out of Order-in-Original No.Kol./Cus/Airport/Admn./12/09 dated 31.03.2009 passed by Commr. of Customs (Airport & Admn.), Kolkata]

(1) Shri Prabir Kumar Guha
(2) Shri Turab Siyawala
(3) Shri Hakimuddin
(4) Shri Atanu Sarkhel
(5) Smt.Bharati Sen

Applicant (s)/Appellant (s)

Vs.

Commr. of Customs (Airport & Admn.), Kolkata

Respondent (s)

Appearance:

Shri R. N. Bandapadhyay, Consultant for Sl.No.(1) & (4) & Shri H. K. Pandey, Adv. for Sl.No.(5) for the Appellants and
None for Sl.No.(2) & (3)
Shri S. Guha, Asstt. Commr. (AR) for the Revenue

CORAM:

HON'BLE SHRI P.K.CHOUDHARY, MEMBER (JUDICIAL)
HON'BLE SHRI V. PADMANABHAN, MEMBER (TECHNICAL)

Date of Hearing : 15.01.2019
Date of Decision : 15.01.2019

ORDER NO…FO/A/75056-75060/2019

Per Bench :

The present five appeals have been filed against a common Order-in-Original No.Kol./Cus/Airport/Admn./12/09 dated 31.03.2009. Under this Order-in-Original dated 31.03.2009, the adjudicating authority has imposed penalties upon the appellants.

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Shri R.N.Bandopadhyay, ld.Consultant appearing for the appellants, Shri Prabir Kumar Guha and Shri Atanu Sarkhel and Shri H.K.Pandey, ld.Advocate appearing for the appellant, Smt.Bharati Sen, argued that these appellants are the officers of Customs and a penalty of Rs.50,000/- each has been imposed upon them under Section 112 (a) of the Customs Act, 1962. That these officers have examined the export consignment of Zinc Ingots under Bills of Export filed by M/s Siyawala Exports Pvt. Ltd. That a detailed investigation was done and Show Cause Notice was issued, interalia, to the present appellants that goods examined by them were not exported to Bangladesh & they were liable to penalty for negligence. Learned Advocate argued that no notice to the appellants was issued within the time prescribed under Section 155 (2) of the Customs Act, 1962. That for not issuing notice within time as per Section 155 (2) the proceeding are required to be quashed on the basis of following case laws:-

(i) CC New Delhi Vs. M.I. Khan [2000 (120) ELT 542 (Tribunal)]

(ii) CC & CE, Hyderabad-II Vs. Rajiv Kumar Agarwal [2007 (217) ELT 392 (Tri.-Bang.)]

(iii) Parvathy Kailasam Vs. CCE Tirupathi [2010 (252) ELT 405 (Tri.-Bang.)].

It was also argued by the Learned Advocate that the officers have not been charged sheeted for disciplinary proceedings & criminal investigation against them has also been closed.

3. Shri S. Guha, Asstt.Commr. (AR) appearing on behalf of the Revenue argued that the trucks, under which goods were declared to be sent to Bangladesh, never crossed the border and it was the duty of the

appellants to see that goods cross the border. Learned AR strongly defended the order of the Adjudicating Authority imposing penalty upon the appellants.

4.1 Heard both sides and perused the case records. The issue involved in the present appeals is whether penalty has been correctly imposed upon the appellant under Section 112(a) of the Customs Act, 1962. Learned Advocate appearing for the appellants argued that a notice is required to be given to the officers within time specified under Section 155 (2) of the Customs Act, 1962 and that no such notice was issued to the appellants. It is observed from the Order-in-Original dated passed by the adjudicating authority that this point was specifically taken by the appellant before the adjudicating authority but Adjudicating Authority has not given any findings on this issue. It is observed that CESTAT Bangalore in the case of CC & CE, Hyderabad-II Vs. Rajiv Kumar Agarwal (Supra) has taken following view on the applicability of Section 155 (2) of the Customs Act, 1962 :-

> ***"6.1*** *No doubt, the above allegations are quite serious in nature. However, the Adjudicating Authority has dropped the proceedings on two grounds :-*
>
> *(i) The proceedings are time barred in view of Section 155(2) of the Customs Act.*
>
> *(ii) The acts of omission and commission of the respondents have not rendered the goods liable to confiscation under the Customs Act. Hence, they are not liable for penalty under Section*

114.

In these circumstances, we want to deal with only the above two grounds on which the Commissioner has dropped the proceedings. Revenue contends in the grounds of appeal that Section 155 of the Customs Act would not be applicable to the adjudication proceedings on the ground that Section 155 refers to "suits, prosecutions or legal proceedings" before the Court. It has further been stated that this position has been brought out in the case of Costao Fernandes v. the State. On going through the Coasto Fernandes decision, we do not find in that decision anywhere holding that Section 155 of the Customs Act would not be applicable to the adjudication proceedings against the Customs Officers. We reproduce Section 155 of the Customs Act.

"155. Protection of action taken under this Act*. - (1) No suit, prosecution or other legal proceeding shall lie against the Central Government or any officer of the Government or a local authority for anything which is done, or intended to be done in good faith, in pursuance of this Act or the rules or regulations.*

(2) No proceeding other than a suit shall be commenced against the Central Government or any officer of the Government or a local authority for anything purporting to be done in pursuance of this Act without giving the Central Government or such officer a month's previous notice in writing of the intended proceeding and of the cause thereof, or after the expiration of three months from the accrual of such cause."

A reading of the said Act shows that the protection under the above section is applicable to all legal proceedings. Further, if protection to officers against proceedings in courts can be given, there is no reason why such a protection cannot be given to proceedings before quasi judicial authorities. Therefore, we do *not find much substance in the Revenue's contention. Further, the Tribunal, in the case of M.I. Khan, has held that protection under Section 155 of the Customs Act is available even in respect of adjudication proceedings. Therefore, the Commissioner was correct in holding that the protection under the Act is available to the respondents. However, in terms of Section 155(2), in order to initiate any proceedings, the time limit indicated therein should be adhered to. In the present case, it is on record that the proceedings have not been initiated within the time limit. Therefore, without going into the merits of the case and also the alleged connivance of the respondents, we hold that the Commissioner was legally correct in dropping the proceedings on the grounds of limitation prescribed in Section 155(2) of the Customs Act, 1962. Hence, the Revenue's appeals have no merits and the same are rejected."*

4.2. Similar view was expressed by other co-ordinate CESTAT benches in the following cases:-

(i) CC New Delhi Vs. M. I. Khan (Supra)

(ii) Parvathy Kailasam Vs. CCE, Tirupathi (Supra).

5. There is nothing on record that provisions of Section 155 (2) of the Customs Act, 1962 were complied with before initiating action against the appellants. Respectfully following the ratio of above relied upon case laws appeals filed by the appellants are allowed without going into other aspects of these proceedings.

6. Appeals **(C/460, 543 & 544/09)** are allowed.

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7. When the matters were called for hearing, none appeared on behalf of the appellants despite notice, nor has any application for

adjournment been received. Notice of hearing has also not been received back "undelivered". Also, none appeared on the earlier several occasions. Shri S. Guha, ld.D.R. appeared for the Revenue.

8. It may be mentioned that as per maxim, *VIAILATIBUS ET NON DORMIENTIBUS JURA SUB VENIUNT*, law helps those who are vigilant and not those who go to sleep.

9. In view of the above, the appeals **(C/541,542/09**) are dismissed for non-prosecution.

(Operative part of the order was pronounced in the open court.)

Sd/	Sd/
(V.Padmanabhan)	**(P. K. Choudhary)**
Member (Technical)	**Member (Judicial)**

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