IN THE CUSTOMS EXCISE & SERVICE TAX APPELLATE TRIBUNAL
WEST ZONAL BENCH AT MUMBAI

Appeal No. C/87595,87597 to 87599/17
C/87722, 87724/17

(Arising out of Order-in- Appeal No. MUM-CUSTM-PAX-APP-455, 456, 453, 446,449/17-18 dated 31.08.2017 passed by the Commissioner of Customs (Appeals), Mumbai III)

M/s. Millienium Freight Forwarders Pvt. Ltd. Appellant
Ms. Tejinder Kaur
M/s. Mahendra Shipping Agency

Vs.

Commr of Customs (ACC) Mumbai Respondent

Appearance:

Shri N.D. George, Advocate for the appellant
Shri Manoj Kumar, AC (AR) for the respondent

CORAM:
Hon'ble Dr. Suvendu Kumar Pati, Member (Judicial)

Date of hearing : 22.06.2018
Date of decision : 16.11.2018

O R D E R No: **A/87918-87923/2018**

Substantiation of charges of mis-declaration of quantity, description and value allegedly made with intend to avail higher drawback by the exporter resulted in the imposition of penalty on the freight forwarding agency, customs house agent and its proprietors respectively which is being challenged in this appellate Tribunal after their unsuccessful attempt before the Commissioner (Appeals).

2. Factual backdrop of the case is that M/s. Orient Export is the alleged exporter who is nowhere in the picture before the appellate authority. Allegation against these appellants is that said M/s. Orient Export filed 9 shipping bills all dated 16.11.2013 for export of readymade garments having a total FOB value of `73,11,157.20 to Sudan under drawback scheme and applied for back to town of the cargo on 30.05.2014 which is more than six months after such filing of shipping bills. On examination of goods on SEZ Mumbai in the presence of proprietor Shri Yusuf Chanuwala of the exporting firm, it was found to be a case of misdeclaration of quantity, description and value made with intent to avail higher drawback, and the adjudicating authority redetermined the value of the exports goods as `36,69,538/-. Accordingly, confiscation of goods against fine and penalty was imposed and the above named appellants were also imposed with penalty, after they were being put to notice and their replies were found to be unsatisfactory by the adjudicating authority. Commissioner (Appeals) confirmed the said order and hence the appeal before this Tribunal.

3. During the course of hearing of the appeal, ld. Counsels for the appellant raised several points while leading his argument including the fact that CHA should not be prosecuted under the Customs Act while separate procedure for violation of Customs Brokers Licensing

Regulation, 2013 empowers the Commissioner of Customs to make necessary enquiry and follow subsequent action. He also pointed out that exporter is not a party to this proceeding, on whose behest the alleged act of omission and commission was made by the appellants.

4. Ld. AR for the department responded to such submissions by way of justifying the legality of the order passed by the Commissioner (Appeals) and taken this Court through the statement of Mrs. Tajinder Kaur, director of M/s. Millienium Freight Forwarders Pvt. Ltd. and the statement of two of her employees named Ganesh Salaskar and Sailash C. Watambale, who admitted by Mrs. Tajinder Kaur to be employees of her concern i.e. M/s. Millienium Freight Forwarders Pvt. Ltd. and who stated to have worked for CHA Mahinder Shipping Agency, another appellant.

5. On perusal of the case records it is observed that placing reliance mainly on the statement of those two employees, who allegedly gone into the customs area with customs pass issued through CHA and intentionally made incorrect and misleading export documents inflating the value to claim excess and undue drawback by way of concealing relevant information about the trader. It is noticed from the Commissioner (Appeals) order dated 21.08.2017 that advocate for the appellant M/s. Millienium Freight Forwarders Pvt. Ltd. and its director submitted a

written application on 18.08.2017 as regards non-grant of request of cross examination of their employees and the same was refused by the Commissioner (Appeals) in his order vide para 9 on the ground that no such request was ever made before the adjudicating authority nor even at the time of filing of the appeal and Rule 5 of Customs (Appeals) Rules, 1982 disentitled the appellant to produce any evidence before the Commissioner (Appeals) for the scrutiny of the order-in-original passed by the Additional Commissioner of Customs (Exports) but the said order clearly reveals at para 31 that during the course of personal hearing, the appellants failed to establish the ground for cross examination for which such permission was refused. When the entire case is based on the statement of those employees, the veracity of which was not tested by permitting the appellants to cross examine them, the same cannot be considered as a complete piece of evidence on which reliance can be placed. Such an order passed by the original adjudicating authority and the Commissioner (Appeals) are in gross violation of principles of natural justice and therefore I find it a fit case which is required to be remanded back for re-adjudication.

6. Section 128A(3) empowers the Commissioner (Appeals) to make such further enquiry as may be necessary to pass such order as he may think proper and in view of the decision of the Hon'ble Supreme Court reported

MIL India Ltd. vs. CCE [2007 (260) ELT 188 (SC)] I am of the view that the Commissioner (Appeals) can exercise power vested with adjudicating authority in accepting evidence and making further enquiry as he deems proper after providing opportunity to the appellant to cross examine the witnesses. Hence the order –

Order

The appeals are allowed by way of remand to the Commissioner (Appeals) with a direction to provide opportunity of cross examination of the principal witnesses to the appellants and to adjudicate himself and pass necessary orders. Accordingly the order passed by the Commissioner (Appeals) dated 31.08.2017 is hereby set aside.

(Pronounced in Court on 16.11.2018)

Dr. Suvendu Kumar Pati
Member (Judicial)

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