CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
MUMBAI

REGIONAL BENCH – COURT NO.405

Excise Appeal No. 89254 of 2018

(Arising out of Order-in-Appeal No. NSK/EXCUS/SSP/APPL/092/18-19 dated 16.07.2018 passed by the Commissioner of CGST & Central Excise(Appeals), Nashik)

M/s Vivilon Textile Industrial ....Appellant
9 Industry House Plot No. 4 Marwah
Estate Off Saki-Vihar Road
Andheri East, Mumbai
Maharashtra

VERSUS

C.C.E. & S.T.-Nasik ....Respondent
Null kendr. Rajaswa Bhawan,,
Old Agra Road...Gadkari Chowk,
Nasik,,Maharashtra-422002

WITH

Excise appeal No. 89258 of 2018

(Arising out of Order-in-Appeal No. NSK/EXCUS/SSP/APPL/092/18-19 dated 16.07.2018 passed by the Commissioner of CGST & Central Excise(Appeals), Nashik)

M/s Harish Bulchandani ....Appellant
9 Industry House Plot No. 4 Marwah
Estate Off Saki-Vihar Road
Andheri East, Mumbai
Maharashtra 400 072

VERSUS

C.C.E. & S.T.-Nasik ....Respondent
Null kendr. Rajaswa Bhawan,,
Old Agra Road...Gadkari Chowk,
Nasik,,Maharashtra-422002

WITH

Excise appeal No. 89260 of 2018

(Arising out of Order-in-Appeal No. NSK/EXCUS/SSP/APPL/092/18-19 dated 16.07.2018 passed by the Commissioner of CGST & Central Excise(Appeals), Nashik)

M/s Confidence Export Pvt Ltd ....Appellant
9 Industry House Plot No. 4 Marwah
Estate Off Saki-Vihar Road
Andheri East, Mumbai
Maharashtra 400 072

VERSUS

C.C.E. & S.T.-Nasik ....Respondent
Null kendr. Rajaswa Bhawan,,
Old Agra Road...Gadkari Chowk,
Nasik,,Maharashtra-422002

WITH

Excise appeal No. 89293 of 2018

(Arising out of Order-in-Appeal No. NSK/EXCUS/SSP/APPL/092/18-19 dated 16.07.2018 passed by the Commissioner of CGST & Central Excise(Appeals), Nashik)

M/s Suhel Roadlines ....Appellant
Gala No. 1 Ramchandra Compound
Behind R C Bapu Petrol Pump
Village Rehnal, Bhiwandi Thane
Maharashtra

VERSUS

C.C.E. & S.T.-Nasik ....Respondent
Null kendr. Rajaswa Bhawan,,
Old Agra Road...Gadkari Chowk,
Nasik,,Maharashtra-422002

APPERANCE:

Shri Prakash Shah, Advocate & Shri Mohit Raval, Advocate
None for the Appellant in Appeal No. E/89293/2018
Shri S.K. Hattangadi, Assistant Commissioner Authorised Representative for the Respondent

CORAM:

HON'BLE MR. AJAY SHARMA, MEMBER (JUDICIAL)

FINAL ORDER NO. A/85335-85338/2020

Date of Hearing: 06.09.2019
Date of Decision: 26.02.2020

PER: AJAY SHARMA

These Appeals have been filed impugning the order dated 16.07.2018 passed by the Commissioner of CGST & Central Excise(Appeals), Nashik in Order-in-Appeal No. NSK/EXCUS/SSP/APPL/092/18-19. Since a common impugned order has been passed by the learned Commissioner therefore I am also disposing of all the four Appeals by this common Order. None Appeared on behalf of M/s Suhel Raodlines- Appellant in Appeal No. E/89293/2018.

2. The limited issued involved in these Appeals are whether the Appellants are liable to pay penalty under Rule 26 of the Central Excise Rules, 2002?

3. The facts leading to the filing of these Appeals are as follows. M/s. Vivilon Textiles Ind.Pvt.Ltd. *[Appellant in Appeal No.E/89254/2018]* is a 100% EOU and was clearing Polyester Texturised Yarn (PTY) against CT-3 certificate issued by M/s. Sunrise Textiles [100% EOU] through M/s. Suhel Roadlines *[Appellant in Appeal No.E/89293/2018]*. M/s. Sunrise Textiles from time to time, procured CT-3 certificates in favour of M/s. Vivilon Textiles, indicating that they intended to procure duty free *Polyster Texturised Yarn (PTY)* from Vivilon. Mostly the services of Suhel Roadlines were used for transporting the PTY cleared duty free from the factory premises of Vivilon to the premises of Sunrise Textiles at Malegaon, Nashik. Officers of DGCEI, Mumbai, on the basis of certain information, conducted searches at the premises of Suhel at Bhiwandi on 28.9.2002 in connection with the enquiries concerning some other EOU and during those inquiries it came to notice that although PTY

was dispatched through Suhel Roadlines for delivery to Sunrise Textiles, but it was diverted to some other place and did not reach M/s. Sunrise Textiles. As per department this was a case of diversion of goods without discharging the duty. Statement of Riyaz Siddiqui, proprietor of Suhel Roadlines was recorded and after investigation a show cause-cum-demand notice dated 9.7.2009 was issued to Sunrise Textiles by DGCEI, Mumbai demanding Central Excise duty to the tune of Rs.36,10,004/- on raw material, viz. Polyester Texturised Yarn(PTY) procured without payment of CE duty, cleared by Vivilon to Sunrise Textiles under CT3/ARE3 procedures and diverted into domestic area by manipulating the certificates. The Appellants herein were also named as co-noticees in the said demand-cum-show cause notice and penalty under Rule 26 ibid was proposed against them for their alleged connivance. Vide Order-in-Original dated 30.3.2010 demand against M/s. Sunrise Textiles was confirmed and penalties were imposed against the Appellants herein under Rule 26 ibid. M/s. Sunrise Textiles did not prefer any appeal against the said order. The Appellants herein against whom penalty was imposed under Rule 26 ibid filed Appeal before the Commissioner (Appeals) and the learned Commissioner vide Order-in-Appeal dated 22.7.2010 rejected the same and upheld the Order-in-Original dated 30.3.2010. Being aggrieved, the Appellants herein filed separate Appeals before this Tribunal. Although Suhel Roadlines also filed Appeal but at that time also nobody appeared on its behalf. The main contention of the Appellants were that no opportunity was given to them to cross-examine Riyaz Siddiqui despite the fact that mainly by relying upon his statement only, show cause notice was issued to them and penalty was imposed under Rule 26 ibid. This Tribunal vide order dated 13.4.2012 disposed of the Appeals and *remanded the matter back to the adjudicating authority with a direction to give a cross-examination of Shri Riyaz Siddiqui and other transporter to the appellant and thereafter pass an appropriate order after giving a reasonable opportunity of hearing to the appellant to present their case.*

4. After remand, the Adjudicating Authority again imposed penalty of Rs. 5 lakhs, 1 lakh, 2 lakhs and 2 lakhs on M/s. Vivilon Textiles Industries Pvt. Ltd., M/s. Confidence Exports Pvt. Ltd., Shri Harish Bulchandani, Director M/s. Vivlon Textiles and M/s. Suhel Roadlines respectively under Rule 26 ibid and observed as under:-

> "17. I would like to mention here that Shri Riyaz Siddqui, Proprietor of Suhel has time and again disclosed the facts in his statements. In such a scenario, cross examination sought will not serve any purpose when all the facts are accepted by the transporter and other 21 transporters who have further transported the goods from Bhiwandi. Nothing new will emerge in the cross examination when all the facts are accepted and are on record. This case is based on facts and circumstances and the cross examination, cannot change the said facts and circumstances".

The Appeals filed by the respective Appellants, mainly on the ground that despite the directions of the Tribunal no opportunity to cross-examination of Riyaz Siddique was granted to them, was dismissed by the learned Commissioner vide common impugned order dated 16.7.2018 while observing that the Adjudicating Authority has provided more than enough opportunity and tried his level best for cross-examination in light of Hon'ble CESTAT order but he cannot hold the proceedings indefinitely and therefore the order passed by the said Adjudicating Authority needs no interference.

5. Learned counsel for the Appellants submits that the penalty imposed on the Appellants solely based on the statement of Mr. Riyaz Siddique, proprietor of M/s. Suhel Roadlines and therefore they asked for the cross-examination of the said Riyaz Siddique but no opportunity was given to them. He further submits that no serious efforts were made by the Adjudicating Authority to secure the presence of said Mr. Siddique and therefore the penalties imposed upon the Appellants are untenable. He also submits the none of the authorities below have recorded any finding to the effect that the Appellants had the knowledge or had a reason to believe that the goods were liable to be confiscated and therefore penalty under Rule 26 cannot be imposed. Per contra learned Authorised Representative for the Revenue reiterated the findings recorded in the impugned order and prayed for dismissal of Appeals. He further submits that many chances were given to Mr. Riyaz Siddique to appear but he did not appear. According to him perusal of the records of the case make it clear that the appellants alongwith M/s. Sunrise Textiles connived with Suhel Roadlines, proprietor Mr. Riyaz Siddique to divert the duty free PTY in the domestic market and therefore penalty under Rule 26 has rightly been imposed upon them.

6. I have heard learned counsel for the Appellants and learned Authorised Representative for the Revenue and perused the records of the case including the synopsis/ written submissions and the case laws produced by the respective sides. The register which has been

seized by DGCEI, Mumbai from the premises of Sunrise Textiles shows the details of the movement of PTY as per the modus of Sunrise Textile but that does not mean that it has been done at the behest or in connivance with the Appellants. For proving the connivance of the Appellants, Revenue relied upon the statement of Mr. Riyaz Siddique, proprietor of Suhel Roadlines. Not only that, the Adjudicating Authority also in its order has observed that the said Riyaz Siddiqui has explained in detail and pinpointed the complicity of Vivilon, Confidence and Harish i.e. the Appellants herein in the whole racket. If that is so, then the requirement of cross-examination of the said Mr. Siddique is very essential qua the appellants. I agree with the submission of learned counsel that the learned Commissioner has not recorded any finding that either of the Appellants had the knowledge or had a reason to believe that the goods were liable to be confiscated which is *sine qua non* for imposing penalty under Rule 26. Rule 26 pre-supposes the existence of knowledge or reason to believe that the goods are liable to be confiscated under the Central Excise Act or the Rules therein. As there is no finding in the impugned order to that effect, hence the imposition of penalty on the Appellants under Rule 26 is illegal and improper. Therefore in my view the impugned order did not bring out the existence of required ingredients attracting the provisions of the said rule. Learned counsel also submits that in various decisions, the Tribunal has held that penalty under Rule 26 can be imposed only on individuals and not on companies. I have gone through the decisions cited on behalf of the Appellants and am of the view that since Vivion

Textiles and Confidence Export are limited companies, they cannot be penalized under the provisions of Rule 26 ibid which is *pari materia* to Rule 209A of erstwhile Central Excise Rules, 1944 as held by the Larger Bench of the Tribunal in the matter of *Steel Tubes of India Ltd.*, v. *Commissioner of Central Excise, Indore, 2007(217) E.L.T. 506*. The said decision very clearly and categorically holds that provisions of Rule 209A which are *pari materia* to Rule 26 of the Central Excise Rules, 2002 will not be applicable to a corporate entity. Otherwise also Rule 26 contains various sub-rules and it has not been mentioned in the show cause notice or in any of the decisions of the authority below as to under which sub-rule the penalty has been levied and in various decisions of the Tribunal it has been held that penalty under Rule 26 of Central Excise Rules, 2002 is not sustainable because the show cause notice did not satisfy as to under which sub-rule of the said rule penalty was proposed to be imposed upon the noticees. I am also not satisfied the way the matter was adjudicated upon by the Adjudicating Authority after remand by the Tribunal. It is in utter violation of the principle of judicial discipline as well as principle of natural justice, still it gets the endorsement of the 1st Appellate Authority i.e. the Commissioner. The principles of judicial discipline require that the orders of the higher appellate authorities, should be followed unreservedly by the subordinate authorities as laid down by the Hon’ble Supreme Court in the matter of *Union of India v. Kamlakshi Finance Corporation Ltd.; 1991 (55) E.L.T. 433 (S.C).* The Hon’ble Supreme Court observed that the order of the Appellate Collector is binding on the Assistant

Collectors working within his jurisdiction and the order of the Tribunal is binding upon the Assistant Collectors and the Appellate Collectors who function under the jurisdiction of the Tribunal. The principles of judicial discipline require that the orders of the higher appellate authorities should be followed unreservedly by the subordinate authorities unless its operation has been suspended by a competent Court. If this rule is not followed, the result will only be undue harassment to assessees and chaos in administration of tax laws. According to me, the Adjudicating Authority as well as the 1st Appellate Authority i.e. the Commissioner are duty bound give due regard to the orders of the Tribunal. Although this Tribunal vide its order dated 13.4.2012 remanded the matter back to the Adjudicating Authority with the specific direction *to give a cross-examination of Shri Riyaz Siddiqui and other transporter to the appellant and thereafter pass an appropriate order after giving a reasonable opportunity of hearing to the appellant to present their case.* But despite that the Adjudicating Authority recorded a finding that since Riyaz Sizziqui has time and again disclosed the facts in his statement therefore cross-examination sought will not serve any purpose and nothing new will emerge in the cross-examination when all the facts are accepted and are on record. If this is the observation of the Adjudicating Authority then one can well imagine how serious were the efforts of the Adjudicating Authority in securing the presence of the said Riyaz Siddiqui for the purpose of cross-examination. This is also apparent from the fact that no summons were issued by the Adjudicating Authority to the said Riyaz Siddiqui and only letters were issued to him. In the matter of *Balbir Steel (P) Ltd. vs. CCE, Kanpur; 1999(114) ELT 561 (Tri.),* Principal Bench of the Tribunal has held that the duty of Revenue does not end merely by issuing summons to the persons on whose statement it relies, it is the further duty of Revenue to produce them, otherwise the statements given by those persons cannot be relied upon for the purpose of adjudication and therefore principles of natural justice are violated by not producing the said witness for cross-examination to the appellant/applicant. In the instant case none of the lower authorities have recorded a finding that even without relying upon the statement of the said Riyaz Siddiqui, any case is made out against the Appellants herein for imposing penalty. No summons were issued by the Adjudicating Authority to the said Riyaz Siddiqui and merely letters were written to him. No other steps have been taken to secure his presence. The only plea made by Revenue is that Riyaz Siddiqui did not reply to any letter. No evidence has been brought on record to show what other steps have been taken by the department to secure the presence of Riyaz Siddiqui for cross-examination. In the facts of this case it can very well said that no proper steps were taken by the authorities below to honour the direction of this Tribunal. I deprecate the way the adjudicating authority conducted adjudication. The conduct of the adjudicating authority although invite strictures but I am refraining myself from doing so. So far as *Appeal No. E/89293/2013* filed by Suhel Roadlines is concerned, I have already mentioned at the beginning of this order that none appeared on behalf of the said Appellant. The said Suhel Roadlines has been penalized mainly on the basis of the statement of its proprietor Riyaz Siddiqui. Due to the non-cooperation of the said Riyaz Siddiqui the proceedings before the lower authority gets delayed. Before the Tribunal also the conduct of the said Riyaz Siddiqui is not appreciable. Although appeal has been filed on behalf of his proprietorship concern Suhel Roalines but nobody appeared to assist at the time of hearing. The plea of cross-examination of Riyaz Siddiqui, which is available to other Appellants and due to which the matter was earlier remanded by the Tribunal on 13.4.2012, is not available to M/s. Suhel Roadlines as the said Riyaz Siddiqui is its proprietor. In my view no case has been made out by Suhel Roadlines- Appellant in their Appeal No. E/89293/2018.

7. Accordingly, the Appeals Nos. E/89254, 89258 & 89260/2018 are allowed with consequential relief, if any and Appeal No. E/89293/2018 is dismissed.

(Order pronounced in the open Court on 26.02.2020)

(Ajay Sharma)
Member (Judicial)

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