IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 30.07.2021

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THE HONOURABLE MR. JUSTICE S.M.SUBRAMANIAM

W.P.No.15897 of 2021
and
W.M.P.No.16792 of 2021

M/s.Kiruba Export,
Rep., by its Proprietor, Ms.S.Vimaladevi,
No.84, Chennimalai Road,
Perundurai, Erode District-638 502. ...Petitioner

-vs-

1.The Commissioner of Customs, Chennai-IV,
Office of the Commissioner of Customs, Chennai-IV,
Custom House, No.60, Rajaji Salai,
Chennai-600 001.

2.The Deputy Commissioner of Customs (BRC-DBK),
Office of the Commissioner of Customs, Chennai-IV,
Custom House, No.60, Rajaji Salai,
Chennai-600 001. ...Respondents

Petition filed under Article 226 of the Constitution of India praying for issuance of Writ of Certiorari to call for the records pertaining to the impugned Order-in-Original No.81386/2021 of the 2nd respondent dated 17.03.2021 and quash the same.

For Petitioner : Mr.Derricksam
for Mr.A.Mohamed Ismail

For Respondents : Mr.Rajendran Raghavan,
Senior Standing Counsel for GST & Customs
for RR1 & R2

ORDER

The Order-in-Original dated 17.03.2021 is under challenge in the present writ petition.

2.The preamble of the order dated 17.03.2021 would reveal that "an appeal against this order lies with the Commissioner of Customs (Appeals), Custom House, 5th Floor, Chennai-600 001, under Section 128(1) of the Customs Act, 1962 within 60 days of communication of this order. The appeal should be in duplicate and should be filed in form CA-1 appended to the Customs (Appeals) Rules, 1982. An appeal against this order shall lie before the Tribunal on payment of 7.5% of the duty demanded where the duty or duty & penalty are in dispute, or penalty, where penalty alone is in dispute. The appeal should bear a Court Fee Stamp of Rs.2.00 only and should be accompanied by this decision or copy thereof. If a copy of this decision is enclosed, it should bear a Court Fee Stamp of Rs.2.00 only prescribed under schedule (i) item 6 of the Court Fee Act of 1970".

3.The learned counsel for the petitioner submitted that the petitioner, in the course of the business, had exported several consignments of jaggery and had been availing the lawful drawback entitled to the petitioner. The second respondent issued a letter of personal hearing claiming that a show cause notice dated 01.03.2017 was issued to the petitioner and called for personal hearing alleging that the petitioner had not submitted negative statements for 170 export consignments made and the drawback availed between April, 2011 to March, 2014. The petitioner states that no such show cause notice was issued to them. Though the sale proceeds were realized then and there, since the second respondent had sought for negative certificates for the relevant period from the Chartered Accountant, the petitioner had approached the second respondent and sought for time to produce the same. The office of the second respondent had accepted the request of the petitioner and had given time till 06.04.2021. While so the petitioner was taking arrangements for the said negative certificates for which he had time till 06.04.2021, the second respondent passed the impugned order on 17.03.2021 without even waiting till 06.04.2021. Thus, the impugned order is in violation of the principles of natural justice and sufficient opportunity has not been granted to the petitioner before passing the impugned order.

4.The learned Senior Standing Counsel appearing on behalf of the respondents disputed the said contention by stating that sufficient opportunities were given and personal hearing was granted on three occasions, which all are recorded and in the impugned order and in the concluding paragraph, the authority competent has clearly stated that "however the exporter has not responded, in spite of several opportunities given to appear in person and/or through his authorized representative to produce evidence for the sale proceeds in respect of the above mentioned shipping bills. Further, personal hearing was given to the exporter vide letter dated 01.03.2021 in F.No.S.Misc.2/223/2016-DBK (BRC) giving 08.03.2021, 09.03.2021 and 10.03.2021 as dates for scheduled PH. However, the exporter has neither responded to the said PH letter dated 01.03.2021, nor appeared for aforementioned hearing dates".

5.Though the petitioner claims that the said recording of the original authority is factually incorrect, this Court cannot conduct an adjudication in respect of such findings made by the original authority. These disputed facts are to be adjudicated with reference to the original records, documents and evidences made available. However, High Court cannot conduct an adjudication with reference to such disputes, which require an elaborate consideration of various facts, circumstances and evidences. Whether the contention of the petitioner is correct or incorrect is to be adjudicated by the competent appellate authority.

6.Admittedly, the petitioner has not exhausted the appellate remedy as contemplated under Section 128 of the Customs Act, 1962 (hereinafter referred to as “the Act”) and further, the petitioner was intimated through the Order-in-Original that such an appeal remedy is to be availed of.

7.Let us consider the scope of Section 128, which falls under Chapter XV of the Act. Section 128 of the Act provides 'appeals to the Commissioner (Appeals)'. Any person aggrieved by any decision or order passed under the Act by an officer of Customs lower in rank than a Commissioner of Customs may appeal to the Commissioner (Appeals) within sixty days from the date of the communication to him of such decision or order. Section 128A contemplates 'procedure in appeal'. Sub-section (1) stipulates that the Commissioner (Appeals) shall give an opportunity to the appellant to be heard if he so desires. Sub-section (2) of Section 128A states that the Commissioner (Appeals) may, at the hearing of an appeal, allow the appellant to go into any ground of appeal not specified in the grounds of appeal, if the Commissioner (Appeals) is satisfied that the omission of that ground from the grounds of appeal was not wilful or unreasonable.

8.Sub-sections (1) and (2) of Section 128A as stated above would provide ample opportunity to an aggrieved person to adjudicate all the factual and legal grounds even if such grounds are not raised on account of certain mistakes or error. Thus, under sub-section (2), the Commissioner (Appeals) is empowered to adjudicate the grounds, which all are not even taken in the grounds for appeal. Sub-section (3) to Section 128A denotes that the Commissioner (Appeals) shall, after making such further inquiry as may be necessary, pass such order, as he thinks just and proper, - (a) confirming, modifying or annulling the decision or order appealed against; or (b) referring the matter back to the adjudicating authority with directions for fresh adjudication or decision, as the case may be in following the cases namely, (i) where an order or decision has been passed without following the principles of natural justice; or (ii) where no order or decision has been passed after re-assessment under Section 17; or (iii) where an order of refund under Section 27 has been issued by crediting the amount to Fund without recording any finding on the evidence produced by the applicant.

9.Thus, under sub-section (3) to Section 128A, the Commissioner (Appeals) is empowered even to remand the matter back to the adjudicating authority with directions for fresh adjudication or decision, as the case may be. Even in cases, the original authority has not followed the principles of natural justice, then also the Commissioner can pass appropriate orders by invoking sub-section (3) to Section 128A of the Act. The powers conferred on the appellate authority viz., Commissioner (Appeals) would reveal that he has been provided with ample powers to deal with all possible circumstances to deal with the grounds raised by the aggrieved person in an appeal.

10.Undoubtedly, the appellate remedy contemplated under the Act is efficacious and able to deal with various possible circumstances and the powers are conferred to issue directions to remand the matter, set aside the order, including the ground of violation of principles of natural justice.

11.When a specific provision is contemplated to deal with the violations of the principles of natural justice, question arises why a writ petition under Article 226 is to be entertained by the High Court.

12.The practice of filing writ petitions on the ground of violation of principles of natural justice is in ascending mode. The aggrieved persons are attempting to thwart the provisions of law by approaching the High Court and with an idea to protract and prolong the issues. High Court cannot encourage such practices of prolonging the issue at the instance of the litigations. Once the remedy provided under the statute is efficacious and capable of dealing with various circumstances including the violation of principles of natural justice, then there is no ground for entertaining a writ petition under Article 226 of the Constitution of India.

13.The tenor of the appeal provisions under Chapter XV of the Act makes it very clear that the Commissioner (Appeals) is empowered to deal with the grounds, which all are not taken in the grounds of appeal by the appellant and deal with the grounds regarding violation of principles of natural justice and many other circumstances. Therefore, this Court is of a strong opinion that the Orders-in-Original passed are to be taken by way of appeal under Section 128 of the Act by an aggrieved person.

14.Many such writ petitions are filed before the High Court challenging the Orders-in-Original without exhausting the appellate remedy. Most of those writ petitions are filed on the ground that principles of natural justice have been violated and it is contended that the violation of principles of natural justice is a ground to entertain a writ petition. When the Customs Act contemplates that the violation of principles of natural justice can be dealt with by the Commissioner (Appeals), then the High Court need not entertain a writ petition against the Orders-in-Original passed by the competent authority and only after exhausting the statutory remedy, such writ petitions need to be entertained.

15.These being the principles to be followed, the petitioner is bound to exhaust the appellate remedy as contemplated under the provisions of the Act, by following the procedures contemplated.

With the above observations, this writ petition stands dismissed. No costs. Consequently, connected miscellaneous petition is closed.

Sd/-
Assistant Registrar(CS-VII)

//True Copy//

Sub Assistant Registrar

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To

1.The Commissioner of Customs, Chennai-IV,
Office of the Commissioner of Customs, Chennai-IV,
Custom House, No.60, Rajaji Salai,
Chennai-600 001.

2.The Deputy Commissioner of Customs (BRC-DBK),
Office of the Commissioner of Customs, Chennai-IV,
Custom House, No.60, Rajaji Salai,
Chennai-600 001.

+1cc to M/s.A.Mohamed Ismail, Advocate, S.R.No.36881
+1cc to M/s.Rajendran Raghavan,Senior Standing Counsel
for GST & Customs. S.R.No.36995

W.P.No.15897 of 2021

JP-II(CO)
SB(25/08/2021)