

**IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
WEST ZONAL BENCH, MUMBAI**

Appeal No. C/532/2010

**Arising out of Order-in-Original No: CC-MJ/04/2009 Adj.ACC, Dated:
30.01.2010**

Passed by the Commissioner of Customs (Import), ACC, Mumbai.

Date of Hearing: 20.02.2019

Date of Decision: 20.03.2019

DHIRU A SHAH

Vs

**COMMISSIONER OF CUSTOMS (IMPORT)
ACC, MUMBAI**

Appellant Rep by: Shri Anil Balani, Adv.

Respondent Rep by: Shri R Kumar, Assistant Commissioner AR

CORAM: C J Mathew, Member (T)

Ajay Sharma, Member (J)

Cus - Smuggling - Confiscation of goods and imposition of penalty - There is no fault in the ruling of the original authority that co-accused could not be subject to cross-examination by another noticee - appellant had not taken advantage of the proffered chance to cross-examine the other individual and chose to absent himself from the proceeding - It is, therefore, not open to the appellant to now claim that only one opportunity had been given especially since the non-availment of the opportunity is not justified by any submission whatsoever - It is also not open to the appellant to plead for a relief that was a granted and, upon failure to avail of that relief, to claim a different ground for assailing the first order, now - By failure to participate in the cross-examination, there is an implicit admission of the relevancy of the statements - no relief can be granted to the appellant - Appeal is dismissed: CESTAT [para 5 to 7]

Appeal dismissed

FINAL ORDER NO. A/85551/2019

Per: C J Mathew:

The challenge to order-in-original no. CC-MJ/04/2009 Adj.ACC dated 30th January 2010 of Commissioner of Customs (Import), Air Cargo Complex, Mumbai is in dispute before us for the second time and the appellant, Shri Dhiru A Shah, contends that the impugned order is flawed in not having taken their submissions into consideration while adjudicating the notice.

2. Proceedings were initiated against M/s Pearl Impex, M/s AK Traders and M/s Mufema Enterprises who imported three consignments, of 'artificial

flowers' and 'key chains', that were found to contain 'computer parts', 'button cells' and 'electronic goods' upon interception before bills of entry could be filed and which were, thereafter, ordered to be confiscated under section 111 of Customs Act, 1962 with the option to be redeemed on payment of fine. Penalties under section 112 of Customs Act, 1962 were also imposed and two of those individuals filed appeals before the Tribunal which remanded the matter back to the original authority on their submission that the cross-examination of the customs house agent and of the alleged financier, the first of whom claimed to have received documents for clearance from the appellant and the latter of whom claimed to have been connected to the importer through the appellant, was essential. Though it is contended by the Learned Counsel that the issues on merit had also been noted by the Tribunal on the former occasion, we do not observe such findings on that score in the remand order which was limited to rehearing of the appeal with direction to decide on the plea of cross-examination before a final order is passed.

3. We have heard Learned Authorised Representative.

4. We find that proceedings were initiated against the goods even before bills of entry were filed, i.e. before an importer could be identified with the import, and that role of the present appellant were established through various evidences. Considering the criticality of these evidences, and the lack of credibility arising from the untested status of those, the Tribunal had, on the last occasion, remanded the matter to ensure such compliance on the specific plea of the appellant. Implicitly, it was the bounden obligation of the appellants therein to participate in the proceedings and make full use of the lifeline afforded to them. Failure on their part to participate is not only recorded in the impugned order but also not denied in the present proceedings.

5. It is now claimed by Learned Counsel that the opportunities afforded were very restrictive and that the co-accused was held to be beyond the pale of such cross-examination which rendered the decision of the Tribunal inoperative. We cannot find fault with the ruling of the original authority that co-accused could not be subject to cross-examination by another noticee. The appellant, however, had not taken advantage of the proffered chance to cross-examine the other individual and chose to absent himself from the proceeding. It is not open for the appellant to claim now that only one opportunity had been given; especially as the non-availment of the opportunity is not justified by any submission whatsoever. Clearly, there is a lack of respect for the adjudicating authority, the adjudicating process and the appellate process.

6. It is not open to the appellant to plead for a relief that was granted and, upon failure to avail of that relief, to claim a different ground for assailing the first order now. The original order has ceased to exist insofar as the appellant is concerned and the substituted order did not have to proceed in merit in view of the failure of the appellant to participate in the proceedings

as directed in the remand order of the Tribunal to subject the evidence to test. By failure to participate in the cross-examination, there is an implicit admission of the relevancy of these statements.

7. In these circumstances, we find ourselves unable to grant any relief to the appellant and the appeal is dismissed.

(Pronounced in Court on 20.03.2019)