Customs, Excise & Service Tax Appellate Tribunal
West Zonal Bench at Ahmedabad

REGIONAL BENCH-COURT NO. 3

Customs Appeal No. 11182 of 2016- DB

(Arising out of OIA-MUN-CUSTM-000-APP-385-15-16 dated 07/03/2016 passed by Commissioner of CUSTOMS-MUNDRA)

Shreeji Shipping **........Appellant**
Shreeji House,
Town Hall Circle,
Jamnagar, Gujarat

VERSUS

C.C.-Mundra **......Respondent**
Office of the Principal Commissionerate of Customs,
Port User Buld. Custom House Mundra, Mundra
Kutch, Gujarat- 370421

APPEARANCE:
Shri P D Rachchh Advocate for the Appellant
Shri Rajesh Nathan, Assistant Commissioner(AR) for the Respondent

CORAM: HON'BLE MEMBER (JUDICIAL), MR. RAMESH NAIR
HON'BLE MEMBER (TECHNICAL), MR. RAJU

Final Order No. 10274/2024

DATE OF HEARING:10.11.2023
DATE OF DECISION:31.01.2024

RAMESH NAIR

This appeal has been filed by M/s. Shreeji Shipping, Jamnagar against demand of Customs Duty with interest and equal amount of penalty and redemption fine imposed by Commissioner of Customs, Kandla/Mundra in connection with SCN dated 29.01.2014 in respect of import of "Floating Crane" & "Grab" imported under Bills of Entry No. 147807 dated 04.02.2010 and 149946 dated 18.03.2010 by invoking extended period under Section 28 of the Customs Act, 1962 for such duty demand.

1.2 Appellant is engaged in provision of various services within port area and was holding Service Tax Registration since 23.01.2003. Appellant imported Floating Crane and filed Bill of Entry No. F-147807 dated 04.02.2010 classifying the same under tariff item 8905 90 90 of the Customs Tariff Act, 1975 claiming benefit of concessional rate of duty under Notification No. 21/2002-Cus dated 01.03.2002 (Sr. No. 353) and has submitted documents like Purchase Sale Contract No. 165.029 & 165.086 dated 11.09.2008, Commercial Invoice 165158 dated 14.12.2009 etc. showing description of goods "FLOATING CARGO CRANE". The proper officer of Customs, after examination of the said imported goods, assessed duty of

Customs which was discharged by debiting from the DEPB script. On being satisfied for and payment of assessed duty, clearance of goods were allowed for home consumption by the proper officer under Section 47 of the Customs Act, 1962. Appellant had imported Grab [as parts of those cranes], filed 2 Bills of Entry No.149946 dated 18.03.2010 and 5570951 dated 26.12.2011 at Mundra port classifying the same under tariff item 89059090. Appellant had further imported another Floating Crane at Mundra port and filed Bills of Entry No. F-4117616 dated 19.07.2011 classifying under CTH 8905 90 90 and claiming benefit of concessional rate of duty under Notification No.21/2002-Cus dated 01.03.2002 (sr. no. 353). Accepting, the customs has assessed duty payment, clearance of the said goods were also allowed for home consumption.

1.2 Post clearance of the imported goods, Assistant Commissioner (SIIB), Customs, Kandla vide letter F. No. S/43-03/SIIB/2012-13 dated 22.05.2012 had informed appellant that investigation was being conducted in the case of imports of Crane and Grab vide Bills of Entry No.147807 dated 04.02.2010, 149946 dated 18.03.2010 and 5570951 dated 26.12.2011 and requested Appellant to intimate location of the Crane and Grab imported under the said two Bills of Entry dated 04.02.2010 and 18.03.2010. In response to the said letter dated 22.05.2012, appellant vide letter dated 30.05.2012 drawn attention towards their letter dated 27.02.2012 (addressed to DRI with copy to customs) and submitted copy thereof. Appellant submitted that ADG, DRI had already investigated the same imports in Bills of Entry, but after considering clarifications/submissions by Appellant had issued SCN only for Bill of Entry No.4117616 dated 19.07.2011 and not raised any SCN for two Bills of Entry; that in DRI SCN, Section 28(4) and 114A of Customs Act were not invoked and Appellant requested to close the said investigation. However, the officers of Customs (Preventive), Jamnagar had carried out search at the office premises of appellant on 13.11.2013 and officers seized Crane and Grab valued at Rs. 7,35,92,867/- and Rs. 53,11,968/- respectively as per Seizure Memo and Panchnama dated 13.11.2013 and had handed over seized goods under Supradnama dt. 13.11.2013 to Senior Account Officer of appellant. The Deputy Commissioner, Customs (SIIB), Kandla vide letter F. No. S/43-03/SIIB/2012-13 dated 22.11.2013 communicated order of provisional release of seized goods, subject to filing Bond of entire value and submitting Bank Guarantee of 25% of value of Seized goods. Appellant vide its letter dated 27.11.2013 had submitted the Bond supported by Bank Guarantee of Rs.1,97,26,500/-. Thereafter, Completing investigation, the Show Cause Notice F. No. S/43-03/SIIB/2012-13 dated 29.01.2014 was issued by the Commissioner of Customs, Kandla for recovery of differential duty Rs.1,14,71,866/- with interest, penalty and fine invoking extended period u/s 28 of Customs Act, 1962. Appellant has objected the said SCN. However, Additional Commissioner, Customs, Mundra while passing the Order-in-Original No. MCH/ADC/VG/01/2015-16 dated 20.04.2015 confirmed the duty demand with interest, imposed penalty under Section 114A, 112 and redemption fine under Section 125 in lieu of confiscation under Section 111(m) of Customs Act, 1962. The Commissioner (Appeals) has upheld the O-I-O dated 20-04-2015 passed by Additional Commissioner vide O-I-A NO. MUN-CUSTM-000-APP-385-2015-16 dated 07-03-2016. Therefore, Appellant has filed present Appeal in this Tribunal.

2. Shri P D Rachchh, Learbed Advocate, appearing on behalf of the appellant submits that there was no need to issue SCN by customs invoking extended period alleging willful mis-classification in the matter as it was already investigated by DRI for all four Bills of Entry but issued SCN F. No. DRI/AZU/ JRU/20/2012 dated 13.04.2012 only for goods imported under bills of entry no .4117616 dated 19.07.2011. The duty demands in Bills of Entry No. 147807 dated 04.02.2010 and No. 149946 dated 18.03.2010 covered in the present SCN/Orders are time barred. In the SCN dated 29.01.2014 it is reflected that investigation in the present case was initiated by customs on the basis of letter dated 16.04.2012 of DRI to consider taking suitable action for safeguarding the revenue in respect of other bills of entry i.e. No. 147807 dated 04.02.2010 and 149946 dated 18.03.2010. However, before SCN was issued by customs on 29.01.2014, the question of mis-classification of goods without intention to evade duty was already settled in favour of the appellant by this Hon'ble Tribunal vide Final Order No. A/11171 to 11173/WZB/AHD/2013 dated 06.08.2013. Thus, SCN dated 09.01.2014 issued by customs was invalid. Consequently, all proceedings conducted thereon become null and void ab initio. He further submits that learned Additional Commissioner's finding for invoking extended period affirmed under the impugned order are absolutely unfair and devoid of merits. In nut-shell, when extended period cannot be invoked, the entire order impugned becomes void of merits. Consequently, no differential duty with interest is required to be paid. It also goes without saying that order of confiscation of the goods and imposition of penalty is also becomes illegal. He submits that the department's interpretation was on parameters of goods with Explanatory Notes. Appellant had voluntarily deposited differential duty in

respect of such other imports on later date subsequent to import, does not by any way lead to infer that Appellant had intentionally mis-declared classification to evade payment of customs duty. He submits that the impugned O-I-A upholding O-I-O issued by the Additional Commissioner confirming differential duty, confiscating the goods, allowing redemption on fine and imposing penalty may kindly be quashed and set aside on this ground.

2.1 Appellant has relied upon the following decisions wherein it is consistently held that burden to prove classification of goods is on revenue.

- UNION OF INDIA V. GARWARE NYLON LIMITED: 1996 (87) ELT 12 (SC)
- NANYA IMPORTS & EXPORTS ENTERPRISES V/s COMMR. OF CUS., CHENNAI - 2006 (197) E.L.T. 154 (S.C.)
- H.P.L. CHEMICALS LTD. V/s CCE, Chandigarh - 2006 (197) E.L.T. 324 (S.C.)

2.2 Appellant without admitting anything further submits that Hon'ble Apex Court and Tribunal in following cases have clearly held that classification is essentially function of the department, mis-classification cannot be ground for confiscation and imposition of penalty.

- Northern Plastic Ltd. Vs. CCE – 1998 (101) ELT 549 (SC)
- Sutures India Pvt. Ltd. Vs. CC – 2009 (245) ELT 596 (Tri. Bang) which was upheld by Supreme Court – 2010 (255) ELT A85 (SC)
- Commr. of Cus. (ACC & Import) Vs. R. K. Impex – 2010 (259) ELT 725 (Tri. Mumbai)

3. Shri Rajesh Nathan, Assistant Commissioner (AR), appearing on behalf of the Revenue opposed the contentions of the Ld. Counsel and reiterated the findings of impugned orders. He also submits to reject the Appeal.

4. We have carefully considered the submissions made by both the sides and perused the relevant records. We find that though the case about dispute of classification of imported goods, but Appellant has made detailed

submissions on time limitation for issuance of SCN. Hence, without even going into the merits of classification of the imported goods, the present case can be decided on limitation. Therefore, we are not discussing issue on merits of the classification in question. In the present case, demand involved is for the imports of Crane and Grab vide Bills of Entry No.147807 dated 04.02.2010 and No. 149946 dated 18.03.2010, whereas the demand SCN No. S/43-03/SIIB/2012-13 was issued on 29.01.2014. Thus, entire demand is under extended period. The Show cause notice as well as Orders thereon alleged that appellant has not disclosed correct classification of imported goods in Bill of Entry filed, which has rendered them liable to pay the differential duty with interest and penalty. On this basis the larger period was invoked in the SCN dated 29-01-2014. We note that the SCN dated 29-01-2014 and orders thereon have relied upon the Explanatory Notes which are only for official use by Officers for general guidance, but they are not accessible to the general public and they are also not in chapter notes under chapter 89 for 8905. As per the provisions of Customs Act, 1962 read with CBEC's Customs Manual, determination of correct rate of duty based on correct classification was fasten on the proper officer of the Customs prior to self assessment era before 08-04-2011. Therefore, when such explanatory Notes were not taken into consideration or followed inadvertently or otherwise for the said imports of Crane and Grab vide Bills of Entry No.147807 dated 04.02.2010 and No. 149946 dated 18.03.2010, Appellant alone cannot be held responsible for suppression of the facts or Appellant has deliberately mis-classified goods in order to evade payment of the customs duty, when all relevant information and documents are submitted by the Appellant while filling the said Bill of Entry, in question.

4.1 We find that observations made by Revenue in SCN dated 29-01-2014 and orders thereon are not correct on the basis of the records. Appellant had filed all relevant documents before customs at relevant time. The goods covered under Bills of Entry No. 147807 dated 04.02.2010 and No. 149946 dated 18.03.2010, were allowed clearance after physically examination by the proper officer of the customs on the final assessment and after payment of appropriate duty thereon. Thereafter, the same set of documents have been considered to demand differential customs duty in this case. SCN dated 29-01-2014 considering Explanatory Notes have alleged that a floating crane without a floating structure/platform debars its classification under CTH 8905 90 90 and for classification of goods imported is to be treated as a lifting and handling equipment classifiable under CTH 8426 99 90. The customs have not unearthed any new documentary evidence except the relied Explanatory Notes to allege/establish suppression of facts or mis-statement in order to evade payment of customs duty. SCN and orders thereon are on the basis that imported floating crane was liable to be re-classified under CTH 8426 99 90 instead of CTH 8905 90 90 and the goods were not eligible for exemption from the duty of Customs under Notification No.21/2002-Cus dated 01.03.2002, Sr. No. 353 and differential duty is recoverable along with interest. It is settled position in law that unless allegation of suppression of facts or mis-statement with intention to evade payment of duty is supported by credible or clinching independent evidence, the same cannot be sustained merely on unsustainable allegations. This being a case of interpretation regarding classification of imported crane and Grab, in absence of any clinching evidence to evade payment of duty, charge of suppression of facts, willful misstatement, fraud, etc., cannot be levelled, for initiation of SCN beyond the normal time limitation. Extended period cannot be invoked in every case of short payment of duty, but only in cases of wilful and deliberate suppression of fact having element of deception or malpractice is required to prove wilful and deliberate suppression of fact with intent to evade duty and this is not the case of wilful/deliberate suppression. It is settled law that there must be deliberate attempt by Appellant to suppress facts from Department with intention to evade payment of customs duty, which is not existing in facts of this case. Merely change in view by another authority after clearance of goods regarding classification, cannot be held against the appellant as view of assessee was also based on documents and it was approved by the authorities, when the Bill of Entry was assessed and the said goods were allowed clearance for home consumption. We find that the various decisions of the tribunal hold such view. Consequently, extended period under Section 28(4) of the Customs Act, 1962 cannot be legally invoked in the SCN or upheld subsequently.

4.2 We also note that the Revenue in the first DRI SCN has not invoked provisions of section 28(4) of the Customs Act 1962 in the SCN dated 13-04-2012, whereas, Commissioner Customs, Kandla in subsequent SCN dated 29-01-2014 for the previous Bill of Entry for imports of Crane and Grab vide Bills of Entry No.147807 dated 04.02.2010 and No. 149946 dated 18.03.2010 has invoked extended period u/s 28(4) of the Customs Act 1962. The appellant has intimated to the Customs department vide letter dated letter dated 30.05.2012 that officers of Directorate of Revenue Intelligence (DRI) have carried out investigation on the classification of floating crane under CTH 8905 90 90 instead of CTH 8426 99 90 at the time of import to evade payment of appropriate customs duty. Officers had searched office premises of appellant and relevant records relating to import including Bills of Entry No. 4112616 dated 19.07.2011 and Bill of Entry No.147807 dated 04.02.2010 were resumed under Panchnama dated 14.02.2012 and statements were also recorded by the Officers. During such investigation, Appellant had submitted copies of all their Bills of Entry related to import of Floating Cranes and Grabs. Appellant had paid customs duty of Rs. 87,46,136/- along with the interest of Rs. 9,27,330/- under the TR-6 Challan No. MP&SEZ/505 dated 02.03.2012 for the crane imported under Bills of Entry No. F-4117616 dated 19.07.2011. Appellant vide its letter dated 27.02.2012 addressed to the Additional Director General, DRI, Ahmedabad with a copy to Deputy Commissioner, Customs, Mundra informed that duty with interest is paid for the Bill of Entry No. F- 4117616 dated 19.07.2011 and requested to conclude as per Section 28(2) of the Customs Act, 1962. But, DRI SCN No. DRI/AZU/JRU/20/2012 dated 13.04.2012 was issued by Additional Director General, DRI, Ahmedabad demanding Customs duty with interest, penalty and proposing appropriation of the amount of duty and interest already paid against the Bills of Entry No. F- 4117616 dated 19.07.2011. The Commissioner of Customs confirmed duty demand and appropriated amount paid and imposed penalty u/s 112(a) of Customs Act, 1962. Being aggrieved the appellant had preferred appeal Nos. C/226-227 & 201/2012 before this Tribunal at Ahmedabad which have been allowed by setting aside confiscation, R/fine and penalties imposed on appellants and holding that the appellant has declared their consignment correctly and was found correct on examination by lower authorities and that consignment of crane imported by appellant is not liable for confiscation vide this Tribunal's Order No. A/11171 to 11173/WZB/AHD/2013 dated 06.08.2013. The ratio of decision in the Appellant's own case also is applicable in the facts of this case to set aside confiscation and penalties imposed.

4.3 We also find that Assistant Commissioner (SIIB), Customs, Kandla vide their letter issued from F. No. S/43-03/SIIB/2012-13 dated 22.05.2012 had informed appellant that investigation was being conducted in the case of imports of the Crane and Grab vide Bills of Entry No.147807 dated 04.02.2010, 149946 dated 18.03.2010 and 5570951 dated 26.12.2011. During such further investigation, when Customs, Kandla initiated investigation into import of similar goods covered under bills of entry

No.147807 dated 04.02.2010 and 149946 dated 18.03.2010, Appellant had again informed Assistant Commissioner (SIIB), CH, Kandla vide letter dated 30.05.2012 that no duty was recoverable from Appellant on crane and grab imported under the said bills of entry as it was also time barred. Officers have also taken shelter of the Explanatory Notes to take a view on classification of the floating cranes and grabs imported by the Appellant. It is settled position in law by decision in the case of Nizam Sugar Factory Versus Collector Of Central Excise - 2006 (197) E.L.T. 465 (S.C.) is that while considering Demand case on Limitation, when all relevant facts are in knowledge of authorities when first SCN was issued, therefore, while issuing second show cause notices, same/similar facts could not be taken as suppression of facts on the part of assessee as these facts were already in knowledge of the Revenue authorities and it was held that no suppression of facts on part of assessee /appellant and the duty Demands and penalty were dropped. In this case also, while the first SCN dated 13-04-2012 was issued by the DRI, all information and documents related to Bill of Entry No.147807 dated 04.02.2010, 149946 dated 18.03.2010 were also submitted to the DRI authorities, but, SCN dated 13-04-2012 had not initiated any action for 2 Bill of Entry No.147807 dated 04.02.2010, 149946 dated 18.03.2010, for which the subsequent SCN dated 29-01-2014 has been issued by Customs invoking extended period, which cannot be invoked in facts of this case.

4.4 From the above it is clear that the appellant have disclosed all the information as regard import of Crane and Grab by Bill of Entry No.147807 dated 04.02.2010, and No. 149946 dated 18.03.2010. We also note that Appellant would have been eligible to CENVAT credit of duty paid as a registered person and situation was revenue neutral and in cases of interpretation and revenue neutrality, extended period cannot be invoked. Therefore, there is no suppression of facts or mis-declaration or willful misstatement in order to evade payment of duty on the part of the appellant. On all these facts and circumstances of the case, we are of the view that there is no malafide on the part of the appellant with intent to evade payment of duty. In the facts and circumstances of the present case, we find that the judgments relied upon by the Learned Counsel which are on the issue of limitation directly apply in the present case. Thus, without going into the merit of the case, we are of the view that the demand is hit by Time Limitation. Accordingly, the entire demand is beyond the normal period of

Time limitation for issuance of SCN. Hence, the same is not sustainable on the ground of time bar.

5. Accordingly, since duty demand is not sustainable, consequential imposition of interest, fine and penalties on appellant under provisions of Customs Act 1962 shall also not be sustainable. The duty demand is clearly hit by Time limitation. Since the entire demand is under extended period, the impugned order is set aside by setting aside the entire duty demand and consequential imposition of interest, fine and penalties. In the result the impugned order is set aside and appeal is allowed only on the ground of time bar, with consequential relief, as per law.

(*Pronounced in the open court on 31.01.2024*)

(RAMESH NAIR)
MEMBER (JUDICIAL)

(RAJU)
MEMBER (TECHNICAL)

Raksha