

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
WEST ZONAL BENCH AT AHMEDABAD**

REGIONAL BENCH – COURT NO. 01

CUSTOM Appeal No. 11217 of 2018

[Arising Out Of OIA-JMN-CUSTM-000-APP-57-17-18 Dated-07/02/2018 Passed By Commissioner of
CUSTOMS-AHMEDABAD]

Maersk Line India Pvt Ltd

Office No. 21/22/23, 2nd Floor, Port Users Complex,
P.O. Uchhaiya, Pipavav, Taluka- Rajula,
Amreli, Gujarat

.....Appellant

VERSUS

C.C.-Jamnagar(prev)

Sharda House...Bedi Bandar Road,
Opp. Panchavati, Jamnagar
Gujarat

.....Respondent

APPEARANCE:

Shri. P D Rachchh, Advocate for the Appellant

Shri. Prashant Tripathi, Superintendent (Authorized Representative) for the
Respondent

**CORAM: HON'BLE MEMBER (TECHNICAL), MR. RAJU
HON'BLE MEMBER (JUDICIAL), MR. SOMESH ARORA**

FINAL ORDER NO.A / 10330 /2024

DATE OF HEARING:25.01.2024

DATE OF DECISION:05.02.2024

SOMESH ARORA

The appellant were engaged as shipping line and import of Containers on re- export basis from Pipavav port and were availing exemption from payment of whole of Customs duty and whole of Additional duty leviable under the virtue of Notification No. 104/94-Customs dated 16.03.1994. The intelligence collected by the officers revealed that the appellant after import of 39 containers failed to follow the procedures as laid down in the said

Notification in as much as they failed to re-export 39 containers within the period of six months prescribed in the said notification and did not seek any extension of time limit for re-export from the proper officer. Thus the lower authority was of the view that the said containers are liable for confiscation for violation of the condition laid down in the Notification No. 104/94-Cus, dtd. 16.03.1994, the said 39 containers lying at M/s. Gujarat Pipavav Port Ltd (11 containers) and M/s Contras Logistics Pvt. Ltd. (28 containers) were placed under seizure on 05.11.2015 and handed over to the respective CFS for safe custody under Supratnama dated 05.11.2015.

2. After completion of investigation a Show Cause Notice, dated 27.04.2016 was issued to appellant. After due process of law the adjudicating authority passed the impugned order, wherein he confirmed duty amounting to Rs. 9,48,095/- along with interest. Ordered for confiscation of 39 empty containers valued at Rs.32,20,324/- under Section 111(o) of the Customs Act, 1962 and allowed to redeem the same on payment of redemption fine of Rs.3,22,000/-. It also imposed a penalty of Rs. 9,48,095/- under Section 112(a) as well as Section 114A of Customs Act, 1962.

3. Being aggrieved with the adjudication order the appellant filed appeal on various grounds before Commissioner (Appeals), who after following process of hearing endorsed in toto the order of lower authority. Being aggrieved appellants have filed the present appeal.

4. Learned Counsel for the appellant submitted that in their case, for all the containers import never was completed as same had never crossed the

customs barriers. Therefore, same cannot be considered as imported into India and no duty of customs is payable by it. They relied upon the decision of Hon ble Apex Curt in the case of Garden Silk Mill Ltd. V/s. UOI- 1999 (113) ELT 358(SC). In the present case appellant has availed the benefit of Notification No. 104/1994 as amended For the sake of clarity Text of Notification No. 104/1994 is reproduced as below:-

In exercise of the powers conferred by sub-section (1) of section 25 of the Customs Act, 1962 (32 of 1962), the Central Government, being satisfied that it is necessary in the public interest so to do, hereby exempts containers which are of durable nature, falling within the First Schedule to the Customs Tariff Act, 1975 (31 of 1975), when imported into India, from, -

(a) the whole of the duty of customs leviable thereon under the said First Schedule; and

(b) the whole of the additional duty leviable thereon under section 3 of the said Customs Tariff Act

Provided that the importer, by execution of a bond in such form and for such sum as may be specified by the Assistant Commissioner of Customs or Deputy Commissioner of Customs binds himself to re-export the said containers within six months from the date of their importation and to furnish documentary evidence thereof to the satisfaction of the said Assistant Commissioner and to pay the duty leviable thereon in the event of the importer's failure to do so:

Provided further that in any particular case, the aforesaid period of six months may, on sufficient cause being shown, be extended by the said Assistant Commissioner for such further period, as he may deem fit.

4.1 Further, appellant argued that the lower authorities have erroneously confirmed the duty under Section 28 of Customs Act, 1962. In this regard they rely on the decision of Tribunal, West Zone Mumbai in the case of M / s Kutch Shipping Agency Pvt. Ltd. V/s Commissioner Of Customs (General)

Mumbai reported in 2017-TIOL-1415- CESTAT-Mum. It is admitted fact that due to one reason or the other, the appellant failed to re-export 39 containers within the period of six months prescribed in the said notification and did not seek any extension of time limit for re-export from the proper officer, which is the prime condition of exemption Notification No. 104/1994 as amended.

4.2 Appellant further submits that the duty of customs is leviable under Section 12 of the Customs Act, 1962 on importation of goods into India. Import commences when goods enter into Indian Territorial waters and is completed only when it crosses the customs barrier and mixed with the land mass of India. However, in the instant case, import procedure of disputed containers was never completed as the same had never crossed the customs barriers.

4.3 It is also a fact on record that 11 containers lying at Gujarat Pipavav Port Ltd., APM Terminal (i.e. GPPL) and 28 containers lying at Contras Logistics-CFS were found heavily damaged. From the date 'Gate In' shown in Annexures to seizure memos it is evident that the said containers were lying there before the fire accident took place on 07.11.2010. Thus, containers were lying in the Customs area. Therefore these containers cannot be considered as imported into India and therefore, no duty of customs is payable on the same. Appellant submits that Hon'ble Apex Court has clearly defined the factors deciding the time and place of import in the case of Garden Silk Mill Ltd. Vs. UOI - 1999 (113) ELT 358(SC) holding that

"Import when completed - Import of goods will commence when they cross the territorial waters of India but is completed when it become

part of the mass of the goods within the country - Taxable event is reached when the goods reach the Customs barrier and Bill of Entry for home consumption is filed - Sections 2(23), 2(27) and 12 of the Customs Act, 1962.

The import of goods into India would commence when the same cross into the territorial waters but continues and is completed when the goods become part of the mass of goods within the country; the taxable event being reached at the time when the goods reach the customs barriers and the bill of entry for home consumption is filed. [1964 (3) SCR 787 (S.C.), 1999 (112) E.L.T. 3 (S.C.) and 1989 (43) E.L.T. 189 (S.C.) followed]. (para 16]

Customs duty - Taxable event is reached when the goods reach the Customs barrier and the Bill of Entry for home consumption is filed - Section 12 of Customs Act, 1962. [para 16]"

4.4 Thus, in view of the above, order confirming duty demand is liable to be quashed only on this ground alone as the disputed containers never left the customs barriers.

4.5 Appellant submits that duty cannot be demanded under Section 28 of the Customs Act, 1962 in the situation like present one. Appellant without admitting anything further submits that it is not the case of the department that duty of customs was not levied or not paid or short levied or short paid on the disputed containers. Therefore, the notice as well as the order confirming demand under Section 28 *ibid* is erroneous and liable to be set aside.

4.6 That the appellant's case is fully covered by the decision of Hon'ble Tribunal in the case of KUTCH SHIPPING AGENCY PVT LTD. Vs COMMISSIONER OF CUSTOMS (GENERAL) MUMBAI as reported at 2017-TIOL-1415-CESTAT- MUM wherein duty was demanded from appellant

shipping agency in respect of containers which were either in possession of the custodian or a govt. agency and therefore, were not re-exported within stipulated time of six months in accordance with provisions of Notification No. 104/94-Cus. Alike in the impugned case, duty was demanded under section 28 of the Customs Act, 1962 in the said case by the customs. In other words, the case of the shipping agency was almost akin to the impugned case of appellant. Hon'ble Tribunal in that case had ruled in favour of appellant shipping agency briefly on the ground that since the containers were not in possession of the shipping agency, duty cannot be demanded from them; that duty in such case cannot be demanded under provisions of section 28 of the Customs Act, 1962.

4.7 It was observed by Hon'ble Tribunal that the original authority has erroneously placed reliance on section 28 of the Customs Act 1962 to recover duty without adducing any evidence to conclude that the ingredients for invoking the extended period are present while, at the same time, acknowledging the existence of a bond furnished in accordance with the conditions prescribed in notification no. 104/94 dated 16th March 1994 as the genesis of the proceedings. One of the other reasons to set aside the order was that the containers remained with the custodian appointed under Customs Act, 1962; that in the circumstances of the containers being in the custody of an entity other than the appellant, an agent of the shipping company to whom the containers belonged, the fastening of responsibility on the appellate for re- export of the containers is without justification; that impossibility of performance of an obligation cannot be held to the detriment of the appellant. It was also observed by Hon'ble Tribunal in the said case that there was no finding on the manner in which value has been determined

for assessment of duty and therefore the said order does not have the authority of law and must, therefore, be set aside.

4.8 Appellant without admitting anything further submits that the learned Commissioner (Appeals) has found that disputed containers were imported in 2010 and even after completion of 5 years same were not re-exported but he failed to judge that demand was raised under Section 28 of the Customs Act, 1962 only on 27.04.2016. It means order confirming demand beyond the period of 5 years stipulated in the said section is beyond scope of the provisions of the Customs Act, 1962. Therefore, order upholding demand under Section 28 with imposition of penalty of amount equal to duty under Section 114A of the Customs Act, 1962 is liable to be set aside.

4.9 Appellant without admitting anything further submits that it is admitted facts on record that most of the containers were damaged and not fit for use, therefore, valuation arrived at by the department in Annexure - B to the show cause notice is totally baseless and contrary to the provisions of Section 14 read with Section 22 and Customs Valuation Rules, 2007. To be precise, appellant respectfully submits that in Annexure-B to the notice, department had shown 'Fair Market Value' of 39 containers to be Rs. 35,56,587/- and 'Realizable Value' to be Rs. 32,20,324/-. As per the notice (para 8), the said value was as per the valuation report dated 18.04.2016 given by Shri Bhaskar G. Bhatt, Govt. Approved Valuer. However, no such report of valuation was ever furnished to appellant by the department neither said report of valuation was relied upon in the notice. In any case, since the alleged valuation was not done by the department in presence of representative of appellant. Appellant therefore, submits that legally no

reliance can be placed on such un-admitted evidence in terms of settled principles of law. This apart, when most of the containers were damaged beyond scope of repairing, as also admitted by department, the same cannot fetch more than scrap value. Appellant therefore, submits that when the assessable value itself is highly inflated and erroneous, customs duty worked out on the basis of the same cannot be sustained.

4.10 In backdrop of the above appellant respectfully further submits that duty of Rs. 9,48,095/- has been demanded on the value of Rs. 32,20,324/- in the impugned case. As per seizure memo value of the 39 damaged containers is Rs. 16,00,000/- only.

5. In view of the above, appellant submits that computation of customs duty of Rs.9,48,095/- on so called realizable value of Rs.32,20,324/- is totally erroneous and, therefore, order is liable to be set aside on this ground too.

6. Appellant in view of the above especially decision of Hon'ble Tribunal in the case of KUTCH SHIPPING AGENCY PVT LTD. Vs COMMISSIONER OF CUSTOMS (GENERAL) MUMBAI as reported at 2017-TIOL-1415-CESTAT-MUM order confirming demand with interest and penalty as well as redemption fine in lieu of confiscation is liable to be set aside. Therefore, it is prayed that appellant's appeal may be allowed by setting aside the impugned Order-in- Appeal of the Commissioner (Appeals) with consequential relief.

7. D.R justified the finding of the both lower authorities and further supported his defense of finding with following case law:

- 2020-TIOL-555-CESTAT-AHM-Radhe Exim P Ltd CC, Mundra
- Final Order No. A/86918/2018 dtd. 04.07.2018 - Kanika Maritime & Mercantiles P Ltd Vs. CC, Mumbai
- 2015 (329) ELT 503 (Tri-Mum) - Mitsui O S K Lines (India) Pvt Ltd Vs. CC (Export), Nhava Sheva
- 2009 (237) ELT 354 (Tri-Mum) - Pol India Agencies Ltd Vs. CC, Raigad

8. We have considered the rival submissions, we find that the appellant have availed benefit of Notification No. 104/94 which permits Duty Free Import of the container subjected to the condition that they are re-exported within six months. In the instance case, same could not be re-exported within six months purportedly due to some fire on the port and damage to other containers, out of 39 containers brought in at the port. Thus, there was clearly a breach of condition of exemption notification and in the absence of any remission or waiver of duty having been granted by the competent authorities and the same not having been sought by the party for considerable length of time. The department through a valuer got duty worked out and same was duly discharged by the appellant after paying R.I. The reliance on the matter of Pol India Agencies Ltd Vs. CC, Raigad reported in 2009 (237) ELT 354 (Tri.-Mum.) has been properly place by the Commissioner (Appeals) while demanding and confirming the duty. However, we find that in the instant case there has a clear cut finding that the container was damaged due to fire and could not be re-exported. But we find that valuation has not been done with full transparency and such valuation report has not been allowed to be commented upon by the

appellants. The grievance thus appears genuine. While in principle, we agree that duty in absence of remission was payable, as import which is subject matter of levy can even take place when goods enter in territorial waters. And only in normal case, the collecting point is deferred till Bill of Entry is filed. However, if goods get destroyed on port, the remission provision comes into play, which in this case was not sought. The assessment of duty etc, however has to be done on proper valuation after following natural justice, therefore, we hold that containers though could be subjected to duty, but assessment has to be on proper valuation arrived as per provisions and by following of natural justice. Appeal is allowed by way of remand on this aspect. As far as penalty is concerned, we hold that same under Section 114(A), which requires malicious intent cannot be sustained in the facts of this matter specifically considering the supervening fact of fire after imports. Same is therefore dispensed with.

9. Appeal disposed of in above terms.

(Pronounced in the open Court on 05.02.2024)

(RAJU)
MEMBER (TECHNICAL)

(SOMESH ARORA)
MEMBER (JUDICIAL)

Prachi