CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
ALLAHABAD

REGIONAL BENCH - COURT NO.I

Customs Appeal No.70479 of 2020

(Arising out of Order-in-Original No.07/Pr.Commr./Noida-Cus/2020-21 dated 27/08/2020 passed by Commissioner of Customs, Noida)

M/s Khanna Traders & Engineers, ...Appellant
(D-26, Site-IV, Surajpur Industrial Area,
Greater Noida-201306)

VERSUS

Commissioner of Customs, Noida ....Respondent

(Concor Complex, P.O., Container Depot, Noida-201311)

WITH

Customs Appeal No.70561 of 2020
WITH
Customs Cross Application No.70077 of 2021

(Arising out of Order-in-Original No.07/Pr.Commr./Noida-Cus/2020-21 dated 27/08/2020 passed by Commissioner of Customs, Noida)

Commissioner of Customs, Noida .....Appellant
(Concor Complex, P.O., Container Depot, Noida-201311)

VERSUS

M/s Khanna Traders & Engineers, ...Respondent
(D-26, Site-IV, Surajpur Industrial Area,
Greater Noida-201306)

APPEARANCE:

Shri R.K. Philips, Advocate &
Shri Apoorv Philips, Advocate for the Appellant-assessee
Shri A.K. Choudhary, Authorised Representative for the Respondent-revenue

CORAM: HON'BLE MR. P.K. CHOUDHARY, MEMBER (JUDICIAL)
HON'BLE MR. SANJIV SRIVASTAVA, MEMBER (TECHNICAL)

FINAL ORDER NOs.70934-70935/2024

DATE OF HEARING : 27 November, 2024
DATE OF DECISION : 27 November, 2024

SANJIV SRIVASTAVA:

These two appeals are directed against Order-in-Original No.07/Pr.Commr./Noida-Cus/2020-21 dated 27/08/2020 passed by Commissioner of Customs, Noida. By the impugned order following has been held:-

"ORDER

i) I order to recover Duty of Customs amounting to Rs. 1,22,87,551/-(Rupees One Crore Twenty-Two Lacs Eighty Seven Thousand Five Hundred Fifty-One Only) from M/s Khanna Traders & Engineers, D-26, Site-IV, Surajpur Industrial Area, Greater Noida-201308 under Sub Section (4) of Section 28 of the Customs Act, 1962 along with applicable interest under Section 28AA of the Customs Act, 1962.

ii) I impose penalty of Rs. 1,22,87,551/- (Rupees One Crore Twenty-Two Lacs Eighty Seven Thousand Five Hundred Fifty-One Only) to M/s Khanna Traders & Engineers, D-26, Site-IV, Surajpur Industrial Area, Greater Noida-201308 under Section 114A of the Customs Act, 1962."

2.1 Appellant has filed self assessment of Bill of Entries at ICD Dadri, Greater Noida for clearance of imported 'Tin Ingots' classifiable under Customs Tariff Heading (CTH) 80011090 from Malaysia manufactured by M/s Malaysia Smelting Corporation, Malaysia. The imported goods attract BCD @ 5% and CVD @ 12.5%.

2.2 Appellant self assessed duty under the provisions of Section 17 (1) of Customs Act and claimed benefit of free trade agreement under Notification No.046/2011-Cus dated 01.06.2011. Accordingly, NIL BCD was paid because of the said notification.

2.3 After certain inquiries made by the DRI, it was found that the benefit of Notification No. 046/2011-Cus dated 01.06.2011 was not admissible to the appellant and this resulted in short payment of duty to the tune of Rs.1,22,87,550.78.

2.4 Show cause notice dated 20.11.2018 was issued to the appellant asking them to show cause as to why-

"i) the duty of Customs amounting to Rs. 1,22,87,550.78 should not be demanded from them under Sub Section (4) of Section 28 of the Customs Act, 1962.

ii) Interest as applicable on the amount mentioned at i) above should not be demanded from them under Section 28AA of the Customs Act, 1962.

iii) penalty equal to the amount of the duty of customs mentioned at Si No. 1) above should not be demanded from them under the provisions of Section 114A of the Customs Act, 1962."

2.5 The said show cause notice was adjudicated as per the impugned Order-in-Original referred in para 1 above.

2.6 Aggrieved appellant-assessee have filed this appeal.

2.7 Revenue have also filed appeal in the matter for inclusion of the interest amount in the penalty imposed under Section 114A of the Act.

3.1 We have heard Shri R K Philips & Shri Apoorv Philips, Advocate for the appellant-assessee and Shri A.K. Choudhary, Authorised Representative for the revenue.

3.2 Arguing for the appellant-assessee learned Counsel submits that-

- Order has been passed in gross violation of principles of natural justice.
- Show cause notice dated 20.11.2018 was never received by him and on receipt of the hearing notice he made inquiries in the matter and on 25.06.2020 when personal hearing was fixed, copy of show cause notice was supplied to him for the first time.
- He also made RTI Application with regards to dispatch and delivery of the said notice.
- However, without allowing any further time or any further hearing in the matter adjudicating authority has proceeded to decide the case ex-parte against them.

- As the order has been passed in gross violation of principles of natural justice, it needs to be set aside on this ground itself.
- There are calculation mistakes also in the demand whereby one Bill of Entry No.6239379 is added twice.

3.3 Learned Authorized Representative reiterates the findings recorded in the orders of the lower authority and in the appeal filed by the Revenue.

4.1 We have considered the impugned orders along with the submissions made in appeal and during the course of argument.

4.2 In the impugned order following has been recorded:-

"4.1 Personal hearings to M/s Khanna Traders & Engineers, D-26, Site-IV, Surajpur Industrial Area, Greater Noida-201306, was granted on 25.06.2020. Shri Rohit Khanna, Plant Manager and Shri Sanjay Kumar, Account Manager have appeared on behalf of the Importer Noticee and stated that they had not received the SCN till date, therefore, a copy of the SCN was provided to them on 25.06.2020.

4.2 Further, Party requested one month time to prepare their reply and has agreed that a reply would be submitted by 4th Aug 2020. They have also agreed that, if they fall to submit reply within the stipulated time, the matter may be decided ex-parte based on available documents.

5. DISCUSSIONS & FINDINGS:-

5.1 I have carefully gone through the Show Cause Notice Issued to M/s Khanna Traders & Engineers and other documents related to the case, evidences on record and submission made during the personal hearing. Since the party has failed to submit their reply by 04.08.2020 as assured at the time of personal hearing, I take up the case for ex-parte decision on the basis of documerits available on record. Taking up the Show Cause Notice for adjudication, I observed that the core issues to be determined in the instant case are as under:-

(i) *Whether the benefit of Notification No. 46/2011-CUS dated 01.06.2011 and 53/2011-Cus oated 01.07.2011 rightly avalled by the importer or the same is inadmissible and Customs duty along with applicable interest is recoverable;*

(ii) *Whether penalty under Section 114A of the Customs Act, 1962 is imposable?"*

4.3 We find that appellant is right in his submission that the adjudication order has been passed in gross violation of principles of natural justice and only one date of hearing i.e. 25.06.2020 was given to the appellant. No show cause notice was served on the appellant and the same was given to them at the time of hearing is evident from the record of hearing, reproduced below:

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RECORD OF PERSONAL HEARING

Name of the party:	M/s Khanna Traders & Engineers
File No.:	VIII(30) Adj-Cus/ICD-DD/Gr-IV/Adj/Khanna/131/18
SCN No.	VIII(30) Adj-Cus/ICD-DD/Gr-IV/Adj/Khanna/131/18/9615 dt. 20.11.2018
Date & Time:	25.06.2020 at 11.30 AM

S. No.	Name of Importer/Consultant Appeared for Hearing	Designation	Appeared For	Signature
01	Mr. Rohit Khanna	Plant Mayr	M/s Khanna Traders & Engineers	
02	Mr. Sanjay Kumar	A/c Manager	M/s Khanna Traders & Engineers	

The party stated that they had not received the SCN till date. A copy of the SCN was given to them today.

Party requested time to prepare their reply – one month since the lawyers/CA's were not easily able to prepare the reply.

Party has agreed that a reply would be submitted by 4th Aug' 2020. If no such reply is submitted the matter will be decided ex-parte with based on available documents.

25-6-2020

For KHANNA T... & ENGI...

Partner

4.4 After service of the show cause notice no opportunity for any personal hearing was given to the appellant and the matter has been adjudicated, immediately after the expiry of the date given for making written submissions. It is settled principle i9n law that justice should not only be done in quasi judicial proceedings but should be apparent from the manner of conduct of proceedings. We agree with the submission of the appellant that the order has been passed in gross violation of principles of natural justice.

4.5 We also note that in para no.2 of the order Commissioner has reproduced the manner of working of demand stating as follows:-

"2.1 The Importer Noticee had filed following self-assessed Bills of Entry at ICD Dadri, Greater Noida for clearance of imported 'Tin ingots' classifiable under Customs Tariff Heading (CTH) 80011090 from Malaysia manufactured by M/s Malaysia Smelting Corporation, Malaysia. The imported goods attract BCD @ 5% and CVD @ 12.5%. The details of the imports are as under:-

1	2	3	4	5	6	7
Bill of Entry No.	6505508	7871402	6239379	6943705	*8193110*	6239379
Dated	26.08.2016	19.12.2016	04.08.2016	03.10.2016	16.01.2017	04.08.16
Wt. (MT)	25	25	25	25	25	25
Ass.Value	31024086	38170300	31687616	33824048	37532157	31687616
Total Duty Payable (in Rs.)	7264444.857	8937766.597	7419813.724	7920069.959	8788342.222	7419814
Total Duty Paid (in Rs.)	5395088.5	6637815.1	5510476.3	5882002	6526842.1	*5510476*
Diff. Duty (in Rs.)	1869356.357	2299951.497	1909337.424	2038067.969	2261500.122	1909337
					Total	Rs. 12287550.78

4.6 The error in computation of demand is visible in the above table as one bill of entry no.6239379 appearing in column 4 & 7 of the table.

4.7 We do not find any merits in the appeal filed by the revenue to the extent that interest amount should have been added to the duty short paid while imposition of penalty under Section 114A of the Act. Tribunal and even High Court has repeatedly emphasized that the word used in the section "or" and not "and". In case of Sony sales Corporation [2021 (376) ELT 472 (Kar)] Hon'ble Karnataka high Court has held as follows:

> *10. We have considered the submissions made on both sides and have perused the record. The solitary issue, which arises for consideration in this appeal is with regard to interpretation of provisions of Section 114A of the Act. Before proceeding further, we may take note of the well settled legal principles with regard to the principles of statutory interpretation, which is reproduced below for the facility of reference.*
>
> *The word 'or' is normally disjunctive and 'and' is normally conjunctive but at times they are read as vice versa to give effect to the manifest intention of the Legislature as disclosed from the context. As stated by SCRUTTON L.J. : "You do sometimes read 'or' as 'and' in a statute. But you do not do it unless you are obliged because 'or' does not generally mean 'and' and 'and' does not generally mean 'or'. And as pointed out by Lord Halsbury the reading of 'or'; as 'and' is not to be restored to, "unless some other part of the same statute or the clear intention of it required that to be done. Where provision is clear and unambiguous the word 'or' cannot be read as 'and' by applying the principle of reading down.*
>
> *"……..speaking generally, a distinction may be made between positive and negative conditions prescribed by a statute for acquiring a right or benefit. Positive conditions separated by 'or' and read in the alternative but negative conditions connected by 'or' are construed as cumulative and 'or' is read as 'nor' or 'and'. [See : Principles of*

Statutory Interpretation by Justice G.P. Singh, 14th Edition.]

11. In the backdrop of aforesaid well settled legal principles with regard to statutory interpretation we may notice relevant extract of Section 114A of the Act, which reads as under :

> *114A. Penalty for short-levy or non-levy of duty in certain cases. - Where the duty has not been levied or has not been short-levied or the interest has not been charged or paid or has been part paid or the duty or interest has been erroneously refunded by reason of collusion or any wilful mis-statement or suppression of facts, the person who is liable to pay the duty or interest, as the case may be, as determined under sub-section (2) of section 28 shall, also be liable to pay a penalty equal to the duty or interest so determined:*

12. The aforesaid rule of statutory interpretation was referred to by Constitution Bench of the Supreme Court in Indore Development Authority v. Manohar Lal and Others, AIR 2020 SC 1496. From perusal of the relevant extract of Section 114A, it is evident that the language employed by the Legislature is plain and unambiguous and the provision contains a positive condition with regard to levy of penalty equal to duty or interest and does not contain any negative condition. The expression used is 'or' which is disjunctive between duty or interest and further use of expression as the case may be clearly suggest that aforesaid provision refers to two different persons and two different situations viz., one in which a person will be liable to duty and in other he may be liable to pay interest only and provides that in both the situations the person liable to duty would be liable to penalty equal to duty and person liable to interest would be liable to penalty equal to interest. Therefore, in view of law laid down by Constitution Bench of Supreme Court, the word 'or' cannot be interpreted as 'and'.

13. So far as reliance placed by Learned Counsel for the appellant on the clarification issued by Central Board of Excise and Customs dated 20-9-2002 is concerned, suffice it to say that the aforesaid clarification cannot be contrary to the plain language of the provision. For yet another reason, no interference is called for as the Tribunal has taken a similar view in the case of B. Suresh Vasudev Baliga (supra) and there is no material on record to show that the aforesaid order was challenged by the Revenue. Therefore, in the facts of the case, the view taken by the Tribunal otherwise also binds the Revenue.

5.1 In result-

i. appeal filed by the appellant is allowed and matter is remanded back to the Original Authority for fresh decision on merits and after following the principles of natural justice within a period of three months from receipt of this order.

ii. Appeal filed by the revenue is dismissed. Cross Objection also gets disposed of.

(Operative part of the order pronounced in open court)

(P.K. CHOUDHARY)
MEMBER (JUDICIAL)

(SANJIV SRIVASTAVA)
MEMBER (TECHNICAL)

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