CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
BANGALORE

REGIONAL BENCH - COURT No.-2

Customs Appeal No.2312 of 2011

(Arising out of Order-In-Original No.10/2011 dated 29.04.2011 passed by Commissioner of Central Excise, Bangalore-II)

M/s Anthem Cellutions (India) Ltd., ...Appellant
49, F1/F2, Bommasandra Industrial Area,
Anekal Taluk, Bangalore-562158

VERSUS

Commissioner of Central Excise, Bangalore ....Respondent
Bangalore II Commissionerate
Central Revenue Building,
Bangalore-560001

APPEARANCE:

Mr. Rajesh Chander Kumar, Sr. Advocate & Mrs. Sakhee Mehta, Advocate for the Appellant
Shri Rajesh Shastry, Authorised Representative for the Respondent

CORAM:
HON'BLE MR. P.A. AUGUSTIAN, MEMBER (JUDICIAL)
HON'BLE MRS. R. BHAGYA DEVI, MEMBER (TECHNICAL)

FINAL ORDER NO. 21317 /2023

DATE OF HEARING : 04.07.2023
DATE OF DECISION: 01.11.2023

PER: P.A. AUGUSTIAN

M/s A & A Zippers is involved in manufacturing and export of labels and zippers. For the purpose of export, they have obtained EPCG license for import of capital goods under license No.2183783 dated 04.01.1995. the import was permitted under Notification No.160/1992-Cus dated 20.04.1992 and customs duty @ 15% was discharged subject to fulfillment of export obligation four times CIF value of the imported goods over a period of time. In 1994, the appellant company took over the asset and liability of M/s A & A Zippers and they have also imported goods under EPCG scheme by paying 15% of Customs duty. Thus M/s A & A Zippers had imported 15 Nos of various capital goods having total CIF value of Rs. 3,56,40,782/-. The appellant submits that against export obligation, appellant exported goods having value of 60% of export obligation and for the remaining 40% export obligation, appellant applied for extension of time. However there was failure on the part of the appellant to comply with the export obligation for balance amount. Alleging that the failure on the part of the appellant to comply with export obligation is an attempt to evade customs duty, proceedings were initiated by DRI.

2. Thereafter SCN was issued on 17.01.2001 directing the appellant to show cause as to why the benefit of Notification No. 160/1992-Cus dated 20.04.1992 should not be denied and the duty along

with interest should not be demanded. During pendency of the above said proceedings, another SCN dated 06.02.2001 was issued by DRI, Chennai directing the appellant to show cause as to why the benefit of Customs Notification No. 160/1992-Cus dated 20.04.1992 should not be denied, as to why the machinery imported by appellant should not be confiscated and duty amounting to Rs.2,38,23,605/- foregone being the benefit extended under Notification No. 160/1992-Cus dated 20.04.1992 should not be demanded with interest @ 24% and penalty should not be imposed on appellant and its Managing Director under Section 112/114AA of the Customs Act, 1962. Appellant challenged said demand on the ground that appellant fulfilled 60% export obligation and also submitted that due to financial constraint, appellant submitted objection before BIFR on 18.09.2000. The matter was adjudicated vide Order-in-Original dated 28.03.2002 and the Adjudication Authority confirmed demand of Rs.2,38,23,605/- with interest @ 24% and also imposed redemption fine and penalty.

3. Aggrieved by said order, appeal was filed before this Tribunal and this Tribunal vide Final Order No. 1315 & 1316/2006 dated 27.06.2006 held as under:-

> ***"6.*** *We have gone through the records of the case carefully. The appellant's contention is that the export*

> *obligation to the extent of 60% has been fulfilled. The extent of export obligation fulfilled should be taken into consideration towards the duty liability in view of the amendment to the Notification No. 160/92 (Cus.), dated 20-4-1992 with retrospective effect by Section 115 of the Finance Act read with entry No. 2 of the Eight Schedule. Further while computing the duty, the Adjudicating authority has taken the full tariff rate of 65% without taking into account the effective rate of duty as contended by the appellants. Moreover, there is no justification for holding the goods liable for confiscation under Section 111(o) as there was no wilful non-compliance of the Notification. The appellant's unit has also become sick and the BIFR proceedings have been initiated. In these circumstances, we set aside the order of confiscation and imposition of redemption fine. There is also no justification for imposing any penalty as the appellant had not willfully violated the conditions of the Notification. There is also no provision at that time in the said notification for demanding interest. Hence we set aside the demand of interest. In view of the above findings, we remand the matter to the Adjudicating authority for re-quantification of duty liability by taking into account the export obligation as already fulfilled and also the effective rate of Customs duty. Thus the appeal is allowed by way of remand. Therefore we also set aside the penalty on Shri Abdul Wahid, Managing Director of the Company."*

4. Aggrieved by said order, respondent filed appeal before the Hon'ble High Court of Karnataka at Bangalore and the Hon'ble High Court vide judgment dated 07.04.2010 in CSTA NO.9/2007 dismissed the appeal as not maintainable. As directed by this Tribunal, *de novo* adjudication proceeding were taken up, Adjudication Authority confirmed demand of duty, denied benefit of Notification No.160/1992-Cus dated

20.04.1992, interest @ 24%, also imposed penalty of Rs.35 lakhs on appellant and ordered confiscation of the machinery imported against EPCG Scheme. Adjudicating Authority allowed redemption of the goods by imposing redemption fine of Rs.75 lakhs under Section 125 of the Customs Act, 1962. Aggrieved by the order, present appeal is filed.

5. When the matter came up for hearing, Learned Counsel submitted that the impugned order is issued in gross violation of the remand order issued by this Tribunal. Learned Counsel further submits that this Tribunal had remanded the matter to the Adjudicating Authority for re-quantification of duty liability by taking into account the export obligation as already fulfilled and also the effective rate of Customs duty. Thus, Adjudication Authority ought to have quantify the duty liability of 40% against goods imported under License No. 3031914 dated 04.07.1994 as the appellant fulfilled export obligation to the extent of 60% and quantify the duty liability of 85% against goods imported under license No. 2183783 dated 04.01.1994 since appellant completed export obligation of 15%. It is further submitted that the Adjudicating Authority acted grossly in excess of its jurisdiction to pass order of imposing penalty and interest as well as confirming confiscation and redemption fine without considering the Final Order of

this Tribunal. Moreover, at the relevant time, there was no provision under Customs Act, 1962 to demand interest for the failure of the importer to meet export obligation.

6. Learned D.R. reiterated the finding in the impugned order. Learned D.R. further submits that when the matter was considered by the Hon'ble High Court of Karnataka, the Hon'ble High Court held that *"after remand if the Adjudicating Authority passes any order, in such event, it is always open for the adjudicating authority to levy interest and penalty if it is entitled to levy interest and penalty on account of any violation of the Act."* Considering the above finding only the Adjudication Authority reconsidered the issue in detail and issued the impugned order. Thus there is no gross violation of the remand order as submitted by the learned counsel of the appellant.

7. Regarding the submissions made by the learned DR. in support of the findings given by the Adjudication Authority in de-novo adjudication, Ld. Counsel submits that the appeal filed by the Department was dismissed as not maintainable and in such a situation, finding given by this Tribunal directing *re-quantification of duty liability by taking into account the export obligation as already fulfilled and also the effective rate of Customs duty,* setting aside the order of confiscation, imposing interest and penalty attained finality. Learned counsel drew our attention to the judgement of the Hon'ble Supreme Court in the matter of **M/s Deepak Agro Foods V/s State of Rajasthan**

reported in 2009 (16) S.T.R. 518 (S.C.). Relevant para of the judgement is reproduced below:-

> ***"15.*** *All irregular or erroneous or even illegal orders cannot be held to be null and void as there is a fine distinction between the orders which are null and void and orders which are irregular, wrong or illegal. Where an authority making order lacks inherent jurisdiction, such order would be without jurisdiction, null, non est and void ab initio as defect of jurisdiction of an authority goes to the root of the matter and strikes at its very authority to pass any order and such a defect cannot be cured even by consent of the parties. (See: Kiran Singh & Ors. v. Chaman Paswan & Ors.). However, exercise of jurisdiction in a wrongful manner cannot result in a nullity - it is an illegality, capable of being cured in a duly constituted legal proceedings."*

8. Heard both the sides. We have gone through the Final order issued by this Tribunal and judgement of the Hon'ble High Court of Karnataka. In the first round of litigation vide order in original 19/2002 dated 02.04.2002 the Commissioner at para 46 had taken on record the fact that the appellant had claimed deduction of duty for 60% of exports on behalf of M/s. A&A Zippers and also Rs. 2 crores on behalf of M/s. Sajawat Industries had not been granted. With regard to the above claim of the appellant the Commissioner at Para 47 observed that "deduction of duty for 60% of exports made on behalf of M/s. A&A Zippers has not been granted, I find that there is no provision in the notification for giving any such benefit. Notification 160/92 dated 20.04.92 stipulates that the importer undertaking an export obligation equivalent to 4 times the CIF value of the capital goods over a period of five years shall import

the goods at concessional rate of 15%". The Tribunal vide Final Order No. 1315 & 1316/2006 dated

27.06.2006 on appeal against this order had clearly observed that

"the extent of export obligation fulfilled should be taken into consideration towards the duty liability in view of the amendment to the notification No.160/92 dated 20.04.92 with retrospective effect by section 115 of the Finance act read with entry No.2 of the eighth schedule". When the respondents filed an appeal against this order of the Tribunal, the Hon'ble High Court of Karnataka held that "if the revenue is aggrieved by the order of the Tribunal, the revenue has to file an appeal before the Hon'ble Supreme Court since the dispute is in relation to the rate of duty leviable on the assessee in view of two different notifications". At this juncture the learned counsel on behalf of the revenue contended that the main grievance of the revenue before the Hon'ble High Court was only with regard to setting aside of the interest and penalty levied by the adjudicating authority on the assessee. Therefore, the observations of the Tribunal with regard to the fulfilment of export obligations is final, where the matter was remanded the matter to the Adjudicating Authority only **"for quantification of the duty liability by taking into account the export obligation as already fulfilled and also the effective rate of Customs duty."** The Commissioner in the impugned order by reopening the fulfilment of export obligation on the ground that documents were not filed and the DGFT failed to intimate the extent of export obligation goes beyond the tenor of the remand order of the Tribunal. Accordingly, the demand of duty to the extent of 60% of exports on behalf of M/s. A&A Zippers and also Rs.2 crores on behalf of M/s. Sajawat Industries is set aside.

9. The Tribunal in its final order had categorically observed that there is no justification for holding the goods liable for confiscation as there was no willful non-compliance of the notification, the order of confiscation by the Commissioner is not justifiable when the remand order was purely for re-quantification of demand of duty. Therefore, we set aside confiscation of the goods along with the redemption fine.

10. Further regarding interest and penalty, this Tribunal had taken a clear view and held that there is no provision for interest at that relevant time and set aside the demand for interest.

Moreover in the matter of M/s Philips (India) Ltd. V/s Commissioner of Customs, Mumbai reported in 2001 (137)
E.L.T. 697 (Tri.-Bom) it is held that as under:-

"9. The notification itself does not provide for payment of interest by the importer. The undertaking by the importer referred to in condition (3) of the notification was only to "pay on demand an amount equal to the duty leviable on such capital goods but for the exemption". The provisions of the Customs Act, 1962 also do not justify demanding interest. Section 28AA of the Act only applies where the duty demanded under Section 28 is not paid within three months from the date of the confirmation of the duty. Section 28AB will not be attracted in this case, the demand for duty not having arisen as a result of any of the factors specified in the proviso under sub-section (1) of Section 28."

11. The view regarding levy of interest is considered by this Tribunal in the matter of **Fal Industries Ltd. V/s Commissioner of Customs, Chennai reported in 2008 (231)**

E.L.T. 524 (Tri.-Mad.) as under :-

"There was no provision in the Customs Act or in Notification No.160/92-Cus. for levy of interest on any amount of duty recovered on the ground of breach of condition attached to the notification."

12. Without discussing the relevant provisions of law which were violated by the appellant, imposition of penalty by the Commissioner is irregular since the Tribunal had already held that

the appellant had not willfully violated the conditions of the notification and on this basis the penalty was set aside.

13. In the present case the appeal filed by the Revenue challenging the final order was dismissed by Hon'ble High Court of Karnataka as not maintainable. Thus, the adjudication authority ought to have followed the findings given by this Tribunal by quantifying the extent of duty without ordering confiscation of goods, imposing interest and penalty. Hence the Adjudication Authority violated the terms of the remand order. Regarding non-consideration of the extent of export obligation, once the Tribunal has given a finding that the appellant complied

with the export obligation, Adjudication authority ought to have quantified the duty liability of 40% against goods imported under License No.

3031914 dated 04.07.1994 as the appellant fulfilled export obligation to the extent of 60% and quantify the duty liability of 85% against goods imported under license No. 2183783 dated 04.01.1994 as the appellant completed export obligation of 15%.

14. In view of the above, appeal is allowed so far it exceeds the re-quantification of duty liability with consequential relief if any as per law. Confiscation and redemption fine along with interest and penalty also set aside. The Appeal is allowed on above terms.

(Order pronounced in the Open Court on **01.11.2023**)

(P.A. AUGUSTIAN)
MEMBER (JUDICIAL)

(R. BHAGYA DEVI)
MEMBER (TECHNICAL)

Nihal