CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL BANGALORE

REGIONAL BENCH - COURT NO. 2

Customs Appeal No. 22692 of 2014

(Arising out of Order-in-Appeal No. COC-CUSTM-000-APP-044-14-15-DT-16-04-14 dated 21.05.2014 passed by Commissioner of Customs (Appeals), Cochin-9).

M/s. Binani Zinc Ltd
Binanipuram,
Cochin
Kerala 683502. **………. Appellant(s)**

VERSUS

The Commissioner of Customs,
-Cochin
Custom House, Willington Island,
Cochin
Kerala – 682009 **……. Respondent**

WITH

(i) Customs Appeal No. 22693 of 2014

(Arising out of Order-in-Appeal No. COC-CUSTM-000-APP-045-14-15-DT-16-04-14 dated 21.05.2014 passed by Commissioner of Customs (Appeals), Cochin-9).

(ii) Customs Appeal No. 22694 of 2014

(Arising out of Order-in-Appeal No. COC-CUSTM-000-APP-046-14-15-DT-16-04-14 dated 21.05.2014 passed by Commissioner of Customs (Appeals), Cochin-9).

(iii) Customs Appeal No. 21718 of 2015

(Arising out of Order-in- Appeal No. COC-CUSTOM-000-APP-05-15-16 dated 29.04.2015 passed by Commissioner of Customs (Appeals), Cochin-9).

(iv) Customs Appeal No. 21719 of 2015

(Arising out of Order-in- Appeal No. COC-CUSTOM-000-APP-03-15-16 dated 29.04.2015 passed by Commissioner of Customs (Appeals), Cochin-9).

(v) Customs Appeal No. 21720 of 2015

(Arising out of Order-in- Appeal No. COC-CUSTOM-000-APP-04-15-16 dated 29.04.2015 passed by Commissioner of Customs (Appeals), Cochin-9).

(vi) Customs Appeal No. 21721 of 2015

(Arising out of Order-in- Appeal No. COC-CUSTOM-000-APP-05-15-16 dated 29.04.2015 passed by Commissioner of Customs (Appeals), Cochin-9).

(vii) Customs Appeal No. 21722 of 2015

(Arising out of Order-in- Appeal No. COC-CUSTOM-000-APP-07-15-16 dated 29.04.2015 passed by Commissioner of Customs (Appeals), Cochin-9).

(viii) Customs Appeal No. 21723 of 2015

(Arising out of Order-in- Appeal No. COC-CUSTOM-000-APP-06-15-16 dated 29.04.2015 passed by Commissioner of Customs (Appeals), Cochin-9).

Appearance:

Shri Abraham Joseph Markos, Advocate for the Appellant
Shri Rajiv Kumar Agarwal, Authorised Representative for the Respondent

CORAM:

Hon'ble P.A. Augustian, Member (Judicial)

Hon'ble Mr. Pullela Nageswara Rao, Member (Technical)

Final Order Nos. 20947-20955 /2024

Date Of Hearing: 04.03.2024
Date Of Decision: 03.09.2024

Per: Pullela Nageswara Rao

M/s Binani Zinc, the Appellant owns and operates the Zinc Smelter factory at Kochi, Kerala.

2. The brief facts are the appellant for the purpose of manufacture of 'Zinc', imported the principal raw material 'Zinc Concentrate' in substantial quantities and in a series of imports. The suppliers M/s Glencore International AG, Switzerland, M/s. Trafigura Beheer B.V. Switzerland, M/s. MRI Trading AG, Switzerland, M/s. Afritalia Trading Limited, Mauritius, M/s. Euromin, Switzerland issued provisional

invoices and the Appellant filed warehouse bills of entry and the goods are assessed provisionally on the basis of the provisional invoice and other documents, pending submission of the final documents, including the final invoice and survey report, on execution of appropriate PD Bonds. Thereafter the goods are cleared from the Private Bonded Warehouse on the basis of provisional price prevalent at the time of clearance from the warehouse and duties were also paid on such provisional price. The price of the 'Zinc Concentrate' is finalized based on the quotational period/London Metal Exchange (LME), which is done two to three months after the actual date of receipt of the raw material. Thereafter, based on the final price arrived on the basis of the quotational period/LME the provisional assessments are finalised.

3. The appeal filed by the appellant pertains to import of 'Zinc Concentrate' imported vide Bill of Entry No. 5995631 dated 14.02.2012, which was provisionally assessed and thereafter finalised after the submission of the final invoice and other documents by the appellants. The adjudicating authority has finalised the provisional assessment and confirmed the short levy of duty of Rs. 77,31,545/- along with the applicable interest. The other 8(eight) appeals, C/22693/2014, C/22694/2014, C/21718/2015, C/21719/2015, C/21721/2015, C/21720/2015, C/21722/2015, C/21723/2015 pertain to eight other Bills of Entry No., 692 dated 26.08.2010, 5657492 dated 05.01.2012, 2455556 dated 20.12.2010, 241293 dated 26.02.2009, 8051324 dated 29.09.2012, 247122 dated 05.06.2009, 8415938 dated 06.11.2012, 265276 dated 13.03.2010 respectively, which were also assessed provisionally and the adjudicating authority has finalised the provisional assessments and confirmed the short levy of duty along with the

applicable interest. The appellant aggrieved by the orders of the adjudicating authority filed an appeal before Commissioner (Appeals) contending that; the Adjudicating Authority's order in so far as demand of applicable interest without adjudication of shortage and excesses and the issue of the credit involved of CVD and SAD was illegal; they averred that no interest could be demanded, where the situation called for an overall adjustment of excesses and shortages; the appeal was being filed as a matter of abundant caution, since the impugned order demanded applicable interest. They also cited the order of the Hon'ble High Court of Kerala in WA 1966 of 2011 dated 22.11.2011 in support of their arguments.

4. In the impugned order the Commissioner (Appeals) held that; the plea of the appellant is that all short falls and excesses in duty that occurs in the course of several provisional assessments should be computed and the final tally arrived at before charging interest on the appellant for a short fall in duty; However, Section 18 (3) of the Customs Act, 1962 is categorical in stating that the importer or exporter shall be liable to pay interest on any amount payable to the Central Government, consequent to the final assessment order at the rate fixed by the Government from the first day of the month in which duty is provisionally assessed till the date of payment thereof; further, each Bill of Entry has to be treated independently by the department as per the provisions of the Customs Act; there is no provision in the Customs Act for clubbing together different Bills of Entry, whether provisional or otherwise; execution of a General Bond cannot be an excuse for altering the structure of the law; since each provisional Bill of Entry has to be subject to a final assessment, individually, liable interest will have to be

charged in every case as per the provisions of Section 18 (3) of the Customs Act, 1962; there is no provision for a 'Consolidated Finalization' in the Customs Act; the Department of Revenue is not a banking or financial institution, where a ledger of debit and credit can be maintained; the department has an option to recover any short fall of payment due by adjustment of any amount lying with the Government, this does not confer a licence upon the appellant to introduce a concept of 'Consolidation'; the appellant has cited a judgment of the Hon'ble High Court of Kerala in support of their plea, in the said judgment the Hon’ble Court has directed the department to decide the matter of interest through proper adjudication and this is precisely what the department has done; an Adjudication order was passed by the Lower Authority taking into consideration all the documents submitted by the appellant; the matter of interest is obviously non-negotiable as per the provisions of Section 18 of the Customs Act; the appellant claims that this procedure is unfair; it is the appellant, who opted to clear their goods provisionally as per Section 18 of the Customs Act and it follows that they will have to comply with every provision of the said Section and selective application of the law cannot be allowed; the appellant has also claimed that the department shows alacrity in finalizing assessments that involve a shortfall of duty, while displaying marked tardiness in dealing with provisional assessments in which refunds may be due to the appellant, if this imputation is correct, it is patently unfair and I am constrained to direct the concerned section to expedite the finalization of all Bills of Entry, where the necessary documents have been submitted by the appellant. Commissioner (Appeals) held that the appeal as such is devoid of any merit and dismissed the appeal. Aggrieved by the impugned order the appellant filed this appeal before the Tribunal. The issue in the other appeals being the same, hence all the 8(eight) appeals are being decided by this common order.

5. The Appellant in the appeals submitted that; they avail credit of the CVD and the SAD paid on the 'Zinc Concentrate' being an input, and no credit is taken on the basic customs duty paid; with respect to the duty payments so effected provisionally, the excess and shortages have to be adjusted on an overall basis, finally; with respect to CVD/SAD the question being one of credit is a revenue neutral exercise.

6. In the appeals the Appellant further submitted that; from the year 2006 onwards after the introduction of the aforesaid relevant statutory provision, a series of imports have been made, which were cleared for home consumption on provisional basis as aforementioned. In all these cases, pursuant to such provisional clearance, final price has also been determined. A Statement showing the total deficiency/excess of duty is enclosed, which was also produced before the Commissioner (Appeals). Further, a consolidated statement of amounts due to the Customs and the amounts due to the Appellant is also enclosed. It is their case that in such a situation, the question of any one Bill of Entry being individually taken up and finalized and, on such finalization, if there is a deficiency in payment of duty, applicable interest being demanded in such individual case cannot arise. The wordings of Section 18(2) have to be so construed that in a case like this, excess/deficiency will have to be determined on an overall basis or such other reasonable basis, which in any case is not prohibited. A contrary interpretation as done in the impugned order, will result in the situation, whereby the Department

will proceed only to finalize the cases, where the final price determined results in further payment to the Department and there will be non-finalization in cases, where the final price determined results in excess and therefore refund to the Appellant. The interpretation of the words "as the case may be" in Section 18(2)(a) therefore is relevant in the context of the present case.

7. The appellant further submitted that; with respect to successive imports that have taken place within the span of even a few days, deficiency in one case and excess in another certainly needs to be adjusted by a consolidated assessment. On such consolidation, only in the event of any deficiency being noticed can payment of interest become applicable; the Assistant Commissioner by order dated 19.06.2013 proceeded to determine the deficient payment under a particular Bill of Entry and mechanically imposed applicable interest.

8. The appellant further submitted that; Commissioner (Appeals) has also erred in finding that there is no provision for clubbing together different Bills of Entry and has further failed to appreciate the facts and the most pertinent aspect is that, the question should have been "is there any prohibition in law?". In the absence of such prohibition, the course of action that advances substantial justice should have been adopted; without such consolidation, if the impugned order and assessments are allowed to operate, in the case of for instance, eight imports effected within a span of one year, the Department can proceed to demand interest even, where there is one case of deficient payment without finalizing the other cases, where there is overwhelming excess. The provisions of Section 18(2) therefore have to be read objectively and purposefully to advance equity and justice; the statements

produced herewith will itself indicate the grievance and the just cause of the Appellant; with regard to CVD and SAD, no question can arise at all of interest in view of the fact that credit is taken and the issue is therefore is revenue neutral; the decision of the Hon'ble High Court of Kerala, has not been appreciated by the Commissioner (Appeals); in fact, the Appellant has unutilized CENVAT to the tune of Rs. 21.75 Crore as on 31.06.2014, which has in fact been paid to the Department and is lying idle; there has been considerable delay in issuing the final assessment order; the Appellant would be put to undue hardship if the interest claim, arising due to no fault of theirs, is allowed merely on the ground that the relevant clause states so.

9. The learned Authorised Representative (AR) for the Revenue submitted that; The appellants import Zinc concentrate for manufacture of Zinc in their plant. The price is dependent on the London metal Exchange price, which is finalized after 2-3 months of imports. The duty is assessed provisionally at the time of import and finalised later on. As per worksheet available in the appeal paper book the interest liability was Rs.1.65 Crore till 2014. While finalizing the provisional assessment the adjudicating authority demanded interest on the short payment.

10. The Learned AR further submitted that; the appellants have not raised this issue before the adjudicating authority; the issue was decided in Revenue’s favour in the case of **M/s BPCL Vs. CC Imports Mumbai 2015 (2) TMI 127 - CESTAT Mumbai,** wherein it is held:-

> *“4.4.1 As regards the question whether excess payment of duty found in one set of bills of entry can be adjusted against short payments made for another set and whether refund claims need to be filed separately for excess payments made, this issue was considered by this Tribunal in the case of HPCL Vs. CC, Bombay*

decided on 30-6-2011. ***After considering the various case laws on the subject, this Tribunal came to the conclusion that any adjustment between the differential amount of duty in relation to the one set of bills of entry where there is a short payment and the excess amount of duty covered by another set of bills of entry is not permissible****. It was further held that "what is required to be done by the assessee is to pay the duty short paid and separately claim refund of the duty paid in excess".* ***Since the issue of unjust enrichment has to be considered, it obviously follows that each transaction has to be examined separately and therefore, there cannot be any clubbing of clearances. Accordingly, we answer the question in favour of revenue and against the appellant."***

(emphasis supplied)

Further, the Hon'ble Tribunal in the case of **HPCL Ltd.,- 2011 (6) TMI 518 CESTAT, Mumbai** has held that:-

"After considering the provisions of law and decisions cited before us, we are of the view that the issue at hand calls for a decision against the appellant in view of the Tribunal's Larger Bench decision in the case of Excel Rubber Ltd (supra). In the context of considering the question whether different clearances of excisable goods could be clubbed together for the purpose of finalization of provisional assessments. the Larger Bench held against the clubbing. It held that clubbing of excess payment of duty claimed as refund on the one hand and demand of differential duty by the department on the other, by adopting the method of 'adjustment,' would certainly result in nullifying the provisions of Rule 7(4) of the Central Excise Rules, 2002. The Larger Bench found that, if such adjustment was allowed, it would result in unjust enrichment to the assessee in regard to interest on duty. The Larger Bench further held that, where excess payment of duty paid by the assessee was found upon finalization of provisional assessment under Rule 7(3), the assessee had no option but to apply to the excise officer for refund of such duty in accordance with the relevant provisions of law and within the time prescribed. Once

such claim was made, the principle of unjust enrichment would get attracted. This decision of the Larger Bench is equally applicable to a case where, upon finalization of provisional assessment, excess payment of duty by the assessee is found in respect of one set of Bills of Entry and short-payment of duty found in respect of another set. On the reasoning adopted by the Larger Bench, any adjustment between the excess payment of duty and the short-payment of duty is not permissible and, on the other hand, what is required to be done by the assessee is to pay the duty short-paid and separately claim refund of the duty paid in excess. Needless to say that the refund claim should be filed under Sec. 27 of the Customs Act and that the provisions of time-bar and unjust enrichment embodied in that section would be applicable..

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..

11. The present issue stands decided against the appellant Accordingly, their claim for adjustment between the differential amount of duty demanded by the lower authorities in relation to the first set of 42 Bills of Entry and the excess amount of duty relating to the second set of 43 Bills of Entry is not tenable and the same is rejected."

11. The Learned AR further submitted that; for each import a provisional duty bond was executed. Each finalisation is a separate event and cannot be clubbed; the effect of such adjustment would be that the appellants get the refund amount without subjecting such amount to test of unjust enrichment. It has been repeatedly held by various courts that the refunds have to be subject to rigors of section 27(3) of the Customs Act. The larger bench of the Hon'ble Tribunal in case of **Excel Rubber 2011 (3) TMI 527 - CESTAT, NEW DELHI (LB)** held that:-

"50. The fallout of the above discussion is that once the authority on finalization of assessment finds any amount of money having been paid in excess of the duty liability ascertained in the final assessment, the excess amount so ascertained would become refundable to the assessee. ***Such excess amount can certainly be adjusted towards any other duty liability of such assessee under Excise Act, 1944 and Rules made thereunder, however, such adjustments are subject to the applicability of the principle of unjust enrichment. Therefore, before grant of adjustment, the authority will have to ascertain whether such excess amount is to be actually refunded to the assessee or is liable either wholly or partly to be credited to the account of consumer benefit fund and only thereafter make an order of adjustment to the extent the amount is found to be actually refundable and not liable to be credited to the account of consumer benefit fund****. Needless to say, that the burden of proof in this regard would lie upon the assessee. The point for consideration is therefore answered accordingly."*

(emphasis supplied)

12. Further, The Learned AR has relied on the decision of the Hon'ble Supreme Court in the case of **Commissioner of Central Excise, Madras Vs. M/s Addison & Co. Ltd.-2016 (8) TMI 1071-SC.** Learned AR further relied on the decision in **TVS Electronics Vs. CCE – 2016 (11) TMI 236.**

13. Further the Hon'ble Madras High court in the case of **CCE, Chennai Vs. National Plywood reported in 2017 (6) TMI 509** relied upon by the learned AR held that;-,

"12.2. Clearly, the Supreme Court recognises that no refund can be claimed, unless the Assessee satisfies the conditions set forth in Section 11B of the 1944 Act.

..

13. The Assessee, in this case is a manufacturer, had to necessarily demonstrate that the burden of duty had not been passed on to the ultimate customer."

14. Heard both parties and perused the records.

15. We find that the issue involved in this case is whether on finalisation of provisionally assessed bills of entry filed for clearance of imported goods at different points of time, wherein on finalisation of such provisionally assessed individual bills of entry results in short levy in some cases and excess levy of duty in some cases and can such short levy and excess levy be netted and the net duty payable, if any should be demanded with interest from the date of such finalisation of assessment to duty.

16. We find that in this regard it is pertinent to analyse the relevant provisions of section 18 of the Customs Act, 1962, which is extracted below:-

"SECTION 18. Provisional assessment of duty-

(1) Notwithstanding anything contained in this Act but without prejudice to the provisions of section 46,-

- *(a) where the importer or exporter is unable to make self-assessment under sub-section (1) of section 17 and makes a request in writing to the proper officer for assessment; or*
- *(b) where the proper officer deems it necessary to subject any imported goods or export goods to any chemical or other test; or*
- *(c) where the importer or exporter has produced all the necessary documents and furnished full information for the assessment of duty but the proper officer deems it necessary to make further enquiry for assessing the duty, the proper officer may direct that the duty leviable on such goods may pending the production of*

such documents or furnishing of such information or completion of such test or enquiry, be assessed provisionally if the importer or the exporter, as the case may be, furnishes such security as the proper officer deems fit for the payment of the deficiency, if any, between the duty finally assessed and the duty provisionally assessed.";

(2) When the duty leviable on such goods is assessed finally in accordance with the provisions of this Act, then -

(a) in the case of goods cleared for home consumption or exportation, the amount paid shall be adjusted against the duty finally assessed and if the amount so paid falls short of, or is in excess of the duty finally assessed, the importer or the exporter of the goods shall pay the deficiency or be entitled to a refund, as the case may be;

(b) in the case of warehoused goods, the proper officer may, where the duty finally assessed is in excess of the duty provisionally assessed, require the importer to execute a bond, binding himself in a sum equal to twice the amount of the excess duty.

(3) The importer or exporter shall be liable to pay interest, on any amount payable to the Central Government, consequent to the final assessment order under sub-section (2), at the rate fixed by the Central Government under section 28AB from the first day of the month in which the duty is provisionally assessed till the date of payment thereof.

(4) Subject to sub-section (5), if any refundable amount referred to in clause (a) of sub-section (2) is not refunded under that sub-section within three months from the date of assessment of duty finally, there shall be paid an interest on such unrefunded amount at such rate fixed by the Central Government under section 27A till the date of refund of such amount.

(5) The amount of duty refundable under sub-section (2) and the interest under sub-section (4), if any, shall, instead of being credited to the Fund, be paid to the importer or the exporter, as the case may be, if such amount is relatable to

(a) the duty and interest, if any, paid on such duty paid by the importer, or the exporter, as the case may, if he had not passed on the incidence of such duty and interest, if any, paid on such duty to any other person;

(b) the duty and interest, if any, paid on such duty on imports made by an individual for his personal use;

(c) the duty and interest, if any, paid on such duty borne by the buyer, if he had not passed on the incidence of such duty and interest, if any, paid on such duty to any person;

(d) the export duty as specified in section 26;

(e) drawback of duty payable under sections 74 and 75]."

17. We find that the appellant have cited the judgement of the Hon'ble High Court of Kerala, wherein it is held that:-

"*The short question arising in the connected Writ Appeals, one filed by the assessee and the other filed by the Revenue, is whether adjudication is called for before raising demand of interest under Section 11AA of the Central Excise Act and also under Section 75 of the Finance Act, 1994.*

On a reading of the provisions, we find that the liability for interest on default is automatic under Section 11AA as well as under Section 75 referred to above and that way the Sections are only declaration of law. At the same time what we notice is that the interest liability is declared on the default amount and that too for the period of default. It is further stated in the Sections that in the event of modification of demand by way of reduction or enhancement, interest payable is only for the period of default reckoned with reference to first demand. Controversy in this case cropped up because demand of AED was not paid as such but was set off by adjustment from duty credit (AED) available on input purchase by the assessee. In other words, duty liability remained as a notional demand, which was fully paid through adjustment from duty credit available from the very beginning of the date of demand. So much so, the controversy itself is as to whether there is a default in a case of payment of duty through belated *adjustment of duty credit available. At least in this case, we feel adjudication is called for because in the first place assessee has not conceded default. Secondly, the question whether the interest provision on default applies to a situation of payment of duty through belated adjustment of credit available at the time of raising the demand. Even if the assessee's contention is accepted in principle by the adjudicating officer, then the question will arise as to whether duty credit was available during the whole period of default to offset the entire demand because otherwise interest will be payable for the differential amount, that is the amount of demand over credit available. So much so, we feel the adjudicating officer should examine the objections raised by the assessee against the demand of interest.*

5. We however hold that if duty is paid against demand with delay other than through adjustment of credit available, interest is automatic and it is a matter of voluntary payment of interest by the assessee or payment on demand by the adjudicating officer which does not require any adjudication except the arithmetical calculation for which no adjudication is called for. However, we hold that adjudication is called for in this case, where additional excise duty demand was fully settled through adjustment of duty credit available."

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18. We find that as per section 18(3) of the Customs Act,1962, interest is payable on the short levy determined on finalisation of the provisional assessment. Further, in the case of clearance of warehoused goods a bill of entry for home consumption (Ex-Bond) under Section 68 read with Section 15(1)(b) has to be filed and each ex-bond bill of entry is a separate assessment, since the rate of duty and other notification benefits, if any are dependent on the date on which ex-bond bill of entry is filed and assessed. We find that in this case the appellant filed warehouse bill of entry for

warehousing of imported goods, which were provisionally assessed and the clearances from the warehouse was on filing of the Ex-bond bills of entry, which were also assessed provisionally. The department has finalised the assessment of the Warehouse bills of entry on submission of the final invoice and other related documents by the appellant. We find that the provisionally assessed home consumption bills of entry (Ex-Bond) also need to be finalised taking into consideration the changes in the assessment of warehouse bills of entry on finalisation and any changes in rate of duty and any changes in eligibility of the notifications, if any. Therefore, in view of the above clubbing of assessment of bills of entry and the proposition of the appellant of Consolidated assessment is not proper as is not provided in the Custom Act, 1962 and hence not tenable.

19. We find that the Tribunal in catena of decisions on the issue have held that clubbing and netting of duty on finalisation of provisional assessments in Customs law and Excise law is not permissible. We do not find any reason to differ with the decisions of the Tribunal.

20. We also find that as per Customs (Finalisation of Provisional Assessment) Regulations, 2018, Notification No.73/2018-(N.T.), dated 14.08.2018, in Regulation 4(8), an express provision was provided, which reads as:-

"For the purpose of these regulations, each Bill of Entry or Shipping Bill, as the case may be, that has been assessed provisionally shall be treated as a separate case of provisional assessment".

21. We find that the appellant has contended that the department is not finalising the bills of entry, where on finalisation there would be excess payments, entitling the appellant for a refund, this issue was raised before the Commissioner (Appeals) who has given directions for finalisation of assessments, where all the documents were submitted. In case all the provisional assessments are not finalised despite the submission of relevant documents by the appellant, we direct that such pending assessments should be finalised preferably with 3(three) months from the receipt of this order.

22. In view of the above discussion and in the facts and circumstances, the appeals are not sustainable. Consequently, all the 9(nine) appeals are dismissed.

(Order pronounced in open court on 03.09.2024)

(P.A. Augustian)
Member (Judicial)

(Pullela Nageswara Rao)
Member (Technical)

Sasidhar..