CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
BANGALORE

REGIONAL BENCH - COURT NO. 1

Customs Appeal No. 21535 of 2015

(Arising out of Order-in-Appeal No. 267/2015 dated 26.03.2015 passed by the Commissioner of Customs (Appeals), Bangalore.)

M/s. Shri Krishna International
No. 19, Devi Nivas, Ground Floor,
Sindhi Colony,
J.C. Road,
Bangalore – 560 002.

Appellant(s)

VERSUS

Commissioner of Customs,
Inland Container Depot,
Whitefield,
Bangalore – 560 066.

Respondent(s)

With

Customs Appeal No. 20571 of 2016

(Arising out of Order-in-Appeal No. 31/2016 dated 21.01.2016 passed by the Commissioner of Customs (Appeals), Bangalore.)

M/s. Aban Exim Pvt. Ltd.,
No. D-60/2, Basement,
East of Kailash,
New Delhi – 110 065.

Appellant(s)

VERSUS

Commissioner of Customs
Inland Container Depot,
White Field,
Bangalore – 560 066.

Respondent(s)

APPEARANCE:

Ms. Reena Rawat, Advocate for the Appellants

Mr. K. A. Jathin, Deputy Commissioner (AR) for the Respondent

CORAM: HON'BLE DR. D.M. MISRA, MEMBER (JUDICIAL)
HON'BLE MRS R BHAGYA DEVI, MEMBER (TECHNICAL)

Final Order No. 21085-21086 /2024

DATE OF HEARING: 25.07.2024
DATE OF DECISION: 25.07.2024

PER : DR. D.M. MISRA

These two appeals are filed against respective Orders-in-Appeal passed by the Commissioner of Customs (Appeals), Bangalore. Since common issue involved, both appeals are taken up for hearing and disposal.

Appeal No.C/21535/2015 by M/s. Shri Krishna International

2.1. Briefly stated the facts of the case are that the appellant had imported new truck tyres with tubes and flaps against Bill of entry No.140015/2007 dated 21.02.2007 and No.140900/2007 dated 07.03.2007 which were assessed to nil Anti-Dumping Duty (ADD, for short) under Notification No.106/2006 dated 09.10.2006. The reference price in the ADD Notification No.88/2007-Cus dated 24.07.2007, has been revised to USD 135.65. Alleging that the said Notification is applicable retrospectively, a show-cause notice dated 25.09.2007 read with corrigendum dated 23.08.2013 proposing to recover ADD amounting to Rs.9,63,537/- along with interest. On adjudication, the demand was confirmed. Aggrieved by the said order, they filed appeal before the learned Commissioner, who rejected their appeal.

Appeal No.C/20571/2016 by M/s. Aban Exim Pvt. Ltd.

2.2. The appellant in this case has also imported new truck tyres with tubes and flaps against Bill of Entry No.135283 dated 08.12.2006 which was assessed to nil ADD under Notification No.106/2006-Cus(ADD) dated 09.10.2006. Later on issuance of Notification No.88/2007-Cus(ADD) dated 4.07.2007, a show-cause notice was issued to the appellant on 18.08.2007 read with corrigendum dated 28.08.2007, proposing recovery of ADD amounting to Rs.4,87,362/- along with interest. On adjudication, the said demand was confirmed with interest.

Aggrieved by the said order, they filed appeal before the learned Commissioner(Appeals) who also rejected the same.

2.3. Hence, the appellants filed these appeals.

3. At the outset, the learned advocate for the appellants has submitted that the authorities below had confirmed the demand on the ground that the duty imposed vide Notification No.88/2007 was applicable on all imports made on or after 09.10.2006 i.e. the date of imposition of provisional ADD. She has submitted that the learned Commissioner(Appeals) has upheld the order of the adjudicating authority by misreading the provisions of Rule 20 of Customs Tariff (Identification, Assessment and Collection of Antidumping Duty on Dumped Articles and for Determination of Injury) Rules, 1995 and the judgments of Hon'ble Kerala High Court in the case of ***CC Vs. Akash Trading Co.*** [2010(253) ELT 734 (Ker.) and Hon'ble Bombay High Court in the case of ***CC(Import), Mumbai Vs. Samarth Industries*** [2014(311) ELT 28 (Bom.)]. She has further submitted that the issue is now no more res integra being settled by the judgment of the Hon'ble Supreme Court in the case of ***CC, Bangalore Vs. G.M. Exports*** [2015(324) ELT 209 (SC)] and consequently, the judgments in ***Akash Trading Co***. and ***Samarth Industries*** are no more good law. She has further submitted that consequent to amendment of sub-section (8) of Section 9A of the Customs Tariff Act, 1975 vide Finance Act, 2009, the date of presentation of Bill of Entry is relevant date for the purpose of determination of rate of duty and limitation. Thus, the impugned Bills of Entry having been presented on 08.12.2006, 21.02.2007 and 07.03.2007, the rates of duty viz. BCD, CVD and ADD as applicable on the aforesaid dates would apply to consignments in question and not the rate of duty as notified under subsequently Notification No.88/2007 dated 24.03.2007. In support, she has referred to the judgment

of this Tribunal in the case of ***Sunrise Enterprises Vs. CCE, Jallandhar*** [2015(315) ELT 621 (Tri.)] Further, she has submitted that the demand is barred by limitation inasmuch as the duty was duly assessed by the proper officer and there was no suppression of facts or misdeclaration on the part of the appellants; therefore, invocation of extended period with interest is bad in law.

4. Learned AR for the Revenue reiterated the findings of the learned Commissioner(Appeals).

5. Heard both sides and perused the records.

6. The short issue involved in the present appeals for consideration is whether antidumping duty is leviable on imported truck tyres with tubes and flaps for the period prior to 24.07.2007.

7. Undisputedly, the provisional reference price fixed under Notification No.106/2006 dated 09.10.2006 has been revised by issuance of Notification No.88/2007-Cus dated 24.07.2007. The Revenue proposed to apply the revised price retrospectively for the clearances made prior to the date 24.07.2007 in computing the ADD. The learned Commissioner(Appeals) in the impugned orders following the judgment of the Hon'ble High Court of Kerala in the case of ***CC Vs. Akash Trading Co***.(supra) and Hon'ble High Court of Bombay in the case of ***CC(Import), Mumbai Vs. Samarth Industries*** (supra), held that levy of ADD could be effected for the prior to 24.07.2007. On the other hand, the contention of the appellant is that the said judgments have been considered by the Hon'ble Supreme Court in the case of ***CC, Bangalore Vs. G.M. Exports*** (supra) and interpreting the Rules 20 & 21 of Customs Tariff (Identification, Assessment and Collection of Antidumping Duty on Dumped Articles and for

Determination of Injury) Rules, 1995 held to be not a good law. It is held by the Apex Court that recovery of ADD on the basis of the Notification No.88/2007 dated 24.07.2007 cannot be made retrospectively for imports prior to 24.07.2007 on revision of reference price.

8. Rules 20 & 21 of Customs Tariff (Identification, Assessment and Collection of Antidumping Duty on Dumped Articles and for Determination of Injury) Rules, 1995 read as follows:-

> ***RULE 20. Commencement of duty.*** *- (1) The anti-dumping duty levied under rule 13 and rule 19 shall take effect from the date of its publication in the Official Gazette.*
> *(2) Notwithstanding anything contained in sub-rule (1) -*
> *(a) where a provisional duty has been levied and where the designated authority has recorded a final finding of injury or where the designated authority has recorded a final finding of threat of injury and a further finding that the effect of dumped imports in the absence of provisional duty would have led to injury, the anti-dumping duty may be levied from the date of imposition of provisional duty;*
> *(b) in the circumstances referred to in sub-section (3) of section 9A of the Act, the anti-dumping duty may be levied retrospectively from the date commencing ninety days prior to the imposition of such provisional duty :*
> ***Provided*** *that no duty shall be levied retrospectively on imports entered for home consumption before initiation of the investigation :*
> ***Provided*** *further that in the cases of violation of price undertaking referred to in sub-rule (6) of rule 15, no duty shall be levied retrospectively on the imports which have entered for home consumption before the violation of the terms of such undertaking :*
> ***Provided*** *also that notwithstanding anything contained in the foregoing proviso, in case of violation of such undertaking the provisional duty shall be deemed to have been levied from the date of violation of the undertaking or such date as the Central Government may specify in each case.*
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> ***RULE 21. Refund of duty.*** *- (1) If the anti-dumping duty imposed by the Central Government on the basis of the final findings of the investigation conducted by the designated authority is higher than the provisional duty already imposed and collected, the differential shall not be collected from the importer.*
> *(2) If, the anti-dumping duty fixed after the conclusion of the investigation is lower than the provisional duty already imposed and collected, the differential shall be refunded to the importer.*
> *(3) If the provisional duty imposed by the Central Government is withdrawn in accordance with the provisions of sub-rule (4) of rule 18, the provisional duty already imposed and collected, if any, shall be refunded to the importer.*

9. Their Lordships interpreting the said rules in ***CC, Bangalore Vs. G.M. Exports'***s case held as follows:-

> ***42.*** *One other interesting thing remains. Most of the debate at the Bar was centered around the expression "levied" in Rule 20 sub-rule (2)(a), revenue contending, based on two judgments of this Court in N.B. Sanjana, Assistant Collector of Central Excise, Bombay and Others v. The Elphinstone Spinning and Weaving Mills Company Ltd., 1971 (1) SCC 337 = 1978 (2) E.L.T. (J399) (S.C.) and Assistant Collector of Central Excise, Calcutta Division v. National Tobacco Co. of India Ltd., (1972) 2 SCC 560 = 1978 (2) E.L.T. (J416) (S.C.), that "levy" does not include "collection". This has been countered by arguments on behalf of the assessees that the word "levied" in the said sub-rule has been used in the same sense as the expression "imposed and collected" in Rule 21(1), and would therefore include "collection" as well. In view of what has been held by us above, we find it unnecessary to decide this contention.*
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> ***43.*** *The effect of Rule 21 on the aforesaid construction of Rule 20 now needs to be adverted to. Rule 21, in turn, is made to carry out what is stated in clause 10.3 of the WTO Agreement. Rule 21(2) echoes what is already found in Section 9A(2). If provisional anti-dumping duty is found to be higher than the final anti-dumping duty, the differential shall be refunded to the importer. But sub-rule (1) goes a step further and states that if the anti-dumping duty finally imposed is higher than the provisional duty already imposed and collected, the differential shall not be collected from the importer.*
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> ***44.*** *It is obvious that this Rule has been framed in the interest of international trade. It is well known that export contracts are entered into long before anti-dumping duties may be imposed, and in the interests of international trade, the importer should not be put to a loss in case a final duty happens to be higher than the provisional duty already imposed. The delicate balancing act between protection of domestic industry and the hardship caused in the course of international trade has thus been tilted in favour of the latter. If learned counsel for the revenue were right, despite the fact that such differential cannot be collected from the importer under Rule 21(1) for the period that the provisional duty notification is in force, during the interregnum period, the full amount of final duty is liable to be recovered from the importer. This would turn Rule 21(1) on its head and result in an absurdity. A simple example will suffice. If provisional duty already imposed and collected is Rs. 50/- per metric ton (PMT), and final duty imposed say one year later with retroactive effect from the date of imposition of the provisional duty is Rs. 100/- PMT, the difference of Rs. 50/- PMT cannot be recovered from the importer for the period that the provisional notification*

is in force. Therefore, for the first 6 months in the aforesaid example, the importer is liable to pay nil duty. However, for the next 6 months, that is in the interregnum period between the expiry of the provisional duty and the date of imposition of the final duty, the importer becomes liable to pay Rs. 100/- PMT. The said example demonstrates how the arguments of the revenue would lead to an absurdity such as this.

45. *Rule 21(1) also answers the contention of the Revenue that the object of anti-dumping laws would be defeated if it were found that dumping and material injury having been found, yet no anti-dumping duty can be levied. By application of this Rule, it is clear that for the period that the provisional duty notification is in force, the difference of Rs. 50/-, in the example just given, cannot be collected from the importer despite Rs. 50/- having been imposed because of dumping and material injury to the domestic industry. Therefore, it is clear that there already exists, within the scheme of the anti-dumping law, a situation in which there is dumping and material injury to the domestic industry, for which an anti-dumping duty is levied, but which cannot be collected. There is, therefore, a balance struck between material injury to the domestic industry and retrospective levy of duty in favour of the latter.*

10. Following the ratio of the aforesaid judgment of the Hon'ble Supreme Court, we do not find merit in the impugned orders. Consequently, the same are set aside and the appeals are allowed with consequential relief, if any, as per law.

(Operative part of this Order was pronounced in Open Court
on conclusion of the hearing.)

(D.M. MISRA)
MEMBER (JUDICIAL)

(R BHAGYA DEVI)
MEMBER (TECHNICAL)

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