CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
BANGALORE

REGIONAL BENCH - COURT NO. 1

Customs Appeal No. 20480 of 2017

(Arising out of Order-in-Original No. BLR-CUSTM-AIR-02/16-17 dated 02.11.2016 passed by the Commissioner of Customs, Bangalore.)

M/s. Kennametal India Ltd.
8/9th Mile, Tumkur Road,
Bangalore – 560 073.

Appellant(s)

VERSUS

Commissioner of Customs,
Airport & Air Cargo Complex,
AI Sats Cargo Terminal,
Kempegowda International Airport,
Bangalore – 560 300.

Respondent(s)

APPEARANCE:

Mr. Syed Peeran, Advocate with
Ms. Shradha Pandey, Advocate for the Appellant.

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. 21238 /2024

DATE OF HEARING: 07.11.2024

DATE OF DECISION: 07.11.2024

PER: R. BHAGYA DEVI

This appeal is filed by the appellant M/s. Kennametal India Ltd., against Order-in-Original No. BLR-CUSTM-AIR-02/16-17 dated 02.11.2016 passed by the Principal Commissioner of Customs, Bangalore.

2. During the course of Onsite Post Clearance (OSPC) audit, it was noticed that the appellant had not included cost of transportation at the time of import and accordingly, the Commissioner in the impugned order confirmed duty demand of Rs.1,11,23,401/- and an interest amount of Rs.47,84,614/-, thus total amount of Rs.1,59,08,015/- which was paid and appropriated in the order. Aggrieved by this order, the appellant is in appeal before us.

3. The Learned Counsel on behalf of the appellant submitted that the appellant is engaged in the manufacture and trade of hard metal products, including tools, ungrounded rods etc. During the relevant period, the appellant had imported various products for the purpose of manufacturing and trading. They had filed various Bills of Entry for the period August 2009 to October 2013 declaring the freight amount in the Bills of Entry by adopting air freight as per the Airway Bill and have not included the value of fuel charge and security surcharge under *bona fide* belief that such levies are statutory in nature and not liable for customs duty.

3.1 Further, it is submitted that 'Onsite Post Clearance Audit' was conducted and the audit report dated 12.09.2012 for the period April 2011 to March 2012 no objections were raised. The second audit was conducted on 04.12.2013 for the period April 2012 to March 2013 and held that the fuel and security surcharge needs to be added to the cost of transportation to determine the assessable value of the imported goods. Consequently, the appellant paid the differential duty along with interest amounting to Rs.1,59,08,015/- under protest for the period August 2009 to October 2013. The show-cause notice dated 23.12.2015 was issued by invoking extended period of limitation appropriating the above amount paid by the appellant, which resulted in impugned order confirming the same.

3.2 The Learned Counsel also submitted that the appellants were accredited with Accredited Client Program (ACP) status and were subject to regular pre and post clearance assessment on random selection basis during the relevant period. Though, the Commissioner in the impugned order had stated that there is no suppression of facts but has confirmed the demand. The entire demand is beyond the normal period of limitation of one year, hence, the impugned order cannot be sustained. Reliance is placed on **M/s. Team HR Services Vs. Union of India 2020 (38) GSTL 457 (Del.)** stating that appropriation of an amount of a non-existing demand is erroneous. Further, with regard to limitation placed reliance on the following decisions submitting that the demand cannot be confirmed beyond the period of limitation.

- **M/s. Medical Engineers (I) Ltd. Vs. CC (Import), Mumbai: 2015 (329) ELT 567 (Tri.-Mum.)**
- **M/s. Bishwanath & Co. Vs. UOI: 2010 (257) ELT 30 (Cal.)**
- **Commissioner of Customs Vs. H. Kumar Gems Inc.: 2015 (323) ELT 142 (Guj.)**
- **M/s. Indian Acrylics Ltd. and others Vs. Commissioner of Customs, Kandla: 2015 (325) ELT 753 (Tri.-Ahmd.)**

4. The Learned Authorized Representative on behalf of the revenue reiterated the findings of the Principal Commissioner in the impugned order.

5. Heard both sides. The period of dispute is from August 2009 to October 2013 and the show-cause notice was issued on 23.12.2015 invoking the extended period of limitation. The Principal Commissioner in the impugned order at Para 14.2

observed that *"The contentions of the noticee are acceptable that they have not suppressed any material facts from the department. It only appears that the departmental officers have noticed the discrepancy for the first time during the second OSPCA. The noticee has been following the practice for long and I do not see any efforts of the noticee to suppress the facts in as much as all the documents were presented to the departmental officers. Hence, I accept the contention that the short-levy is not due to suppression of facts or willful mis-statement or collusion. Accordingly, the short-levy falls under sub-section (1) of Section 28 of Customs Act, 1962 and not under sub-section (4) of Section 28 ibid"*. Accordingly, the show-cause notice is held to be redundant.

5.1 The Commissioner having held that there is no suppression and the show-cause notice being held as redundant cannot confirm the demand and appropriate the demand which is time barred. In the case of **Commissioner of Customs Vs. H. Kumar Gems Inc.** relied upon by the appellant, the Hon'ble High Court observed as follows:

> ***"10.*** *Insofar as invocation of the provision of Section 28 of the Act is concerned, the Tribunal has found, as a matter of fact, that there is no suppression or wilful misstatement on part of the importer. That the licences had been procured bonafidely in the ordinary course of its business and that the importer had no knowledge that the licences were cancelled. Thus, it is apparent that the ingredients for invoking the extended period of limitation under the proviso to Section 28(1) of the Act have not been satisfied. In the circumstances, the Tribunal has rightly held that the demand is barred by limitation."*

6. Moreover, the show-cause notice was issued invoking suppression under Section 28 (4) of the Customs Act, 1962 while the Commissioner in the impugned order confirms and appropriates the demand under Section 28 (1) and (2) of the

Customs Act, 1962 which is clearly beyond the scope of the show-cause notice. It is a settled law that the authorities cannot travel beyond the scope of the show-cause notice as observed by the Apex Court in the case of **Caprihans India Ltd. Vs. CCE 2015 (325) ELT 632 SC.** In view of the above and as rightly claimed by the appellant, in view of the decisions relied upon by them and the fact that the Principal Commissioner in the impugned order having clearly held that there is no suppression, the demand cannot be sustained and hence, the impugned order is set aside.

Appeal is allowed.

(Operative portion of the order pronounced in Open Court
on conclusion of hearing.)

(D.M. MISRA)
MEMBER (JUDICIAL)

(R. BHAGYA DEVI)
MEMBER (TECHNICAL)

rv