CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
BANGALORE

REGIONAL BENCH - COURT NO. 1

Customs Appeal No. 21903 of 2018

(Arising out of Order-in-Original No. COC-Customs-000-COM-32/18-19 dated 16.10.2018 passed by the Commissioner of Customs, Cochin)

M/s. National Trades and Agencies
NTA Chambers, Hina House,
Willingdon Island,
Cochin-682 003.

Appellant(s)

VERSUS

The Commissioner of Customs
Custom House, Willingdon Island
Cochin-682 009.

Respondent(s)

APPEARANCE:

Shri Pradyumna G.H., Advocate for the Appellant.
Shri Maneesh Akhoury, Assistant Commissioner (AR) for the Revenue.

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

Final Order No. 20129 / 2025

DATE OF HEARING: 15.01.2025
DATE OF DECISION: 15.01.2025

PER : D.M. MISRA

This appeal is filed against of Order-in-Original No. COC-Customs-000-COM-32/18-19 dated 16.10.2018 passed by the Commissioner of Customs, Cochin.

2. Briefly stated the facts of the case are that on the basis of intelligence that the importer M/s. FCI Oen Connectors Ltd

evaded payment of applicable customs duty by availing irregular exemption from payment of Basic Customs Duty (BCD) in respect of goods viz., Liquid Crystal Polymers (LCP) imported during the period 2013 – 2017, investigation was initiated by DRI, Cochin. On completion of investigation, a show-cause notice was issued on 14.02.2018 to the said importer proposing to deny the benefit of Notification No.25/1999-Cus. dated 28.02.1999 by classifying the goods under Customs Tariff Heading 3907 9990 and recovery of the differential duty along with interest and also, proposed to impose penalty on the appellant under various provisions of Customs Act, 1962. During the course of investigation itself the importer had paid the differential duty along with interest. The learned Commissioner on adjudication, taking recourse to the provisions of Section 28(6) of the Customs Act, 1962, concluded the proceedings under Section 28(6)(1) of the Customs Act, 1962. Further, he has imposed penalty under Section 112(a) of the Customs Act, 1962 and Section 114AA of the Customs Act, 1962. The present appeal is filed by the appellant, the Customs Broker, against imposition of penalty.

3. At the outset, the leaned counsel for the appellant submitted that once the proceedings against the importer deemed to have been concluded in terms of Section 28(6)(1) of the Customs Act, 1962, the imposition of penalties on the appellant, a Customs Broker under Section 112(a) and 114AA of the Act is unsustainable and liable to be set aside. He has submitted that as per subsection (5) of Section 28 of the Act, if a notice has been served under subsection (4) of the Act, such person may pay the duty in full or part, as may be accepted and the interest payable thereon under Section 28AA and the penalty equal to 15% of the duty specified in the notice or the duty so accepted by that person, within 30 days of receipt of the notice and inform the proper officer by such appellant in writing.

3.1 Further, he has submitted that subsection (6) of Section 28 of the Act, it is laid down that where the importer has paid duty with interest and penalty under subsection (5), the proper officer shall determine the amount of duty or interest and on determination, if he is of the opinion that duty with interest and penalty has been paid in full, then, the proceedings in respect of such person or other persons to whom the notice has been served under subsection (1) or subsection (4) shall be deemed to be concluded. In the present case, the appellant was issued notice proposing penalty along with importer M/s. FCI Oen Connectors Ltd. alleging violation of various provisions of Customs Act, which attracts penal provisions. Since the importer had paid the entire duty and interest thereon as well as penalty equivalent to 15% of the duty well within 30 days from the issuance of show-cause notice, considering the case is covered under Section 28(5) of the Customs Act, 1962, the learned Commissioner taking recourse to subsection (6) of Section 28 of the Act granted relief to the importer by concluding the proceedings against him. He has submitted that once the proceedings against the importer has been concluded under Section 28(6), the present appellant being a co-noticee is also entitled to relief under Section 28(6) of the Customs Act, 1962. In support, he referred to the judgment of this Tribunal in the case of **Orbit Jewellers vs. CC, Air Cargo (Exports), New Delhi: 2016 (338) ELT 620 (Tri.-Del.)**. Further, he has referred to the Circular issued by the Board, wherein it has clarified the applicability of the benefit of the said provisions is also applicable to the co-noticees. It is his contention that the Commissioner has not taken note of the provisions of the Act, and imposed penalties on the appellant.

3.2 Further, the learned advocate for the appellant has submitted that since the issue relates to classification of goods and wrong availment of exemption Notification No.25/1999-Cus. dated 28.02.1999 and the importer FCI Oen Connectors Ltd has been in the business for last 22 years and therefore, wrong classification of the goods and consequent claiming inadmissible exemption by them cannot attract penalty on the appellant who is a customs broker. Further, he has submitted that in a similar set of facts where the appellant was a customs broker, penalty has been set aside by this Tribunal vide Final Order No.20453/2019 dated 03.06.2019.

4. Learned Authorised Representative (AR) for the Revenue reiterated the findings of the learned Commissioner. He has vehemently argued that it was never placed before the learned Commissioner by the appellant either through the reply or during the personal hearing that their case would squarely fall under the provision of subsection (6) of Section 28 of the Customs Act, 1962. Thus, they cannot raise the said plea for the first time before this Tribunal. Further, he has submitted that the wordings of the Section 28(6) of Customs Act, 1962 is clear and applicable only to the person who has been saddled with the duty liability or penalty. It is his contention that the appellants are penalised separately for their acts and omissions committed by them.

5. Heard both sides and perused the records.

6. The short question involved in the present appeal is whether the appellant, a customs broker, is liable to penalty under Section 112(a) and 114AA of the Customs Act, 1962 for alleged misclassification of the imported goods by the importer FCI Oen Connectors Ltd. In the impugned order, the learned Commissioner taking note of the fact that the importer had paid the entire amount of differential duty along with interest and 15% of penalty, concluded the proceedings under Section 28(6) of the Customs Act, 1962. Further, he has not considered the

case of the appellant, a co-noticee, in concluding the proceedings against him, but proceeded to impose penalty under Section 112(a) and 114AA of Customs Act, 1962. The grievance of the appellant is that their case also squarely falls under subsection (6) of Section 28 of the Customs Act, 1962. For better appreciation, the said provision is reproduced as below:

> "(6) Where the importer or the exporter or the agent or the employee of the importer or the exporter, as the case may be, has paid duty with interest and penalty under sub-section (5), the proper officer shall determine the amount of duty or interest and on determination, if the proper officer is of the opinion—
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> (i) that the duty with interest and penalty has been paid in full, then, the proceedings in respect of such person or other persons to whom the notice is served under sub-section (1) or subsection (4), shall, without prejudice to the provisions of sections 135, 135A and 140 be deemed to be conclusive as to the matters stated therein; or
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> (ii) that the duty with interest and penalty that has been paid falls short of the amount actually payable, then the proper officer shall proceed to issue the notice as provided for in clause (a) of sub-section (1) in respect of such amount which falls short of the amount actually payable in the manner specified under that sub-section and the period of [4][two year] [old][one year] shall be computed from the date of receipt of information under sub-section (5)."

7. We find that the Board has issued a Circular dated 15.03.2016 about applicability of Section 28(6) to co-noticees who has been issued notice under Section (1) or subsection (4) of Section 28 of the Customs Act, 1962. We find that neither the appellant raised the issue before the learned Commissioner nor the learned Commissioner addressed the applicability of the said Circular to the case of the appellant as co-noticee. The learned advocate for the appellant fairly submits that the said argument has not been advanced before the learned Commissioner.

Therefore, in the interest of justice, it is prudent to remand the matter to the adjudicating authority to consider whether the provisions of Section 28(6) of the Customs Act, 1962 would be applicable to the appellant as a co-noticee when the proceedings against the importer M/s. FCI Oen Connectors Ltd. directed to be concluded under the said provisions. While passing the order, the learned Commissioner is directed to take note of the Circular No.11/2016-Cus. dated 15.03.2016. In the result, penalty imposed on the appellant is set aside and the appeal is allowed by way of remand to the adjudicating authority to re-examine the issue afresh in the light of the above observation. Needless to mention a reasonable opportunity be allowed to the appellant. Appeal is allowed by way of remand.

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

(D.M. MISRA)
MEMBER (JUDICIAL)

(R. BHAGYA DEVI)
MEMBER (TECHNICAL)

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