CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
SOUTH ZONAL BENCH
BANGALORE

Appeal(s) Involved:

C/549/2009-DB

[Arising out of Order-in-Original No. 77/2009
dated 16/07/2009 passed by the Commissioner of Customs,
Cochin]

M/s. INDIAN OIL CORPORATION LTD. AMBALAMUGAL PO COCHIN-682 309.	Appellant(s)

Versus

The Commissioner of Customs CUSTOM HOUSE, WILLINGDON ISLAND COCHIN – 682 009. KERALA	Respondent(s)

Appearance:

Mr. Muthu Venkataraman, Advocate VMJ ASSOCIATES #79, 17TH CROSS, MALLESWARAM, BANGALORE – 560 003. KARNATAKA	For the Appellant
Mrs. D. S. Sangeetha, Jt. Commissioner (AR)	For the Respondent

Date of Hearing: 21/08/2019
Date of Decision:23/08/2019

CORAM:

HON'BLE SHRI S.S GARG, JUDICIAL MEMBER
HON'BLE SHRI P. V. SUBBA RAO, TECHNICAL MEMBER

Final Order No.20667/2019

Per : P. V. SUBBA RAO

This appeal is filed against the Order-in-Original No. S66/15/07 CCU Cus. dated 06.07.2009. The facts of the case in brief are that the appellant is a Public Sector Undertaking engaged in import of petroleum products through the Port of Cochin. These come in large super tankers which cannot berth in the Port. Therefore, the oil is transferred to smaller vessels called the daughter vessels and transitted to the Port. The appellants filed 28 Bills of Entry between 01.03.194 to 31.03.1997 in respect of consignments received in daughter vessels. It is the allegation in the SCN that they had short paid the duty amounting to Rs.1,36,78,064/- by not including the freight incurred in respect of daughter vessels. The appellants paid an amount of Rs.98,79,024/- during investigation itself. A SCN was issued along with a corrigendum demanding duty reckoning the amount which the appellant received from the Oil Co-ordination Committee towards freight as cost of freight of the daughter vessel from the mother vessel to the shore. An Order-in-Original No. 09/2001 was passed by the Commissioner of Customs confirming a duty demand of Rs.3,48,52,085/- together with applicable interest and imposing penalty under Section equal to the amount of the duty.

2. On appeal, this Bench vide Final Order No. 692/07 dated 07.06.2007 remanded the matter to the Commissioner directing him to pass a speaking order after finalization of provisional assessments. The specific direction by the Bench in this Final Order as follows:

1. On a perusal of the impugned order, however, we find that the plea of assessee that the assessments were provisional was not accepted by the Commissioner. It would appear that the assessments were treated as final and, accordingly, the demand of duty confirmed against the assessee. On the facts of this case and in the light of the Board's Circular ibid, we must hold that the assessments are provisional and the same requires to be finalized. Ld. Commissioner shall finalize the assessments in terms of the Board's Circular dated 12.1.2006 after hearing the assessee on what should be the amounts of 'daughter vessel freight' to be included in the assessable value of the subject goods. The aforesaid worksheet produced before us by Ld. Counsel today may also be considered by the Commissioner. Accordingly, we set aside the impugned order and remand the case to the Ld. Commissioner for passing a speaking order after finalization of the provisional assessments in the aforesaid manner.

2. If the demand of duty raised in the SCN and the corrigendum thereto was premature for want of finalization of provisional assessments, the proposal for imposing penalty was also likewise. In this context, we must also consider the submission of the appellants that they had no intent to evade payment of duty on the subject goods. During the course of investigations, they had themselves paid duty on 'daughter vessel freight' on a notional basis. What remained to be done was correct determination of the freight to be included in the assessable value. There was no intent to evade payment of duty. Ld. SDR has pointed out that Section 55 of the Customs Act was clear enough to enable the assessee to correctly determine the freight to be included in the assessable value of the subject goods. Ld. Counsel has countered this submission by pointing out that the includability of 'daughter vessel freight' in the assessable value of the goods was not free from doubt even in the departmental circles as evidenced by the Board's circular. We have found a point in this submission of counsel inasmuch as the Board's decision was taken after deliberations in a conference of Chief Commissioners of Customs. In the circumstances, it cannot be said that the legal position was clear enough to the assessee so as to compel them to include 'daughter vessel freight' in the assessable value of the goods. It may not be correct to invoke Section 114A of the Customs Act against them in these circumstances. Ld. Commissioner shall bear this in mind while acting upon this remand order.

Consequent upon the above directions, the impugned Order-in-Original No. 77/2009 dated 30.06.2009 was passed by the Commissioner upholding the demand as originally made in Order-in-Original 09/2001 along with interest and only reducing penalty to some extent.

3. Aggrieved by this impugned order, the present appeal is filed on the following grounds:

(i) The impugned order has gone beyond the scope of the remand by the CESTAT in as much as the direction was that no penalty can be imposed upon the appellant under Section 114A of the Customs Act under the circumstances. However, the Commissioner imposed a penalty in the impugned order under this very Section.

(ii) The legal position was unclear during the period and hence payment was not made by the appellant during the relevant period. This was a bona fide belief that duty cannot be payable. This ambiguity is very clear inasmuch as the CBEC themselves debated as to how to deal with the issue of freight of daughter vessels from the mother vessels to the Port and appointed a Committee to go into the matter. Thereafter, Circular No. 04/2006 dated 12.01.2006 was issued, the relevant portion of which is as follows:

""4. The above issue was discussed in the Chief Commissioner's Conference held on 1st October, 2005 at Mumbai. The conference agreed that the recommendations of the Shri R.K. Chakraborti Committee should be accepted and that pending cases of assessments should be finalized as per the two alternative methods of computation of cost of transportation for daughter/time chartered vessel. The first option which is based on the World Scale rates duly adjusted on the basis of AFRA rates should be followed wherever the World Scale rates are available for the transportation between high seas and respective minor ports in India. In cases where the World Scale Freight Rate Index is not available, the cost element required for arriving at the freight rate may be based on the benchmarks used by the World Scale Association. In both cases, Wharfage and transshipment charges should be added to arrive at the total freight. It was also made clear that the data in respect of these calculations should be submitted by the respective importers to the satisfaction of the assessing officer. Accepting services by the Cost Accountant's may also be considered by the respective Commissionrates depending upon the extent of complexity of the cases.

5. The matter has been considered by the Board and it has been decided that all pending cases involving lighterage charges would be finalized on the basis of World Scale Rates and AFRA wherever available. In case of minor ports where WSO rates along with AFRA are not available, the concerned Commissioners should direct the shipping companies to get the WSO rates fixed."

(iii) The appellant being a Public Sector Undertaking, no intention to evade Customs Duty and therefore no penalty should have been imposed upon them.

(iv) In respect of 16 Bills of Entry that indicating in the impugned order, the assessment was already finalized and the same should have been re-opened.

4. Learned Counsel for the appellant takes us through the facts of the case and explains that super tankers of oil cannot reach most Ports in India due to lack of required draft in the sea. Therefore, they are invariably stopped on high seas from where the oil is transferred through daughter vessels. The freight charged by the daughter vessels for transporting the crude oil is a complex mechanism and it cannot be easily identified. Therefore, CBEC themselves have formed a Committee headed by Sh. R.K. Chakraborti, the then Member (L&J) to examine the matter who gave their report. This report was further discussed in the conference of Chief Commissioners and thereafter the Board took a final call and issued directions as above. These directions state that wherever the World Scale assessment rates are available, the same should be followed for calculating the amount of duty payable. In cases where they are not available, an alternative mechanism based on benchmarks has been indicated for determining the freight of daughter vessels. It is further made clear that the Cost Accountant's services may be considered by the Commissionerates depending upon the complexity of the cases. He would urge that in their case, they have clearly submitted a certificate from the Chartered Accountant giving consignment wise details of the freight as per the standard rates as indicated in Pages 23 & 24 of the paper book. As per this calculation, they were liable to pay Excise Duty of only Rs.58,11,335/-. He would submit that this statement was rejected by the Learned Commissioner in the impugned order because there was a typographical error in the annexures by mentioning the wrong PD Bonds number at Serial No. 2 of the table. Merely because the PD Bonds numbers is wrongly mentioned in one entry, the entire table was rejected by the Learned Commissioner. He also did not follow the directions of the CBEC Circular No. 04/2006 and went on his own assessment based on the amounts which the appellant charged from the Oil Pool Committee towards freight. He would urge that the Learned

Commissioner, as an officer of the CBEC was bound by the CBEC's Circular which mandates that the WSO rates be reckoned. He fairly submits that they there was a typographical error in the table submitted by them by mentioning wrong PD Bond number but that should not vitiate the entire report. He would submit that if the matter is remanded with specific directions regarding the method to be adopted for calculation of differential duty, he would satisfy the Commissioner with proper figures. He would also pray for setting aside the penalty under Section 114A upon them.

5. Learned Departmental Representative reiterates the findings of the impugned order and asserts the figures of actual freight charged by them were available the question of WSO freight figures does not arise in this case.

6. We have considered the arguments of both sides and perused the records.

7. We find that in the Final Order No. 692/2007 dated 07.06.2007, the Bench had categorically held that Section 114A of the Customs Act 1962 does not apply in this case and no penalty can be imposed upon the appellant. We are not aware of any order of a higher judicial forum setting aside this finding of this Bench. The imposition of penalty by the Commissioner in the impugned order is a clear violation of this direction by this Bench and therefore, the same needs to be set aside. We also find that the issue of freight of daughter vessels was unclear to everyone including the CBEC themselves and it was only discussed, deliberated and clarified by the CBEC vide their Circular dated No. 04/2006 dated 12.01.2006. Under such circumstances to allege that the appellant has not paid duty correctly with an intention to evade is not correct.

8. As far as the question of inclusion of freight of the daughter vessels is concerned, the method has been prescribed by the Board and the aforesaid Circular No. 04/2006 which is binding upon the departmental officers including the Commissioner. Wherever WSO rates are available, it has been categorically held that those rates must be applied and alternative

method can be used only if these rates are not available. In the instant case, the Learned Commissioner has ignored this direction of the Board and has reckoned a different value on the ground that the appellant has recovered a higher amount towards freight. Such an order is contrary to the directions of the CBEC which are binding upon him. In view of the above, we find that the duty liability needs to be worked out directly from the WSO rates which, according to the appellant, are available for the period and any demand made on the basis of some other calculation is not sustainable. For this reason, we find that the impugned order needs to be set aside and the matter must be remanded to the original authority for the limited purpose of calculation of the differential duty payable as per the WSO rates duly attested on the basis of AFRA rates during the relevant period. The appeal is allowed by way of remand to the original authority for the limited purpose of calculation of the differential duty payable as above. The penalty imposed in the impugned order is set aside. The appeal is disposed of as herein above.

(Order was pronounced in Open Court on **23/08/2019**)

S.S GARG
JUDICIAL MEMBER

P. V. SUBBA RAO
TECHNICAL MEMBER

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