

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
BANGALORE**

REGIONAL BENCH - COURT NO. 1

Customs Appeal No. 28399 of 2013

[Arising out of Order-in-Appeal No. 385/2013 dated
10/10/2013 passed by Commissioner of Customs (Appeals),
Bangalore.]

M/s. Cisco Systems Pvt. Ltd.

Divyashree Chambers
'B' Wing, No.11, O' Shaugnessey Road,
Off Langford Road,
BANGALORE - 560 027.
KARNATAKA

Appellant(s)

VERSUS

Commissioner Customs Bangalore

AIRPORT & AIR CARGO COMPLEX
COMMISSIONERATE, MENZIES AVIATION
BOBBA BUILDING, DEVANAHALLI
BANGALORE - 560 300.
Karnataka

Respondent(s)

WITH

Customs Appeal No. 21104 of 2016

[Arising out of Order-in-Appeal No. 256-257/2016 dated
31.03.2016 passed by Commissioner of Customs (Appeals),
Bangalore.]

M/s. Cisco Systems Pvt. Ltd.

Brigade South Parade
No.10, M. G. Road,
BANGALORE - 560 027.
KARNATAKA

Appellant(s)

VERSUS

Commissioner Customs Bangalore

AIRPORT & AIR CARGO COMPLEX
COMMISSIONERATE, MENZIES AVIATION
BOBBA BUILDING, DEVANAHALLI
BANGALORE - 560 300.
Karnataka

Respondent(s)

WITH

Customs Appeal No. 21105 of 2016

[Arising out of Order-in-Appeal No. 258-259/2016 dated 31.03.2016 passed by Commissioner of Customs (Appeals), Bangalore.]

M/s. Cisco Systems Pvt. Ltd.

Brigade South Parade
No.10, M. G. Road,
BANGALORE - 560 027.
KARNATAKA

Appellant(s)

VERSUS

Commissioner Customs Bangalore

AIRPORT & AIR CARGO COMPLEX
COMMISSIONERATE, MENZIES AVIATION
BOBBA BUILDING, DEVANAHALLI
BANGALORE - 560 300.
Karnataka

Respondent(s)

WITH

Customs Appeal No. 20295 of 2018

[Arising out of Order-in-Appeal No. 1002/2017 dated 13.12.2017 passed by Commissioner of Customs (Appeals), Bangalore.]

M/s. Cisco Systems (India) Pvt. Ltd.

Brigade South Parade
No.10, M. G. Road,
BANGALORE - 560 027.
KARNATAKA

Appellant(s)

VERSUS

**Commissioner Customs
Bangalore**

BMTC Building,
Above BMTC Bus Stand, Domlur,
Bangalore - 560 071.
Karnataka

Respondent(s)

WITH

Customs Appeal No. 21031 of 2018

[Arising out of Order-in-Appeal No. 171/2018 dated 27.03.2018 passed by Commissioner of Customs (Appeals), Bangalore.]

M/s. Cisco Systems (India) Pvt. Ltd.

Brigade South Parade
No.10, M. G. Road,
BANGALORE - 560 027.
KARNATAKA

Appellant(s)

VERSUS

Commissioner Customs (Refunds)

AIRPORT & AIR CARGO COMPLEX
COMMISSIONERATE, MENZIES AVIATION
BOBBA BUILDING, DEVANAHALLI
BANGALORE - 560 300.
Karnataka

Respondent(s)

AND

Customs Appeal No. 27341 of 2013

[Arising out of Order-in-Appeal No. 246/2013 dated 30.04.2013 passed by Commissioner of Customs (Appeals), Bangalore.]

Commissioner Customs

AIRPORT & AIR CARGO COMPLEX
COMMISSIONERATE, MENZIES AVIATION
BOBBA BUILDING, DEVANAHALLI
BANGALORE - 560 300.
Karnataka

Appellant(s)

VERSUS

M/s. Cisco Systems Pvt. Ltd.

Divyashree Chambers
'B' Wing, No.11, O' Shaugnessey Road,
Off Langford Road,
BANGALORE - 560 027.
KARNATAKA

Respondent(s)

Appearance:

Ms. Neetu James, Advocate (LAKSHMI KUMARAN & SRIDHARAN) for the Appellant.
Shri Rama Holla, Superintendent, Authorised Representative for the Respondent

CORAM:

HON'BLE SHRI P. ANJANI KUMAR, TECHNICAL MEMBER
HON'BLE SHRI P DINESHA, JUDICIAL MEMBER

Final Order No. 20005 to 20010 / 2022

Date of Hearing: 05/01/2022

Date of Decision: 07/01/2022

Per: P. ANJANI KUMAR

The appellants, M/s. Cisco Systems Pvt. Ltd., are engaged in import of goods from their related entities and sale, thereof. The imports effected by the appellants were subjected to provisional assessment and were referred to Special Valuation Branch (SVB). The SVB vide order 23.4.2009 held that the appellant and Cisco Systems Management, Netherlands are related in terms of Rule 2(2) of Customs Valuation (Determination of Prices of the Imported Goods) Rules, 1988. It was ordered that the imports for various years 2000 to 2007 be valued at the percentage of the General Price List (GPL) as indicated in the order. On a request made by the appellant, consequent to SVB order, the Assistant Commissioner of Customs (Air Cargo Complex), Bangalore has finalised the assessment as per the SVB order. It was directed, in respect of appeal Nos. C/21104/2016, C/21105/2016 and C/28399/2013 that the appellants pay differential duty in respect of certain Bills of Entry along with interest under Section 18(3) of the Customs Act, 1962 and that duty wherever paid in excess was held to be refundable. However, on the issue of consequential refund, it was held that in terms of Para 17 of the SVB order where the declared invoice price is higher than the average selling price to unrelated buyers, the declared invoice price must be adopted. In respect of appeal No. C/20295/2018, the original authority and appellate authority have rejected the consequential refund arising out of the order impugned in appeal C/21105/2016 on the grounds of unjust enrichment. In respect of appeal No. C/21031/2018, the original authority appropriated the demand of interest in respect of the refund consequential

to order impugned in appeal No. C/28399/2013. On an appeal preferred by the appellants, Commissioner (A) has confirmed the findings of the Order-in-Original. Revenue has also filed an appeal No. C/27341/2013 on the ground that interest was not charged or confirmed in Order-in-Appeal No.246/2013 dated 30.04.2013. As all these appeals are on the same issue and they are taken up together for consideration.

2. Learned counsel for the appellant submits that interest is not liable to be paid on finalisation of Bills of Entry as the provisional assessment took place prior to the insertion of sub-clause (3) to Section 18 of the Customs Act, 1962 with effect from 13.7.2006. Learned counsel submits that the mere fact that assessments were finalised after 13.7.2006 does not result in interest liability as no provision to charge the interest existed at the time of provisional assessment.

2.1 Learned counsel relies upon the following case laws:

- (i) *Commissioner of Customs, Tuticorin vs. CESTAT, Chennai: 2021 (376) ELT 65 (Mad.)*
- (ii) *Commissioner of Customs (Preventive) vs. Goyal Traders: 2014 (302) ELT 529*
- (iii) *Beam Global Spirits & Wine (India) P. Ltd. vs. CC, New Delhi: 2018 (360) ELT 142 (Tri. - Del.)*
- (iv) *Bhagyanagar Metals Ltd. vs. Commissioner of Central Excise, Hyderabad-II: 2016 (333) ELT 395 (Tri. - LB)*
- (v) *M/s. Escorts Heart Institutes and Research Centre vs. CC (Import & General), New Delhi: 2016-TIOL-761-CESTAT-DEL.*
- (vi) *Commissioner of Customs vs. Hindalco Industries Ltd.: 2010 (262) ELT 106 (Guj.)*
- (vii) *Commissioner of Customs vs. Hindalco Industries Ltd.: 2008 (231) ELT 36 (Guj.)*
- (viii) *Jaswal Neco Ltd. vs. Commissioner of Customs, Visakhapatnam: 2015 (322) ELT 561 (SC)*

- (ix) *Reliance Industries Ltd. vs. Union of India: 2015 (326) ELT 664 (Guj.)*
- (x) *CC (Appeal), Bangalore vs. M/s. Alcatel Luccent India Pvt. Ltd. decided by Hon'ble High Court of Karnataka on 30.09.2021 in CSTA No.7/2021.*
- (xi) *Mangalore Refinery & Petrochemicals Ltd. vs. CC, Mangalore: 2015 (323) ELT 484 (Kar.)*

2.2 Learned counsel for the appellant submits that appellants are eligible for refund of excess duty paid. The impugned order wrongly holds that SVB order in Para 17 states that where the declared invoice price is higher than the average selling price to unrelated buyers, the declared invoice price must be adopted; Learned counsel submits that the finalisation order followed the loading as ordered in the operative portion of the SVB order. He submits that during the impugned period i.e., 2001-2003, the appellant has imported spare parts at 35% of GPL whereas the unrelated buyers imported at 50% of GPL in 2001 and 48% of GPL in 2002; therefore, the declared price does not exceed the annual average selling price to the unrelated buyers; the observation in para 17 of the SVB order is not relevant to the years 2003 and before.

2.3 Learned counsel for the appellant further submits that the appropriation of excess duty paid towards the interest in terms of Section 18(3) in respect of appeal No.21031/2018, despite the order of stay granted by CESTAT vide Misc. Order dated 7.2.2014, is not correct. Learned counsel also submits that it is incorrect to state, in respect of appeal No. C/20295/2018, that the appellant has not proven that the incidence of duty has not been passed on and therefore, the claim is hit by unjust enrichment; in respect of provisional assessments undertaken before 2006, the clause of unjust enrichment is not applicable as the amendment to Section 18 of the Act was with effect from 13.7.2006. He relies upon the following case laws:

- (i) *Commissioner of Customs vs. Hindalco Industries Ltd.: 2008 (231) ELT 36 (Guj.);*
- (ii) *Mangalore Refinery & Petrochemicals Ltd. vs. CC, Mangalore: 2015 (323) ELT 484 (Kar.);*
- (iii) *CCE & ST, Vadodara-II vs. Panasonic Battery India Co. Ltd.: 2014 (303) ELT 231 (Tri.-LB);*
- (iv) *CC (Appeals), Bangalore vs. M/s. Alcatel Lucent India Pvt. Ltd. decided by Hon'ble High Court of Karnataka on 30.09.2021 in CSTA No.7/2021*

2.4 Learned counsel submits that the same arguments apply in respect of departmental appeal No. C/27341/2013.

3. Learned AR appearing for the Revenue reiterates the grounds of appeal in respect of appeal No. C/27341/2013 and the Order-in-Original and Order-in-Appeal in respect of other appeals.

4. Heard both sides and perused the records of the case.

5. We find that as far as demand of interest is concerned, learned Commissioner vide Order-in-Appeal finds that "*the appellant relied upon the decision of the Tribunal (Chennai Bench) in the case of M/s. Sterlite Industries Pvt. Ltd., against which an appeal is pending before the Hon'ble Madras High Court. The decision by Tribunal has not attained finality and hence, does not have any binding nature of constructive judicata*". However, we find that Hon'ble Madras High Court decided the issue finally in the case of **CC, Tuticorin vs. Sterlite Industries (India) Ltd.: 2021 (376) ELT 65 (Mad.)** holding that:-

"4. In view of the aforesaid and having heard the Learned Counsel for the parties, we are satisfied that prior to amendment of law, by insertion of Section 18(3) in the Customs Act, the Revenue could not demand any interest on the differential duty assessed upon final assessment where the goods have been cleared on provisional assessment under Section 18(1) of the Act. The retrospective levy is not intended and the amendment in law is a substantive provision for making a provision for levy of interest in the present case. Therefore, for a period prior to 13-7-2006, such levy of

interest cannot be imposed on the Assessee. Therefore, being in respectful agreement with the view of the Gujarat High Court, we do not find any merit in the present appeals filed by the Revenue and the order passed by the Learned Tribunal is correct.”

5.1 We also find that Hon’ble Gujarat High Court in the case of **Goyal Traders: 2014 (302) ELT 529 (Guj.)** have followed the above decision and have observed as follows:

“17. In the present case, we find that prior to introduction of sub-section (3) of Section 18 of the Act in the present form, there was no liability to pay interest on difference between finally assessed duty and provisionally assessed duty upon payment of which the assessee may have cleared the goods. It was only with effect from 13-7-2006 that such charging provision was introduced in the statute. Upon introduction therefor such provision created interest liability for the first time w.e.f. 13-7-2006. In absence of any indication in the statute itself either specifically or by necessary implication giving retrospective effect to such a statutory provision, we are of the opinion that the same cannot be applied to cases of provisional assessment which took place prior to the said date. Any such application would in our view amount to retrospective operation of the law.”

5.2 On going through the above, we do not entertain any doubt whatsoever on the non-applicability of interest for the provisional assessments undertaken before the amendment in Section 18 in 2006. Therefore, to this extent, the impugned orders do not survive and are liable to be set aside. Moreover, we find that the approach of the learned Commissioner (Appeals) vide the above cited order is in violation of the principle of judicial discipline. As no stay was granted as on that date against the order of the Tribunal, the learned Commissioner (Appeals) was bound by the decision of the Tribunal.

5.3 Coming to the issue of applicability of bar of unjust enrichment in respect of provisional assessments before 2006, we find that Karnataka High Court in the **Mangalore Refinery & Petrochemicals Ltd.: 2015 (323) ELT 484 (Kar.)** have set the matter to rest holding that bar of unjust enrichment is not applicable to the cases of provisional assessments before the amendment in 2006. The Hon’ble High Court held that:

“10. Section 27 of the Act provides for claiming of refund of duty. It relates to a claim for refund of duty or interest paid by the assessee or borne by him in a case not falling under the provisional assessment. Sub-section (2) of Section 27 of the Act

provides that any excess duty so paid after such determination shall be credited to the Fund. The proviso may be in exception instead of crediting to the Fund, the said amount is payable to the assessee, if the said amount does not fall within any of the categories mentioned in (a) to (f) of the said proviso. One such instance where the assessee was not entitled to refund was where he had already passed on the burden of duty on the customer. That is, if it is refunded to him, it would be a case of unjust enrichment. Such a provision was conspicuously missing in Section 18 of the Act. It is by way of amendment which came into effect from 13-7-2006 the said provisions contained in sub-section (2) of Section 27 of the Act was added to Section 18 by way of sub-section (5). If for a claim under Section 18 of the Act, if an assessee has to put forth a claim under Section 27 of the Act, there was no necessity for the parliament to introduce sub-section (2) of Section 27 of the Act by way of sub-section (5) of Section 18 of the Act. It only demonstrates Sections 18 and 27 are merely exclusive. Section 27 applies to a case of constitutional levy, illegal levy or a levy by mistake as held by the Apex Court in the case of *Mafatlal Industries Ltd. v. Union of India* reported in 1997 (89) E.L.T. 247 (S.C.). Section 18 does not fall within any of those claims. By way of provisional assessment, the duty is paid subject to the condition that after final assessment, he would pay any additional levy and if the payment of duty is in excess of what is actually determined, then he would be entitled to the refund. To claim refund under Section 18 of the Act, the assessee was not expected to invoke Section 27 of the Act. Refund under Section 18 of the Act is independent of refund under Section 27 of the Act. It is for this reason when the Parliament wanted to prevent unjust enrichment, they amended Section 18 of the Act and introduced by way of sub-section (5) what is contained in sub-section (2) of Section 27 which includes unjust enrichment. Therefore, it follows prior to the amendment, this doctrine of unjust enrichment was not attracted to refund claim under Section 18 of the Act.”

5.4 In respect of the averments on the issue of refund of duty paid on import of spare parts before 2003, we find that the learned counsel for the appellants has categorically submitted that there was no case where they have imported at a price higher than the price at which the independent /unrelated entities have imported the spare parts. Therefore, the observations in para 17 of the SVB order are superfluous and not applicable as far as the imports in 2002 or before are concerned. Therefore, we do not find any basis in the conclusions arrived at in Order-in-Original and Order-in-Appeal. For the reasons cited above and the judgments of Hon’ble High Courts of Madras and Gujarat, no interest can be charged on finalisation of provisional assessments initiated before 2006 for the reason that there was no charging Section during the relevant period notwithstanding the fact that such assessments are finalised after the amendment.

5.5 In view of the above, we find that the impugned orders in respect of appeal Nos. C/28399/2013; C/21104/2016; C/21105/2016, C/20295/2018; and C/21031/2018 do not survive on merits and thus, are liable to be set aside. The grounds of appeal in respect of appeal No. C/27341/2013 are not worth consideration.

6. In the result, we allow the appeal Nos. C/28399/2013; C/21104/2016; C/21105/2016, C/20295/2018; and C/21031/2018 with consequential relief, if any, as per law. We dismiss the revenue appeal No. C/27341/2013.

(Order pronounced in the Open Court on **07/01/2022**.)

(P. ANJANI KUMAR)
TECHNICAL MEMBER

(P DINESHA)
JUDICIAL MEMBER

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