CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
BANGALORE

REGIONAL BENCH - COURT NO. 1

Customs Appeal No. 528 of 2009

[Arising out of Order-in-Appeal No. 61/2009 dated 30/06/2009 passed by the Commissioner of Customs, Bangalore]

Safina Towers Pvt. Ltd.
No.3, Ali Askar Road, Bangalore **Appellant(s)**

VERSUS

Commissioner of Customs, Bangalore
C.R. Building, Queens Road,
P.B. No. 5400,
Bangalore - 560 001 **Respondent(s)**

Appearance:

Shri Kiran S Javali, Senior Advocate for the Appellant

Shri P. Gopakumar, Additional Commissioner (AR) for the Respondent

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

Final Order No. 20158 / 2022

Date of Hearing: 16/02/2022
Date of Decision: 31/03/2022

Per : P. DINESHA

The appellant is a 100% EOU, is issued with a Private Bonded Warehouse Licence within the meaning of Section 58 of the Customs Act, 1962. The appellant was also permitted to import 'Telematic Infrastructural Equipments' duty free for being used for the export of software outside India in terms of Notification 153/93-Cus. dated 13/08/1993, as amended. The appellant has also executed a bond in Form-B17 dated 16/09/2005 for Rs. 50,00,000/- (Rupees Fifty Lakhs only) with Bank Guarantee. Appellant having established a facility for the use of 100% EOU's under STPI for use in the export of software, there was no dispute that the appellant was eligible for exemption from the whole of Customs duty on import of 'Telematic Infrastructural Equipments', as per Notification No. 153 *ibid.*

2. The appellant filed a Bill of Entry No. 163377 dated 14/01/2008 for having imported item 'office furniture' falling under Chapter 94033090, duty free. The value of the said goods was declared at Rs. 48,47,272/- (Rupees Forty Eight Lakhs Forty Seven Thousand Two Hundred and Seventy Two only). The examination of the goods was conducted by the Bond Officer who also confirmed that the goods were office furniture only.

3. The Revenue issued a letter dated 04/03/2008 asking the appellant to pay the applicable duty with interest as, according to the Revenue, the imports were made in violation of provisions of Notification No. 153 *ibid*. as amended to which the appellant had replied that there was no such violation as alleged by the Revenue and that the appellant was eligible for

exemption as claimed. Not satisfied, the Assistant Commissioner of Customs, Customs Division, Bangalore issued a show-cause notice dated 19/03/2008 *inter alia* proposing to demand the applicable duty apart from penalty under Section 117 *ibid.* and applicable interest.

4. The appellant filed a detailed reply justifying its claim for exemption and further claiming that the appellant was also entitled to import computer software and tools, kits and spares and hence nomenclature would not matter as long as the import is of the eligible items only. They had also contended that what was actually imported by them was computer furniture which was erroneously classified as 'Office Furniture' by the very Bond Officer himself and in any case they had imported only the capital goods which they were authorized to import and hence, there is no question of liability to any duty.

5. The adjudicating authority however not satisfied with the explanation/reply proceeded to pass the adjudication order dated 22/07/2008 wherein he has confirmed the proposals made in the show-cause notice, by demanding the Customs duty being the duty foregone on the ineligible goods imported duty free, under Section 28A *ibid.* He also demanded appropriate interest on the duty foregone, under Section 28AB *ibid*. along with a penalty under Section 178 *ibid.* for claiming exemption under

Notification 52/2003. Aggrieved by the demand, an appeal was filed by the appellant before the First Appellate Authority and the First Appellate Authority vide impugned order dated 30/06/2009 having upheld the duty demand, the present appeal has been filed before this forum.

6. Heard Shri Kiran S. Javali, Senior Advocate and Shri P. Gopakumar, the learned DR for the Revenue, we have considered the rival contentions.

7. The primary argument of the learned Senior Advocate is that there can never be a demand under Section 28A *ibid*. since the benefit of exemption Notification has been held inapplicable to the appellant in this case, to which the learned Senior Advocate would go every root of the issue as the demand under wrong provision has been made, which is not enforceable. Without prejudice to the above, the learned Senior Advocate would also submit that the adjudicating authority has wrongly held that the items bonded were not in the nature of computer furniture for allowing duty free benefits under Notification No. 153 *ibid.* and that they were not being used for development and export of software, for denying the benefit of duty free import. He would further submit that the appellant is a 100% EOU and any violation could only be handled by the Development Commissioner alone and hence the Assistant

Commissioner of Customs has no jurisdiction to assume jurisdiction over the unit. He would rely on the CBEC instruction issued vide Circular No. 21/95-Cus. dated 10/03/1995 and Circular No. 122/95-Cus. dated 28/11/95. Moreover, he would also submit that as observed in the show-cause notice itself, the appellant has already executed a bond worth Rs. 50,00,000/- (Rupees Fifty Lakhs only) which would cover the value of the goods imported and further submits that in any case the appellant had placed order for import of computer furniture and imported computer furniture only and hence the subject goods were rightly covered by the Exemption Notification No. 152/93 *ibid.* Since the said goods was modular furniture which was specifically and scientifically designed to be used by software engineers at their work stations.

8. Per contra, the learned AR Shri P. Gopakumar supported the findings of the lower authorities.

9. After hearing both sides, we find that proposal in the show-cause notice demanding the Customs duty was made under Section 28A *ibid.* and the confirmation of the said proposal was also made in the Order-in-Original, under Section 28A only.

9.1. Heading of Section 28A gives 'power' not to recover duties not levied or short levied as a result general practice, Section 28 carries the heading ***"recover of duties not levied or not paid or short levied or short paid or erroneously refunded".*** We have carefully gone through the above provisions and find that the demand has been made under a wrong provision and hence the same has become not enforceable.

9.2. From the above, therefore it is clear that the Customs Authorities lack jurisdiction and hence we accept both the contentions of the learned Senior Advocate and set aside the impugned order.

10. Consequently, the appeal stands allowed with consequential benefits, if any, as per law.

(Order pronounced in the Open Court on **31/03/2022**)

(P. ANJANI KUMAR)
TECHNICAL MEMBER

(P. DINESHA)
JUDICIAL MEMBER

...iss