# CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL CHENNAI

Regional Bench – Court No. IV

## Customs Appeal No. 40144 of 2013

(Arising out of Order-in-Appeal C.Cus. No. 1183/2012 dated 18.10.2012 passed by the Commissioner of Customs (Appeals), No. 60, Rajaji Salai, Custom House, Chennai – 600 001)

**M/s. Tata Hitachi Construction Machinery Co. Ltd., : Appellant**
Jubilee Building, 45, Museum Road,
Bangalore – 560 025

**VERSUS**

**The Commissioner of Customs, : Respondent**
No. 60, Rajaji Salai, Custom House,
Chennai – 600 001

**APPEARANCE:**

Shri. P.K. Ethirajan, Advocate for the Appellant

Shri. M. Jagan Babu, Authorized Representative for the Respondent

**CORAM:**

**HON'BLE MR. MADHU MOHAN DAMODHAR, MEMBER(TECHNICAL)**
**HON'BLE MR. P. DINESHA, MEMBER (JUDICIAL)**

**FINAL ORDER NO. 40674 / 2019**

DATE OF HEARING: 05.04.2019

DATE OF DECISION: 05.04.2019

**PER MADHU MOHAN DAMODHAR :**

The facts of the matter are that the appellants filed a Warehouse Bill of Entry No. 875017 dated 24.10.2008 by declaring wrong exchange rate as Japanese Yen 100 equivalent to Rs. 44.4/- instead of the correct exchange rate of Japanese Yen 100 equivalent to Rs. 52.62/-. The system calculated the duty of Rs. 10,57,259/- for an assessable value of Rs. 36,91,648/-, while the actual duty with the correct exchange rate was Rs. 12,52,985/-, resulting in the short collection of Rs. 1,95,726/-.

2. Accordingly, a Show Cause Notice dated 02.02.2009 was issued to the appellant proposing to demand differential duty of Rs. 1,95,726/- along with interest in terms of Notification No. 114/08 (NT) dated 24.10.2008. In adjudication, the Original Authority vide Order-in-Original dated 29.01.2010 confirmed the differential duty demand as proposed in the Show Cause Notice with interest thereon. In appeal, the Commissioner (Appeals) vide impugned order dated 18.10.2012 upheld the order passed by the adjudicating authority. Aggrieved, the appellant is now before this forum.

3. Today when the matter came up for hearing, Ld. Advocate Shri. P.K. Ethirajan made oral and written submissions which can be broadly summarized as under :

(i) The original importer had sold the warehoused goods under "In-Bond sale" to the In-Bond buyer of the warehoused goods namely, Shri. Ramesh Balasaheb Jagtap, Pune, Maharashtra under an In-Bond sale basis as per Section 59(5) of the Customs Act, 1962. As per the said Section, where the whole or any part of goods are transferred to another person, the transferee shall execute the bond and furnish the security as specified in Sub-Section (3) of Section 59 ibid. By going through this provision, once goods are transferred to another person, i.e., sold to another person, the transferee should become the absolute owner of the cargo and the Customs Act, enforcing the transferee, should follow the customs provision.

(ii) Thus, In-Bond buyer viz. Shri. Ramesh Balasaheb Jagtap, Pune, Maharashtra, filed the Ex-bond Bill-of-Entry vide B/E No. 876548 dated 28.10.2008 by executing a bond for sum equal to twice the amount of duty assessed on such in-bond purchase of warehoused goods, declaring correct exchange rate as well as disclosing relevant import duty too, thereby binding himself to Section 59, Sub-Section (1) (a), (b) and (c) of the Customs Act, read with Sub-Section (5) of Section 59 ibid, which is reproduced below :

> *"Where the whole of the goods or any part thereof are transferred to another person, the transferee i.e., In-Bond buyer of the warehoused goods shall execute a bond in a manner specified in Sub-Section (1) or Sub-Section (2) and furnish security as specified under Sub-Section (1) of Section 50 of the Customs Act, 1962."*

(iii) Although the In-bond buyer filed the Bill-of-Entry for home consumption as per Section 68 and declared the import duty payable in respect of such goods, an order for clearance of such goods for home consumption has been made by the proper officer, as per the warehousing Bill-of-Entry assessment order. The Proper Officer who is allowed said goods clearance, not factored due declaration furnished in Ex-bond Bill-of-Entry, despite In-bond buyer willing to pay the said duty.

(iv) Though In-Bond buyer, on his own ascertainment declared the correct exchange rate for arriving at the correct assessable value and willing to pay the additional duty as per Section 68, in the self-assessment made by him for the Ex-bond Bill-of-Entry under Section 17 of the Customs Act, 1962, the Proper Officer who has passed the assessment order for the Ex-bond Bill-of-Entry for removal of the warehoused goods should have modified the self-assessment made for the warehousing Bill-of-Entry, re-assessed the same and permitted the removal of the warehoused goods for home consumption. It is a manifest error on the part of the Proper Officer who made the order for removal of the warehoused goods for home consumption without considering declaration of correct exchange rate prevailing on the date of filing the warehouse Bill-of-Entry made at the time of filing the Ex-bond Bill-of-Entry.

(v) Thus the onus of discharging duty liability as per the revised assessment made for Ex-bond Bill-of-Entry under Section 17 or 18 of the Customs Act, 1962, squarely rests on the person who has presented the Ex-bond Bill-of-Entry under Section 68 of the Customs Act, 1962, in terms of Section 59(1) read with Sub-Section (5) of the Act.

(vi) The differential duty should have been demanded from Shri. Ramesh Balasaheb Jagtap, Pune, Maharashtra and not from the appellant. The Show Cause Notice was issued under Section 28 for recovery of duty that was short levied. If so, when the initial levy of duty was on the customer who filed the Bill-of-Entry for home consumption, the short levy should also have been addressed to that customer.

(vii) The definition of importer under Section 2(26) of the Customs Act, 1962 read as "in relation to any goods at any time between their importation and the time when they are cleared for home consumption includes any owner or any person holding himself out to be the importer". It is well settled that import is complete only when goods have been cleared for home consumption and not when the goods are warehoused. In the present case, the person clearing the goods for home consumption is Shri. Ramesh Balasaheb Jagtap, who has filed the Bill-of-Entry for home consumption and has paid duty on the goods as the importer.

(viii) Any short levy should have been on Shri. Ramesh Balasaheb Jagtap who is the person chargeable with the duty. The Department cannot levy Customs Duty on one importer and then demand duty that was short levied from the appellant.

4. On behalf of the respondent, Ld. AR Shri. M. Jagan Babu supported the impugned order. He further submitted that the assessment effected in the Warehouse Bill-of-Entry is final and except the rate of duty, the other parameters remain finalized.

5. Heard both sides and have gone through the facts of the case.

6.1 Section 14 of the Customs Act, 1962 lays down provisions for the valuation of imported goods. As per the third proviso to Section 14 (1), *"such price shall be calculated with reference to the rate of exchange as in force on the date on which a Bill-of-Entry is presented under Section 46 or a shipping bill of export, as the case may be, is presented under Section 50."*

6.2 Section 46 ibid contains the provisions for filing of Bill-of-Entry for goods on importation. The first paragraph of the said Section reads as under :

> *"(1) The importer of any goods, other than goods intended for transit or transhipment, shall make entry thereof by presenting [electronically] to the proper officer a Bill-of-Entry for home consumption or warehousing in the prescribed form:"*

7.1 What then comes to the fore is that for imported goods, whether for home consumption or for warehousing, a Bill-of-Entry has to be filed only under Section 46 ibid. From the conjoint reading of Section 14 and Section 46 of the Customs Act, 1962, it becomes clear that whether the Bill-of-Entry is filed for home consumption or for warehousing, the rate of exchange that would be applicable would be that which is in force on the date on which such Bill-of-Entry is presented. In case of warehousing, this would mean that the exchange rate at the Into-Bond stage in a Bill-of-Entry for warehousing filed under Section 46 ibid, will apply.

7.2 There is also a provision in Section 59 (2) ibid., to permit the importer to execute a general bond on any such amount as the competent authority may approve, in respect of warehousing of goods to be imported within a specified period.

7.3 As per Section 59 ibid, an importer of any goods, in respect of which a Bill-of-Entry for warehousing has been presented under Section 46 and assessed to duty either under Section 17 or Section 18, is required to execute a bond in a sum equal to thrice the amount of duty assessed on such goods, binding himself –

(a) To comply with all the provisions of the Act and the rules and regulations made thereunder in respect of such goods;

(b) To pay, on or before the date specified in the notice of demand, all duties and interest payable under Sub-Section (2) o Section 61; and

(c) To pay all penalties and fines incurred for the contravention of the provisions of this Act or the rules or regulations, in respect of such goods.

7.4 Sub-Section (3) of Section 59 requires that the importer shall furnish such security as may be prescribed in addition to execution of a bond under Sub-Section (1) or (2).

8.1 What is not in dispute is that the correct rate of exchange that should have been adopted at the stage of filing of Bill-of-Entry No. 875017 dated 24.10.2008 under Section 46 ibid was Japanese Yen 100 equal to Rs. 52.62/- instead of Japanese Yen 100 equivalent to Rs. 44.4/-, apparently wrongly adopted by the appellant herein.

8.2 The goods have been warehoused by the appellant and on such warehousing, a bond/security as mandated in Section 59 (warehousing bond) would surely have been submitted by the appellant. The bond was given by such appellant, *inter alia*, to comply with the provisions of the Act and the rules and regulations made thereunder in respect of the impugned goods. This being so, the liability to pay up the differential duty liability arising out of incorrect exchange rate adopted at the time of filing of Bill-of-Entry under Section 46 ibid., albeit for warehousing, would have fallen on the shoulders of the appellant <u>if the said warehoused goods had been cleared by them for home consumption as per the procedure laid down in Section 68 ibid.</u>

8.3 However, it is an undisputed fact that the goods after warehousing had been sold in Bond to one Shri. Ramesh Balasaheb Jagtap and that the Ex-Bond Bill-of-Entry No. 876548 dated 28.10.2008 was filed by the latter. In such circumstances, a different set of legal provisions will be applicable namely, as under :

(i) As per the first proviso to Section 68, the owner of warehoused goods may, at any time before an order for clearance of goods for home consumption has been made in respect of such goods, relinquish his title to the goods upon payment of penalties that may be payable in respect of the goods and upon such relinquishment, <u>he shall not be liable to pay duty thereon</u>.

(ii) As per Section 59 (5), where the whole of the goods or any part thereof is transferred to another person, the transferee shall execute a bond in the manner specified in Sub-Section (1) or Sub-Section (2) of Section 59 and furnish security, as specified under Sub-Section (3).

8.4 The combined takeaway of the above provisions is that when the goods are transferred while still being warehoused, the transferee, who then becomes responsible and liable to comply with the provisions of the Act, etc., has to pay all duties and interest payable and to pay all penalties and fines that may be incurred in respect of such goods.

8.5 Viewed in this light, for clearance of the warehoused goods for home consumption, the Bill-of-Entry required to be filed as per Section 68 (a) ibid will have to be done so by the transferee only. So also, the import duty, interest, fine and penalties that may be payable as per Section 68 (b) ibid would also be the liability of the transferee and <u>not</u> of the original owner of the goods. In this case, the appellant is the original owner of the goods and Shri. Ramesh Balasaheb Jagtap is the transferee. Hence, such import duty that is required to be calculated on the assessable value under Section 14 ibid is calculated with reference to the rate of exchange as in force on the date on which the Bill-of-Entry was filed under Section 46 (for Into-Bond warehousing).The rate of duty in case of goods cleared for a warehouse under Section 68 as per the provisions of Section 15 (b), will be that applicable on the date on which the Ex-Bond Bill-of-Entry for home consumption has been filed.

8.6 However, as found by us above, since the goods stand transferred by the appellant to Shri. Ramesh Balasaheb Jagtap, with permission from the competent authority, the liability for paying up all such duty liabilities and other dues, including any differential duty liability on account of incorrect rate of exchange adopted at the first stage of importation, will also have to be necessarily fastened only on the transferee and not on the appellant. Hence, the apparent short levy of Rs. 1,95,726/- with interest thereon on account of such exchange rate, the difference should have been demanded only from Shri. Ramesh Balasaheb Jagtap and not from the appellant.

9. In the light of the discussions, findings and conclusions hereinabove, we find that the appellant cannot be saddled with the demand upheld in the impugned order. The impugned order cannot therefore be sustained and will require to be set aside, which we hereby do.

10. The appeal is allowed with consequential benefits, if any, as per law.

(Operative part of the order was pronounced in open court)

**(MADHU MOHAN DAMODHAR)**
MEMBER (TECHNICAL)

**(P. DINESHA)**
MEMBER (JUDICIAL)

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