

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE
TRIBUNAL
NEW DELHI**

PRINCIPAL BENCH-COURT NO.-2

Customs Appeal No. 53440 of 2018-[DB]

[Arising out of Order-in-Original No. 13/NKU(13)ADG(ADJ) DRI/N. Delhi/2018-19 dated 10-07-2018 passed by Additional Director General (Adjudication), New Delhi]

M/s Jubilant Life Science Limited

Plot No. 1A, Sector-16A,
Institutional Area, Noida, UP

Appellant

Versus

Additional Director General (Adj),

Directorate of Revenue Intelligence,
New Delhi

Respondent

Appearance

Shri Amit Jain, Advocate

- for the appellant

Shri Sunil Kumar, Authorized Representative

- for the respondent

CORAM: Hon'ble Mr. Anil Choudhary, Member (Judicial)

Hon'ble Mr. Bijay Kumar, Member (Technical)

Date of Hearing: 04.04.2019

Date of Decision: 03.10.2019

Final Order No: 51288 /2019

Bijay Kumar:

1. The present appeal is arises order dated 10.07.2018 passed by the Additional Director General (DRI) vide which he has confirmed, the demand raised vide Show Cause Notice dated 15/19-05-2017 against the appellant pertain to inclusion of the "ship demurrage charges" incurred by the appellant. This ship demurrage charge was not declared by the appellant for the purpose of determination of assessable value of the imported goods under the provisions of Section

14 of Customs Act, 1962 read with Rule 3 and 12 of Customs Valuation read with (Determination of value of imported goods) Rules, 2007 for the period 07.09.2012 to 11.09.2015. The Adjudicating Authority confirmed the entire demand as raised in the Show Cause Notice and also imposed penalties and interest under relevant provisions of Customs Act, 1962 (for short "Customs act").

2. Being aggrieved by the order the appellant is in appeal before this Tribunal.
3. Brief facts of the case are that the appellant is engaged in manufacture of supply of organic chemicals. During the relevant time the appellant imported "Acetic Acid" and "Methanol" in bulk, in terms of agreement with the supplier for supply of these goods. The contract price for these imported goods were on the basis of Cost, Insurance & Freight (CIF) basis and the goods were imported by the appellant on a chartered vessel. As per the agreed terms, the cargo was to be unloading from the vessels at the port of discharge within a specified period of time, known as "lay time". When there was any delay in unloading the goods beyond the "lay time" the appellant was required to pay demurrage charges to the shipping lines. The demurrage charges were not known at the time of filing of bills of entry and were ascertained only after a few months of the importation, when the supplier raised the debit note on the appellant for recovery of such demurrage charges.

4. The Directorate of Revenue Intelligence (DRI), Kolkatta Zonal, unit conducted an inquiry in relation of customs duty payable by the appellant on account of such demurrage charges. During the investigation itself the appellant deposited differential customs duty amounting to Rs. 1,50,73,863/- along with interest of Rs. 63,31,105/- towards the demurrage charge paid on those bills of entry through which imports were made. Learned Adjudicating Authority held that demurrage charges are liable to customs duty in terms of Rule 10 (2) of Valuation Rules and confirmed the demand along with interest and also imposed penalty under Section 114 of the Customs Act.
5. Learned Advocate on behalf of the appellant submitted that the demurrage charges are not includable in the assessable value of imported goods under Section 14 of the Customs Act, where the duty chargeable on the price paid or "Payable at the time and place of importation". Section 14 of the Customs Act cannot be extended to include something which is not contemplated under Section 14 of the Customs Act.
- 5.1 Learned Advocate place the reliance on the following decisions also stated that the scope of Section cannot be extended by mere Explanation;
- (i) **Indian Oil Corporation Limited vs. Commissioner of Customs, Calcutta [2000 (122) ELT 615 (Tri-LB)].**
 - (ii) **Commissioner of Customs, Calcutta vs. Indian Oil Corporation Limited[2004 (165) ELT 257 (SC)]**

and was further maintained in the case of [(2005) ELT A119(SC)]

(iii) CCE Mangalore vs. Mangalore Refinery and Petrochemicals Limited[2015 (325)ELT 214(SC)]

In the case of Mangalore Refinery and Petrochemicals Limited (supra) it has been held that the demurrage charges are the post importation expenses and hence beyond the purview of transaction value of imported goods.

5.2 Learned Advocate further submits that Section 14 of the Customs Act was amended vide Finance Act, 2007 with effect from 10/10/2007 to include the cost of transportation to the place of importation, further there was no reference to the inclusion of demurrage charges as sought to be included by Explanation 2 Rule 10(2) of the Customs Valuation Rules. It was impressed upon that the provisions of Section 14 prior to and there after the amendment do not authorised the inclusion of demurrage charges to the value of imported goods for the purpose of assessment of duty of Customs. The Explanation has been added in Rule 10(2) of Valuation Rules for inclusion of demurrage charges is not sustainable and has been declared to *ultra vires* in the case of **Tata Steel Limited vs. Union of India [2019 -TIOL-595-HC-ORISSA-CUS]**.

- 5.3 Hon'ble Court also held that the demurrage charge is not to be included as a part cost envisaged by the Legislation. Learned Advocate also relied upon the decision **Tata Steels Limited vs. Union of India [2019-TIOL-595-HC-ORISSA-CUS]** in support of the assertion that Explanation is only to explain and not add or alter or widen the scope and ambit of the Section.
- 5.4 Learned Advocate further argues that once the import has been affected by utilisation of valid advance license, no demand can be raised after discharge of export obligation discharge certificate. (EODC). Therefore, the demand pertaining to the value of goods which represented demurrage charges could not have been confirmed in the impugned order. Learned Advocate also relied upon the decision of **Reliance Industries Limited vs. Commissioner of Cus. (Prev), Ahmedabad,[2004 (174) ELT 344(Tri.-Mum.)]**, wherein it is held that floating crane charges in the nature of post importation expenses and is treated as a part of loading/unloading, which is covered under the landing charges by addition of notional amount of 1 % under the Customs Valuation Rules. The reliance to this effect was also placed on the deliberation of the Tariff Conference of Commissioner of Customs on 2nd and 3rd November, 2000, wherein it is decided that stevedoring charges are not includible separately in the assessable value of the goods, as they

are adequately covered 1 % of FOB value towards the loading and unloading and handling charges in terms of Rule 9 (2) (b) of Customs Valuation Rules, 1988.

5.5 Learned Advocate also placed reliance on CBEC Circular No. 80/2002-Cus dated 29/11/2002. Further, it was submitted by learned advocate that the demand pertain to 282 Bills of Entry for which re-assessment has been proposed in the Show Cause Notice and it was confirmed by the Adjudicating Authority in the impugned order is contrary to the settled Principal of law as the Department as not file any appeal against the said finalisation of the Bills of Entry placing reliance on all the following decisions;

- (i) **Collector of Central Excise, Kanpur vs. Flock (India) Private Limited[2000 (120) ELT 285 (SC)]**
- (ii) **Priya Blue Industries Limited vs. Commissioner [2004 (172) ELT 145(SC)]**
- (iii) **Madhus Garage Equipments vs. CC(A),[2006 (198) ELT 388(Tri.-Bang)]**
- (iv) **Imperial Exports vs. CCE, Cochin,[2007 (212) ELT 113 (Tri.-Bang)]**

5.6 Learned Advocate also submits that the invocation of extended period of limitation for raising the demand is contrary to the Section 28(4) of Customs Act as there was no mis-representation on the part of the appellant. The appellant has not included the shipping demurrage charges in the assessable value for the purpose of

payment of Customs duty placing reliance on various Circulars issued by the CBEC;

- (i) **467/21/89-Cus V dated 14-08-1991**
- (ii) **14-2001-Cus., dated 2-3-2001**
- (iii) **5/2006-Cus., Dated 12-1-2006**
- (iv) **26/2006-Cus., dated 26-9-2006**

It is evident from these Circulars that there was a conflicting view on the issue of inclusion of shipping demurrage charges, it cannot be said that the appellant has deliberately suppressed any information from the Department.

5.7 Finally, learned Advocate submits that in the recent judgement of **TATA Steels vs. Union of India and Ors. [2019-TIOL-595-HC-ORISSA-CUS]**, Hon'ble High Court of Orissa as declared the Explanations to Sub Rule 2 of Rule 10 of Customs Valuation Rules 2007, as *ultra virus* and therefore, the entire demand is not assessable.

6. Learned Authorised Representative on behalf of the Revenue, however, justified the impugned order and reiterated the findings contained therein. Learned AR also submits that the Adjudicating Authority has followed the decision of Larger Bench of this Tribunal in case of **Commissioner of Customs, Jamnagar vs. Grasim Industries Limited [2013 (296) ELT 39 (Tri.-Del.)]**, wherein it is held that the inclusion of demurrage charge is

justified in view of insertion explained to Rule 10 (2) Valuation Rules 2007.

7. We have considered the arguments made by the learned Counsel on behalf of the appellant and learned DR for the Revenue.
8. We find that the Hon'ble High Court of Orissa and it was in the case of Tata Steels has declared the proviso to Rule 10 (2) of the Valuation Rules to be *ultra virus*. Revenue has not brought any ruling contrary to the judgement of Hon'ble High Court of Orissa wherein the proviso appended to Section 10 (2) of the Valuation Rules has been struck down.
9. In view of above, we hold that impugned order is not sustainable. We also reproduce the relevant portion of the Hon'ble Orissa High Court which is as under;

"13. We have heard learned counsel for the parties. It is well-settled principle of the statute that while interpreting a statute, one has to go by the scope and object of the principal Act. Under the principal Act, while amending it on 10th October, 2007, proviso has included the costs and services, including commissions and brokerage, engineering, design work, royalties and licence fees, costs of transportation to the place of importation, insurance, loading, unloading and handling charges to the extent and in the manner specified in the Rules.

The demurrage has not been included as a part of cost envisaged by the legislation. Further, it is a kind of penalty. Therefore, it could not have been envisaged by the legislation to be included in the definition of Section 14 of the Act. However, in view of the clarifications by way of judgements of the Hon'ble Supreme Court, more particularly in the cases of Wipro Ltd. (supra), Essar Steel Ltd. (supra) and Manglore Refinery & Petrochemicals Ltd. (supra), it is made clear that demurrage cannot be included for the purpose of valuation under the Customs Act, 1962. In that view of the matter, we are of the considered opinion that the contentions raised by the petitioner that the relevant provisions in the Principal Act is silent about the 'demurrage'; thus, it was beyond the

the legislative power to include it in the Rules is accepted and thus the explanation to sub Rule-(2) of Rule 10 of the Customs Valuation (Determination of Value of Imported Goods) Rules, 2007 is held to be bad and hence declared ultra virus the Constitution/provision of Section 14 of the Customs Act, 1962, and hence the same is struck down.”

10. Accordingly, we set aside the impugned order and allow the appeal with consequential benefit, if any.

(Order pronounced in open court on 03.10.2019)

(BIJAY KUMAR)
MEMBER (TECHNICAL)

(ANIL CHOUDHARY)
MEMBER (JUDICIAL)

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