CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
NEW DELHI.

PRINCIPAL BENCH - COURT NO. II

Custom Appeal No.50977 of 2021

(Arising out of Order-in-Appeal No.30(SM)CUS/JPR/2021 dated 24.03.2021 passed by the Commissioner (Appeals), Central Excise & Central Goods & Service Tax, Jaipur]

M/s. Continental Engines Ltd. **Appellant**
(Machining Division),
100% EOU, A-88, RIICO Industrial Area,
Bhiwadi, Alwar-301 019.

VERSUS

Commissioner of Customs **Respondent**
NCRB, Statue Circle, C-Scheme,
Jaipur.

APPEARANCE:

Shri Anurag Kapur, Advocate for the appellant.
Ms. Tamanna Alam, Authorised Representative for the respondent

CORAM:

HON'BLE MR. ANIL CHOUDHARY, MEMBER (JUDICIAL)

FINAL ORDER NO.50495/2022

DATE OF HEARING/DECISION: 25.05.2022

ANIL CHOUDHARY:

Heard the parties.

2. The issue involved in this appeal is whether the show cause notice is bad for invocation of extended period of limitation. The brief facts are that the appellant is a 100% EOU, engaged in the manufacture of Automatic Cylinders. For this purpose, they imports aluminium ingots duty free, as they are engaged in the manufacture and export of finished goods. The import is already duty free under Exemption Notification No.52/2003- Cus dated 31.03.2003.

3. Some quantity of such ingots worth Rs.5,11,65,254/- was cleared by the appellant to its sister unit in Domestic Tariff Area (hereinafter referred to as 'DTA Unit') during the period March, 2013 to December, 2014.

4. On clearance of ingots to DTA, the appellant paid Basic Customs Duty (BCD), Education Cess (Ed. Cess) and Secondary & Higher Education Cess (SHE Cess) in cash. The appellant also paid Countervailing Duty (CVD) and Special Additional Duty (SAD) on such clearances, by utilisation of Cenvat credit.

5. During the course of audit conducted for the period April, 2011 to March, 2016, it was noticed that the appellant cleared the imported Aluminium Ingots to the DTA (sister unit), on which customs duty of Rs.99,78,660/- was to be paid at the time of such clearance during March, 2013 to November, 2014. The appellant paid a portion of Customs Duties of Rs.24,00,679/- i.e. BCD of Rs.21,70,235/- and Cesses of Rs.2,30,444/- in cash through PLA, and rest of the Customs Duty of Rs.75,77,981/- i.e. CVD of Rs.55,11,235/- and SAD of Rs.20,66,745/- by utilising CENVAT credit. However, as per the department, the said amount of CVD and SAD was required to be paid in cash.

6. On being pointed out, the Appellant submitted that the calculation of duty liability for the period March, 2013 to November, 2014 was of Rs.75,73,992/-. It furnished the correct calculations and paid the full amount in cash through TR-6 challans. However, in the audit observations, it was recorded that the appellant has short paid customs duty of Rs.4,937/- during the month of November, 2014. It was also pointed out that interest leviable on delayed payment of customs duty was also not paid, as required in terms of provisions enshrined in Notification No.52/2003-Cus dated 31.03.2003.

7. The appellant had disputed the liability to interest, as according to them, they had already paid duty by debiting to cenvat credit, and hence they have no liability to interest. They carried the matter in further appeal, which is pending presently before the High Court.

8. Accordingly, Revenue issued show cause notice dated 02.02.2016 demanding customs duty of Rs.88,38,971/-, alleged to be short paid, as appellant had already paid duty by debit to cenvat credit account, along with proposal to appropriate the same, alongwith interest under Section 28 AA of the Act and further, penalty was also proposed. The said show cause notice was adjudicated on contest vide order-in-original dated 7.11.2016, whereby the proposed demand was confirmed along with interest under Section 28 AA of the Act, and further allowing appropriation of the amount, which the appellant already deposited Rs.64,42,330/- plus Rs.9,27,423/- in cash totalling Rs.73,69,753/- and further equal amount of penalty was imposed under Section 114 A of the Customs Act. Further, imposed penalty of Rs.10 lakhs under Section 26 (2)(ii) of the Central Excise Rules, 2002. It is further evident that a separate show cause notice was issued to the sister concern - M/s. Continental Engine Ltd. (Foundry Division), was also adjudicated by the same order-in-original confirming the demand of cenvat credit of Rs.88,38,971/- under Rule 14 of CCR along with interest and equal amount of penalty.

9. Subsequently, the present show cause notice dated 12.01.2018 has been issued proposing to recover Rs.4,937/- as customs duty short paid for the month of November, 2014 and also proposing to demand interest on the entire amount of Rs.88,43,824/-, being the customs duty (which is the amount demanded earlier vide show cause notice dated 2.2.2016). Further, the demand of interest amounting to Rs.12,62,092/- on the said amount of Rs.88,43,824/- along with proposal to impose penalty under Section 114 A

of the Customs Act. The second show cause notice was adjudicated on contest by the Asstt. Commissioner vide Order-in-Original dated 31.05.2019, confirming truncated demand towards customs duty of Rs.1,064/- along with interest and also confirming interest of Rs.12,62,092/-, as proposed plus penalty of Rs.1,064, plus penalty of Rs.12,64,092/- under Section 114 A of the Customs Act, 1962.

10. Being aggrieved, the appellant preferred appeal before the Commissioner (Appeals), inter alia, challenging the show cause notice on the ground of limitation, who was pleased to reject the ground of limitation observing that duties of customs payable could not have been paid from cenvat account. As the duty demand was not paid initially at the time of clearance and was paid subsequently, thus there occurred delay resulting into requirement for payment of interest under Section 28 AA of the Act. It was further observed that these facts came in the knowledge only during the course of audit and accordingly, extended period was rightly invoked. Thus, the appeal was rejected.

11. Being aggrieved, the appellant is before this Tribunal.

12. Ld. Counsel for the appellant informs that against the first show cause notice dated 2.2.2016, pursuant to adjudication order, they had appealed before the Commissioner (Appeals), then appellant had filed appeal before this Tribunal and on being unsuccessful, they were in appeal and are before the Hon'ble Rajasthan High Court.

13. It is further urged that in view of aforementioned facts and circumstances, the present second show cause notice on the same set of facts and circumstances dated 12.01.2018 is evidently bad for invocation of extended period of limitation, and is directly in the teeth of the ruling of the Hon'ble Supreme Court in the case of **Nizam Sugar Factory Vs. CCE – AP 2006 (4) TMT 127.**

14. Ld. Authorised Representative for the respondent/Department relies on the impugned order.

15. Having considered the rival contentions, I find that the second show cause notice is also on the same facts and circumstances. Further, it is found that the amount of interest under Section 28 AA demanded in the earlier show cause notice also, and the same was confirmed in the adjudication proceedings, which is presently subjudice before the Hon'ble Rajasthan High Court. Thus, in the present show cause notice, which is mainly for the demand of interest under Section 28 AA and also for a small amount of short tax paid for the same period, is bad for invocation of extended period of limitation. Accordingly, in view of the findings hereinabove , I allow this appeal and set aside the impugned order. The appellant is entitled to consequential benefits in accordance with law.

(Order dictated & pronounced in open Court).

(Anil Choudhary)
Member (Judicial)

Ckp