IN THE CUSTOMS, EXCISE & SERVICE TAX
APPELLATE TRIBUNAL
West Block No. 2, R.K. Puram, New Delhi – 110 066.

Date of Hearing/Order: 27.4.2017

Appeal No. C/52857/2016-SM

(Arising out of Order-in-Appeal No. CC(A) Cus/D-II/ICD PPG/489/2016 dated 13.6.2016 passed by the Commissioner of Customs (Appeals), New Delhi)

Subros Ltd. — Appellant

Vs.

CC, New Delhi — Respondent

Appearance

Shri Abhinav Jaganath, Advocate - for the appellant

Shri K. Poddar, D.R. - for the respondent

CORAM: **Hon'ble Mr. Ashok K. Arya, Member (Technical)**

Final Order No. 53175/2017

Per Ashok K. Arya :

The appellant viz. M/s Subros Ltd. is in appeal against Order-in-Appeal No. 489/2016 dated 13.6.2016 whereunder Order-in-Original dated 6.1.2015 passed by Joint Commissioner was set aside and the matter sent back to the original authority viz. Joint Commissioner "to have a fresh look after due finalisation of the provisionally assessed Bill of Entry No. 7965818 dated 17.9.2012". The impugned order-in-appeal further says that "upon finalisation, the original adjudicating authority will readjudicate the case in the light of the investigation into the case……….".

2.1 The brief facts are that :

(i) The appellant imported thermistors classifying the same under Customs Tariff Heading 85334030 and claiming benefit of 'Nil' duty under Notification No. 24/2005-Cus dated 1.3.2015 (Sl. No. 21)

(ii) After examination, the Customs department was of the view that the goods are classifiable under CTH 84159000 as parts of auto air conditioner attracting duty @ 10%.

(iii) The Bill of Entry was provisionally assessed, which was filed by the appellant on 17.9.2012.

(iv) The department issued Show Cause Notice (SCN) dated 24.4.2014 to the appellant proposing classification of the subject goods under Customs Tariff Heading 84159000 whereas the importer appellant declared the classification under Customs Tariff Heading 85334030.

(v) The Show Cause Notice was originally adjudicated on 31.12.2014 by the Joint Commissioner where he observed that issuing show cause notice in this case appears to be premature and directed the appraising group - AC/DC to finalise assessment of Bill of Entry and quantify the exact amount of duty leviable on such goods before issuing any fresh show cause notice in the matter.

3. Revenue appealed before Commissioner (Appeals) against the original order dated 31.12.2014 passed by Joint Commissioner. The Commissioner (Appeals) set aside the impugned order and sent back the matter to the original adjudicating authority to have a fresh look after due finalisation of provisional Bill of Entry dated 17.9.2014. The Commissioner (Appeals) makes a further mention that upon finalisation, the original authority will readjudicate the case in the light of investigation into the case.

4. With above background both sides represented by ld. Counsels, Shri Abhinav Jaganath and Shri K.Poddar have been heard.

5. The main submission of the ld. Counsel for the appellant is that no show cause notice under Section 28 of the Customs Act can be issued to the appellant when the goods have been provisionally assessed and the said assessment has not been finalised under Section 18. In support, he cites the following case laws:

(i) *Pramod Kumar Nathani Vs. Union of India* – 2016 (34) ELT 642 (Cal.)

(ii) *AS Syndicate Warehousing Pvt. Ltd. Vs. CC* – 2011 (267) ELT 46 (Ca.).

(iii) *Finolex Industries Ltd. Vs. CC, Mumbai* – 2003 (159) ELT 949 (Tri.- Mum).

(iv) *International Computers Indian Manufacturers Ltd. Vs. Union of India* – 1981 (8) ELT 632 (Del.).

6. Ld. Counsel for the Revenue however, vehemently submits that Revenue has issued show cause notice in order to finalise provisional asseseement and show cause notice can be issued under Section 28 of the Finance Act, as there is no other way than under Section 28 where Revenue proposed change of classification. In support, he cites following case laws:

(a) *Gujarat Narmada Valley Fertilizers & Chem. Ltd. (GMVFC) Vs. CC* – 2014 (305) ELT 72 (Guj.).

(b) *Shree Electromelts Ltd. Vs. CC* – 2014 (314) ELT 719 (Tri.- Ahmd.).

7. After having gone through the facts on record and submissions of both the sides, it appears that Section 18 of the Customs Act deals with provisional assessment of duty and Section 28 mainly deals with the recovery of dues from the concerned persons in case of short levies or non-levies of duty or erroneous refund. The appellant submits that the Revenue should have firstly finalised the assessment before issuing any show cause notice if required. The importer appellant filed Bill of Entry No. 7965818 dated 17.9.2014 and the subject goods were assessed provisionally and the Revenue chose to issue show cause notice dated 24.4.2014 for change in the classification.

7.1 The ld. Counsel for the appellant submits that the show cause notice has not been issued for finalisation of assessment but it only proposes change in the classification only.

7.2 From the facts it is on record that there are two conflicting classifications - one is proposed by the importer appellant and another by the Revenue. Revenue has proposed to change of classification by issue of show cause notice, which the appellant is challenging saying that the same cannot be issued under Section 28 of Customs Act. However, whenever there is finalisation of provisional assessment there has to be some kind of notice to be issued to the importer to make him aware what are the grounds on which the provisional assessment is being finalised so that the importer is able to respond to what is the proposal in 'finalisation of provisional assessment'.

7.3 Ld. Counsel for the Revenue submits that there cannot be issuance of two show cause notices for the same imports by the Revenue and the Revenue department by issue of present show cause notice wants to finalise earlier provisional assessment made for subject goods. On the other hand, ld. Counsel for the importer appellant submits that show cause notice did not mention that provisional assessment is being finalised by issue of show cause notice. The Hon'ble Gujarat High Court in the case of ***Gujarat Narmada Valley Fertilizers & Chem. Ltd.*** (GMVFCL) (supra), where in case of import of coal initially provisional assessment was made and thereafter show cause notice was issued under Section 28 of the Customs Act, inter alia observed as under:

> "**6.** Learned counsel Shri Trivedi for the petitioner, however, submitted that in the present case the petitioner has raised a contention not previously raised by the other importers namely that there has been no finalization of the provisional assessment and that therefore, no duty demand could have been raised. In this context, he relied on a decision of the Supreme Court in the case of *Serai Kella Glass Works Pvt. Ltd.* v. *CCE,* (1997) 4 SCC 641 = 1997 (91) E.L.T. 497 (S.C.) in which it was observed as under :
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>> "17. Section 11-A deals with recovery of duty not levied or not paid or short-levied or short-paid or erroneously refunded. Proceedings under Section 11-A have to be commenced with a show cause notice issued within six months from the relevant date. 'Relevant date' has been defined under sub-section 3(ii) to mean in a case where duty of excise is provisionally assessed under this Act or the rules made thereunder, the date of adjustment of duty after the final assessment thereof.
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>> 18. After final assessment, a copy of the order on the return filed by the assessee has to be sent to him. Duty has to be paid by the assessee on the basis of the final assessment within ten days' time from the receipt of the return. No question of giving any notice under Section 11-A arises in such a case. It is only when even after final assessment and payment of duties, it is found that there has been a short-levy or non-levy of duly, the Excise Officer is empowered to take proceedings under Section 11-A within the period of

> limitation after issuing a show cause notice. In such a case, limitation period will run from the date of the final assessment. The scope of Section 11A and Rule 173-I is quite different. In this case, the provisional assessment earlier made by the proper officer has been quashed and pursuant to the direction of the High Court, the proper officer has made the final assessment. No question of failure of issuance of show cause notice under section 11-A arises in this case. Even otherwise, we do not find any infirmity in the order of the Tribunal."

Our attention was also drawn to a decision of the Supreme Court in the case of *Commissioner, Central Excise & Customs* v. *ITC Ltd.,* (2007) 1 SCC 62 = 2006 (203) E.L.T. 532 (S.C.) in which relying on the decision in the case of *Serai Kella Glass Works Pvt. Ltd.* (supra) and referring to the relevant provisions of the Central Excise Act and the Rules thereunder, the Supreme Court observed that the amount becomes payable only in the event the assessee does not deposit the amount levied within a period of 10 days from the date of completion of the order of assessment. Recourse to provisional assessment is resorted to only when the conditions laid down therein are satisfied, viz. where the assessee is found to be unable to produce any document or furnish any information necessary for assessment of duty on any excisable goods. It was, therefore, observed that :

> "24. Whereas provisional duty is levied in terms of sub-rule (1) of Rule 9-B, final assessment is contemplated under sub-rule (5) thereof by reason of which the duty provisionally assessed shall be adjusted against the duty finally assessed and in event the duty provisionally assessed falls short of or is in excess of the duty finally assessed, the assessee will pay the deficiency or will be entitled to a refund, as the case may be. Ultimately, thus, the liability of the assessee would depend upon the undertaking of exercise by the assessing Officer to compete the assessment proceeding as contemplated under the Rules."

7. In the present case, facts are substantially different. The notice as reproduced hereinabove, first and foremost proposes to adopt certain classification which, in the opinion of the department, would be correct for the imported goods rejecting the classification canvassed by the petitioner. It is in this context that in para 24(1) of the notice calls upon the petitioner show cause why the classification of the imported goods under Heading 2701 19 20 should not be rejected and why the same should not be re-classified under the Heading 2701 12 00 of the First Schedule to the Customs Tariff Act, 1975. Further proposals are only consequential in nature and includes proposal for adopting correct classification and quantifying the differential customs duty on 37,000 MT of coal imported by the petitioner. Proposal is also for recovery of the differential customs duty with interest.

8. In our opinion, this is not a case where recovery of duty under Section 28 of the Act is preceded the finalisation of the classification. As a matter of fact, the very notice issued is for finalization of the classification on the basis of the proposal and the *prima facie* opinion of the department rejecting the classification presented by the petitioner. We do not find that the same is without jurisdiction.

9. Learned counsel, however, contended that if the adjudication were to be undertaken by the Commissioner, the petitioner would lose its valuable right to appeal. As noted earlier, if there is no dispute about the competence of the Commissioner to issue show cause notice and adjudicate upon it, merely because by way of consequence, there is elimination of right of one appeal, that by itself would not convince us to hold that the show cause notice is without jurisdiction. Right of appeal is a creation of the statute. If the Commissioner under the provisions of the Act and the Rules framed thereunder is competent to adjudicate certain issues, merely because the noticee in such case may lose one stage of appeal would not render the action of the Commissioner *per se* without jurisdiction.

10. Counsel also submitted that the question of confiscation of goods would arise only after the duty demand is crystallized and the petitioner fails to pay

> the same. At his request we leave such a question open for the petitioner to raise before the Commissioner and the Commissioner to decide the same if so raised by the petitioner.
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> (Emphasis supplied)

7.5 By following Hon'ble Gujarat High Court's above decision in the case of GMVFCL and the observations made thereunder, I am of the considered view that the issuance of show cause notice for the present facts is legally valid recourse for 'finalisation of assessment' though it that may be that said wordings may not have been used in the show cause notice. The submission of the appellant in the light of the observations made in the Gujarat High Court decision (supra) do not have sufficient force. The case laws cited by the appellant are also not applicable for the present facts.

7.6 It is noted that the show cause notice dated 24.4.2014 issued in this case to the appellant has not made a mention of 'reassessment' or 'final assessment' as per the provisions of Section 18(2) of Customs Act, 1962, though subject goods initially were assessed and released provisionally. However, from the proceedings initiated by the show cause notice, it is clear that Revenue wants to have 'finalisation of provisional assessment', though specific mention of provisions Section 18(2) and Section 18(3) were not made. Therefore, considering the present facts, the SCN issued by the Revenue to appellant is the proceedings under Section 18(2) and

18(3) along with Section 28 of Customs Act, which is clear from the reading of the decision (supra) of Hon'ble Gujarat High Court.

8. The impugned order-in-appeal mentions that original authority will have 'a fresh look on the case after due finalisation of the provisionally assessed Bill of Entry'. But said impugned order does not make clear that who will finalise provisionally assessed Bill of Entry. Therefore, in the light of discussions made earlier and following the Hon'ble Gujarat High Court decision (supra), it is ordered that the original adjudicating authority will finalise provisionally assessed Bill of Entry during the fresh adjudication proceedings, which are being ordered by this order, for which the appellant shall be given opportunity of personal hearing and submission of necessary documents/evidence as admissible by law.

9. In the result, the impugned order is modified to above effect and the appeal is disposed of accordingly.

(Dictated & pronounced in open Court)

(Ashok K. Arya)
Member (Technical)

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