CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL,

WEST BLOCK NO.2, R.K. PURAM, NEW DELHI-110066

BENCH-DB

COURT –III

Customs Appeal No.C/53139-53140/2014-CU [DB]

[Arising out of Order-in-Original No.05/2014/ AD/ COMMR/ ICD/TKD passed by the Commissioner of Customs, New Delhi]

M/s.Saharsh Distributors Pvt. Ltd.
Harkirat Singh …Appellant

Vs.

C.C., New Delhi … Respondent

Present for the Appellant : Mr.S.Vasudevan, Advocate
Mr.Devender , Advocate
Present for the Respondent: Mr. R.K. Maji, D.R & Mr. Nanthuk, D.R.

Coram: HON'BLE MR. S.K. MOHANTY, MEMBER (JUDICIAL)
HON'BLE MR. V.PADMANABHAN, MEMBER (TECHNICAL)

Date of Hearing/Decision: 31/05/2017

FINAL ORDER NO. 53626-53627/2017

PER: S.K. MOHANTY

This appeal is directed against the impugned order dated 5th March 2014 passed by the Commissioner of Customs, Inland Container Depot, New Delhi.

2. Brief facts of the case are that the appellant imported 20 containers of 'Electro Refined Copper Cathode' vide Bill of Entry Nos.6586547 and 6587086 both dated 19.04.2012 and claimed

the benefit of Notification No.21/2012-Cus. dated 17.03.2012. The bills of entry were provisionally assessed upon fulfilment of the conditions prescribed by the Customs Authorities. Pending finalization of bills of entry, the Department initiated proceedings under Section 28 of the Customs Act, 1962 for denying the benefits under Notification No.21/2012- CU dated 17.03.2012 and also for confiscation of goods and confirmation of Special Additional Duty of Customs (SAD) and for imposition of penalties. The show cause proceedings initiated by the Department culminated in the adjudication order, wherein the proposals made therein were confirmed. The ld. Advocate appearing for the appellant fairly admits that the appellant is not eligible to the benefit of Notification 21/2012-Cus. for the goods imported, but submits that the proceedings initiated under Section 28 ibid is not proper and justified inasmuch as, assessment of bills of entry made under Section 18 has not been finalized. Thus, he submits that the impugned order passed is not sustainable. To support such stand, ld. Advocate has relied on judgment of Hon'ble Supreme Court in the case of Commissioner of Central Excise and Customs, Mumbai vs. ITC Ltd. – 2006 (203) ELT 532 (S.C.).

3. On the other hand, the ld. D.R. appearing for the Revenue reiterates the findings recorded in the impugned order.

4. Heard both sides and perused the records.

5. The short question involved in this appeal for consideration by the Tribunal is whether before finalization of bills of entry, which are provisionally assessed under Section 18, the Department

can proceed to confirm the duty demand and to impose penalty by resorting Section 28 ibid.

6. It is an admitted fact on record that the bills of entry were provisionally assessed and before their finalization, the Department initiated show cause proceedings under Section 28 ibid. Section 28 ibid deals with recovery of duties not levied or short levied or erroneously refunded. On perusal of the said statutory provisions, it reveals that in order to invoke the said statutory provisions, two things must be satisfied, i.e. non-levy of duty or short levy of duty. In the present case, since the assessment is provisional, the duty liability has not been determined by the Department, hence, there is no question of short levy or non-levy. Thus, proceedings initiation under Section 28, which culminated in the impugned order dated 5th March 2014 in our opinion is not sustainable and will not stand for judicial scrutiny. We find that under Section 11A of Central Excise Act, 1944 (*Perimateria* with Section 28 ibid), the Hon'ble Supreme Court in the case of ITC Ltd. (supra) held that proceedings under Section 11A cannot be initiated without completing the assessment proceedings. The relevant paragraph in the said judgment is extracted herein below:-

> ***17.*** *Section 11A of the Act provides for a penal provision. Before a penalty can be levied, the procedures laid down therein must be complied with. For construction of a penal provision, it is trite, the*

golden rule of literal interpretation should be applied. The difficulty which may be faced by the Revenue is of no consequence. The power under Section 11A of the Act can be invoked only when a duty has not been levied or paid or has been short-levied or short-paid. Such a proceeding can be initiated within six months from the relevant date which in terms of sub-section (3)(ii)(b) of Section 11A of the Act (which is applicable in the instant case) in a case where duty of excise is provisionally assessed under the Act or the Rules made thereunder, the date of adjustment of duty after the final assessment thereof. A proceeding under Section 11A of the Act cannot, therefore, be initiated without completing the assessment proceedings.

7. Since the present proceedings were initiated under Section 28 before finalization of the assessment, the same is not maintainable at this juncture. However, the Department is at liberty to take appropriate measures after finalization of the bills of entry in question.

8. In view of above, we do not find any merits in the impugned order. Accordingly, after setting aside the same, we allow the appeals in favour of the appellants.

[Dictated and pronounced in the open Court)

(V.PADMANABHAN) **MEMBER (TECHNICAL)**	**(S.K. MOHANTY)** **MEMBER (JUDICIAL)**

Anita