

CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL,
WEST BLOCK NO.2, R.K. PURAM, NEW DELHI-110066

BENCH-DB

COURT –III

Customs Appeal No.C/51629-51630/2014-CU [DB]

[Arising out of Order-in-Appeal No. 32-33(VC)Cus/JPR-I/2013 dated 29.11.2013 passed by the Commissioner of Central Excise, Jaipur-I]

M/s. Roochees Time Pvt. Ltd. & Ors. ...Appellant

Vs.

C.C.E.- Jaipur-I ...Respondent

Appearance:

Mr. Somnath Shukla, (Advocate) for the Appellant
Mr. A. Jain, AR for the Respondent

CORAM:

Hon'ble Mr. S.K. Mohanty, Member (Judicial)
Hon'ble Mr. Ashok K. Arya, Member (Technical)

Date of Hearing:15.02.2017

Date of Decision:14.06.2017

Final Order No.53953-53954/2017

Per S.K. Mohanty:

This appeal is directed against the impugned order dated 17.12.2013 passed by the Id. Commissioner of Central Excise (Appeals), Jaipur.

2. Brief facts of the case are that the appellant imported P-68 watch movement from Hong Kang and filed the Bills of Entry for home

consumption before the Customs authorities having jurisdiction over the port of import. On the basis of the invoice issued by the overseas supplier, the appellant had indicated the per unit value of imported goods (US\$ 0.08 i.e. Rs.3.66) for the purpose of assessment of the duty liability. On scrutiny of the documents, it was revealed by the Department that the value of imported goods declared by the appellant is quite low. Accordingly, for ascertaining the correct value of goods, the Customs Department sought information from the President of All India Watch Manufacturers Association, New Delhi., who informed that the price of impugned goods was approximately HK \$ 2.25 or Rs.15/- to Rs.16/- per piece. On the basis of such report, the Customs Department prima-facie formed the opinion that the goods were undervalued by the appellant, and accordingly, the subject goods were detained under Section 110 of the Customs Act, 1962. The goods were assessed provisionally on execution of Surety Bond and on payment of Customs duty on the provisionally assessed value. Subsequently, the Department further enquired into the matter through DRI and Consulate General of India at Hong Kong. On the basis of the report received from various agencies, show cause proceedings were initiated against the appellants, seeking for enhancement of value, payment of differential Customs duty and for imposition of penalties. The SCN dated 05.05.2011 was adjudicated vide order dated 06.02.1012, wherein the proposals made therein were confirmed. On appeal, the adjudged demands were upheld by the Id. Commissioner (Appeals). Hence, these present appeals were filed before the Tribunal.

3. The Id. Advocate appearing for the appellant submitted that the assessment in this case is provisional and has not been finalized till date. Thus, he submits that issuance of show cause notice and passing of the adjudication order under Section 28 of the Customs Act, 1962 is not proper and justified. To support such stand, Id. Advocate has relied on the judgement of Hon'ble Supreme Court in the case of Commissioner of Central Excise and Customs, Mumbai vs. ITC Ltd.- 2006 (203) E.L.T. 532 (S.C.), the judgement of Hon'ble Delhi High Court in the case of ITC Ltd. – 2010 (250 E.L.T. 189 (Del.) and the judgement of Hon'ble Calcutta High Court in the case of A.S. Syndicate (Warehousing) Pvt. Ltd. – 2011 (267) E.L.T. 469 (Calcutta).

4. On the other hand, the Id. D.R. appearing for the Revenue reiterated the findings recorded in the impugned order and further submitted that provisional ascertainment of duty done in this case cannot be equated with provisional assessment as prescribed under Section 18 of the Act. Thus, the assessment is not provisional and accordingly, confirmation of duty demand, confiscation of imported goods and imposition of penalties in the adjudication order and confirmed in the impugned order are in conformity with the statutory provisions.

5. Heard both sides and perused the records.

6. The short question involved in this appeal for consideration by the Tribunal is, as to whether, before finalization of Bill of Entry, which was provisionally assessed under Section 18 *ibid*, can the Department

proceed against the importer to confirm the differential duty demand and for imposition of penalty.

7. We find from the endorsement in the Bill of Entry that the same was provisionally assessed as per the order dated 21.12.2006. It has also been accepted in the show cause notice as well as in the impugned order that the goods were assessed provisionally on execution of Surety Bond and on payment of Customs Duty on the provisionally assessed value of the imported goods. The authorities below have not confirmed the fact that after finalization of the Bill of Entry, the demands were confirmed against the appellant. Thus, in absence of any documentary evidence to show finalization of Bill of Entry, it has to be construed that the same is still provisional, awaiting finalization.

8. Section 28 of the Act contemplates issuance of show cause notice for recovery of duties which were not levied or short levied. For issuance of show cause notice under such statutory provision, the duty liability is required to be ascertained by the proper officer. In the present case, since the assessment is provisional and the proper duty liability has not been quantified/ ascertained as per the provisions of Section 18 *ibid*, there is no question of short levy or non-levy of duty. Thus, proceedings initiated under Section 28, which culminated in the impugned order dated 17.12.2013, in our opinion will not sustainable and will not stand for judicial scrutiny. In this context, the Hon'ble Supreme Court in the case of ITC Ltd. (*supra*) held that proceedings under Section 11 A of the Central Excise Act, 1944 (*perimateria* with Section 28 *ibid*) 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."

9. Since the present proceedings were initiated under Section 28 ibid 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 Bill of Entry in question.

10. In view of the 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.

(Pronounced in the open court on 14.06.2017)

(ASHOK K. ARYA)
MEMBER(TECHNICAL)

(S. K. MOHANTY)
MEMBER (JUDICIAL)

Anita