IN THE CUSPTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL, NEW DELHI, PRINCIPAL BENCH NEW DELHI

Date of Hearing:27.10.2017
Date of Decision:22.11.2017

Customs Appeal No.50370/2017 (DB)

[Arising out of Order-in-Appeal No.8/CE/LTU/DLH/2016 dated 4.11.2016 passed by the Commissioner of Central Excise (Appeals-I), New Delhi]

M/s.Havells India Ltd. Appellants

Vs.

CCE & ST, New Delhi Respondent

<u>Appearance:</u>
Rep. by Shri J.P. Kaushik, Advocate for the appellant.
Rep. by Shri P. Juneja, AR for the respondent.

Coram: Hon'ble Shri S.K. Mohanty, Member (Judicial)
Hon'ble Shri B. Ravichandran, Member (Technical)

Final Order No.58007/2017

<u>Per B. Ravichandran:</u>

The appeal is against order dated 4.11.2016 of Commissioner of Central Excise (Appeals-I), Delhi. The appellants are engaged in the manufacture of electrical switches and other electrical products. They have imported inner and outer plates for the said switches, during the period from 16.06.2006 to 25.07.2012 claiming exemption from customs duty in terms of Sl.No.112 of Notification no.25/99-Cus dated 28.02.99. The condition for the said exemption is prescribed in the Customs (Import of Goods at Concessional Rate of Duty for Manufacture of Excisable Goods) Rules 1996. The officers of DRI conducted certain verifications in August, 2012 and held a view that the imported plates were not parts of switches and units were not entitled for the said exemption. A show cause notice dated 20.11.2012 was issued by the DRI demanding customs duty for the period from 14.11.2007 to 25.07.2012 under Section 28 of the Customs Act, 1962. Proposal for confiscation of seized goods as well as imposition of penalty was also made in the notice. The appellants paid the duty and interest demanded in the show cause notice and filed an application in the Settlement Commission for closure of the case. The matter was closed by the Settlement Commission upholding the duty and interest but waiving penalty and redemption fine. The goods were ordered to be released. Later, on 13.12.2013, another show cause notice demanding customs duty of Rs.61,35,772/- was issued invoking Rule 8 of the said Rules covering the period 16.06.2006 to 13.11.2007. This notice was adjudicated by the Asstt. Commissioner vide order dated 28.1.2015. He confirmed the duty liability and also held the goods, which were imported availing exemption as liable for confiscation. A redemption fine of Rs.70 lakhs along with penalty of Rs.35 lakhs was imposed. On appeal, vide the impugned order, the Commissioner (Appeals) upheld the original order.

2. Ld. Commissioner appearing for the appellant elaborated the grounds of appeal in the following lines:-

(a) On merit, they are eligible for the exemption claimed by them. Switch cannot be fitted without inner and outer plates and these are considered as parts of switches. Merely because some quantity of plates is sold as spares, they do not cease to be parts of switches. Sl.No.112 of notification no.25/99-Cus mentions parts of switches.

(b) The show cause notice cannot be issued by the Asstt. Commissioner incharge of the manufacturing unit. There is no jurisdiction when the assessment of imported goods were made by the Customs Officers in the port of import. In fact, the demand made by the show cause notice issued by DRI was made answerable to the Addl. Commissioner of Customs (Adjudication), Import and General IGI Airport, New Delhi. Based on the same set of allegations, the present show cause notice was issued and was adjudicated by a central excise officer, who is not competent to decide the exemption on imported goods, which is the role of the assessing officer at the port of import. Reliance was placed on the decision of the Hon'ble Karnataka High Court in the case of **Molex India Ltd. – 2015 (317) ELT 250 (Karnataka).**

(C) Exemption notification no.25/99-Cus is subject to condition and procedure, as prescribed in 1996 Rules. All the procedure, as mentioned in Rules 3, 4 and 7 have been followed properly by the appellant. All records were subjected to audit and verification by the officers from time to time. The department is fully aware of the facts of import and usage of plates availing exemption. Hence the demand is barred by limitation.

(d) The reliance placed on the judgement of Hon'ble Supreme Court in **Mediwell Hospitals and Health Care Pvt. Ltd. – 1997 (89) ELT 425 (SC)** is mis-placed. The Apex Court was dealing with the provisions of Notification no.64/88-Cus, which provided for continuing obligations to be fulfilled for exemption. Notification no.25/99-Cus involved in the present case has no such continuing obligation. The condition is fulfilled on usage of imported goods.

(e) Reliance is placed on the decision of the Apex Court in **Gujarat Ambuja Exports Ltd. – 2016 (338) ELT 481 (SC).** The Apex Court held that the demand under Rule 8 of 1996 Rules should be issued within the reasonable time. In the present case, the show cause notice was issued on

13.12.2013 covering the period of 18.06.2006 to 13.11.2007. Accordingly, it is well beyond the reasonable time and, therefore, barred by limitation.

(f) The show cause notice cannot be issued by the Asstt. Commissioner Incharge of the manufacturing unit. There is no jurisdiction when the assessment of imported goods were made by the Customs Officers in the port of import. In fact, for the demand made by the show cause notice issued by the DRI, the same was made answerable to the Addl. Commissioner of Customs (Adjudication), Import and General IGI, Airport, New Delhi. Based on the same set of allegation, the present show cause notice was issued and was adjudicated by the central excise officer.

3. Ld. AR for Revenue contested the appeal. He submitted that since the appellants violated the conditions of 1996 Rules, the jurisdictional officer is empowered to recover the duty upon denial of the concession. The appellants have executed a running bond in terms of the said rules and violation of the conditions are dealt with by invoking the Rule 8 of the said Rules. Relying on the decision of the Hon'ble Supreme Court in the case of **Gujarat Ambuja Exports Ltd.,** it is submitted that the invocation of Rule 8 has been upheld by the Apex Court. Ld. AR supported the findings of the Commissioner (Appeals) and submitted that there is no merit in the present appeal.

4. We have heard both the sides and perused the appeal records.

5. The first point for determination is whether or not the show cause notice and an adjudication proceedings are valid on the question of jurisdiction as contested

by the appellant. The present show cause notice dated 13.12.2013 was issued by the Dy. Commissioner of Central Excise & Service Tax, LTU, New Delhi. The said Dy. Commissioner is having jurisdictional control for central excise on the appellant's unit. The appellants have executed bond in pursuance of the conditions of 1996 Rules. However, we note that the concession for customs duty as claimed by the appellant was extended upon assessment at the time of import by the officers of Customs at the port of entry. The present proceedings are to deny the exemption, due to violation of post-import conditions. The officer having central excise jurisdiction over the manufacturing unit invoked the provisions of Rule 8 to demand and recover customs duty by denying the exemption initially allowed upon assessment at the time of import by the competent officer of customs. In other words, the assessment done by the Customs Officers at the time of import is varied by invoking Rule 8 of 1996 Rules by central excise officers, in whose jurisdiction the appellant's unit is falling. We note that such dual jurisdiction of two officers having assessment powers and power to demand differential duty upon re-assessement, is legally unsustainable.

6. Admittedly, the violation of post-import conditions was subject matter of decision for the five years period in respect of this very same appellant in pursuance of the investigation carried out by the officers of DRI. The DRI issued show cause notice dated 20.11.2012 invoking provisions of Section 28 of the Customs Act, which deals with non-payment or short payment of customs duty and procedure to recover the same. The period covered by the said show cause notice was 14.11.2007 to 25.07.2012. The notice was made answerable to the jurisdictional Addl. Commissioner of Customs in the port of import through which the impugned goods were imported and assessed to customs duty extending the

benefit of concession under Notification no.25/99-Customs. The said show cause notice was settled by the Settlement Commission on an application filed by the appellant.

7. The present proceedings are for the period preceding the period covered by the show cause notice issued by the DRI. This show cause notice dated 13.12.2013 was issued to cover the period from 16.06.2006 to 13.11.2007, which is well beyond 5 years period that could not be covered under a demand invoking Section 28. It would appear that two separate proceedings were initiated against the appellant, one under Section 28 for the permissible period of 5 years and another subsequent one invoking Rule 8 for the period beyond 5 years on the ground that Rule 8 did not provide for any time limit. We find such dual approach by the Revenue is not legally sustainable.

8. On the jurisdiction of the Dy. Commissioner of Central Excise, LTU to demand and recover customs duty on the goods, which were cleared through New Customs House, New Delhi on assessment by the competent customs officers, we note that such action will be beyond the competence and legal jurisdiction. The Revenue contended that the Dy. Commissioner of Central Excise is a proper officer notified under Section 4 read with Section 2 (34) of the Customs Act 1962. We note that the question is not whether or not the Dy. Commissioner of Central Excise is a proper officer for customs work. The question is with reference to the imported items, which were assessed by the officers of customs in the port of entry. The subsequent variation of the said assessment has been carried out by the central excise officer having jurisdiction on the unit of the appellant. The Revenue defended such demand for the second time by the central excise officer on the ground that there is a violation of condition, post-importation and the bond

executed by the appellant empowers the invocation of Rule 8 by the jurisdictional central excise officer to demand customs duty. It that be so, we fail to appreciate as to the need for demand under Section 28 for five years as issued by DRI answerable to the Add. Commissioner of Customs in the port of import where the goods were initially assessed.

9. It is apparent and clear that show cause notice issued by the DRI correctly invoked the jurisdiction of the proper Customs Authority in charge of assessment to apply the provisions of Section 28 of the Act. It is not open to the Revenue to resort to Rule 8 to demand and recover customs duty for earlier period, beyond five years.

10. Regarding the reliance placed by the Revenue on the decision of the Apex Court in **Gujarat Ambuja Exports Ltd. (supra)** to justify action under Rule 8, we note that the Apex Court was not examining the jurisdictional issue. The Apex Court was examining the eligibility of the appellant for benefit under notification no.21/2002-Cus. After deciding the issue on merit, the Apex Court held that Rule 8 did not provide for any statutory time limit and in such situation, the time limit of Section 28 cannot be resorted to. The question has to be decided, keeping in view the facts of each case and to examine whether the period in question is reasonable or not. In the said case, the Apex Court held that the notice was issued within the reasonable time after inquiring into the violation of the post-import condition. There is no finding with reference to jurisdiction of the adjudicating officer. Applying the ratio of the Apex Court regarding the reasonable time to the facts of the present case, we note that the show cause notice dated 13.12.2013 was issued to cover the period of 16.06.2006 and 13.11.2007. This is a second proceedings in continuation of proceedings initiated by show cause notice dated 20.12.2012

covering the period 14.11.2007 to 25.11.2015. We are unable to appreciate the reason for two proceedings on the same issue, one invoking section 28 for five year period and much later and another one invoking Rule 8 for earlier period which is even beyond five years. If the ratio of reasonable period for issue of demand under Rule 8 is considered, the present demand is beyond reasonable time as the same is issued almost six years' after the period of import.

11. Coming back to the issue of jurisdiction of the Dy. Commissioner of Central Excise to decide the demand for customs duty when the assessment at the time of import was carried out by the Customs officer at the port of import, we We are of the considered view that such dual jurisdiction is not permissible. The action of DRI in issuing show cause notice invoking Section 28 for five years period and the demand to be decided by the jurisdictional customs assessing officer of the port of import makes it clear that the jurisdiction as adopted by the DRI is correct and proper.

12. We note that the issue of jurisdiction in similar set of facts came up for decision by the Hon'ble Karnataka High Court in **Molex India Ltd. – 2015 (317) ELT 250 (Karnataka)**.The High Court held that the Dy. Commissioner of Central Excise was not appointed as customs officer and has no jurisdiction to issue show cause notice. The said decision was confirmed by the Hon'ble Supreme Court in **2015 (326) ELT A 184 (SC)**.

13. Ld.AR for Revenue contended that the retrospective amendment carried out in 2011 will cover the situation as the Dy. Commissioner of Central Excise has been notified as proper officer under Section 28. As already noted, the demand proceedings in the present case is not under Section 28 of the Customs Act. This is

under Rule 8 of 1996 Rules. In respect of this appellant, a five year demand on the very same issue has been issued invoking Section 28. The notice was made answerable to the jurisdictional customs officer at the port of import. In such situtation, we note that another proceedings, for earlier period, cannot be initiated invoking Rule 8 by the central excise officer. In the present proceedings, the central excise officer did not exercise his powers, if any, under Section 28 of the Customs Act. Such powers were admittedly available with the Assessing Officer of Customs at the port of import.

14. In view of the above analysis, we find the impugned order is not legally sustainable on more than one ground. Accordingly, the same is set aside and the appeal is allowed.

[order pronounced on 22.11.2017.]

(S.K. Mohanty)
Member (Judicial)

(B. Ravichandran)
Member (Technical)

Ckp.