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

BENCH-SM

COURT – IV

Customs Appeal No. C/51478 & 51479/2018 [SM]

[Arising out of a common Order-in-Appeal No. CC-A-CUS-D-II-ICD-TKD-IMPORT-812-813-2018 dated 26/04/2018 passed by the Commissioner of Customs, CGST and Central Excise, New Delhi (ICD) (ITC)]

Rohit Sakhuja & Jagjeet Impex ...Appellant
Vs.
C.C.-New Delhi(ICD TKD)(Import) ... Respondent

Present for the Appellant : Mr. Ashish Batra, Advocate
Present for the Respondent: Mr. P. Juneja, D.R.

Coram: HON'BLE MRS. RACHNA GUPTA, MEMBER (JUDICIAL)

Date of Hearing : 14.08.2018
Pronounced on : 23.08.2018

FINAL ORDER NO. 52818-52819/2018

PER: RACHNA GUPTA

Vide the present Order, I dispose of the above mentioned two Appeals, the issue being similar as one Appeal is with respect to the main importer and another is with respect to the co-noticee. The facts of these Appeals are that M/s Jagjeet Impex with Mr. Navneet Singh as proprietor are engaged in import of air conditioners of general brand, LED panels, parts of LED TVs, packing material and other electronic goods. Department received an information about the said importer importing split air conditioners of 1.5 tons by mis-declaring the same as that of 1 ton cooling capacity. The Department accordingly conducted examination of the goods covered by bill of entry No. 2747268 dated 29.09.2015 and it was discovered that even weight and dimensions of air conditioners had discrepancies. An investigation in the premises of M/s Jagjeet Impex was also conducted and the records thereof were found in possession of Shri Rohit Sakhuja, the co-noticee. In fact, the address of M/s Jagjeet Impex was found non-existing and the business of importing, selling of imported goods and other activities were found to be controlled by Shri Rohit Sakhuja. After conclusion of the investigation, Show Cause Notice dated 08.02.2016 alleging that they had conspired to make fraudulent import of goods with malafide intentions to evade customs duty and have tried for illegal import by suppressing the material facts from the Department knowing that the goods were liable for confiscation under Section 111(m) of the Customs Act, violation of Section 14 and Section 46 of the Customs Act, and that of Section 7 of Foreign Trade (Development and Regulation) Act, 1992 was served upon them demanding the proportionate penalties under Section 112A and 112B and Section 114 A and 114 AA of Customs Act, 1962. Vide the Order dated 31.08.17 passed by Additional Commissioner of Customs the allegations of the said Show Cause Notice alongwith the demand, interest and penalties therein were confirmed. Aggrieved of that Order, the Appeal was filed before Commissioner(Appeals) who vide the Order under challenge dated 26.04.18 has upheld the Order-in-Original confirming the denial for the benefit of Section 28(5) and Section 28(6) of the Customs Act, 1962. Resultantly, the present Appeal has been filed.

2. I have heard Shri Ashish Batra, Ld. Advocate for the appellant and Shri P. Juneja, Ld. DR for the Department.

3. Ld. Counsel for the appellant has impressed upon sub-section 5 and sub-section 6 of Section 28 of the Customs Act submitting that the provision permits conclusion of the proceedings under the Act where the duty alongwith interest and the penalty as mentioned therein is deposited within 30 days of issuance of Show Cause Notice and no differential has been subsequently demanded by the Department. It is also impressed upon that the payment in compliance of said Section was made by the appellant even prior the issuance of Show Cause Notice, still the Show Cause Notice was served and has been adjudicated against the appellant. The findings of the authorities below are therefore alleged to be erroneous while denying the benefit of this provision to the appellant. Orders are accordingly prayed to be set aside. Ld. Counsel has relied upon the decision of this Tribunal in the case of **M/s Orbit Jewellers Vs. Commissioner of Customs, Air Cargo (Exports), New Delhi 2016 (338) E.L.T. 620 (Tri. – Del)**.

4. While rebutting these arguments it is submitted by the Department that there is no infirmity in the Order under challenge as Section 28 of the Customs Act, 1962 is applicable only in the cases where Show Cause Notice under sub-section

4 thereof has been issued. The present case is the case of mis-declaration of the imported goods resulting into the confiscation of the consignment. Since the appellant cannot claim the ownership of those confiscated goods till he deposits the RF, hence, the case of the appellants is out of the ambit of Section 28. In addition, there is a Circular No. 11/2016 dated 15.03.2015 which expressly excludes the cases of confiscation out of the purview thereof. Same is impressed upon as being rightly applied by the Adjudicating Authority below. Appeals are prayed to be rejected.

5. After hearing both the parties, I opine that the only adjudication in the given facts and circumstances is as to whether when the appellant has paid the entire duty amount alongwith the interest and the penalties, the proceedings would have been concluded and as to whether the Adjudicating Authorities below have been right while not concluding the proceedings in that scenario. For proper adjudication of this controversy, appreciation of provision of Section 28 (1) (A) is relevant because this is the provision which came into effect vide Section 22 of the Taxation Laws (Amendment Act, 2006) so as to provide for deemed conclusion of the proceedings. The provision reads as follows:

> *"5) Where any duty has not been levied or has been short levied or the interest has not been charged or has been part paid or the duty or interest has been erroneously refunded by reason of collusion or any wilful misstatement or suppression of facts by the importer or the exporter or the agent or the employee of the importer or the exporter, to whom a notice has*

been served under sub-section (4) by the proper officer, such person may pay the duty in full or in part, as may be accepted by him, and the interest payable thereon under Section 28AA and the penalty equal to fifteen per cent of the duty specified in the notice or the duty so accepted by that person, within thirty days of the receipt of the notice and inform the proper officer of such payment in writing.

6) Where the importer or the exporter or the agent or the employee of the importer or the exporter, as the case may be, has paid duty with interest and penalty under sub-section (5), the proper officer shall determine the amount of duty or interest and on determination, if the proper officer is of the opinion –

*(i) that the duty with interest and penalty has been paid in full, then, **the proceedings in respect of such person** or other persons to whom the notice is served under sub-section (1) or sub-section (4), shall, without prejudice to the provisions of Sections 135, 135A and 140 **be deemed to be conclusive as to the matters stated therein**; or*

(ii) that the duty with interest and penalty that has been paid falls short of the amount actually payable, then, the proper officer shall proceed to issue the notice as provided for in clause (a) of sub-section (1) in respect of such amount which falls short of the amount actually payable in the manner specified under that sub-section and the period of one year shall be computed from the date of receipt of information under sub-section (5).”

6. The bare perusal of the above provisions makes it clear that the same is a beneficial piece of legislation with an intention to reduce the litigation proceedings where the

assesse satisfies the condition of the said Section. The language makes it clear that the provisions provide for deemed conclusion of the proceedings against the assesses if the payment as regard the duty, interest and 15% penalty thereof stands made by the assesse within a period of 30 days of the receipt of Show Cause Notice. It is further seen that the provision is applicable even in the cases of demand having been arisen on account of collusion, wilful mis-statement or suppression i.e. even in respect of illegal activity of the assesse, if the same stands accepted by him and the respective duty alongwith proportionate interest and the required penalty stands paid.

7. Now coming to the fact of the present case, the appellant herein has made the payment against the impugned bill of entry dated 29.09.2015 even prior the issuance of Show Cause Notice i.e. on 01.09.2015 itself with subsequent payment towards the penalty and interest on 07.01.2016 and 18.02.2016 respectively. The requisite TR-6/GAR-7 Challans are attached with the Appeal papers. As per the above provision, the appellant had the time to make the deposit till 08.03.2016 but the payment stands made by 18.02.2016. It is also apparent from the Show Cause Notice that the said payment of the differential duty and that of the penalty was brought to the notice of the Department vide letter dated 08.01.2016. The said acknowledgment is very much recorded in the Show Cause Notice itself. In the given circumstances, I am of the opinion that the Department has committed an error

even while issuing the Show Cause Notice. The original Adjudicating Authority has committed another error while re-determining the value of ceased goods because the said re-determination had to be made by the proper officer at the time of deposit itself and if after the said determination, the duty stands paid in full (with interest and penalty), the proceedings shall have to be deemed to be conclusive as to all the matters stated in the Show Cause Notice. It is only in case that after the said determination, the deposited duty and interest is found falling short of the amount actually payable, then the same could be demanded, which shall be payable within a period of two years as shall be computed from the date of receipt of said information. The Department has miserably failed to follow the prescribed procedure.

8. No doubt Sections 28(5) and 28(6) are applicable without prejudice to the provisions of Sections 135, 135A and 140 of the Customs Act but perusal of Show Cause Notice makes it clear that none of these provisions have been invoked at the time of issuing Show Cause Notice. It has already been observed that in fact the Show Cause Notice, in the present case, was not required to be issued. Though the Department has impressed upon about the present case to be a case of confiscation on account of mis-declaration punishable under Section 135 of the Act and has also impressed upon Circular No. 11/2016 excluding the case in one to be out the ambit thereof. But I am of the opinion that Section 28(5) and 28(6) are applicable for all those cases as are mentioned in sub-

section 4 of Section 28. Perusal thereof makes it clear that collusion, wilful mis-statement or suppression of facts are mentioned to be the reason for evasion of duty. The alleged Act of appellant is squarely covered under the said sub-section. Hence, I opine that case of appellant is very much covered under the deemed conclusion scheme of legislature under Section 28 of the Customs Act. To accept the Revenue's stand would therefore amount to curtailing the sweep of a beneficial provision to the appellants. I opine that Adjudicating Authorities below had adopted artificial interpretation of these provisions to defeat the statutory intent. It is well settled law that the legislative intent, extending certain beneficial provision to the assessee, should not be made frivolous by interpreting the provision in a particular manner other than the one which reflects upon such intent.

9. Further, the Circular as relied upon by the Department though expressly excludes the cases covered under Sections 111, 113, 115, 118, 119, 120 & 128 to be out of the purview of this Circular but this emphasis of Department is also not opined to be of any benefit to the Department for the reasons that the Circular is merely a clarification regarding the co-noticees. Hence, the Circular is not applicable at least on the main importer. As far as the co-noticee, Mr. Rohit Sakhuja is concerned, I am of the opinion that Circular is not applicable upon him as well for the simple reason that the Circular has tried to widen the scope of Section 28(5) and 28(6) of the Act. It is the settled provision that Circulars being mere clarificatory

in nature cannot supersede the legislature. It is also settled principle of law as was held by Hon'ble Apex Court in **Babu Vs. Bar Council Kerala AIR 1999 (S.C.) 128** that if the manner of doing a particular act is prescribed under any statute, the act must be done in that manner or not at all. In another case of **Aphali Pharmaceuticals Ltd. Vs. State of Maharashtra 1989 (44) E.L.T. 613**, the Hon'ble Apex Court has observed that a taxing statute must be interpreted in the light of what is clearly expressed therein and nothing can be implied nor can the provisions be imported into them so as to supply an assumed deficiency.

9. The present is opined to be a clear case of presumed and assumed interpretation of Section 28(5) and 28(6) by the Adjudicating Authorities below. The Commissioner(Appeals) is held to have committed an error while giving more emphasis to a clarificatory Circular than to the settled provision of the statute. The case law as relied upon by the appellant squarely covers the facts and circumstances of the present case with the only difference that the case is of the period when the amendment in Section 28 was not in existence. However, perusal of then Section 28(1A) and Section 28(5) and 28(6) as on date makes it clear that the provisions are '*pera materia*'. Following the ratio laid down by the said decision and in view of the entire above discussion, I agree with the contentions raised by the appellant holding the infirmity, as observed above, in the Orders under challenge. Resultantly, I hereby set aside both the Orders under challenge extending the

benefit of deemed conclusion of the proceedings in view of Section 28 of the Customs Act to the appellants herein for the reason that they have complied with the conditions mentioned in the provision for the purpose even prior the issuance of Show Cause Notice. Both the Appeals are therefore hereby allowed. Consequential benefits, if any, to be followed.

[Pronounced in the open Court on 23.08.2018]

(RACHNA GUPTA)
MEMBER (JUDICIAL)

D.J.