CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL NEW DELHI.

PRINCIPAL BENCH, COURT NO.IV

Customs Appeal No.50893 of 2019

(Arising out of Order-in-Original No. ALW-EXCUS-000-COM-042-18-19 Dated 21.12.2019 passed by Commissioner of CGST, Rajasthan)

M/S Arjun Industries **Appellant**
Regd. Office: C-9/9366, Vasant Kunj,
New Delhi-110070

Versus

Commissioner of Central Goods and Service Tax, Customs & Central Excise, **Respondent**
A-block, Surya Nagar Alwar.

Appearance
Present for the Appellant : Shri N.K. Sharma, Advocate
Present for the Respondent: Shri Sunil Kumar, Authorised Representative

CORAM: **Hon'ble Mr. Bijay Kumar, Member (Technical)**
Hon'ble Ms. Rachna Gupta, Member (Judicial)

Date of Hearing/Decision: 26.06.2019

Final Order No. 50983/2019

Bijay Kumar:

The present appeal is field against order in original dated 21.01.2019 passed by the Commissioner of Central Goods & Service Tax and Customs, Alwar, wherein the following demands have been conformed against the appellant.

(i) A demand of Customs duty under Section 28(1) of Customs Act, 1962 (hereafter referred to as Customs Act), amounting to Rs.1,01,03,020/- (Rs. One Crore One Lakh Three Thousand and Twenty only) along with interest thereon @ 20% per annum up to the date of payment under Section 28AB of the Act.

(ii) The demand of Central Excise duty amounting to Rs. 6,18,198/- (Rs. Six Lakh Eighteen Thousand One Hundred Ninety Eight only) alongwith interest thereon @ 20% per annum up to the date of payment under Section 11A and Section 11AB of the Central Excise Act, 1944 (herein after referred to as 'Excise Act').

(iii) Confiscation under order Section 111(o) of the Customs Act, for the goods valued at Rs. 2,47,02,701/- (Rs. Two Crore Forty Seven Lakh Two Thousand Seven Hundred One only), however, option of redemption was granted to the appellant on payment of redemption fine of Rs. 1,50,00,000/- (Rs. One Crore Fifty Lakh only) under Section 125(1) of the Customs Act.

(iv) Further, confiscation was also ordered under Rule 209 of erstwhile Central Excise Rules, 1944/ Rule 25 of the Central Excise Rules, 2002, the goods valued at Rs. 46,32,223/- (Rs. Forty Six Lakh Thirty Two Thousand Two Hundred Twenty Three only), however, option of redemption has been granted to the appellant on payment of redemption fine of Rs. 25,00,000/- (Rs. Twenty Five Lakh only) under Section 34 of the Excise Act.

(v) Penalty was also imposed under Section 112 of the Customs Act, for Rs. 1,00,00,000/- (Rs. One Crore only) and other of penalty has been imposed under Rule 209 of erstwhile Central Excise Rules, 1944 and Rule 25 of Central Excise Rules, 2002 for Rs. 5,00,000/- (Rs. Five Lakh only) upon the appellant.

Being aggrieved by the impugned order the appellant is before us in appeal on the following grounds:

1. The order has been passed pursuant to remand order of this Tribunal, order No. C/A/57118/2017-CU(DB) dated 29.09.2017 which set aside the order in original dated 13.11.2013. The appellant had approached to Hon'ble

Rajanthan High Court against this remand order of the CESTAT, however, had not been successful, and the order of the CESTAT remanding the matter to the original adjudicating authority was upheld by the High Court.

2. The adjudicating authority has not given findings on the substantive issues raised by the appellant in their submission dated 26.11.2018, while passing the impugned order.

3. The appellant also contended that the show cause notice in this matter was issued first time, on 30.03.2000, raising the Customs duty demand along with interest, which was dropped by the order in original No.23/2000 dated 16.08.2000 by the then adjudicating authority and therefore issuing the subsequent show cause notices on the same issue was without any authority of law, and on this ground along the proceedings is required to be quashed, placing reliance on the following decisions:

(i) 2005(192) ELT 1197 (Tr-Del) Osaka Alloys & Steel Pvt. Ltd. Vs Commissioner CE Jalandhar.

(ii) 2014(308) ELT 81 (T-Ahd) Swiss Parenterals Pvt. Ltd. Vs Commissioner of CE & ST Ahmadabad

(iii) 1944(69) ELT 477(BOM) Metal Extenders Industries Pvt. Ltd. Vs UOI

(iv) 2014(306) ELT 231(Del) India Tourism Development Corp Ltd.

(v) ..... (222) ELT 404 (T-Ahd) Solitaire Machine Tools Ltd.

(vi) Final Order No. A/60407/2017-SM(BR) Dt-15.03.2017 in the case of Raman Narula.

It is the submission of the appellant that the adjudicating authority has not dealt with the above case laws, which was stated to be in their favour, while adjudicating the show cause notices.

It is further submitted that adjudicating authority has also failed to consider the decision of Hon'ble High Court in case of Mavi Industrial Ltd. Vs Commissioner of Customs and Central Excise, Thane-II-**2013 (289) E.L.T. 15 (Bombay),** which squarely covered the case at hand.

4. Regarding the duty demand of indigenously procured goods, the order 203/2003 dated 21.10.2003 was set aside by order in appeal No.2016 (GRM) CE/JPR-1/2006 dated 31.08.2016, placing reliance on CESTAT order 18.3.2005 holding that the liability to recover the duty arises only at the time its debonding, which has not arrived till that date in view of extension of LOP which was extended till 31.03.2008. This appellate order was passed as per the remand order of CESTAT Final order No. 583/06-SM(BR) dated 10.04.2006 in earlier order in appeal No.138(SN)CE/JPR-I/2004. Therefore, the proceedings initiated by second and third show cause notice dated 29.10.2001 and 13.08.2008 respectively, were without the authority of law. Also, the confiscation that had been proposed in the impugned order is not sustainable in view of provisions of Section 111 of the Customs Act. Similarly, the confiscation proposed under Rule 2009 of Central Excise Rule, 1944 (here in after referred to as Excise Rules) is also not valid in case on hand.

5. The adjudicating authority also failed to notice that the import has taken place in between year 1996-1999 and proposal to confiscate the imported goods have been made in 2008, during that period the value of the imported goods has depreciated substantially, the appellant has also provided Chartered Engineers certificate in support of that, wherein it is stated that value of the machinery imported has depreciated in value and stood at Rs. 42,55,000/-. The reference was also made to the provisions of

Rule 3(5A) of Cenvat Credit Rule 2004, according to which if the capital goods when cleared as waste and scrap, the manufactures shall pay the duty on amount of transaction value and not on the original purchase value. The impugned order is also silent on this issue.

6. It is also submitted that the appellant had imported the capital goods involving customs duty Rs. 1,01,03,020/- without payment of duty at the strength of EPCG/ Advance licence and indigenous capital goods without payment of duty amounting to Rs. 6,18,198/- on CT-3 Certificate issued by the jurisdictional excise officers. It is the submission by the appellant than due to circumstances beyond the control of the appellant could not be start their business and also affect export as per the licence granted to them. In the mean time one of the director of the appellant company also passed away. The appellant got embroiled in litigation with bank and the excise department which launched various proceedings under the different show cause notices.

7. Capital Goods, which were imported or indigenously procured are still lying in the factory and also there is no case of misuse or diversion thereof. The appellant’s submission that they do not have any fund to run the factory or to honour the demand confirmed against them by the impugned order was not considered by the adjudicating authority. It has also informed the adjudicating authority vide latter dated 20.02.2009 and 23.02.2009 to take possession of the confiscated goods and sell them, so as to recover the duty and penalty and refund the remaining amount to the appellant.

8. The appellant was permitted by the Ministry of Industry to set up hundred percent Export Oriented Unit (100%EOU) for the manufacture of Roasted Dry Fruits and Spices for which industrial approval was granted vide

letter F. No. PER-329 (1995) EOV/309/95 dated 07.07.1995 as per the conditions stipulated therein. The appellant was also granted private bonded warehouse license under 65 of the Customs Act for deposit of the imported goods for the manufacture of export products under bond. The Ministry of Finance vide notifications No.13/81-Customs dated 09.02.81, Notification No.52/97 Customs dated 03.06.97, as amended by Notifications No.65/99 dated19.05.99, has exempted the goods specified therein, when imported into India or procured from public warehouse or private warehouse appointed under section 57 or 58 of the Customs Act, for the purpose of manufacture of articles of export out of India or being used in connection with the production or packaging of goods or services out of India by 100% export oriented units approved by the Board of approvals for such EOUs by the Ministry of Industry, (Department of Industrial Policy & Promotion) or the Development Commissioner concerned, from whole of the duties of customs leviable under the First Schedule to the Customs Tariff Act, 1975, and additional duty, if any, leviable thereon under Section 3 of the Customs Act. As per prescribed procedure the appellant/importer was required to as execute a bond with such a surety or security as prescribed, binding themselves for export of manufactured goods. The appellant failed to export goods during License Obligation Period (LOP) and also did not completely install the imported / indigenously procured machinery within a period of one year from the importation thereof, and also failed to obtain extension as required in terms of Notification, No.13/81- CUS (Supra) read with amending notifications. Therefore, the show cause notice dated 13.03.2000, was issued to the appellant demanding Customs duty & Central Excise duty. The show cause notice was decided by the adjudicating authority, vide order in original No. 23/2000. Dated 16.08.2000, who set aside the demand.

Thereafter, on the same issue another show cause notice dated 29.10.2001 was issued to the appellant which was decided by the order dated 23.09.2003, wherein the demand, which was dropped earlier by order dated 16.08.2000 was confirmed, however, the goods confiscated was allowed to be redeemed on payment of redemption have been of Rs. 50,00,000/- alongwith the imposition of penalty of Rs.10,000/- under Section 117 of Customs Act. The appellant preferred appeal against this order, which was set aside vide the Tribunals final order No.279/05-B dated 18.03.2005 with consequential benefit. Similarly, the demand in respect of indigenously procured goods was confirmed by the lower adjudicating authority vide order dated 22.10.2003 under the provisions of Central Excise Act and Rules. The appeal against this order was dismissed by the Commissioner (Appeal), vide order in appeal No. 138/2004 dated 16.04.2004. The appellant preferred appeal against this order of Commissioner (Appeal), before Hon'ble CESTAT. The CESTAT vide its order No.583/06-SM(BR) dated 10.04.2006 remanded the matter to the Commissioner (Appeal) for a fresh decision on merits. Accordingly, the Commissioner (Appeal) passed order in Appeal No.203/2003, by which the order of lower adjudicating authority, being order in original No. 203/2003 was set aside. Therefore, no demand existed after the order of Hon'ble Tribunal and Commissioner (Appeal) against the appellant after year 2006.

9. The department, thereafter, issued yet another show cause notice to the appellant on the same ground vide C No. (v) (84)15/off/185/08 dated 13.08.2008 proposing to demand the Customs and Central Excise duty foregone while availing the exemptions. This show cause notice was adjudicated upon vide order in original No.JAI-EXCUS-001-COM-083-13-14

dated 13.11.2013 by conforming the demand. This order was again agitated, 3rd time, before this Tribunal, The Hon'ble CESTAT by order dated 29.09.2017 remitted the matter back to adjudicating authority with the following observations.

> 7. The admitted facts of the case are that the appellants were permitted to operate an EOU in 1995 subject to various conditions. The prime condition is that they have to manufacture and export the products from their units. They have not exported any product. After repeated extension of LOP, the same was terminated w.e.f. 1.4.2013. In fact the licensing authority, the Development Commissioner, Noida, categorically recorded the developments from the date of issue of LOP in 1995 and concluded that the appellants failed to fulfill the terms of the LOP and there is a violation of the FTDR read with FTP 2009-2014. As such, the violation of EXIM Policy and non-fulfilment of export conditions is clearly an admitted fact. Now, the contest against the present proceedings is only on the ground that before such termination of LOP by the Competent Authority, the Customs Authorities could not have been initiated proceedings. We note that though the technical objection is valid, at that time of issue of the impugned order all facts including the termination of LOP by the Competent Authority has been taken note of and duly analysed by the Original Authority. This much has been admitted by both the sides. During the submission, ld. Counsel for the appellant was specifically asked as to the process of fresh adjudication based on all facts now in the knowledge of the appellant than can be completed by the Original Authority. We note that both the sides agreed for such course of action. Accordingly, we set aside the impugned order and remand the matter to the Original Authority for a fresh decision. The Original Authority shall provide adequate opportunity to the appellant to submit their defence with supporting documents before a fresh decision is taken. We note that the facts, as recorded in the impugned order, can be considered and also available for the appellant for filing their defence.

10. In compliance of this order the adjudicating authority has re-confirmed demand vide impugned order dated 21.01.2019.

11. Learned advocate on behalf of appellant submitted that this is the fourth round of litigation before this Hon'ble Tribunal against the show cause notice on the issue which has been set aside on a number of occasions earlier. The present show cause notice is thus time-bared as the department

has confiscated the imported goods as well as indigenous procured goods in year 2000 itself, even though the LOP was extended by the Development Commissioner, Noida Export Processing Zone till year 2013. Therefore, it was not legally correct to confiscate the goods lying in the bonded warehouse of the appellant. Also, that while confirming the demand depreciation as per the notifications 13/81-Customs as amended, was not granted by the adjudicating authority. In respect of warehouse imported goods.

12. The department has also denied the renewal of the license to the private bond warehouse in year 2000 itself and in terms of the bond executed by the appellant, the department should have raised the demand within the period of limitation, as prescribed in the notification. Similarly, provisions existed for the realisation of duty foregone in case of indigenous procured goods, under notification No.1/95-CE dated 04.01.1995 which has not been followed by the department. Therefore, the issuance of various show cause notices after year 2000, were time bared and the adjudicating authority should not have confirmed the impugned demand on this ground itself.

In view of aforesaid submissions the Learned Advocate pleaded for setting aside of the impugned order.

Learned Department representatives on behalf of revenue has reiterated the findings contained in the impugned order.

We have gone through the submissions made by both the sides and also perused the appeal records.

13. The appellant in the case has approached the Tribunal as many as four time against the various orders passed by the adjudicating authority/appellant authority on the same sets of facts and circumstances. In spite of quashing the demand/order against appellant by the Commissioner (Appeal) and the Tribunal, the adjudicating authority has been issuing the show cause notices on one pretext or other contrary to the provision of Customs and Central Excise Act. Once the order passed by the Commissioner on the same issue which has been set aside by this Tribunals and also by the Commissioner (Appeal), the re-opening of the issue amounts to non compliance of the order of the Tribunal/Commissioner (Appeal). Once the department has issued the show cause notice before the expiry of LOP and that has been decided in appeal, by setting aside that, the same issue cannot be revived by another show cause notice even after the extension of LOP period. In this case the impugned order is passed in terms of show cause notice dated 13.08.2012, however, no such show cause notice is on record. The show cause notice that is enclosed with the appeal memorandum is of date 13.08.2012 appears to be wrong and out to have been dated 13.08.2008, as evident from the case file. Even if it is presumed that the show cause notice is issued on 13.08.2012 as has been stated in the order dated 13.11.2013 demand against the appellant would be premature as the LOP has been extended till year 31.03.2013 by the DGFT. Which is also evident the remand order of CESTAT dated 20.09.2017.

14. The Learned adjudicating authority has not considered the previous decisions of the Tribunal, which set aside the order against the appellant. We also find that the repeated show cause notices, on the same issue, have been issued which is held to be not permissible placing reliance on the

decision of Tribunal in case of **Solitaire Machine Tools Ltd. Vs. Commissioner of Central Excise,2008(222) E.L.T. 404 (Tri-Amd)** the relevant paragraph of the order is reproduced as under:

> **5.2** We are in agreement with the submissions of the learned advocate that the clearances effected in pursuance of the permission granted in 1992 cannot be guided by the subsequent restriction imposed in 1995 by DGFT authorities. Further, when the show cause notice has been issued in Jan'96 in respect of the very same clearances, issue of another show cause notice in April '96, including the demand proposed in the earlier show cause notice issued on 19-1-96 and proceeding with two separate adjudication and confirmation of two demands are not permissible. It is also noticed that the two demands have been issued after issue of second show cause notice. The second demand amounting to Rs. 2,39,951/- includes the amount already included in the order of the original authority arising out of the show cause notice dt. 19-1-96 which is not legal and proper. We have already noted that no appeal has been filed against the order of demand in pursuance of show cause notice dt. 19-1-96. The present order of the Commissioner (Appeals) arising out of the show cause notice dt. 12-4-96 cannot be allowed to survive.

Similar view has been expressed in case of **Commissioner of Central Excise Bangalore Vs. Andhra Steel Corporation Ltd. 2002 (145) E.L.T.-567 (Tri.Bangalore)** reproduced as under:

> (a) The uncontroverted position is, a show cause notice was issued by the Range Superintendent answerable to the Assistant Collector as to why documents of Modvat credit of Rs. 1,74,382/- under Rule 57-I should not be determined as recoverable, as the same was availed on duty paid on inputs, used for job work purpose. This notice was dated 30-1-96 and covered the period July '94 to December '94. The respondents replied this notice on 22-3-96, a personal hearing was granted and the appellants were heard by the Assistant Commissioner on 29-7-98 by an order dt. 9-4-99, this notice was withdrawn by the Assistant Commissioner. Meanwhile, another show cause notice dt 7-4-99 was issued by Deputy Commissioner answerable to the Addl. Commissioner for the period April, 94 to December, 94, on the same reasons proposing recovery of Modvat credit on inputs used in job work. This notice was for an amount of Rs. 3,86,488/- and also proposed why penalty under Rule 173(Q)(1) read with Rule 57-I(4) of Central Excise Rules, 1944 should not be imposed. The Additional

Commissioner confirmed the demand under Rule 57-I(2) and imposed a penalty of Rs. 50,000/-

(b) No new material when compared to the material in notice dt. 30-1-96 has been brought on record in the subsequent show cause notice dt. 7-4-99, except the raised quantification of the amount, probably due to increase in the period. The new charge on penalty appears to be invoked to substantiate the charge of suppression and overcame the bar of limitation.

(c) The earlier notice for the period, July, 94 to December, 94 dt. 30-1-96 has been ordered to be withdrawn by the competent adjudicating officer, after hearing the Respondents and considering the written reply. While there can be no doubt about the issue of this notice being an administrative act, but the fact that the appropriate authority, after receipt of the written reply and grant of personal hearing, passed an order on 9-4-99 withdrawing the notice, leads one to conclude, that 'Procedure simulating the Judicial Process' was undertaken, therefore, the order dt. 9-4-99 withdrawing the notice has to be considered as quasi judicial decision, an order in adjudication. The order of withdrawal of the notice not being a ministerial act, but being a quasi judicial order would hold good, being not challenged in appeal. In any case, appeal to the Commissioner (Appeals) can be taken up under Section 35 of Central Excise Act, 1944 against any decision or order ministerial or quasi judicial, passed under the Act by a Central Excise Officer lower in rank than the Commissioner (Appeals) unlike Section 35B of the Act where appeals to Tribunal could be made only against an order passed by a Commissioner as an adjudicating authority. This Order of withdrawal of demand notice for the period July, 1994 to December, 1944 is therefore valid till it is set aside. Therefore, we find substance in the cross-appeal filed by the Respondents herein.

(d) As regards the question of res judicata and estoppel being pleaded, we find that the Tribunal in the case of *Godrej Boyce Mfg. & Co. Ltd.,* 1994 (71) E.L.T. 429 (T) have held in para 7 of the reported decision that "with an issue having already stood decided and accepted by way of not challenging the same by approaching the appellate authority, then subsequent notices issued raising the same grounds on which earlier adjudication proceedings and order passed thereunder, has assumed finality could as well be rejected *ex-facie* as not sustainable, as principles of *res judicata* would come into play," We note with approval and rely on the following findings arrived by the Bench

"……Further merely because the period of demand is different, there could be no alteration in the approach, as the basis for raising the demand remains the same, on which a decision is already taken earlier by the competent authority, and which has assumed finality by virtue of not preferring any appeal………"

We are aware that in the case before us subsequent notice has been issued by an authority senior in rank to the Assistant Collector who ordered withdrawal of the demand for the period July to December, 94, which was not the

> case before the Bench in the case of *Godrej Boyce Mfg Co Ltd.* Yet we hold that merely because the demand is three months earlier in the show cause notice issued by Dy. Commissioner, being from April, 94 to December, 94 and the earlier demand notice was covering the period July, 94 to December, 94, we cannot uphold the plea of the learned DR that the demand for the period April to June, 94 should be remanded back for decision on merits, when we find that no new material has been brought by the Revenue to prove that the Respondents herein had not contested the earlier show cause notice on merits. In this view, we cannot uphold the plea that demands for April to June, 94 to be redetermined.
>
> (e) There are catena of decisions some of them were cited during the course of hearing. They lead to the proposition that the conduct of issuing the second show cause notice in such case could not be upheld. We find substance in the said proposition made relying upon the decision of the Hon'ble Calcutta High Court AIR 1961 Cal 195 in the case of *Jiban Saha* v *S.K. Chatterjee* wherein it was held that if the second/revised notice issued on identical terms notwithstanding the scope of the first one and taking advantage of the defence already disclosed by the noticee, in first reply thereto and also in the personal hearing, such second notice would be illogical and barred by the principles of analogous to *res judicata*. We do not therefore find any substance in the grounds made in the present appeal filed by the Revenue. The reasons pleaded and not applying the Tribunal's judgment in the case of *M/s. National Industries* v. *CCE, Nagpur,* 1997 (94) E.L.T. 92 as applied by the learned Commissioner (Appeals) do not impress us.

15. We also find that the department has not renewed the warehousing licence of the appellant after year 2000 and thereafter the demand was required to be made in terms of the notifications No.13/81 (Supra) within prescribed time, which has not been done by the department. Therefore, the demand is also time bared. We also take strong objection for issuing repeatative of show cause notices, even after the issue having been decided by the appellate form including Hon'ble CESTAT. This practise of issuing of show cause notices after issue having been decided, has been held to be illegal as held by Hon'ble High Court in case of M/S India Tourism Development Corporation Ltd., Vs Delhi Administration (2014) (306) E.L.T.(Delhi), the paragraph, which are relevant is the reproduced as under.

> 14. The said order passed by the Collector of Excise only deleted names of the two restaurants that had been

> inadvertently allowed and treated as attached with the 'Orbit Bar'. No penalty or direction for payment of any licence fee for the said two restaurants was passed. The order dated 1.4.1985 became final and was accepted by both parties.
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> 19. It is settled proposition of law that the quasi-judicial authority cannot review its earlier decision unless the power of review is conferred by the statute.
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> 24. In view of the above, we are of the considered opinion that the order dated 8-5-1992 and the consequent demand raised by the respondents vide memorandum dated 9-6-1992 are not sustainable and are hereby set aside. In case, the petitioner has paid or deposited any amount pursuant to the interim order of this Court dated 19-6-1992 for stay of the memorandum dated 9-6-1992, the petitioner shall be entitled to refund of the same with interest @ 12% per annum.

16. We also find that the entire goods, which has been procured indigenously or imported is still lying in the appellant's warehouse. The appellant has requested for the disposal of confiscated goods under the provisions of Customs and Central Excise Act and recover the demand penalty against them. But the department has failed to do so. We therefore hold that the impugned order is contrary to the provisions of the law, on merits and also on the limitation and is not sustainable.

Appeal is allowed with consequential benefit if any.

(Operative part pronounced in open court)

(BIJAY KUMAR)
MEMBER (TECHNICAL)

(RACHNA GUPTA)
MEMBER (JUDICIAL)

JB