CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
REGIONAL BENCH AT HYDERABAD
Division Bench
Court – I

Appeal No. C/383/2009

(Arising out of Order-in-Appeal No.01/2009 (V-II) CUS, dated 25.02.2009 passed by CCCE & ST (Appeals), Visakhapatnam)

Nikhil Refineries Pvt Ltd ..... Appellant(s)

Vs.

CC, CE & ST, Visakhapatnam - I ..... Respondent(s)

Appearance
Shri S. Thirumalai, Advocate for the Appellant.

Shri Arun Kumar, Dy. Commissioner/AR for the Respondent.

Coram:
HON'BLE Mr. M.V.Ravindran, MEMBER (JUDICIAL)
HON'BLE Mr. P. Venkata Subba Rao, MEMBER (TECHNICAL)

Date of Hearing: 02.08.2018
Date of Decision: 02.08.2018

FINAL ORDER No. A/30830/2018

[Order per: P.V. Subba Rao.]

1. This appeal is filed against the Order-in-Appeal No.01/2009 (V-II) CUS dated 25.02.2009. The appellant imported edible oils which were stored in shore tanks which were registered as Customs Private Bonded Warehouses. As per the established law and practice, the import duty in such cases is calculated depending upon the quantity received in the shore tanks and not what came in the ship. The quantity received in the shore tanks is measured using the calibration charts issued by the surveyors and confirmed by the Legal Metrology (Weights & Measures) Department. The calibration charts

provide the data to quantify the cargo stored in the tanks and the volume of the cargo is calculated based on the calibration chart and the same is multiplied by the load port density and the temperature of the cargo. It was felt by the Dy. Commissioner from the shore tank survey ullage reports that the cargo quantified based on the calibration charts provided by the appellant did not appeared reliable and he, therefore, initiated steps to conduct physical verification and thereafter directed the importer to get the tanks re-calibrated immediately so as to ensure accurate quantification of the cargo for the purpose of collection of duty. Accordingly, the appellant got the warehouse tanks re-calibrated by M/s Gowthami Marine Surveyors & Consultants and confirmed by the District Inspectors of Legal Metrology and submitted the same to the department.

2. Based on these reports the department came to a conclusion that importer has received excess cargo to the tune of 27.67 MT in various bills of entry and had not discharged duty on the same. The appellant was asked as to why an amount of Rs.4,13,810/- as customs duty on this quantity along with interest, should not be demanded from them and why penalty under Sec.114 should not be imposed on them. The annexures to the show cause notice show that this amount was calculated on 23 bills of entry listed in Annexure-II as the difference between the quantity as per the old calibration charts and as per the new calibration charts. The show cause notice also encloses Annexure-I in which various quantities on which duty paid, were found to be in excess of what was to be paid by them as per the new calibration charts. As per this Annexure-I to the show cause notice itself, the assessee had, in fact, paid an excess duty of Rs.24,81,268/- in respect of some other bills of entry. The appellant, however, paid the

differential duty as demanded. The lower authority, vide his Order-in-Original No.12/20087 dated 01.07.2008 confirmed the demands on the importer and appropriated the amount already paid by them against the demand. He also confirmed the interest at the appropriate rate and imposed mandatory penalty equal to the differential duty. Aggrieved, the appellant preferred an appeal before the first appellate authority who upheld the Order-in-Original and rejected the appeal. The appellant preferred this appeal against the Order-in-Appeal on the following grounds.

A. The entire proceedings of the show cause notice leading to Order-in-Original are bad in law as the appellant had paid the duty demanded even before the show cause notice was issued voluntarily and therefore, no show cause notice should have been issued under Sec.28(2B). This section indicates that no notice can be issued, once the appellant has paid the differential duty.

B. A plain reading of Sec.28 shows that it applies to only cases where duty has not been charged or has been short charged or erroneously refunded which is not the case herein because the moment the difference was pointed out, they had paid the duty. He relied on the following case laws:

   a. Al Falah Exports Vs CCE [2006 (198) ELT 343 (L-B)]
   b. CCE Vs Roshan Lal Lalit Mohan [2006 (206) ELT 325 (Tri-Del)]
   c. Auto Transport Services Vs CCE [2006 (3) STR 330 (Tri-Del)]
   d. CCE Vs Bangalore Auotomats [2007 (219) ELT 684 (Tri-Bang)]

C. The demands are barred by limitation because there is no evidence of fraud, collusion, wilful misstatement or suppression of facts.

3. The learned counsel further contended that quantification carried out on vessels/ship cannot be the reason for ordering re-calibration of tanks as has been done by the Asst. Commissioner. He further contended that short payment, if any, against some bills of entry must be set off against excess payments in respect of the other bills of entry. He further argued that the short payment is hit by time bar. Lastly, he contended that there is no case to impose penalty or demand interest and prayed to set aside the Order-in-Appeal.

4. The learned Departmental Representative, on the other hand, reiterated the arguments made in the Order-in-Original and Order-in-Appeal and argued that it cannot be denied that there was excess quantity of which duty was not paid because the tanks of the appellant were not properly calibrated. It is only on the insistence of the department that the tanks were re-calibrated and the short payment noticed and therefore the demand along with interest and penalty are liable to be confirmed.

5. We have considered the arguments on the both sides. We find that the tanks needed to be calibrated and they were calibrated initially by one agency and they were re-calibrated on the direction of the department through another agency. The re-calibration resulted in re-calculation of the quantities in respect of several bills of entry and the department had demanded duties in respect of those bills of entry where there was a short payment. It is true that there was also excess payment in many more bills

of entry as per the re-calibration chart. Therefore, if the re-calibrated measurements are considered the appellant had, in fact, lost money by paying excess duty overall and has not gained anything by not re-calibrating their tanks. Therefore, it cannot be alleged that the appellant had any motive to evade payment of duty because he actually paid excess duty on the whole. We, therefore, find that the extended period of limitation cannot be invoked with respect to those demands and since the show cause notice has been issued after the period, the entire demand is unsustainable and therefore we find the Order-in-Original confirming the demand was incorrect and the Order-in-Appeal upholding the Order-in-Original was also not correct. At any rate, the appellant had already paid the differential duty demanded by the department and there was no reason for the department to issue show cause notice or propose to impose penalty on the appellant. The demand of differential duty along with interest and penalty are therefore liable to be set aside and we do so. As far as the request of the appellant for refund of excess duty paid by them is concerned, refund of duty was not an issue under consideration in the show cause notice or the Order-in-Original or Order-in-Appeal. The appellant is free to file a refund claim for the excess duty paid and this can be considered as per the law by the authorities.

6. The appeal is allowed.

(Operative part of this order was pronounced in the open court
on conclusion of hearing)

(P.VENKATA SUBBA RAO)
MEMBER (TECHNICAL)

(M.V. RAVINDRAN)
MEMBER (JUDICIAL)

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