

**CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
REGIONAL BENCH AT HYDERABAD**

Division Bench

Court – I

Appeal No. C/513/2009

(Arising out of Order-in-Original No.13/2009-Adjn-Cus dt.31.03.2009 passed by CCCE & ST,
Hyderabad - II)

M/s Mahindra & Mahindra Ltd
Automotive Sector, Mahindra Nagar,
Near Bidar 'T' Junction, Zaheerabad,
Medak District – 502 220

.....Appellant

VERSUS

Commissioner of Customs, Hyderabad -
CUSTOMS
Kendriya Shulk Bhavan, L.B. Stadium Road,
Basheerbagh, Hyderabad,
Telangana – 500 004

.....Respondent

With

Appeal No. C/514/2009

(Arising out of Order-in-Original No.13/2009-Adjn-Cus dt.31.03.2009 passed by CCCE & ST,
Hyderabad - II)

Shri V. Vaidyanathan, Manager,
M/s Mahindra & Mahindra Ltd,
Automotive Sector, Mahindra Nagar,
Near Bidar 'T' Junction, Zaheerabad,
Medak District – 502 220

.....Appellant

VERSUS

Commissioner of Customs, Hyderabad -
CUSTOMS
Kendriya Shulk Bhavan, L.B. Stadium Road,
Basheerbagh, Hyderabad,
Telangana – 500 004

.....Respondent

Appearance

Present for the Appellant: Shri Bipin Verma, Advocate

Present for the Respondent: Shri N. Bhanu Kiran, Authorized Representative.

Coram:

HON'BLE MR. ANIL CHOUDHARY, MEMBER (JUDICIAL)
HON'BLE MR. P. VENKATA SUBBA RAO, MEMBER (TECHNICAL)

FINAL ORDER No. A/30524-30525/2019

Date of Hearing: 10.04.2019
Date of Decision: 16.05.2019

[Order per: P. VENKATA SUBBA RAO.]

1. These appeals are filed against Denovo Order-in-Original No. 13/2009-Adjn-Cus dated 31.03.2009.
2. The original show cause notice in this case was issued on 20.07.1995 and was adjudicated vide Order-in-Original dated 28.11.1997. On appeal, CESTAT vide its order dated 16.07.2003 remanded the matter back to the original authority which was decided by him vide the impugned denovo adjudication order.
3. Heard both sides and perused the records.
4. The appellant herein is a company engaged in manufacture and marketing of motor vehicles, having its factories at Kandivali and Nasik. In addition, they also took over another company originally set up by Allwyn Nissan Ltd at Zahirabad. This company was taken over by the appellant in 1994 and the period of dispute is between 1990 and 1994. The appellant herein is now dealing with the matter as the successor of the original company which they bought. The issue which falls for consideration in this case is whether a concessional rate of customs duty available for Original Equipment (OE) parts vide Notification No. 222/87-Cus dated 01.03.1987, 146/92-Cus dated 26.03.1992 and 72/93 dated 28.02.1993 can also be availed in respect of those parts which the appellant, after import, diverted to their spare parts division. There was a separate notification in terms of 74/85-Cus dated 17.03.1985 for spare parts upto 1992 which provided for a relatively higher rate of customs duty. In other words, for parts of automobiles which were imported during the relevant period there was a tariff rate, a lower level of exemption for such parts are to be imported for sale as spare parts and a much higher level of exemption if the parts are imported as Original Equipment for manufacture of the vehicles. Appellant imported some goods as meant for spare parts division applying appropriate rate of customs duty. They also imported parts as OE on which they claimed a much higher level of exemption.

5. Investigation by the department revealed that during the period 23.05.1990 to 31.12.1994, the appellant had diverted the goods which were imported as OE parts to their spare parts division under transfer note called Spare Parts Transfer Note (SPTN). Admittedly, this was done not in all cases but in some cases only which, according to the learned counsel for the appellant, was about 1% or less. He would further submit that in some cases, goods were taken on loan basis from manufacturing division by the spare parts division and returned in the form of another spare part of the same type. The department issued a show cause notice dated 20.06.1995 seeking to deny the benefit of the exemption notification and demanded the differential duty of Rs.1,71,33,655/-. It was also proposed to impose a penalty upon the appellant. In the impugned order, the demand is confirmed and penalty imposed.

6. The appeal of the appellant is under following grounds:

- (1) During the relevant period the previous firm viz., M/s Allwyn Nissan Ltd which they took over were importers and manufacturers and therefore no duty can be charged or malafide can be alleged against them being only the successor firm.
- (2) There was an understanding between the spare parts division and the manufacturing division that the parts will be lent and returned and therefore no duty can be charged from them. He would argue that there was no loss of revenue and such diversions are permissible.
- (3) The diversions being only 1% could not have been done with any malafide intention. He would further submit that of the total demand, an amount of Rs.18,66,114.81/- was demanded under Sec.28B of the Customs Act holding that the amount has been collected as representing customs duty from the customers and must be deposited in the Government Account. He would submit that this demand was on mere speculation that appellant must have had charged some amount as representing customs duty.
- (4) As is evident from the case, there were only two types of imports viz., (i) used as original equipment by their manufacturing division and (ii) import for use as spare parts by their spare parts division. In the first case, the parts will go straight in the manufacture of the

vehicles and no amount is ever collected from the buyer of the vehicle as representing customs duty paid on the parts used in the manufacture of the goods. As far as the spare parts division is concerned, it sells spare parts at the listed price. It does not charge a separate customs duty from the customers. The import price, customs duty, expenses, their profit etc., all get incorporated into the invoice price which they charge. Therefore, there is no possibility or evidence whatsoever in the records of the case to show that they have charged any amount as representing customs duty from their customers. Therefore, demand on this ground needs to be set aside.

- (5) He would further argue that the exercise is revenue neutral and therefore, extended period of limitation should not be invoked.

7. Learned departmental representative reiterates the findings of the impugned order and submits that demands were correctly confirmed along with the interest and penalties were correctly imposed.

8. We have considered the arguments on both sides and perused the records. The crux of the issue is whether the concessional rate of duty available for parts imported as OE parts by the appellant will also be available when they divert such parts for other purposes. The appellants argue such diversions are only by way of loans which get readjusted by their spare parts division. Revenue's argument is that the spare parts division has its own procurement at higher rates of customs duty. The imports by their manufacturing division should be used for the purpose for which they are meant otherwise the duty to be charged.

9. We find that there were various uses on how to interpret an exemption notification – strict versus liberal. There were decisions on all levels including by the Hon'ble Apex Court taking both views. All these views finally put to rest by the constitutional bench by the Hon'ble Apex Court in the case of Dilip Kumar & Co. and others (Civil Appeal No. 3327/2007). It has been held that an exemption notification being an exception to the general rule must be viewed strictly against the person claiming the exemption. In case of any doubt whether the benefit is available or

otherwise, the benefit of such doubt should be in favour of revenue and against the assessee. Therefore, regardless of what decisions were taken at various points of time, including in this case, the law now settled is that any exemption notification must be construed strictly. In this case, eligibility of exemption notification was not in doubt at the time of import. The exemption was available for a specific end-use. Having imported the parts for the specified end-use, assessee has, thereafter, diverted them for some other use. Clearly, such diversions are not covered by the exemption notification. There is no scope for such diversion or even of loaning of the goods for some other purpose with the understanding that a corresponding quantity of the goods will be returned after some time. Therefore, as far as the exemption notification is concerned, they are NOT entitled to the benefit of exemption notification on such quantity of the goods as were diverted from OE to their spare parts division. The appellant's contention that they were not the manufacturers during the relevant period who had imported the goods but had taken over the firm subsequently also does not carry their case any further. Once they have taken over the unit from the previous owners, they necessarily take on all the assets and liabilities including contingent liabilities of the unit. Therefore, they are fully liable to pay differential duty. Another argument put forth by the learned counsel is that they have only diverted less than 1% of the goods. This also does not reduce their liability. Since they have diverted a small proportion, the duty is also demanded on such small proportion and penalty has also been proposed proportionately. As far as the demand of Rs.18,66,114.81/- made under Sec.28B is concerned, after hearing both sides, we find that the demand is based on the presumption that the appellant has collected some amount as representing customs duty by incorporating such amount in their cost calculations. Clearly, there is no evidence that the customer was charged some amount as representing customs duty. Section 28B does not provide for recovery of any amount included in the cost calculation as element of Customs Duty. Therefore, the demand on this count is not sustainable and needs to be set aside and we do so.

9. A small quantity of the goods valued at Rs.2,10,000/- were confiscated by the impugned order under Sec.111(o) of the Customs Act for violation of the conditions of the customs notification. An option to redeem

the same has been given under Sec.125 by paying redemption fine of Rs.25,000/- only. We find no reason to interfere with either confiscation or the reasonable amount of fine imposed for redemption of the goods on this count. In the impugned order a penalty of Rs.40 lakhs has been imposed under Sec.112 (a) & (b) of the Customs Act upon the appellant for non-compliance of the conditions of the customs notification and clandestine clearance of OE parts to their spare parts division as discussed above. A penalty of Rs.75,000/- was also imposed on the following individuals who worked with the appellant Shri V. Vaidyanathan – Rs.75,000/-, Shri C.S. Ramakrishnan – Rs.75,000/- and Shri S. Upadhya – Rs.75,000/-. We find that considering that these executives were working for and on behalf of the appellant, there is a case to set aside personal penalty on them. We also find a case to reduce the penalty imposed on the appellant under Sec.112 (a) & (b) for non-compliance of the customs notification and clandestine removal of parts and accordingly, reduce penalty to Rs.10 lakhs.

10. In view of the above, we pass the following order:

The appeal is partly allowed by modifying the impugned order by setting aside the demand of Rs.18,66,114.81/- under Sec.28B, setting aside personal penalty under Sec.112(a) on Shri V. Vaidyanathan, Shri C.S. Ramakrishnan and Shri S. Upadhya and reducing the penalty on the appellant under Sec.112 (a) & (b) to Rs.10,00,000/-.

11. The appeal is partly allowed as herein above.

(Order pronounced in the open court on 16.05.2019)

(ANIL CHOUDHARY)
MEMBER (JUDICIAL)

(P.VENKATA SUBBA RAO)
MEMBER (TECHNICAL)