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

Single Member Bench

Court – I

Appeal No. C/30181/2019

(Arising out of Order-in-Appeal No.VJD-CUSTM-PRV-APP-116-18-19 dt.31.10.2018 passed by CCT & C (Appeals), Guntur)

M/s Coromandel International Ltd,
No. 1-2-10, Sardar Patel Road,
Coromandel House, Secunderabad,
Telangana – 500 003

......Appellant

VERSUS

Commissioner of Central Tax – Guntur - GST
C.R. Buildings, Kannavarithota, Guntur,
Andhra Pradesh – 522 004

......Respondent

Appearance

Shri Karan Talwar, Advocate for the Appellant.
Shri A.V.L.N. Chary, Authorized Representative for the Respondent.

Coram:

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

FINAL ORDER No. A/30604/2019

Date of Hearing: 30.09.2019
Date of Decision: 30.09.2019

[Order per: P.V. SUBBA RAO.]

1. This appeal is filed against Order-in-Appeal No. VJD-CUSTM-PRV-APP-166-18-19 dated 31.10.2018.

2. Heard both sides and perused the records. Learned counsel for the appellant submits that they have imported goods and paid the appropriate amounts of customs duty including value of goods and 1% landing charges as applicable. They also had separately incurred demurrage charges and on being pointed out by the department they have paid the customs duty even

on the demurrage charges incurred by them. It is the case of the department in the show cause notice that the appellant should also have paid 1% landing charges on demurrage charges. On being pointed out they have paid customs duty on 1% demurrage charges reckoning the same as landing charges. The appellant is only contesting the imposition of penalty under section 114A of the Customs Act, 1962 alleging that they have suppressed the information from the department and it only came to light on investigation by the SIIB of the Custom House. He would submit that the entire basis for the allegation is that the demurrage charges including 1% landing charges on demurrage charges are includible in the assessable value for calculating the customs duty in terms of explanation 2 to Sub Rule (2) of Rule 10 of Customs Valuation (Determination of price of imported goods) Rules, 2007. He would submit that this provision of the Customs Valuation Rules has been struck down by the Hon'ble High Court of Orissa at Cuttack in Writ Petition (C) No. 7917/2009 in the case of M/s Tata Steel Ltd [2019-TIOL-595-HC-Orissa-CUS]. He would draw the attention of the bench to the question framed by the Hon'ble High Court in Para 1 of the judgment and the final decision in Para 13 which are as follows:

> *"1. By way of this writ petition, the petitioners have approached the Court challenging the "Explanation" to Sub-rule (2) of Rule 10 of the Customs Valuation (Determination of Price Imported Goods) Rules, 2007 and prayed to declare it to be ultra vires the provisions of Section 14 of the Customs Act 1962 (for short, 'the Act')."*
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> *"13. We have heard learned counsel for the parties. It is well-settled principle of the statute that while interpreting a statute, one has to go by the scope and object of the principal Act. Under the principal Act, while amending it on 10th October, 2007, proviso has included the costs and services, including commissions and brokerage, engineering, design work, royalties and licence fees, costs of transportation to the place of importation, insurance, loading, unloading and handling charges to the extent and in the manner specified in the Rules.*
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> *The demurrage has not been included as a part of cost envisaged by the legislation. Further, it is a kind of penalty. Therefore, it could not have been envisaged by the legislation to be included in the definition of Section 14 of the Act. However, in view of the clarifications by way of judgments of the Hon'ble Supreme Court, more particularly in the cases of Wipro Ltd. (supra), Essar Steel Ltd. (supra) and Mangalore Refinery & Petrochemicals Ltd. (supra), it is made clear that demurrage cannot be included for the purpose of valuation under the Customs Act, 1962. In that view of the matter, we are of the considered opinion that the contentions raised by the petitioner that the relevant provisions in the Principal Act is silent about the 'demurrage'; thus, it was beyond the the legislative power to include it in the Rules is accepted and thus the explanation to Sub Rule-(2) of Rule 10 of the Customs Valuation (Determination of Value of Imported Goods) Rules, 2007 is held to be bad and hence declared ultra vires the Constitution/ provision of Section 14 of the Customs Act, 1962, and hence the same is struck down."*

3. He would submit that the inclusion of demurrage charges in the assessable value for the purpose of calculating customs duty itself has been held ultra vires of section 14 of Customs Act by the Hon'ble High Court of Orissa and struck down. Therefore, the demand of duty on the demurrage charges as well as 1% landing charges on such demurrage charges itself is not sustainable. However, they have already paid customs duty and they are not pressing for setting aside the same. He only prays that the penalty imposed under section 114A may be set aside.

4. As an alternative argument he would further submit that in the case of M/s Wipro Ltd [2015 (319) ELT 177 (SC)] the Hon'ble Apex Court has examined in detail whether 1% landing charges can be included in the assessable value at all. Paras 31 and 36 of this judgment are reproduced below:

> *"31. In contrast, however, the impugned amendment dated 5-7-1990 has changed the entire basis of inclusion of loading, unloading and handling charges associated with the delivery of the imported goods at the place of importation. Whereas fundamental principle or basis remains unaltered insofar as other two costs, viz., the cost of transportation and the cost of insurance stipulated in clauses (a) and (c) of sub-rule (2) are concerned. In respect of these two costs, provision is retained by specifying that they would be applicable only if the actual cost is not ascertainable. In contrast, there is a complete deviation and departure insofar as loading, unloading and handling charges are concerned. The proviso now stipulates 1% of the free on board value of the goods irrespective of the fact whether actual cost is ascertainable or not. Having referred to the scheme of Section 14 of the Rules in detail above, this cannot be countenanced. This proviso, introduces fiction as far as addition of cost of loading, unloading and handling charges is concerned even in those cases where actual cost paid on such an account is available and ascertainable. Obviously, it is contrary to the provisions of Section 14 and would clearly be ultra vires this provision. We are also of the opinion that when the actual charges paid are available and ascertainable, introducing a fiction for arriving at the purported cost of loading, unloading and handling charges is clearly arbitrary with no nexus with the objectives sought to be achieved. On the contrary, it goes against the objective behind Section 14 namely to accept the actual cost paid or payable and even in the absence thereof to arrive at the cost which is most proximate to the actual cost. Addition of 1% of free on board value is thus, in the circumstance, clearly arbitrary and irrational and would be violative of Article 14 of the Constitution.*
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> *36. We are, therefore, of the opinion that impugned amendment, namely, proviso (ii) to sub-rule (2) of Rule 9 introduced vide Notification dated 5-7-1990 is unsustainable and bad in law as it exists in the present form and it has to be read down to mean that this clause would apply only when actual charges referred to in Clause (b) are not ascertainable."*

5. He would submit that the Hon'ble Apex Court has held that 1% landing charges can only be included if the actual cost incurred towards landing are not ascertainable. Wherever the actual cost incurred towards landing charges is ascertainable, 1% cannot be included on notional basis. In their case they have already included 1% charges on FOB value. They have not incurred any landing charges on the demurrage charges which are only a form of penalty paid for delaying the ship. Even following this judgment of Hon'ble Apex Court, no customs duty can be charged on 1% of demurrage charges.

6. Learned departmental representative agrees with the facts of the case as narrated by the learned counsel for the appellant and reiterates the arguments of the impugned order.

7. I have considered the arguments on both sides and perused the records. The only question to be decided is whether the penalty under section 114A can be imposed upon the appellant holding that they have suppressed the facts by not including 1% as landing charges on the demurrage charges in the assessable value for calculating the customs duty in the above factual matrix. The inclusion of demurrage charges itself has been struck down by the Hon'ble High Court of Orissa as ultra vires of constitution/section 14 of the Customs Act. Therefore, even if they had not included nor paid the customs duty on such amount they cannot be faulted. Therefore, I find that the penalty imposed under section 114A is not sustainable and is liable to be set aside and I do so.

8. Appeal is allowed and the impugned order imposing penalty under section 114A is set aside with consequential relief, if any.

(Dictated and pronounced in the open court)

(P.VENKATA SUBBA RAO)
MEMBER (TECHNICAL)

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