CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
HYDERABAD

REGIONAL BENCH - COURT - I

Customs Appeal No. 205 of 2009

(arising out of order-in-Appeal No. 70 & 71/2008(H-II)Cus dated 28.11.2008 passed by Commissioner of Central Excise, Customs & Service Tax, (Appeals-II) Hyderabad)

M/s Andromeda Foundation India Pvt Ltd — **Appellant**
1st Floor, Topaz Building, Somajiguda, Hyderabad

Versus

The Commissioner of Customs Central Excise & Service Tax, — **Respondent**
Central Revenue Building,
LB Stadium Road,
Basheerbagh, Hyderabad

WITH

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(arising out of order-in-Appeal No. 70 & 71/2008(H-II)Cus dated 28.11.2008 passed by Commissioner of Central Excise, Customs & Service Tax, (Appeals-II) Hyderabad)

Dr. Sudhakar Krishnamurthy — **Appellant**
Director,
M/s Andromeda Foundation India Pvt Ltd
1st Floor, Topaz Building, Somajiguda, Hyderabad

Versus

The Commissioner of Customs Central Excise & Service Tax, — **Respondent**
Central Revenue Building,
LB Stadium Road,
Basheerbagh, Hyderabad

Appearance:

Mr Karan Talwar, Adv for the Assessee.

Mr N. Bhanu Kiran, A.R. for the Respondent.

CORAM

HON'BLE Mr. P. Venkata Subba Rao, Member (Technical)
HON'BLE Mr. P. Dinesha, Member (Judicial)

FINAL ORDER No: 31015-31016 / 2019

Date of Hearing: 20/09/2019
Date of Decision: 05/11/2019

[ORDER PER:P.VENKATA SUBBA RAO]

These two appeals have been filed by the appellant aggrieved by the impugned order-in-appeal Nos 70 & 71/2008(H-II)Cus dated 28.11.2008. M/s Andromeda Foundation is an importer of medical equipment and Dr Sudhakar Krishnamurthy is its Director. They imported medical equipment through Air Cargo Complex Hyderabad claiming 'Nil' rate of customs duty as per Notification No. 64/88 dated 01.03.1988. This was a conditional exemption notification and in support of their claim, the importer submitted duty exemption certificate issued by DGHS New Delhi. Based on the documents submitted, the goods were provisionally assessed and cleared at 'Nil' rate of duty after obtaining a bond/undertaking from the importer that they would comply with the conditions of the Notification. One of the conditions of the Notification is the issuance of Installation certificates by DGHS. In the instant case, the DGHS vide letter dated 06.10.1997 rejected the importer's application for grant of exemption certificate and also cancelled the duty exemption certificate already issued to them. Further investigations by the department revealed that the importer had violated certain other conditions of the notifications also. Accordingly, the demand notice was issued proposing to deny the benefit of notification and demanding the differential duty of Rs 7,33,306/- along with interest and a penalty was proposed to be imposed on the importer as well as its Director.

The demand was confirmed by order-in-original No. 1/1999-Cus dated 30.01.1999 and the imported goods were confiscated with an option to redeem the same on payment redemption fine of Rs 1,00,000/-. In this order, the Commissioner ordered final assessment of the goods under Section 18(2) of the Customs Act 1962. Against this order, an appeal was filed by the appellant before CESTAT on the ground that the order of DGHS was itself challenged by them before the Hon'ble High Court of A.P. Accepting the plea, the CESTAT remanded the matter to the lower authority with a direction to keep the matter in abeyance till final disposal of the petition by the Hon'ble High Court of A.P. Hon'ble High Court vide its order dated 08.11.2005 dismissed the writ petition No. 14754 of 1999 filed by the appellant concluding that there is no reason to interfere with the order of DGHS. The appellants filed an SLP against the order of Hon'ble High Court which was dismissed by the Apex Court.

2. Hence the matter was readjudicated by the department. Presumably due to change in powers of adjudication, the matter was decided by Additional Commissioner in this second round of litigation. Aggrieved by the order of the Addl Commissioner, the appellant appealed before the first appellate authority who by the impugned order upheld the order of the Additional commissioner and rejected the appeal. Hence these appeals. The following issues fall for consideration in this case:

1) Whether the order of the Additional Commissioner upheld by the Commissioner (Appeals) in the impugned order denying the benefit of Notification No. 64/88-Cus dated 01.03.1998 on the goods imported vide bill of entry No. 4061 dated 07.09.1993 and

consequent demand of duty of Rs 7,33,304/- towards customs duty is liable to be upheld.

2) Whether the confiscation of the medical equipment valued at Rs 6,50,382/- under Section 111(o) of the Customs Act 1962 and an option of redemption on payment of a fine of Rs 1,00,000/- under Section 125 of the Customs Act 1962 needs to be upheld.

3) Whether penalty of Rs 7,33,306/- on the importer under Section 114A of the Customs Act 1962 needs to be upheld.

4) Whether demand of interest under Section 28 AB of the Customs Act 1962 on the amount of duty demanded needs to be upheld.

5) Whether penalty of Rs 1,00,000/- on Dr Sudhakar Krishnamurthy, Director of M/s Andormeda Foundation under Seton 112(a) needs to be upheld.

3. Learned counsel for the appellant submits that provisions of Section 28AB and Section 114A of the Customs Act 1962 were not on the Statute book at the time of import. There is no explicit provisions in either to give them retrospective application. For this reason alone, the demand of interest under Section 28AB and imposition of penalty under Section 114A need to be set aside. He relies on the judgement of the Hon'ble High Court of Delhi in the case of Diwan Chand Satya Pal Agarwal Imaging Research Centre Vs UOI [2017(345)ELT 182 (Del) para 25 of which reads as follows:

> "25**.** The limited issue before this Court concerns the applicability of Section 114A and 28AB of the Act to the imports in question made by the Petitioner. In law there is no denial by the Department that the said two provisions did not exist in the statute at the time of import of the seven equipments by the Petitioner. In other words, the Department is unable to deny that neither Section 114A nor Section 28AB could have been invoked as far as the SCN issued to the Petitioner was concerned."

In view of the above, he would submit that the demand of interest under Section 28AB and imposition of penalty under Section 114A need to be set aside as the imports pertain to prior to 28.09.1996 when these provisions were introduced.

4. On the question of demand, learned counsel for the appellant would urge that the demand has been confirmed referring to Section 28 of the Customs Act 1962. In their case the duties were provisionally assessed under Section 18 and therefore a show-cause notice for recovery of duties not levied or not paid or short levied or short paid or erroneously refunded ought to have been issued only after the date of adjustment of duty after the final assessment or reassessment. On this ground the demand itself is not sustainable. He further argues that there was no evidence of any wilful suppression of information with intent to evade tax in their case and therefore the penalty cannot be imposed on them.

5. *Per contra,* learned D.R. reiterates the findings of the original authority as well as the first appellate authority and asserts that the demand of interest and penalties have been correctly imposed.

6. We have considered the arguments of both sides and perused the records. As far as the eligibility of exemption Notification No 64/88 is concerned there is no doubt that the appellant have not been issued an installation certificate by the DGHS and the exemption certificate has also been cancelled. Therefore, they have not fulfilled the conditions of Notification No. 64/88. This Notification gives exemption to hospital equipment imported by specific category of hospitals subject to certification by DGHS. Among the conditions that are to be fulfilled is also a condition of continuous obligation of treating some percentage of their patients free of

cost. Several hospitals across the country who availed the benefit of this exemption notification have not fulfilled the conditions. In the present case, the appellant has not even got the DGHS certificate. The non-issue of certificate by DGHS was challenged by them through a writ petition in the Hon'ble High Court of A.P. and subsequently before the Hon'ble Supreme Court through an SLP. Both the Hon'ble High Court of A.P. and Hon'ble Apex Court have upheld the decision of the DGHS of not issuing the certificate. Under these circumstances, the claim that they are entitled to the benefit of exemption notification and the demand denying them the benefit of this Notification is not sustainable is preposterous. It has been held by the Hon'ble Apex Court in the case of Dilip Kumar & Company [2018(361)ELT 577 (SC)] that an exemption notification must be strictly construed and any benefit of doubt must go in favour of the Revenue and against the assessee. In this case there is not even an iota of doubt that the assessee appellant has not fulfilled the conditions of exemption notification. In the original order passed by the Commissioner, the demand was confirmed for recovery under Section 28 along with finalisation of assessment under Section 18 of the Customs Act 1962. Only on the plea of the appellant that they had challenged the decision of DGHS before the Hon'ble High Court, the matter was remanded to the lower authority by the CESTAT. In the subsequent order, the lower authority has referred only to Section 28 of the Customs Act 1962. Merely because he referred to Section 28, it does not automatically entitle the appellant to the benefit of exemption notification, the conditions of which they have clearly not fulfilled especially considering that their writ petition before the Hon'ble High Court and SLP before Hon'ble Supreme Court against non-issue of certificate by DGHS have also failed. Section 28 of the Customs Act 1962 clearly refers to recovery of duties not paid short paid etc. Such recovery can be ordered within one year or as the case may five years from the relevant date. In case of provisional assessment, the relevant date is the date of finalisation of assessment. In this case, the assessments were finalised denying them the benefit of exemption notification and the differential duty has accrued consequently. We, therefore, find that the appellant is liable to pay the differential duty under Section 28. As far as the interest under Section 28AB and imposition of penalty under Section 114A of the Customs Act are concerned we find that both these provisions were not in existence at the time of import. As held by the Hon'ble High Court of Delhi in the case of Diwan Chand Satya Pal Agarwal Imaging Research Centre (supra), these provisions have no retrospective application. Hence demand of interest under Section 28AB and imposition of penalty on the importer under Section 114Aare not sustainable and need to be set aside and we do so. As far as the confiscation of imported goods which were provisionally released and imposition of redemption fine under Section 125 are concerned we find that under Section 111 several types of goods brought into India from a place outside India shall be liable to confiscation. C lause (o) of this Section read as follows:-

> "(o) any goods exempted, subject to any condition, from duty or any prohibition in respect of the import thereof under this Act or any other law for the time being in force, in respect of which the condition is not observed under the non-observance of the condition was sanctioned by the proper officer;"

It is not in doubt that the goods in question were exempted subject to conditions from the duty under Notification No 64/88-Cus it is not in doubt that the conditions of this exemption notification were not fulfilled by the appellant. It is also not in doubt that the denial of certificate by DGHS which resulted in non-fulfilment of these conditions was upheld in their case by the

Hon'ble High Court of A.P as well as by Hon'ble Supreme Court. Under these circumstances, we find that their goods are squarely covered by Section 111(o) of the Customs Act 1962. Although the goods were valued at Rs 6,50,382/- considering the condition of the age of the machines, etc. the original authority has imposed a redemption fine of Rs 1,00,000/- under Section 125 of the Customs Act 1962. In this factual matrix we find no reason to interfere with this confiscation or the amount of redemption fine imposed.

7. As far as the imposition of penalty on Dr Sudhakar Krishnamurthy Director of M/s Andromeda Foundation is concerned we find that Section 112 of the Customs Act reads as follows:-

> "112 Penalty for improper importation of goods, etc. —Any person,
>
> (a) who, in relation to any goods, does or omits to do any act which act or omission would render such goods liable to confiscation under section 111, or abets the doing or omission of such an act, or
>
> (b) who acquires possession of or is in any way concerned in carrying, removing, depositing, harbouring, keeping, concealing, selling or purchasing, or in any other manner dealing with any goods which he knows or has reason to believe are liable to confiscation under section 111,
>
> shall be liable,—
>
> (i) in the case of goods in respect of which any prohibition is in force under this Act or any other law for the time being in force, to a penalty [not exceeding the value of the goods or five thousand rupees], whichever is the greater;
>
> (ii) in the case of dutiable goods, other than prohibited goods, subject to the provisions of section 114A to a penalty not exceeding ten percent of the duty sought to be evaded or five thousand rupees, whichever is the higher;
>
> Provided that where such duty as determined under sub-section (8) of section 28 and the interest payable thereon under section 28AA is paid within thirty days from the date of communication of the order of the proper officer determining such duty, the amount of penalty liable to be paid by such person under this section shall be twenty-five per cent of the penalty so determined;
>
> (iii) in the case of goods in respect of which the value stated in the entry made under this Act or in the case of baggage, in the declaration

made under section 77 (in either case hereafter in this section referred to as the declared value) is higher than the value thereof, to a penalty [not exceeding the difference between the declared value and the value thereof or five thousand rupees], whichever is the greater;

(iv) in the case of goods falling both under clauses (i) and (iii), to a penalty [not exceeding the value of the goods or the difference between the declared value and the value thereof or five thousand rupees], whichever is the highest;

(v) in the case of goods falling both under clauses (ii) and (iii), to a penalty [not exceeding the duty sought to be evaded on such goods or the difference between the declared value and the value thereof or five thousand rupees], whichever is the highest.]"

Duty involved in this case was Rs 7,33,306/- and therefore penalty of Rs 1,00,000/- imposed on Dr Sudhakar Krishna Murthy who is the Director of the importer firm appears just and reasonable and we find no reason to interfere with the same.

7. In consequence the impugned order is upheld except to the extent of setting aside the demand of interest under Section 28AB of the Customs Act 1962 and imposition of penalty under Section 114A of the Customs Act 1962. Both appeals are disposed of as hereinabove.

(Order pronounced in open court on 05/11/2019)

(P. Venkata Subba Rao)
Member (Technical)

(P. Dinesha)
Member(Judicial)

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