IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL,
EAST REGIONAL BENCH : KOLKATA

Cus.Appeal No.70002/13

(Arising out of Order-in-Original No.Kol./Cus/Port/76/2012 dated 22.09.2012 passed by the Commissioner of Customs (Port), Kolkata)

M/s Era Infra Engineering Ltd.

Applicant (s)/Appellant (s)

Vs.

Commissioner of Customs (Port), Kolkata

Respondent (s)

Appearance:

Shri V. K. Singh, Adv. for the Appellant (s)
Shri S. N. Mitra, Asstt. Commr. (A.R.) for the Respondent (s)

CORAM:

SHRI P. K. CHOUDHARY, HON'BLE JUDICIAL MEMBER

Date of Hearing : 15.01.2018
Date of Pronouncement : 27.03.2018

ORDER NO.F/O/76645/2018

Per Shri P. K. Choudhary :

This is an appeal filed by the Appellant against the Order-in-Original No.Kol./Cus/Port/76/2012 dated 22.09.2012 passed by the Commissioner of Customs (Port), Kolkata.

2. Briefly stated the facts of the case are that the appellant imported one consignment of "Flash Butt Welding Machine" vide Bill of Entry No. 361261 dated 28.08.2007 and claimed the benefit of exemption notification No. 84/97-CUS dated 11.11.1997. On scrutiny of the records it was found that there was a mis-declaration of the value.

3. A Show Cause Notice dated 10.02.2009 was issued proposing confiscation of the goods and demand of duty along with interest and to impose penalty.

4. By the impugned Order, the Learned Commissioner of Customs (Port) held that two nos. of Flash Butt Welding Machines, complete with accessories, imported under Bills of Entry dated 14.08.2007 and 28.08.2007 are liable to confiscation under Section 111(m) of the Customs Act, 1962 and the goods in respect of Bill of Entry dated 14.08.2007 had been released and no redemption fine in lieu of confiscation was imposed. However, goods covered under Bill of Entry dt.28.08.2007 were provisionally released on execution of bond, a fine of Rs. 10 Lakhs in lieu of confiscation, in terms of Section 125 of the Act, 1962 was imposed. It has also imposed penalty of Rs. 3 Lakhs and allowed amendment of Bill of Entry dated 14.08.2007 under provisions of Section 149 of the Act, 1962 in view of the revised Customs Invoice dated 20.06.2007 raised by the supplier and also taking into account the duty exemption certificate dated 17.03.2007. Order for re-assessment of the Bill of Entry and for encashment of the Bank Guarantee was issued. Hence, the appellant filed this appeal.

5. Heard both sides and perused the appeal records.

6. The Learned Advocate appearing on behalf of the appellant argued the matter at length. He submitted that the appellant produced the valid duty exemption certificate at the time of import of machine under Bill of Entry dated 14.08.2007. The dispute arose when the Assessing Officer raised the query to explain the declared value on

28.08.2007 and the appellant submitted revised invoice dated 11.01.2008 vide their letter dated 21.01.2008 stating that the error in the invoice was purely unintentional and due to oversight on the part of the foreign supplier. The Adjudicating authority observed that it is not a bonafide mistake since it took five months to issue a revised invoice and therefore penalty would be imposed under Section 112(a) of the Customs Act, 1962. However, the Adjudicating authority allowed the amendment of the Bill of Entry dated 14.08.2007. He has also dropped the demand of duty. For the purpose of proper appreciation of the case the relevant portion of the Adjudication Order is reproduced below :

> *"15. So far as the demand of duty is concerned, I agree with the written submissions of the notice that the demand under Section 28 is not legally sustainable. I find that the demand of duty of Rs.10,14,542.57 against Bill of Entry No.358899 dated 14.08.07 is based on a hypothetical situation i.e. charging of duty in the event of the importers being not in possession of duty exemption certificate. The fact of the matter is that the importers claimed duty exemption under exemption Notification No.84/97-Cus dated 11.11.1997 on the strength of Duty Exemption Certificate No.CPM/RVNL/RAIPUR/ERA dated 17.03.2007 issued by the M/s Rail Vikas Nigam Limited, Raipur. The department has not challenged the validity of duty exemption certificate. Hence, it is sufficient to hold that at the material time of clearance, the importers were in possession of a valid duty exemption certificate issued by the proper authority in terms of Notification No.84/97-Cus. Subsequent enquiry also revealed that the post importation conditions attached with the aforesaid*

exemption notification have been duly fulfilled by the importers. In this connection, I find that M/s RVNL, the appropriate project authority, vide their letter dated 08.01.2008 have categorically confirmed that the machinery imported under the Bill of Entry No.358899 dated 14.08.2007 has reached Raipur and was under inspection and installation. I also find that no value of the said machine was mentioned in the aforesaid duty exemption certificate. However, the quantity of such machines approved for duty free import was duly mentioned therein. Therefore, I find that value of the machine was not a limiting factor for import under the aforesaid duty exemption certificate. Had the importer declared the correct contract value at the time of filing of the bill of entry, even then there would not have been levied any duty on the subject goods because of the valid duty exemption certificate dated 17.03.2007. Section 28 of the Customs Act, 1962 comes into play in cases where any duty has not been levied or has been short-levied or erroneously refunded, or when any interest payable has not been paid, part paid or erroneously refunded, whereas in the case of Bill of Entry No.358899 dated 14.08.2017 no duty is leviable on the goods imported. Therefore, I find that the demand of duty of Rs.10,14,542.50 under Section 28 of the Customs Act, 1962 against the Bill of Entry No.358899 dated 14.08.2007 does not hold goods. Accordingly, the question of demand of interest under Section 18AB ibid does not arise. I find that the importer vide letter dated 21.01.2008 had requested the Department to re-assess the Bill of Entry No.358899 dated 14.08.2007 in view of the revised invoice dated 11.01.2008 raised by the supplier and also taking into account the duty exemption certificate dated 17.03.2007 and the request of the importer is still pending with the

Department. I find that the Bill of Entry No.358899 dated 14.08.2007 is required to be amended as per provisions contained in Section 149 of the Customs Act, 1962 as per the request of the importer and re-assessed accordingly."

7. The Learned Counsel argued that the imposition of redemption fine and penalty are not justified. Section 111(m) of the Act, 1962 provides that any goods which do not correspond in respect of the value with the entry made under this Act shall be liable for confiscation.

8. I find that the Adjudicating authority allowed the amendment of the Bill of Entry under Section 149 of the Act, 1962 and therefore the confiscation of the goods and imposition of redemption fine is not justified. However, there is a mis-declaration in the Bills of Entry and the imposition of penalty is warranted. However, the quantum of penalty is excessive and the same is required to be reduced.

9. In view of the above discussion, the impugned Order is modified to the extent that redemption fine is set aside and the penalty is reduced to Rs. 1 Lakh. The appeal is disposed of in the above terms.

(Pronounced in the open Court on 27.03.2018)

Sd/

(P. K. CHOUDHARY)
MEMBER (JUDICIAL)

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