IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL, KOLKATA
EASTERN ZONAL BENCH : KOLKATA

REGIONAL BENCH - COURT NO.2

Customs Appeal No.75199 of 2020

(Arising out of Order-in-Appeal No.KOL/CUS/AKR/426/2020 dated 15.07.2020 passed by Commissioner of Customs(Appeals), Kolkata.)

M/s. Anutham Exim Private Limited
(PS Aviator, 5th Floor, Room No.501,
New Town Road, Mouza Atghora,
Chinar Park, Rajarhat, Kolkata-700136.)

...Appellant

VERSUS

Commissioner of Customs, Kolkata

.....Respondent

(Customs House, 15/1, Strand Road,
Kolkata-700001.)

APPEARANCE

Shri B.L. Narasimhan, Advocate & Shri Rahul Tangri, Advocate for the Appellant (s)

Shri A.K.Biswas, Superintendent, Authorized Representative for the Respondent (s)

CORAM: HON'BLE SHRI P.K.CHOUDHARY, MEMBER(JUDICIAL)

FINAL ORDER NO. 75392/2020

DATE OF HEARING : 1 September 2020
DATE OF DECISION : 1 September 2020

P.K.CHOUDHARY :

The appellant is in appeal against Order-in-Appeal No.KOL/CUS/AKR/426/2020 dated 15.07.2020 passed by the learned Commissioner of Customs (Appeals), Kolkata. The facts of the case in brief are that the appellant is a private limited company engaged in the business of import and sale of carbonated fruit drinks such as Big Cola, Big Orange Cola, Big-lemon and other similar products classifiable under Tariff Item 2202 99 20 of the Customs Tariff Act, 1975 and specified at Sl.No.48 under schedule 2 as “Fruit Pulp or Fruit Juice based drinks” in Notification No.1/2017-Integrated Tax (Rate) dated 28.06.2017 (hereinafter “IGST Rate Notification”) taxable @ 12%. Based on the specifications of the product, the appellants filed Bills of Entry No.7482868 and 7482872 both dated 20.04.2020 applying IGST @ 12%. The Customs Officer at Jaigon Land Customs Station while assessing the said Bills of Entry entertained a view that such goods are classifiable under Tariff Sub Heading 2202 10 under schedule 4 as “water, including mineral water and aerated water, containing added sugar or other sweetening matter or flavor” and thus attracting IGST @ 28% and Compensation Cess @ 12%. The adjudicating authority classified the subject products under the Tariff Sub-Heading 2202 10 scheduling the same as carbonated waters and directed the appellant to pay the differential amount of duty. Being aggrieved, the appellants filed Appeal before the Commissioner of Customs(Appeals), Kolkata. The learned Commissioner of Customs (Appeals) vide Order-in-Appeal No.KOL/CUS(CCP)/AKR/299/2020 dated 08.06.2020 allowed the appeal of the appellant and set aside the Order-in-Original No.01/AC/DH-DIVH/20-21 dated 06.05.2020 holding the subject products to be classifiable under the Tariff Item 2202 9920 as Fruit Juice based drinks. Subsequently, consignments were allowed clearance (under 17 Bills of Entry dated 10-15 June 2020) as well as upon taking the written undertaking binding the appellant to pay differential duty. Thereafter the Assistant Commissioner, Dinhata Division passed the Provisional Assessment order being F.No.VIII(10)01/CUS/CMC/DSCN/ANUTHAM EXIM/2020-21/10 dated 16.06.2020 invoking the provisions of Section 18(1)(c) of the Customs Act, 1962. The orders sought to allow clearance of the future consignment of the subject goods under the Tariff Item 2202 9920 upon execution of indemnity bonds and bank guarantee for 20% of the differential duty. However, the corrigendum being F.No.VIII(10)01/CUS/CMC/DSCN/ANUTHAM EXIM/2020-21/10 dated 17.06.2020 was issued increasing the execution of bank guarantee equivalent to 100% of the differential duty. Being aggrieved the appellant preferred Writ Petition No.5694 (W) of 2020 before the Hon'ble Calcutta High Court challenging the aforesaid order. The Hon'ble High Court vide Order dated 02.07.2020 observed that the Provisional Assessment order is an appealable order and directed the appellant to file appeal before the first appellate authority. The appeal was filed before the first appellate authority. The learned Commissioner of Customs(Appeals), Kolkata disposed of the appeal and allowed the Provisional Assessment of subsequent Bill of Entry for identical products which were already re-assessed under Tariff Item 2202 9920 of the Customs Tariff Act, 1975. Vide Bill of Entry No.7482868 and 7482872 both dated 20.04.2020 vide Order-in-Appeal No.KOL/CUS(CCP)/AKR/299/2020 dated 08.06.2020. Being aggrieved, the appellants are in appeal before the Tribunal.

2. Before the hearing, the appellants have filed written notes of arguments wherein these grounds are pressed.

(a) Bank Guarantee should not be insisted for provisional assessment when appellate order is in favour of assessee.

(b) It is humbly submitted that there is no case of provisional assessment *per se.* However, still, if the department considers that it needs to do more investigation or agitate the issue before higher forums, it may provisionally assess the goods by executing bond to safeguard the interest of Revenue. When the matter has already been decided by an appellate order in favour of the assessee, no onerous condition of execution of 100% bank guarantee can be forced on an assessee.

(c) In a similar factual scenario, in the case of **Sai Exports v. Commissioner of Cus. (Port-Import), Chennai 2018 (10) GSTL 161 (Mad.)**, the Hon'ble High Court of Madras, observed that the assessee had already obtained a favourable order with respect to valuation of knitted polyester fabric from learned Commissioner of Customs (Appeal), against which an appeal was merely pending before Tribunal. Hence, in such a scenario, the department could not insist upon the production of bank guarantee for provisional assessment. Following decisions uphold similar ratio:

- **J.B.Printing Inks Ltd. v. UOI 1990 (47) ELT 234 (Bom.)**
- **Bhawani Metal Corporation v. UOI 2015 (330) ELT 116 (Cal.)**
- **Chalissery Kirana Mechant v. UOI 2015 (324) ELT 112(Ker.)**

(d) In light of the aforesaid judicial decisions, it is clearly established that there is no mandate to furnish bank guarantee for the purpose of provisional assessment in cases where the appellate order or an ex-facie case is in favour of the assessee. The Appellant humbly submits that present act of the department to enforce 100% bank guarantee upon the Appellant is flagrantly illegal and arbitrary. It is submitted that the impugned order is in total disregard to the applicable legal provisions and thus, liable to be set aside on this ground alone.

3. The learned Advocate appearing on behalf of the Appellant submitted that since the assessment of the identical goods has already been decided in favour of the appellant by the Order-in-Appeal dated 08.06.2020 passed by the first appellate authority, therefore, the department is bound to follow the same, even though department has filed appeal against the same in view of the Judicial Discipline. In this regard, he placed reliance on the Hon'ble Supreme Court's judgment in the case of **Kamlakshi Finance Corporation 1991 (55) E.L.T. 433 (S.C.)**.

Thus, it was imperative for the Assistant Commissioner of Customs to honour the order passed by the first appellate authority, in view of the Judicial Discipline.

4. Alternatively, he also submitted that even if the provisional assessment is resorted to, still the circumstances do not warrant the imposition of the onerous condition of furnishing 100% bank guarantee on the Appellant for the differential duty amount (viz. 28%), since the appellate authority's order on the assessment of

identical goods is in their favour. For this, he relied on the judgment of Hon'ble Madras High Court in the matter of **Sai Exports v. Commissioner, 2018 (10) G.S.T.L. 161 (Mad.)**, where in identical set of facts the Hon'ble High Court held that the department cannot mechanically insist upon the bond and bank guarantee without reference to the appellate order in assessee's favour on the same issue. Thus, the Hon'ble High Court directed that no personal bond or bank guarantee for the provisional assessment of the consignments should be called for.

5. Similar proposition has been held in the case of **Chalissery Kirana Merchant v. UOI 2015 (324) ELT 112 (Ker.)**.

6. The learned Authorized Representative appearing on behalf of the respondent Revenue justified the impugned order.

7. Heard both sides and perused the appeal records.

8. I find that the Appellant's products are seasonal and competitive in market. As pointed out by the counsel for the Appellant, already substantial part of the season has been lost by the appellant due to the inability to comply with the conditions of provisional assessment put forth by the department, particularly the furnishing of 100% Bank Guarantee. Once the assessment of the identical products has already been decided by the Commissioner (Appeals) in favour of the appellant vide the OIA dated 08.06.2020, I see no justification in ordering to furnish 100% Bank Guarantee. This is judicial indiscipline and squarely covered by the ratio of the Hon'ble Supreme Court in the case of **Kamlakshi Finance Corporation** (Supra), where the Hon'ble Apex Court has observed thus:-

> ***"…………………………The principles of judicial discipline require that the orders of the higher appellate authorities should be followed unreservedly by the subordinate authorities. The mere fact that the order of the appellate authority is not "acceptable" to the department - in itself an objectionable phrase - and is the subject-matter of an appeal can furnish no ground for not following it unless its operation***

has been suspended by a competent Court. If this healthy rule is not followed, the result will only be undue harassment to assessees and chaos in administration of tax laws."

9. Further, as a safeguard measure so that there is no loss of revenue to the Exchequer, the Department may carry on provisional assessment of the consignments being imported by the appellant, but at the same time cannot burden the appellant with the condition of 100% bank guarantee. I have gone through the judgment of the Hon'ble Madras High Court in **Sai Exports** (Supra), relevant paras of which are reproduced below:-

> ***"2.*** *The petitioner is an importer of various textile fabrics from China and other countries and in the course of business activities, they had imported a consignment of 100% Knitted Polyester Fabric of specification (220-240 GSM) 75 X 100 Denier from China. The petitioner imported quantity at the unit price of US$ 2, by Invoice dated 28-3-2017, the total invoice value is US$ 300.20. Based on this, the petitioner has filed Bill of Entry No. 9317183, dated 16-4-2017 before the third respondent. The third respondent has directed the petitioner to furnish bond and Bank guarantee for provisional assessment of the subject goods. Being aggrieved by the same, the petitioner is before this Court.*
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> ***3.*** *Considering the facts and circumstances of the case, I find that there is no justification on the part of the respondents to mechanically insist for furnishing bond and Bank guarantee for provisional assessment of the subject goods. This conclusion is supported by the following reasons. Earlier, the petitioner had effected three imports during the year 2013. The respondents did not accept the declared value and enhanced the value to unit price of US$ 4.82. The petitioner cleared the goods based on the enhanced value. Subsequently, an Order-in-Original No. 21613/2013, dated 28-2-2013 was passed, against which, the petitioner filed an appeal before the Commissioner of Customs (Appeals). This appeal was rejected by order dated 24-3-2014, stating that the petitioner has not produced any evidence to*

substantiate their claim. As against the same, the petitioner has filed an appeal in C/40939/2014 before the CESTAT and the appeal is pending. In the year 2014, the petitioner imported similar goods under five Bills of Entry, which were all allowed clearance after endorsement of value by Order-in-Original dated 31-1-2014. This was contested before the Commissioner of Customs (Appeals) and the appeal filed by the petitioner was allowed by order dated 1-5-2014. Thus, the petitioner was able to establish that the price declared by them was the correct price of the imported goods. Aggrieved by such order, the Revenue has preferred appeal before the CESTAT and an application for stay was moved by the Revenue, which was dismissed by order dated 11-2-2015. The Revenue has not preferred any further appeal against the rejection of the stay petition. The appeal filed by the Revenue is still pending. Thus, as on date, the value declared by the petitioner in respect of identical goods has been accepted by the Commissioner of Customs (Appeals) in the order dated 1-5-2014 and such order has not been stayed by the CESTAT. Mere pendency of an appeal before the Appellate forum will not amount to stay of the order passed by the lower forum/authority. In the instant case, the valuation of the identical goods passed by the Commissioner of Customs (Appeals) is binding on the third respondent.

4. *At this juncture, it is worthwhile to refer to the decision of the Hon'ble Supreme Court of India in the case of Union of India v. Kamlakshi Finance Corporation Ltd. reported in 1991 (55) E.L.T. 433 (S.C.). In the said decision, the Hon'ble Supreme Court pointed out as to how the order of the appellate authority binds the lower authority working within its jurisdiction. The relevant portion of the judgment reads as follows.*

> *"6.........The High Court has, in our view, rightly criticised this conduct of the Assistant Collectors and the harassment to the assessee caused by the failure of these officers to give effect to the orders of authorities higher to them in the appellate hierarchy. It cannot be too vehemently emphasised that it is of utmost importance that, in disposing of the quasi-judicial issues*

before them, revenue officers are bound by the decisions of the appellate authorities. The order of the Appellate Collector is binding on the Assistant Collectors working within his jurisdiction and the order of the Tribunal is binding upon the Assistant Collectors and the Appellate Collectors who function under the jurisdiction of the Tribunal. The principles of judicial discipline require that the orders of the higher appellate authorities should be followed unreservedly by the subordinate authorities. The mere fact that the order of the appellate authority is not "acceptable" to the department - in itself an objectionable phrase - and is the subject-matter of an appeal can furnish no ground for not following it unless its operation has been suspended by a competent Court. If this healthy rule is not followed, the result will only be undue harassment to assessees and chaos in administration of tax laws".

5. *Thus, the third respondent cannot mechanically insist upon the production of bond and Bank guarantee without referring to the earlier decision passed by the Commissioner of Customs (Appeals), which is in favour of the petitioner.*

6. *In the light of the above, the writ petition is allowed, the impugned order is quashed and the respondent is directed to provisionally assess the subject goods relating to Bill of Entry dated 16-4-2017 without mechanically insisting upon personal bond and the Bank guarantee by taking note of the decision of the Commissioner of Customs (Appeals) dated 1-5-2014 in Order-in-Appeal C. Cus No. 745/2014 and pass appropriate orders for release of the goods on provisional assessment within a period of three weeks from the date of receipt of a copy of this order. No costs. Consequently, connecte miscellaneous petition is closed."*

I find that the facts of the above case are identical to the facts of the case in hand. I am in total agreement with the ratio of the said judgment.

10. Further, I find that the matter has also been dealt by the Hon'ble Kerala High Court in the case of **Chalissery Kirana Merchant** (supra). Relevant paragraph of the said judgement is reproduced:-

> ***"7.*** *Having regard to the aforementioned submissions, the short question to be considered is whether the impugned orders are legally sutainable. There is no material in the impugned orders to indicate that the Customs have any doubt regarding the origin of goods. The main reason stated is that another consignment was under investigation by DRI in regard to the origin of the goods. Though, it was argued by the learned Standing Counsel appearing for the respondents that the intention of issuing Exts. P30 to P32 is to conduct an enquiry with reference to the imported material, no material is produced to indicate that either any samples were taken or the same has been sent for analysis. Under such circumstances, we have no hesitation to come to the conclusion that the only reason stated is regarding an enquiry in respect of another consignment which is pending consideration by the DRI. Whether they have any doubt regarding the consignment imported by the petitioner is not borne out by records. Under such circumstances, the direction to call upon the petitioners to furnish Bank Guarantee/Cash deposit to the extent of 35% or 20% of the differential duty as the case may be, will be too harsh. If at all any liability could be fastened on the petitioners while making the final assessment, it would suffice that the petitioners submit appropriate undertaking in writing in the form of an Indemnity Bond agreeing and undertaking to pay the differential duty, if any, imposed at the time of final assessment. Under such circumstances, we are of the view that directions issued by the learned Single Judge is to be modified to the following extent and we allow the Writ Appeal, as under :"*

11. In view of the above discussion, I, direct the respondent Revenue to allow the import of consignments of the Appellant without insisting on any Bank Guarantee with immediate effect. The respondent Revenue is expected to adhere to this order in letter and spirit, without causing any further loss of business to the Appellant. The appellants shall be permitted to release the goods on condition of their executing Indemnity Bond agreeing and undertaking to pay the amount of differential duty as may be imposed on them by the

Customs authorities while making the final assessment, instead of bank guarantee.

Order Dasti.

(Dictated and pronounced in the open Court.)

SD/
(P.K.CHOUDHARY)
MEMBER (JUDICIAL)

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