

**IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL,
KOLKATA**
REGIONAL BENCH – COURT NO.2

Customs Appeal No. 248 of 2010
Customs Appeal No. 277 of 2010

(Arising out of Order-in-Original No. KOL/CUS/PORT/29/2010 dated: 20.05.2010 passed by
Commissioner of Customs, Custom House, 15/1 Stand Road, Kolkata-700 001)

Hydraulic Study Dept.

(20, Garden Reach Road, Kolkata-700 043.)

...Appellant

VERSUS

Commr. of Customs (Port), Kolkata.

(Customs House, 15/1, Stand Road, Kolkata-700 001.)

...Respondent

AND

Comm. of Customs (Port), Kolkata

(Customs House, 15/1, Stand Road, Kolkata-700 001.)

...Appellant

VERSUS

Calcutta Port Trust

(Customs House, 15/1, Stand Road, Kolkata-700 001.)

...Respondent

APPEARANCE :

Present for the Appellant: Mr. Ritzu Ghosal and Mr. Abhishek Banerjee,
Advocate

Present for the Respondent: Mr. Manish Mohan (Addl. Commr.),
Authorized Representative for the Respondent

CORAM:

HON'BLE MR. R. MURALIDHAR MEMBER (JUDICIAL)

HON'BLE MR. RAJEEV TANDON MEMBER (TECHNICAL)

FINAL ORDER No. 76765-76766/2023

DATE OF HEARING :30.08.2023

DATE OF PRONOUNCEMENT:22.09.2023

PER: RAJEEV TANDON

Both, the department as well as Hydraulic Study Department (of Kolkata Port Trust) are aggrieved against the order passed by the learned Commissioner of Customs (Port) Kolkata vide Order No. KOL/CUS/PORT/29/2010 dated 20th May 2010. The short question in the appeal of the revenue and the cross appeal filed by the party revolves on a narrow compass, concerning admissibility of exemption Notification No. 70/81-CUS, dated 26.03.1981 and Not. No. 152/94-CUS dated 13.07.1994, benefit of which is dis-allowed by the learned adjudicating authority. The current order has been passed in remand proceedings, subsequent to the order passed by the Tribunal vide Order No. M1247-S-1248-A-1250-CAL/2001 dated 20.11.2001. Vide the impugned order, passed by the learned Commissioner a duty amount of Rs. 7,07,77,168 under Section 28AB of the Customs Act,1962¹ has been confirmed, besides imposition of penalty of the like amount on the noticee, under Section 114A of the Customs Act.

2. Briefly stated, Kolkata Port Trust through its Research wing Hydraulic Study Department (HSD), that undertakes research work in various aspects of hydraulic behavior of Bhagirathi-Hooghly River system, and has been recognized as a Scientific Research and Development unit by the Ministry of Surface Transport, Government of India, imported certain goods said to be for purpose of carrying out its objective. The importer sought to avail duty

1. The Act.

concessions in terms of Notification No. 70/81-Cus dated March 26, 1981 and 152/94-Cus dated July 13, 1994, which exempts from payment of custom duty such goods as are imported by a research institution, subject to the research institution furnishing a certificate issued by the specified officer of the administrative ministry concerned, not below the rank of an Under-Secretary. The said certificate was required to be to the effect that –

The import of the goods imported was essential for research; and were to be used for such purposes only by the said institution and the said institution was not engaged in any commercial activities.

3. The administrative controlling ministry, the Ministry of Surface Transport, Government of India, granted the requisite certificate of exemption for import of various scientific machineries, equipments, instruments, apparatus and other accessories and spare parts, in favour of Hydraulic Study Department of the Calcutta Port Trust.

4. During the period 1992 to March 1996, the appellant thus imported various scientific instruments and apparatus, orders for which were placed on the foreign suppliers for supply of such equipments or parts thereof for replacement of the accessories. The invoices issued were in the name of the appellant. The bills of lading indicated that the appellant was the importer. The bills of entry were filed by the Controller of Stores as the agent of the appellant and clearance was done by the Material Management Department on behalf of the appellant. The Commissioner of Customs (Port) however issued a show cause notice dated 07.09.1999, inter alia alleging that the certificate were obtained fraudulently by submitting false and wrong declaration and as the appellant had imported the said goods and scientific instruments for the purpose of using the same in commercial activity, the

said concession was not available. In response the appellants stated that Calcutta Port Trust, being a statutory authority could not charge for the usage of VTMS imported, a facility not recognized by the Maritime Rules and that the scale of rates were statutorily fixed. In fact, on the factual matrix of the case, the order of the learned adjudicating authority, records as under:

"35. During hearing Shri S. Banerjee, Bar-at-Law, drew attention of the Adjudicating authority to the Paragraph VIII of the SCN wherein, in the statement given by the officers and employee of Kolkata Port Trust, it is stated that the imported consignment VTMS was used for research and development purposes. The Deputy Chief Accounts Officer, Finance Department, Vide his letter dated 26.08.1999 had informed that vessel related charges are levied on incoming and outgoing vessels visiting Haldia Dock Complex and Kolkata Docks, and port dues for entry into the port. He further added that for providing services by VTMS, a consolidated charge from the vessels is taken and no separate charge for VTMS is recovered. Emphasizing on the statement given by the Port Trust Officers, it is said that a consolidated charge for towage and pilotage is recovered from the vessels visiting Haldia Dock Complex and Kolkata Docks by the KoPT which includes the cost for providing the service of VTMS but no separate charge is recovered for providing service by VTMS. The senior advocate also stated that the Imported item is not used separately in providing service to the vessel and the schedule of charges are only fixed by the Ministry of Surface Transport only. During hearing, the Senior Advocate further submitted a letter issued by the Ministry of

Science and Technology dated 26.09.2005 wherein it is stated that they have been recommending the Hydraulic Study Department under KoPT for registration under DSIR for availing exemption under Notification No. 51/96/CUS. Afterwards, the Ministry of Science and Technology gave due recognition to Hydraulic Study Department of KoPT as a research and development unit. The Hydraulic Study Department of KoPT is recognized as a Scientific Research Development Unit under the Ministry of Surface Transport."

5. Vide an order dated December 29, 2000, the Commissioner of Custom (Port) however confirmed the demand of duty of Rs. 7,07,77,168/- and imposed a penalty of Rs. 7,07,77,168/-, denying the benefit of exemption notifications referred supra.

6. In the first round of litigation the appeal filed by the appellant was allowed by the Tribunal which remanded the matter back to the Commissioner with the following observations-

"We have heard the submissions made there from both sides. A reading of the impugned order shows that basically the benefit of notification has been denied to the appellant/applicant on the ground that the certificates produced by him as envisaged in the notifications are not correct inasmuch as the same has been obtained by misleading the Ministry of Surface Transport. We are afraid that the above reasoning of the Commissioner for rejecting the certificate provided by the appellant/applicant is not correct inasmuch as it is not for the Custom authorities to

decide upon the correctness or otherwise of the certificates in question. If the authorities were having any doubt about the correctness of the certificates produced by the appellant/applicant, it was open to them to take up the matter with the Issuing Authority instead of rejecting the certificates on the face of it on the basis of the Custom's own evidence inasmuch as the applicant/appellant has claimed that the subsequent certificates given by the appropriate authorities has been accepted by the Customs, we consider it fit to remand the matter to the Commissioner for looking into the above factual aspects and reconsider the case. Accordingly, after dispensing with the condition of pre-deposit of duty and penalty, the impugned orders are set aside and the matter is remanded to the Adjudicating Authority for fresh adjudication in the light of observation made by us in the preceding paragraph, the appeal is thus allowed by of remand."

7. It is alleged by the assessee, that the learned Commissioner, by an order dated May 20, 2010, without complying with the directions given by the Tribunal and without verifying the correctness of the certificates issued by the Ministry, once again confirmed the duty amount of Rs. 7,07,77,168/- besides imposing penalty under Section 114A of the act.

8. We have heard the rival submissions of the two sides. The department's plea is that an exemption benefit has to be strictly read into and its benefit is not accruable as Hydraulic Study Department was engaged in commercial activity and the imported goods were put to commercial use.

9. As noted earlier, while the issue revolves around availment of exemption benefit, the crux of the dispute centers around the certificates of exemption granted by the Ministry of Surface Transport, in favour of the assessee and whether such certificates are correct or were obtained by misleading the concerned ministry and whether Hydraulic Study Department were engaged in commercial activities. It is an admitted position that the Commissioner of Customs, while re-adjudicating the matter in remand proceedings has not caused any enquiries with the Issuing Authority to validate and/or invalidate the correctness of exemption certificates so issued. This Tribunal order, during the earlier round of litigation passed on November 20, 2001, was clear and unambiguous. While setting aside the order of the Commissioner of Custom (Port) it had specifically mentioned that if the authorities were having any doubt with regard to the correctness of the certificates so produced by the appellant, it was open to them to take up the matter with the Issuing Authority. The impugned order passed afresh does not reflect anywhere that the Issuing Authorities were referred to in the matter and enquiries caused about the veracity of the certificate, questioned by the Commissioner of Customs (Port), to substantiate its finding in the impugned order.

10. As to a specific query raised by the bench, as to why the bill of entry has the importer's name as Controller of Stores, KoPT, in response the appellant states that the bills of entry are prepared by the agent of the importer, who prepared the bill of entry in the name of their principals, as both the importer as well as the agent were part of the same principal. He further stated that the document of import is ideally the bill of lading issued

by the exporter, which specifically contains the appellants name as the importer. The invoices raised by the exporter also clearly show the name of the importer as Hydraulic Study Department, who are also the appellants herein.

11. On the question of engaging in commercial activity on part of the Hydraulic Study Department of Calcutta Port Trust, it was pointed out that Hydraulic Study Department is a separate unit/institution under the aegis of Calcutta Port Trust and carries out no commercial activities. The mandate of the institution being to undertake research oriented work for which purpose it was also registered as a scientific R & D unit. Further, Calcutta Port Trust being a body constituted under the Port Trust Act regulated by the Ministry of Surface Transport, was empowered to collect only such charges and at such rates as were fixed by TAMP (Tariff Authority for Major Ports). Further, the said charges were levied for pilotage/berthing of the vessels moving in and out of the channel into the port and had nothing to do with the imported equipments and spares used for research based activities in the port area, although it is a different matter that the study undertaken and data analysed and generated by the imported equipment were helpful in guiding the vessels for entry and exit into the port/channel.

12. We note that the learned Commissioner of Customs (Port) has failed to appreciate that Hydraulic Study Department is a research entity of the KoPT and further proceeded erroneously with the understanding that the noticee had willfully suppressed the said fact and obtained the required certificates by misrepresentation. It is also an incorrect observation made by the learned Commissioner that nowhere the name of the appellant figures in the import documents. The fact that the exporter has validly inscribed the name

of the research wing-Hydraulic Study Department on the bill of lading, entitles the latter to a valid title for import of the said goods. There is no evidence of any further high sea sales of the said goods prior to their importation. Thus, the veracity of Hydraulic Study Department being the importer is not in doubt. There has been no evidence provided to substantiate the contention of the adjudicating authority that HSD was engaged in commercial activity and therefore the imported goods were not eligible to exemption benefit.

13. The argument concerning that the bills of entry for imports have been filed by the Controller of Stores, has also been sufficiently well explained, by the appellant importer. The fact that the Bill of Lading as well as the export invoices are issued in the name of Hydraulic Study Department leaves no doubt to deny them their rightful claim as importers. It is stated by the appellants that the Controller of Stores being the Clearing and Forwarding Agent of the appellant are required to sign the bill of entry at the time when the goods are imported. The Controller of Stores merely acts as an agent of the appellant herein, who are the original importer as evident from the aforesaid i.e. bills of lading as well as the invoices issued by the suppliers of the said goods.

14. We hold that in view of our discussions above the Hydraulic Study Department of Calcutta Port Trust were eligible for the benefit of Notification No. 70/80-Cus dated 26.03.1981 and Notification No. 152/94-Cus dated 13.07.1994. We are thus of the view that the aforesaid exemption benefit has been inappropriately denied to the appellants. We therefore set aside

the impugned order in original, and allow the appeal filed by Hydraulic Study Department of Calcutta Port Trust. The appeal filed by the department is dismissed.

(Pronounced in the open Court on...22.09.2023.)

Sd/-
(R. Muralidhar)
Member (Judicial)

Sd/-
(Rajeev Tandon)
Member (Technical)

K.M.