

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

Customs Appeal No. 78223 of 2018

(Arising out of Order-in-Appeal No. KOL/CUS(PORT)/AA/1089/2018 dated 14.06.2018 passed by Commissioner of Customs (Appeals), Kolkata.)

M/s. Century Pulp & Paper,
(11th Floor, 10 Camac Street Kolkata-700017.)

...Appellant

VERSUS

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

...Respondent

APPEARANCE :

Present for the Appellant: Ms. Payal Bharwani, Chartered Accountant

Present for the Respondent: Shri A.K. Chowdhury, Authorized Representative

CORAM:

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

HON'BLE MR. RAJEEV TANDON MEMBER (TECHNICAL)

FINAL ORDER No.75183/2024

DATE OF HEARING :31.01.2024

DATE OF PRONOUNCEMENT : 09.02.2024

PER: RAJEEV TANDON

The instant appeal is filed by M/s. Century Pulp and Paper, Kolkata assailing the order in appeal passed by the Commissioner of Customs, (Appeals) Custom House, Kolkata vide Order in Appeal No. KOL/CUS(PORT)/AA/1089/2018 dated 14.06.2018. The short question involved in the instant appeal concerns the liability to pay interest upon finalization of provisional assessment prior to insertion of sub-section (3) in Section 18 of the **Customs Act, 1962.**¹

1. The Act.

2. To recapitulate the facts of the case- the appellant, engaged in the business of paper manufacture, had in the year 1997–98 imported certain goods under the project import regulations for purpose of capacity extension and setting up new lines for manufacture of coated and uncoated paperboards. The said goods were imported vide seven Bills of Entry and duty concession as admissible for project imports at the time of ex bond availed. The said assessment was undertaken on provisional basis and requisite formalities in law discharged. Subsequently, during 2011–12 upon a query from the department about the status of the matter, the appellant informed that due to adverse market conditions and changes of technology, the said project could not be commissioned. The imported goods, lying as such, were therefore, reclassified under appropriate headings of CTH, 8441/8208 and 8413 and 8537(spares) (earlier classification of imported goods being under 9801 as project imports). It is not in dispute that the duty as liable on the imported goods subsequent to the final assessment has been duly paid by the appellant and a differential duty amount of Rs. 92,83,716/- was paid in pursuance of the order in original, passed by the learned Deputy Commissioner of Customs, Group 6 Arrear Cell vide orders dated 24 March 2014. Vide the instant order in appeal under challenge, the appellant in their appeal have agitated the direction to pay interest and that too on the entire duty amount leviable on the said goods.

3. The appellant submits that they are not liable to pay any interest confirmed upon finalization of the provisional assessment. It is their case that the said provisional assessment had been undertaken prior to the incorporation of the said provisions [Section 18(3)] in law carried out by Taxation Laws Amendment Act 2006 with effect from 13.07.2006. They

submit that in their case, the goods were imported in the year 1997-98 and also ex bonded during the period 1998-99.

4. Vehemently arguing on their proposition the learned C.A Ms. Payal Bharawani points out that Section 18 of the Act provides for provisional assessment of duty on the imported goods. Sub-section (3) thereof deals with the interest liability in cases where goods are provisionally assessed. This sub-section was inserted to Section 18 with effect from 13.07.2006 and therefore prior to its insertion, interest was not payable for the time gap between provisional assessment and final assessment. She observes that the said anomaly in law was identified by the 27th Standing Committee on Finance (2005-06), Fourteenth Lok Sabha as under:

"12. Presently, Section 18 of the Customs Act, which provides for provisional assessment of duty does not provide for various issues arising from the finalization of provisional assessment. The proposals of Clause 18 seek to insert sub-section (3), sub-section (4) and sub-section (5) to Section 18 of the Customs Act, 1962 to provide for a mechanism to regularize the payments of duty short levied and interest thereon and duties that are to be refunded on finalization of a provisional assessment."

4.1. It is therefore the appellants case that pursuant thereto, sub-section (3) was inserted in Section 18 of the Customs Act, 1962. The said sub-section reads as follows:-

" (3) The importer or exporter shall be liable to pay interest, on any amount payable to the Central Government, consequent to the final assessment order or re-assessment order under sub-section (2), at the rate fixed by the Central Government under

Section 28AB from the first day of the month in which the duty is provisionally assessed till the date of payment thereof."

5. We have heard the two sides and perused the records- the short question for consideration is whether interest is payable by the appellant upon finalization of the provisional assessment undertaken prior to the insertion of the said sub-section and if so on what quantum of duty- i.e. whether the differential duty is payable upon finalization on the entire duty leviable or only on the differential component of duty paid by the importer upon finalization of the goods and whether Section 18(3) would come into play for provisional assessments having taken place prior to the date of its insertion in the statute, i.e. to say if applicable, would it have a retrospective applicability.

6. A perusal of sub-section (3) of Section 18 shows that an assessee becomes liable to pay interest on the differential duty calculated at the time of final assessment at the rate fixed under Section 28AB of the Customs Act, 1962. It is a common principle of law that a legislation is always prospective in nature unless when by express words or by necessary implication the provisions are declared or construed to have retrospective effect. Thus, in the case of **Binani Industries Ltd. Vs. CCT**,². Hon'ble Supreme Court held as under:

" 13. It is a cardinal principle of construction that every statute is prima facie prospective unless it is expressly or by necessary implication made to have a retrospective operation..... Unless there are words in the statute sufficient to show the intention of

the legislature to affect existing rights, it is deemed to be prospective only- 'nova constitutio futuris formam imponere debet non praeteritis'- a new law ought to regulate what is to follow, not the past. (See. Principles of Statutory Interpretation by Justice G.P. Singh, 9th Edn., 2004 at p. 438.)....."

Further, in the case of **CIT (Central), New Delhi Vs. Vatika Township Private Limited**³ which relied upon **Govind Das Vs. ITO**⁴ to state that prima facie any statute entails prospective application, unless otherwise mentioned in the statute in question. The following observation in the former case is extracted and reproduced below:

"36.....11. Now it is a well-settled rule of interpretation hallowed by time and sanctified by judicial decisions that, unless the terms of a statute expressly so provide or necessarily require it, retrospective operation should not be given to a statute so as to take away or impair an existing right or create a new obligation or impose a new liability otherwise than as regards matters of procedure. The general rule as stated by Halsbury in Vol. 36 of the Laws of England (3rd Edn.) and reiterated in several decisions of this Court as well as English courts is that – 'all statutes other than those which are merely declaratory or which relate only to matters of procedure or of evidence are prima facie prospective and retrospective operation should not

3. (2015) 1 SCC 1

4. (1976) 1 SCC 906

be given to a statute so as to affect, alter or destroy an existing right or create a new liability or obligation unless that effect cannot be avoided without doing violence to the language of the enactment. If the enactment is expressed in language which is fairly capable of either interpretation, it ought to be construed as prospective only."

Also it is well established that a substantive provision of law cannot be considered to be retrospective unless specified to the contrary by the Legislature. Reliance on the proposition is placed on the ratio of law laid down in the case of **Rochiram & Sons Vs. Union of India**,⁵ **CIT Vs. Gwalior Rayon Silk Mfg. Co. Lal**.⁶ and **SL. Srinivasa Jute Mills (P) Ltd. Vs. Union of India**,⁷ amongst several others.

7. Viewed in the backdrop, in the present case there are neither "express words" nor "necessary implication," made out to consider the said provision as retrospective. The provisions of sub-section 3 to Section 18 of the Act, (inserted on 13.07.2006 vide Section 21 of the Taxation Laws (Amendment) Act, 2006), therefore do not have any retrospective applicability. The amendment in law will thus have to be construed only prospectively i.e. its applicability will be only to such cases of provisional assessments as are made post the insertion of the said provision in the statute book and cannot be applied to cases of provisional assessments that were made or took place prior to it [Section 18(3)] being a part of the statute.

5. 2008 (226) ELT 20 (SC),

6. (1992) 3 SCC 326

7. (2006) 2 SCC 740.

8. It would be noteworthy to point out that the amendment made in Section 18 of the Customs Act, 1962 w.e.f. 13.07.2006, vide Section 21 of the Taxation Laws (Amendment) Act, 2006, inserting sub-sections (3), (4) & (5) to Section 18, came up for consideration before the Hon'ble Gujarat High Court in the case of **Commissioner of Customs Vs. Hindalco Industries Ltd.**,⁸ in the context of applicability of the provisions of unjust enrichment in Section 27 of the Customs Act, 1962 to a case of refund arising upon finalization of provisional assessments made under Section 18 of the Customs Act, 1962, prior to 13.07.2006. The Hon'ble High Court held as under:

"18. On a plain reading it becomes apparent that sub-sections (3) and (4) relate to liability to pay interest or entitlement to claim interest consequent upon final assessment order. However, sub-section (5) is the material amendment which indicates that the Proviso, appearing below sub-section (2) of Section 27 of the Act has now been incorporated as a part of Section 18 of the Act. On a plain reading the distinction between Section 18 as it stood prior to amendment i.e. upto 12-7-2006 and subsequent to the amendment i.e. with effect from 13-7-2006 becomes apparent. The difference is stark and revealing and it is not possible to agree with the contention of revenue that such amendment has to be understood as clarificatory in nature. This is more so, when one reads the amendments made in 1998 and the amendment made in Rule 9B of the Central Excise Rules in

1999 considering the pronouncement of the Apex Court as to the distinction between making of a refund and claiming of a refund; the amendment cannot be considered to be retrospective in nature; and cannot be made applicable to pending proceedings.

19. This can be considered from a slightly different angle. While introducing the Taxation Laws (Amendment) Bill, 2005 (Bill No. 74 of 2005) the Notes on Clauses in relation to Section 18 of the Act indicate that sub-sections (3), (4) and (5) to Section 18 of the Act, have been inserted to provide for a mechanism to regularize the payments of duty short levied and interest thereon and duties that are to be refunded on finalization of provisional assessment and in this context in the report of the Standing Committee on Finance it has specifically been noted that this amendment became necessary because Section 18 of the Act which provides for provisional assessment of duty presently (i.e. upto 12-7- 2006) does not provide for various issues arising from the finalization of provisional assessment. Thus, it becomes apparent that the amendment in question is substantive in nature when one finds that various provisions have been inserted which were not forming part of the original Section 18 of the Act as it stood upto 12-7-2006. It is not possible to state that the provisions for payment of interest on duty short levied or entitlement to interest on duty paid in excess of the finally assessed duty can be considered to be clarificatory provisions and in the same vein the newly inserted sub-section (5) deserves consideration. Thus in effect upto 12-7-2006 no provision existed in Section 18 of the Act which would

permit revenue to invoke principles of unjust enrichment in relation to duty paid in excess, found to be so, upon finalization of provisional assessment under Section 18 of the Act."

(Emphasis Supplied)

9. Apart from the aforesaid, the learned representative for the appellant, in support of their contention on prospective leviability has placed reliance on the following cases:

(i) Bhagyanagar Metals Ltd. Vs. Commissioner of C. Ex., Hyderabad-II⁹ to hold as under:

"45. We find that precedents referred to by Revenue are not applicable to the facts of the present case. In Commissioner of Trade Tax, Lucknow Vs. Kanhai Ram Thekedar (supra) the Hon'ble Supreme Court was dealing with the need for issuing separate demand for recovery of interest. In BHEL Vs. CC & CE, Kanpur (supra) the Hon'ble Allahabad High Court was dealing with provisions of Rule 7 (4) of Central Excise Rules, 2002 read with Section 37(2) of the Central Excise Act, 1944, the Hon'ble High Court held that the interest is compensatory in nature and becomes due when the duty payment was not made in time. In CC, Bangalore Vs. Pierre Colsun Inc. (supra), the Hon'ble Karnataka High Court was dealing with the obligation to pay interest in terms of Section 28AA. We find that in the present case, there was provisional

assessment which was later finalized. Since, at the time of resorting to the provisional assessment there was no statutory provision authorizing imposing of interest on the differential duty, (the provision which was introduced w.e.f. 13-7-2006) there is no interest liability in these cases.

(Emphasis Supplied)

(ii) Commissioner of Customs, Tuticorin Vs. CESTAT, Chennai¹⁰ to hold as under:

" 4. In view of the aforesaid and having heard the learned Counsel for the parties, we are satisfied that prior to amendment of law, by insertion of Section 18(3) in the Customs Act, the Revenue could not demand any interest on the differential duty assessed upon final assessment where the goods have been cleared on provisional assessment under Section 18(1) of the Act. The retrospective levy is not intended and the amendment in law is a substantive provision for making a provision for levy of interest in the present case. Therefore, for a period prior to 13-7-2006, such levy of interest cannot be imposed on the assessee. Therefore, being in respectful agreement with the view of the Gujarat High Court, we do

not find any merit in the present appeals filed by the Revenue and the order passed by the learned Tribunal is correct."

(Emphasis Supplied)

(iii) Commissioner of Customs (Preventive) Vs. Goyal Traders¹¹ to hold as under:

"12. It is not in dispute that prior to 13-7-2006, there was no provision under which the authorities could levy interest on the differential duty i.e. between finally assessed customs duty and provisionally assessed duty. Alongwith other provisions contained in Section 18, sub-section (3) was therefore introduced to enable the department to levy such interest. We may also notice that simultaneously other changes were also made in Section 18 relating to the question of unjust enrichment and refund of duty already collected under certain circumstances.

13. The answer to the question posed before us would depend on whether sub-section (3) of Section 18 of the Act in the present from creates a new liability. In other words, the said provision can be stated to be stated to be a substantive provision creating fresh liability and not a mere procedural provision.

14. It is, by now, well settled that the statutory amendments, either creating fresh liability hitherto no

existing or extinguishing accrued rights would be considered prospective unless statute either specifically or by necessary implication gives such provision retrospective effect.

15. In other words, it is a well established principle of construction that a statute inconsistent with substantive rights is prima facie considered prospective unless it is expressly or by necessary implication may have been given retrospective operation (refer to the decision of Apex Court in case of Keshavan Medhava Menon Vs. State of Bombay- AIR 1951 SC 128).

16. Particularly, in fiscal legislation imposing liabilities generally governed by the normal rule is that it is not retrospective in nature. It is, however, equally undisputed that a procedural provision when made applicable to pending proceedings would not be viewed as given retrospective operation to the liability. In case of Govinddas and Ors. Vs. the Income Tax Officer and Anr.- AIR 1977 Supreme Court 552, the Apex Court was×××××.

17. In the present case, we find that prior to introduction of sub-section (3) of Section 18 of the Act in the present form, there was no liability to pay interest on difference between finally assessed duty and provisionally assessed duty upon payment of which the assessee may have cleared the goods. It was only with effect from 13-7-2006 that such charging provision was introduced in the statute. Upon introduction therefore such provision created interest liability for the first time w.e.f. 13-7-

2006. In absence of any indication in the statute itself either specifically or by necessary implication giving retrospective effect to such a statutory provision, we are of the opinion that the same cannot be applied to cases of provisional assessment which took place prior to the said date. Any such application would in our view amount to retrospective operation of the law.”

(Emphasis Supplied)

10. From the aforesaid it is evident that the court's have repeatedly held the amendment to Section 18 of the Act, as a substantive piece of legislation and it cannot be considered to be of a clarificatory nature. The same cannot be therefore given a retrospective effect. The provisions of Section 18(3) of the Act, would have no application to the present case and the Assessment Order demanding payment of interest, in respect of provisional assessment made prior to 13.07.2006 is not in accordance with law.

11. The said issue being no more *res integra*, it need to be also pointed out that with the reference to similar provisions on the excise side, incorporated vide Rule 7(4) of the Central Excise Rules, 1944, the Board Vide Order- Instruction- Central Excise issued vide their Reference No.- **F.No. 354/66/2001-TRU** dated **21.06.2001**, had clarified that provisions relating to charging of interest will apply only to cases in which provisional assessment is resorted to after the date of promulgation and had specifically indicated the date 01.07.2001. It clarified that such provisions would not be applicable with respect to provisional assessments carried out in the past period, even if the assessments were finalized on or after the said date of incorporation of similar provisions on the excise side for charging of interest. This apart, from the rulings as held by various judicial authorities and as it is a cardinal principle of law that a different meaning cannot be assigned to

similarly worded/placed provisions, and in the absence of any such specific expression, as discussed forgoing paras, we find no merit in the order of the lower authority.

12. In view of discussions aforesaid, the question of demand of interest either on the entire duty amount or on the differential duty is no more relevant. Hence, we refrain from casting our observations on the said limited aspect, as we hold that no interest is leviable in the present matter, in the first place.

13. Under the circumstances, we are of the view that the order of the lower authority suffers from inherent defect of misinterpretation of law and therefore is liable to be quashed. We therefore set aside the impugned order and allow the appeal filed by the appellant, with consequential relief if any, as per law.

(Pronounced in the open court on...09.02.2024..)

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

**Sd/-
(Rajeev Tandon)
Member (Technical)**

K.M