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

REGIONAL BENCH - COURT NO.2

Customs Appeal No.75464 of 2015

(Arising out of Order-in-Original No.KOL/CUS/Commissioner/11/ADJN(PORT)/2015 dated 16.02.2015 passed by Commissioner of Customs (Port), Kolkata.)

M/s. Titagarh Wagons Limited
(756, Anandapur, Near Manovikas Kendra, Kolkata-700107, West Bengal, India.)

...Appellant

VERSUS

Commissioner of Customs (Port), Kolkata

.....Respondent

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

APPEARANCE

Shri Bhaskar Thakkar, Chartered Accountant & Ms. Sheha Nandi, Advocate for the Appellant (s)

Shri S.Debnath, Authorized Representative for the Revenue

CORAM: HON'BLE SHRI R. MURALIDHAR, MEMBER(JUDICIAL)
HON'BLE SHRI RAJEEV TANDON, MEMBER(TECHNICAL)

FINAL ORDER NO. 75200/2024

DATE OF HEARING : 5 February 2024
DATE OF DECISION : Feb. 15, 2024

Per : RAJEEV TANDON :

The Appellant, a manufacturer of wagons, Bailey bridges, Heavy Earth Moving and Mining Equipment, Steel & SG iron castings etc., imported Meter gauge bogies, wheels, axles and other parts of railway locomotives/rolling stock (classifiable under CTH 8607 of the Customs Tariff Act, 1975) vide 6(six) Bills of Entry during the period 28.05.2012 to 31.03.2013. At the time of import, duty was paid by the appellant as indicated in the EDI system. The appellant submits that Excise Duty (for the purpose of levy of CVD) on goods falling under Chapter 86 under Central Excise Tariff Act, 1985 was proposed to be fixed at 6% vide Finance Bill, 2012. However, at the time of promulgation of the Finance Bill and its enactment on 28.05.2012, the rate of duty for products under CTH 8607 was enacted as 12%. Therefore, the duty due to be discharged under Section 3(1) of the Central Excise Tariff Act, 1985 was 12% and not 6% as was self-assessed by them based on the EDI systems calculations. Thus CVD was short paid at the time of import to the tune of 6%. The appellants were therefore issued a Show Cause Notice which came to be adjudicated upon vide Order-in-Original No.KOL/CUS/Commissioner/11/ADJN(PORT)/2015 dated 16.02.2015 confirming the demand for short levied CVD besides also demanding interest under section 28AA of the Customs Act.

2. Against the aforesaid order of the Ld.Commissioner, the appellant is in appeal before us assailing the said order for the limited aspect of confirmation of the interest amount.

3. The contention of the Department is that the duty self-assessed under Section 17(1) of the Act by the Appellant was not in accordance with the provisions of the statute and therefore besides short paid duty amount, the appellant is also required to pay appropriate interest as aforesaid. The appellant contends that in the facts and circumstances of the case as the EDI system in itself indicated the CVD leviable @ 6% at the time of import they were therefore not liable to pay interest under Section 28AA of the Customs Act. It is relevant to point that the appellant has accepted their liability for payment of differential duty and duly paid the same which was also ordered to be appropriated vide the impugned Order-in-Original referred to above. The appellant contends that in the first place, the duty paid by them and the self-assessment undertaken was never challenged by the Department. It is

therefore their case that since the imported goods were subjected to re-assessment, Section 28AA of the Customs Act is not applicable to the facts of the present case and it ought to be considered as a case falling under the provisions of Section 47 of the Customs Act. They further argued that the short paid duty was also not on account of any omission or commission at their end, but was clearly a failure of the duty computed by the EDI system and as there was no short payment of duty noticed at the time of clearance of goods for home consumption, the goods were permitted to be cleared by the Customs authorities. Ld.Counsel for the appellant further submitted that it be noticed that there was no duty re-determination in the sense of the term and therefore no interest under Section 28AA of the Act was payable.

4. We have heard the Ld.AR for the Department, who supports the Department's stand and states that nothing prevented the importer to pay duty at appropriate rates of their own accord, as the rate of CVD leviable was 12% and not 6%.

5. To examine the issue it is necessary that Section 28AA as it then stood is taken note of. The same is reproduced hereunder for ready reference:-

> **SECTION 28AA.** [**Interest on delayed payment of duty.** Notwithstanding anything contained in any judgment, decree, —
>
> *(1) order or direction of any court, Appellate Tribunal or any authority or in any other provision of this Act or the rules made thereunder, the person, who is liable to pay duty in accordance with the provisions of section 28, shall, in addition to such duty, be liable to pay interest, if any, at the rate fixed under sub-section (2), whether such payment is made voluntarily or after determination of the duty under that section.*
>
> *(2) Interest at such rate not below ten per cent. and not exceeding thirty-six per cent. per annum, as the Central Government may, by notification in the Official Gazette, fix, shall be paid by the person liable to pay duty in terms of section 28 and such interest shall be calculated from the first day of the month succeeding the month in which the duty ought to have been paid or from the date of such*

erroneous refund, as the case may be, up to the date of payment of such duty.

(3) Notwithstanding anything contained in sub-section (1), no interest shall be payable where,—

(a) the duty becomes payable consequent to the issue of an order, instruction or direction by the Board under section 151A; and

(b) such amount of duty is voluntarily paid in full, within forty-five days from the date of issue of such order, instruction or direction, without reserving any right to appeal against the said payment at any subsequent stage of such payment.].

It be noted that sub-section2 of Section 28AA mandates payment of interest at appropriate rates, to be paid by a person liable to pay duty in terms of Section 28. As the Appellant has sought refuge under Section 47 of the Customs Act stating that the short-payment in duty need to be considered as a case therein and not as covered with reference to short payment of duty under Section 28. Sub-section 1 of Section 47 as it then read is reproduced hereunder:-

Section 47 – Clearance of goods for Home Consumption.

[(1)] Where the proper officer is satisfied that any goods entered for home consumption are not prohibited goods and the importer has paid the import duty, if any, assessed thereon and any charges payable under this Act in respect of the same, the proper officer may make an order permitting clearance of the goods for home consumption :

6. The Appellants have in support of their case referred to the decision of this Tribunal in the case of **Commissioner of Customs, Chennai Vs. Uma Mercantile (P) Ltd. [2010 (259) E.L.T. 437 (Tri.-Chennai)]**,. We note that the aforesaid decision cited by the Ld.Counsel for the Appellant is however not in the context of a situation as existent herein. The fact in the present matter being the appellant paid duty as indicated and computed by the EDI system and upon satisfaction of the import duty being paid, the Proper Officer allowed the clearance of the said goods for home consumption. It is observed

that the Ld.Adjudicating authority in operative part of its order, has specifically observed as under:-

<u>ORDER</u>

(i) *I confirm the demand of short levied duty of customs amounting to Rs.1,77,47,250/- (one crore seventy seven lacs forty seven thousand two hundred and fifty only) as shown in the annexure-1 to the show cause notice in terms of section 28 of the Customs Act, 1962 and order appropriation of an amount Rs.1,77,47,250/- (one crore seventy seven lacs forty seven thousand two hundred and fifty only) already paid by the noticee M/s. Titagarh Wagons Ltd vide Customs receipt nos. 1-72 to 77 all dated 15.07.14 towards the confirmed amount of duty.*

(ii) *I also confirm demand of interest on the short levied duty of Rs.1,77,47,250/- (one crore seventy seven lacs forty seven thousand and fifty only) at the applicable rate to be paid by the noticee M/s. Titagarh Wagons Ltd. in terms of section 28AA of the Customs Act, 1962.*

(iii) *I refrain from confiscation and imposition of fine and penalty as the noticee M/s. Titagarh Wagons Ltd. has paid the short levied amount as demanded and they have not suppressed/mis-declared the facts at the time of importation but duty was short levied due to EDI system error.*

7. While we note that it is settled law that interest is compensatory in character and not punitive, we also take note of the fact that the short levy in the present case, in no way can be attributed to the assessee's fault. Section 28AA calls for payment of interest on short levied duty amount due in terms of Section 28. We note that no sooner had the appellant been served with the Show Cause Notice, they paid the differential duty Even before the lower authorities as observed from the Order-in-Original, the appellant never disputed the short paid duty and only contested the payment of interest thereon. As it was not attributable (a) to any fault on their count, (b) that there have been no short payment of assessed duty, in terms of what the Customs EDI System foretold and (c) that there was no case of any willful

misstatement or suppression of facts. The Appellant has also brought to our notice yet another case in the case of **Commissioner of Customs, Vijayawada Vs. Ruchi Soya Industries Ltd. [2016 (339) E.L.T. 613 (Tri.-Bang.)]**, wherein duty as assessed by the Customs Officer was paid by the importer on the very day as required under Section 47 of the Customs Act. However, because of the lag in time span between the day of assessment and that of entry inwards there was an enhancement in the rate of duty. The assessee however paid the differential duty as required under law and within the time specified. Upon reference to the Third Member it was held by the Tribunal that the importer in the said case was not liable to pay interest as the duty leviable under Section 47 of the Customs Act, stood duly discharged and there was no delay in payment thereof. The present case is somewhat similar, while in the cited case it was a change in the rate of duty in the time interlude between assessment and grant of entry inwards, in the present case it is a variation of duty rates that between the time of presentation of Bill of Entry and the enactment of the Finance Bill. The fact is that in both the cases, upon payment of import duty, out of charge order for home clearance, by the Proper Officer under Section 47 of the Act was appropriately issued, and it was only subsequent that demand for differential duty was raised. There being no delay in payment of this differential in duty it was held that no interest was therefore payable, as there was no late payment.

7.1 Relevant paras of the said decision reads as under:

> ***"19.*** *In such a scenario, the assessee has taken a categorical stand that the provisions of Section 47(2) requiring an assessee to pay interest, if duty assessed by the Customs is not paid within 2 days are not applicable. Once the assessed duty stands paid, orders for clearance of the cargo are issued under Section 47 and the cargo is cleared, the provisions of Section 47 stop having any applicability. As the respondents have deposited the assessed duty in terms of the provisions of the said section, and there was no late payment of duty so assessed by the Customs, no demand for interest can be raised under Section 47(2) of the Act.*

> ***20.*** *For better appreciation of the provisions of Section 47, I reproduce the same.*
>
> > ***"47. Clearance of goods for home consumption -*** *(1) Where the proper officer is satisfied that any goods entered for home consumption are not prohibited goods and the importer has paid the import duty, if any, assessed thereon and any charges payable under this Act in respect of the same, the proper officer may make an order permitting clearance of the goods for home consumption.*
> >
> > *(2) Where the importer fails to pay the import duty under sub-section (1) within two days (excluding holidays) from the date on which the bill of entry is returned to him for payment of duty, he shall pay interest at [such rate, not below [ten per cent] and not exceeding thirty six per cent per annum, as is for the time being fixed by the Central Government, by notification in the Official Gazette], on such duty till the date of payment of said duty."*
>
> *As is clear from the reading of the above provisions, sub-section (2) of Section 47 provides for interest in those cases where importer has not paid the import duty assessed in terms of sub-section (1) of Section 47 within a period of 2 days from the date on which the assessed Bill of Entry is returned to him for payment of duty. In the present case, the respondent has admittedly paid the duty within a period of 2 days from the date of assessed Bill of Entry and there is no dispute about the same. I find no justifiable reason to confirm the interest against the importer for alleged contravention of Section 47."*

8. In view of the fact that short paid duty amount was paid without demur or protest and in time, no sooner the Department brought the same to the importer's notice, besides the fact that duty short paid in the first instance, can in no way be attributed to any fault on the part of the importer/appellant, we note sufficient compliance of the requirements of Section 47 as at the time of clearance, and that is why order permitting clearance for home consumption was granted by the

proper officer. Under the circumstances, subjecting the importer to levy interest on duty as short paid in terms of Section 28 is not warranted besides being unduly harsh, particularly when there is no omission on account of any fault attributable to the importer.

9. For reasons foregoing the demand for interest is set aside and the appeal filed is allowed.

(Order pronounced in the open court on 15.02.2024)

Sd/

(R. MURALIDHAR)
MEMBER (JUDICIAL)

Sd/

(RAJEEV TANDON)
MEMBER (TECHNICAL)

sm