IN THE CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL, KOLKATA

REGIONAL BENCH – COURT NO.2

Customs Appeal No.75210 of 2019

[Arising out of Order-in-Appeal No.89/CUS/CCP-GST/2018 dated 30.10.2018 passed by Commr. (Appeals), of CGST & Excise, Customs Bhubaneswar]

M/s Seatrans Marine Private Ltd.
Plot No.A/48,Unit III, Kharvel Nagar, Bhubaneswar-751001

Appellant

VERSUS

CC (Preventive), Bhubaneswar
C.R.Building, Rajaswa Vihar, Bhubaneswar-7, Odisha

Respondent

WITH

(1) Customs Appeal No.75211 of 2019
(M/s Seatrans Marine Private Ltd.)

[Arising out of Order-in-Appeal No.90/CUS/CCP-GST/2018 dated 30.10.2018 passed by Commr. (Appeals), of CGST & Excise, Customs Bhubaneswar]

(2) Customs Appeal No.75212 of 2019
(M/s Seatrans Marine Private Ltd.)

[Arising out of Order-in-Appeal No.85/CUS/CCP-GST/2018 dated 30.10.2018 passed by Commr. (Appeals), of CGST & Excise, Customs Bhubaneswar]

(3) Customs Appeal No.75214 of 2019
(M/s Seatrans Marine Private Ltd.)

[Arising out of Order-in-Appeal No.86/CUS/CCP-GST/2018 dated 30.10.2018 passed by Commr. (Appeals), of CGST & Excise, Customs Bhubaneswar]

(4) Customs Appeal No.75215 of 2019
(M/s Seatrans Marine Private Ltd.)

[Arising out of Order-in-Appeal No.88/CUS/CCP-GST/2018 dated 30.10.2018 passed by Commr. (Appeals), of CGST & Excise, Customs Bhubaneswar]

(5) Customs Appeal No.75217 of 2019
(M/s Seatrans Marine Private Ltd.)

[Arising out of Order-in-Appeal No.87/CUS/CCP-GST/2018 dated 30.10.2018 passed by Commr. (Appeals), of CGST & Excise, Customs Bhubaneswar]

(6) Customs Appeal No.77187 of 2019
(M/s Seatrans Marine Private Ltd.)

[Arising out of Order-in-Appeal No.198/CUS/CCP-GST/2018 dated 26.06.2019 passed by Commr. (Appeals), of CGST & Excise, Customs Bhubaneswar]

(7) Customs Appeal No.77188 of 2019
(M/s Seatrans Marine Private Ltd.)

[Arising out of Order-in-Appeal No.200/CUS/CCP-GST/2018 dated 26.06.2019 passed by Commr. (Appeals), of CGST & Excise, Customs Bhubaneswar]

(8) Customs Appeal No.77189 of 2019
(M/s Seatrans Marine Private Ltd.)

[Arising out of Order-in-Appeal No.199/CUS/CCP-GST/2018 dated 26.06.2019 passed by Commr. (Appeals), of CGST & Excise, Customs Bhubaneswar]

(9) Customs Appeal No.77190 of 2019
(M/s Seatrans Marine Private Ltd.)

[Arising out of Order-in-Appeal No.201/CUS/CCP-GST/2018 dated 26.06.2019 passed by Commr. (Appeals), of CGST & Excise, Customs Bhubaneswar]

APPERANCE :

Mr.Pramod Kumar Rai & Mr.Dipankar Majumder, both Advocates for the Appellant
Shri S.Guha, Authorized Representative for the Respondent

CORAM:
HON'BLE MR. S.S.GARG, MEMBER (JUDICIAL)
HON'BLE MR.P.VENKATA SUBBA RAO, MEMBER (TECHNICAL)

FINAL ORDER NO…75257-75266/2020

DATE OF HEARING : 05.02.2020
DATE OF DECISION : 05.02.2020

PER S.S.GARG :

These 10 (Ten) appeals have been filed by the appellants against various impugned orders passed by Commissioner (Appeals), whereby the Commissioner (Appeals) has rejected the appeals of the appellants by upholding the Order-in-Originals. All the ten appeals involve identical facts and the issue involved is also identical and, hence all the ten appeals are being taken up for disposal together. For the sake of convenience, the Customs Appeal No.C/77190/2019 is taken up.

2. Briefly stated the facts of the case as alleged by the Revenue are that the appellants are engaged in the shipping business and had acted as Shipping Agent of the importer M/s JSW Ispat Steel Ltd. (now known as M/s JSW Steel Ltd.), who had chartered a Foreign Vessel M.V.Spar Virgo for carriage of Iron Ore Fines. The vessel arrived at Haldia Port and after discharge of import cargo there it arrived at Dhamra Port in Ballast for movement of costal cargo of iron ore fines from Dhamra Port to Dharmtar Port. The appellants filed Bill of Entry dated 01.01.2013 for payment of duty on bunkers, provisions and stores likely to be consumed during coastal voyage. The Bill of Entry was provisionally assessed and the appellants paid provisional duty of Rs.24,47,983/- vide TR-6 Challan dated 04.01.2013. Subsequently, the said Bill of Entry was finalized on 31.08.2015. The said assessment order was not challenged by any party and attained finality. Thereafter, a show-cause notice dated 07.04.2017 was issued to the appellant for payment of differential Customs duty amounting to Rs.5,80,802/- along with applicable interest. After following the due process, the Joint Commissioner of Customs (Preventive), Bhubaneswar, confirmed the demand raised in the show-cause notice. Being aggrieved by the said order, the appellant filed appeal before the Commissioner (Appeals), who rejected the said appeal.

3. Heard both sides and perused the records.

4. The Ld.Counsel appearing on behalf of the appellants, submits that the impugned order passed by the Commissioner (Appeals) is not sustainable in law as the same has been passed without properly appreciating the facts and law and binding judicial precedents. He further submitted that the show-cause notice dated 07.04.2017 issued to the appellant, is not maintainable for the following reasons :

(a) SCN issued under Section 28 of the Customs Act of 1962 to a person other than importer is not maintainable at all.

(b) Bill of Entry which is finally assessed (& assessment order specifically mentions that this is an appealable order) and which has not been appealed by Department cannot be disturbed by issuing Show Cause Notice under Section 28 of the Customs Act in view of numerous decisions and especially in view of the Hon'ble Supreme Court Judgement in the case of ITC Ltd. Vs. CCE, Kolkata-IV 2019-TIOL-418-SC-CUS-LB.

(c) Reliance is also placed on Aspin Wall and Company Versus C.C.E. (2001) 132 ELT 644, in which it has been held that simply by presenting papers for clearance of goods, one does not become importer of goods or agent of Importer under Section 147 of Customs Act, 1962. The person presenting the papers cannot be held to be responsible for short levy of duty on grounds of having filed Bill of Entry on behalf of Importer.

He further submitted that Revenue has added 1% of the price paid to ship owner as loading and unloading charges under Rule 10(2)(b) of the Customs Valuation Rules, 2007. He further submitted that the said addition of 1% of the price is wrong and illegal on the following reasons:

(a) It is submitted that neither anything has been uploaded from the vessel nor any charges has been paid to vessel owner towards any kind of loading-unloading. The bunkers and other provisions have been consumed on the vessel itself without any kind of unloading.

(b) In case of Wipro Limited Versus A.C.Customs 2015 (319) ELT 177 (SC), apex Court has held that unloading charges at a flat rate of 1% of FOB, added by Customs authorities in assessable value is in violation of Section 14 of Customs Act.

(c) The Court has held that if actual unloading charges can be ascertained, then it is the actual charges which can be added to assessable value.

(d) After Wipro decision, the provision prescribing the flat addition of 1% towards unloading has been deleted by Govt. vide Notification dated 26.09.2017 to align valuation rules with Supreme Court decision.

(e) In the present case, actual unloading charges being nil, nothing can be added towards unloading charges.

He further submitted that the addition of 1% of the price paid to ship owner, has been made on the basis of Circular, which is contrary to the statutory provisions and cannot have any legal basis. It is further submitted that Revenue has added 20% and 1.125% of price paid to ship owner towards freight and insurance respectively under Rule 10 (2)(a) and (c) respectively of Customs Valuation Rules, 2007, which is also not legally correct in view of the following reasons :

(a) This addition is based on a wrong presumption that price paid to ship owner for bunkers and stores is a F.O.B price and thus freight and insurance components needs to be added.

(b) The fact is that price paid to ship owner for costal run is not F.O.B. price rather it was all inclusive price prevailing at Indian Port and thus, nothing was to be added towards freight and insurance.

(c) Further, Rule 10 (2) makes it very clear that, value shall be for delivery at the time and place for importation and in case, value of goods are taken at a place other than the place of delivery of importation and freight and insurance component upto the place of importation is not ascertainable, in that case alone this 20% or 1.125% loading was permissible. In the present case price is ascertainable for delivery at the time and place of importation at Haldia port and thus there was no question of further addition towards freight and insurance.

In support of his submissions, he relied on the following decisions :

(i) ITC Ltd. Vs. CCE, Kolkata-IV : 2019-TIOL-418-SC-CUS-LB

(ii) Aspinwall & Co. Vs.CCEx., Trichy : 2001 (132) ELT 644 (Tri.-Chennai) ;

(iii) Interglobe Aviation Ltd. Vs. CC, New Delhi : 2018 (360) ELT 170 (Tri.-Del.).

5. The Ld.D.R. for the Revenue, reiterated the findings of the impugned order.

6. After considering the submissions of both sides and perusal of materials on record, we find that in the present case, the appellant is not the importer and in fact, the importer is M/s JSW as per Section 2 (26) of the Customs Act, 1962. It is necessary to reproduce the definition of "importer " provided in Section 2 (26), which is reproduced herein below :

> *"importer", in relation to any goods at any time between their importation and the time when they are cleared for home consumption, includes any owner, beneficial owner or any person holding himself out to be the importer"*

Further, we find that in the case of Aspin Wall and Company cited (supra), it has been held that simply by presenting papers for clearance of goods, one does not become importer of goods or agent of importer under Section 147 of the Customs Act, 1962. The person presenting the papers cannot be held to be responsible for short levy of duty on grounds of having filed Bill of Entry on behalf of importer. Further, we find that the addition of 1% of the price paid to ship owner as loading and un-loading charges is also not sustainable in law in view of the judgement of apex Court in the case of Wipro Ltd. Vs. A.C.Customs : 2015 (319) ELT 177 (SC), wherein the Apex Court has held that unloading charges at a flat rate of 1% of FOB value added by Customs authorities in assessable value is in violation of Section 14 of the Customs Act, 1962. In the present case, the actual unloading charges being nil, nothing can be added towards un-loading charges. Further, the addition of 20% and 1.125% of the price paid to ship owner towards freight and insurance, is also not sustainable in law because the said addition is based on a wrong presumption that price paid to ship owner for bunkers and stores is a FOB price. Further, we find that no amount has been incurred by JSW in addition to what has been paid to ship owner and on which duty has already been assessed towards freight and insurance. Thus, when Customs duty has already suffered on value of bunkers and provisions, which included all costs incurred upto the Haldia Port, there is no question of any addition of freight and insurance.

7. In view of the above discussions and by relying upon the ratio decisions of the cases cited (supra), we are of the considered opinion that the impugned orders passed by the Commissioner are not sustainable in law and therefore, we set aside the same by allowing all the appeals of the appellants with consequential relief, if any.

(Operative part of the order was pronounced in the open court)

(S.S.Garg)
Member (Judicial)

(P.V.Subba Rao)
Member (Technical)

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