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

REGIONAL BENCH – COURT NO.2

Customs Appeal No. 104 of 2011

(Arising out of Order-in-Appeal No. KOL/CUS/CKP/306/2010 dated 27.10.2010 (date of issue 03.11.2010), passed by Commissioner of Customs (Appeals), Kolkata)

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

Appellant

VERSUS

M/s. Naitik Vinimay Pvt. Ltd.
(27, Weston Street, 3rd Floor, Room No. 303, Kolkata-700012)

Respondent

APPEARANCE :
Mr. S. Chakraborty, Authorized Representative for the Appellant
Mr. K. K. Sanyal, Consultant for the Respondent

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

FINAL ORDER NO.76029/2025

Date of Hearing : 4TH April 2025
Date of Decision : 4th April 2025

PER R. MURALIDHAR

The appellant imported 11 consignments of synthetic oil during the period 2008. Subsequently, in view of the investigation taken up by DRI, a Show Cause Notice was issued in respect of the 11 consignments on the ground that the appellant had classified the goods as "Synthetic Oil" falling under CTH 33029011, whereas the Revenue takes the view that the goods are classifiable under CTH 3301 [natural essential oil]. In the Order-in-Original, the Adjudicating Authority held that one consignment pertains to Synthetic Oil and allowed the classification adopted by the appellant. In respect of the balance 10 consignments, he held that the CTH 3301 [Natural essential oil] is required to be followed. Being aggrieved, the appellants filed their appeal before the Commissioner (Appeals).

2. Vide OIA No. KOL/CUS/CKP/270, 271 & 272/2010 dated 21.9.2010 (issued on 28/09/2010), the Commissioner (Appeals) held that in respect of the eight consignments, the same would fall under

the CTH 3302 [synthetic oil] as claimed by the appellant. He held that in respect of the two consignments, the same would fall under CTH 3301 (Natural essential oil] as contended by Revenue. In respect of the two items held as classifiable under CTH 3301, the appellants did not file any further appeal before the Tribunal.

3. After the Commissioner (Appeals) passed the OIA No. KOL/CUS/CKP/270, 271 & 272/2010 dated 21.09.2010 (issued on 28/09/2010), the Department filed an appeal along with Condonation Petition on 01/10/2010 before the Commissioner (Appeals). In this Appeal, the Revenue took the ground that penalty under Section 114A of the Customs Act, 1962 should have been imposed by the Adjudicating Authority

4. The Commissioner (Appeals) vide Order No. KOL/CUS/CKP/306/2010 dated 27.10.2010 (issued on 03/11/2010) has condoned the delay and passed the Order as under:-

> *"The Review Application has been filed on the premise that the lower authority had not imposed penalty under section 114A of the Customs, Act, 1962, whereas this was a fit case for imposing penalty under this section. <u>Without going into the merits of the Review Application, I have to state that the impugned order was as well challenged by the respondent in appeal before me, which resulted in the passing of order-in-appeal No. Kol/Cus/CKP/270, 271 and 272/2010, dated 21.9.2010. Before passing-this appellate order, the appellant was called for the hearing but nobody appeared from the Department in spite of notice and especially when the case was intricate and involved high stakes.</u> Even in relation to the present Review Application, nobody appeared for the hearing for the Department and this being especially so when the Review Application has been filed by the Department. The respondent did appear for the hearing and made oral and written submissions. <u>I have to further note that with the passing of this order-in-appeal, the original order against which the present Review Application has been filed has got merged with this order-in-appeal. This being particularly so when the issue relating to imposition of penalty was duly considered in the order-in-appeal. Thus, in the eyes of the law, there does not exist, either today or even at the time of filing of the Review Application, the order-in-original against which the Review Application could be filed. When that is so, there cannot be any case for filing the Review Application against a non-</u>*

existent order-in-original. In this context, I refer to the Larger Bench CESTAT decision in the case of CCE vs L.M.L. Ltd. (Scooter Division) (2002 (143) ELT 431 (Tri-LB)]; the decision of CESTAT in Commissioner of Central Excise (Hyderabad vs Hari Steel Tubes [2007 (212) ELT 389 (Tri-Bang.);) and the High Court decision in the case of Union of India vs Inani Carriers [2009 (13) STR 230 (Raj.)]. My above decision is very much supported by these judicial decisions."

5. Being aggrieved, the Department has filed a single appeal on 19th March 2011 before the Tribunal wherein they have stated that they are filing the appeal against both OIAs (OIA issued on 28/9/2010 and OIA issued on 03/11/2010). Even this appeal was filed with a delay. They have sought Condonation of Delay of 42 days in respect of OIA issued on 03/11/2010. This Bench vide Final Order No. S-1187/A-695/KOL/2012 dated 17/09/2012 held that the doctrine of merger would not be applicable in this case and remanded the matter to the Commissioner (Appeals).

6. Being aggrieved, the Respondent herein filed an appeal before the Hon'ble High Court of Calcutta. After going through the factual details and statutory provisions, the Hon'ble High Court of Calcutta, on 23/12/2013, passed the Order. The relevant portion is extracted below:-

We are convinced that the Tribunal was clearly wrong. case of Pearl Drinks Ltd., the apex Court did not opine that the doctrine of merger does not apply. What had happened in that case was that the assesse's appeal, which was heard and disposed of by the Tribunal, concerned only two out independent appeal filed by the of the eight heads. Whereas the admissibility of the deduction in respect of the balance six heads was questioned in an independent appeal filed by the Department. It is in these circumstances that Their Lordships held that the order disposing of the appeal of the assessee could not preclude the hearing of the appeal filed by the Department. That situation was altogether different. In the case before us, the original order dated June 4, 2010 against which the review was sought, was no longer in force after the appellate order was passed on September 21, 2010, issued on September 28, 2010. In the circumstances, we are also of the opinion that after the appellate order was passed, not only

> *the original order merged into the appellate order, but all points with regard thereto became res judicata. Therefore, it was no longer open for review. Therefore, the order dismissing the review application was unexceptionable. The Tribunal, however, should have disposed of the appeal against the order dated September 21, 2010 including the question of condonation of delay which the Tribunal did not touch.*
>
> *Therefore, the order under challenge is set aside. The matter is remanded back to the Tribunal for the limited question of considering the prayer for condonation of delay and in case such prayer is allowed, for hearing of the appeal against the order dated September 21, 2010, issued on September 28, 2010, on merits.*

7. The Learned AR submits that the matter has been remanded to the Tribunal for the limited question of considering the prayer for condonation of delay. He prays that in view of the direction of the Hon'ble High Court, the condonation may be considered as well as the merits of the case may be taken up by the Bench.

8. After going through the factual details, we find that in the first place, the Revenue is in error in filing a single Appeal against two OIAs which were passed on two different dates. From the Condonation Petition filed at Page No. 2 of Appeal Paper Book, it is seen that they have sought condonation only in respect of the OIA dated 27.10.2010 [issued on 03/11/2010] which incidentally has been considered by the Bench and the delay was condoned vide Order No. M/393/KOL/2012 dated 02/08/2012. We do not find that any COD Petition has been filed by the Revenue in respect of the OIA dated 21/09/2010 (issued on 28.09.2010). Therefore, the question of condonation of the delay will not arise.

9. So far as the OIAs are concerned, we find that vide OIA dated 21.9.2010 [issued on 28/9/2010], the Commissioner (Appeals) has allowed the appellant's appeal in respect of the eight items and has dismissed their appeal in respect of the two items. No specific challenge has been made by Revenue against this order by way of specific appeal against this OIA.

10. The Commissioner (Appeals) in his second OIA dated 27.10.2010 [issued on 03/11/2010] has noted that the appeal was filed belatedly after Order-in-Appeal dated 21/9/2010 [issued on 28/9/2010] was passed and has held in view of doctrine of merger will be applicable in the particular case.

11. Further, the issue was already considered by Hon'ble High Court (reproduced at Para 6 above), which has held that Doctrine of Merger is applicable in the present case.

12. Therefore, we do not find any merit in the appeal filed by the Revenue. Accordingly, we dismiss the appeal filed by the Revenue.

(Dictated and pronounced in the open court.)

Sd/-

(R. Muralidhar)
Member (Judicial)

Sd/-
(Rajeev Tandon)
Member (Technical)

Pooja