IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL
WEST ZONAL BENCH AT MUMBAI

APPEAL NO: C/86753/2017

[Arising out of Order-in-Appeal No: 164 & 165(Gr.V)/2017(JNCH)-Appeal-II dated 30th March 2017 passed by the Commissioner of Customs (Appeals – II), Mumbai – II.]

Swastik Engineering …***Appellant***

versus

Commissioner of Customs (NS-I)
Nhava Sheva ***…Respondent***

Appearance:

Shri CM Sharma, Consultant for appellant

Shri Sandeep R Nair, EO (AR) for respondent

CORAM:

Hon'ble Shri C J Mathew, Member (Technical)

Date of hearing:	**04/12/2017**
Date of decision:	**09/03/2018**

ORDER NO: ____________________________

Three issues remaining in the dispute are pleaded in appeal of M/s Swastik Engineering against order-in-appeal no. 164 & 165(Gr.V)/2017(JNCH)-Appeal-II dated 30th March 2017 of Commissioner of Customs (Appeals – II), Mumbai – II. These are, interest on pre-deposit made at the time of filing of appeal, interest on interest of ₹ 39,550/- charged on the assessed duty, ₹ 3,17,620/- on goods that were finally cleared in December 2015 against assessment of February 2015 and the issue of detention certificate.

2. The background of this case is the import of ball bearings from Hongkong *vide* bill of entry no. 8237222 dated 7th February 2015 and the declared value of ₹ 12,28,585/-, not being acceptable to the proper officer of customs, was re-determined as ₹ 17,58,424/- with differential duty of ₹ 1,36,976/-. Instead of clearing the goods at the re-determined assessment, appellant went in appeal and sought for order-in-assessment which was issued on 1st July 2015. On appeal before the first appellate authority, the re-determination was set aside in order dated 30th September 2015 following which the duty, as per the original declaration, along with interest of ₹ 39,550/- totaling ₹ 3,57,197/- was deposited on 14th December 2015 by appellant for clearance of the goods. Further, the appellant paid demurrage charge of ₹ 12,470/-.

3. The request for issue of detention certificate for the said period was rejected by Deputy Commissioner of Customs on the ground that the goods had not been subject to detention by Nhava Sheva Customs. The interest for delayed payment of duty was levied as section 47(2) of the Customs Act, 1962 mandates the charging of interest at

appropriate rate for the period commencing after two days from the date of return of bill of entry till the date of payment of duty, which being effected on the electronic data interchanging system, was automatically computed. The refund of pre-deposit of ₹ 45,460/- was allowed and dispute is only on eligibility for interest.

4. Learned Consultant appearing for appellant places reliance on circular no. 1053/02/2017-CX dated 10th March 2017 of Central Board of Excise and Customs which specifies that

> *'26. Refund of pre-deposits:-(i) Where the appeal is decided in favour of the party/assessee, he shall be entitled to refund of the amount deposited along with the interest at the prescribed rate from the date of making the deposit to the date of refund in terms of Section 35FF of the Central Excise Act, 1944.'*

5. Learned Authorised Representative contends that this had not been agitated before the lower authorities and that the provisions of the circular would have been implemented had such approach been made to the proper authority. As there can be no doubt that the competent authority would be guided by the circular referred to, and as the issue has been raised by the Learned Consultant, it is directed that the interest thereon on the pre-deposit be released to the appellant without delay.

6. The claim of the appellant for being relieved of the interest

charge of ₹ 39,550/- is based on the absence of an order of assessment for them to comply with once the re-determined assessment order had been set aside. Learned Consultant contends that, as far as the appellant is concerned, the liability in the assessment order had been discharged promptly after the appellate authority had decided the mater and, hence, there was no scope for charging interest. Reliance is placed on the decision of the Hon'ble High Court of Bombay in *Blue Star Limited v. Union of India [2010 (250) ELT 179 (Bom.)]* which held

> *'16. On behalf of the petitioners learned Counsel also drew our attention to the judgment in Philips India Ltd. & Anr. v. Assistant Commissioner, Commercial Taxes, Calcutta and Ors., (2004) 10 SCC 436. In that case an appeal was preferred. The stay was granted. Certain amounts were directed to be deposited which were deposited. Ultimately in the appeal the order came to be passed directing recomputation on the basis set out in that judgment. In another Appeal the amount of tax was reduced. The respondent issued fresh demands. The question was whether the assessee could be treated as a defaulter and liable to pay interest. In that context bearing in mind the provisions thereof, the Supreme Court was pleased to hold that considering Section 31 of the Income-tax Act where in a case where assessment is reduced, enhanced or annulled or where fresh assessment is directed to be made, then the earlier order ceases to exist and the liability can only arise from the date of fresh demand. Therefore, once an order is set aside the earlier order ceases to exist and the liability can only arise from the date of fresh demand notice. It is, therefore,*

submitted that once the order is set aside the earlier order ceases to exist and the liability arises only on fresh determination. Reliance was placed on the judgment of the Supreme Court in Income Tax Officer, Kolar & Anr. v. Seghu Buchiah Setty, AIR 1964 SC 1473.

16. What is the effect, therefore, of the Original Order being set aside by the First Appellate Authority, by the Tribunal, by the High Court or by the Supreme Court. Section 11AA provides for interest in case a person is charged with duty under sub-section (2) of Section 11A and fails to pay such duty. In other words there must be duty which is ascertained which has to be payable. If the Original Order is set aside then there is no duty which is ascertained which is payable and consequently no interest would be payable. As noted earlier interest is compensatory. It is to recompensate a party. In the instant case the State for not recovering its monies (duties) on time. At the point of time interest becomes due the interest there must be an ascertained amount of duty which a party needs to pay. If there is no ascertained duty, there is no question of compensating the State by way of interest. The fact that duty subsequently has been ascertained and becomes payable from the date when it was due, does not make a party liable for interest from that date. That situation is covered by the explanations to the Section.

17. Section 11AA has two explanations. By virtue of the first explanation, if duty payable is reduced, then the date of determination of reduction shall be date on which the amount of duty is first determined to be payable. In other words interest would be payable on the duty as reduced not from the date of such reduction of duty but from the date of the first order. That is because even if the duty is reduced there is still an order of determination but a reduced amount. By

> *Explanation 2 where duty payable is increased or further increased two situations are set out. For the amount of duty first determined to be payable it is the date on which the duty was first determined and in so far as the increase of duty is concerned, the date on which the increased amount of duty is payable. So also in the case of further increase the date of the order on which the amount is further increased. The Explanation, therefore, gives the intent of the Legislature. The intent of the Legislature appears to be that in a case of increase of duty, the increased tax becomes payable not from the original date, but from the date on which it is increased and in the case of reduction it relates back to the first date.'*

7. Furthermore, reliance is also placed on the decision of the Tribunal in *South India Corporation Agencies Ltd. v. Commissioner of Customs, Sea, Chennai [2004 (178) ELT 229 (Tri. Chennai)]*

> *'13. ……. As regards, the findings of the ld. Commissioner (Appeals) that re-assessment can only be done under Section 17(4), it is noticed that this view of the Commissioner is not correct because it is not a case where they had withheld any information or it was a case of misdeclaration as can be seen from the provisions of Section 17(4) of the Customs Act. A perusal of the provisions of Section 17(4) would indicate that if subsequently on examination or testing of the goods or otherwise it is found that any statement in such entry or document or any information so furnished is not true in respect of any matter relevant to the assessment, the goods may, without prejudice to any other action which may be taken under this Act be re-assessed to duty. Therefore the findings of the Commissioner that re-assessment is permitted only under Section 17(4) of the Customs Act (even in a normal case where all the information furnished is found*

> *true) is not correct. The re-assessment in their case has been done under Section 2(2) read with Section 47(1) and (2) of the Customs Act. …… …… ……………………. Therefore, the original assessment is not valid in view of the re-assessment done on 13-5-2002, and duty has been paid by the appellant on 13-5-2002 i.e. on the date of re-assessment itself. They were not required to pay any interest and this interest amount of Rs. 3.65 crores is, therefore, required to be refunded to them.'*

8. According to Learned Authorised Representative both these decisions were handed down in the context of assessment under section 17 as it existed prior to 8th September 2011. It is his contention that, in the revised version of assessment under section 17, it is self-assessment that is subject to re-determination and the setting aside of the re-determination by an appellate order restores the original self-assessment which had been in existence from the date of filing of the bill of entry.

9. It would appear that the contention of the Learned Authorised Representative is consistent with the decision in *re Blue Star Limited* and, in the context of reduction in duty liability, the payment falls due from the date of self-assessment. In the instant case, the appellant could not have any cavil with the self-assessed amount of ₹3,17,620/-. Any refund payable by the Central Government of pre-deposited amount with resolution of dispute before appellate authority in favour of assessee entails eligibility for interest. Had the appellant sought the

intervention of the first appellate authority after the payment of the undisputed amount, pre-deposit was not required to be made and, upon decision in their favour, liability to interest also would not have arisen. In the era of self-assessment, the appellant should have paid the undisputed duty and proceeded in appeal. Having failed to do so, the interest liability cannot be avoided.

10. On the issue of detention certification, it is the submission of the appellant that the order of assessment was issued after a period of four months from the date of return of bill of entry and that it was the arbitrary manner in which the assessable value was enhanced that compelled the appellant to delay clearance while challenging the assessment. It was submitted that the delay in clearance was not on their account but owing to the Customs authorities, who, by virtue of exercise of their assessment powers, effectively ensured detention of the cargo which could not be cleared without payment of higher duty. Citing Public notice no. 26/2010 dated 2nd March 2010, wherin, on goods seized or detained or confiscated by the proper officer, the customs cargo service providers were directed not to collect any rent on demurrage for the said period has been cited. It is the contention of the Learned Consultant that detention certificate be issued for this purpose. Having examined the referred public notice, it is seen that there is no provision therein for issue of detention certificate and the circular itself forwarns the logistics service provider not to collect any

rent or demurrage in specified circumstances. There is no dispute that the goods were not seized or confiscated and it is questionable whether the goods had actually been detained when the appellant was at liberty to clear their goods on payment of duty. Detention follows on order issued to a custodian not to release goods without the approval of the competent authority. Such an order is not seen on the record, nor has it been produced by the appellant.

11. Nevertheless, it is seen from the facts and circumstances that the re-determination of the assessable value on the goods imported by the appellant was set aside and the original declaration accepted. Had re-determination not occurred delay would not have occurred. Considering the trouble visited and the delays incurred by the appellant owing to the wrong re-determination on the part of the proper officer it would appear only proper that a detention certificate should be issued by the Customs authorities which may be produced before the custodian of the cargo to seek relief from the demurrage from detention charges already paid.

12. Consequently the appeal is allowed partly on the above terms.

(Pronounced in Court on 09/03/2018)

(C J Mathew)
Member (Technical)

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