

**IN THE CUSTOMS, EXCISE & SERVICE TAX
APPELLATE TRIBUNAL
WEST ZONAL BENCH AT MUMBAI
COURT No. I**

APPEAL No. C/150/2011

(Arising out of Order-in-Appeal No. 03(Gr.VII-D)/2010(JNCH)/EXP-03 dated 6.1.2011 passed by Commissioner of Customs (Appeals), Mumbai-II)

Kopran Ltd.

Appellant

Vs.

Commissioner of Customs (E), Nhava Sheva

Respondent

Appearance:

Shri Ramnath Prabhu, Advocate, for appellant

Shri Manoj Kumar, Assistant Commissioner (AR), for respondent

CORAM:

Hon'ble Mr. Ajay Sharma, Member (Judicial)

Hon'ble Mr. Sanjiv Srivastava, Member (Technical)

Date of Hearing: 01.11.2018

Date of Decision: 10.01.2019

ORDER No. **A/85037/2019**

Per: Sanjiv Srivastava

The appeal is directed against the order in appeal No 03 (Gr VII D)/2010 (JNCH)/EXP-0-3 dated 6.01.2011 of the Commissioner of Customs (Appeal) Mumbai II. By the said order Commissioner (Appeal) has upheld the order of Assistant Commissioner of Customs DEEC (Monitoring Cell) JNCH Sheva, holding as follows:

"I confirm the demand of Anti Dumping Duty amounting to rs 6,86,759/- along with interest @ 15% p a from the date of clearance of the goods to the actual payment of duty as per condition mentioned in para (1) of the Bond executed by the License holder under Notification No 43/2002 dated 10/04/2002 against the said advance License No 0310253750 dated 19/02/2004. I order for payment of Anti Dumping Duty of Rs 6,86,759/- along with interest on duty @ 15% p a towards duty liability from the date of clearance of the goods to the actual payment of duty."

2.1 Appellants had obtained Advance license No 0310253750 dated 19.02.2004 under DEEC Scheme governed by Notification No 43/2002 dated 19.04.2002. Against the said license they had imported duty free goods.

2.2 Since the Appellants had not exported the entire quantity required to fulfill the entire export obligation appellants were directed by the Joint Director, DGFT to pay duty on all items imported without payment of duty. Appellants paid the duty as directed and Jt Director DGFT issued the redemption letter on 06.02.2009.

2.3 However before cancelling the LUT Bond dtd 13.04.2004, Customs Authority issued a Show Cause Notice dated 11.06.2009 demanding Anti Dumping duty on Alpha Dane Salt for excess quantity of 1686.70 Kgs amounting to Rs 6,86,759/- along with interest.

2.4 Show Cause Notice was adjudicated as per the order of adjudicating authority, supra. On appeal Learned Commissioner (Appeal) upheld the order in original. Aggrieved by the order of Commissioner (Appeal) Appellants have filed this appeal.

3.1 In their appeal appellants have challenged the order of Commissioner (Appeal) on following grounds:-

i. While confirming the demand of duty Commissioner (Appeal) had relied upon Section 143A of the Customs Act, 1962. In their understanding the said section was inserted by section 17 Customs, Central excise and Salt and Central Board of Revenue (Amendment) Act, 1978, the same was never enforced, for the reason that Duty Free Schemes under Foreign Trade Policy have self contained provisions for dealing with cases where duty payment is required by importers when conditions of such license are violated and not fulfilled.

ii. Further invoking such section for the first time in the appellate proceedings was not justified as neither show cause notice nor adjudicating authority had invoked the said provision. {reliance on Toyo Engineering India Limited [2006 (201) ELT 513 (SC)]

iii. They were permitted duty free imports under Advance License Scheme and for effecting such imports

they had executed LUT/ Bond dated 13.04.2004 in accordance with the provisions of Notification No 43/2002-Cus dated 19.04.2002 read with relevant provisions of the Import Export Policy.

iv. LUT/ Bond dated 13.04.2004 does not cover Anti Dumping Duty. The said LUT/ Bond has been accepted by the accepted by the Deputy Commissioner an in terms of para 4, thereof specifically binds them to pay an amount equal to the duty leviable but for exemption under Notification No 43/2002-Cus dated 19.04.2002.

v. Since there was no reference to anti dumping duty either on the B/E or the LUT/ Bond executed by them the same cannot be recovered by enforcing the said bond.

4.1 We have heard Shri Ramnath Prabhu Advocate for the Appellant and Shri Manoj Kumar, Assistant Commissioner (Authorized Representative) for the revenue.

4.2 Arguing for the appellants learned counsel submitted-

i. They have executed the LUT/ Bond for clearing the goods under Advance License issued to them, in terms of exemption Notification No 43/2002-Cus, and they had not bound themselves to pay the Anti

Dumping duty in respect of the said goods. He relied heavily on para 4 of the LUT/ Bond.

ii. Larger Bench of Tribunal has in case of Caprihans India Ltd [2001 (129) ELT 162 (T-LB)] has held that “section 2(15) of the Customs Act, 1962 defines duty as a duty of Customs leviable under the Customs Act, 1962. Since Anti Dumping duty is levied under Section 9A of Customs Tariff Act, it cannot be considered as duty of Custom.

iii. The section 143A of Customs Act, 1962 which has been applied by Commissioner appeals for upholding the demand made against them has never been brought into force., and hence reliance placed by the Commissioner (Appeal) on the same is not correct.

iv. In case of Dharampal Lalchand Chug [2015 (323) ELT 753 (Bom)], and stated that by resorting to the LUT/ Bond, the period of limitation as prescribed by the Section 28 cannot be surpassed. The demand of duty if required to be made will have to be made within the period of limitation prescribed.

4.3 Arguing for the revenue learned Authorized Representative submitted

i. Notification No 43/2002-Cus under which the goods were cleared without payment of duty provided exemption from duties of custom, leviable subject to

certain conditions. Since these conditions were not fulfilled subsequently the duty not paid was required to be paid by the appellant, in terms of Bond/ LUT executed by the appellant for claiming the exemption.

ii. The claim of the appellant that they had not bound themselves to pay anti dumping duty leviable cannot be justified as they have bound themselves to pay the custom duty but for the exemption claimed under Notification.

iii. The appellants have paid the duty in the present case on 23/10/2008 and the Show Cause Notice making the demand of duty was issued on 27.05.2009, during the period when the Bond/ LUT executed by the appellants was still in force. Thus demand of anti dumping duty in terms of the conditions of Bonds is justified.

5.1 We have considered the submissions made by both the sides.

5.2 Notification No 43/2002-Cus dated 19/04/2002 read as follows:

“In exercise of the powers conferred by sub-section (1) of section 25 of the Customs Act, 1962 (52 of 1962), the Central Government, being satisfied that it is necessary in the public interest so to do, hereby exempts materials imported into India, against an Advance Licence issued in terms of sub-paras (a) and (b) of paragraph 4.1.1 of the

Export and Import Policy (hereinafter referred to as the said licence), from the whole of the duty of customs leviable thereon which is specified in the First Schedule to the Customs Tariff Act, 1975 (51 of 1975), and from the whole of the additional duty, safeguard duty and anti-dumping duty leviable thereon respectively under sections 3, 8 and 9A of the said Customs Tariff Act, subject to the following conditions namely :-

(i) that the description, value and quantity of materials imported are covered by the said licence and the said licence is produced before the proper officer of customs at the time of clearance for debit;

(ii) that where import takes place after fulfilment of export obligation, the shipping bill number(s) and date(s) and quantity and FOB value of the resultant product exported are endorsed on the said licence:

Provided that where import takes place before fulfilment of export obligation, the quantity or FOB of the resultant product to be exported are endorsed on the said licence;

(iii) that the importer at the time of clearance of the imported materials executes a bond with such surety or security and in such form and for such sum as may be specified by the Assistant Commissioner of Customs or Deputy Commissioner of Customs binding himself to pay on demand an amount equal to the duty leviable, but for the exemption, on the imported materials in respect of which the conditions specified in this notification have not been complied with, together with interest at the rate of twenty-four percent per annum from the date of clearance of the said materials:

Provided that bond shall not be necessary in respect of imports made after the discharge of export obligation in full;

(iv)

- (v)
- (vi)
- (vii)
- (viii)

2.

Explanation. - In this notification, -

.....”

5.3 From the plain reading of the notification it is quite evident that the exemption has been granted from the payment of *“whole of the duty of customs leviable thereon which is specified in the First Schedule to the Customs Tariff Act, 1975 (51 of 1975), and from the whole of the additional duty, safeguard duty and **anti-dumping duty** leviable thereon respectively under sections 3, 8 and 9A of the said Customs Tariff Act.”* For availing the said exemption importer is required to execute a bond *“binding himself to pay on demand an amount equal to the duty leviable, but for the exemption, on the imported materials in respect of which the conditions specified in this notification have not been complied with,”*

5.4 The Bond that is thus executed, binds the importer to pay an amount equal to the duty leviable, but for exemption, on the imported material in respect which conditions as specified in the notification has not been complied with. The bond executed does not make any

distinction between the duty leviable, but prescribes that what so ever duties that have been exempted in terms of this notification including the anti-dumping duty is required to be paid in case the conditions of notification are not fulfilled.

5.5 The para 4 of the bond executed reads “4. *In the event of failure to fulfill full or part of the Export obligation as specified in the said notification and the License, we the obligor, herein undertake to pay the custom **duty but for the exemption** and also interest @ 15% per Annum thereon forthwith from the date of clearance of the imported goods till the date of payment of duty and without demur, to the government.*” From the bond also it is quite evident that appellants have bind themselves to pay all the duty that have been exempted at the time of clearance.

5.6 Appellants have relied upon the decision of the Tribunal larger bench in case of Caprihans in their support to argue that the “section 2(15) of the Customs Act, 1962 defines duty as a duty of Customs leviable under the Customs Act, 1962. Since Anti Dumping duty is levied under Section 9A of Customs Tariff Act, it cannot be considered as duty of Custom.” The fallacy of the said argument is evident from the fact that said decision was rendered with reference to refund of anti dumping duty provisionally collected, for which separate

regime of refund has been provided by the section 9A of the Customs Tariff Act, 1985 and thus tribunal larger bench has held that for the purpose of refund of the said anti dumping duty provisions of section 27 of the Customs Act, 1962 shall not apply. However said decision of tribunal larger bench has not been agreed to by the Bombay High Court, who have in case of Kanakia Construction } held as follows:

“2. By this appeal what is challenged is the order dated 28-5-2007 passed by the Central Excise, Customs and Service Tax Appellate Tribunal in Appeal No. C/1219 of 2006. It is common ground that before the tribunal two questions were argued. First was that because the matter is covered by Section 9A of the Customs Tariff Act, 1975, it being a self-contained provision, the doctrine of unjust enrichment does not apply. The second question argued was that the certificate of the chartered accountant which was submitted on behalf of the respondent to claim that there was no unjust enrichment in this case is not a relevant document. Perusal of the order of the tribunal shows that the tribunal relying upon a Larger Bench judgment in the case of Caprihans India Limited v. Collector of Customs, Bombay [2001 (129) E.L.T. 162 (Tri. - LB)] held that since the matter is covered by Section 9A of the Customs Tariff Act, doctrine of unjust enrichment does not apply. It was argued before us that though the respondent has produced sufficient material on record, the tribunal did not go into it.

3. We have been pointed out the judgment of the Supreme Court in the case of Sahakari Khand Udyog Mandal Limited v. Commissioner of Central Excise &

Customs reported in 2005 (181) E.L.T. 328 (S.C.) where now the Supreme Court has held that even where the provisions of Section 11B of the Central Excise Act do not apply, the doctrine of unjust enrichment can apply and, therefore, merely because the matter is covered by Section 9A, operation of doctrine of unjust enrichment may not be excluded.

4. *In our opinion in view of the judgment of the Supreme Court, the order which is impugned in the appeal cannot be sustained. It will have to be set aside and the matter will have to be remanded back to the Tribunal for reconsideration on both the questions which were argued before us. The tribunal in the light of the judgment of the Supreme Court referred to above, shall examine the issue whether the doctrine of unjust enrichment will be applicable in the instant case and if it finds that the doctrine of unjust enrichment is applicable, the tribunal shall also go into the question whether the respondent has produced sufficient material on record to show that this is not a case of unjust enrichment.”*

5.7 Section 2(15) of the Customs Act, 1962 reads ““duty” means a duty of customs leviable under this Act;” and section 12 of the Act reads “(1) Except as otherwise provided in this Act, or any other law for the time being in force, duties of customs shall be levied at such rates as may be specified under the Customs Tariff Act, 1975 (51 of 1975), or any other law for the time being in force, on goods imported into, or exported from, India.” Thus plain reading of Section 2(15) and Section 12 make it evident that the duties of custom include all

the duties that are levied under the Customs Tariff Act, 1985.

5.8 Thus we are not in position to agree with the contention of the appellant that the Bond/ LUT executed by them do not cover the anti dumping duty leviable on the imported material at the time of importation/ clearance of the imported material.

5.9 Appellants have heavily relied upon the decision of the Bombay High Court in case of Dharampal Lalchand Chug, supra. Their reliance is on para 20 which read as follows:

“20. Equally, if there is any condition to furnish a Bond and in that behalf it is prescribed that in the event the terms and conditions on which the Bond has been given and accepted are breached and violated, a demand can be raised, that that stipulation will not mean that the mandate of Section 11A is any way diluted or can be interpreted with the aid of such term or condition of the Bond. Thus, the terms and conditions of the exemption notification or of the Bond cannot be of any assistance. That only would enable recovery of duty and further levy of interest, recovery thereof and equally of penalty. In these circumstances, we do not find any provision which would enable us to conclude that the date of knowledge or the date of discovery of the fraud by the Revenue will be the determinative and decisive date. If that is beyond the period of five years, then, Section 11A will have to be interpreted accordingly is the express stand and which we find cannot be accepted because the plain language of the statute or the words of the section cannot be

brushed aside or ignored. We find that the words being such and therefore, we cannot accept this contention of Mr. Pakale."

5.10 The said decision of the Hon'ble Bombay High Court do not advance the case of the appellants any further. In that case the issue was not in respect of fulfillment of an export obligation in future, but demand was in respect of the goods cleared from the factory in contravention of the provisions of the exemption notification. The demand of duty in respect of the goods cleared in the case before the Bombay High Court was not dependent on the fulfillment of subsequent obligation, whereas in the present case the demand has arisen on account of non fulfillment of the export obligation as specified in the advance license. The appellants have themselves admitted that they had not fulfilled the export obligation as specified in the Advance License issued to them by the Director General Foreign Trade. In fact they have themselves paid the duty in terms of the said bond due as per their determination on 23/10/2008. Demand is in respect of the duty short paid by the appellants on their own determination. We are not in position to agree with the submissions of the appellant based on the decision of Bombay High Court.

5.11 Section 28 of the Customs Act, 1962 defines relevant date for the purpose of making demand as in terms of the said section as follows:

"Explanation 1- For the purposes of this section, "relevant date" means,- (a) in a case where duty is not levied or not paid or short-levied or short-paid, or interest is not charged, the date on which the proper officer makes an order for the clearance of goods;

(b) in a case where duty is provisionally assessed under section 18, the date of adjustment of duty after the final assessment thereof or re-assessment, as the case may be;

(c) in a case where duty or interest has been erroneously refunded, the date of refund;

(d) in any other case, the date of payment of duty or interest."

In the present case no duty has been short levied or short paid at the time of clearance, of goods as the same have been cleared in terms of exemption notification after fulfillment of the conditions of exemption notification. Admittedly this case is also not a case of provisional assessment under Section 18 or case of demand of amount erroneously refunded. Thus the case shall not fall in any of the category (a), (b) or (c) in the definition of relevant date under section 28, but shall be case under (d). Thus the period of limitation for the purpose of section 28, accordingly shall have to be computed from the date of payment of duty. If that be

so the demand has been made within the period of limitation from the relevant date which in the present case is the date of payment of duty i.e. 23/10/2008.

5.12 Since we find that demand of anti dumping duty is sustainable in terms of the bond executed by the appellant, we are not considering the pleas raised under section 143A of the Customs Act, 1962.

6.10 In view of above we do not find any merit in the appeal filed by the appellants and dismiss the same.

(Pronounced in court on 10.01.2019)

(Ajay Sharma)
Member (Judicial)

(Sanjiv Srivastava)
Member (Technical)