CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL, MUMBAI
WEST ZONAL BENCH
COURT No.

Appeal No. C/1180/2006

(Arising out of Order-in-Original No. CC-(SP)-11/2006/ACC (Adj) dated 24.07.2006 passed by Commissioner of Customs (Import), Mumbai)

Advanced Spectra Tek Pvt. Ltd. **Appellant**
175/176, Por Ramangamadi
GIDC, Vadodara 390 020

Vs.

Commissioner of Customs (ACC&I) Mumbai **Respondent**
Air Cargo Complex, Sahar,
Andheri (E), Mumbai 400 099

<u>Appearance:</u>

Shri Brijesh Pathak, Advocate for the Appellant
Shri R. Kumar, Authorised Representative for the Respondent

<u>CORAM:</u>

Hon'ble Dr. D.M. Misra, Member (Judicial)
Hon'ble Mr. Sanjiv Srivastava, Member (Technical)

FINAL ORDER NO. **A/85711/2019**

Date of Hearing: 16.01.2019
Date of Decision: 16.01.2019

PER: SANJIV SRIVASTAVA

This appeal is directed against the order in original No CC-(SP)-11/2006/ ACC (Adj) dated 24.07.2006 of Commissioner Customs (Import) Mumbai. By the said order Commissioner has held as follows:

"i. I confirm the duty of Rs 49,49,505/- (Rupees Forty Nine Lakhs Forty Nine Thousand Five Hundred and Five Only) under Section 28(2) of the Customs Act, 1962 and appropriate Rs 35,00,000 deposited by the importer against differential duty leviable thereon. I order that the

balance amount of differential duty of Rs 14,49,505/- (Rupees Fourteen Lakhs Forty Nine Thousand Five Hundred and Five Only) be paid by M/s Advance Spectra Tek Pvt Ltd, forthwith.

ii. I order M/s Advance Spectra Tek Private Ltd., to pay interest of Rs 18,17,863/- (Rupees eighteen Lakhs Seventeen Thousand Eight Hundred and Sixty Three Only) on 6 Bs/E and the interest as applicable on the rest 2Bs/E leviable under Section 28AB of the Customs Act, 1962.

iii. I hold the goods imported under 8 Bs/E liable for confiscation under section 111(o) of the Customs Act, 1962, but in absence of the goods available with the department, I do not confiscate them.

iv. I impose penalty of Rs 49,49,505/- (Rupees Forty Nine Lakhs Forty Nine Thousand Five Hundred and Five Only) on M/s Advance Spectra Tek Pvt Ltd under section 114A of the Customs Act, 1962.

v. I impose a penalty of Rs 30,00,000/- (Rupees Thirty Lakhs only) under Section 112(a) of the Customs Act, 1962 on M/s Advance Spectra Tek Pvt Ltd."

2.1 Appellants have filed 8 Bill of Entries during the period 15.03.2000 to 18.10.2001. for import of *"Danload 6000 Electronic Preset Flow Metering Equipment and Its Parts".* The classification of goods was sought under CTH 9026.80 for Danload 6000, CTH 9026.90 for its part and 8524.90 for configuration software. The goods were accordingly assessed and cleared on payment of Customs duty @ (10% BCD + 16% CVD +4% SAD).

2.2 Enquiries were subsequently initiated by the SIIB, for redetermination of the classification of the goods cleared vide the said Bill of Entries under CTH 9032 attracting Customs duty @ (25% BCD + 16% CVD + 4% SAD). During course of enquiry/ investigations statements of Shri Shrish Additional Chief Manager (Projects), Shri

Umed Fifadra Director, of the Appellant and Shri Atul Thakkar Project Manager, Indian Oil Tanking Limited was recorded.

2.3 After completion of enquiry/ investigations a show cause notice dated 11.03.2005 was issued to appellants calling them to show cause as to why:

“(i) the configuration software should not be considered as part of Danload 6000 and classified under CTH 9032.

(ii) Danload 6000 and its parts not be classified under CTH 9032 and differential duty amounting to Rs 3355461/- (rupees Thirty Three Lakhs Fifty Five Thousand Four Hundred and Sixty One Only) and interest thereon be confirmed and recovered in terms of proviso to Section 28 of the Customs Act, 1962 and why the Revenue deposit of Rs 35,00,000/- (Rupees Thirty Five Lakhs Only) deposited by him not be adjusted against duty and interest applicable thereon.

(iii) Danload 6000 and its part/ components imported by M/s Advance Spectra Tek Private Ltd., totally valued at Rs 2,00,91,213.00 (Rupees Two Crore Ninety One Thousand two Hundred and Thirteen Only) covered under 8 Bills of Entry Nos as mentioned in Annexure A to this notice, should not be held liable for confiscation under Section 111 (m) of the Customs Act, 1962 read with Section 46(4) of The Customs Act, 1962 for misdeclaration of the value and contents.

(iv) Penalty should not be imposed on them under Section 112(a) and Section 114A of the Customs Act, 1962.”

2.4 This show cause notice has been adjudicated by the Commissioner as per her order as referred to in para 1, supra. Aggrieved by the order of Commissioner, appellants have filed this appeal.

3.1 Appellants have in their appeal have assailed the order of Commissioner stating –

i. Classification of the goods under consideration as determined by the Commissioner under heading 9032 contrary to the classification claimed by them under heading 9026.80, 9026.90 and 8524.90 is not correct. After explaining the details of the imported item submit that as per HSN Explanatory Note for CTH 9026 and Chapter No 7 to Chapter 90 the correct classification of imported Danload 6000 will be in CTH 9026.80 and its part in 9026.90 and configuration software in CTH 8524.90 in view of the terms of said heading and chapter Note 6 to Chapter 85.

ii. The order of Commissioner is bad in law, because against the duty demand of Rs 3355461/- (Rupees Thirty Three Lakhs Fifty Five Thousand Four Hundred and Sixty One Only) in Show Cause Notice, Commissioner has confirmed the demand of Rs 49,49,505/- (Rupees Forty Nine Lakhs Forty Nine Thousand Five Hundred and Five Only). Reliance placed by the Commissioner on section 154 of the Customs Act, 1962 for justifying the confirmation of duty demand more than that stated in Show Cause Notice is totally misplaced.

iii. Demand is barred by limitation as they have not suppressed anything from the department hence invocation of longer period of limitation as per proviso to section 28(1) is not justified. Even if the limitation is to be counted from the date of knowledge and start of enquiry, then also three years delay in issuance of Show Cause Notice cannot be justified and be a reason for invoking extended period. They rely on the Apex Court decision in case of Nizam Sugar [2006 (197) ELT 466 (SC)]. They also rely upon the decisions in case of Chemphar

Drugs and Liniments {1989 (40) ELT 276 (SC)], Padmini Products {1989 (43) ELT 195 (SC)], Tamil Nadu Housing Board {1994 (74) ELT 9 (SC)] and Malleable Iron and Steel Casting [1998 (100) ELT 8 (SC)]

iv. Penalties have been imposed both under section 112 (a) and 114 A which is forbidden as per fifth proviso to section 114A. Thus entire order imposing penalties need to be quashed. Further there has been no act of deliberate suppression, misdecalaration or fraud etc., committed by them which can justify the penalty imposed on them under Section 112.

4.1 We heard Shri Brijesh Pathak, Advocate for the Appellants and Shri R Kumar, Assistant Commissioner, Authorized Representative for the Revenue.

4.2 Arguing for the appellants learned advocate reiterated the submissions made in appeal. He stated that the item imported by them was correctly classified and assessed by the Customs at the time of clearance of the goods. It was subsequently after a lapse of considerable period of time that revenue started investigating the case of misclassification, and issued the show cause in respect of the imports made by them during the 15.03.2000 to 18.10.2001, only on 11.03.2005. The show cause notice is clearly barred by limitation as they had not misdeclared or suppressed any fact from the Customs at time of filling of Bill of Entry. Since all the facts were completely brought to the knowledge of department, it was for the assessing officer to determine the correct classification and demand duty accordingly. Since the demand is his by limitation, so entire show cause notice should fail including the imposition of penalties.

4.3 Arguing for the revenue learned Authorized representative reiterated the findings recorded by the adjudicating authority. He submitted that the goods is question were definitely not flow meters as they were not used for measuring the flow of gas or liquid hence the classification claimed by them under CTH 9026 was not justified. Commissioner has after considering all the facts determined the correct classification of the imported goods. He further submitted that while dismissing the Appeal of the Appellant on default Tribunal has No A/87968/17/CB dated 12.06.2017, has on merits upheld the classification as determined by the Commissioner. Since the order was ex-parte the same was recalled vie order No M/85066/2018 dated 29.01.2018. He further submits that catalogue of the of the imported goods describe the product as Danload 6000 Electronic Preset and not as *"Danload 6000 Electronic Preset Flow Metering Equipment"*. The appellants have in the import documents deliberately added the words *"Flow Metering Equipment"* with sole purpose of misclassifying the same. Since the appellants have deliberately misdeclared the goods with intention to evade payment of duty, extended period of limitation has been rightly for making the demand.

5.1 We have considered the submissions made in appeal and by both the parties during the course of argument along with the impugned order.

5.2 We find that issue can be decided on the ground of limitation itself as the show cause notice demanding the duty in respect of imports made vide bill of entries filed during the period 15.03.2000 to 18.10.2001 was issued on 11.03.2005. For making the allegation of suppression against the Appellant, para 16, 17 & 18 of the show cause notice states as follows:

"16. It is evident from the above that the correct description and details of the equipment DANLOAD 6000 was deliberately suppressed by M/s Advance Spectra Tek

Private Ltd (India) Pvt Ltd and Sh Umed Fifadra to evade payment correct rate of duty.

17. Therefore it appears that M/s Advance Spectra Tek Private Ltd had deliberately

(a) submitted manipulated/ incomplete catalogue of the DANLOAD 6000 so that the correct description and classification of the equipment could not be determined.

(b) split the value of equipment into hardware/ hardware equipment and software to evade payment of correct amount of duty; and

(c) classified the equipment under CTH 8471 as against CTH 9032 to evade payment of appropriate rate of duty.

18. Hence the goods totally valued at Rs 2,00,91,213.00 (Rupees Two Crore Ninety One Thousand Two Hundred and Thirteen only) and covered by eight Bills of Entry as mentioned in Annexure A in this notice , appears to be liable for confiscation under Section 111 (m) of the Customs Act, 1962 and M/s Advance Spectra Tek Pvt Ltd. appears to be liable penalty under Section 112(a) of the Customs Act, 1962. Similarly duty amounting to Rs 33, 55,461/- (Rupees Thirty Three Lakhs Fifty Five Thousand Four Hundred and Sixty One Only) which was not levied due to misdeclaration by the importers appears to be recoverable under the provisions of Section 28 of the Customs Act, 1962 together with interest in terms of Section 28AA of the Act ibid. By reason of this duty evasion, the importers have made themselves liable for penalty under Section 114A of the Act ibid."

5.2 Commissioner has while considering the issue on the ground of limitation has in para 36.1 & 36.2 of the order recorded as follow:

"36.1 The importer has argued that the department have mistaken by invoking the extended period under proviso to section 28 of the Customs Act, 1962. They have

submitted that though the Bs/E were assessed on 15.3.2000, 6.4.2000, 20.4.2000, 19.05.2000, 24.07.2000, 26.08.2000, 24.10.2000 and 18.10.2001, the investigation started as late as on 20.2.2002 and the show cause notice was issued on 11.3.2005. The show cause notice dated 11.3.2005 is apparently time barred.

36.2 I have gone through the provisions of Section 28 of Customs Act, 1962 which provides that if any duty has been short levied by reason of collusion or any wilful mis-statement or suppression of facts by the importer or the agent or employee of the importer, the proper officer may within 5 years from the date of payment of duty serve the show cause notice on the person chargeable with the duty short levied. From the records, I find that this is a clear case of wilful mis-statement and suppression of facts by the importer. They have deliberately classified the goods under 9026.80 and to claim the classification under 90.26 they have given the description of the goods as Danload 6000 Electronic Present Flow Metering Equipment. They have consciously done so, so that the department would confuse Danload 6000 Electronic Preset with 'Flow Meter' simplicitor because of the language 'Flow Metering Equipment' used. And as flow metres are specifically included in the tariff description of chapter heading 90.26, the department will not raise any doubt about the classification under 90.26. If their intention would have been bonafide and they were of the genuine belief that the equipment is akin to (That is why they have relied on Moorco case dealing with flow meter) flow meter, they should have honestly declared the classification under CTH 9026.10 which is "for instruments and apparatus for measuring or checking the flow or level of liquids" which carries the BCD rate of 25% adv. instead of CTH 9026.80 under residuary category of "other instruments and apparatus" carrying BCD rate of 10% adv. They themselves have become prey to their own scheme of *wilful mis-statement and suppression of facts as they have confused to what and when they would misstate/misdeclare/suppress. This is obvious from the way they have declared PCA key board generally under CTH 9026.90 but in one case they have declared it under 8471.60. Similarly, in case of PCA Display in one case, they have declared it under CTH 9026.90 whereas in the rest they have declared it under 8531.20. Therefore, the deptt. is right in invoking the extended period of 5 years applying the proviso to Section 28 for issue of show cause demanding the differential duty. Having said that the time period of 5 years is available to the deptt. I still feel pained to note that the show cause notice could have been issued much earlier instead of elongating the investigation from 2002 to 2005, intercepted by long spell of non action. But as long as the show cause notice is issued within the prescribed limit of 5 year, no purpose will be served if I deal on the subject of inordinate delay caused within the department."*

5.3 The findings of the Commissioner are contrary to the facts of case and hence cannot be sustained. The appellants have made the declaration on the Bill of Entries as per the description given in the invoices of the foreign supplier. Since the description as has been given by the foreign supplier declare on the Bill of Entries, the appellants cannot be held guilty for mis declaring the same. The classification declared by the appellants on the Bill Of Entry is as per their understanding and assessment, it is for the assessing officer to determine the correct classification and duty payable. It is not the case of the department that appellants have made any declaration which was contrary to the documents available with the importer at the time of filing of Bill of Entry. No evidence has been produced by the department to the effect that catalogue of the *"DANLOAD 6000"* was called for by the assessing officer and not produced by the appellants. The entire case of the revenue is based on the few statements recorded by the Custom officers. The statement of Mr Shrish were recorded on 20.02.2002, 11.06.2002, 25.08.2004 and 03.02.2005, Shri Fifadra on 03.04.2002 and of Shri Atul on 19.11.2003. Since all the facts including the catalogues relied upon in show cause notice were made available to revenue as early as in 2002, the delay in issuance of show cause notice could not be justified. We are of the view that case of appellant on the issue of extending period of limitation is squarely covered in their favour by the decision of the Hon'ble Apex Court Magus Metal P Ltd [2017 (355) ELT 323 (SC)], wherein it has been held that

"6.*Insofar as the order of the learned Tribunal holding the show cause notice dated 18-3-2003 to be time barred in the six appeals referred to above, we do not find any error in the order of the Tribunal and its conclusions in arriving at the said conclusion. The 'normal' period of limitation for issuing a show cause notice under Section 28 is one year from the due date and unless there is suppression of facts or misstatement, the extended period of limitation will not be attracted. In the present case, the show cause notice, dated 18-3-2003 in respect of the earlier consignments, admittedly, is beyond one year. Such notice beyond the normal period of limitation could have been issued only if there have been suppression of facts. If, from the show cause notice, dated 16-4-2002 and the report of the EPTRI and NMDC in respect of the samples from the consignments dated 24-12-2001 and 24-1-2002, the Revenue was already in the know of the relevant facts, it is difficult to understand as to how the Revenue could have the benefit of anything but the "normal" period of limitation to issue the show cause notices dated 18-3-2003. The order of the learned Tribunal insofar as the six appeals are concerned, holding show cause notices issued therein to be time barred and interfering with the* *adjudication orders dated 29-3-2004 and 23-9-2004, therefore, must have the approval of this Court."*

5.4 In case of Cemphar Drugs and Liniments [], Hon'ble Apex Court held that

"***8.*** *Aggrieved thereby, the revenue has come up in appeal to this Court. In our opinion, the order of the Tribunal must be sustained. In order to make the demand for duty sustainable beyond a period of six months and up to a period of 5 years in view of the proviso to sub-section 11A of the Act, it has to be established that the duty of excise has not been levied or paid or short-levied or short-paid, or erroneously refunded by reasons of either fraud or collusion or wilful misstatement or suppression of facts or contravention of any provision of the Act or Rules made thereunder, with intent to evade payment of duty. Something positive other than mere inaction or failure on the part of the manufacturer or producer or conscious or deliberate withholding of information when the manufacturer knew otherwise, is required before it is saddled with any liability, before the period of six months. Whether in a particular set of facts and circumstances there was any fraud or collusion or wilful misstatement or suppression or contravention of any provision of any Act, is a question of fact depending upon the facts and circumstances of a particular case. The Tribunal came to the conclusion that the facts referred to hereinbefore do not warrant any inference of fraud. The assessee declared the goods on the basis of their belief of the interpretation of the provisions of the law that the exempted goods were not required to be included and these did not include the value of the exempted goods which they manufactured at the relevant time. The Tribunal found that the explanation was plausible, and also noted that the Department had full knowledge of the facts about manufacture of all the goods manufactured by the respondent when the declaration was* *filed by the respondent. The respondent did not include the value of the product other than those falling under Tariff Item 14E manufactured by the respondent and this was in the knowledge, according to the Tribunal, of the authorities. These findings of the Tribunal have not been challenged before us or before the Tribunal itself as being based on no evidence."*

5.5 In case of Easland Combines [2003 (152) ELT 39 (SC)], Hon'ble Apex Court held as follows:

"29.*It is settled law that for invoking the extended period of limitation duty should not have been paid, short levied or short paid or erroneously refunded because of either fraud, collusion, wilful mis-statement, suppression of fact or contravention of any provision or rules. This Court has held that these ingredients postulate a positive act and, therefore, mere failure to pay duty and/or take out a licence which is not due to any fraud, collusion or willful mis-statement or suppression of fact or contravention of any provision is not sufficient to attract the extended period of limitation."*

5.6 Thus in view of the law laid down by Hon'ble Apex Court in the above stated decisions and many others we are of the view that extended period of limitation is not invokable in the present case. Order of Commissioner to the extent of holding that extended period of limitation cannot be sustained.

5.7 By the impugned order Commissioner has confirmed demand of duty which was never there in the show cause notice. While Show Cause Notice demanded duty of Rs 33,55,461/- Commissioner has confirmed demand of Rs 49,49,505. The justification given by the Commissioner by referring to Section 154 of the Customs Act, 1962 is not tenable. Section 154 of Customs Act, 1962 reads as follows:

"SECTION 154. Correction of clerical errors, etc. - Clerical or arithmetical mistakes in any ***decision or order*** *passed by the Central Government, the Board or any officer of customs under this Act, or errors arising therein from any accidental slip or omission may, at any time, be corrected by the Central Government, the Board or such officer of customs or the successor in office of such officer, as the case may be."*

From plain reading of the Section it is evident that the Section is available for correction of arithmetical mistakes or clerical errors in the "decisions or orders" and not the Show Cause Notice. By applying the said Section for correction of the error in the Show Cause Notice, has gone beyond the scope of section.

5.8 Since we are not in position to sustain the order of Commissioner on ground of limitation under proviso to Section 28 (1), we are not making any observation on the issue of classification, decided by the Commissioner.

6.1 In view of discussions as above we allow the appeal filed by the appellants and set aside the order of Commissioner.

(Order pronounced in the open court)

(Dr. D.M. Misra)
Member (Judicial)

(Sanjiv Srivastava)
Member (Technical)

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