CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL, MUMBAI
REGIONAL BENCH

Customs Appeal No. 324 of 2010
C/Cross/24 of 2010

(Arising out of Order-in-Original No. 166/2009 CC(I), JNCH dated 17.12.2009 passed by Commissioner of Customs (Import), Nhava Sheva)

Commr. of Customs (I), Nhava Sheva **Appellant**
Jawaharlal Nehru Custom House,
Post Uran, Dt. Raigad,
Sheva 400 707.

Vs.

M/s. GTL Infrastructure Ltd. **Respondent**
Maestros House,
MIDC, Bldg. No.2,
Sector 2, Millenium Business Park,
Mahape, Navi Mumbai 400 710.

Appearance:

Shri T. Viswanathan, Advocate, for the Appellant
Shri Ramesh Kumar, Authorised Representative for the Respondent

CORAM:

Hon'ble Mr. S.K. Mohanty, Member (Judicial)
Hon'ble Mr. Sanjiv Srivastava, Member (Technical)

FINAL ORDER NO. **A/86703/2019**

Date of Hearing: 25.06.2019
Date of Decision: 24.09.2019

PER: SANJIV SRIVASTAVA

This appeal filed by the revenue is directed against the order in original No 166/2009 CC(I), JNCH dated 17.12.2009, of the Commissioner Customs (Imports), Nhava Sheva. By the impugned order Commissioner held as follows:

"14. Accordingly, I pass the following order:

(i) The imported goods namely, OFS is classifiable under CTH 90011000; benefit of Notification No 024/2005-Cus is not available for them.

(ii) An amount of Rs 14,99,939/- (out of the total demand for Rs 92,94,731/-) is hereby confirmed under Section 28(2) of CA 62.

(iii) Appropriate interest has to be paid on the aforesaid confirmed amount under Section 28AB of the CA 62.

(iv) There shall be no order regarding confiscation of the goods.

(v) There shall be no penalty on the noticees."

2.1 Respondents were engaged in importation of *"48F Optical Fibre Cable"* by classifying them under CTH 85447090 and claiming the benefit under Notification No 24/2006-Cus dated 01.03.2005. Investigation undertaken by DGRI, revealed that the said goods were correctly classifiable under heading No 90011000, they were required to pay basic Customs duty @ 10% under Notification No 21/2002-Cus dated 01.03.2002 (S No 507). During the course of investigation respondents had deposited Rs 92,94,731/- against the duty short paid by them against six bill of entries during the period 23.05.2008 to 14.08.2008 ((Annexure A) to Show Cause Notice).

2.2 A show cause notice dated 25.02.2009 was issued by Additional Director General DRI Mumbai asking the respondents to Show Cause to Commissioner Customs (Import) Nhava Sheva as to why-

(i) the goods imported vide the Bills of Entry detailed in Annexure A to this Show Cause Notice should not be classified under T I 90011000 and benefits of Notification 24/2005 dated 01.03.2005 availed by M/s GSTL Infrastructure Ltd by classifying the goods under TI 85447090 should not b denied.

(ii) The goods i.e. "48F Single Mode Fiber Optical Cable" of declared value Rs 7,58,34,112/- imported at JNPT port as detailed in Annexure A to this notice and already cleared should not be held liable to confiscation under Section 111(d), and Section 111(m) of the Customs Act, 1962. However since the goods are not available for confiscation, why a fine should not be imposed under Section 125 of the Customs Act, 1962.

(iii) The differential Custom duty worked out in Annexure A to this Notice amounting to Rs 92,94,731/- (Rupees Ninety Two Lakhs Ninety Four Thousand Seven Hundred and Thirty One only) equivalent to the duty exemption availed on the goods viz OFC imported and cleared by availing undue benefits under Notification No 24/2005 dated 01.03.2005 as amended should not be demanded from them under proviso to Section 28(1) of the Customs Act, 1962.

(iv) The amount of Rs 92,94,731/- deposited voluntarily should not be appropriated against differential duty liability in respect of the imports mentioned at Annexure A to this notice.

(v) Interest should not be recovered from them on duty short levied/ short paid in terms of Section 28AB of the Customs Act, 1962.

(vi) *Penalty should not be imposed upon them under section 112(a)/ 114A and 114AA of the Customs Act, 1962.*

2.3 The show cause notice has been adjudicated by the Commissioner as per impugned order referred in para 1, supra.

2.4 Aggrieved by the order of Commissioner, revenue has preferred this appeal.

2.5 Respondents have filed the cross objections to the appeal.

3.1 In their appeal revenue has assailed the order of Commissioner stating- *'The importer had accepted the classification as proposed and voluntarily paid the differential duty Rs 92,94,731/- during the course of investigation i.e. prior to the issuance of Show Cause Notice. While upholding the classification as proposed in the Show Cause Notice, the adjudicating authority has concluded that there was no mis-declaration. The section 28(2B) stipulates that where in case other than those of wilful misstatement if the person, chargeable with the duty or the interest pays such amount before the service of notice, no notice shall be served to him under the said section in respect of the duty or the interest so paid. Therefore, once a view has been taken by adjudicating authority that there was no mis declaration in the case, the adjudication proceedings should have been concluded mandatorily under sub section 2B of Section 28, Customs Act, 1962 with appropriation of duty paid voluntarily by the importer during investigation. Otherwise also, if the importer pays any duty voluntarily, admitting such liability the issue of invoking limitation to such an amount does not arise in terms of Section 28(2B). Therefore, the adjudicating authority has erred in not appropriating the differential duty amount of Rs 77,94,792/- which was paid voluntarily by the importer prior to the issuance of Show Cause Notice. The only issue open legally was to determine imposition of penalty by examining facts relating to collusion, wilful mis statement and suppression of facts."*

3.2 In there cross objections respondents have stated as follows:

- *DRI has no authority to collect the duty during the investigation. Further, any amount deposited during the pendency of investigation is in the nature of* *deposit. Such deposit cannot be towards payment of duty;*

- *OFC imported is correctly classifiable under Heading 8544 of the Customs Tariff;*
- *Relevant date for computing time limit of six month under Section 28 of the Customs Act, 1962 is date of service of SCN and not the date of issue of SCN. Accordingly, even demand of Rs 14,99,939/- confirmed with respect to OFC imported vide bill of entry No 959757 dated 14.08.2008 is time barred.*

4.1 We have heard Shri Ramesh Kumar, Assistant Commissioner, Authorized Representative for the Revenue and Shri T Viswanathan, Advocate for the respondents.

4.2 The issue of classification of Optical Fiber Cables has been settled by the larger bench of Tribunal in case of Vodafone Essar Gujarat {2018 (360) ELT A193 (CESTAT-LB)} under Chapter 90 and hence we follow the said decision.

4.3 On the issue of the applicability of Section 28(2B) for appropriation of the amount said to be deposited voluntarily by the respondents, we are not in position to agree with the contentions raised by the revenue. By Act 14 of 2001, sub-section (2B) has been inserted to Section 28 of the Customs Act, 1962 which reads as under :

"(2B) Where any duty has not been levied or has been short-levied or erroneously refunded, or any interest payable has not been paid, part paid or erroneously refunded, the person, chargeable with the duty or the interest, may pay the amount of duty or interest before service of notice on him under sub-section (1) in respect of the duty or the interest, as the case may be, and inform the proper officer of such payment in writing, who, on receipt of such information, ***shall not serve any notice***

under sub-section (1) in respect of the duty or the interest so paid *:*

Provided that the proper officer may determine the amount of short-payment of duty or interest, if any, which in his opinion has not been paid by such person and, then, the proper officer shall proceed to recover such amount in the manner specified in this section, and the period of "one year" or "six months" as the case may be, referred to in sub-section (1) shall be counted from the date of receipt of such information of payment."

4.4 Interpreting the said sub section, Hon'ble Karnataka High Court has in case of Powerica Ltd [2012 (276) ELT 302 (Kar)] held as follows:

"4. *In view of the aforesaid provision, when the assessee pays the duty and penalty and inform the proper Officer of such payment in writing, who on receipt of such information shall not serve any notice under sub-section (1) in respect to the duty or the interest so paid.* ***If in law there is a prohibition for initiation of the proceedings to recover the duty and penalty after it is paid before the issue of show cause notice, certainly in such a proceedings which is not maintainable, question of imposing penalty would not arise. In other words, if duty and penalty is paid even before the issue of show cause notice and the said fact is informed to the proper officer, he shall not initiate any proceedings to recover the duty and interest, much less for imposition of penalty.*** *Therefore, the order imposing penalty is illegal. The Tribunal has set aside the same for different reasons. As the ultimate order is proper and we have set aside the same, we do not see any merit in this appeal. Accordingly, it is dismissed. Thus, the substantial question of law is answered in favour of the assessee and against the revenue.*"

4.5 In our view the law is very clear on the subject. In the proceedings initiated by the revenue, demanding the duty by invoking extended period as per the proviso to Section 28(1) of the Customs Act, 1962 revenue cannot seek the benefit of sub section (2B) for the reason it fails to establish its case under the said proviso. Once the show cause notice has been issued in respect of any amount whether deposited or not deposited, by invoking extended period as per the proviso to Section 28(1), the adjudicating authority is bound to determine the issue as per the notice issued. In case he arrives at finding that extended period is not invokable he is duty bound to drop the demand to the extent it is not maintainable, even if the amounts have been deposited prior to issuance of notice. Similar view has been expressed by the Larger Bench of Tribunal in case of Al-Falah Exports 206 (198) ELT 343 (T-LB)] in following words:

*“**1.2** We have heard ld. Advocates and ld. DR and have considered the submissions made. After considering the material it is found.*

(a) Causes for arriving at penalties under the Customs Act, 1962 and Central Excise Act, 1944 are not similar, inasmuch as the Former Act raises liability to penalty for transgressions and violation of import/export prohibitions without or with Customs duty infringement while the Later Act chiefly concerns itself as a Revenue Generation measure with penalties related & consequent to such Revenue Generation effort only. The objectives in provisions of Sections 114A & 11AC may be comparable, other penalty provisions e.g. Sections 112 or 114 & 116 of Customs Act, 1962 are suigeneris.

(b) A reading of Section 28 of the Customs Act, 1962, provides for recovery of duties having escaped assessment, Para 2B of which reads as under.

“……….”

This would indicate vital consequence flowing as -

(i) legislative prescription of the issue of show cause notice on the cut off date by which time, if the duty was paid then no notice was required to be issued/served under the provisions of Section 28(1) of the Customs Act, 1962.

(ii) That no notice is envisaged under sub-section 28(1) to be issued on account of the payment of duty amounts effected before issue of such notice would imply that no further determination of duty by the proper officer was required to be arrived at. Since there would be no determination of duty under Section 28(2B), the provisions of Section 114A could not be attracted as would appear clearly from reading of provisions Section 114A of the Customs Act, 1962.

(c) Since legislative prescribed procedure, is not to issue notice, in cases where payments of the amounts at a time prior to the notice have been effected, is without any pre-conditions as regards causes/reasons for such payments required to be made or effected, it would not make a difference whether such duty was paid before or after the intervention by the departmental officers in any form or manner, this would include the fact of search, seizure etc. Therefore we cannot find the view taken in the case of M/s. Saheli Synthetics Pvt. Ltd. vide Order Nos. A/681 to 683/2005-WZB/C-III, dtd 19-7-2005 to uphold that there is a call for a differentiation, in approach based on reasons of intervention by the department; rendering the consequent payments effected, on re-assessment clearance of Customs goods already made or when effected otherwise."

4.6 Thus by issuing the show cause notice, Revenue has itself opted not to settle the issue in terms of subsection 2B of Section 28 of Customs Act, 1962. Having done so they cannot go back subsequently on failing in adjudication proceedings to ask for settlement and appropriation of the amounts paid in terms of this section.

5.1 In view of discussions as above we do not find any merits in the appeal filed by Revenue and dismiss the same. The cross objections filed by the respondents are disposed off upholding the impugned order.

(Order pronounced in the open court on 24.09.2019)

(S.K. Mohanty)
Member (Judicial)

(Sanjiv Srivastava)
Member (Technical)

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