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

Customs Appeal No. 89376 of 2018
C/Cross 85055 of 2019

(Arising out of Order-in-Original No. 121/2016-17/CC/NS-I/JNCH dated 31.01.2017 passed by Commissioner of Customs, JNCH, Nhava Sheva)

M/s. Sakar Industries Pvt. Ltd. **Appellant**
H/10, Madhavpur Market,
Shahbaug Road,
Ahmedabad 380 004.

Vs.

Commr. of Customs, Nhava Sheva-I **Respondent**
JNPT, Custom House,
Nhava Sheva,
Raigad 400 707

Appearance:

Shri H.K. Hirani, Consultant, for the Appellant
Shri A.P. Kothari, 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/86792/2019**

Date of Hearing: 17.06.2019
Date of Decision: 10.10.2019

PER: SANJIV SRIVASTAVA

This appeal and cross objections are directed against order in original No 121/2016/17/ CC/NS-I/JNCH dated 31.01.2017 of Commissioner Customs NS-I, JNCH, Nhava Sheva. By the impugned order Commissioner has held as follows:

"i. I order that goods totally valued at Rs 8,41,44,815/- (Rupees Eight Crore Forty One Lakhs Forty Four Thousand Eight Hundred and Fifteen Only) in respect of 4 Bill of Entry's No 780187 dated 24.03.11, 3145027 dated

07.04.11, 3156426 dated 08.04.11, 4674399 dated 18.09.11 are liable for confiscation under the provisions of Section 111(d), (m) of the Customs Act, 1962. However as the good are not available for confiscation, I do not impose any redemption fine in lieu of confiscation.

ii. I order that total differential Customs duties of Rs 91,50,097/- (Rupees Ninety One Lakhs Fifty Thousand Ninety Seven Only) in respect of 4 Bill of Entry's No 780187 dated 24.03.11, 3145027 dated 07.04.11, 3156426 dated 08.04.11, 4674399 dated 18.09.11 be demanded and recovered from M/s Sarkar Ferro Alloys Pvt Ltd., in terms of provisions of proviso to erstwhile Section 28(1) of the Customs Act, 1962.

iii. I order that interest on the aforesaid differential Customs duties (as in clause ii above) be recovered from M/s Sarkar Ferro Alloys Pvt Ltd., under the provisions of Section 28AA, as may be applicable, of the Customs Act, 1962.

iv. I impose Penalty of Rs 10,00,000/- (Rupees Ten Lakhs Only) on M/s Sarkar Ferro Alloys Pvt Ltd., under Section 112(a), , of the Customs Act, 1962.

v. I impose Penalty of Rs 1,00,000/- (Rupees One Lakhs Only) on Shri Ramesh Shah, Director of M/s Sarkar Ferro Alloys Pvt Ltd., under Section 112(a), , of the Customs Act, 1962.

vi. The final assessment of Bills of Entry No 778026 dated 22.03.2011, 316405 dated 07.04.2011 and 4432424 dated 23.08.2011 is ordered to be done as per provisions of section 18 of the Customs Act, 1962."

2.1 Appellants had imported Molybdenum Ore Concentrate declaring the same as Molybdenum Ore and claiming exemption from Countervailing Duty (CVD) as per notification No 04/2006-CE dated 01.03.2006 on seven Bill of Entries as detailed in table below:

Bill of Entry		Description	Assessable Value 'Rs	Duty Paid 'Rs	Assessment
Number	Date				
778026	22.03.11	Roasted Molybdenum Ore 62.9%	4,37,66,536	11,26,988	Provisional
316405	07.04.11	Roasted Molybdenum Ore 60.58%	2,16,42,241	5,57,288	
4432424	23.08.11	Roasted Molybdenum Ore 59.46%	1,75,94,626	4,53,062	
3145027	07.04.11	Roasted Molybdenum Ore 62.43%	2,13,40,834	5,49,527	Final (RMS)
3156426	08.04.11	Roasted Molybdenum Ore 59.32%	2,23,05,668	5,74,371	
4674399	18.09.11	Roasted Molybdenum Ore 59.65%	1,85,48,402	4,77,621	
780187	24.03.11	Roasted Molybdenum Ore 59.65%	2,19,49,910	5,65,210	
		Total	16,71,48,217	43,04,067	

2.2 In view of the investigations undertaken by the Director General Revenue Intelligence, it was found that item imported was not Molybdenum Ore but was Molybdenum Ore Concentrate, and hence the exemption from CVD claimed by the Appellants was not admissible to them.

2.3 A Show cause notice dated 12.03.2012 was issued to them asking them to show cause as to why-

- Goods imported vide the seven Bill of Entries be not confiscated under Section 111(d) & (m) of the Customs Act, 1962. Since the goods are not available for confiscation, why redemption fine be not imposed;
- Differential Customs Duty amounting to Rs 1,86,16,220/- in respect of the seven B/E be not demanded and recovered from them in terms of proviso to Section 28(1) ibid;
- Interest should not be demanded and recovered under Section 28AA ibid;
- Penalties should not be imposed on them under Section 112(a) and Section 114A ibid.

2.4 Show cause notice has been adjudicated by the Commissioner as per the impugned order referred in para 1, supra.

2.5 Aggrieved appellants have filed this appeal.

2.6 Revenue has also filed cross objections in the matter

3.1 We have heard Shri H K Hirani, Consultant for the Appellant and Shri A P Kothari, Additional Commissioner, Authorized Representative for the Revenue.

3.2 Arguing for the Appellants, learned Consultant submitted that-

- Since the Bill of Entries have been verified, examined and assessed by the proper officer before the clearance of the goods they cannot be guilty for misdeclaration with intention to evade payment of duty, hence extended period could not have been invoked.
- There was confusion with regards to applicability Chapter Note 4 to Chapter 26 in Excise Tariff, (as admitted by the Circular of 2012). It is settled position in law that laying claim to some exemption, whether admissible or not is a matter of belief and not amount to mis-decalaration;
- In view of the decision of the Apex Court in case of Star Industries relied upon by the revenue, the goods could not have been held liable for confiscation;
- Denial of exemption in respect of the Bill of Entries filed prior to date of receipt of Presidential Assent for Finance Act, 2011 is completely unsustainable. It would only after the publication of the Finance Act,2011, that the amendments made in Tariff will become applicable as has been held by the Apex Court in case of Param Industries {2015 (321) ELT 192 (SC)]
- The imported goods are ores and not ore concentrate and hence the benefit of exemption claimed will be admissible to them.
- For the goods to be liable for confiscation under Section 111, mis-declaration is required to be proved

and, if there is no case of mis-declaration, confiscation cannot be made-

- Sony Impex [2007 (215) ELT A49(SC)];
- Kapil International [2008 (228) ELT 139 (T)]
- Pdm Impex [2005 (191) ELT 1121 (T-Kol)]
- Acti Technologies [2005 (189) ELT 121 T-Mum)]
- Northern Plastics [1998 (101) ELT 549 (SC)]

➢ No interest can be demanded when demand itself is not payable

- Pratibha Processors [1996 (88) ELT 12 (SC)]
- Jayathi Krishna & Co [2000 (119) ELT 4 (SC)]

➢ No penalty should have been imposed as has been held in the following cases.

- Kuresh Laila [2005 (189) ELT 45 (T-Chennai)]
- Polynova Chemical Industries [2005 (179) ELT 173 (T-Mum)]
- Jupiter Exports [2002 (145) ELT 608 (T-Chennai)]
- Pawan Goel [2001 (135) ELT 1425 (T-Del)]

3.3 Arguing for the revenue learned Authorized Representative while reiterating the findings in the impugned order submitted that-

➢ Issue involved in present case is squarely covered by the decision of the Apex Court in case of Star Industries [2015 (324) ELT 656 (SC)];

➢ The issue raised by the Appellant in respect of the applicability of the amendments made by Finance Act, 2011 to the imports made prior to the Presidential Assent to the Act, and it publication are irrelevant in view of the Specific declaration made in terms of Provisional Collection of Tax Act, 1931 in Finance Bill, 2011 making these amendments applicable from the date of introduction of the Bill.

- As per the amended Section 28, vide Finance Act, 2011 the normal period for making the demand of the duty short paid was one year from the relevant date. Since in this case the show cause notice has been issued on 12.03.2012 in respect of the bill of entries filed during the period 22.03.2011 to 18.09.2011, the arguments made by the Appellant in respect of mis-declaration etc are irrelevant as the show cause notice has been issued within period of one year, i.e. normal period of limitation and hence the for making the demand the issue of mis-declaration will become irrelevant.
- However it is fact that appellants have misdeclared the goods imported by them by declaring them as Molybdenum Ore instead of Molybdenum Ore Concentrate to avail the benefit of exemption from CVD under Notification No 4/2006-CE, and hence the goods have been rightly held to be confiscable under Section 111(d) and (m) of the Customs Act, 1962.However since the goods were not available for confiscation, Commissioner has not confiscated nor imposed any redemption fine;
- Appellants have short paid the duty at the time of clearance of goods, and hence the demand of interest under Section 28AA is justified;
- For the act of mis-declaration Commissioner has imposed penalty under Section112(a) which is neither excessive nor unjustified looking into the quantum of duty sought to be evaded.

4.1 We have considered the impugned order along with the submissions made in appeal and during the course of arguments.

4.2 The issue on merits has been settled by the Hon'ble Apex Court in case of Star Industries [2015 (324) ELT 656 (SC)] holding as follows:

"26. *Before we discuss these arguments and arrive at a particular conclusion, we would like to recapitulate the salient features of the case about which there is no dispute :*

(a) The assessee is seeking benefit of Notification No. 4/2006-C.E. and relies upon Sl. No. 4 thereof which totally exempts goods described therein from payment of excise duty. The goods which are otherwise excisable are, thus, exempted from payment of duty. Description of these goods in Sl. No. 4 is 'Ores'.

(b) The goods imported by the assessee fall in Chapter 26 of Central Excise Tariff Act. Particular Tariff Item is 2613 against which the description of goods given under the said Tariff Item is 'Molybdenum Ores and Concentrate'.

(c) The goods imported by the assessee were not Molybdenum Ores in original form as mined. They had admittedly undergone the process of roasting and after the roasting, they are known as 'concentrates'. Even the assessee has described these goods as 'Roasted Molybdenum Ore Concentrate.'

(d) Chapter Note 4 treats the aforesaid process of roasting Ores into Concentrate as 'manufacture'.

27. *On the aforesaid facts, case of the assessee was that since ores include concentrates, assessee had claimed exemption from payment of CVD under Notification No. 4/2006-C.E. In support of this claim that even after roasting, concentrates remain ores only on the plea that ores is genus and concentrates is specie thereof, the assessee refer to literature on chemical technology and also its earlier judgment in M/s. Hindustan Gas and Industries Ltd. case which, in turn, relied upon the judgment of this Court in MMTC case. We have already* *analysed the decision in M/s. Hindustan Gas and Industries Ltd. case. The entire decision proceeds on the basis that roasting of an ore to obtain concentrate does not amount to manufacture specially when roasting is a process by which impurities in the ore are removed and the recoverable content of metal oxide is enhanced. In support, reference was made to Kirk-Othmer's Encyclopedia of Chemical Technology. Likewise, in MMTC case as well, which was relied upon by the Tribunal, this Court had held that Wolfram Concentrate which was having minimum 65% Tungsten Oxide was still an ore and classifiable under Item 26. Thus, the decision in Hindustan Gas primarily rested on the reasoning that roasting of an ore to obtain concentrate would not amount to manufacture and ore and concentrate are one and the same inasmuch as concentrate remains ore and only impurities are removed therefrom. On this premise, it was held that ore is genus and concentrate is a specie thereof.*

28. *According to us, it is very clear from the reading of the judgment in Hindustan Gas case that basic and the common thread which runs throughout the decision is that subjecting ore to the process of roasting does not amount to manufacture. This very basis gets knocked off with the amendment carried out in the year 2011 with the insertion of Note 4. Note 4 now categorically mentions that the process of converting ores into concentrates would amount to 'manufacture'. Therefore, it cannot now be argued that roasting of ores and converting the same into concentrates would not be manufacture. For the same reason, the judgment in MMTC becomes inapplicable and reliance upon Kirk-Othmer's Encyclopedia becomes irrelevant. With the addition of Note 4, a legal friction is created treating the process of converting ores into concentrates as manufacture. Once this is treated as manufacture, all the consequences thereof, as intended for creating such a legal* *friction, would automatically follow. Following shall be the inevitable implications :*

(a) *It is to be treated that Molybdenum Ore is different from concentrate. That is inherent in treating the process as 'manufacture' inasmuch as manufacture results in a different commodity from the earlier one. Section 2(f) defines this term as under :*

"manufacture" includes any process, -

(i) *incidental or ancillary to the completion of a manufactured product;*

(ii) *which is specified in relation to any goods in the Section or Chapter notes of the First Schedule to the Central Excise Tariff Act, 1985 (5 of 1986) as amounting to manufacture; or*

(iii) *which, in relation to the goods specified in the Third Schedule, involves packing or repacking of such goods in a unit container or labelling or re-labelling of containers including the declaration or alteration of retail sale price on it or adoption of any other treatment on the goods to render the product marketable to the consumer."*

(b) *The purpose of treating concentrate as manufactured product out of ores is to make concentrates as liable for excise duty. Otherwise, there was no reason to deem the process of converting ores into concentrates as manufacture.*

29. *Once the aforesaid legal repercussions are taken note of, as a fortiori, it becomes obvious that Notification No. 4/2006-C.E. which exempts only ores would not include within itself 'concentrates' also because of the reason that after the insertion of Note 4, concentrate is to be treated* *as a different product than ores, in law for the purposes of products of Chapter 26.*

30. *This brings us to the effect of Chapter Note 2 which is retained even after insertion of Chapter Note 4. No doubt, as per Chapter Note 2, 'ores' means minerals of mineralogical species actually used in the metallurgical industry for the extraction of mercury, of the metals of Heading 2844 or of the metals of Section XIV or XV, even if they are intended for non-metallurgical purposes. As per this note, metals of Section XV would be included in the term 'ores'. However, after the insertion of Chapter Note 4, these two Notes, namely, Note 2 and Note 4 have to be read harmoniously. If we accept the submission of the learned counsel for the assessee predicated on Note 2, then Note 4 even after its conscious inclusion, would be rendered otiose which cannot be countenanced. Therefore, Note 2, when seen along with Note 4, has to govern itself in limited territory. On the basis of deeming fiction created by Note 4, once we arrive at the conclusion that process of roasting of Ore amounts to manufacture and it creates a different product known as Concentrate, for the purpose of exemption notification, which exempts only 'Ores' it is not possible to hold that Concentrate will still be covered by the exemption notification. Therefore, harmonious construction of Note 2 and Note 4 would lead us to hold that in those cases when Note 4 applies and Ores becomes a different product, it ceases to be Ores.*

31. *We, thus, are of the opinion that in the impugned judgment, the Tribunal has rightly arrived at the conclusion that by virtue of Note 4, concentrate has to be necessarily treated as different from ores which is deemed as manufactured product after Molybdenum Ores underwent the process of roasting. Once we keep in mind that conversion of ores into concentrate is considered as manufacture and, therefore, becomes liable for central* *excise levy, exemption Notification No. 4/2006-C.E. is to be interpreted in this light as the Legislature has intended to treat ores and concentrates as two distinct items and Notification No. 4/2006-C.E. exempts only 'ores', concentrates automatically falls outside the purview of said notification. It is rightly argued by the learned senior counsel for the Revenue that exemption notifications are to be construed strictly and even if there is some doubt, benefit thereof shall not ensure to the assessee but would be given to the Revenue. This principle of strict construction of exemption notification is now deeply ingrained in various judgments of this Court taking this view consistently."*

4.3 The arguments made by the Appellant with regards to applicability of the Chapter Note 4 inserted vide Finance Act, 2011, in respect of the import made priors to the date of assent and publication of the Finance Act, 2011 have been rejected by the Hon'ble Apex Court in case of Bengal Shrachi Housing Development Limited {2017 (6) GSTL 356 (SC)]

"20. *In Chhotabhai Jethabhai Patel and Co. v. The Union of India and Anr., 1962 Supp. (2) SCR 1 at 20-21 = 1999 (110) E.L.T. 118 (S.C.), this Court was faced with the challenge of the levy of a retrospective excise duty. One of the arguments made against the levy of such duty is that excise duty being indirect, which is that it is ultimately to be passed on to the consumer, a retrospective levy would be ultra vires the legislative competence of Parliament as it could not possibly be passed on. This argument was repelled in the following terms :*

"There is no doubt that excise duties have been referred to by the economists and in the judgments of the Privy Council as well as in the Australian decisions as an instance of an "indirect tax", but in construing the

expression "duty of Excise" as it occurs in Entry 84 we are not concerned so much with whether the tax is "direct" or "indirect" as upon the transaction or activity on which it is imposed. In this context one has to bear in mind the fact that the challenge to the legislative competence of the tax - levy is not directed to the imposition as a whole but to a very limited and restricted part of it. This challenge is confined (a) to the operation of the tax between the period March 1, 1951, and April 28, 1951, and (b) even in regard to this limited period, it is restricted to the imposition of the additional duty of six annas per lb. which was levied, beyond the eight annas per lb. collected from the appellants by virtue of the Finance Bill under the provisions of the ***Provisional Collection of Taxes Act, 1931****. It would seem to be rather a strange result to achieve that the tax imposed satisfies every requirement of a "duty of Excise" in so far as the tax operates from and after April 28, 1951, but is not a "duty of Excise" for the duration of two months before that date.*

Learned Counsel conceded, as he had to, that even on the decision relied upon by him, the fact that owing to the operation of economic forces it was not possible for the taxpayer to pass on the burden of the tax, did not alter the nature of the imposition and detract from its being a "duty of Excise". For instance, the state of the market might be such that the duty imposed upon and collected from the producer or manufacture might not be capable of being passed on to buyers from him. Learned Counsel urged that this would not matter, as one had to have regard to "the general tendency of the tax" and "the expectation of the taxing authority" and to the possibility of its being passed on and not to the facts of any particular case which impeded the operation of natural economic forces.

The impediment to the duty being passed on might be due not merely to private bargains between the parties or *abnormal economic situations such as the market for a commodity being a buyers' market. Such impediments may be brought about by the operation of other laws which Parliament might enact, such for instance, as control over prices. If in such a situation where the price which the producer might charge his buyer is fixed by the statute, say under the Essential Supplies Act, and a "duty of Excise" is later imposed on the manufacturer, it could not be said that the duty imposed would not answer the description of an "excise duty". Learned Counsel had really no answer to the situation created by such a control of economy except to say that it would be an abnormal economic situation. It could hardly be open to argument that a tax levied on a manufacturer could be stated not to be a "duty of Excise", merely because by reason of the operation of other laws the taxpayer was not permitted to pass on the tax-levy. The retrospective levy of a tax would be one further instance of such inability to pass on, which does not alter the real nature or true character of the duty.""*

4.4 Section 28 of the Customs Act, 1962 was amended by the Finance Act, 2011 to prescribe normal period of limitation as one year from the relevant date. The relevant provisions of amended section are reproduced below:

"SECTION 28. Recovery of duties not levied or not paid or short-levied or short- paid or erroneously refunded. –

(1) Where any duty has not been levied or has been short-levied or short-paid or erroneously refunded, or any interest payable has not been paid, part-paid or erroneously refunded, for any reason other than the reasons of collusion or any wilful mis-statement or suppression of facts,-

(a) the proper officer shall, within one year from the relevant date, serve notice on the person chargeable with the duty or interest which has not

been so levied or paid or which has been short-levied or short-paid or to whom the refund has erroneously been made, requiring him to show cause why he should not pay the amount specified in the notice;

(b) ......

Explanation 1:- For the purpose of this section, "relevant date" means –

(a) in a case where duty is not levied, 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 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 our view show cause notice issued within one year from the date of filing of Bill of Entry, is definitely within the normal period of limitation and demand made therein cannot be held to be hit by limitation under Section 28 of the Customs Act, 1962. Rejecting arguments similar to those advanced by advanced the appellants in respect of erstwhile Section 28, Hon'ble Apex Court has in case of Jain Shuddh Vanaspati [1996 (86) ELT 460 (SC)] held as follows:

"5. It is patent that a show cause notice under the provisions of Section 28 for payment of Customs duties not levied or short-levied or erroneously refunded can be issued only subsequent to the clearance under Section 47 of the concerned goods. Further, Section 28 provides time limits for the issuance of the show cause notice thereunder

commencing from the "relevant date"; "relevant date" is defined by sub-section (3) of Section 28 for the purpose of Section 28 to be the date on which the order for clearance of the goods has been made in a case where duty has not been levied; which is to say that the date upon which the permissible period begins to run is the date of the order under Section 47. *The High Court was, therefore, in error in coming to the conclusion that no show cause notice under Section 28 could have been issued until and unless the order under Section 47 had been first revised under Section 130."*

4.5 It is a fact that the goods imported are nothing but Molybdenum Concentrate and appellants have declare the same as Molybdenum Ore on the Bill of Entries and the documents relating to import clearance. In view of the mis-declaration made the goods have been held liable for confiscation under Section 111(m) of the Customs Act, 1962, but not confiscated as they were not available for confiscation. Commissioner has also not imposed any redemption fine on the appellant hence we do not discuss this aspect any further as this issue of confiscation has become irrelevant. However for the acts of omission and commission leading to misdeclaration of the goods for which they had become liable for confiscation under Section 111, Commissioner has imposed penalty under Section 112(a) and we uphold the same.

4.6 The reliance placed by the Appellants on the Hon'ble Apex Court in case of Pratibha Processors and Jayathi Krishna & Co is not of any significance as we are upholding the demand of duty hence demand for interest will be sustained. For upholding the demand of interest we rely upon the following decisions.

i. P V Vikhe Patil SSK [2007 (215) ELT 23 (Bom)]

ii. Kanhai Ram Thakedar [2005 (185) ELT 3 (SC)]

iii. TCP Limited [2006 (1) STR 134 (T-Ahd)]

iv. Pepsi Cola Marketing Co [2007 (8) STR 246 (T-Ahd)]

v. Ballarpur Industries Limited [2007 (5) STR 197 (T-Mum)]

4.7 Since cross objections are only in support of the impugned order, they are not being considered further.

5.1 In view of discussions as above, appeal is dismissed and cross objections disposed off accordingly.

(Order pronounced in the open court on 10.10.2019)

(S.K. Mohanty)
Member (Judicial)

(Sanjiv Srivastava)
Member (Technical)

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