CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL MUMBAI
WEST ZONAL BENCH

Custom Appeal No. 88216 of 2013

(Arising out of Order-in-Appeal No.320/MCH/ADC/EP/2013 dated 22.5.2013 passed by the Commissioner of Customs (Appeals), Mumbai.)

M/s. Afcons Infrastructure Ltd. **.... Appellant**
Afcons House, 16, Shah Industrial Estate
Veera Desai Road, Azad Nagar,
Andheri (W), Mumbai – 400 053.

Vs.

Commissioner of Customs (Export), Mumbai **.... Respondent**

APPEARANCE:

Shri M.L. Grover, Advocate for the appellant
Shri Bhushan Kamble, Authorised Representative for the Respondent

CORAM:

HON'BLE SHRI S.K. MOHANTY, MEMBER (JUDICIAL)
HON'BLE SHRI P. ANJANI KUMAR, MEMBER (TECHNICAL)

FINAL ORDER No: A/87472/2019

DATE OF HEARING: 12.12.2019
DATE OF DECISION: 12.12.2019

PER: P. ANJANI KUMAR

The appellants M/s. Afcons Infrastructure Ltd. have imported used Casagrande make hydraulic piling rigs and filed a Bill of Entry NO.966449 dated 13.9.2010. The appellant paid the duty using DFCC (SFIA) and availed the Notification No.21/2002-Customs. On examination of the goods, the officers found that the goods are classifiable under CTH 8430 and the exemption under 21/2002 was only available to goods classifiable under Chapter 72. The importers admitted their offence and paid applicable duty along with interest on 10.11.2012. Additional Commissioner of Customs issued an adjudication order denying the benefit and penalty of Rs.5,23,100/- was also imposed. On an appeal by the appellants, Commissioner (A) vide impugned order No.320/MCH/ADC/EP/2013 dated 22.5.2013 upheld the Order-in-Original.

2. Learned counsel for the appellants contended that penalty is not imposable under Section 28(2B) as the differential duty was paid along with interest; however, the adjudicating authority and the appellate authority opined that the payment was made after the detection of wrongful availment by the officers, therefore, penalty under Section 114 and/or 112(a). Appellant relied upon the following case laws:

(i) *Northern Plastic Ltd Vs. Collector of Customs & Central Excise - 1998 (101) E.L.T. 549 (S.C.) (para 19,22 and 23)*

(ii) *Devraj M. Salian vs. Commissioner of Customs (I), Mumbai 2015 (316) E.L.T. 139 (Tri.-Mumbai) (para 5.2)u*

(iii) *Komal Trading Company vs. Commissioner of Cus. (Import), Mumbai - 2014 (301) ELT 506 (Tri-Mumbai)*

(iv) *S. Rajiv & Co. vs. Commissioner of Cus. (CSI Airport), Mumbai: 2014 (302) ELT 412 (Tri.-Mumbai)*

3. The learned AR reiterated the findings of OIO and OIA.

4. Heard both sides and perused the records of the case. We find that the appellants have claimed an exemption. The Department have examined the goods on first-check basis and found that the machinery imported by the appellants falls under Chapter 84 and hence, the exemption claimed under Notification No.21/2012 is not applicable. The differential duty was paid along with the interest. The appellants claim that in terms of Section 28(2B), no show-cause notice needs to be issued and no penalty can be

leviable. We find that the appellants have only claimed an exemption Notification. As the goods were second=hand machinery, there was no way that the goods might have escaped examination by the officers. In such circumstances, department was in its right to deny the exemption if found not applicable. Inference of suppression of facts, etc., cannot be inferred just because the appellants have claimed benefit of a Notification. Claiming of the benefit of the Notification does not amount to mis-declaration. Therefore, we find that department was not correct in imposing penalty in such circumstances. We find that Tribunal in the case of ***S. Rajiv and Co.*** (supra) observed that

> *"Because the appellant had initially made a claim for exemption from duty based on the documents available, it cannot be said that the appellant had mis-declared the goods. The ratio of the decision of the Hon'ble Apex Court in the case of Northern Plastics Ltd and of the Hon'ble Bombay High Court's decision in the case of Guarav Enterprises would squarely apply to the facts of the case. Therefore, there is no warrant for confiscation of imposition of any penalty"*

5. In view of the above, the appeal is allowed with consequential relief, if any.

(Operative portion of the Order was pronounced in open court on 12.12.2019.)

S.K. MOHANTY
MEMBER (JUDICIAL)

P. ANJANI KUMAR
MEMBER (TECHNICAL)

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