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

Customs Appeal No. 86644 of 2013

(Arising out of Order-in-Original CAO No. 05/2013/CAC/CC(I)/AB/Gr. VB dated 14.01.2013 passed by the Commissioner of Customs (Import), Mumbai)

Maharashtra Medical Foundation **Appellant**
Joshi Hospital,
778, Shivaji Nagar,
Opp. Kamala Nehru Park,
Pune 411 004.

Vs.

Commissioner of Customs (Import), Mumbai **Respondent**
New Custom House,
Ballard Estate, Mumbai 400 001.

Appearance:

Shri Mayur Shroff, Advocate, for the Appellant
Shri Ashwini Kumar, Additional Commissioner, Authorised Representative for the Respondent

CORAM:

HON'BLE MR. SANJIV SRIVASTAVA, MEMBER (TECHNICAL)
HON'BLE DR. SUVENDU KUMAR PATI, MEMBER (JUDICIAL)

Date of Hearing: 23.01.2023
Date of Decision: 23.01.2023

FINAL ORDER NO. A/85130/2023

PER: SANJIV SRIVASTAVA

This appeal is directed against Order-in-Original CAO No. 05/2013/CAC/CC(I)/AB/Gr. VB dated 14.01.2013 passed by the Commissioner of Customs (Import), Mumbai. By the impugned order, Commissioner has held as follows:-

"*ORDER*

(a) The equipments imported vide Bill of Entry No. 10211 dated 26.02.1990 are eligible for exemption in terms of Notification 65/88-Cus and Notf 159/89-cus dated 12.05.89.

(b) I confirm demand for duty amounting to Rs.3,11,022/- and interest under Section 47(2) of Customs Act, 1962 to be paid by

the importer on the said goods under Section 125(2) read with Section 12 of the Customs Act, 1962.

15. The order regarding confiscation of the goods under section 111(0) and redemption fine of Rs.2,50,000/-, under section 125(1), and penalty of Rs.25,000/- under section 112(a) of the Customs Act ordered vide Order-in-Original dated 03.10.2000 ordered vide Order-in-Original dated 08.01.2010 are upheld by the Honorable Tribunal in its order dated 18.06.2008 and 03.10.2011 respectively and will be therefore recoverable from the importer."

2.1 Appellant has challenged the impugned order only to the extent of demand of interest and does not challenge any other part of the order in the appeal.

3.1 I have heard Shri Mayur Shroff, Advocate for the appellant and Shri Ashwini Kumar, Additional Commissioner, Authorised Representative for the Revenue.

3.2 Arguing for the appellant, learned counsel submits that:-

- The provisions of Section 47(2) of the Customs Act, 1962 are not attracted in the facts and circumstances of the present case.
- In the case of Ruchi Soya Industries Ltd. [2016 (339) ELT 613 (Tri.-Bang.)], Bangalore Bench of the Tribunal held that Section 47(2) provides for interest in those cases where import duty assessed in terms of sub-section (1) of Section 47 within a period of two days from the date on which the assessed Bill of Entry submitted for payment of duty. In the present case appellant has not faulted on payment of duty as assessed as per the Bill of Entry.
- In the present case demand has also not been confirmed under Section 28 of the Customs Act but under Section 125(2) read with Section 12 of the Act.
- Tribunal has in the case of Armaity S. Patel [2014 (310) ELT 313 (Tri.-Mumbai)] held that Section 125(2) does not provide for payment of interest.

- In the case of Bharat Hospital & Institute of Oncology [2010 (249) ELT 65 (Tri.-Bang.)], it was held that the provisions of Section 28AA are not attracted when duty has not been demanded in terms of Section 28. Therefore the demand is not sustainable.
- Accordingly the demand for interest be set aside.

3.3 Learned AR reiterates the findings recorded in the impugned order.

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

4.2 Commissioner has vide the impugned order recorded the following findings:-

"12. As directed by the CESTAT the short question that arises for consideration before me to quantify the actual duty payable as per the order of the Tribunal dated 11.06.2008. Based on the submissions made before me during the hearing I condone the delay in deposit of government dues, even though on their part the importers complied with CESTAT's orders. However, due to banking misc communication the amount deposited by the importer could not be transferred to the Customs Account.

13. I find that the items imported by the importer were held eligible for exemption under Notification 65/88-cus vide entry at S.No.C-105 with description "Ultrasonograph" vide Order-in-Original dated 8.01.2010. Notification No 159/89 dt 12.05.1989 exempts auxiliary duty on certain goods which are wholly or partially exempt from basic customs duty as detailed below:-

"In exercise of the powers conferred by sub-section (1) of section 25 of the Customs Act, 1962 (52 of 1962), read with sub-section (4) of Section 35 of the Finance Act, 1989 (13 of 1989), and in supersession of the notification of the Government of India in the Ministry of Finance (Department of Revenue) No. 106/89-Customs, dated the 1st March, 1989, the Central Government, being satisfied that it is necessary in the public interest so to do, hereby exempts the goods which are partially

or wholly exempt from the duty of customs specified in the First Schedule to the Customs Tariff Act, 1975 (51 of 1975) by virtue of the notification of the Government of India in the Ministry of Finance or in the Department of Revenue and Banking specified in the Schedule below, from the whole of the auxiliary duty of customs leviable on such goods under sub-section (1) of Section 35 of the said Finance Act.

Provided that the exemption under this notification with respect to any goods mentioned in any notification specified in the said Schedule shall be subject to the conditions, if any, subject to which such goods are exempt by virtue of such notification, either partially or wholly, from the duty of customs specified in the First Schedule to the said Customs Tariff Act."

I find that Notification No 65/88 Cus 01.03.1988 is specified at Serial no. 233 in the schedule to the Notification 159/89. There is no condition attached to the import of the said goods, for availing the benefit in terms of Notification 159/89. I find that the importers have already been granted exemption in terms Notification 65/88 vide Order-in-Original dated 08.01.2010 which has been upheld by the CESTAT. I find that further exemption from Auxiliary Duty of Customs is also available in terms of 159/89-Cus dated 12.05.89. So the total duty payable by the importer is only 40% (Basic Customs duty) on the assessable value. I find that the duty has been re- calculated. Accordingly, the duty liability on the said goods would be Rs.3,11,022/- (Rupees Three Lakhs Eleven Thousand and Twenty Two only) which has to be paid by the importer. This order is subject to the results of CA26331/08 filed by the importer."

4.3 Interestingly the Commissioner has not recorded any reason for demanding the interest under Section 47(2) of the Customs Act. Section 125 of the Customs Act reads as follows:-

*"**SECTION 125. Option to pay fine in lieu of confiscation.** - (1) Whenever confiscation of any goods is authorised by this Act, the officer adjudging it may, in the case of any goods, the importation or exportation whereof is prohibited under this Act or under any other law for the time being in force, and shall, in the*

case of any other goods, give to the owner of the goods or, where such owner is not known, the person from whose possession or custody such goods have been seized, an option to pay in lieu of confiscation such fine as the said officer thinks fit :

Provided that where the proceedings are deemed to be concluded under the proviso to sub-section (2) of section 28 or under clause (i) of sub-section (6) of that section in respect of the goods which are not prohibited or restricted, no such fine shall be imposed:

Provided further that without prejudice to the provisions of the proviso to sub-section (2) of section 115, such fine shall not exceed the market price of the goods confiscated, less in the case of imported goods the duty chargeable thereon.

(2) Where any fine in lieu of confiscation of goods is imposed under sub-section (1), the owner of such goods or the person referred to in sub-section (1), shall, in addition, be liable to any duty and charges payable in respect of such goods.

………”.

4.4 From a plain reading of the above section, it is evident that Section 125(2) is not a section for confirmation of demand of duty, but it creates an obligation on the importer/person seeking redemption of the goods as per Section 125(1) to pay the amount. Section 125(2) clearly provides only for payment of duty as noted above.

4.5 Accordingly the demand for interest made cannot be upheld.

4.6 In the case of Ruchi Soya Industries Ltd. [2016 (339) ELT 613 (Tri.-Bang.)], Tribunal by majority has held as follows:-

*“**26.** The goods were cleared or the out of charge order was made on 23-11-2000. It is after this that a letter was issued demanding enhanced duty. The appellants paid the differential duty on 10-3-2001. It is to be noted that the assessed duty stands discharged by respondents on 20-11-2000 itself. Thus there was no delay in paying duty assessed in terms of Section 47(1) of the Act. Sub Section (2) of Section 47, states that*

interest is payable if the duty is not paid within 2 days from the date on which the assessed bill of entry is returned to the assessee for payment of duty. I have to agree with the Member (J) that in the present case in terms of Section 47(1), there is no delay in payment of duty and consequently there is no liability to pay interest under Section 47(2) of the Act. The learned counsel appearing for respondents, Shri Karan Talwar has relied upon the judgment laid in India Carbon Ltd. v. State of Assam 1997 (106) STC 460 SC to canvass the proposition that interest is substantive in nature and for levy of interest there should be a substantive provision. The demand and recovery of interest thus can be only as provided by law."

4.7 In the case of Bharat Hospital & Institute of Oncology [2010 (249) ELT 65 (Tri.-Bang.)], following has been held:-

*"**8.** As regards the payment of interest, we find that the interest has been demanded under 28AA of the Customs Act, 1962. In this case we find the question of invoking provisions of Section 28AA of the Customs Act, 1962 does not arise and in the show cause notice also there is no proposal to do so. In the absence of any determination of the duty under Section 28(1) the question of payment of interest under Section 28AA does not arise. In view of this, the interest sought to be levied and collected from the appellant is liable to be set aside and we do so. The impugned order to the extent it confirms the demand of the interest from the appellant is set aside."*

4.8 In the case of Armaity S. Patel [2014 (310) ELT 313 (Tri.-Mumbai)], Tribunal has held as follows:-

*"**5.5** As regards the demand of interest of Rs. 9,50,316/-, Section 125(2) does not provide for payment of interest. Further in the present case, interest has been demanded under the provisions of Section 28AB; the said Section 28AB will come into picture only when the duty demand is confirmed under Section 28 of the Customs Act and therefore, the provisions of Section 28AB has no role to play in the present case. Similarly, we notice that penalty has been imposed under Section 114A; the said*

Section applies only when duty demand is confirmed under Section 28A(1) of the Customs Act. In the present case the duty demand has been confirmed under Section 125 and therefore, the question of invoking Section 114A for imposition of penalty on the appellant is clearly unsustainable in law. Accordingly, we set aside the same."

5.1 In view of the above decisions, we do not find any merits in the demand for interest made by the impugned order. The impugned order needs to be modified to that extent.

5.2 Appellant is not challenging any other part of the order.

5.3 Appeal is allowed. Impugned order is modified to the extent of dropping the demand for interest.

(Order pronounced in the open court)

(Sanjiv Srivastava)
Member (Technical)

(Dr. Suvendu Kumar Pati)
Member (Judicial)

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