CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL MUMBAI

WEST ZONAL BENCH

CUSTOMS APPEAL NO: 86406 OF 2021

[Arising out of Order-in-Appeal No. MUM-CUSTM-AMP-APP-543/2020-21 dated 09th November 2020 passed by Commissioner of Customs (Appeals), Mumbai – III.]

Otis Elevator Company (India) Limited
Branch S. No. 28, D-2 Unit No.3 & 4 Sai Dhara
Mumbai-Nasik Highway NH3, Opp: R.K. Petrol Pump
Borivali (Kusksha) Bhiwandi, Thane - 421302. … ***Appellant***

versus

Commissioner of Customs (ACC - Import)
Air Cargo Complex, Andheri-Kurla Road
Sahar, Andheri (E), Mumbai - 400099. ***…Respondent***

APPEARANCE:

Shri Parth Parikh, Advocate for the appellant

Shri S B Hatangadi, Assistant Commissioner (AR) for the respondent

CORAM:

HON'BLE MR C J MATHEW, MEMBER (TECHNICAL)
HON'BLE MR AJAY SHARMA, MEMBER (JUDICIAL)

FINAL ORDER NO: A / 86250/2023

DATE OF HEARING: 15/03/2023
DATE OF DECISION: 29/08/2023

PER: C J MATHEW

This is a case of imports of 'elevator parts', effected by M/s Otis Elevator Company (I) Ltd, which, according to the appellant, is merely a chapter of accidents that has been misconstrued by the adjudicating authority to charge them with penalty under section 114A and section 114AA of Customs Act, 1962 and was upheld in the order[1] of Commissioner of Customs (Appeals), Mumbai – III despite the factual circumstances presenting a contrary picture and without considering their plea of bar on such proceedings when imports are, as yet, pending finalization.

2. The appellant had filed bill of entry no. 3652813/21.12.2015 for clearance of goods valued at ₹ 7,71,850, covered by four invoices procured from M/s Otis Centre European De Pieces Detachees, France, that were cleared on payment of duty of ₹ 2,03,987 and, in accordance with 'risk management system' in vogue, was given out of charge' on 22nd December 2015. It appeared that excess goods that were eventually enumerated in five other invoices of 6th August 2015 had been received in excess for which the appellant, by letter dated 13th June 2016, sought amendment in the said bill of entry to enable regularization of excess. Upon rejection of the request, in order dated 10th October 2016, for being unable to reconcile the date of the invoices preceding the imports as well as deficiencies in corresponding purchase orders, the appellant discharged liability of differential duty of ₹ 10,17,631.98 along with interest of ₹ 1,85,432 on these excess goods that were, additionally, sought to be regularized

[1] [order-in-appeal no. MUM-CUSTM-AMP-APP-543/2020-21 dated 9th November 2020]

as imports along with consignment cleared by them against bill of entry no. 998946/22.07.2015. Thereafter, notice was issued to them for recovery of the differential duty under section 28 of Customs Act, 1962, along with interest thereon under section 28AA of Customs Act,1962, and for imposition of penalties which, as confirmed by the adjudicating authority, was upheld in the impugned order.

3. It is contended by Learned Counsel for appellant that, in the factual circumstances of reporting excess as well as voluntary payment of duty and penalty, further proceedings was not called for. It was further pointed out the detailed explanation for the mixup had been furnished to the lower authorities with little avail. It was also contended that their request for amendment of bill of entry had unjustifiably been rejected leading to the impugned outcome. He submitted that the order of the original authority makes it abundantly clear that both the bills of entry had been assessed provisionally and, yet, and despite their protestation at the impropriety of adjudication in relation to provisionally assessed goods, the lower authorities proceeded to penalize them. Reliance was placed on the decision of the Hon’ble High Court of Calcutta in *Jaju Petro Chemical Pvt Ltd & another v. Commissioner of Customs (Port) & another [2017 (7) TMI 633 – CALCUTTA HIGH COURT]* and of the Tribunal in *Commissioner of Customs, Mumbai v. Exotic Fashions [2010 (262) ELT 651 (Tri-Mumbai)]*, in *Saharsh Distributors Pvt Ltd [2017 (354)*

ELT 671 (Tri-Del)] and in *Kevin Infotech (P) Ltd v. Commissioner of Customs (Port), Kolkata [2007 (216) ELT 435 (Tri-Kolkata)]*.

4. According to Learned Authorized Representative, a Larger Bench of the Tribunal in *LD Textile Industries v. Commissioner of Customs, Ahmedabad [2005 (190) ELT 174 (Tri-LB)]* has held that

> *'26. The ld. Advocate for the appellants then argued that Section 28 of the Customs Act is not invokable when the assessments were provisional. It is a fact that out of three Bills of Entry presented at Veraval, two were provisionally assessed. The show cause notice issued by Collector of Customs, Gujarat seeks to demand duty under Section 28.*
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> *27. A similar question arose in the case of Reliance Industries Limited v. Union of India - 1988 (36) E.L.T. 49 (Bom.). M/s. RIL cleared goods under Project Import Regulations, which were assessed provisionally. Without finalizing the Bills of Entry a show cause notice was issued alleging misdeclaration and demanding differential duty. This was challenged before the Hon'ble Bombay High Court. It was argued before the court that once the goods were cleared under Section 47 of the Customs Act, there is no scope to issue a show cause notice as such a step would amount to reviewing an order without going through the procedure laid down in Section 130 of the Customs Act. The Court rejected this contention after referring to the decisions in the Jain Sudh Vanaspati [1982 (10) E.L.T. 43 (Del.)], Popular Dye Chem etc. [1987 (28) E.L.T. 63 (Bom.)] stating "these decisions have no application to a provisional assessment and clearance, as in the present one, which has been granted under the Project Contract Regulation. By the very nature such assessments of goods are provisional". The Hon'ble High Court*

therefore held that a show cause notice can be issued under Section 124 even without finalizing the assessment. This Single Judge decision was upheld by the Division Bench which observed that clearances made under Project Import Regulations are under Section 143 of the Customs Act. Continuity Bonds have been executed by the importers at the time of clearances. The situation in the present case is similar if not identical. The allegations in the show cause notice are two fold. The appellants misdeclared the goods at the time of import and secondly the appellants have not observed the conditions of the Notification under which duty free clearance was accorded thereby rendering the goods liable to confiscation. The appellants executed a bond at the time of clearance as in the case of RIL cited supra. If a show cause notice in the case of RIL can be held to have been rightly issued there is no reason as to why in the present case it should not be held to be so.

28. While on the subject we may also refer to the case of Paharpur Cooling Towers Pvt. Ltd. - 1999 (107) E.L.T. 518. The Tribunal after distinguishing the decision in Union of India v. Godrej Boyce Manufacturing Company - 1989 (44) E.L.T. 3 (Bom.) and relying on Duncan Agro Industries v. Union of India - 1989 (39) E.L.T. 511 (Del.) later affirmed by the Supreme Court, held that "an adjudicating authority cannot keep the issue and confirmation of demand hanging in the air to be quantified on the finalisation of the provisional aspects of the assessments". The Tribunal held that it is perfectly in order to arrive at the quantum of duty while adjudicating a case even when the initial assessments were provisional. We are aware that this decision and the one in Duncan Agro are in the context of provisional assessments made under Central Excise Act. We have merely referred to these decisions to indicate that both in the Customs Act as well as in the Central Excise Act, action to proceed against the offending goods can be started and concluded even when the

> *assessments were provisional. In the present case two Bills of Entry were provisionally assessed and one finally.'*

and relied on the decision of the Hon'ble Supreme Court in *Commissioner of Customs, Mumbai v. Virgo Steels [2002 (141) ELT 598 (SC)]* about proceeding to adjudicate without notice.

5. We do not believe the decision in *re LD Textile Industries* would assist the submission of Learned Authorized Representative as the issue therein pertained to diversion of imported goods after clearance implying an entirely different offence; in the present instance, the assessments were under 'risk management scheme' of unsupervised clearance requiring option for intervention on particulars pertinent to assessment. Discrepancy in quantity or description is inherently present in the proceeding for finalization.

6. That was the crux of the finding that

> *'6. The confiscation proposed in the show-cause notice was under Section 111(o) of the Customs Act, which was relatable to the question whether the importer had committed breach of any condition attached to Customs Notification No. 203/92. If they have committed such breach, they would not be entitled to exemption from payment of duty on the imported raw-material. In other words, the ground on which confiscation was proposed in the show-cause notice is one normally associated with assessments inasmuch as exemption notifications are taken note of by the assessing authority. The penalty proposed under Section 112(a) of the Act is one which depended on the confiscability, or*

> *otherwise, of the goods under Section 111 of the Act. In other words, the proposal to confiscate the goods under Section 111 and to impose penalty on the importer under Section 112 is linked to assessment. Where the finalisation of the assessments is yet to come through, such proposal would have no relevance. The learned Commissioner of Customs is perfectly right in having dropped all the proposals made in the show-cause notice. In the result, his order stands affirmed and these appeals are dismissed.'*

in *re Exotic Fashions* which dismissed the appeal of Revenue on dropping of proceedings for confiscation by the adjudicating authority. In *re Saharsh Distributors Ltd*, the Tribunal was persuaded by the precedent of the decision of the Hon'ble Supreme Court in *Commissioner v. ITC Ltd [2006 (203) ELT 532 (SC)]* which erases the precedential value of decision of the Tribunal in *re LD Textile Industries* rendered earlier.

7. There is no dispute on the discharge of differential duty and the interests of the exchequer, thus safeguarded, will not be prejudiced by setting aside the impugned order and the notice restored to the original authority for disposal along with proposal to finalise the provisional assessment of the appropriate bill of entry.

(Order pronounced in the open court on 29/08/2023)

(AJAY SHARMA)
Member (Judicial)

(C J MATHEW)
Member (Technical)

**/as*