CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL, MUMBAI

REGIONAL BENCH - COURT NO. I

Customs Appeal No. 87438 of 2014

(Arising out of Order-in-Original No. MUM-CUSTM-PAX-COM-16-13-14 dated 28.03.2014 passed by the Commissioner of Customs, CSI Airport, Mumbai)

M/s Halliburton Offshore Services Inc. **.... Appellant**
A-18, MIDC Estate, Cross Road – B,
Andheri (East), Mumbai – 400 093

Versus

Commissioner of Customs (Airport), Mumbai **.... Respondent**
CSI Airport, Avas Corporation Point,
Makawana Lane, Andheri-Kurla Road
Andheri (East), Mumbai – 400 059

Appearance:

Shri D.H. Nadkarni, Advocate for the Appellant

Shri M.H. Patil, Authorized Representative for the Respondent

CORAM:

HON'BLE MR. S.K. MOHANTY, MEMBER (JUDICIAL)
HON'BLE MR. M.M. PARTHIBAN, MEMBER (TECHNICAL)

FINAL ORDER NO. A/85437/2024

Date of Hearing: 18.04.2024
Date of Decision: 18.04.2024

PER: S.K. MOHANTY

Briefly stated, the facts of the case are that the appellants herein had imported logging, perforation, stimulation, tools & testing materials etc., for undertaking the Oil Exploration services within India. Based on some intelligence, Directorate of Revenue Intelligence (DRI) initiated investigation and observed that the appellants had evaded customs duty by resorting to undervaluation of the said imported goods. On the basis of DRI investigation, show-cause proceedings were initiated for recovery of the differential duty in respect of the imports made for the period from 08.11.1993 to 18.08.1995. The show-cause notice (SCN) dated 30.03.1999 issued in this regard was adjudicated vide Order-in-Original dated 17.01.2000, wherein the learned Commissioner of Customs had confirmed the customs duty amount of Rs.69,37,035/- along with interest on the appellants and also ordered for imposition of penalty of Rs.3 crores under the *proviso* of Section 112(a) and (b) of the Customs Act, 1962. The duty amount of Rs.61 lakhs and Rs.8,37,035/- deposited by the appellant during the course of investigation were appropriated against the confirmed duty demand. Feeling aggrieved with the order dated 17.01.2000, the appellants had preferred an appeal before this Tribunal and the Tribunal vide order dated 16.12.2005 had allowed the appeal filed by the appellants. Against the said order dated 16.12.2005, the Department had preferred appeal before the Hon'ble Bombay High Court and vide order dated 5.01.2011, the Hon'ble High Court has quashed the order dated 16.12.2005 passed by the Tribunal and remanded the matter back to the Tribunal for deciding the appeal in accordance with law. Pursuant to the remand directions of the Hon'ble Bombay High Court, this Tribunal took up the *de novo* proceedings and vide order dated 13.02.2013 has disposed of the appeal filed by the appellants by remanding the matter back to the original authority for re-determination of duty amount as per paragraph 5 recorded in the said order. In the order dated 13.03.2013, the Tribunal has kept all issues open for consideration by the original authority.

1.1 Pursuant to the remand direction dated 13.02.2013, the original authority took up *de novo* adjudication proceedings and vide Order-in-Original dated 28.03.2014 (herein after, for short, referred to as "the impugned order") has confirmed the demand as proposed for recovery in the show-cause notice dated 30.03.1999. The demands confirmed in the present impugned order and the earlier order dated 17.01.2000 remained the same, except the quantum of penalty, which was reduced from Rs.3 crores to Rs.2 crores in the impugned order. Being dis-satisfied with the impugned order dated 28.03.2014, the appellant has preferred this appeal before the Tribunal.

2. Learned Advocate appearing for the appellants submitted that the show-cause notice dated 30.03.1999 issued for the period 08.11.1993 to 18.08.1995 is clearly barred by limitation of time inasmuch as the said notice was issued beyond the period of five years from the relevant date. As regards the observations recorded in the impugned order that the voluntary deposit made and adjusted

against time bar demand is sustainable, learned Advocate has stated that the original authority has blindly placed reliance on the order dated 06.07.1994 passed by the Tribunal in the case of *India Cement Ltd. Vs. Collector of Central Excise, Madras – 1994 (18) ELT 499 (Tri).* He has stated that the appellant had taken the plea of limitation right from the beginning during the course of adjudication proceedings. He further submitted that since, the issue of limitation was not considered in the case of India Cement Ltd. (supra), ratio of such decision cannot be applied for deciding the present issue differently. To support this contention, the learned Advocate has relied on the decision of the Tribunal in the case of *Gopalji Heavy Lifters Vs. Commissioner of Customs (Import), Mumbai – 2017 (357) ELT 537 (Tri-Mum.).* He further submitted that the penal provisions contained in Section 112(a) and (b) *ibid* should not be invoked for imposition of penalty on the appellant inasmuch as there was no proposal made in the show-cause notice for confiscation of the goods and the impugned order has travelled beyond the scope of the show-cause notice by ordering for confiscation of the goods and for imposition of penalty. Learned Advocate also submitted that the impugned order, though has discussed the provisions of Notification No. 86/95-Cus dated 01.03.1994, but failed to consider the subsequent Notification No. 66/95-Cus dated 16.03.1995, wherein the condition prescribed towards the value of imported consignment up-to the limit of Rs.10,000/- was deleted.

3. On the other hand, learned Authorized Representative appearing for Revenue reiterated the findings recorded in the impugned order and supports the order insofar as it has confirmed the adjudged demand on the appellants.

4. Heard both sides and examined the case records.

5. It is an admitted fact on record that the appellants had paid an amount of Rs.69,37,035/- during the course of investigation with regard to the imports made under the disputed Bills of Entry. The appellant had also raised the point of limitation for issuance of show-cause notice before the adjudicating authority as well as before the Tribunal during the course of initial round of litigation. Thus, in such circumstances, the decision of this Tribunal in the case of *India*

Cement Ltd. (supra) cannot be relied upon to hold that the appellants had not raised the issue of limitation earlier and the same was raised for the first time before the adjudicating authority, while passing the *de novo* adjudication order. We find that the co-ordinate Bench of this Tribunal in the case of *Gopalji Heavy Lifters (supra)* has considered the facts involved in the *India Cement Ltd. (supra)* and has held that when issue with regard to limitation has been raised before the original authority, the same should be addressed while adjudicating the matter. The relevant paragraphs in the order dated 15.11.2016 (Gopalji Heavy Lifters) are extracted herein below: -

> ***"8.*** *We have perused the decision in re India Cements cited by the adjudicating authority in support of the adjustment. That decision was of a Special Bench which, consisting as it then did of three members, decided by a majority of two-to-one that the demand would sustain. The demand was against a Central Excise assessee who, as a manufacturer, was a regular payer of duties. The observations of the majority, recorded separately, would place the facts in true light.*
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> > *"15. The duty demanded was paid by the factory, albeit, as the counsel for India Cements said, under protest. The question that, therefore, arises is, should the Tribunal order the Central Excise to return this money as it was recovered under a demand that was time barred. We think not.... The demand was quite right to the extent that the money demanded was due to the Central Excise revenue. The only flaw in the demand is that it was issued outside time.*
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> > *17.... It is for the first time that during the course of arguments before us that it came out that the demand made by Central Excise for recovery of duty ... from the appellants was time-barred. Earlier this point was not raised before any other authority. Even in the grounds of appeal this point was not taken. It is nowhere on records that the appellants were forced to pay this duty amount or that any coercive measures were adopted by the department to make the appellants pay that duty amount. What is apparent is, a demand was raised by the Department for payment of the duty amount which the appellants were to pay and in pursuance of that demand, the appellants paid that duty amount which might be barred in time.'*
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> ***9.*** *It is apparent that the adjudicating authority has either not read the decision supra and was misguided into believing what was impressed upon him or, being aware of its inapplicability, deliberately avoided citing the relevant extract in the hope that the citation would pass suffice to convince. The facts could not be more startlingly at variance : a Central Excise assessee, on being served with a demand, paid the amount so demanded without ever raising the issue of limitation of time at any stage except in oral arguments before the Tribunal. It was, consequently, held that duty paid, with complete awareness, and acceptance, of a demand is not liable to be returned even if the mechanism for recovery was absent. Here no demand had been issued when the amount was 'voluntarily' paid by M/s. Gopalji Heavy Lifters and the notice had been contested on limitation before the original authority. So too before us and so assertively pressed by learned Counsel for appellant. Consequently, we affirm the position in law that 'adjustment' is but a euphemism for 'appropriation' and, just as equally, without legal sanctity. We hold that adjudicating authority has exceeded his powers in adjusting Rs. 26,27,103, and interest of Rs. 13,86,709, from the voluntary deposit."*

6. In view of the above, we are in agreement with the submissions made by the appellant that they had taken a plea of limitation all along before the adjudicating authority at the time of first round of adjudication of the matter arising out of the show-cause notice dated 30.03.1999. Since part of the demand has been confirmed in the impugned order beyond the period of 5 years, we are of the view that the said demand confirmed beyond the extended period of limitation cannot be sustained. Since the adjudged demand was confirmed both for the period within 5 years and beyond, we are of the view that the original authority should quantify the demand liable to be confirmed against the appellant for imports made by them should be confined to the period of 5 years.

7. We find that the show-cause notice at internal page 7 has held that the goods are liable for confiscation under Section 111(m) *ibid* and on the basis of such proposals made in the show-cause notice, the impugned order dated 28.03.2014 has invoked the provisions of Section 112(a) and (b) *ibid* for imposition of penalty on the appellant. Since the show-cause notice has specifically proposed for confiscation of the goods and the said proposals made thereunder was adjudicated upon by the adjudicating authority, it cannot be said that the proposal for confiscation of goods was considered for the first time by the adjudicating authority and not proposed for in the show-cause notice dated 30.03.1999. Thus, we do not appreciate with the submissions made by the appellants that the adjudicating authority has completely raised a new ground, which was not canvassed in the show-cause notice. Therefore, we are of the view that based on the quantification of the duty demand, the original authority should also discuss about provisions of Section 112(a) and (b) *ibid* for a decision with regard to the quantum of penalty to be imposed on the appellants. For quantification of the penalty amount, the original authority should examine the ratio of judgment delivered by the Tribunal in the case of *Amrit Foods Co. Ltd. Vs. Commissioner of Central Excise, Meerut-I – 2003 (153) ELT 190 (Tri-Del),* which was subsequently upheld by the Hon'ble Supreme Court, reported in *2005 (190) ELT 433 (SC)*.

8. We further find that the benefit of Notification No. 66/95-Cus dated 16.03.1995 has not been considered by the original authority at the time of passing of the impugned order. Since the notification

dated 16.03.1995 has amended the provisions of earlier notification dated 01.03.1994, the said amending notification has the bearing with regard to consideration of the issue of benefit provided thereunder. Therefore, the original authority should also examine the details of the notification dated 16.03.1995 and accordingly decide the issue as to whether, courier parcels imported by the appellant should be liable for payment of duty in terms of the said amended notification.

9. The present issue also involves goods imported as baggage. On reading of the provisions of Section 129A *ibid*, it transpires that this Tribunal has no jurisdiction to deal with the issue of imports made through baggage. Therefore, we are not expressing our views on the imports made by the appellant thorough baggage. The adjudicating authority is at liberty to pass the order in this regard as deemed fit and proper.

10. In view of the foregoing discussions, the impugned order is set aside and the matter is remanded back to the original authority for passing of *de novo* adjudication order on the basis of observations made in the preceding paragraphs. Needless to say, that reasonable opportunity of hearing should be granted to the appellants before deciding the issues afresh.

11. In the result, the appeal is allowed by way of remand.

(Dictated and pronounced in open court)

(S.K. Mohanty)
Member (Judicial)

(M.M. Parthiban)
Member (Technical)

Sinha