CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL MUMBAI

WEST ZONAL BENCH

CUSTOMS APPEAL NO: 168 OF 2011

[Arising out of Order-in-Appeal No: AGS(2) 268/2011 dated 11th January 2011 passed by the Commissioner of Central Excise & Customs (Appeals), Aurangabad.]

Indo Rama Synthetics (I) Ltd
A-31 MIDC Industrial Area
Nagpur …***Appellant***

versus

Commissioner of Customs & Central Excise
N-5, CIDCO, Aurangabad ***…Respondent***

APPEARANCE:

Ms Lakshmi Menon, Advocate for the appellant

Mr Ramesh Kumar, Assistant Commissioner (AR) for the respondent

CORAM:

HON'BLE DR D M MISRA, MEMBER (JUDICIAL)
HON'BLE MR C J MATHEW, MEMBER (TECHNICAL)

FINAL ORDER NO: A/ 85856 /2021

DATE OF HEARING: 05/03/2021
DATE OF DECISION: 05/03/2021

PER: C J MATHEW:

Shorn of the minutiae that dot the records in appeal filed by M/s Indo Rama Synthetics (I) Ltd against order-in-appeal no. AGS(2)268

/2011 dated 11th January 2011 of Commissioner of Central Excise & Customs (Appeals), Aurangabad and in the submission made by both sides during the hearing, the dispute is limited to the computation of liability to duties of customs on the goods, allowed free at the time of import, that remained after completion of export obligation conditional upon which the exemption had been permitted to be availed. Even less complex is the plea of Learned Counsel for appellant that the impugned order, taken to its logical conclusion, should have rendered proceedings for recovery of differential duty to be barred by being beyond the normal period of limitation prescribed in section 28 of Customs Act, 1962.

2. The appellant, having been issued with ‘advance licence’ dated 27th March 2002 entitling them to procure ‘mono ethylene glycol (MEG)’ without payment of duties of customs under notification no. 50/2000-Cus dated 27th April 2000, effected imports of 3400 MT valued at ₹ 6,30,19,496.00 against bill of entry no. 42/29.04.2002 and 2450 MT valued at ₹5,41,08,248.00 against bill of entry no. 84/05.06.2002. It is common ground that the appellant had fulfilled their obligation under the relevant scheme of the Foreign Trade Policy and, upon obtaining ‘export obligation discharge certificate (EODC)’ from the competent authority, found itself possessed of 538.325 MT of the imported goods that remained after deploying 5301.675 MT as inputs in the manufacture of eligible excisable goods. It is also

common ground that, by adopting assessable value of ₹ 18,535 per MT, they discharged liability of ₹ 45,49,900 as duties of customs and ₹ 11,55,500 towards interest thereon on 7th January 2004. Admittedly, the assessable value, based on purchase price of the earlier and larger of the two consignments, was not acceptable to customs authorities who, placing reliance on the higher value of the later consignment, arrived at an alternative computation of ₹ 54,21,296 towards duties of customs and demanded differential duty of ₹8,71,396, along with interest thereon, in show cause notice dated 16th April 2007.

3. The survival of the confirmation of this demand, despite the penalty imposed under section 114A of Customs by the original authority having been set aside, in the impugned order is the sole grievance agitated by Learned Counsel in this proceeding. According to her, the first appellate authority, after taking note that the constraints in ascertainment of stock-in-balance of the two consignments separately left no option but to value the unutilized goods by 'first in first out (FIFO)' method, had no hesitation in returning the finding that ingredients warranting recourse to the penalty under section 114A of Customs Act, 1962 did not exist which, she contends, should been held to be no less applicable to the demand under section 28 of Customs Act, 1962 as decided by the Hon'ble Supreme Court in *Commissioner of Customs, Mumbai v. MMK Jewellers [2008 (225) ELT 3 (SC)]*. It was also argued that no

particular method of valuation had been prescribed, till 26th July 2007, by Central Board of Excise &Customs (CBEC) for such computation at the time of discharge of duty liability by the appellant.

4. According to Learned Authorised Representative, there is no flaw in the finding of the lower authorities as the difference in value of the two imported consignments was sufficient motive, even as it is natural for any commercial organisation to utilise inputs in the order of procurement, to attempt evasion of duty by adoption of the lesser of the two values for assessment. In his view, the spirit behind circular no. 27/2007-Cus dated 26th July 2007 of Central Board of Excise & Customs (CBEC), being articulation of normal commercial practice, was not intended solely for prospective implementation. Furthermore, he relied upon the decision of the Hon'ble Supreme Court in *Commissioner of Central Excise, Calcutta v. Pradyumna Steel Ltd [1996 (82) ELT 441 (SC)]* wherein it has been held that

> *'3. It is settled that mere mention of a wrong provision of law when the power exercised is available even though under a different provision, is by itself not sufficient to invalidate the exercise of that power. Thus, there is a clear error apparent on the face of the Tribunal's order dated 23-6-1987. Rejection of the application for rectification by the Tribunal was, therefore, contrary to law.'*

to contend that decision of the Larger Bench of the Tribunal in *Bombay Hospital Trust v. Commissioner of Customs, Sahar, Mumbai*

[2005 (188) ELT 374 (Tri-LB)], which held that recovery of duties of customs on conditionally exempted goods did not have to resort to section 28 of Customs Act, 1962, did validate the demand even if effected under a wrong authority of law.

5. It is abundantly clear from the facts and circumstances that the appellant, in accordance with eligibility for exemption of duties of customs in the import of 'mono ethylene glycol (MEG)' for manufacture and supply of specified goods, had not only availed of that benefit but also, upon fulfilment of the obligation thereto by utilisation of less than permissible quantity, discharged duty liability on goods that remained by applying the lower of the two declared values. Admittedly, the appellant did not maintain separate records of utilisation from the two consignments which would have clearly identified the duty liability on 'mono ethylene glycol (MEG)' that remained unused. In the absence of any substantiation of the practice followed in consumption of inputs that would detract from the appropriateness of 'first in first out (FIFO)' method, and despite liability having been discharged on the basis of the value of the earlier consignment even though there is no doubt that inputs utilised exceeded the quantity contained therein, the grievance that the first appellate authority did not take the findings to its logical conclusion yet remains as the cavil to be addressed in these proceedings.

6. Though Learned Authorised Representative did rely upon the

decision of the Hon'ble Supreme Court in *re Pradyumna Steel Ltd* to suggest that the proceedings initiated for recovery under section 28 of Customs Act, 1962, which, doubtlessly, could not be invoked beyond the period specified therein, would not impede legality of confirmation of duty liability that, as held by the Tribunal in *re Bombay Hospital Trust*, was due under the alternative authority of the exemption notification itself, that proposition does not find favour with us. Interestingly enough, though, by the rescinding enactment of section 70 of Finance Act, 2013, now consigned to the archives, section 17 of Customs, Central Excises and Salt and Central Board of Revenue (Amendment) Act, 1978 did incorporate section 143A in Customs Act, 1962 for such eventuality but that was never notified for bringing into force; that very legislative intent appears to have been reflected in the decision of the Tribunal. However, from the enunciation of

> *'21. ... we agree with the conclusion in Lady Amphthil (supra) that duty can be recovered by the Department when post importation conditions of an exemption notification are not fulfilled. We, however, do not agree with the observation in Lady Amphthil (supra) that the period of limitation in such cases will commence from the date of issue of notice. Since the time limit prescribed under Section 28 has been held to be not applicable to such cases, and since there is no other specific time-limit under the customs law to cover such cases, we are of the view that the notice of demand will not be subject to any limitation of time in such cases of non-fulfilment of post-importation conditions casting a continuing*

obligation...'

in *re Bombay Hospital Trust,* it is evident that denial of the exemption in notification no. 50/2000-Cus dated 27th April 2000, and consequent recourse to recovery, had its genesis in non-compliance with the post-importation conditions contingent upon which the availment was sought and allowed. No such breach, or taint thereof, has been sought to be fastened on the appellant in the proceedings leading to this appeal. On the contrary, it would appear that the appellant, though entitled to deploy such materials for the manufacture of any other goods, voluntarily opted for payment of duty. Hence the circumstances in which the decision was handed down in *re Bombay Hospital Trust* does not apply to the present dispute.

7. Though in the valuation of the stock remaining after fulfilling the prescribed obligation, the appellant chose the most favourable from among 'first in first out (FIFO)', 'last in first out (LIFO)', 'average price' and 'weighted average price' and which was sought to be substituted by that most favourable to Revenue, it is also beyond the pale of controversy that a 'proper' method was pinpointed only long after the duty liability had been discharged. It is also evident that, even in the absence of specific declaration of the method adopted, the computation sufficed as suitable indication. The finding in the impugned order that there has been no suppression, or intent to evade duty, is, consequently, unassailable. That this is so is further

evidenced by the conspicuous lack of any appeal by Revenue against such finding. The absence of any ingredient among those specified in section 114A of Customs Act, 1962 would justify, to no lesser extent, the lack of recourse also to the extended period of limitation for recovery of differential duty and interest thereon.

8. In view of the above, we find that the claim of the appellant cannot be discarded and, therefore, the demand fails. Appeal is allowed on our finding of applicability of limitation without going into the correctness of the computation of duty liability.

(Operative Part of the Order Pronounced in Open Court on 5th March 2021)

(Dr. D M Misra)
Member (Judicial)

(C J Mathew)
Member (Technical)

**/as*