CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL, MUMBAI

REGIONAL BENCH - COURT NO. I

Customs Appeal No. 90054 of 2014

(Arising out of Order-in-Appeal No. GOA-EXCUS-000-APP-047-14-15 dated 19.08.2014 passed by the Commissioner (Appeals), Central Excise & Customs, Goa)

M/s Ratnagiri Gas & Power Pvt. Ltd. **.... Appellant**
Vill. - Anjanvel, Tal. – Guhagar,
Ratnagiri, Maharashtra

Versus

Commissioner of Customs, Pune **.... Respondent**
41/A, ICE House, Sassoon Road,
Pune – 411 001

Appearance:

Shri Akhilesh Kangsia a/w Ms. Madhura Khandekar, Advocates for the Appellant

Shri Mahesh 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/87462/2024

Date of Hearing: 08.08.2024
Date of Decision: 09.12.2024

PER: M.M. PARTHIBAN

This appeal has been filed by M/s Ratnagiri Gas & Power Pvt. Ltd. (for short 'RGPPL' and herein after referred to as 'the appellants') assailing the Order-in-Appeal No. GOA-EXCUS-000-APP-047-14-15 dated 19.08.2014 (herein after referred to as "the impugned order") passed by the Commissioner(Appeals), Central Excise & Customs, Goa.

2. The facts of the case are summarized herein below: -

2.1 The appellants vide an agreement dated 02.02.2012 entered with Gas Authority of India Limited (GAIL) had purchased 1960086.950 MMBTU [85,000 cubic meters] of Liquefied Natural Gas (LNG) on high sea sale basis from GAIL. Initially, GAIL had in turn had purchased and imported

30,00,000 MMBTU [1,29,500 cubic meters] of LNG from Excelerate Energy Limited, Woodlands, Texas, USA, who is the supplier located abroad, and out of which 1960086.950 MMBTU [85,000 cubic meters] of LNG alone was sold by GAIL to RGPPL on high sea sale basis. Upon arrival of the vessel carrying LNG at the port of import, both RGPPL and GAIL, respectively had filed Bills of Entry (B/Es) for their imports. RGPPL had filed B/E bearing No. 04/2011-12 dated 27.03.2012 for provisional assessment on the basis of Bill of Lading no. 20120301 dated 06.03.2012, for quantity of LNG purchased by them on high sea sale basis from GAIL i.e., 1960086.950 MMBTU [85,000 cubic meters] of LNG. Further, a separate B/E No. 05 dated 30.03.2012 had been filed by GAIL for import of balance 935921.750 MMBTU [44,500 cubic meters] of LNG by them, which is not a subject matter in this case. As per assessment practice followed by the Customs authorities at the port of import for LNG imports, RGGPL had paid Rs. 7,79,37,340/- towards provisionally assessed import duty, as applicable to the entire quantity of LNG mentioned in bill of lading vide TR-6 Challan No. 77/2011-12 dated 27.03.2012. Only after such payment of provisionally assessed duty, permission for discharge of LNG was granted by the assessing officer of the jurisdictional Customs authorities at the port of import.

2.2 The learned Advocate appearing for the appellants submitted that during unloading of the LNG cargo, a technical glitch had occurred in the LNG terminal and the unloading of LNG had to be terminated midway. RGPPL was able to unload only 311837.03 MMBTU [12,000 cubic meters] of LNG which is 14% approx. of the entire quantity purchased from GAIL. Further, it is submitted by them that even after waiting for 21 days, the technical glitch could not be resolved, and therefore the balance quantity of LNG which could not be unloaded, was not imported and the same were exported out of the country.

2.3 It is further submitted by the learned Advocate that, upon RGPPL’s request, GAIL had also executed an agreement dated 25.09.2012 with the supplier abroad to re-sell the balance quantity left in the vessel. According to such agreement, RGPPL had returned the balance quantity of LNG which could not be unloaded from the vessel. Thus, he stated that the appellants through GAIL had exported back the entire quantity of LNG which could not be unloaded and hence these are not in the nature of imported goods.

2.4 On the other hand, learned Authorised Representative reiterated the findings of the learned Commissioner (Appeals) in the impugned order.

3. Heard both sides and perused the records of the case.

4. The issues for consideration before the Tribunal are as follows: -

(i) Whether the refund of customs duty claimed by the appellants in respect of goods which are not unloaded at the port of import is admissible?

(ii) Whether the element of unjust enrichment are required to be examined and if so, whether these have been properly examined on the basis of documentary evidences submitted by the appellants and as required under Section 18/27 of the Customs Act, 1962?

5.1 From the records of the case, we find that based on the factual position evidenced by Survey Report, the imported goods which were actually unloaded at the port of import, in B/E No. 04/2011-12 dated 07.03.2012 was taken up for finalization by the proper officer of Customs/Assistant Commissioner of Customs, Dapoli Division, to reflect the quantity which was unloaded and discharged for home consumption clearance. Vide Order dated 15.03.2013, the Assistant Commissioner had finalized the provisional assessment and assessed the final customs duty payable in respect of the actual quantity of 311837 MMBTU [12844.651 cubic meters] unloaded at the port of import as Rs.4,72,98,000/-, as against Rs.7,79,37,340/- paid at time of provisional assessment for the entire quantity of 1960086.950 MMBTU [85,000 cubic meters].

5.2 Pursuant to the above Order dated 15.03.2013, RGPPL had filed application for refund of excess amount of customs duty paid during provisional assessment i.e. Rs.3,06,39,340/- [7,79,37,340 – 4,72,98,000] vide their letter dated 22.07.2013 which is subject matter of present appeal. This refund represents duty paid on LNG which was not unloaded and not cleared for home consumption.

5.3 In pursuance to the finalization of assessment of the impugned B/E dated 27.03.2012 vide Order dated 15.03.2013, the appellants have filed refund application seeking refund of customs duty paid in excess to the amount of duty finally assessed viz., refund of excess amount of customs duty paid during provisional assessment i.e. Rs.3,06,39,340/- [7,79,37,340 – 4,72,98,000]. Against the said refund application/letter dated 22.07.2013, the original authority had sanctioned the refund claim of Rs.3,06,39,340/-. However, he directed that such refund shall be credited to the Consumer Welfare Fund (CWF) under Section 27(2) of the Customs Act, 1962 on the ground that the appellants have failed to prove that the incidence of duty burden had not been passed by them to any other person. Feeling aggrieved with the above order, the appellants have filed an appeal before the Commissioner (Appeals), Goa, who in modifying the original order, has sanctioned refund of Rs.30,39,991/- and credited the balance amount to the CWF by upholding the order of crediting the balance amount by the original authority.

6. We find that the issue of refund of customs duty is arising on account of excess duty collected on the total quantity of goods/LNG proposed to be imported by the appellants as per Bill of Lading, as against the actual quantity of imported goods/LNG discharged by the vessel. The facts of the case are not disputed by Revenue that as against the quantity estimated to be discharged at the time of initial filing of B/L and B/E for which total duty was paid them on provisional basis, the actual quantity discharged was less by 311837.03 MMBTU.

7.1 The learned Commissioner (Appeals) in the impugned order had examined the details of the customs duty paid and the duty finally assessed and have come to the conclusion that the certificates produced by the Chartered Accountant have been taken into account and only an amount of Rs.3,06,39,340/- is refundable on account of customs duty paid in excess by the appellants. Learned Commissioner (Appeals) had also taken into account the fact that the final assessment of the duty vide Order dated 15.03.2013 by the original authority, was modified on the basis of the Order dated 16.09.2013 passed by the first appellate authority in respect of issues relating to demurrage charges/chartering expenses, retention charges, HSFO consumed during the period of vessel lying at the port of import, value of mooring trails etc. and the appellants have further filed one another refund claim of Rs. 2,75,99,349/- which was duly sanctioned by such original authority. Since, the original authority had referred to the Chartered Accountant’s certificate and the Books of Account for the relevant period, to consider the element of unjust enrichment and thereafter passed the refund order to the appellants for the above amount, he had adjusted the amount of Rs.2,75,99,349/- being an amount eligible for refund on account of the Order-in-Appeal dated 16.09.2013 being accounted in such CA Certificate and therefore allowed refund of Rs.30,39,991/- only, being the balance amount (Rs.3,06,39,340 - Rs.2,75,99,349 = Rs.30,39,991/-).

7.2 In this regard, we find that the appellants have submitted the complete details of Annual accounts with suitable explanation in terms of Note 12 and 18 to state that amount of refund claim on account of various issues have been duly shown in the balance-sheet under the head "Assets (non-current assets and current assets)" and further, they have not passed on the duty burden to any other person, on the quantity of LNG which was not unloaded and the duty was initially paid provisionally for total quantity. We find that the various details including ledger accounts, Chartered Accountant's certificate dated 18.06.2013, 06.07.2013 & 08.04.2014 have to be read together with complete financial records submitted, in order to arrive at whether the elements of unjust enrichment have been fulfilled or not. We find that impugned order, though referred these documents, have not gone into the details of exact quantum of the customs duty applicable on the imported goods which were unloaded at the port of import and the quantity of goods which was not unloaded being shortage of LNG as against the proposed quantity intended to be imported show in B/L and B/E, but which was exported back. Further, the impugned order has referred to issue arising from one another order of the Commissioner (Appeals) dated 16.09.2013, where the valuation of the imported goods alone was examined and the assessable value was accordingly re-determined. Direction was given to the original authority for re-determination of assessable value in respect of charges to be included. On the above basis, the original authority had also re-determined the final assessment of customs duty and revised it downwards from Rs.4,74,82,178/- to Rs. 1,98,82,829/- and also sanctioned the refund claim of Rs. 2,75,99,349/- after satisfying himself on the element of unjust enrichment on the basis of same Chartered Accountant's certificate.

7.3 We find that the refund of duty arising on account of the present case as decided by the original authority in his order dated 26.11.2013 is arising on account of short landing of the goods / quantity not unloaded, as against the proposed quantity of import of LNG by the appellants. It is also a fact not disputed by the Revenue, that the entire quantity of the goods 1960086.950 MMBTU [85,000 cubic meters] of LNG proposed for import by the appellants RGPPL, in actual terms only 311837 MMBTU [12844.651 cubic meters] were unloaded at the port of import. The balance quantity of LNG which could not be unloaded, was exported back out of the country. Hence, these unloaded LNG do not bear the character of imported goods in terms of the definition of 'imported goods' under Section 2(25) of the Customs Act, 1962. Therefore, we are of the considered view, that the question of applicability of Section 12 ibid on the goods which were not at all unloaded and eventually exported back should have been examined by the authorities below at the time of final assessment of customs duty under Section 17(5) *ibid* or at the time of first appeal before the learned Commissioner (Appeals).

8. We also find that there is force in argument made by the learned Advocate for the appellants that in respect of provisional assessment of duty, pending discharge of the imported goods, and when the entire quantity has not been actually discharged, the claim of unjust enrichment does not apply to such cases of goods not unloaded/short landed, by relying upon the orders passed by the co-ordinate Bench of this Tribunal in the cases of *Petronet LNG Ltd. Vs. Commissioner of Customs, Ahmedabad* – 2012 (275) E.L.T. 568 (Tri-Ahmd.) and *Commissioner of Customs, Ahmedabad Vs. Hazira LNG Pvt. Ltd.* – Final Order No. A/11473/2017 dated 20.07.2017. We also find that the order of the Tribunal Hazira LNG Pvt. Ltd. (supra), was upheld by the Hon'ble High Court of Gujarat in the judgement delivered on 15.02.2018.

9. In view of the aforesaid discussions, we find that the issue needs to be examined in detail on the above aspects by examining the legal provisions relating to refund of provisionally assessed duty at the time of finalization under Section 18 of the Customs Act, 1962; judicial pronouncements of the Hon'ble High Court of Ahmedabad and the Orders of the Tribunal as well as the various certificates, books of account produced by the appellants and clear findings have to be given about the eligibility of refund of customs duty towards goods not unloaded/ short landed quantity of goods, which was exported back out of the country. Needless to state that reasonable opportunity of personal hearing shall be given to the appellants and various documents, evidences produced by the appellants should be taken into account and a fresh order shall be passed in the above case.

10. In the result, the impugned order is set aside and the appeal is allowed by way of remand for fresh adjudication of the case by the learned Commissioner (Appeals).

(Order pronounced in court on 09.12.2024)

(S.K. Mohanty)
Member (Judicial)

(M.M. Parthiban)
Member (Technical)

Sinha