CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL MUMBAI

WEST ZONAL BENCH

CUSTOMS APPEAL NO: 90132 OF 2014

[Arising out of Order-in-Appeal No: MUM-CUSTM-PRV-APP-437 TO 440/14-15 dated 30th September 2014 passed by the Commissioner of Customs (Appeals), Mumbai.]

Deputy Commissioner of Customs (Preventive)
Alibagh Division, Koliwada, Alibagh,
Dist: Raigad - 402201 … ***Appellant***

versus

Shreeji Overseas (I) Pvt Ltd
Sreeji House, Plot No. 269 Sector 1/A
Mamlatdar Office Road, Gandhidham - 370210 ***…Respondent***

APPEARANCE:

Shri Krishna Azad, Assistant Commissioner (AR) Advocate for the appellant

None for the respondent

CORAM:

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

FINAL ORDER NO: 85795/2025

DATE OF HEARING: 04/11/2024
DATE OF DECISION: 01/05/2025

PER: C J MATHEW

Towards the end of 1732, a man by the name of Benjamin Franklin, later to be famous as one of the architects of the Declaration of Independence of the United States of America (USA), published

‘Poor Richard’s Admanack’

and, since then, continued to bring out editions every year. In the 1753 edition is found

‘Haste makes waste’

and nothing could be more typical of that aphorism than this appeal which is before us. Ostensibly, it was only when M/s Ganesh Polychem Ltd, as a respondent in appeal of Commissioner of Customs (Preventive) under section 129A of Customs Act, 1962 upon review undertaken by the competent Commissioners of Customs on 27th December 2014 with consequent grievance arising from disinclination on the part of Commissioner of Customs (Appeals), Mumbai – II to decide the appeals of ten importers on merit which, by amendment to Customs Act, 1962 withdrawing power to remand for fresh decision from the purview of section 128A of Customs Act, 1962, with effect from 11th May 2001 through Finance Act, 2001, that they came to be designated as an identified disputant in the controversy. Review of ten separate orders-in-appeal of the first appellate authority, culminated in direction to Deputy Commissioner of Customs (Preventive), Alibag Division to file appeal under section 129A(2) of Customs Act, 1962 and which appeared to have impressed that worthy into taking the ‘instruction’ literally to file one single appeal against ten different importers as respondents citing the impugned order[1], disposing off disputation over imports effected between 2004-05 and 2009-10, as cause of grievance.

2. In the meanwhile, as early as August 2011, in terms of instruction[2] of Central Board of Excise and Customs notifying monetary limit for filing of appeals, which, *inter alia,* determined ₹ 5,00,000 as threshold for disputation by departmental authorities before the Tribunal, some of the 18 orders should not have been agitated; that, nonetheless, did not deter the reviewing authorities in ordering further litigation or that lip service was ostensibly paid to the 'new litigation policy (NLP)', at least, by recourse to exceptions provided. From this combination of the aspects, *viz.,* single appeal and no desegregation according to bills of entry, we are unable to consider the thresholds for conformity thereof as at least two of the appellate order are not excludable. Accordingly, we are left with no option but to determine the contention of the reviewing authorities that the order of the first appellate authority was not legal and proper solely for the reason that, instead of deciding on merit in the appeals of the ten importers, the matters were remanded to the original authority.

3. The first appellate authority, in its wisdom, decided the appeals

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[1] [order-in-appeal no. MUM-CUSTM-PRV-APP-437 TO 440/14-15 dated 30th September 2014]
[2] [issued from F.No. 390/Misc./163/2010-JC dated 17th August 2011]

in separate orders for each importer and, on the limited plea that 'proper officer' had, contrary to section 17(1) of Customs Act, 1962, finalized bills of entry without a speaking order, restored the disputes before the original authority. That flaw on the part of the 'proper officer' subsisted is not disputed by the reviewing authorities but yet, impliedly, the first appellate authority was expected to rectify the flaw by stepping into the shoes of 'proper officer' to confirm the assessment by 'proper officer' on finalization of 'provisional assessment' and despite being aware that the first appellate authority had before it nothing but 18 bills of entries, filed by the 10 importers for import of 'crude sulphur' in bulk at various times in the second half of the first decade of the new millennium and the demand for differential duty, that lacked demonstrated application of mind.

4. M/s Ganesh Polychem Ltd, incidentally, happens to be the lone importer not issued with the show cause notice before two bills of entry of theirs had been finalized and their intervention with 'memorandum of cross-objections', which, owing to having been filed beyond the period stipulated in Customs Act, 1962, attended to as a separate entity led to them, along with first of the respondents, being acknowledged by the Registry for the purpose of notice. Further, as none of the respondents, including M/s Ganesh Polychem Ltd, made their appearance before the Tribunal, the grievance of the reviewing authority, being, within a narrow compass, enabled conclusion of the

hearing with the assistance of Learned Authorized Representative, who was just as hapless as everyone else concerned with the proceedings could be.

5. From the records it is seen that this chapter of accidents commenced with a purported 'special drive' though we are unable to ascertain the prompt for the finalization of eighteen bills of entry, that had been assessed provisionally by the specially designated 'proper officer', through only ten orders clubbing the imports at Dharamtur in the Alibag Division of the customs jurisdiction of each of the imports. Apparently these demands were not in compliance with obligation to issue 'speaking order' prescribed in section 17(5) of Customs Act, 1962 compelling them, in consequence, to seek relief to the extent that the impugned bills of entries had been finalized. We find that there is no dispute that the impugned bills of entry had been assessed 'provisionally' and consequently, in accordance with section 18 of Customs Act, 1962, permitting 'provisional assessment' as an interim measure till such final assessment was rendered under section 17 of Customs Act, 1962 by the 'proper officer' and, therefore, with the consequence thereof, for differential duty to be recovered or refund to be allowed as intended in section 18(2) of Customs Act, 1962. Thus, as on the date of finalization of assessment of the impugned bills of entry, and with effect from 8^{th} April 2011, the 'proper officer' was obligated to pass 'speaking order' in terms of section 17(5) of

Customs Act, 1962. That, however, is lacking

6. Properly speaking, the first appellate authority could not be faulted for failing to decide the issue on merit in the absence of statutorily mandated justification, befitting the responsibility and accountability devolving on 'proper officer', and, more so, in the light of the amended obligation placing onus on the 'proper officer' thereby. There is no doubt that the Finance Act, 2001 did exclude remand as option available with the first appellate authority within the scope of relief and such constraint was, no doubt, agitated before the constitutional courts in appeals and writ petitions owing to which the Central Board of Excise and Customs (CBEC), taking note of these decisions and judgements, issued direction[3] for first appellate authorities, thus

> *'6. In the light of the observations of Hon'ble Supreme Court in the case of MIL India Ltd. and the judgement of Hon'ble High Court of Punjab & Haryana in the case of M/s. Enkay (India) Rubber Co. Pvt. Ltd., M/s. B.C. Kataria and M/s. Hawkins Cookers Ltd., you are requested to issue suitable instructions to the Commissioners(A) working under your jurisdiction to follow the said judgments strictly. It may also be brought to their notice that Hon'ble Supreme Court in the case of MIL India Ltd., while noting that the powers of remand had been taken away, has also categorically stated that the Commissioner (A) continues to exercise the power of*

[3] [F.No. 275/34/2006-CX.8A dated 18th February 2010]

> *adjudicating authority in the matter of assessment and the Commissioner(A) can add or subtract certain items from the order of assessment made by the adjudicating authority and the order of Commissioner (A) could also be treated as an order of assessment. Board instructions dated 25.7.2008 (copy enclosed) may be referred in this regard.'*

7. Surprisingly, and regrettably so, the Central Board of Excise and Customs (CBEC), by insisting that the first appellate authority, and especially in matters of assessment, even in the face of being handicapped by irresponsible discharge of statutory obligation devolving on original authorities, should not remand matter, failed to acknowledge the 'mote' in its own while ignoring the metaphorical 'speck' in the eyes of the first appellate authority. The only other option left to the appellate authority, and which neither such an authority nor supervisory jurisdiction would have found palatable, was invalidation of the finalization for being only partially effected. The first appellate authority did so but, at the same time, was gracious enough not to compromise the interests of exchequer and remanded only to afford another opportunity for the jurisdictional officers to substantiate their grounds for recovery of differential duty in accordance with section 18(2) of Customs Act, 1962, despite which the review thereof insisted the 'buck' should be delegated upwards. None of the judgments relied upon by the review authorities were conceived in circumstances similar to that which faced the first

appellate authority, *viz.*, irresponsible discharge of statutory obligations and disregard of statutorily prescribed powers and accountability. Such disposal by the original authority is sheer prescription for anarchy and chaos and, instead of appreciating the chance offered for rectification, the administrative authorities appeared to have taken umbrage in a casual manner. We do believe that our findings *supra* are not harsh enough for the circumstances but, in our view, that should suffice for disposal of this appeal.

8. The assessment had been pending finalization for over five years and the purported 'special drive' appears to have prompted the hasty disposal thereof. All that the importers sought was justification for being saddled with additional duty liability. The plea made on behalf of respondents before the first appellate authority are on record and it is certainly not a reflection of proper application of mind that the reviewing authorities conveniently chose to overlook all of these. The manner in which the imports have been dealt with by the customs administration is contrary to the provisions of Customs Act, 1962 and, notwithstanding which, the reviewing authority appears to have had the temerity to seek refuge under the very statute that they have chosen, along with 'proper officer', to desecrate. In the circumstances in which this appeal has been filed, contrary to the requirement in section 129A(2) of Customs Act, 1962, warranting review and appeal against individual orders,

inappropriate resort to privileges in Customs, Central Excise and Service Tax Appellate Tribunal (Procedure) Rules, 1982, permitting filing of single appeal, does not come to the rescue in the light of statutory obligations devolving on the reviewing authority.

9. In these circumstances of improper review, we find no reason to interfere with the order of the first appellate authority and, accordingly, dispose off this appeal as lacking in merit.

10. A copy of this order may also be brought to the notice of Chairman, Central Board of Indirect Taxes and Customs (CBEC) for perspective on the manner in which statutory obligations are discharged by statutory authorities.

(Order pronounced in the open court on 01/05/2025)

(AJAY SHARMA)
Member (Judicial)

(C J MATHEW)
Member (Technical)

**/as*