CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL CHENNAI

REGIONAL BENCH – COURT NO. III

CUSTOMS APPEAL No.6 of 2011

(Arising out of Order-in-Appeal No.48/2010 dated 30.09.2010 passed by the Commissioner of Customs & Central Excise (Appeals), Tiruchirapalli)

The Commissioner of Customs **Appellant**
Custom House, New
Harbour Estate,
Tuticorin 628 004.

VERSUS

M/s.R.R. Traders **Respondent**
B-32, Sarvonnati Kirol Road,
Ghatkopar West Mumbai –
400 086.

APPEARANCE :

Shri R. Rajaraman, AC (AR)
For the Appellant

None
For the Respondent

CORAM : HON'BLE MS. SULEKHA BEEVI C.S., MEMBER (JUDICIAL)
HON'BLE MR. SANJIV SRIVASTAVA, MEMBER(TECHNICAL)

DATE OF HEARING : 08.08.2022
DATE OF PRONOUNCEMENT : 12.08.2022

FINAL ORDER No. 40293 / 2022

PER : SANJIV SRIVASTAVA

This appeal is filed by Revenue against Order-in-Appeal No.48/2010 dated 30.09.2010 passed by the Commissioner of Customs & Central Excise (Appeals), Tiruchirappali by which the Commissioner (Appeals) has modified the order of the Assistant Commissioner to the extent of reducing the redemption imposed to Rs.1,60,000/- under Section 125 and penalty to Rs.80,000/- imposed under Section 112 (a) of Customs Act, 1962. The order of original authority is as follows :-

ORDER

i) I reject the declared value of USD 30429/- (Rs.14,19,513/-) (CF) for 1844 Used tyres imported under the Bill of Entry No.482275 dt.23.03.2010 under Rule 12 of Customs Valuation Rules, 2007 and re-determine as USD 33846.4 (Rs.1578935/-)(CF) under Rule 9 of Customs Valuation Rules, 2007 read with Section 14 of Customs Act, 1962.

ii) I confiscate the 1843 Nos. of Used tyres valued at Rs.15,78,935/- (CF) imported under the Bill of Entry No.482275 dt.23.03.2010 under Section 111(d) & 111(m) of the Customs Act, 1962 read with Section 3(3) of The Foreign Trade (Development and Regulation) Act, 1992. However, I give an option to the importer to redeem the same on payment of a Fine of **Rs.3,00,000/- (Rupees three lakhs only)** under Section 125 of Customs Act and on payment of appropriate duty on the re-determined value.

iii) I impose a penalty of **Rs.2,00,000/- (Rupees two lakhs only)** on the importer under Section 112 (a) of the Customs Act, 1962.

2. The matter has been posted for hearing today. None appeared for the respondent. We have heard Shri R. Rajaraman, Asst. Commissioner, Authorized Representative for the Revenue.

3. We also note that in this case appeal has been fled in the year 2011 and Tribunal vide its Stay Order No.641/2011 dated 27.06.2011 held as follows :

> "The application of the Revenue for stay of operation of the order of the Commissioner (Appeals), who has reduced the quantum of fine in lieu of confiscation of used tyres and reduced the penalty, is dismissed, as the question as to whether reduction is sustainable or not as per department's contention is a matter for decision in the appeal and not at this stage. However, in view of the fact that rejection of stay may result in respondents claiming and obtaining refund, we direct status quo to be maintained until the disposal of the appeal."

4. After the stay order in 2011, it appears that matter has got listed for the first time now. We find that the question involved in this appeal is in a narrow compass and taking into account the year of appeal, we find that this appeal can be disposed of without hearing the respondent.

5. Learned Authorized Representative reiterated the grounds submitted in the appeal. He states that Commissioner (Appeals) has wrongly relied upon the order of CESTAT Bangalore Bench in the case of *H.T. Company Vs CC Hyderabad* – 2007 (208) E.L.T. 507 (Tri.-Bang.) for fixing the fine and redemption fine as per the percentage indicated in that order. To support his case, he relies upon the decision of Hon'ble Calcutta High Court in the case of *CC (Preventive), West Bengal Vs India Sales International* – 2009 (241) E.L.T. 182 (Cal.).

6. We have considered the impugned order along with the submissions made in the appeal and during the course of arguments. Commissioner (Appeals) for disposing of the appeal, has held as follows

:

"6. I have carefully gone through the appeal, oral/written submissions made by the appellant and also the provisions of law in the subject matter. The appellants imported used tyres under Bill of Entry No.482275 dated 23.03.2010 for import of used tyres through Tuticorin Customs Port by classifying the product under CTH 40122090 and declaring the value as USD 30,429 (Rs.14,49,837 CF). The details of tyres are given in para 2 above. The used tyres of size 13" & 15" are Classifiable under CTH 40122020 and used tyres of size 16" & 20" are classifiable under CTH 40122010 attracting Basic Customs Duty@ 10% adv. on the assessable value. In accordance with Exim Code 40122020 & 40122010 of ITC (HS) Classification of Export & Import items 2009-14 read with Para 2.17 of Foreign Trade Policy, 2009-14, the import of used tyres is restricted, subject to the condition that import is permitted freely if the per tyre CIF value is USD 175 and above . Hence a specific licence is required for import of used tyres classifiable under CTH 40122090, if the declared value per tyre is less than USD 175. In the instant case, the highest declared value per tyre is USD 26 only and as such the present import requires a licence from DGFT, which the appellants do not posses. The value declared was not accepted. The value has determined under Rule 9 (Residual method) of the CVR, 2007 read with Section 14 (1) of Customs Act., 1962. The value estimated by the Chartered Engineer was adopted for assessment which was accepted by the appellants. In as much as the appellants did not possess any valid licence and misdeclared the value the confiscation of the goods under Section 111 (d) & 111 (m) of the Customs Act, 1962 read with Section 3(3) of Foreign Trade (Development and Regulation) Act, 1992, imposition of redemption fine under Sec.125 of Customs Act, 1962 and imposition of penalty under Sec.112 (a) of the Customs Act, 1962 by the lower authority is sustainable. However following the ratio of Hon'ble South Zonal Bench, Bangalore in the case of H.T Company Vs. Commissioner of Customs, Hyderabad reported in 2007 (208) ELT 507 Tribunal, Bangalore and in the case of Selection Enterprises Vs, C.C.Hyderabad reported in 2008(232) ELT 755 Tribunal, Bangalore wherein the redemption fine and penalty have been fixed at 10 % and 5% respectively on the enhanced value of the goods, the redemption fine is reduced from Rs.3,00,000/- to Rs.1,60,000/- (Rupees One lakh and sixty thousand only) and penalty is reduced from Rs.2,00,000/- to Rs.80,000/- (Rupees Eighty Thousand only). The appellants are given option to redeem the confiscated goods on payment of fine of Rs.1,60,000/- under Section 125 of Customs Act, 1962. The appellants are also liable to pay the penalty of Rs.80,000/- under Section 112 (a) of Customs Act, 1962. The other arguments and case laws put forth by the appellants do not come to their help, as they have no relevance to this case."

7. The only reason stated by the revenue in the appeal filed by them before this tribunal is as follows:

"*v) The purpose of penalties and fine is basically for punitive punishment according to gravity of offence. Although it can be said to be a subjective*

assessment, yet this subjective assessment should have a rationale and equability of justice in different matters. Therefore offence requires imposition of suitable fine and penalty. The

Commissioner (A) has relied on the CESTAT decision in the case of M/s H T Company vs CC, Hyderabad relating to import of computer monitors, colour printers, etc. In the present case, the goods imported are used tyres, which are restricted goods with high profit margins. Hence, the RF and penalty imposed are justified. The Hon'ble High Court of Judicature at Calcutta in the case of Commr of Cus (Preventive),

West Bengal vs India Sales Interational as reported in 2009 (241) ELT 182 (Cal) has allowed the departmental appeal on said held that tribunal should not have any authority to sit on appeal on said question and it is not within domain of Tribunal to come to such conclusion to reduce the amount without properly testing the question that whether discretion applied by said authorities properly or not. In this case, the Hon'ble CESTAT have reduced the RF from Rs 64 lakhs to Rs 8 lakhs and penalty from Rs 5 lakhs to Rs 2 lakhs. Though the observation is related to CESTAT order, the principle in the High Court order is applicable to all appellate authorities. In view of the ratio of this High

Court order, the order in appeal is not proper and legal."

8. It is settled position in law that it is the discretion of the authority deciding to determine the quantum and fine and penalty as per the gravity of the offence involved. Even in the decision relied upon by the revenue to support their case Hon'ble High Court has held as follows:

"4. Being aggrieved from the said order this appeal has been preferred by the Department and the appeal was admitted by this Court on the following questions of law:

"1. Whether, the sandal wood which falls under the category of prohibited goods covered under Negative List, Part = I, Sl. No. 9 of Chapter-XVI, of EXIM Policy, 1991-1997 should not have been released to exporter for exportation?

2. Whether the seized sandal wood were liable for absolute confiscation under Section 13(D)(I) and (e) of the customs Act, 1962?

3. Whether, the CESTAT should have allowed release of sandal wood, export of which is prohibited, to the exporter upon redemption fine of Rs.8 lakhs against a value of Rs.64 lakhs in the year 1994?"

……..

9. In the facts and circumstances of the case the Commissioner of Customs (Preventive), having regard to the fact that the goods attempted to be exported were Sandal Wood and not finished products and thereby it attracts, according to Mr. Bose, under 'prohibited items of

Part I' of Chapter XVI of Import & Export Policy for the year 1992097. He further submitted that the Commissioner has exercised his power to prohibit absolutely the export of such goods. The CESTAT by the impugned order has, however, directed the redemption of such prohibited goods and according to Mr. Bose that cannot be done even after taking into account which has even been made under section 125 of the Customs Act.

10. Section 125 of the Customs Act reads as follows:

"….."

11. *He further tried to contend before us that in the said section it has been specifically used the word 'prohibited' that prohibition has to be read in conjunction to the word 'negative list' as has been framed under the said policy and therefore he submitted further that is the reason why in section 11 it has been stated with regard to prohibition on importation and exportation of goods and specifically stated that prohibited either absolutely or otherwise or subject to such condition has been specifically mentioned in the said Section 11 of the said Act. That is the reason Mr. Bose tried to convince us that the word which has been used by the legislators under Section 125 as `prohibited' has to be read as prohibited absolutely.*

12. *In our considered opinion the Court cannot insert any word in the statute since it is within the domain of legislators. Whatever the legislators think fit and proper can be legislated. The Court cannot insert any word in the legislation but Court has power to interpret the same without inserting anything.*

13. *Accordingly, in our considered opinion, which has not been used in Section 125 of the said Act by the legislators cannot be inserted by us or can be read as such as submitted by Mr. Bose. We feel that the option which has been given under Section 125 of the said Act in respect of the prohibited goods and the right given to the authorities for redemption of the confiscated goods in question cannot be taken away by the Court by inserting a particular word therein. Therefore, in our considered opinion we do not find any substance in respect of such submission as has been made by Mr. Bose on this point. On the contrary we feel that the power has been given by the legislators to*

a particular authority to act in a particular manner and the said particular authority must act accordingly and not otherwise at all.

14. ***Therefore, in our considered opinion that the Tribunal has the right to pass such order by giving an option to pay fine in lieu of confiscation of goods as has been directed to be done by them.***

15. *So far as the point no.2 is concerned, the discretion as exercised by the Tribunal for awarding the penalty in favour of the respondent firm as well as for the partners, we feel such discretion which has been specifically dealt with by the authority the Tribunal should not have any authority to sit on appeal on the said question and it is not within the domain of the Tribunal to come to such conclusion to reduce the amount as has been sought to the done in the facts and circumstances of the case without properly testing the question that whether the discretion has been applied by the said authorities properly or not.*

Hence, in our considered opinion that part of the order so passed by the Tribunal cannot be accepted by us and the said poartion of the order of the Tribunal has to be set aside.

16. *We only impose penalty as directed to be paid by the firm as well as by the partner has been adjudicated upon by the said authority has to be paid and accordingly that part of the order of the Learned Tribunal is set aside and the order imposing penalty on the firm and partner which has been awarded by the said authorities has been upheld by us to that extent. Upon payment of the amount as directed*

by the authority the goods should be released within a period of six weeks from the date of communication of this order.

9. From the order of the Hon'ble High Court as reproduced above it is quite evident that the issue under consideration of Hon'ble High Court was in respect of the absolute confiscation of the goods, or allowing the same to be released on payment against the redemption fine. Hon'ble High Court on the issue hasupheld the order of tribunal (appellate authority) permitting the release of the goods on payment of redemption fine. Further High Court has held that against the total assessed value of the Rs 64 lakhs, the redemption fine of Rs 8 lakhs imposed by the tribunal would suffice. In this case also the goods have been allowed to be released against the redemption fine which is about 8 % of the value of the confiscated goods.

10. It is not even the case that Commissioner (Appeals) has exonerated completely the respondent. The total offence which is as per the order of the Assistant Commissioner, is about 10% of under valuation. Against the declared value of US$ 30429 (Rs 14,19,513/-), Revenue has determined the loaded value to U$ 33846.40 (Rs 15,78,935/- CIF). The total case which involves undervaluation is not more than 10% of the value of the goods under importation. Thus in the present case the redemption fine as determined by the Commissioner (Appeal) on the basis of the CESTAT Bangalore Bench order is above

10%, which is higher than what has been upheld by the Hon'ble High Court. Hence we do not find any merits in the said submissions of the revenue.

11. We do not find any merits in the appeal filed by Revenue challenging the order of Commissioner (Appeals) whereby he has reduced the redemption fine equivalent to 10% of undervaluation and which is in accordance with the order of Bangalore CESTAT referred to above.

12. It is also settled principle in law that while deciding the appeal the Appellate Authority steps in shoes of the adjudicating authority. Section 128 and 128 A of the Customs Act, 1962 provide as under:

Section 128. Appeals to Commissioner (Appeals). -

(1) Any person aggrieved by any decision or order passed under this Act by an officer of customs lower in rank than a Commissioner of Customs may appeal to the Commissioner (Appeals) within sixty days from the date of the communication to him of such decision or order:

(2) ……

128 A Procedure in Appeal

(1) ……...

(2) …….

(3) The Commissioner (Appeals) shall, after making such further inquiry as may be necessary, pass such order, as he thinks just and proper,

confirming, modifying or annulling the decision or order appealed against; ……"

From the above provisions of the Custom Act, 1962, it is quite evident that there is sufficient power vested in the Commissioner (Appeal) to confirm, modify or annul any decision or order appealed against. Any order used in the section 128 and 128A, is wide enough to include the orders passed in respect of the imposition of penalty on the aggrieved person. Thus the order of reducing the penalty by Commissioner (Appeal) and aligning the same with the percentage of penalty as determined by the Bangalore Bench cannot be faulted with.

13. Accordingly, the appeal filed by the Revenue is dismissed and the impugned order of Commissioner (Appeals) is upheld.

(Pronounced in court on 12.08.2022)

(SULEKHA BEEVI C.S.)
MEMBER (JUDICIAL)

(SANJIV SRIVASTAVA)
MEMBER (TECHNICAL)