Taxhelpline Case No. 148 of 2013

[INLAND REVENUE APPELLATE TRIBUNAL]

Custom Appeal No.127/PB of 2011, decided on 1st October, 2012. Date of hearing: 6th June, 2012

Before Gulab Shah Afridi, Member (Judicial)

Isaac Ali Qazi for Appellants. Sardar Ali Khan Assistant Collector and Naseer Khan Superintendent Customs for Respondents

Messrs AGE INDUSTRIES (PVT.) LTD., PESHAWAR
Vs
DEPUTY SUPERINTENDENT CUSTOMS (AUDIT), PESHAWAR and 2 others

JUDGMENT

GULAB SHAH AFRIDI, MEMBER (JUDICIAL).---This appeal filed by Messrs AGE Industries (Pvt.) Ltd., Peshawar (appellant herein) is against the Order-in-Appeal No.154 of 2011 dated 6-5-2011 passed by the learned Collector Customs (Appeals), Peshawar, whereby appeal against the Order-in-Original No.87 of 2010 dated 26-5-2010, dismissed the appeal.

2. Brief facts of the case are that the respondent conducted audit of the industrial units for availing the benefit of S.R.O.565(I)/2006 dated 5-6-2006 and reconciling their raw material record with subsequent consumption/production etc. Based on their audit, the Deputy Collector Customs, Dry Port, Peshawar issued three Demand-Show Cause Notices as reproduced below:-

(i) Demand-cum-Show Cause Notice C.No. Cus/DP/Audit/S.R.O. 565/91/2009/178 dated 18-1-2010 alleging that during 2005-2006 "Steel Wire Rod of 204.705 M. Ton was imported in excess against

the sanctioned quota of 514.500 M. Ton. The excess quantity of 72.714 M. ton was chargeable to statutory rate of duty but contrary it was cleared by availing the un-due exemption by paying duty @ 5%. Similarly the remaining excess quantity of 131.991 M. Ton was cleared on payment of duty 10% instead of the applicable rate of 25% resulting in short payment of duty/taxes…."

(ii) Demand-cum-Show Cause Notice C.No. Cus/DP/Audit/S.R.O. 565/91/2009/180 dated 18-1-2010 alleging that during 2006-2007 "…..that High Carbon Steel Wire of 177.199 M. Ton was imported in excess against the sanctioned quota of 571.428 M. Ton. The excess quantity was chargeable to statutory rate of duty @ 25% but contrary it was cleared by availing the un-due exemption by paying duty @ 5% resulting in short payment of duty/taxes…."

(iii) Demand-cum-Show Cause Notice C.No. Cus/DP/Audit/S.R.O. 565/91/2009/181 dated 18-1-2010 alleging that during 2007-2008 "that Binder Yarn of 17:188 M. Ton was imported in excess against the sanctioned quota of 0.812 M. Ton. The excess quantity was chargeable to statutory rate of duty but contrary it was cleared by availing the un-due exemption by paying duty @ 5%. Similarly PP Film Compact (different size) of 3.436 M. Ton was imported and cleared on payment of duty @ 5% by availing un-due exemption despite the fact that no quota was allowed in this particular raw material and the item was chargeable to duty @ 25% resulting in short payment of duty / taxes.

3. Subsequently, after completion of the requisite proceedings, the Deputy Collector Customs, Customs Dry Port, Peshawar, who vide Order-in-Original No.87 of 2010 dated 25-5-2010 ordered the management of the unit to deposit the evaded customs duty amounting to Rs.1,889,930 Sales Tax amounting to Rs.283,555 and Advance Income Tax to the tune of Rs.143,965 (Aggregating to Rs.2,317,450) into the Government Treasury.

4. Aggrieved, the appellant-unit filed an appeal before the Collector Customs (Appeals), Peshawar, which was dismissed vide Order-in-Appeal No.154 of 2011 dated 6-5-2011 (issued on 9-7-2011). Hence the instant appeal, inter-alia, on the following grounds:--

(i) That impugned order is erred both in law and facts, hence, not sustainable in the eyes of law.

(ii) That impugned Order is the result of incomplete investigation, hence, liable to be set aside.

(iii) That without prejudice the reliance of learned Collector Appeals on the Tribunal's Appeals Nos. 154/ST/IB/2005 and 155/ST/IB/ 2005 dated 28-11-2005 for deciding the controversy of limitation as envisaged in Section 32 is erroneous. Kind attention is invited to the honourable Sindh High Court Judgment in case of Messrs Gandhara Nissan v. Collector Customs reported as 2007 PTD 117 wherein the honourable High Court has held that:

"This brings us to the crucial point whether the enhancement of period of limitation with effect from 1-7-2000 shall have the effect of reviving a case which was already barred by time prior to such amendment. The admitted facts are that the relevant date for the purpose of subsection (2) of section 32 of the Customs Act, in the present case is 1-4-1997. It is also admitted fact that up to 30th June, 2000 period of limitation provided in subsection (2) of section 32 was 3 years. Thus, the show-cause notice could be issued under section 32(2) in accordance with the law prevailing at the relevant time within a period of 3 years which expired on 30th March, 2000. The result is that it became past and closed transaction. We are of the considered opinion that once a matter becomes barred by time then the subsequent enhancement in the period of limitation shall not have the effect of reopening the past and closed transaction and resuscitating the matters which attained finality and had gone in the annals of history. It is totally immaterial as to when the Appraisement Intelligence Branch discovered the short levy, because there is no law to the effect that the period of limitation shall commence from the date of discovery of the short levy. If the departmental officers were negligent and were not able to detect the short levy of customs duty within the period of limitation provided in law at the relevant time, the only course open with the department was to initial appropriate disciplinary proceedings against the departmental officers. The learned members of the Tribunal have fell in serious error in holding that the Appraisement

Collectorate detected the short levy after amendment of Customs Act, 1969, and therefore, it was not a past and closed transaction in spite of expiry of the period of limitation.

Reliance is also placed on 2007 PTD 127.

(iv) That without prejudice to the merit of the cause as the impugned demand-cum-show cause notices had not been adjudicated within stipulated 120 days, ipso facto, made the impugned order legally ineffective, hence, liable to be declared as of no legal effect.

(v) That perusal of record shows that, in terms of subsection (3) of section 179 of the Customs Act 1969, Demand-cum-Show Cause Notices dated 18-1-2010 should have been decided on 18-5-2010, whereas the instant case Demand-cum-Show Cause Notice has been decided on 26-5-2010 i.e. adjudication order has been passed more than 8 days beyond the stipulated period of 120 days, hence, rendered the impugned order as coram non judice. Reliance is placed on 2011 PTD 110, 2010, PTD 324 and 2009 PTD 204.

(vi) That appellant denies the allegation of misdeclaration and humbly submit that demand Show Cause Notice is void ab initio for having been issued by incompetent authority which ipso facto rendered the subsequent proceedings, including the IMPUGNED ORDER nullity in the eyes of law.

(vii) That most humbly submitted the adjudicating officer lacked the jurisdiction to issue and adjudicate the demand-cum-show cause notices as pencuniary jurisdiction of the Deputy Collector Customs Dryport is upto Rs.800,000 whereas vide impugned order-in-original a liability of Rs.2,317,450 which makes the impugned order coram non judice.

(viii) That impugned order is based on conjectures and surmises.

(ix) That conceding on the aforesaid ground, the appellant

specifically submit the Demand-cum-Show Cause Notice ground as under:

Demand-cum-Show Cause Notice for the year 2005-2006:

(x) That cause of import of excess quantity of 204.705 MT of Carbon Steel Wire Rod without prejudice is attributable to the inadvertence and error as the entire execution of the quota under the concessionary S.R.O. 565(I)/2006 is controlled electronically by an officer not less than Deputy Collector of Customs who is holder of the exclusive password of authorization and verification of import as per Survey Report under the said S.R.O., therefore, the said cause falls within the provision of subsection (3A) of section 32 of the Customs Act, 1969, therefore, not recoverable being time barred under the show cause notice issued on 18-1-2010 for the alleged short levy occurred in 2005-2006. Attention is invited to Messrs Khyber Lamps case reported as 2001 SCMR 838.

(xi) That without prejudice to the above, the demand prima facie appears to be has been inflated as it has been alleged that out of 204.75 MT, 72.714 MT was imported under concessionary rate of 5% where the rest of the 131.991 MT was cleared @ 10% customs duty and the differential amount has been calculated on the basis that the entire 204.75 MT was subjected to 25% statutory customs duty which is highly misconceived for the following reasons.

(a) That the cable grade High Carbon Steel Wire Rod 5.5 MM JIS G SWRH 3506 is infact classifiable under PCT Heading 7213.9190 subjected to 10% statutory duty, however, during that period (2005-2006) were due to inadvertence were cleared under PCT Heading 7213.9110.

(b) That the inadvertence was caused for the reason that as the said quantity was being imported under concessionary rate of 5%, therefore, the importer as well as the customs authorities were least bothered to the classification aspect as it would not cause any monetary and material impact on the goods.

(c) That the description of the goods self suggest that it is of prime quality cable grade, therefore, it was correctly classifiable under PCT Heading 7213.9190.

(d) That later on the Appellant imported the said goods under the same description under the subject concessionary S.R.O. and was cleared under its correct PCT Heading 7213.9190.

(e) That may it please be noted that the High Carbon Steel Wire Rod of secondary quality are not permissible under the relevant standards (British Standard), hence as of no use in manufacturing of Conductor in the cable industry. For the aforesaid reason, appellant has never imported Secondary Quality of Carbon Steel Wire Rod.

(xii) That for the reason stated above, the correct statutory rate of duty applicable to the alleged excess quantity of 204. 75 MT was 10%, hence, without prejudice the appellant subject to the limitation may be confronted with liability of differential amount of 5% on 72.714 MT.

(xiii) That without prejudice the adjudicating officer was bound to accept the Reconciliation Report whereby differential amount for the years 2005-2006 and 2006-2007 was calculated as Rs.408,144.

Demand-cum-Show Cause Notice for the year 2006-2007:

(xiv) That for the reason mentioned in para-X to XIII and further for the reason in the impugned Orders, it has been conceded that subject item was subject to 10% Customs Duty whereas appellant has paid customs duty @ 5%, therefore, the demand of 5% differential amount of duty 177.199 MT WITHOUT PREJUDICE is subject to limitation, if permissible by law.

Demand-cum-Show Cause Notice for the year 2007-2008:

(xv) That sanctioned quota was not fully availed during the year 2007-2008.

(xvi) That Binder yarn was imported in a quantity of 18000 kgs instead of sanctioned quota of 812 kgs. The management has already admitted in written reply to the demand cum show because notice to pay off the related duties and taxes vide letter No.AGE/31-H dated 27-1-2010.

(xvii) That PP filler yarn was imported in tune of 3488 Kgs under wrong PCT heading. The quota was sanctioned for 4802 kgs under PCT heading 5607.4900 while the material was cleared under PCT heading 3920.1000, the management has already assured the payment of duties payable in the above stated reply to Demand Cum Show cause notice.

5. In rebuttal, the respondent-department filed their written comments to the following effect:-

Parts - I & II. No comments.

Grounds.

I & II. Denied. The Order-in-Original/Order-in-Appeal have been passed by competent authorities after providing ample opportunities of hearing to the appellants and talking into consideration the verbal/written submission of the appellant's counsel. Both the orders are self speaking and in accordance with law.

III & IV. Not relevant. The time period under section 179 of the Customs Act, 1969 is regulatory and not mandatory. In this regard attention is invited to verdict of Supreme Court of Pakistan vide Civil Appeal No. 2036 of 2004 announced on 29-1-2006.

"No order can be scraped or annulled or set-aside only on the grounds that the same has been passed with un-reasonable delay".

Not agreed. As stated above.

VI & VII. Not agreed. It is not a case that would attract provisions of section 179 of the Customs Act, 1969. Rather section 32(4)

provides that an appropriate officer can decide a case where show cause notice has been issued under section 32(3A) of the Customs Act, 1969, S.R.O. 371(I)2002 dated 15-6-2002 has determined that in such case, the appropriate officer would be the Superintendent or Principal Appraiser. Moreover, section 4 of the Customs Act empowers a senior officer in hierarchy to exercise all powers and discharge all duties conferred or imposed upon any officer subordinance to him.

VIII. Not admitted. As explained above.

IX & X. Not admitted as stated for the following reasons. The importer did not come back to point out that the PCT Heading was wrongly applied until the audit team pointed out the same, therefore, it is an afterthought submission.

XI. Not correct. The applicable rates of duty/taxes were rechecked and subsequently the revised assessment sheet was accordingly issued duly accepted by the appellant. This fact has also been admitted by the appellant in para 6 of the present appeal. The plea of the appellant is that they imported the raw material under wrong PCT heading due to such inadvertence and self admission of the offence on part of appellants indicated plainly that the demanded short levied amount by the respondent department is based on facts and in accordance with the law.

XII to XIV. The appellant has clearly admitted the audit observations. Thus needs no further clarification.

6. During the course of arguments, learned counsel for the appellant besides reiterating the above grounds allowed to submit written arguments on the strength of which he prayed for acceptance of the appeal.

7. On the other hand, learned DR supported the order impugned and opposed the contention of the learned counsel for the appellant. Copy of the appellant's written arguments were given to the DR in

response, the DR also submitted counter arguments, wherein dismissal of appeal was prayed.

8. I have heard both the parties and gone through the record. Besides memo. of appeal, Respondents para-wise comments, rejoinder and verbal arguments, as desired, the parties have also been allowed to file written arguments, which are placed on file. It transpired that appellant, a manufacture of wires, cables and conductors, has been a beneficiary of S.R.O. 565(I)/2006 dated, 5-6-2006. After requisite survey of their unit, quota per annum was allotted to them by FBR (the then CBR). Under the said S.R.O. their items were subject to concessionary rate of customs duty @ 5%. Before the issuance of S.R.O. 565(I)/2005 dated 6-6-2005 High Carbon Steel Wire Rod was being cleared under PCT heading: 7213.9100, but in S.R.O. 565(I)/2005 dated 6-6-2005, instead new PCT Headings: 7213.9110 and 7213.9190 were introduced. The said anomaly was first pointed out by officials of Peshawar Dry Port when the appellant Messrs AGE Industries filed GD# 3355 dated 27-6-2005. The matter on reference of the appellant was resolved by FBR Islamabad vide its letter 29-6-2005, thus, AGE Industries was allowed by Dry Port officials to file the GD 3355 dated 27-6-2005 with changed PCT heading of 7213.9110 to avail the benefits of S.R.O. 565(I)/2005. The Dry Port note read as under:--

"Messrs AGE Industries has filed GD No. 3355 dated 27-6-2005, through Messrs Maqsood Custom Agency for import of High Carbon Steel Wire Rod, as raw material for the manufacturing of cables and conductors, claiming there on exempt of Customs Duty in excess of 5% in terms of Sn 13 of S.R.O. 565(I)/2005 dated 6-6-2005.

The PCT heading 7213.9100 claimed by the importer do falls/ included in the ibid S.R.O. but in the current tariff, this has been replaced with the newly 7 created PCT heading 7213.9100 and 7213.9190, and are not included in the S.R.O.

The unit therefore, approached the Board for including the PCT heading in the S.R.O. The Board vide letter C.No. (6) survey -

I/2005 (Pt) dated 29-6-2005, allowed the release under Sr. No.13 of the S.R.O. subject to the condition of submission of under taking.

Copy of the Board letter is place opposite now the unit has submitted an undertaking, therefore, if approached import may please be allowed after acceptance of the under taking.

Submitted for orders please"

9. Later on FBR in line with its letter dated 29-6-2005 brought the requisite amendment in S.R.O. 565(I)/2011 vide amending S.R.O. 780(I)/2005 date 6-8-2005 to restore the correct PCT Heading to the High Carbon Steel Wise Rod. It has been noticed that under the said concessionary S.R.O. 565(I)/2005 dated 6-6-2005, the appellant's last import was made on 28-2-2006 at Peshawar Dry Port where after under Clause (iii) "the clearance of inputs is allowed through one port only" of the said S.R.O., the learned Collector Peshawar vide letter C.No.SI/Misc/OFFICE/53/2006-VI dated 6-9-2006 duly transferred the concessionary import's of the appellant to the jurisdiction of the Collectorate of Customs Appraisement Karachi, where after all the imports under the said S.R.O. were made and cleared under that jurisdiction. It appears that in December, 2009 a team of the Customs Dry Port Peshawar conducted audit of the appellant imports under the said S.R.O. where after appellant was served three demand cum-show cause notices under section 32(2) and (3A) of the Customs Act, 1969 relating to the years 2005-2006, 2006-2007 and 2007-2008 (as detailed in para.2 above), wherein it was alleged that appellant had imported beyond their quota in the respective years and got it cleared under the aforesaid concessionary S.R.O. or under the PCT heading other then mentioned in their quota allocated to them.

10. For the year 2007-2008, the appellant always found to have chosen to be non-contesting, however, subject to reconciliation and before this Tribunal they have paid amount as determined so far by the two lower fora. As far as the demands relating to the years 2005-2006 and 2006-2007 are concerned, the appellant besides on factual ground also contested these demands on ground of limitation and jurisdiction. Before lower fora several attempts were made for reconciliation but all remained unsuccessful. In Para-wise

comments, before the adjudicating authority, the learned Auditor conceded to the appellant plea on PCT Heading and also conceded on the point that alleged excess quantity was liable to duty @ 10% instead of 25%, thus, at the most differential amount was to be recovered @ 5%. However, without assigning any reasons the learned adjudicating authority failed to give his assent to the finding of the audit officer. To finally determine the issue, the appellant was allowed to substantiate their take on the factual aspect by documentary evidence if any. Appellant accordingly submitted all record along with written arguments; copy of which along with all supporting documents was supplied to the respondents. In reply to the appellant's written arguments, respondent avoided to meet the factual aspect thus hardly controverted the appellant stand point at least on factual aspect of the case. Hence, in final analysis, based on record, it transpired that during 2005 2006, the appellant imported High Steel Wire Rod (Primary Grade Material) vide 11 GDs wherein by four GDs 131.991 MT High Steel Wire Rod were cleared on statutory rate of 10%, whereas rest of the 587.209 MT were cleared vide 7 GDS under the concessionary S.R.O. Prima facie the 72.709 MT quantity (CD=113,288+ST=16,994) was in excess to the allocated quota 514.5 MT however, in next year i.e. 2006-2007, the appellant imported 160.268 MT lesser then the allocated quota 571.428 MT. Similarly, during the year 2007-2008 though the appellant had not contested, yet Rs.164,648 were excessively extracted by miscalculation of the Department. Hence, besides pleading a strong case on limitation, it cannot be alleged of excess importation in the year 2005-2006 had caused any prejudice to the revenue rather if the period under audit if is to be taken cumulatively, appellant have imported lesser quantity under the concessionary S.R.O. from the allocated quota. Hence, under the circumstances on factual aspect, hardly any mense rea could be attributed appellant, hence, demands relating to the years 2005-2006 and 2006-2007 are not sustainable in the eyes of law.

11. Now coming to the question, whether Show Cause Notice relating to the clearance at Karachi is coram non judice, thus, demand on imports after February, 2006 which are cleared at Karachi is of any legal effect is sounded plausible, however, where

the appellant submitted to the jurisdiction partially, therefore, restrained is opted to not to go into that controversy.

12. On limitation, to determine whether the alleged excess Carbon Steel Wire Rod in the year 2005-2006 is attributable to the inadvertence and error, it has been found as per procedure the entire execution of the quota under the concessionary S.R.O. 565(I)/2006 is controlled electronically by an officer not less than a Deputy Collector of Customs who is holder of the exclusive password of authorization and verification of import as per Survey Report under the said S.R.O., therefore, the said cause, in absence of allegation of collusion, falls within the provision of subsection (3) and prevailing subsection (3A) of section 32 of the Customs Act, 1969, specially when show cause is issued as result of audit, as subsection (3A) has a direct reference to audit, thus, no other subsection of 32 except subsection (3A) is applicable, therefore, the alleged short levy occurred in 2005-2006 is not recoverable for being time barred by time. Subsection (2) section 32 ibid is not attracted to the case as subsection (2) can be invoked for two causes only: "where, by reason of any such document or statement as aforesaid or by reason of some collusion, any duty or change has not been levied or has been short levied..." in the instant case, no such document or statement (as mentioned in subsection (1) of section 32) has caused the alleged short levy nor in the show cause notice any collusion was alleged. Besides above, though in the show cause along with subsection (2) of 32 ibid penal provision clauses 14 of section 156(1) ibid were invoked, however, no penalty was imposed. This fact alone warrants the non-application to 32(2) ibid. Hence, it is straight cause of inadvertence and error and misconstruction falls within the purview of subsection 32(3) ibid. Reliance is placed on Messrs Khyber Lamps case reported as 2001 SCMR 838 and other judgments of the apex court reported as 2007 PTD 127, 1992 SCMR 1898, 2001 SCMR 838, 2011 SCMR 1279, 2012 SCMR 392 wherein the apex court also endorsed the various High Courts views in cases reported. In this respect, specific reference is made to the august Supreme Court Judgment in case of Collectorate Customs (Preventive) Karachi v. Pakistan State Oil reported as 2011 SCMR 1279 wherein the honorable Supreme Court has held that:--

"8. The pivotal question which needs:---determination would be as to whether the import levies should have been recovered on the "delivered quantity" of oil or "manifested quantity" of oil and whether show-cause notice could have been issued under section 32(1) and (2) of the Customs Act or otherwise? We intend to examine the provisions as enumerated in section 32 of the Customs Act which are reproduced hereinbelow for ready reference:--

"…..32. False statement, error, etc.---(1) If any person, in connection with any matter of customs,-

(a) makes or signs or causes to be made or signed, or delivers or causes to be delivered to an officer of customs any declaration, notice, certificate or other document whatsoever, or

(b) makes any statement in answer to any question put to him by an officer of customs which he is required by or under this Act to answer, knowing or having reason to believe that such document or statement is false in any material particular, he shall be guilty of an offence under this section.

(2) Where, by reason of any such document or statement as aforesaid or by reason of some collusion, any duty or charge has not been levied or has been short-levied or has been erroneously refunded, the person liable to pay any amount on that account shall be served with a notice within three years of the relevant date, requiring him to show cause why he should not pay the amount specified in the notice.

(3) Where, by reason of any inadvertence, error or misconstruction, any duty or charge has not been levied or has been short-levied or has been erroneously refunded, the person liable to pay any amount on that account shall be served with a notice within (six months) of the relevant date requiring him to show cause why he should not pay the amount specified in the notice....".

9. Now here at this juncture it would be proper to examine as to whether the provisions as enumerated in section 32 of the Customs Act, reproduced hereinabove, can be made applicable in these cases or otherwise? The language as employed in section 32 of the Customs Act is plain and simple and no scholarly, interpretation would be needed. The provisions as envisaged in section 32 of the Customs Act would be attractive in the following cases:--

(i) On filing deceptive, false and fake declaration, notice, certificate, document or statement;

(ii) Issuance of notice within a period of three years for payment of specified amount in case of short levied of duty, its non-payment, erroneously refunded as a result of some collusion;

(iii) In case of inadvertence, error or misconstruction, non-levied or short levied of any charge/duty, the payment shall be made subject to notice within six months;"

13. In view of the above, this appeal is partially succeeds as the demand relating to the year 2007-2008 is retained whereas demands relating to the years 2005-2006 and 2006-2007 are hereby declared not sustainable both on point of law and facts, thus the impugned order is hereby set aside to that extent. Accordingly impugned order is modified accordingly.

Order accordingly