NEUTRAL CITATION
2024:GUJHC:30963-DB

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

R/TAX APPEAL NO. 211 of 2024

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THE PRINCIPAL COMMISSIONER, CUSTOMS, AHMEDABAD COMMISSIONERATE

Versus

M/S. GAIL (INDIA) LTD.

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Appearance:

MR CB GUPTA(1685) for the Appellant(s) No. 1

for the Opponent(s) No. 1

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CORAM:**HONOURABLE MR. JUSTICE BHARGAV D. KARIA**
and
HONOURABLE MR. JUSTICE NIRAL R. MEHTA

Date : 13/06/2024

ORAL ORDER

(PER : HONOURABLE MR. JUSTICE BHARGAV D. KARIA)

1. This appeal is filed under section 130 of the Customs Act, 1962 [for short 'the Act'] by the appellant-Revenue proposing the following substantial question of law arising out of the order dated 25.08.2013 passed by the Customs, Excise and Service Tax Appellate Tribunal, West Zonal Bench, Ahmedabad [for short 'CESTAT']in Customs Appeal No. 12326 of 2018:

(i) Whether the CESTAT is right in holding that "date of service" of finalization of provisional assessment is the relevant date for computation of period of limitation for filing refund claim when section 27(1B)(c) of the Customs Act,1962 provide the date of adjustment of duty after the final assessment or date of re-assessment, as the relevant date for computation of period of limitation?

(ii) Whether in the facts and circumstances of the case, the CESTAT is right in allowing the appeal of the respondent?

2. The CESTAT has allowed the appeal filed by the respondent which was preferred against the order of rejection of refund claim made by the respondent-assessee as time barred in view of the following facts.

2.1 The respondent-assessee is engaged in import of Liquified Natural Gas [LNG]. The respondent filed 16 Bills of Entry for clearance of imported LNG which was assessed provisionally under section 18 of the Act on execution of the bond. On production of the original document, the said Bills of Entry were assessed finally as under:

Sr no	B/E/ No. & Date	TR6 Challan No. & Date (As per E-Receipt)	Date of Final Assessment	Qty.as per Bill of Lading/Provisionally assessed Bill of Entry (MMBTU)	Qty as per final invoice/ finally Assessed bill of Entry (MMBtu)	Custom Duty paid at the time of Pro Assessment	Custom Duty to be paid as per final invoice qty/Finally Assessed B/E.	Refund claimed of excess duty paid
1	2	3	4	5	6	7	8	9 (8-7)
1	3423536/ 01.10.2013	2007179039/ 01.10.2013	07.10.2015	3315760	3243490.09	157901801	154460215	3441586
2	3724229/ 06.11.2013	2007405289/ 06.11.2013	20.10.2015	3321470	3251856.24	128201536	125514618	2686918
3	4161112/ 23.12.2013	2007733287/ 26.12.2013	08.10.2015	3209670	3174303.82	179554727	177576797	1977930
4	6181535/ 21.07.2014	2009267277/ 22.07.2014	07.10.2015	3150934	3002707.14	141638631	134975693	6662938
5	4576314/ 07.02.2014	2008051383/ 10.02.2014	08.10.2015	2441880	2399797.88	117775559	115745892	2029667
6	4083700/ 16.12.2013	2007673514/ 16.12.2013	08.10.2015	3465900	3400095.14	163754376	160645294	3109082
7	3561494/ 17.10.2013	2007283015/ 18.10.2013	08.10.2015	3333260	3312644.41	153866072	152914700	951372
8	6005546/ 03.07.2014	2009135927/ 04.07.2014	08.10.208	3160082	2790832.64	141278990	137136063	4142927
9	9727328/ 01.04.2013	2005886550/ 02.04.2013	08.10.2015	3651640	3568274.61	156245997	152678990	3567007

10	5603392/ 26.05.2014	2008831620/ 07.05.2014	08.10.2015	3171073	3017711.82	140949534	134754331	6195203
11	3615729/ 23.10.2013	2007324503/ 24.10.2013	08.10.2015	3154352	2996419.15	142592621	135453311	7139310
12	9651747/ 22.03.2013	2005824134/ 26.03.2013	08.10.2015	3413153.2	3242553.73	121847591	115757324	6090267
13	3249824/ 12.09.2013	2007046497/ 13.09.2013	20.10.2015	3072092	2936808.15	126548968	120976253	5572715
14	3325533/ 20.09.2013	2007121440/ 24.09.2013	07.10.2015	3171666	3019477.81	148273795	140948752	7325043
15	5296506/ 24.04.2014	2008610173/ 26.04.2014	07.10.2015	3525072	3368150.68	176731721	168864423	7867298
16	5030872/ 27.03.2014	2008409667/ 29.03.2014	08.10.2015	3448646.1	3269405.04	175845176	166705793	9139383
Total Amount of Refund (In Rs.)								77898646

2.2 The respondent-assesseee filed refund application for the excess duty paid on 26.10.2016 after submitting certificates dated 07.09.2016 issued by M/s. Joshi, Patel, Bhatt & Co., Chartered Accountant stating that as required for examination of the principle of unjust enrichment before sanction of the refund under sections 27 and 28D of the Act wherein it was certified that the amount of custom duty paid against the Bills of Entry was shown as refund of custom duty under the head “Receivables” in the books of account and therefore, incidence of excess custom duty paid has not been passed on to the customers.

2.3 The Adjudicating Authority rejected, the refund claim of the petitioner as time barred because the date of final assessment was between 07.10.2015 and 20.10.2015 for aforesaid 16 Bills which was beyond the prescribed period of one year as per section 27(1B)(c) of the Act which provides that where any duty is paid provisionally under section 18, the limitation of one year shall be computed from the date of adjustment of duty after final assessment thereof or in case of reassessment from the date of such reassessment. The adjudicating authority therefore after issuance of show-cause notice and considering the reply filed by the respondent-assessee, rejected the refund claim on the ground that the respondent-assessee filed the refund claim after one year from the date of final assessment between 07.10.2015 to 20.10.2015.

3. Being aggrieved, the respondent-assessee preferred appeal before the CESTAT which was allowed by relying upon the decision of Indian Oil Corporation reported in 2014 (308) ELT 169 by observing as under:

> "5. We have considered the rival submission. we find that the Tribunal as has held that the order of finalization of the provisional assessment is the relevant date for the purpose of claiming refund. In the case of Indian Oil Corporation (supra) following has been observed.

"2. The second issue is whether the refund arising out of completion of provisional assessment shall undergo the process of Section 27 when the refunds related to the period prior to 13-7-2006.

3.To answer both the issues, facts are not in dispute exhibiting that the provisional assessments in the case of the appellant were completed prior to the communication of the final assessment order. The date on which a public order is served on the person to whom that is meant, such date of service is counted for remedial measure if the person on whom the order served is aggrieved. The date of communication is deceive for different purposes of law in respect of the person to whom the order is meant and on whom that Is served.

4.Secondly when refund arises upon completion of provisional assessments, that flows suo motu under law prior to 13-7-2006 to the assessee without an application being made. The

> refund so arising does not under go the process of Section 27 of the Customs Act, 1962 but is covered by the Section 18 of the said Act. However Section 18 has undergone amendment with effect from 13-7-2006 with necessary Implication that even refund arising on completion of provisional assessment shall be governed by Section 27 of the said Act. By that amendment, bar of limitation as well as unjust enrichment are enacted to the law, Therefore before 31-7-2006, the refund arising upon completion of the provisional assessments is not intended by law to undergo the test of limitation as well as unjust enrichment in terms of law laid down by the Hon'ble High Court of Delhi in the case of the present appellant reported in 2012 (282) E.L.T. 368 (Del.). Following the ratio laid down therein, appeal of the appellant is allowed and the refund is payable to the appellant".

In view the above, we find that the case of the appellant is covered by the aforesaid decisions an date of service of finalization of provisional —_assessment is the relevant date for this purpose.

6. Learned AR has argued that the information regarding finalization was known to the appellant and they could have assessed the dome through the ICEGATE, however, it is also notice that revenue has been regularly serving the order of finalization of provisional assessment as can be seen from the letters dated 02.03.2018, 07.04.2018, 07.06.2018, 04.04.2018, 10.03.2017, 10.03.2017, 23.03.2017, 26.04.2017, 15.11.2017, 21.11.2017 and 21.11.2017 produced by the appellant."

4. Learned advocate Mr. C.B.Gupta for the appellant submitted that as per contents of the show-cause notice and the findings recorded at by the adjudicating authority, as per the report of the Superintendent of Customs dated 29.11.2016, the Bills of Entry were finally assessed between 07.10.2015 and 20.10.2015 and refund

application is filed on 26.10.2016 and therefore, the same is time barred as refund application is filed beyond one year from the date of final assessment.

4.1 It was submitted that the department has uploaded the final assessment on the portal of ICEGAT System and the respondent was required to take notice of such final assessment made available on the portal. It was therefore submitted that the Tribunal has committed an error in allowing the appeal filed by the respondent.

5. Considering the above submissions, it would be germane to the refer to the relevant provision of section 18 and 27 of the Customs Act reads as under:

"(18). Provisional assessment of duty[(1) Notwithstanding anything contained in this Act but without prejudice to the provisions of section 46 [and section 50],

(a) where the importer or exporter is unable to make self-assessment under sub-section (1) of section 17 and makes a request in writing to the proper officer for assessment; or

(b) where the proper officer deems it necessary to subject any imported goods or export goods to any chemical or other test; or

(c) where the importer or exporter has produced all the necessary documents and furnished full information but the proper officer deems it necessary to make further enquiry; or

(d) where necessary documents have not been produced or information has not been furnished and the proper officer deems it necessary to make further enquiry, the proper officer may direct that the duty leviable on such goods be assessed provisionally if the importer or the exporter, as the case may be, furnishes such security as the proper officer deems fit for the payment of the deficiency, if any, between the duty as may be finally assessed or re-assessed as the case may be, and the duty provisionally assessed.]

(27). Claim for refund of duty.—3 [(1) Any person claiming refund of any duty or interest, —

(a) paid by him; or

(b) borne by him,

may make an application in such form and manner as may be prescribed for such refund to the Assistant Commissioner of Customs or Deputy Commissioner of Customs, before the expiry of one year, from the date of payment of such duty or interest:

(1B) Save as otherwise provided in this section, the period of limitation of one year shall be computed in the following manner, namely:—

(a) in the case of goods which are exempt from payment of duty by a special order issued under sub-section (2) of section 25, the limitation of one year shall be computed from the date of issue of such order;

(b) where the duty becomes refundable as a consequence of any judgment, decree, order or direction of the appellate authority, Appellate Tribunal or any court, the limitation of one year shall be computed from the date of such judgment, decree, order or direction;

(c) where any duty is paid provisionally under section 18, the limitation of one year shall be computed from the date of adjustment of duty after the final assessment thereof or in case of re-assessment, from the date of such re-assessment."

6. On perusal of the above provisions of the Act, it is clear that once the provisional assessment is done and the assessee is entitled to the refund claim, then he has to make application within a period of one year under section 27 read with section 27(1B) of the Act.

7. It is pertinent to note that the adjudicating authority while considering the reply filed by the petitioner has observed in para 14.4 of the order dated 20.03.2017 while rejecting the refund application of the petitioner as under:

> "14.4 I have also gone through the defence submission dated 08.02.2017, additional submission dated 07.03.2017 and oral submission made by them during the course of personal hearing on 27.02.2017, I find that the claimant has also pleaded that their letter dated 19.08.2016 may be treated as their refund claim which has been filed within period of one year from the date of final assessment between 07.10.2015 to 20.10.2015, I have seen the said letter dated 19.08.2016 (marked as Annexure 8-B of their defence reply dated 07.02.2017), I find that the said letter is purely In a prayer / request form for early finalizing of Customs duty by way of early final assessment and, no way related to refund of Customs duty. Also, there is no evidence from the enclosed photocopy of the aforesaid letter that it has been acknowledged / received by the department at any point of time. The said letter has not

> been received by this office. Also, therefore, it carries no meaning at all.”

8. From the above observation it appears that the assessee made application on 19.08.2016 with a prayer for finalizing of custom duty by way of final assessment which means that till that point of time, the assessee was not aware about the final assessment.

9. Merely because the Custom Department has uploaded the final assessment orders on portal is not sufficient compliance of intimation to the assesee as it is a condition sine quanon to file the refund claim within one year as per section 27(1B)(c) of the Act from the date of finalization provided such order of

assessment is communicated to the assessee. Therefore, the Tribunal has rightly taken into consideration the various documents intimating the respondent assessee about the finalization of provisional assessment communicated by the respondent in para No. 6 of the order which is quoted hereinabove.

10. In view of the above, we do not find any infirmity in the impugned order of the Tribunal and no question of law much less any substantial question of law arises therefore, the appeal being devoid of any merit, is accordingly dismissed.

(BHARGAV D. KARIA, J)

(NIRAL R. MEHTA,J)

JYOTI V. JANI